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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 26.11.2019

Pronounced on: 12 .05.2020

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O.M.P. (COMM) 428/2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Manish K. Bishnoi, Mr.
Anurag Sarda & Mr. Umang Raj,
Advocates

versus

M/S IJM-GAYATRI JOINT VENTURE

..... Respondent

Through: Mr. Jayant Mehta, Mr. Angad
Mehta & Mr. P.D.V. Srikar,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'Act') challenging the Arbitral Award dated 09.08.2017. Claimant before the Arbitral Tribunal was M/s. I.J.M.-Gayatri (Joint Venture) who is the Respondent herein and is being referred to as the Respondent, hereinafter. The Respondent before the Arbitral Tribunal, National Highways Authority of India, the Petitioner herein would be referred to as Petitioner hereinafter.

2. Brief facts that need to be captured for adjudicating the present petition are that the Petitioner took up the Project pertaining to widening of 4/6 lanes and upgrading of existing 2 lane Road of NH-5 in the State of Andhra Pradesh from Km. 291.000 to Km. 358.000 of Ongole-

Chilakaluripet-Contract Package AP-13, under the "Golden Quadrilateral" Scheme of Government of India. Being the lowest bidder, the Contract was awarded to the Respondent and an Agreement was executed on 25.05.2001. Notice to proceed with the work was issued by the Petitioner on 29.05.2001 in accordance with Clause 41.1 of Special Conditions of Contract (SCC) stipulating the dates of Commencement and Completion as 1.6.2001 and 31.12.2003, respectively. The time stipulated for completion was 31 months and Defects-Liability period as per Clause 49.1 was 12 months.

3. The Contract stipulated sectional completion of road and was divided into Sections -“A”, “B” and “C”. The original date of completion of each section was extended upto 24.03.2006, 31.12.2005 and 24.03.2006, respectively.

4. After submission of “Final Statement” by the Respondent on issuance of the Defects Liability Certificate by the Petitioner on 21.10.2008, certain disputes arose between the parties and were referred to a Dispute Review Board, but the Board did not give any recommendation and the matter was referred to Arbitration.

5. The Respondent being the Claimant preferred the following claims before the Arbitral Tribunal:

“1. Claim for refund of Extra Seigniorage charges recovered from running bills on account of enhanced volume of Minor Minerals considering swell/bulkage factor

2. Claim for compensation of extra cost and expenses incurred due to locking of securities due to prolongation of the contract period

3. *Claim for compensation of additional overhead expenses due to prolongation of the contract period*
4. *Claim for compensation of loss of profit resulting from loss of business opportunity due to prolongation of the contract period.*
5. *Claim for compensation of loss sustained due to loss of productivity of Plant & Machinery unutilized to the full extent due to various delays and hindrances ' during the original stipulated period of contract.*
6. *Claim for refund of enhanced seigniorage charges wrongly recovered by the Acting Resident Engineer in IPC-56 in-lieu of Final Statement, the payment of which was already made in various IPCs up to IPC-55 in-terms of Contract Clause 70;8 of COPA.*
7. *Claim for payment of interest at 18% per annum on all the pending claims 1 to 6 from the date of cause of action for due payment till the date of actual payment. ”*

6. Petitioner filed its statement of Defence and finally the Arbitral Tribunal passed an Award in favour of the Respondent, operative part of which is as under:

Claim No.	Description of Claim	Amount claimed in Rs.	Amount Awarded in Rs.
1.	<i>Claim for the seigniorage charges recovered from running bills on account of enhanced volume of minor minerals considering swell / bulkage factor.</i>	90,59,253/-	78,99,558/-
2	<i>Claim for compensation of extra cost and expenses incurred due to locking of securities due to prolongation of the contract period.</i>	2,11,63,200/-	45,27,011/-
3.	<i>Claim for compensation of additional overhead expenses due to prolongation of the Contract Period.</i>	29,05,08,704/-	7,58,32,312/-
4.	<i>Claim for compensation of loss of profit resulting from loss of business opportunity due to prolongation of the contract period.</i>	19,36,72,469/-	7,96,74,288/-
5.	<i>Claim for compensation of loss sustained due to loss of productivity of plant and machinery unutilized to the full extent due to various delays with hindrances during</i>	10,79,46,386/-	8,63,57,088/-

	<i>the original stipulated period of Contract.</i>		
6.	<i>Claim for refund of enhanced Seigniorage charges wrongly recovered by the Acting Resident Engineer in IPC-56 in lieu of Final Statement, the payment of which was already made in various IPCs upto IPC-55 in terms of Contract Clause 70.8 of COPA.</i>	65,46,047/-	65,46,047/-
7.	<i>Claim for payment of interest on claim no.1 to claim no.6.</i>	<i>Upto 31.07.2017 Rs.59,40,03,598/ and further at the same rate of 10% compounded monthly from 01.08.2017, till date of payment.</i>	<i>At the rate specified in contract clause 60.8, on awards of Claim 1 and 6, from date of submission of Draft Final Statement to the Engineer, and on awards of Claim 2, 3, 4 & 5, from 31.01.2012, the date of reference for arbitration, till date of award. From date of award to actual date of payment, at 10% per annum simple interest on the all awards of all claims No.1 to 6.</i>

7. Learned counsel for the Petitioner has argued with respect to all Claims which have been allowed in favour of the Respondent. With respect to Claim No. 1 which was for refund of Extra Seigniorage Charges recovered from running bills of the Respondent, on account of enhanced volume of Minor Minerals, learned counsel for the Petitioner argued that in Road Construction Contracts, minor minerals in the form of stones, sand, gravel, clay and other material is used. In the present EPC (Engineering, Procurement and Civil Construction) Contract, Clause

28.2 of the General Conditions of Contract (GCC) provided that except where otherwise stated, Contractor shall pay all tonnage and other royalties, rent and other payment or compensation for getting the said material. Hence, the liability to pay Seigniorage Charges to the State Government of AP was of the Respondent under the Contract. However, in order to facilitate collection of Seigniorage Charges, the State Government had issued a G.O. No. 23 dated 05.03.1999 by which the Petitioner, being the Employer, was made responsible for collecting the charges by deducting the same from the running bills of the Respondent. The Petitioner had no role in computing or quantifying the charges, and was merely to deduct the same, from time to time. Upto 24th IPC (Interim Payment Certificate), the charges were deducted on the basis of solid content/mixed design as computed by the State Government. Vide letter dated 26.07.2003, the State Government demanded additional seigniorage charges computed on the quantity of minor mineral in the form of their transportation, by applying Bulkage factor. It is argued that the Petitioner neither had any right nor any occasion to question the demand since the liability to pay seigniorage charges was that of the Respondent. The finding of the Tribunal that the Petitioner unilaterally changed the methodology of calculating the charges and that too, retrospectively, is incorrect as the Petitioner was only a facilitator. It is also argued that if the Respondent was aggrieved by the charges, it ought to have challenged the same in appropriate legal proceedings by impleading the State of Andhra Pradesh. The present claim could not have been adjudicated by the Arbitral Tribunal in the absence of State of Andhra Pradesh, which was not a party to the Arbitration Agreement. It is contended that the

Tribunal has erred in holding that the Petitioner could not clarify the adoption of bulkage factor, without appreciating that the Petitioner was in no position to defend the acts of the State Government. The amount deducted from the bills towards Seigniorage Charges was remitted by the Petitioner to the State Government. However, as a result of the finding by the Tribunal, charges would now have to be borne and incurred by the Petitioner which would be in express violation of Clause 28.2 of the GCC. The Award is in clear conflict of the contractual provision and is hence perverse as per the judgment of the Supreme Court in *DDA v. R.S. Sharma (2008) 13 SCC 80*.

8. Learned counsel for the Petitioner also argues that the Respondent had accepted and allowed the deduction from its running bills post IPC-24 without any objection and protest, and recoveries were actually made. Nothing prevented the Respondent from taking recourse to legal proceeding against the State Government at that stage.

9. With respect to Claim No. 2 which was for compensation for loss sustained due to locking of securities on account of prolongation of the Contract, it is argued by learned counsel for the Petitioner that the claim of the Respondent is based on the contention that the contract had to be extended by nearly 27 months on account of the delay caused by the Petitioner, which is a breach of the contract. It is submitted that a plethora of evidence brought on record before the Tribunal, which it has failed to even consider, showed that the delay was attributable to the Respondent, for slow progress of the work. Tribunal has also failed to give cogent and sufficient reasons in support of the claim. Tribunal has based its finding merely on the fact that Extension of Time (EOT) was granted by the

Petitioner, but has not even adverted to the plethora of letters written by the Independent Engineer clearly blaming the Respondent for delay throughout the project. It is argued that the Independent Engineer clearly brought out the reasons for delay by the Respondent in the form of not arranging adequate funds, resources, not making timely payment to sub-contractor, abandonment of work, labour strikes, non-procurement of material etc. Attention of the Court is drawn to several documents in this regard, brought on record, which are argued to be merely illustrative of the delay caused by the Respondent.

10. Petitioner relies upon the judgment of Supreme Court in the case of *Associate Builders v. DDA, AIR (2015) SC 620* where the Court has held that the Arbitral Tribunal must adopt a 'judicial approach' which means that it cannot act arbitrarily or in a whimsical manner. The Court has also held that if the Tribunal fails to draw an inference which ought to have been drawn or the inference is untenable, the Court can interfere in the Award. Counsel also relies upon the judgment in the case of *Somdutt Builder Ltd. v. State of Kerala, (2009) 10 SCC 259* and *State of West Bengal v. Afcons Infrastructure Ltd., 2010 SCC OnLine Cal. 2608* to argue that in the said case similar Award apportioning delay without any supporting reason was set aside.

11. Claim No. 3 was for compensation for overhead expenses on account of prolongation of the Contract. It is argued by the Petitioner that claim of the Respondent was based on the contention that heavy overhead expenses were incurred because of overstay on the construction site, beyond the original contract period and thus, the Tribunal has awarded Rs. 7,58,32,312/- as compensation. It is argued that the Respondent had

initially claimed an amount of Rs. 29,05,08,704/- which was revised to Rs. 12,70,20,765/-. The initial computation was based on Hudson's Formula which is an empirical formula and was without any supporting evidence of the actual overhead expenses. The Respondent produced a Chartered Accountant Certificate to certify the reduced amount claimed later and the CA was also brought as a witness. The testimony of CA was however not found credit-worthy as recorded by the Tribunal itself in para 3.3.11. It is submitted that once the Respondent failed to prove the actual overhead expenses, the claim merited outright rejection and the Award was therefore clearly contrary to Section 73 of the Indian Contract Act, 1872. The argument is that merely a finding of breach will not lead to an award of compensation for loss till the party proves actual loss or damage.

12. It is further argued that the quantification is even otherwise ex facie faulty. Respondent had engaged UPSBC to do the bridge/structural work for a lump-sum amount of Rs. 14.08 crores and thus the expenses due to delayed work, if it all incurred could have been incurred by UPSBC only. It is an admitted position that neither the UPSBC claimed any overhead expenses on account of delay nor were any paid to UPSBC. The finding is thus clearly contrary to Section 73 of the Indian Contract Act, 1872.

13. Counsel for the Petitioner relies upon the judgment in case of ***Mapex Infrastructure Pvt. Ltd. v. National Highway Authority of India, 2018 SCC OnLine Del 6664***, wherein it was held by this Court that a sub-contractor's cost can be claimed by the principal contractor only by furnishing proof that such a claim is made by the former and that the latter has actually made the payment, after applying the principle of

mitigation of loss. It is submitted that this objection was raised by the Petitioner and is recorded in para 3.2.5 by the Tribunal, but has not even been dealt with and the claim has been allowed, which is a patent illegality.

14. Claim No. 4 was for compensation of loss of profit resulting from loss of business opportunities due to contract prolongation. Counsel argues that the claim of the Respondent was based on the alleged acts of the Petitioner due to which the Contract was extended by nearly 27 months and allegedly, the resources of the Respondent remained locked up, depriving it of the profits. It is pointed out that it was the Respondent who was solely responsible for the delay and the finding of the Tribunal that delay is attributable to the Petitioner is perverse being contrary to abundant evidence available on record. The Tribunal has failed to give adequate reasons to support the finding. Instead of mobilizing the resources within the stipulated period, the Respondent had sufficient leeway to carry out the work in the extended period, thereby minimizing the expenditure.

15. It is further argued that it is settled law that the party claiming loss/damage needs to prove the same by leading evidence and the damage cannot be remote but should be in contemplation of the parties. Respondent has not proved any opportunity which came its way and was thus lost in the prolonged period of the Contract. Merely stating that various tenders were lost during this period is not enough. Claim for loss of profits has to be pleaded and proved through documents and evidence. It is also argued that the claim overlaps with the claim of loss on account of idling of plant & machinery and both could not have been allowed by

the Tribunal. Counsel relies upon the judgment in the case of ***Bharat Coking Coal Ltd. v. L.K. Ahuja (2004) 5 SCC 109***, wherein it was held that the Contractor has to prove loss of profit by producing evidence. It was also held that the said claim could not be allowed after claims for escalation and price of material etc., were allowed. In the case of ***NHAI vs. HCC 2016 SCC OnLine Delhi 6112***, this Court has held that a person claiming loss of profit must establish that he had the opportunity to deploy its resources in another venture and that those ventures would have yielded profit. The Tribunal must also consider if the equipment were owned by the contractor or were to be hired from other contracts. Reliance is also placed on ***AIR v. Unibros and Others, (2002) Suppl. Arb.LR 618 (Del.)*** where the Court held that for assessing loss of profit Hudson's Formula cannot be straightway applied unless factors like capacity to earn the profit etc. are proved by the contractor.

16. Claim No. 5 was for compensation of loss sustained due to loss of productivity of plant & machinery unutilized to full extent due to delays and hinderances in the original period. The contention of the counsel for the Petitioner is that the entire claim of the Respondent was based on impediments and delays caused by the Petitioner which had an adverse cumulative effect on the plant & machinery which had been deployed and could not be withdrawn or utilized elsewhere. This according to the Respondent had led to losses by way of ownership charges i.e. depreciation, insurance, storage charges, crew charges etc. Learned counsel for the Petitioner contends that the claim was allowed without an iota of evidence. Petitioner had objected that details of the plant & machinery along with date of purchase and date of deployment at the site

along with copy of invoices etc. had not been proved at all. The claim was for respondent's own machinery said to have been deployed and unutilized in the original contract period. The monthly reports did not contain any details of ownership of the machinery or details of working hours and unutilised hours, with specific period, month-wise and machine-wise. The whole bridge work was given on sub-contract basis and major structures were executed by M/s UPSBC. Compensation of loss is claimed for total quantum of work executed in the extended period, as though the whole machinery and equipment including that of M/s UPSBC was idle, however, the sub-contractor had not even raised such a claim. The Petitioner had also raised objection about the inflated nature of Claim No. 5 since the productivity losses of the equipment claimed were more than the component of equipment in the total project cost. Petitioner relied upon the judgment in the case of *State of Orissa v. M/s. Samantary Construction Pvt. Ltd. 2015 SCC Online 865* wherein it was held that the Arbitrator ought to ascertain total value of machinery before awarding the claims since such loss should not exceed the price of the equipment. The Tribunal has brushed aside the objection by holding that there was no record to evidence that the claimed amount exceeded the cost of machinery. It is submitted that this finding is perverse since Respondent had failed to produce any document to show the value of plant & machinery and till such evidence was brought on record, no estimation of the idling losses could have been made. This apart, none of the 19 items of key plant & machinery are owned by the Respondent. Also, to claim idleness or under-utilization of machinery, Respondent had

to prove that there was existence of an opportunity to deploy the machinery for gainful employment, which was never done.

17. It is further contended that the methodology for calculation of loss of productivity was not in terms of the contract. Productivity has to be measured on a day to day basis and not on the total value of a particular BOQ item. Extension of time was granted for all the three milestones so as to not cause idleness and most of the Earth-Handling machinery could not have been idle, since a lot of frontage of lower layers of carriageway were available for working. The Monthly Progress Reports only contain theoretical number of machinery, classification-wise, and not details of specific machinery owned by the Respondent with working hours and unutilized hours.

18. The next argument by the learned counsel for the Petitioner is with respect to Claim No. 7 which was for payment of interest on Claim No. 1 to Claim No. 6. It is argued that the claim was for pendente lite and future interest. The Tribunal has erroneously awarded pendente lite interest @10%, compounded monthly, which is punitive. The Tribunal has relied upon Sub-Clause 60.8 of COPA (Conditions of Particular Application), which is inapplicable and is only for payment certified by the Engineer which was not so in the present case. It is argued that even otherwise, Section 31(7)(a) of the Act provides for pre-reference and pendente lite interest at a reasonable rate. The Tribunal has awarded exorbitant amount and moreover the Respondent had never claimed compound interest in any of its Notices sent to the Petitioner. Learned counsel relies upon the judgment in the case of *NHAI v. M/s. KNR Patel (JV) KNR House* in *Civil Appeal No. 3597/2017*, where an identical contractual clause was

considered and the Apex Court reduced the pendente lite interest awarded @ 10% compounded monthly to simple interest @12% per annum. It is further pointed out that in **SLP No. 16506-07/2016**, between the same parties, Supreme Court had granted leave on the issue of grant of compound interest in terms of Clause 60.8. SLP has been admitted and in the meantime, Petitioner has been directed to calculate pendente lite simple interest @12% per annum.

Learned counsel also relies on the judgment of the Supreme Court in **Vedanta Limited v. Union of India and Ors. 2018 SCC OnLine Del 11253** wherein it has been held that rate of interest awarded by the Tribunal must be compensatory and not punitive. In the case of **Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Another (2007) 2 SCC 720** rate of interest for pendente lite and future period was reduced to 9%.

19. Per contra, learned counsel for the Respondent at the outset argues that the Award is a well-reasoned Award based on the documents and the evidence placed before the Tribunal. He argues that the scope of judicial review under Section 34 of the Act is extremely limited and it is not open to the Court to re-appreciate the evidence led before the Tribunal or interpret the contractual terms differently. If the view taken by the Tribunal is a possible view, this Court cannot interfere in the Award. Even reasonableness of reason is the preserve of the Tribunal and this Court cannot sit in appeal over the reasons and the findings. The grounds being urged by the Petitioner would require the Court to judge the matter as an Appellate Court which is beyond the scope of its power under Section 34 of the Act.

20. Learned counsel at the outset denies it was the Respondent who was responsible for the delay in completion of the work or was not equipped with resources to carry out the work, as required in the laid down Schedule. It is submitted that the lapses and breaches by the Petitioner were highlighted and communicated to the Petitioner time and again, which is why the Engineer-in-Charge granted extension of time on four occasions. This decision was subsequently approved by the Committee of senior officials of the Petitioner. The events of delay resulting in grant of EOTs, granted by the Engineer had been examined in detail by the Tribunal. In fact, it was the Petitioner who was responsible for the delay, both, in non-handing over the land and technical approvals, besides delay in removal of encroachments, release of drawings and changes in the bridge's layout etc. It is argued that this was fortified by the fact that no Liquidated Damages were levied by the Petitioner, while granting the extension of time.

21. Learned counsel for the Respondent has relied on the judgment in the case of *ONGC v. Saw Pipes Ltd. (2003) 5 SCC 70*, to contend that interference is permissible when the Award is patently illegal and shocks the conscience of the Court. In *McDermott International Inc. v. Burn Standard Co. Ltd. and Others (2006) 11 SCC 18*, Apex Court has held that challenge to the Award is available on very limited grounds and there must be a minimal interference since the parties have chosen to resolve their disputes through Arbitration. The limited grounds for challenge are now clearly spelt out in Section 34 itself, after a series of pronouncements on the aspect. The Impugned Award is neither in violation of Public Policy nor Interest of India, and nor violates Justice or Morality. The

Tribunal has in detail dealt with the issue of grant of extension of time. In determining the issue of delay, Tribunal has referred to various communications between the parties, recommendations of the Engineer in-charge and Monthly Progress Reports.

22. On merits it is argued that, with regard to Claim No. 1, the Tribunal has noted that deduction from IPCs 1-24 was done without applying any Bulkage factor. Payment of Seigniorage was done under Clause 28.2 of the Contract, without any objections and the Petitioner was unable to explain the basis of determination of bulkage factor. Significantly, even the Contract did not contemplate applying the said factor. Further, Clause 14.3 of the ITB-8 provided that all royalties, duties, taxes etc. as applicable 28 days prior to Base Date were to be included in the contract price. On date of execution of the contract, Bulkage factor applicable was 1 and not 1.5. Clause 70.8 of the Agreement provided for reimbursement of additional cost incurred by Contractor, resulting from increased cost on account of loss promulgated after 28 days prior to Base Date. The Agreement did not provide for Bulkage factor of 1.5 and was unilaterally applied in 2003 by the Petitioner pursuant to a Notification issued by the A.P. Mines and Geology Department. The contention, therefore, is that the application of Bulkage factor is extraneous to the Agreement and in any event, this would fall within clause 70.8 of the Agreement. Reliance is placed on the judgment of the Supreme Court in *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI) (2019) SCC 131*, wherein it has been held that an Award which is based on Formulas, extraneous to the contract, is to be set aside.

23. With regard to Claim No. 2, learned counsel for Respondent argues that the Tribunal has allowed only a part-sum against the claimed amount and that too after assessing the evidence before it. Sum awarded is supported by a Banker's Certificate on the basis of the actuals proved. Thus, there is application of mind and the finding cannot be faulted with.

24. With respect to Claim Nos. 3 & 4, it is argued that the Tribunal has relied on MoRTH Standard Data Book to award the claims. This was one of the methods of computation submitted by the Respondent. The rates prescribed in the said Data Book have been accepted by several Courts to be reasonable. In fact, in so far as Claim No. 4 is concerned, the Tribunal rejected application of Hudson's Formula to calculate the loss of profit. In so far as Claim No. 3 is concerned, only a part of the project work was sub-contracted to the UP-State Corporation, whereas the contract price was much higher. In any event, it is argued that this would amount to reappreciating evidence which is beyond the scope of Section 34 of the Act.

25. With regard to Claim No. 5 counsel for the Respondent contends that the said claim was limited to Ownership and Operation & Maintenance Charges. While awarding the claim, the Tribunal relied on invoices submitted by the Respondent and the MoRTH Standard Rates. These issues are purely in the Domain of the Arbitrator and cannot be interfered with in the present petition. For Claim No. 7, it is urged that the Tribunal has awarded the contractual rate of interest for Claim No. 1 and for the remaining claims, the interest has been awarded at @ 10%. It is no longer *res-integra* that the Tribunal has a power to award interest at the

rate it deems reasonable, as long as the parties have not agreed on anything to the contrary.

26. I have heard the learned counsels for the parties.

27. Claim No. 1 awarded in favour of the Respondent was for refund of extra Seigniorage Charges recovered from its running bills on account of enhanced volume of minor minerals, applying the Bulkage factor. As per Clause 28.2 of the GCC, the Respondent was liable to pay all tonnage and other royalties, rent, other payments, if any, for getting stone, sand, gravel, clay etc. required for the Works. Government of A.P. amended Rule No. 10 (1) of the A.P. Mineral Concession Rules under the Mines and Minerals (Regulation and Development) Act, 1957, through a Notification issued vide GO No. 331 dated 21.06.2000. The amended provision reads as under:-

“In the mentioned schedules, the rates for Seigniorage Fee on the Minor Mineral consumed in the work are given for per unit, in CUM (volumetric) in Schedule-I and dead rent is given for per unit in Hectare in Schedule-II.”

The Government vide GO No. 23 dated 05.03.1999 mandated deduction of Seigniorage Charges by PWD from the bills of the Contractor.

28. Petitioner deducted Seigniorage Charges at the rate specified in Schedule-I of the GO for minor minerals, consumed and measured as compact quantities in CUM of the work carried out from the first 24 IPCs paid in first 31 months from commencement. At this stage, on the recommendation of the Vigilance and Enforcement Officer, as per demand notice of the Assistant Director of Mines and Geology, Petitioner introduced application of bulkage factor on compacted quantities to work

out loose quantities consumed in the work. The Department raised demand for the balance charges on NHAI applying the Bulkage factor, interpreting provision of Rule 34 (1) of the Concession Rules. Petitioner deducted the charges on loose quantities consumed in the entire work executed, applying Bulkage factor of compacted quantities right from the commencement of the work i.e. retrospectively. Respondent in its Final Statement under Clause 60.11 of COPA, claimed the difference of the charges calculated by applying bulkage factor of loose quantities and the charges calculated on the compacted quantities.

29. The Tribunal was of the view that the arguments by the Respondent were valid in light of GO dated 05.03.1999 which imposes statutory duty on NHAI to deduct Seigniorage Charges as per the Act and the GOs. It is the NHAI which had to interface with the Department to the exclusion of the Respondent. The Tribunal negated the contention of the Petitioner that it was duty bound to effect recovery on a demand from the Mining Department on the ground that the letter dated 26.07.2003, issued by the Assistant Director, Mines was not a GO but only a Demand Notice. Before effecting recovery, Petitioner was under an obligation to satisfy itself regarding the demand being lawful and as per the GOs and the Act. Tribunal has observed that Petitioner could not explain how the values of Bulkage factor were arrived at. In the Defence Statement, a value of 1.5 was indicated but the Tribunal observed that, this was not existing in the recommendations of the Vigilance Department and no further document was brought to support the version.

30. The Tribunal interpreted the word ‘dispatched’ used in Rule 10 (1) to hold that if the word could be related to transportation and made

synonymous to loose quantities, then the work 'consumed' could be synonymous to compact quantities. In that case, dispatch quantity will not be analogous to consumed quantities while both have to be the same, and therefore, the interpretation of the Vigilance Department was incorrect. Tribunal further observed that in the present case, minor minerals to be used were to be measured at the time of consumption for charging the Seigniorage Fee. Until the 24th IPC, fee was deducted on compacted quantities, but after the intervention of the Vigilance Officer, it was charged for loose quantities by multiplying compacted quantities with bulkage factor, retrospectively. The Tribunal concluded that the Respondent was right in the submission that there was no provision for applying any swell/bulkage factor on compacted quantities for Seigniorage Charges in the contract. The word 'tonnage' used in Clause 28.2 indicates that Charges are to be paid on tonnage i.e., weight basis. Seigniorage Fee is applicable on the solid contents, which would mean minerals without voids, which the minor minerals are not. Tribunal was of the view that if the volume of solid contents is to be worked out then specific gravity and weight of the material should be known, which was not the case here. Tribunal also went into the technical aspects of the bulkage factor and was of the view that the Petitioner could not calculate the bulkage factor by calculating loose quantities from the compacted as gravel or earth do not exist loosely in the land. After a detailed analysis, the Tribunal came to a finding that the claim for excess Seigniorage Charges deducted by the Petitioner is not the same as it would have been in the case of compacted and finished volume of the items of work.

Tribunal, therefore, allowed the claim for refund of the charges in favour of the Respondent.

31. Having perused this part of the award, in my opinion, the Respondent is right in its contention that there is no patent illegality in the Award to this extent. The Respondent is right in its contention that the Petitioner is calling upon the Court to reappreciate and interpret the Clauses of the Contract to come to a different finding. What is of significance is that the Tribunal has placed reliance, to come to a conclusion in favour of the Respondent, not only on the provisions of the Act and the GOs but also on the Clauses of the Agreement between the parties. As per Clause 14.3 of the ITB, all royalties, taxes etc. as applicable 28 days prior to the Base Date were included in the contract price. As on date of the execution of the contract, the Bulkage factor applicable was not 1.5. Clause 70.8 of the Agreement provided for reimbursement of additional cost incurred by a Contractor resulting from increased costs on account of loss promulgated after the 28 days, prior to the base date. The Bulkage factor was admittedly applied unilaterally in 2003 pursuant to a Notification of the Mines Department. Thus, as rightly held by the Tribunal, the bulkage factor was extraneous to the Agreement and as rightly contended by the Respondent, squarely fell within Clause 70.8 of the Agreement.

32. Tribunal has carefully analyzed all the provisions of the Act and the GOs and more importantly the Clauses of the Agreement. It has rightly come to the conclusion that the bulkage factor was extraneous to the Agreement and could not have been applied more so, retrospectively. The Tribunal was also of the view that the G.O dated 05.03.1999 imposed

a statutory and fiduciary duty on the NHAI to deduct the Seigniorage Charges. No Clearance Certificate was required by the Respondent from the Mining Department and hence it was for the NHAI to interface with the Department to the exclusion of the Contractor. The Demand Letter by the Assistant Director, Mines, was only a demand notice and moreover, the NHAI was not bound by directions which were against the provisions of law. Relevant part of the Award is reads as under:-

“1.3.13 AT is of the view that the arguments put forward by the Claimant are valid in the light of G.O. No. 23 dated 05.03.1999 which imposes statutory and fiduciary duty on the works departments i.e. NHAI in this case to deduct seigniorage charges as per ACT and G.Os. As no clearance certificates from Mining Department is required by the Claimant, so it is NHAI to interface with the Mines and Mineral Department to the exclusion of the Contractor. The letter dated 26.07.2003 issued by the Assistant Director Mines is not a G.O but 'demand notice' based on the recommendations of Vigilance and Enforcement Officer. Therefore the Respondent contention that he is duty bound to effect the recovery of demand raised by Mining Department and has no other obligation towards contractor is not correct. Before effecting the recovery from the contractor, the Respondent has obligation to satisfy himself regarding the correctness of demand raised in view of Act and G.O.s under enforcement. As the Respondent has obligations towards contractor to deduct seigniorage charges as per law, the Respondent cannot redirect the Claimant to approach to some other authority for redressal on the issue.

1.3.14 The Respondent stated that they have no role in fixing the bulkage factors but only complied with the directions contained in the letter dated 26.07.2003 issued as demand notice by the Assistant Director Mines and Geology. The Respondent could not explain how the

values of bulkage factors used are arrived at. In their defense statement they have indicated value of bulkage factor as 1.5 but this value is not existing in recommendations of Vigilance Department; further the Respondent tried to explain the value during hearings (written synopsis by NHAI) but could not explain clearly and put up no document in support of their version.

1.3.15 "When a quarry lease is granted under these rules, the Seigniorage Fee or Dead rent whichever is higher, shall be charged on all Miner Minerals dispatched or consumed from the land at the rate specified in Schedule-I and Schedule-II as the case may be." The Vigilance and Enforcement Officer could relate 'dispatched' word as used in the Rule 10(i) with measurement of Miner Mineral in the form of its transportation i.e. loose quantities. So, to work out loose quantities, bulkage factors on compacted quantities were introduced and for this enhanced volume, the seigniorage charges were demanded from the contractor through Respondent.

If the 'dispatched' word can be related to transportation and made synonymous of loose quantities then the 'consumed' word can be made synonymous of compact quantities. And in that case dispatched quantities will not be analogues to consumed quantities while both have to be same. Therefore interpretation made by the Vigilance & Enforcement Officer seems to be incorrect. In the instant case the Miner Minerals to be used in works are to be measured at the time of consumption for charging seigniorage fee. Until payment of 241h IPC, the seigniorage fee was deducted on compacted quantities and thereafter with the intervention of Vigilance Officer it was charged for loose quantities calculated on multiplying compacted quantities with bulkage factors retrospectively .

1.3.16 The Claimant's contention that the swell/bulkage factor applied on compacted quantities to calculate loose

quantities of Minor Mineral consumed in the work for working out seigniorage fee by the Respondent, is against law and provisions of contract. The Claimant rightly stated that there is no provision for applying any swell/Bulkage factor on compacted quantities for calculating seigniorage charges in the contract. The Mines and Mineral Act and also does not lay down any, procedure for applying any bulkage factor while effecting recovery of seigniorage fee. The word 'Tonnage' used in Clause 28.2 GCC indicates that seigniorage charges are to be paid on tonnage; meaning thereby on weight basis. The seigniorage fee is applicable on solid contents of Minor Minerals. This is considered opinion of the AT that the solid content means Mineral without voids but Minor Minerals do not exist without voids in the land or in compacted state at consumption site. If volume of solid contents are to be worked out then specific gravity and weight of the material should be known. Such is not the case here. Thus, the grounds given by the Claimant that the seigniorage charges payable on weight basis and on solid contents of Minor Minerals, are not convincing grounds in support of their case.

1.3.17. The Panchayat Raj Department of Govt. of A.P. by memo dated 26.11.1982 provided direction in respect to measurement of quantities consumed in the work. The Memo says "The Government therefore direct that the departmental officers of the Panchayat Raj Engineering Department shall recover the Seigniorage charges from the bills of contractors for work done and measured with reference to quantities used in the works as per theoretical requirements at the rates prescribed by the mines and Geology Department." The Claimant also stated that they have accomplished an agreement with the State of A.P. on 27.02.2009 wherein G.O. Ms. No. 331 dated 21.06.2000 and G.O. Ms. No. 217 dated 29.09.2004 were referred and clause No.104.0 of the agreement stipulated as "Seigniorage fee shall be recovered from the bills of the

Contractor on the work done and measured with reference to the quantities used in the works as per the theoretical requirements at the rates prescribed by the government of Andhra Pradesh as per Minor Mineral Concession Rules subject to amendments". Clearly, the procedure prescribed in the referred G.O.s. would have been followed by the Respondent for calculating the seigniorage charges.

1.3.18. The theoretical requirements of the Miner Minerals such as earth and gravel which are to be used in the work as they are existing in land, is the same as the finished and compacted quantities. There is well laid procedure for working out theoretical requirements of materials in an item of work as standardized in Data Book of Ministry of Road Transport and Highways. From item No. 3.08 (Embankment), 3.10 (Sub-Grade), 3.11 (shoulder) and 3.12 (Median Filling) in Data Book clearly indicate that 1M³ Earth or Gravel is required for 1M³ of finished and compacted item.

1.3.19 The Respondent in their written synopsis tried to calculate a bulkage factor for item No. 3.10 (Sub-Grade) as 1.25 taking loose thickness as 250 mm arbitrarily and compacted thickness from the loose as 200 mm. Calculating loose quantity from compacted is vague as the gravel or earth is not existing in loose in the land and theoretical requirement as per Data Book is also not for any loose quantity. Therefore, pleading by the Respondent is not tenable. In case of Embankment the Respondent has given reference of some circular of Irrigation Department regarding Swell factor of soils (18%) and allowance for compaction and shrinkage (12% to 12 and 1/2 %), which has no relevance with this issue.

33. A Co-Ordinate Bench of this Court in **O.M.P. 737/2012** in the case of **NHAI v. IJM Gayatri(JV)**, i.e., the same parties, had the occasion to deal with the similar issue and similar contentions. Court has held that no

patent illegality could be found with the conclusion reached by the Tribunal once it has thoroughly analyzed the relevance circulars, Government Notifications and the Clauses of the Contract. Relevant part of the judgment reads as under:-

“3. Claim No. 2 was for refund of extra seigniorage charges deducted from running bills in the sum of Rs. 30,60,070 on account of enhanced volume of materials considering the swell/bulkage factor. It is submitted by Mr. Chetan Sharma, learned Senior counsel for the NHAI that under Clause 28.2 of the General Conditions of the Contract (?GCC?), the Respondent had to pay all tonnages and royalties, if any, for extracting the materials required for the work. A statutory duty was cast upon the NHAI to deduct the seigniorage charges from the bills of the Respondent. Further, it was made clear under Clause 34.2 of the Special Conditions of Contract (?SCC?) that the Respondent shall comply fully with all existing acts, regulations and bye-laws, notifications that may be passed by the State or the Central Government and shall keep NHAI indemnified. It is further submitted that AT erred in allowing the above claims. The learned AT analyzed G.O. No. 23 dated 5th March 1999 under which the responsibility and obligation for proper collection of seigniorage charges was placed on the NHAI. It was concluded that recovery of seigniorage charges had to be based on measurement of solid contents (compacted) without applying any bulkage factor. The only method available with the Mines Department to arrive at the quantity for recovering of seigniorage charges was ?as consumed? in the work which in turn meant measurement in compacted form as per ?unit? mentioned in the BOQ. On the other hand it was found that the NHAI unilaterally changed the methodology for

calculating seigniorage charges by applying bulkage factor and that too retrospectively.

Consequently, the excess seigniorage charges to the extent of Rs. 30,60,070 was liable to be reimbursed to the Respondent. The AT concluded that imposition of bulkage factor was unilateral and without reference to the Respondent. It was noticed that in other contracts the NHAI was deducting seigniorage charges without application of bulkage factor.

4. As regards the plea of the NHAI that the deductions were made as per the directions of Government of Andhra Pradesh, the AT referred to the relevant letter/clarification dated 24th July 2000 which did not mention about the bulkage factor but required the minerals to be measured on the basis of the quantity undertaken from the quarry site. Further, the ADMG was required to initiate any action for recovery only after satisfying himself that the findings of the Vigilance and Enforcement Department were correct. No such action appeared to have been initiated.

5. Having examined the detailed and reasoned Award in respect of Claim No. 2, this Court is unable to find any patent illegality in the conclusion reached by the AT. It has thoroughly analysed the relevant circulars and notifications as well as the applicable clauses of the contract. The decision in respect of Claim No. 2 is, therefore, not called for interference.”

34. The decision of the Tribunal in respect of Claim No. 1, therefore, does not call for any interference.

35. With respect to Claim No. 2, the contention of the Respondent was that due to extension of the contract by 27 months on account of the acts

of the Petitioner, Respondent suffered losses on account of additional expenditure for keeping the Bank Guarantees alive for additional period. The Tribunal has extracted in para 2.1.2 of the Award, the eleven Bank Guarantees which remained locked during the additional period as a consequence of prolongation of contract. In para 2.1.3, the Tribunal notes that the Bank Guarantees were issued to secure performance and/or Retention Money. The Tribunal has analyzed each of the Bank Guarantees with respect to the date on which it was to be released under the original contract and the date on which it was actually released and the extra expenditure incurred along with interest, to keep them alive. Tribunal has also noted that the claim was supported with Banker's Certificate towards commission charges and losses incurred and has rendered a finding that the contention of the Petitioner that the contract was extended at the request of the Respondent and hence it could not claim a loss on account of locking of securities is ex-facie absurd. It notes that the Respondent notified the detailed particulars of all events from time to time in terms of Clause 44.2 of the GCC. The Engineer analyzed the events and determined the Extension of Time, in terms of Clause 44.3 of the Agreement and that the Petitioner granted the extension of time. A clear finding is rendered that the security BGs were renewed beyond the stipulated date of 31.03.2005, as a consequence of delay in completion of the Contract. Tribunal has taken note of the contentions of the Petitioner that the Extension of Time was a gracious act and that the Respondent did not give any notice while extending the BGs. Tribunal has rejected the contention that grant of EOT was a gracious act on the ground that there is no such provision in the Contract to grant EOT, out of grace. Tribunal

observed that once the EOT was granted after analyzing all pros and cons, Respondent cannot be made to suffer for the extra expenditure. Having rejected the contentions of the Petitioner in favour of the Respondent, the Tribunal has been cautious to Award expenditure on Bank Guarantees on the basis of the evidence before it. Whatever claim of expenditure was supported by the Banker's Certificate, has been allowed but where the Respondent did not substantiate the claim by a Banker's Certificate, that part of the claim has been disallowed. Relevant part of the Award reads as under:-

"2.3.4 The Claimant had provided one certificate of Bank Commission Charges for BGs issued by IJM Corporation, which includes BG No. LG-00012/2001 dt:15.05.2001 for a sum of Rs.1,44,66,634/-. This certificate is for various other work contract, like APSH 8; HPPCL, Pk-1, and APSH-7 etc. This certificate is in form of a table prepared by claimant, and there is no certificate from the bank. The AT is of considered opinion that the claimant is not entitled for this amount.

2.3.4 The Claimant provided Bankers certificates of Commission and other charges for performance BG No. 24/77 dated 15/05/2001. The additional amount comes to (64,48,014-36,81,602+ 15,11,252+2,49,347) Rs. 45,27,011 for which the Claimant is entitled, along with interest."

In my opinion, this part of the award with respect to Claim No. 2 calls for no interference by this Court.

36. With respect to Claim No. 3, the Arbitrator has adopted the methodology of quantifying the Claim based on the MoRTH Standard Data Book for rate analysis. The Respondent had proposed three methods for quantification out of which the Tribunal has adopted the

aforementioned methodology. The Tribunal was of the view that the component of the overhead charges as provided in the MoRTH Data Book was the most appropriate method to adopt in the light of the records and information placed before the Tribunal. The Tribunal split the work into two categories as per the MoRTH Standard Data Book viz. road work and bridge work and was of the view that the Respondent had rightly taken the percentage as 8% for road work and 25% for bridge work. However, it did not agree with the calculation of the Respondent in seeking overhead expenses on the entire cost of the project, but calculated only on the cost of work carried out in the extended period. Taking the cost of work as per the Final Payment Certificate (FPC), the Tribunal arrived at a certain calculation and awarded the amount. The Tribunal disregarded the certificate of the Chartered Accountant as well as the deposition of the Chartered Accountant as doubts had been raised by the Petitioner on its credibility. The Tribunal was of the view that the Respondent's calculation based on Hudson's Formula could not be accepted. The Tribunal has noted that the compensation could be calculated as additional overhead during the extended period and worked out the following methodology and calculation to arrive at the awarded amount:-

*“Cost of total bridgework as per FPC-56 = Rs.470,336,603
Cost of bridge work, done up to stipulated date of completion as per IPC 25 = Rs.31,94,60,045
Cost of bridge work done in extended period = 470,336,603
- 319460045 = Rs.15,08, 76,558
Cost of other remaining work done in extended period =
995,928,597 -150876558 = Rs.84,50,52,039*

Therefore over head for bridge work comes out to = 15,08,76,558 x 25/100 = Rs3, 77,19,140
And for Road Work to Rs. 84,50,52,039 x 8/100 = Rs 6,76,04,163
Total Over Head Charges = Rs. 10,53,23.303
As discussed, Over Head cost is to be reduced by 10% for one time fixed item of Overhead.
On reducing overhead charges by 10% of Rs 10,53,23.303; comes out to be Rs. 9,47,90,973/-."

37. The Tribunal was of the opinion that 20% more work could have been done by the Respondent during the original contract period and accordingly reduced the overhead charges by 20%. Thus, the Tribunal awarded Rs. 7,58,32,312/- as against the claim amount of Rs. 12,70,20,765/-. In my opinion, no patent illegality can be found in this part of the Award. The Tribunal has adopted a methodology which in his wisdom was apt to calculate the amount claimed. Moreover, while calculating the amounts, the Tribunal has taken into account the amounts as per the FPC. There is no dispute by the Petitioner on the validity or otherwise of the FPCs which are certified by the Independent Engineer. No interference is called for in the Award qua the Award of this Claim in favour of the Respondent.

38. In *Associate Builders v. DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 : 2014 SCC OnLine SC 937 at page 89, the Apex Court categorically held that the decision as to what Formula would be applicable in a particular scenario, is the domain of the Arbitrator. It was held:

“56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the arbitrator for having applied a formula of 20 months instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross-objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it would itself do “rough and ready justice”. We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

39. Supreme Court in the above judgement also placed reliance on the judgment in ***McDermott International Inc. v. Burn Standard Co. Ltd.***, (2006) 11 SCC 181, wherein the following observations were made:

“106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.

107. If the learned arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court.

109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.”

40. Claim No. 4 is on account of Loss of Profit for Rs. 19,36,72,469/- for which the Tribunal awarded Rs. 9,96,74,288/-. In my view, the Petitioner is right in its contention that this claim is overlapping with Claim No. 3. There is merit in the contention of the Petitioner that the respondent is claiming to seek double benefit. While on one hand it is argued by the Respondent that it had mobilized his resources during the extended period and therefore, should be granted the claim under Overhead expenses, while on the other hand it is also seeking loss of profit on the ground that had these resource been gainfully deployed elsewhere he could have earned profit. The Arbitrator has allowed Claim No. 3 on account of utilization and mobilization of resources under the heading overhead charges and therefore, to claim loss of profit on

mobilization of resources at the site can certainly not be allowed. I also find merit in the contention of the Petitioner that it is a settled law that a party claiming loss of profit will have to first prove the existing opportunity, and then its attempt to seize that opportunity and finally prove that by not availing the said opportunity, it has incurred a loss. The loss would have to be quantified and proved. The Petitioner is right that none of these factors have been proved by the Respondent and there are no documents or any evidence on record in proof of loss of profit. In the case of **DDA vs. PC Sharma, FAO(OS) 143/2006, decided on 02.02.2009**, a Division Bench of this Court has held that there are three distinct heads of damages which a Contractor can claim legally; which are claims for idle machinery/labour, escalation and loss of profits, subject to the same being duly established where the work gets prolonged due to the fault of the employer. But what is important is that a contractor will be entitled to these claims only if the same are duly established. Loss of profits is a claim in the form of damages under Section 73 of the Indian Contract Act. In order to seek a claim under any of the three heads, the Contractor will have to lead evidence and establish the claim. A mere calculation without any evidence on record would not be enough for the Arbitrator to Award these Claims. In the case of **Kailash Nath Associates vs. DDA and Anr., (2015) 4 SCC 136**, the Supreme Court clearly held as under:-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining

of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

4. The section applies whether a person is a plaintiff or a defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

41. The Bombay High Court in ***Essar Procurement Service Ltd. vs. Paramount Constructions***, 2016 SCC Online Bom 9697 clearly held that

Sections 73 & 74 of the Contract Act require actual damage or loss to be proved and the proof cannot be dispensed with. In the case of *Ajay Singh Vs. Suneel Darshan, 2015 SCC Online Bom 1412*, a Division Bench of the Bombay High Court relying upon the case of *Maharashtra State Electricity Board vs. Sterlite Industries (India) Ltd., 2000 SCC Online Bom 89* and *Edifice Developers and Project Engineers Ltd. v. Essar Projects (India) Limited, 2013 SCC Online Bom 18*, held that if a party has not suffered any loss, even if the Respondent has committed a breach, it cannot be awarded compensation under Section 73 of the Contract Act. When the loss is in terms of money, the same would have to be proved and only when it is shown that the party has suffered an injury or a loss can it be awarded the claim of loss of profit.

42. A perusal of the Award shows that the Petitioner had raised an objection that the claim for loss of profit and loss of productivity of Plant and Machinery were overlapping but the Tribunal has not dealt with the issue of overlapping under Claim No. 4. A perusal of the Award further shows that the Tribunal has allowed Claim No. 4 on the basis of the MoRTH Data Book taking the profit as 10% of the function of cost as also the time as function of the Contractor's profit. It is evident no evidence was led by the Respondent to show actual loss of profit. Supreme Court has in the case of *Murlidhar Chiramjilal vs. Harishchandra Dwarkada AIR 1962 SC 366* clearly laid down the principles of Award of damages under Section 73 of the Contract Act, 1872 which are as under:

“The two principles on which damages in such cases are calculated are well settled. The first is that, as far as possible, he who has proved a breach of a bargain is to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the Contract had been performed; but this principles is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Ry.Co. of London (1912) AC 673. at P.689). These two principles also follow from the law as laid down in S.73 read with the Explanation thereof. If, therefore, the contract was to be performed at Kanpur it was the Respondents duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it is suffered any damages thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the Respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it...”

10. We, therefore, find the Respondent's contention that the Claimant has not suffered an actual loss to the unfounded in as much as the actual loss suffered by the Claimant in this case is the loss of an expected profit that the Claimant would have earned had the Respondent honoured its obligations under the Agreement. We find that none of the judgments relied upon by the Respondent i.e. (i) Bombay Container Terminals Pvt. Ltd. v. Central Warehousing Corporation [CS(OS) No.776-A of 2004], (ii) Ashok Kumar Khanna v. Johnson & Johnson Co. [RFA (OS) 32/2011] negate the aforesaid view and do not help the Respondent. We find that the Claimant calculated loss of

profit as difference between the contracted rate and the spot market rate at which the Respondent fixed the same cargoes during the period. We, therefore, conclude that the Claimant is entitled to damages for its loss of profit.

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The Award of the Arbitrator under Claim No. 4 thus deserves to be set aside.

43. In so far as Claim No. 5 is concerned which was for loss of productivity of Plant and Machinery unutilized during the original period of contract, the contention of the Respondent was that during the currency of the contract there were impediments and delays attributable to the Respondent. These delays caused disruptions and thus machinery could not be withdrawn and utilized at another site. Consequently, losses were claimed on account of reduced productivity in the nature of depreciation, interest on capital cost of Plant & Machinery, storage charges, overheads, insurance etc. during the original Contract Period, more particularly on account of 19 number Key plant and equipment. The method that was

adopted by the Respondent for claiming loss was that the Respondent had, for each item, calculated the machinery hours actually required for each of the BOQ items for the quantities, actually measured and certified during the original period and for the Final Completion, quantities actually measured and certified till completion. The calculation was as per machinery outputs certified under the MoRTH Standard Data Book.

44. Petitioner had contended that the claim was based on presumptions and exaggerations. MOST hire charges are for preparing the estimate at Government level and not used by Contractors. No doubt the cost of machinery is taken into consideration but not at the hire charges adopted by MOST. It was argued that the charges have to be proved by documentary evidence which was not done and Monthly Progress Report could not be the bases for evaluation. The JV did not own any of the 19 items of the Key Plant and Equipment. To claim idleness, the Respondent had to prove that there was an opportunity for deployment at another site which was not done. Details of purchase of the machinery with its invoice and history was never furnished.

45. Tribunal held that the Respondent was entitled to compensation on account of prolongation of contract on the strength of Clause 53.4 and 60.10 as well as 60.11. Since the prolongation was attributable to the Employer, the Contractor was entitled to loss of productivity of plants and machinery. The Tribunal also observed that the Respondent had placed on record invoices for 19 items of the main equipment which were purchased and deployed at site. Status of deployment of the machines was also shown as evidence. The Petitioner's claim that during the contemporary period, other contracts were being executed by the JV

simultaneously was negated by the Tribunal, on the ground that the Petitioner could not furnish any evidence in support of this contention. The Tribunal also noticed that the Petitioner could not substantiate its argument that the idle charges were not supported by any data of actual idling hours. Finally the Tribunal allowed the claim as under:-

“The Claimant's claim is for owned plant towards Ownership, Operation and maintenance charges i.e. (i) Depreciation -Machine (ii) Depreciation-Tyres (iii) Interest charges on capital cost (iv) Storage Charges (v) Repair charges-Tyres/Track (vi) Crew charges and (vii) Miscellaneous charges i.e. maintenance towards periodical overhauling. Accordingly the loss of productivity hours for each of the 19 items of Plant & Equipment is arrived at by deducting the machinery hours consumed for the quantities executed during the original contract -period from the total machinery hours actually required for total executed quantities as per BOQ. These machinery usage hours are for the work executed during extended period, machinery hours multiplied by the net usage rates for ownership, operation and maintenance excluding POL, Lubricants, overheads and Repair charges give the loss of productivity in original period and these losses are to be compensated. This cost worked out by the Claimant is Rs. 10,79,46,386 Crore.”

46. The Tribunal has all through rendered a finding that the default was on the part of the Employer, which is a finding of fact and calls for no interference. Based on this the present claim has also been allowed. The main argument of the Petitioner before the Arbitral Tribunal was that the Supreme Court in case of ***State of Orissa vs. M/s. Samantary Construction Pvt. Ltd., 2015 SCC Online 856*** has held that the claim based on Hire Charges could not be for indefinite period and in no case

exceed the price of machinery and equipment. The Tribunal has held that there is no record before the Tribunal to evidence that the claim amount exceeded the cost of machines for which productivity loss was claimed. What is of significance is that the claim was for Ownership, Operation and Maintenance charges, as mentioned above, and therefore, the Tribunal calculated the loss of productivity by deducting the machinery hours consumed for quantities executed from the machinery hours required for the total executed quantity as per BOQ and thus allowed the claim in favour of the Respondent. In my view, there is no perversity or patent illegality in this part of the Award. Under Section 34 of the Act, no interference is thus called for under this claim.

47. In so far as the claim for interest is concerned, the Tribunal has awarded interest @10% per annum compounded monthly in accordance with sub-Clause 60.8 from the date of the Statement of Completion to the date of the Award and from the date of the award to actual payment @10% per annum, simple interest. In so far as claim Nos. 2 to 5 are concerned, interest has been awarded from 31.01.2012 i.e. the date of reference to Arbitration till the date of the Award and from the date of the Award to actual payment @10% per annum simple interest. Sub-Clause 60.8 of COPA is extracted hereinunder: -

“In the case of Final Certificate pursuant to Sub-Clause 60.13, within 84 days after the agreed Final Statement and written discharge have been submitted to the Engineer for certification and in the event of failure of the Respondent to make payment within the times stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid.”

48. With regard to Claim No. 7, the argument of the petitioner is that the Tribunal has committed a patent illegality in awarding pendente lite interest @ 10% compounded monthly which is punitive. I find merit in the contention of the petitioner. Section 31 (7) (a) of the Act provides for interest at a reasonable rate. In the case of *NHAI vs. KNR Patel (supra)* the Supreme Court has reduced the interest granted by the Tribunal @10% compounded monthly to simple interest @12% per annum. In the case of *Vedanta (supra)*, the Supreme Court has clearly laid down that the rate of interest must only be compensatory and not punitive. In my view, traversing of law on the grant of interest as well as in the facts of this case, the interest awarded by the Tribunal @10% compounded monthly is certainly punitive and exorbitant. Accordingly, the Award to the extent it grants interest @10% per annum compounded monthly under Clause 60.8 on Award of Claim No. 1 from the date of submission of statement of the Engineer and on Award of Claim Nos. 2,3,4 and 5 from 31.01.2012 till the date of the Award, is set aside. The Award of interest @10% per annum as simple interest on Claim Nos. 1 to 6 from the date of the Award to actual payment is upheld as this Court finds no infirmity in this part of the Award.

49. The Impugned Award to the extent it has allowed Claim No. 4 is hereby set aside. The remaining part of the award is upheld. Respondent is at liberty to agitate its claim with respect to the pre-reference and pendente lite interest on Claim Nos. 1 to 6 in accordance with law.

50. Petition is partially allowed.

JYOTI SINGH, J

MAY 12th, 2020/ rd/yo