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

% Judgment delivered on: 23.12.2021

\+ **O.M.P. (COMM.) 458/2020, I.A. NOS. 257/2021 & 2649/2021**

**M/S KMC CONSTRUCTION LTD** .....Petitioner

versus

**NATIONAL HIGHWAY AUTHORITY OF INDIA** ....Respondent

**Advocates who appeared in this case:**

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| For KMC Construction : Ltd. | Ms Kiran Suri, Senior Advocate with Mr Hitendra Nath Rath, Advocate. |
| For National Highways : Authority of India | Mr Arun Kumar Varma, Senior Advocate with Mr Yamandeep Kumar and Mr Shashank Bhansali, Advocates. |

**CORAM**
**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioner (hereafter 'KMC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the **A&C Act**') impugning an Arbitral Award dated 24.09.2019 (hereafter 'the **impugned award**') rendered by an Arbitral Tribunal constituted by three members (hereafter 'the **Arbitral Tribunal**'). KMC also impugns an order dated 21.11.2019 (hereafter

the ‘revised order’), whereby its application under Section 33 of the A&C Act was rejected.

2. KMC challenges the impugned award in respect of its Claims Nos. 3, 5, 13, 19 and 22.

3. Briefly stated, the facts that are necessary to address the controversy are stated hereunder.

3.1 NHAI, by a Letter of Acceptance (LoA) dated 22.08.2001, awarded a contract for the work of ‘Widening to four lanes and strengthening of the existing two lane carriageway between Km 278/000 to Km 340/000 of Udaipur-Ratanpur-Gandhinagar Section of NH-8 in Rajasthan, package no. UG-1’ (hereafter the ‘**Project**’) to KMC. Subsequently, the parties entered into an agreement dated 05.10.2001 (hereafter ‘the **Agreement**’). In terms of the Agreement, KMC agreed to execute the works at a Contract Price of ₹164,75,76,353/-. The works for the Project were to commence on 30.10.2001 and completed by 30.04.2004.

3.2 It is KMC’s case that NHAI had failed to handover the site to it and had provided an incorrect Detailed Project Report (DPR). Despite this, KMC completed the project two months prior to the stipulated date of completion. The works were completed on 28.02.2004 at a Contract Price of ₹248,00,00,000/- against the original Contract Price of ₹164,75,76,353/-. KMC submitted its completion statement on 08.05.2004. It is KMC’s case that the Engineer did not process the payments due to it and extended the defect liability period. Finally, the

Engineer issued the Defect Liability Certificate on 24.05.2006. The Engineer issued a Statement at Completion proposing a recovery of ₹18,16,34,122/- against the Final Bill of ₹70,51,84,650/-. Further, the Engineer did not give its decision on the other sums payable to KMC.

3.3 NHAI invoked the Performance Bank Guarantee furnished by KMC in the sum of ₹16,47,57,636/-.

3.4 In view of the disputes, KMC invoked the Arbitration Agreement by a letter dated 16.09.2006 and nominated Sh PV Rama Raju as an Arbitrator. NHAI nominated Sh VS Dixit as its nominee Arbitrator. Both nominated Arbitrators appointed Sh Prafulla Kumar as the Presiding Arbitrator and the Arbitral Tribunal was constituted on 12.11.2006.

3.5 In the meanwhile, KMC also filed a Writ Petition (bearing W.P. No. 18269/2006) before the High Court of Andhra Pradesh seeking interdiction of the invocation of the Bank Guarantee. By an order dated 29.11.2006, that High Court restrained NHAI from encashing the aforesaid Bank Guarantee. NHAI appealed against the aforesaid order before the Division Bench of the High Court of Andhra Pradesh and the Court ordered KMC to keep the Bank Guarantee alive during the course of the arbitration proceedings.

3.6 Before the Arbitral Tribunal, KMC raised twenty-two claims aggregating to ₹135,96,28,549/-. NHAI filed its Statement of Defence and also raised counter-claims.

3.7 By a letter dated 11.10.2013 addressed to the Arbitral Tribunal, both parties requested the Arbitral Tribunal to keep the arbitral proceedings in abeyance, to enable them to amicably resolve the disputes by Conciliation before the three CGM Committee and the Independent Settlement Advisory Committee (ISAC). However, the Conciliation was not successful and by a letter dated 23.06.2015, KMC requested the Arbitral Tribunal to resume the arbitral proceedings. Mr VS Dixit recused from the Arbitral Tribunal and Mr Ninan Koshi was appointed by NHAI in place of him. Mr Ninan Koshi and KMC's Arbitrator jointly appointed Mr SC Sharma as the Presiding Arbitrator on 19.04.2016.

4. On 24.09.2019, the Arbitral Tribunal delivered the impugned award. A tabular statement indicating the amounts awarded against the claims made by KMC is set out below:

| Claim No. | Nomenclature of Claims | Amount of the Claim as per Applicant | Amount of Claims as per Award | Declaratory Claim for Interest as per Applicant | Interest on Claims as per Award |
|---|---|---|---|---|---|
| 1 | CLAIM No. 1 Variations ordered as per Clause 51.1 for which new rates are to be paid as per market rates in terms of Clause 52.1 and 52.2 | 7,62,12,757/- | 3,19,51,622/- | 38,81,56,355/- | 5,80,24,145/- |
| i. | E2: Supplying and fixing of Netlon Geo-textile behind abutments and wing walls | 6,90,466/- | 3,44,890/- | Amount included above in Claim No.1 | |
| ii. | E3: Removal of existing tree stumps | 15,87,359/- | 15,87,359/- | --do-- | |
| iii. | E4: Providing and fixing m position HYSD bars for Median Drain Chambers | 1,33,85,106/- | 72,42,390/- | --do-- | |

Signature Not Verified
Digitally Signed
By:DUSHYANT
RAWAL

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| iv. | E5: Sand filling in open wells falling in construction area | 7,52,005/- | 5,22,413/- | --do-- | |
| v. | E12: Painting of Kerbs | 5,93,462/- | 4,74,416/- | --do-- | |
| vi. | E16: Pedestrian Guard Railing | 6,30,840/- | 5,12,188/- | --do-- | |
| vii. | Rl.02: PCC M:15 grade Cement Concrete for RCC Retaining Walls | 3,13,367/- | Nil | --do-- | |
| viii. | Rl.03: PCC M:25 grade Cement Concrete for RCC Retaining Walls | 16,92,228/- | Nil | --do-- | |
| ix. | Rl.04: Providing and fixing in position HYSD reinforcement bars | 32,49,271/- | Nil | --do-- | |
| x. | R2.05: Construction of Stone Masonry in CM (1:3) for Masonry Retaining Wall | 2,07,99,485/- | 8,64,800/- | --do-- | |
| xi. | UD.02: Construction of RCC Urban Drains as per approved Drawing | 2,91,41,234/- | 1,86,85,239/- | --do-- | |
| xii. | CD.02: Providing Encasement to Cross Ducts with M: 15 Grade Concrete | 32,12,2611- | 17,17,927/- | --do-- | |
| xvi. | CD.03: Providing 150 mm dia. PVC Pipe m Cross Ducts | | | | |
| 2. | CLAIM NO.2 New rates to be paid for the quantities executed more than 25% of Bill of Quantities and 2% of Contract Price as per sub-clause 52.2 | 27,62,38,125/- | 11,24,51,315/- | 1,40,99,62,986 /- | 20,42,11,587/- |
| 3. | CLAIM NO. 3 Escalation to be paid on Base Rates as per clause 70.1 (Price Adjustment) and not after discounting the base rate by the rebate | 2,62,01,641/- | Nil | 13,37,37,306/- | Nil |

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| 4. | CLAIM NO.4 Classification of roadway excavation materials as per clause 301.2.1 (ii) attracting payment under Item No.: 2.01(b), but payment made under item Nos. 1.02(a) and 2.01(a) | 3,99,84,686/- | 1,95,93,580/- | 20,40,88,148/- | 3,55,81,941/- |
| 5. | CLAIM NO.5 The rebate is limited to BOQ quantity only and cannot be applied to work done beyond BOQ quantities | 9,65,26,231/- | Nil | 59,84,79,236/- | Nil |
| 6. | CLAIM No.6 Rocky Sub grade is to be paid as per clause 301.6 under item No.: 2.10 of BOQ | 3, 75,24,163/- | Nil | 19,15,29,250/- | Nil |
| 7. | CLAIM NO. 7 Payments not made for the diversions made as per Engineer's instructions with 200 mm thick WMM and 40 mm thick DBM | 47,99,749/- | 28,34,132/- | 2,44,98,676/- | 51,46,783/- |
| 8. | CLAIM N0.8 Payments for routine maintenance not made. Payment to be released as per clause 3002 | 19,29,273/- | 10,92,967/- | 98,47,314/- | 19,84,828/- |
| 9. | CLAIM NO.9 Balance payment to be made under item No 12.09 for planting and maintenance of median hedges and tree sapling | 7,18,183/- | 7,18,183/- | 36,65,719/- | 13,04,220/- |
| 10. | CLAIM NO. 10 Payment of Escalation for Bitumen content in Tack Coat and Prime Coat to be paid as per Clause 70.5(ii)a | 30,18,985/- | Nil | 22,65,827/- | Nil |

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| 11. | CLAIM NO. 11 Reimbursement of Seigniorage Charges recovered from the bill on account of Earthwork (minor minerals) | 14,35,599/ | Nil | 73,27,524/- | Nil |
| 12. | CLAIM NO. 12 Further sums are to be paid for the variations exceeding 15% of the Effective Contract Price | 22,63,81,902/- | 3,93,83,321/- | 72,98,79,504/- | 6,66,05,072/- |
| 13. | CLAIM NO. 13 Bonus not paid for early completion of 6 months (only paid for 2 months) | 4,00,00,000/- | Nil | 20,41,66,313/- | Nil |
| 14. | CLAIM NO. 14 Costs to be paid for idling of Men and Machinery due to transporter's strike and due to Mining Department Instructions | 62,57,800/- | 47,35,147 I- | 2,01,75,818/- | 80,08,080/- |
| 16. | CLAIM NO. 16 Cost to be paid for rectification of damages caused due to accidents | 68,59,334/- | Nil | 2,21,15,228/- | Nil |
| 17. | CLAIM NO. 17 Reimbursement of amount towards cost of repairs after DLP i.e. one year after Taking Over Certificate | 42,63,034/- | 7,69,350/- | 1,37,44,478/- | 13,01,124/- |
| 19. | CLAIM NO. 19 Losses suffered by the contractor as a consequence of failure to release the Performance Bank Guarantee on the expiry of defect liability period | 55,78,89,631/- | 4,07,91,985/- (Including interest) | 67,69,71,248/- (Including interest) | 1,73,70,736/- (Including interest) |

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| 20. | CLAIM NO. 20<br>Interest payable to the contractor for delay in release of Additional Performance Bank Guarantees | 59,29,566/- | Nil | 1,91,17,556/- | Nil |
| 22. | CLAIM NO. 22<br>Interest is to be paid for unpaid executed items from the date of completion of the work | 461,90,07,700 /- | 38,21,67,760/- | 398,27,57,23/- | Sum of as above (Excluding Claim No.19) |
| 23. | Declare that the letter dated 29.07.2006 is illegal, void, ab initio and of no effect, being contrary to law and in violation of the terms and conditions of the contract | | Nil | | Nil |

5. The Arbitral Tribunal rejected the counter-claims preferred by NHAI. A tabular statement setting out the counter-claims is given below:

| Claim No. | Nomenclature of Counter-Claims | Amount of the Counter-Claims as per Opposite Party |
|---|---|---|
| Claim- A | Recoveries on various accounts (Non-Refundable) | |
| i. | Scrap Steel of RCC Slab & RC Pipes | 1,42,005/- |
| ii. | Dismantled Mansory Stone | 5,48,029/- |
| Claim –B | Recoveries in IPC's (Non-refundable) | |
| i. | Recoveries on account of New Rock rates and other items with interest | 14,91,24,898/- |
| Claim- C | Amount to be withheld on account of non-submission of NOC disputes etc. | |
| i. | Mining Department dues (refundable) | 1,70,87,188/- |
| ii. | EPF dues (refundable) | 66,56,014/- |
| iii. | Labour Case (refundable) | 3,00,000/- |
| iv. | Claims by M/s Akschat Farms refundable) | 8,00,000/- |
| v. | Withheld amount of escalation for want of submission of invoices of material consumed (refundable) | 21,70,171/- |

6. KMC filed an application under Section 33 of the A&C Act dated 22.10.2019, *inter alia*, seeking modification of the impugned award in respect of reimbursement of commission paid for the Bank Guarantee. KMC claimed that there was an error in its calculation of the Commission paid to the Bank. However, the Arbitral Tribunal rejected the same by an order dated 21.11.2019.

***Submissions***

7. KMC has assailed the impugned award in respect of five claims – Claim Nos. 3, 5, 13, 19 and 22. The said claims were either rejected or not accepted in entirety by the Arbitral Tribunal. Ms Suri, learned senior counsel appearing for KMC, has advanced contentions in respect of each of the aforesaid five claims.

8. First, she submitted that the formula, as stipulated under Clause 70.3 of the Conditions of Particular Application (COPA), required the price adjustment to be worked on the value of work done (referred to as R-1). The said value was to be computed on the basis of the base rates as quoted by KMC. Ms Suri claimed that NHAI had erroneously adjusted the base rates by applying a discount/rebate as offered by KMC on the overall price, for working the formula as stipulated under Clause 70.3 of the COPA. She stated that the issue was no longer *res integra* and was covered by the decision of a Coordinate Bench of this Court in ***National Highways Authority of India v. Oriental Engineer Pvt. Ltd.: 2018 SCC OnLine Del 10120***.

9. Second, Ms. Suri submitted that the Arbitral Tribunal had erred in rejecting KMC's claim for payment at the quoted rates in respect of works executed beyond the Bill of Quantities (BOQ). She stated that the Engineer had incorrectly calculated the amount payable to KMC, at a discounted price, in respect of work done beyond the BOQ. She stated that KMC had quoted a rate for the BOQ items and had also offered a rebate; however, that rebate was limited to executing the BOQ items. Any work done beyond the BOQ was required to be paid at the quoted rates without considering the discount or rebate as offered by KMC. She submitted that the said issue was covered by the decisions of this Court in ***National Highways Authority of India v. M/s ITD Cementation India Ltd.: 2009 (13) DRJ 176*** and in ***Chennai Ennore Port Road Company Ltd. v. Coastal SPL (JV): 2019 SCC Online Del 9267***. She submitted that since the impugned award runs contrary to the aforesaid decisions, the impugned award to the extent it rejects KMC's claim under Claim No.5, is required to be set aside.

10. Third, she submitted that the Arbitral Tribunal had erred in rejecting KMC's claim for early completion of works by a period of six months. She stated that KMC would have qualified for the maximum bonus (of six months) since it would have completed the works six months prior to the stipulated date of completion (that is, 30.04.2004), however, there were several defaults on the part of NHAI resulting in hindrances and delays. Notwithstanding the same, KMC had completed the works two months prior to the stipulated date of completion. The Engineer had admitted the delay and recommended extension of time

for a period of 147 days, however, the extension of time was not necessary as KMC had completed the works before the stipulated date. Ms Suri submitted that in view of these circumstances, KMC would be entitled to bonus for early completion of works and the extension of time was required to be considered for that purpose. She relied on the decision of the Division Bench of this Court in ***Union of India v. N.N. Buildcon Pvt. Ltd.: 2015 SCC Online Del 11647***, in support of her contention.

11. Fourth, she submitted that the Arbitral Tribunal had allowed KMC's claim (Claim No.19) for loss suffered due to NHAI's failure to release the Performance Bank Guarantee (PBG) on expiry of the Defect Liability Period (DLP). She stated that the Arbitral Tribunal had erred by not granting bank commission of ₹37,01,895/- for the period from 01.05.2007 to 30.04.2009 and, for the period after 01.11.2018 on the assumption that KMC had not proved the same. She stated that KMC had produced certain receipts as well as a sanction letter, however, the Arbitral Tribunal had erroneously ignored the same. She also stated that KMC had submitted a certificate from the bank dated 23.01.2020, however, the same was not a part of the record before the Arbitral Tribunal.

12. In addition, she submitted that the Arbitral Tribunal had erred in awarding interest at the rate of 12% per annum instead of the contractual rate of 1/30$^{th}$ of 1% per calendar day.

13. Lastly, she submitted that the Arbitral Tribunal had erred in not awarding interest at the rate of 1% per month compounded monthly on unpaid executed items from the date of completion of the work. She further submitted that the Arbitral Tribunal had also erred in not awarding interest for the period from 24.10.2013 to 23.06.2015 on the ground that the arbitral proceedings were suspended as the parties were exploring the possibility of an amicable settlement.

***Reasons and Conclusion***

14. The first question to be examined is whether the impugned award is vitiated by patent illegality as the Arbitral Tribunal has rejected KMC's Claim No.3 – claim for escalation to be paid on the basis of rates as quoted by it.

15. KMC had claimed a sum of ₹2,62,01,641/- on account of difference in price adjustment as accepted by NHAI and as claimed by KMC. In terms of Clause 70.1 of the COPA, KMC was entitled to price adjustment on the basis of rise and fall in the labour cost index. The said price adjustment was to be determined with reference to the base rates as quoted by KMC. The controversy between the parties relates to the base rates. NHAI claimed that the base rates as quoted by KMC for various BOQ items were required to be discounted as admittedly, KMC had offered certain rebates and discounts on the Contract Price as quoted by it. KMC claimed that although it had offered a discount but the same was on the overall Contract Price and not on rates as quoted for the individual items. Therefore, the price adjustment was required

to be computed with reference to the rates of various BOQ items as quoted by it and not on the basis of a discount or rebate.

16. KMC had submitted the bid quoting a Contract Price of ₹211,66,64,388/-. Subsequently, it had offered a rebate pursuant to which the Contract Price was reduced to ₹164,65,76,353/-. KMC claimed that the said discount was on the overall price and did not affect the rates for items quoted by it. Accordingly, KMC claimed that the price escalation under Clause 70.1 of the COPA – which was required to be computed according to the formula as specified in Clause 70.3 of the COPA – was required to be computed on the base rates.

17. The Arbitral Tribunal found that KMC had in fact offered certain rebates on the tendered rates and therefore, its claim that the formula under Clause 70.3 of the COPA was required to be worked on the base rates as quoted by it by disregarding the discount or rebate as offered by it, was rejected.

18. The Arbitral Tribunal rejected the contention that KMC had offered a rebate on the overall Contract Price without affecting the base rates as quoted by it for various items.

19. This Court finds no infirmity with the Arbitral Tribunal's decision. The tender submitted by KMC indicates that it had quoted the item rates against each item of the BOQ and had also quoted the value of the said work, which was a product of the rates quoted and the estimated quantity. The said figures for each items were added to provide the cumulative value of different heads of works and their

aggregate value amounted to ₹211,66,64,388/-. KMC had offered rebate in terms of a letter dated 17.06.2001. The contents of the said letter are relevant and are reproduced below:

> "Please refer the bid submitted by us for the above work. In accordance with Clause 23, Section – I – instructions to bidders of Volume – I (Modification and withdrawal of Bids) we hereby offer rebated as follows.
>
> 1) 22.59% (Percent twenty two point five nine only) rebate for all the items in Bill Nos.2,3,4,7,8,9,10,11 and 12 in BILL OF QUANTITIES.
>
> 2) 18.36% (Percent eighteen point three six only) rebate for all the items in Bill Nos.1,5A,5B,6A, 6B and 6C in BILL OF QUANTITIES."

20. It is clear from the above that KMC had offered discounts on *"all items"* of BOQ and not simply a discount on the overall price as claimed by it. Thus, the fundamental premise on which KMC had founded its claim does not hold good.

21. In view of the above, the decision of the Coordinate Bench of this Court in ***National Highways Authority of India v. Oriental Engineer Pvt. Ltd.*** (*supra*) is of no assistance to KMC as in that case the contractor had given an overall discount on the price and not on all items of the BOQ. It is also important to note that in that case, the arbitral tribunal had accepted the contention that the price adjustment clause was required to be worked on the base rates as quoted by the contractor. The Coordinate Bench of this Court had rejected NHAI's challenge to the arbitral award as the Court found that the arbitral tribunal's interpretation of the clause was a plausible one and warranted no

interference. The Division Bench of this Court had also concurred with the aforesaid view and found no ground to interfere with the impugned award or with the decision of the Single Bench rejecting NHAI's challenge under Section 34 of the A&C Act. Rejection of a petition under Section 34 of the A&C Act does not imply that the decision of the Arbitral Tribunal is correct or that the Court concurs with the same. It merely means that no interference with the arbitral award is warranted as the grounds for setting aside the award under Section 34 of the A&C Act are not established.

22. The second question to be examined is whether the Arbitral Tribunal's decision to reject KMC's Claim No.5 is patently illegal. KMC had claimed a sum of ₹9,65,26,231/- on account of additional payment for execution of items in excess of the specified quantities mentioned in the BOQ. The payments for such quantities executed by KMC were cleared at the discounted rates quoted by KMC. KMC claimed that it had offered the discount only in respect of the quantities under the BOQ and it had not agreed to extend that discount for quantities executed in excess of the BOQ. The Arbitral Tribunal found KMC's contention to be unmerited.

23. The Preamble to BOQ clearly stated that "*the quantities given in the Bill of Quantities are estimated and provisional and are given to provide a common basis for bidding*." Thus, it was contemplated that the quantum of work executed may vary. The Arbitral Tribunal noticed that by a letter dated 17.06.2001, KMC had offered a discount in respect

of all the items in the BOQ and had not mentioned any condition that the discount was limited only to the quantities as mentioned in the BOQ.

24. The decision of the Arbitral Tribunal to reject KMC's Claim No.5 cannot by any stretch be considered to be patently illegal or in conflict with the public policy of India. The Arbitral Tribunal's view is clearly a plausible view and cannot be interfered with in these proceedings.

25. The next question to be examined is whether the Arbitral Tribunal had erred in rejecting KMC's claim for bonus for early completion of the Contract (KMC's Claim No.13).

26. KMC claimed that it was entitled to ₹4,00,00,000/- as bonus for completing the works prior to the stipulated date of completion, in terms of Clause 47.3 of the COPA. The stipulated date for completion of the Contract was 30.04.2004 and KMC claims that it had completed the works on 28.02.2004. Undeniably, KMC is entitled to bonus for completing the works two months prior to the stipulated date of completion of the Contract; and, the said bonus was paid to it. KMC claims that it is entitled to bonus for a period of six months – which was the maximum – as there were delays for reasons attributable to NHAI and the stipulated period for completing the works was required to be extended. KMC claimed that the works would have been completed even prior to 28.02.2004, if there were no defaults on the part of NHAI. The Engineer found that there was a delay of eighty-nine days in handing over the site and removing obstructions; a delay of ten days in

providing a decision with regard to the drawings etc.; a delay of twenty-five days on account of additional work; and, a delay of over twenty-three days on account of *force majeure* events. KMC claimed that the Engineer had recommended an extension of time of 147 days, however, the same was not necessary as KMC had completed the works prior to the expiry of the original Contract period. Nonetheless, the said extension of time was required to be considered for the purpose of calculation of bonus.

27. The Arbitral Tribunal held that in terms of Clause 47.3 of the COPA no adjustment of time, by reason of granting an extension of time, was required to be allowed for computing the bonus payable under the Contract. Clause 47.3 of the COPA is relevant and is set out below:

> **"47.3 Bonus for early completion:**
> If the contractor achieves completion of the whole works prior to the time completion prescribed by Clause 43, the Employer shall pay to the contractor a sum, stated in the 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 the bonus payments, the time given in the Bid for completion of the whole of the works is fixed and unless otherwise agreed, no adjustment of the time by reason of granting an extension of time pursuant to clause 44 or any other clause of these conditions will 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."

28. As is apparent from the above, Clause 47.3 of the COPA expressly provides that the time for completion of the Contract is fixed and unless the parties otherwise agree, no adjustment of time by reason of granting extension of time would be allowed. *Sensu stricto,* KMC's contention that it was entitled to bonus under Clause 47.3 of the COPA by taking into account its entitlement to extend the time for completion of work, which it was otherwise entitled to, is not admissible under the said clause. Considering that the Engineer had found certain delays on the part of NHAI, it was possible for the Arbitral Tribunal to take another view. However, this Court is unable to accept that the Arbitral Tribunal's view is manifestly erroneous and renders the impugned award patently illegal.

29. In ***Union of India v. N.N. Buildcon Pvt. Ltd.*** (*supra*), which is relied upon by KMC, the Arbitral Tribunal had accepted the contractor's claim. This Court found no grounds to interfere with the same under Section 34 of the A&C Act. As noted above, dismissal of an application under Section 34 of the A&C Act for setting aside an arbitral award cannot be construed to mean that the Court concurs with the decision of the Arbitral Tribunal; it merely means that the Court does not find any ground under Section 34(2) or Section 34(2A) of the A&C Act, to interfere with the award.

30. It is also material to note that there is nothing in the said decision, which indicates that the contractual clause in the context of which the said decision was rendered, included any specific bar to adjustment on account of extension of time as is the case under Clause 47.3 of the

COPA. In this view as well, the decision in ***Union of India v. N.N. Buildcon Pvt. Ltd.*** (*supra*), does not further KMC's case.

31. The next question required to be considered is whether the Arbitral Tribunal's decision in respect of KMC's Claim No.19 – claim for loss suffered by KMC as a consequence of failure on the part of NHAI to release the Performance Bank Guarantee within the stipulated period – is patently illegal.

32. NHAI had issued the Taking Over Certificate on 28.02.2004. The Defect Liability Period of twelve months expired on 28.02.2005 in terms of Clauses 10.2 and 10.4 of the GCC. NHAI was obliged to return the Performance Bank Guarantee for a sum of ₹16,47,57,636/- (hereafter 'the **PBG**') furnished by KMC within a period of fourteen days thereafter. However, NHAI issued the Defect Liability Certificate on 24.05.2006. Thus, the PBG was required to be released latest by 07.06.2006, that is, within the fourteen days period after the issuance of the Defect Liability Certificate. However, NHAI did not release the PBG and this resulted in KMC incurring additional costs on account of commission paid to the Bank for extending the PBG along with further interest on that commission. KMC also claimed interest on the said amount.

33. NHAI contested the aforesaid claim. NHAI contended that it had attempted to invoke the PBG but this Court had, at the instance of KMC, interdicted the invocation of the PBG and directed that the PBG be kept alive till the conclusion / completion of the arbitral proceedings. NHAI

claimed that KMC had not disputed the said direction and therefore, was not entitled to any claim, which was premised on the PBG being kept alive.

34. The Arbitral Tribunal had considered the disputes and had rejected NHAI's contention. The Arbitral Tribunal noted that the Engineer had issued the Defect Liability Certificate certifying that *"The contractor has fulfilled all of its physical and contractual obligation under the above said contract"* and therefore, NHAI was required to release the PBG. However, NHAI had failed to do so. The Arbitral Tribunal also held that the directions issued by this Court to keep the PBG alive were occasioned due to wrongful actions on the part of NHAI in attempting to invoke the PBG.

35. The principal PBG was for a sum of ₹16,47,57,636/-. The said amount was not paid by KMC and therefore, its claim for interest on the said amount was rejected. However, the Arbitral Tribunal found that KMC had paid commission for keeping the PBG alive during the extended period and quantified the said amount at ₹2,34,21,249/-. In addition, the Arbitral Tribunal also awarded interest at the rate of 12% per annum on the said amount to be computed from various dates on which commission was paid.

36. The principal controversy in the present case relates to the computation of the amount of commission. According to KMC, it had updated its claim for commission to ₹2,70,65,979/- and its calculation of ₹2,33,97,855/- submitted earlier was erroneous. KMC also contends

that the Arbitral Tribunal had erroneously not granted bank commission for the period 01.05.2007 to 20.04.2009. KMC had also filed an application under Section 33 of the A&C Act seeking rectification of the award to that extent since KMC's claim had been accepted but according to KMC, there was a computation error in computing the awarded amount against the said claim.

37. The Arbitral Tribunal rejected KMC's application under Section 33 of the A&C Act by an order dated 21.11.2019. It clarified that it had computed the amount of bank commission payable to KMC on the basis of the certificates issued by Andhra Bank, which were produced by KMC in evidence; and, not on the basis of the computation as provided by KMC. Therefore, there was no computational error in the impugned award. Insofar as KMC's claim for award of commission and interest after 31.03.2018 is concerned, the Arbitral Tribunal held that since the claim for future amounts after 31.3.2018, was not made in the Statement of Claims, the same could not be granted.

38. It is necessary to refer to Paragraph 19.4.8 of the impugned award, which indicates the basis on which the Arbitral Tribunal has computed the amount of the PBG commission. The said paragraph is set out below:

> "19.4.8 The AT has examined the updated claim and decides as follows:
>
> i) The principal amount of the Performance Bank Guarantee of Rs.16,47,57,636/- was not actually paid to the Bank and hence it is

not an expenditure incurred by the Claimant. In view of this, the Claimant is not entitled to interest on the amount of Performance Bank Guarantee for the period 07.06.2006 to 31.03.2018 as claimed by the Claimant. Hence the amount of Rs.50,53,72,664/- claimed towards Performance Bank Guarantee amount and interest thereon is not admissible and is disallowed.

ii) It is seen from the statements (page 954 of Vol 4 and page 2525 of CH-29) furnished by Andhra Bank that the total commission paid by the Claimant on various dates for keeping Bank Guarantee alive for the extended period amounts to Rs.2,34,21,249/-. The bank commission for the extended period was paid in instalments on different dates on 26.05.2006, 25.08.2006, 20.02.2007, 20.04.2009, 14.10.2009, 03.11.2010, 18.11.2011, 30.10.2012, 30.10.2013, 11.03,2014, 08.09.2014, 30.10.2014, 30.10,2014, 31.10.2016, 22.11.2016, 12.09.2017, 25.10,2017. Accordingly, AT holds that Claimant is entitled to reimbursement of the amount paid towards BG commission to the bank as per the statement furnished by the bank. The dates on which payments were made are due dates for interest calculation.

iii) The Claimant is also entitled to interest on the commissions paid to the Bank.

iv) As regards rate of interest, it is seen that the Claimant has adopted the rate prescribed in the Appendix to Bid as per sub-clause 60.8 of COPA. This rate applies only to delayed payments for work done during the execution of the Contract and hence cannot

> be applied to commissions paid to bank. The AT decides that simple interest at the rate of 12% per annum on the amount paid by the Claimant towards BG commission, will be reasonable."

39. It is seen from the above that the Arbitral Tribunal had relied upon a statement furnished by KMC referred to as CH-29. The copy of the said tabular statement is annexed at pages 894 and 895 of the documents filed by KMC. The said tabular statement indicates the amount of commission for PBG, paid to Bank from 29.05.2006 to 31.08.2018. The sum total of the commission paid is reflected as ₹2,33,97,855/-. KMC claims that there is a totalling error in the said chart and the calculation is incorrect.

40. However, in the order dated 21.11.2019 passed by the Arbitral Tribunal in KMC's application under Section 33 of the A&C Act, the Arbitral Tribunal has clarified that it had relied on the certificates issued by Andhra Bank – Certificate dated 20.04.2007 and Certificate dated 03.03.2018 for awarding the claim in favour of KMC. These two certificates issued by Andhra Bank being Certificates dated 20.04.2007 and 03.03.2018 are annexed at pages 782 and 896 of the documents filed along with this petition.

41. A perusal of the Certificate dated 20.04.2007 indicates that the commission of ₹51,66,510/- was paid by KMC for the period 01.03.2005 to 30.04.2007. Out of the aforesaid amount, an aggregate sum of ₹21,26,309/- was paid from 26.05.2006 to 30.04.2007 (₹5,78,000/- plus ₹11,55,887/- plus ₹4,62,422/- being the last three entries in the said certificates).

42. The Certificate dated 3.03.2018 indicates that a total amount of ₹2,12,24,940/- was paid towards PBG commission including service tax/GST from 20.04.2009 to 03.03.2018. Thus, the aggregate amount of ₹2,34,21,249/- (being ₹2,12,24,940/- and ₹21,26,309/-) has been awarded by the Arbitral Tribunal. However, the said certificates do not reflect the PBG commission paid for the period 01.05.2007 to 20.04.2009. The said figures are included in the tabular statement referred to by the Arbitral Tribunal in the impugned award. The commission reflected in the said tabular statement is set out below:

| **Period of Extension** | **BG Commission Amount** |
|---|---|
| 01.05.2007 to 31.10.2007 | ₹9,24,732.00 |
| 01.11.2007 to 30.04.2008 | ₹9,25,721.00 |
| 01.05.2008 to 31.10.2008 | ₹9,25,721.00 |
| 01.11.2008 to 30.04.2009 | ₹9,25,721.00 |

43. The said PBG commissions have not been included in the impugned award. KMC had produced a copy of a debit advice issued by Andhra Bank reflecting a debit of ₹9,24,732/- however, the same is not legible. In addition, KMC had also produced a letter issued by Andhra Bank sanctioning the facility of PBG commission to KMC. The said letter specifies that the commission would be charged at 1% for all types of Bank Guarantees. Undisputedly, the PBG was kept alive. The sanction letter produced by KMC clearly indicates that commission was payable on the PBG at the rate of 1% per annum. The Arbitral Tribunal had accepted that PBG commission was payable to KMC for a period

from 29.05.2006 to 31.10.2018. However, the Arbitral Tribunal has not included the PBG commission for the period 01.05.2007 to 20.04.2009 for the reason that KMC had failed to produce any certificate from the bank evidencing payment of the PBG commission for that period.

44. The Arbitral Tribunal has adopted a strict approach in this regard and has disregarded the evidence other than the certificates issued by Andhra Bank. KMC had not produced any evidence to show that it had paid commission for the period 01.05.2007 to 19.04.2009. The Arbitral Tribunal has also awarded interest from the dates when KMC paid the commission. Thus, its decision to adopt a strict approach to proceed only on the evidence that established actual payment of commission, cannot be faulted. This Court cannot re-evaluate the evidence to supplant its opinion over that of the Arbitral Tribunal. The view of the Arbitral Tribunal cannot be stated to be patently illegal, warranting interference in these proceedings.

45. The last contention to be examined is whether the impugned award to the extent it does not award interest as claimed by KMC is vitiated by patent illegality. KMC's grievance in this regard is two-fold. First, that the Arbitral Tribunal has not awarded interest at the rate as agreed by the parties. KMC claims that in terms of Clause 60.8 of the COPA, it was entitled to interest at the rate of 1% per month compounded monthly on the payments due in respect of items executed by it from the date of completion (that is, 31.07.2004) till the date of payment. Second, that the Arbitral Tribunal has not awarded any interest for the period 24.10.2013 to 23.06.2015 as the parties were

endeavouring to resolve their disputes amicably and the arbitral proceedings were at a standstill. Clause 60.8 of the COPA is relevant and set out below:

> "The amount due to the contractor under any interim payment certificate issued by the engineer pursuant to this clause or to any other term of the contract, shall subject to clause 47, be paid by the employer to the contract within 14 days after the contractor's monthly statement has been certified pursuant to sub-clause 60.13, within 84 days after the agreed final statement and written certificate pursuant to sub-clause 60.13, within 84 days after the agreed final statement and written discharge have been submitted to the engineer for certification. In the event of failure of employer to make payment within the time stated, the employer shall pay to contractor interest compounded monthly at the rates stated in the Appendix to bid upon all sums unpaid from the date upon which the same should have been paid."

46. NHAI had disputed KMC's claim for interest on the ground that KMC was not entitled to any of its claims. The relevant extract from the Statement of Defence setting out NHAI's averments to contest KMC's Claim No. 22, is set out below:

> "**CLAIM NO.22 - Rs. 44,31,22,017/- : Interest is to be paid for unpaid executed items from the date of competition of the work**.
>
> (1) Contents of para under reply are denied as false and incorrect. The Claimant has miserably failed to corroborate its illegal and alleged claims with ample evidence and supporting documents making it liable to be rejected with exemplary cost. In view of the averments made in the preceding paras, all the claims of the Claimant deserves to be summarily rejected and hence, question for the payment of any alleged interest doesn't arise. The

> claimant is not entitled to any amount to be paid under any of the claims submitted before this Hon'ble Tribunal. Each and every averment as stated in the claim under reply is denied except specifically admitted herein. There should not be any deemed admission on the part of the Respondent for want of specific denial.
>
> Quantification done by the claimant is vague and baseless. Figures mentioned in the quantification are baseless. In these circumstances the claim under reply is liable to be dismissed."

47. It is apparent from the above that, NHAI did not dispute that KMC was entitled to interest at the contracted rate or the interest rate as specified under the Contract was exorbitant and in the nature of penalty. According to NHAI, KMC's claim were untenable and therefore, it was not entitled to any interest.

48. It is important to note that the Arbitral Tribunal had accepted KMC's claim and held that "*as per the Contract, the claimant is entitled to interest from due date till the date of payment*".

49. It is material to note that it was not NHAI's defence that interest under Clause 60.8 of the COPA is not payable on the amounts due for the works executed by KMC as no payment certificate had been issued in respect of the said amounts. The contention to this effect before this Court is clearly an afterthought.

50. This Court is also not persuaded to accept that merely because an interim payment certificate has not been issued for the work done, the contractor would lose his right to receive the interest under the Contract if he prevails in his claim for payment for the work done. This would clearly imply that the interim certificate has been wrongly withheld.

Surely, the contractor cannot be penalised for the same. It is not necessary for this Court to dilate on this issue any further as this was not the defence raised by NHAI before the Arbitral Tribunal. More importantly, the Arbitral Tribunal has accepted that KMC was entitled to interest as per the Agreement in respect of its claims except, the amount in respect of loss suffered on account of non-release of the Bank Guarantees.

51. Having found that KMC was entitled to interest, the Arbitral Tribunal had reduced the rate of interest from 1% per month (12% per annum compounded monthly) to simple interest at the rate of 16% per annum (that is, 2% above the current Prime Lending Rate of SBI). The Arbitral Tribunal was of the view that the award of interest at the contracted rate would become exorbitant in view of the provision regarding compounding interest on monthly rests. The Arbitral Tribunal had, therefore, increased the rate of interest but deleted the provision for compounding interest.

52. There is substance in KMC's contention that the award of interest runs contrary to the terms of the Agreement. Merely because the interest burden becomes large, is not a ground to deny interest as contracted for by the parties. The increase in the quantum of interest is mainly due to the period spent by KMC in securing the award. While KMC has been denied its dues, NHAI has enjoyed the benefit of retaining the funds.

53. It is also important to note that it was not NHAI's case that the interest rate provided under the Agreement was in the nature of penalty or in *terrorem*. As noticed above, no such defence was taken. The

Agreement is a commercial contract between the parties and the parties are bound to honour the same. It is common knowledge that any finance obtained from banks is on interest compounded monthly or quarterly. Although, the Arbitral Tribunal had referred to the Prime Lending Rate of State Bank of India, it did overlook that the finance provided by SBI is on compound interest and not simple interest.

54. It is also material to note that the Supreme Court has rendered several decisions holding that where a contract between the parties proscribes awards of interests, the Arbitral Tribunal would not have the power to award interest under Section 31(7)(a) of the A&C Act and for the period prior to the date of the award. [See: ***Sayeed Ahmed And Company v. State of Uttar Pradesh And Ors.: (2009) 12 SCC 26***; ***Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat And Ors.: (2010) 8 SCC 767***; ***Ambica Construction v. Union of India: (2017) 14 SCC 323***; and ***Jaiprakash Associates Limited (JAL) v. Tehri Hydro Development Corporation (India) Limited (THDC): 2019 17 SCC 786*** ].

55. In a recent decision by the Supreme Court rendered in ***Union of India v. Manraj Enterprises: Civil Appeal no. 6592 of 2021, decided on 18.11.2021***, the Supreme Court had referred to the earlier decision in ***Union of India v. Bright Power Projects (India) (P.) Ltd.: (2015) 9 SCC 695*** and had observed that the words '*unless otherwise agreed by the parties*' as used in Section 31(7)(a) categorically specify that "*the arbitrator is bound by the terms of the contract insofar as award of*

*interest from the dater of cause of action to the date of award is concerned.”*

56. The Court also observed that the arbitrator is a creature of the contract and it has no power to award interest contrary to the terms of the agreement/contract between the parties. The principle that an arbitrator is bound by the terms of the contract resonates through in various other decisions rendered by the Supreme Court as well. The said principle will also hold good, where the parties have expressly agreed that the same would be payable.

57. In cases, where the agreement expressly provides for payment of interest; unless the terms of the contract in regard to interest are found to be invalid or inapplicable, the arbitral tribunal is required to render an arbitral award in conformity with the terms of the Contract. In cases where the agreement proscribes award of interest, the arbitral tribunal cannot award interest. In cases, where the contract is silent as to payment of interest, the arbitral tribunal would have the discretion to award interest as Section 31(7)(a) of the A&C Act empowers the arbitral tribunal to do so.

58. The Arbitral Tribunal also denied interest to KMC for the period when the arbitration proceedings were at a standstill. This Court finds that there is no justifiable reason for the same. It is conceded that during the course of the arbitral proceedings, the parties had without prejudice to their respective rights and contentions attempted to resolve their disputes amicably. Considering that it is conceded that such discussions

were without prejudice to all rights and contentions; the decision of the Arbitral Tribunal to deny KMC the interest for the period that the parties were endeavouring to resolve their disputes, that is, for a period from 24.10.2013 to 23.06.2015 is, *ex facie*, erroneous. The time taken for discussion between the parties could not be to the advantage of NHAI or a disadvantage to KMC. It certainly did not absolve NHAI to pay interest which the Tribunal held was payable under the Agreement.

59. In view of the above, the impugned award to the extent it rejects KMC's claim for interest at the contracted rate for the period from which the amount became due to the date of the award, is set aside.

60. The petition is disposed of in the aforesaid terms.

**VIBHU BAKHRU, J**

**DECEMBER 23, 2021**
**RK/v**