

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

% Date of decision: 28th November, 2022

+ O.M.P. (COMM) 471/2022 & I.A. 19352/2022

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Ramesh Kumar and
Mr. Abhishek Gusain, Advs.

versus

M/S SUNCON SOMA (JV)

..... Respondent

Through: Mr. Gukamal Hora Arora and
Mr. Jaisal Baath, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award dated July 15, 2022, passed by the Arbitral Tribunal adjudicating the disputes between the parties herein.

2. At the outset, Mr. Ramesh Kumar, learned counsel for the petitioner, NHAI, would submit that the petitioner is challenging the award to the extent of Claim No.4 and part of Claim No.5. He state that the challenge to Claim No.4 which is under the head “*Compensation consequent to the abnormal time in grant of NOC for Crusher and quarry and undue restrictions imposed during quarry*” is primarily against an excess amount of ₹1,25,11,684/-, granted by the Tribunal over and above ₹6,87,00,000/-, i.e., the amount granted by the Dispute Revenue Board (‘DRB’, for short).

According to Mr. Kumar, the entitlement of the respondent against this claim is ₹6,87,33,000/- and not ₹8,12,44,684/- as has been granted by the Arbitral Tribunal.

3. Insofar as the Claim No.5 is concerned, the challenge is against a part of claim being ₹4,24,03,868/- granted by the Arbitral Tribunal under the heading “*Compensation for plant and machinery*” and also an amount of ₹2,44,94,525/- granted under the heading “*Cost towards deployment of manpower & fixed expenses*”.

4. With regard to challenge to the Claim No.4 is concerned, the submission of Mr. Kumar primarily is that the Arbitral Tribunal has completely overlooked Clause 67.1 of the Concession Agreement (‘CA’, for short) which is with regard to the proceedings and recommendations of the DRB. He states that Arbitral Tribunal has committed an error in law overlooking the said clause, which clearly states that, “...*Whether or not, DRB recommendations has become final and binding upon the employer and the contractor recommendation shall be admissible as evidence in subsequent dispute resolution procedure including any arbitration or litigation having any relation to the dispute to which the recommendation relates....*”

5. According to him, in view of the stipulation, the DRB recommendation is an important document and is admissible in evidence. Therefore, the Arbitral Tribunal could not have ignored the same without giving reasons for not accepting the same. He states that the DRB having recommended an amount of

₹6,87,33,000/-, the Arbitral Tribunal could not have granted a higher amount of ₹8,12,44,684/- i.e., an excess amount of ₹1,25,11,684/-. In this regard he has drawn my attention to recommendation of DRB in paragraph 5 of recommendation under Claim No. 4 in the following manner:-

“..... The Contractor (the Respondent herein) has submitted the details of breakup of the rate on 05.10.2016 and the rate of aggregates as produced from the plant as Rs.371.00 per MT in 2008, Rs.371.00 per MT in 2009, Rs.371.5 per MT in 2010, Rs.366.6.00 per MT in 2011, Rs.424.30 per MT in 2012, Rs.421.7 per MT in 2013, and Rs.580.8 per MT in 2014. The rise in the Contractor lowest rate in 2010 compared to the highest in 2014 comes to 113% in 6 years i.e. 18.9% per year. Correspondingly market rate is 149% i.e. 24.83% per year in respect of outsourced suppliers. There is difference of 5.93% on higher side in respect of market procurements. The owner produced material also could suffer the market fluctuations. The owner produced material cost needs to be adjusted by higher cost of 5.930/0. The claimed amount thus will be 0.9407 say 0.94 i.e. Rs.0.94 x 8,12,44,684 i.e. Rs.763,70,000/-. The Cost shall not include profit. The reduction of 10% is applied. The amount works out as Rs.6,87,33,000/ ...”

6. He also states that the amount recommended by the DRB becomes all the more important in view of the fact that the respondent did not issue any notice of dissatisfaction to such recommendation at any point of time before the commencement of arbitration. Hence, the grant of the excess amount of ₹1,25,11,684/- by the Arbitral Tribunal need to be set aside.

7. With regard to Claim No.5 on account of *Compensation for plant and machinery*, he submits that the Arbitral Tribunal in paragraph 12.3.3 of the award had noted the following parameters, which the respondent had not taken into consideration while claiming compensation for plant and machinery:

- a. Scrap value of the machinery while working out depreciated value/depreciation.
- b. Life of machinery when it was brought on the site for work.
- c. Justification whether the machinery was actually required for type of work being carried out at site at any particular time or was it being parked at camp site without any work to include it in the list of 'Physically Present Machineries' in the MRPs.
- d. No allowance of extra time is provided to the respondent while assigning additional work and signing supplementary agreement.
- e. Whether the respondent had taken measures to mitigate or minimise the loss.
- f. Components of machinery which was owned and which was hired, and whether machinery hired was returned to the supplier during the period when it was not required for work.

It also held that the compensation for idle plant and machinery is admissible only for the period beyond the original contract period plus extra time required for carrying out the additional work assigned in supplementary agreement.

8. Thus, as held, the respondent is entitled for compensation for the period April 01, 2014 till April 31, 2015. Mr. Kumar submits that the Arbitral Tribunal has applied a mitigation factor of 0.8 to the amount claimed by the respondent and awarded a sum of ₹4,24,03,868/- for idle plant and machinery for the said period. This is despite the fact that the Arbitral Tribunal in paragraph 12.3.2 had noted that the respondent had sought the compensation not based on actual/real loss suffered by it but based on certain theoretical and empirical calculations, which have to be given due attention and analysis to arrive at the actual entitlement of the claimant i.e., respondent but still the Arbitral Tribunal has not carried out such an exercise while awarding the claim of compensation for plant and machinery during the prolonged period.

9. In other words, his submission is that the Arbitral Tribunal has failed to apply all the parameters while adjudicating the compensation for plant and machinery, except the mitigation factor. Therefore, the compensation of ₹4,24,03,868/- granted by the Arbitral Tribunal is liable to be set aside.

10. Similarly, he submits that the amount of ₹2,44,94,525/- granted by the Arbitral Tribunal towards *Cost towards deployment of manpower & fixed expenses* is also liable to be set aside, as the

Arbitral Tribunal itself in paragraph 12.3.4.A of the award has observed that the expenditure incurred during the period from January 01, 2014 to April 30, 2015 with realistic mitigation factor only can be considered for compensation that can be awarded to the respondent herein and also that it is seen from the details submitted by the claimant (respondent), that the expenses towards insurance meetings, stationary, legal and professional fee, maintenance of colony, welfare and other benefits of staff, miscellaneous expenses (without details) and lodging and boarding etc. have all been included in the fixed charges, part of the same are also covered in the overheads being claimed separately by the claimant (respondent).

11. It is his submission that the Arbitral Tribunal relied on the same expenses, which were found without details, took the calculation worked out by the claimant (respondent) for the period January 01, 2014 to April 30, 2015 for a sum of ₹3,06,18,155/- and thereafter applied the mitigation factor of 0.8 to award an amount of ₹2,44,94,525/-. According to him, this is not tenable.

12. On the other hand, the learned counsel for the respondent would submit that the recommendations of the DRB are only persuasive and not binding on the parties. She also stated, it is true that NHAI has conveyed its dissatisfaction on the DRB recommendations on dispute Nos.1 to 4 and its intention to commence arbitration vide letter dated November 28, 2016, but the respondent has, vide letter dated September 28, 2017 nominating its Arbitrator, reserved right to file counter claims with respect to

the aforesaid four disputes/claims for which the DRB had furnished its recommendations. Hence, the respondent has not accepted the recommendation of the DRB on Claim No.4 by which it granted an amount of ₹6,87,33,000/- against a claim for ₹8,12,44,684/-. She submits that challenge of the petitioner is limited to Claim No.4 whereby an amount of ₹1,25,11,684/- has been granted by the Tribunal over and above what was granted by the DRB and also the part of the claims under Claim No.5 (which were not subject matter of the recommendations of the DRB). She submits even otherwise, during hearing on February 08, 2018, it was decided that the respondent herein shall be the claimant and the petitioner NHAI shall be the respondent therein. The respondent and the petitioner herein were asked to file their Statement of Claims and Statement of Defense respectively. She has drawn my attention to paragraphs 1 to 4 of the order dated February 08, 2018 of the Arbitral Tribunal which reads as under:-

“1. Employer (NHAI) has submitted an application dated 02.08.2018 to declare Employer as the Respondent and the Contractor as the Claimant. Contractor has filed a compilation of documents in reply to the said application of the Employer, dated 02.02.2018.

2. Ld. Advocate for Employer pleaded that the Contractor was the Claimant before the DRB. As the DRB's recommendations have been challenged by the Employer NHAI, the recommendations are not final. The Contractor continues to be Claimant and the Employer as Respondent.

3. This issue was deliberated during the 1st preliminary hearing held on 06.11.2017 and thereafter it was decided with the consent of both parties that as the Employer has applied for arbitration against the DRB's recommendations, the Employer is the Claimant before the AT. Now, the Employer having changed their counsel, the issue has been reopened by the present Ld. Advocate of the Employer. It is regretted to note that in raising this issue now, the time of more than three months has just been lost.

4. Ld. Advocate for the Contractor has rebutted the Employer's above arguments. However, he finally submitted that to avoid any further delay in disposal of this case, they are prepared to be called as the Claimant and the Employer as the Respondent."

It is in the claim that the respondent herein has sought a higher amount of ₹8,12,44,684/-.

13. In other words, it is her submission that the respondent was within its right in the facts of the case to make a claim as considered and granted by the Arbitral Tribunal. She submits, the plea urged by Mr. Kumar on the non maintainability of the claim of the respondent herein is totally misconceived. It is her contention that award in question does not require any interference by this Court, keeping in view the settled position of law in terms of the judgment of the Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181**.

14. Having heard the learned counsel for the parties, the limited challenge of the petitioner to the impugned award dated July 15, 2022 of the Arbitral Tribunal is only to the extent of claim

No.4 whereby the Arbitral Tribunal has granted an amount of ₹8,12,44,686/-, which is ₹1,25,11,684/- more than the amount granted by the DRB i.e., ₹6,87,33,000/- and part of Claim No.5 under two heads being *Compensation for plant and machinery and Cost towards deployment of manpower & fixed expenses*.

15. Insofar as Claim No.4 is concerned, the issue is whether the Arbitral Tribunal is justified in granting the amount of ₹8,12,44,684/- as against ₹6,87,33,000/- granted by the DRB.

16. It is reiterated that the petitioner has not challenged the grant of ₹6,87,33,000/- by the DRB. Having said that, reliance has been placed by Mr. Kumar on clause 67.1 of the CA which reads as under:-

“If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board (“the Board”).

The Board shall be established when each of the three Board Members has signed a Board Member’s Declaration of Acceptance as required by the DRB’s rules and procedures (which, along with the declaration of acceptance form, are attached as

Annex “A-III” to these Conditions of Particular Applications – Part II).

The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. If either of these Members is not so selected and approved within 56 days of the date of the Letter of Acceptance, then upon the request of either or both parties such Member shall be selected as soon as practicable by the appointing authority specified in the Appendix to Bid. The third Member shall be selected by the other two and approved by the parties. If the two Members selected by or on behalf of the parties fail to select the third Member within 14 days after the later of their selections or if within 14 days after the selection of the third Member, the parties fail to approve that Member, then upon the request of either or both parties such third Member shall be selected promptly by the same authority specified in the Appendix to Bid who shall seek the approval of the proposed third Member by the parties before selection but, failing such approval, nevertheless shall select the third Member. The third Member shall serve as Chairman of the Board.

In the event of death, disability, or resignation of any Member, such Member shall be replaced in the same manner as the Member being replaced was selected. If for whatever other reason a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman then either of the other members) shall inform the parties and such non-serving Member shall be replaced in the same manner as the Member being replaced was selected. Any replacement made by the parties shall be

completed within 28 days after the event giving rise to the vacancy on the Board, failing which the replacement shall be made by the Appointing Authority in the same manner as described above. Replacement shall be considered completed when the new Member signs the Board Member's Declaration of Acceptance. Throughout any replacement process the Members not being replaced shall continue to serve and the Board shall continue to function and its activities shall have the same force and effect as if the vacancy had not occurred, provided, however, that the Board shall not conduct a hearing nor issue a Recommendation until the replacement is completed.

The recommendation of the Board shall be binding on both parties who shall promptly give effect to it unless and until the same shall be revised, as herein after provided, in an arbitral award. Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works in accordance with the contract.

If either the Employer or the Contractor is dissatisfied with any Recommendation of the Board, or if the Board fails to issue its Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation or any extension mutually agreed upon by the Employer and the Contractor, then either the Employer or the Contractor may, within 28 days after the expiry of the said period, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and subject

to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days or any extension mutually agreed upon by the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 28 days after the parties received such Recommendation from the Board, the Recommendation shall become final and binding upon the employer and the contractor.

Whether or not it has become final and binding upon the Employer and the Contractor a Recommendation shall be admissible as evidence in any subsequent dispute resolution procedure, including any arbitration or litigation having any relation to the dispute to which the Recommendation relates.

All Recommendations which have become final and binding shall be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer.

If during the contract period, the Employer and the Contractor are of the opinion that the Disputes Review Board is not performing its functions properly, the Employer and the Contractor may together disband the Disputes Review Board and reconstitute it. A new board shall then be selected in accordance with the provisions applying to the selection of the original Board as specified above, except that words “within 28 days after the Letter of Acceptance” shall be replaced by the words “within 28 days after the date on which the notice disbanding the original Board became effective”.

The Employer and the Contractor shall jointly sign a notice specifying that the Board shall stand disbanded with effect from the date specified in the notice. The notice shall be posted by a registered letter with AD or delivered personally to each Member of the Board. A Member shall be deemed to have received the delivery of the letter even if he refuses to do so."

17. The said clause stipulates that if the employer or the contractor is dissatisfied with the recommendations of the DRB, either of them shall give notice to the other party of its intention to commence arbitration. It is a fact that the petitioner herein had conveyed its dissatisfaction to the recommendations made by the DRB in disputes No.1 to 4. The award on Claim No.4 is the subject matter of the challenge in this petition to the extent stated above. It is true that no notice was given by the respondent within 28 days expressing its dissatisfaction with the recommendations of the DRB, but while nominating its Arbitrator vide letter dated September 24, 2017, it had expressed that it may file counter claim with respect to the four disputes/claims.

18. The plea of Mr. Kumar was that respondent having not issued notice could not file Claim No.4 claiming a higher amount of ₹8,12,44,684/-, but the fact is that petitioner has expressed its dissatisfaction to the amount of ₹6,87,33,000/- granted by the DRB. The grant of said amount to the respondent has not attained finality even qua the petitioner. In other words, the grant of ₹6,87,33,000/- in favour of the respondent has been contested by

the petitioner and in that sense the amount granted has not attained finality.

19. The contention of Mr. Kumar is that the Tribunal by granting the amount of ₹8,12,44,684/- i.e., ₹1,25,11,684/- in excess has not considered the recommendations of the DRB.

20. It is settled law that the recommendations of the DRB can act as evidence in the subsequent proceedings *inter se* parties and the Tribunal can factor/consider the recommendations to come to a conclusion.

21. In the present case, it need to be seen whether the Tribunal was justified in allowing the claim of the respondent and granting the amount of ₹8,12,44,684/- by an excess of ₹1,25,11,684/- over and above what has been granted by the DRB, i.e., ₹6,87,33,000/-. In this regard, it is necessary to reproduce the final conclusion of the DRB and the Arbitral Tribunal in the following manner:-

“5. Decision of DRB

The DRB unanimously decides that the Contractor is entitled to be paid the excess cost incurred. The Engineer decision is rejected.

Examination of amount claimed by the Contractor:

The Contractor had submitted the details of the claim with their original submission on 11.03.2016 volume I, Rs. 8,12,44,684 as difference of cost of spalls materials procured from open market and that could have produced at their own plant.

The Contractor has submitted the details of breakup of the rate on 05.10.2016 and the rate of aggregate as produced from the plant as Rs.371.00 per MT in 2008, Rs.371.00 in 2009, Rs. 370.5 in 2010, Rs.366.6 in 2011, Rs, 424.30 in 2012, Rs.421.7 in 2013 and

Rs.580.8 in 2014. The rise in the Contractor lowest rate in 2010 compared to the highest rate in 2014 comes to 113% in 6 years i.e. 18.9% per year. Correspondingly market rate is 149% i.e. 24.83% per year in respect of out sourced supplier~. There is difference of 5.93% on higher side in respect of market procurements. The owner produced material also could suffer the market fluctuations. The owner produced material cost needs to be adjusted by higher cost of 5.93%. The claimed amount thus will be 0.9407 say 0.94 i.e. Rs.0.94 x 8, 12, 44,684 i.e. Rs. 7, 63, 70,000/-. The cost shall not include the profit. The reduction of 10% is applied. The amount works out as Rs.6,87,33,0001/-. The details furnished by the Contractor could not be verified for exactness but these appear to be reasonable. This exercise should have been now done by the Engineer in spite of rejection as untenable due to want of contemporary records The DRB has done its best in view of the justification of the Contractor's pleadings and no comment from the Engineer/Employer.”

ARBITRAL TRIBUNAL

“11.3.24. Due to the aforesaid non foreseeable situation the Contractor had to incur additional expenditure by way of procuring the stone metal from the market required for the works at higher cost so as to maintain and achieve the planned progress in the best interest of the project, until April 2010 when their quarry and crusher were made functional.

11.3.25. AT unanimously decides that due to the above stated abnormal delays in granting approval for installation of Crusher and quarry, the Contractor is entitled under Clause 12.2 of the CA to be paid the excess cost incurred by them in procuring the stone metal from the market at higher cost till the permission for quarrying was made

available to them. Originally the Claimant Contractor had submitted the details of the claim in the statement at Pg 2843/CD-12 for an amount of Rs.8,12,44,684/-. The Claimant thereafter made alternative calculations in order to corroborate its claim no.4 and the alternative calculations have been made on the basis of contemporary record including IPCs. By the aforesaid alternative calculations, the total amount of the Claim comes to Rs. 14,78,88,944/-, Pg37/CD-27. It may be mentioned here that the statement of suppliers' invoices as well as the ledgers based on which above amount has been worked out have been duly checked by the Chartered Accountant, Pg 36 to 46 and 47 to 80/CD-330 refer. It is noted that the escalation has also been paid for local materials, and upto April, 2010, Pg310/CD-23, it works out to Rs.3,29,82,147/-, Pg 310/CD23 refers. The net amount of Claim as per revised calculations will thus be Rs. (14,78,88,944-3,29,82,147) = Rs. 11,49,06,797/-. However the Claimant Contractor has already restricted the claim to Rs.8,12,44,684/-. The Respondent did not give any comments on quantification of the Claims despite repeated reminders by AT.

11.3.26. In view of above, against Claim No.4 a Sum of Rs. 8,12,44,684/- is awarded in favour of the Claimant Contractor."

22. The DRB while giving its recommendations had primarily relied upon the details submitted by the respondents of the breakup of the rates of the material procured from the plant. The DRB had noted that the breakup of the rates given by the respondent shows an increase of 113% in 6 years i.e., 18.9% per year whereas the correspondent increase of market rates was 149% i.e., 24.83% per

year. The difference of 5.93% being on higher side, the DRB has by applying a formula arrived at the figure of ₹6,87,33,000/-. Whereas, the Arbitral Tribunal has considered clause 12.2 of the CA which stipulates excess cost incurred by the contractor in procuring stone / metal from the market at higher cost till the permission for quarrying was made available to it, shall be paid. There is no dispute that because of lack of approvals, the respondent contractor had to procure the stone / metal from the market. The Tribunal also considered that initial claim of the respondent was ₹8,12,44,684/- but thereafter made alternative calculations which brought the amount to ₹14,78,88,944/- based on the statement of invoices as well as ledgers, based on which amount was worked out and duly checked by a Chartered Accountant. It also noted that the escalation for local material was also paid up to April 2010 which worked out to ₹3,29,82,147/-. The Arbitral Tribunal had subtracted the amount of ₹3,29,82,147/- from the amount of ₹14,78,88,944/- to reach an amount of ₹11,49,06,797/-. But the respondent having restricted its claim to ₹8,12,44,684/- the Tribunal granted the said amount only and not the higher amount. What is important to note is that the petitioner did not give its comments on the quantification of claim despite repeated reminders by the Arbitral Tribunal. In that sense, the petitioner did not contest the quantification given by the respondent herein based on the suppliers' invoices and also the ledgers as duly checked by the Chartered Accountant.

23. That apart, I find that the respondent being the claimant before the Arbitral Tribunal, was also within its rights to make a claim in the manner it did. That apart, even clause 67.3 which reads as under, would make it clear that the Tribunal is within its rights to revise the amount as granted by the DRB. The amount of ₹6,87,33,000/- granted by the DRB has been revised to ₹8,12,44,684/- which the Tribunal is entitled to do under clause 67.3 of the CA.

Clause 67.3

“Any dispute in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to Sub-Clause 67.1 shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.”

(emphasis supplied)

24. If that be so, the Arbitral Tribunal has considered evidence over and above what was available before the DRB. It is not a case where the recommendations of the DRB have been completely overlooked. Moreover, the finding of the Arbitral Tribunal is a finding of fact and the law in that regard being well settled, this Court is of the view that the conclusion arrived at by the Arbitral Tribunal cannot be interfered with.

25. Insofar as challenge to the award on claim No.5 of the Arbitral Tribunal is concerned as stated above, the challenge is limited to *Compensation for plant and machinery and Cost*

towards deployment of manpower & fixed expenses. The amounts granted under both the heads are ₹4,24,03,868/- and ₹2,44,94,525/- respectively.

26. With regard to the conclusion of the Arbitral Tribunal on the grant of compensation for plant and machinery, the submissions of Mr. Kumar are primarily the following:-

(i) That the Arbitral Tribunal despite holding the compensation claimed is not based on actual loss/real loss suffered, but is based on certain theoretical and empirical calculations which have to be given due attention, has not considered the same while granting the compensation.

(ii) The Arbitral Tribunal despite setting certain parameters for adjudicating the claims of *Compensation for plant and machinery* has failed to apply the same, except the mitigation factor.

27. In this regard it is necessary to reproduce the finding of the Arbitral Tribunal on this claim in paragraph 12.3.3:-

“A. Perusal of the calculations submitted by the Claimant in different alternatives indicate that these have not taken into account certain important parameters such as:

- a) scrap value of the machinery while working out depreciated value/depreciation.*
- b) life of the machinery when it was brought on site for work.*
- c) Justification whether the machinery was actually required for the type of work being*

carried out at site at any particular time or it was just being parked at camp site without any work to include it in list of was physically present machinery in the MPR.

- d) no allowance has been giving for the additional time required for carrying out extra/additional work worth Rs.214.801 Crores which was assigned to the Claimant to supplement the agreement signed on 15.12.2009.*
- e) the mitigation measures that the Claimant was expected to take to minimise losses*
- f) component of the machinery which was owned by the Claimant and that which was hired and reasons as to why the machinery that was hired and not required on work was not returned back to the supplier for the duration it was not required.*

B. As has been brought out above that compensation for idle machinery and plants is admissible only for the period which was beyond the original contract period plus the extra time required for carrying out additional works assigned to the Claimant in wake of the supplement agreement. For rest of the period the Claimant has already been recommended for extension of time by the Engineer and payments for the additional quantities and variations made in terms of supplement agreement. A comparative study of the compensation sought by the Claimant as per submissions made along with the statement of claims and subsequently as submitted in two alternatives has been compiled below to show the variation in the claimed amount and determine amount that would be admissible for the real prolongation period from January 2014 till 30.04.2015- the period which is considered to be only on account of the Respondent and factors such as rains for which neither party is responsible.

- a) CD-XII Page 3002 to 3004 (orgl submission):
Rs.5,30,04,835/-
- b) CD-31/Pages 87-97 (Alternative 1)
Rs.10,41,69,211/-
- c) CD-31/Pages 127 (Alternative-2) (Rs. 125.05
for period beyond Feb. 2010 till 30.04.2015)

*C. Keeping in view the parameters that have not been accounted for by the Claimant in its quantification we tend to apply a mitigation factor of 0.8 to the amount of compensation worked out by the Claimant for the period January 20 14 April 20 15 in its submissions along with SOC which is amounting to Rs.5,30,04,835. Hence Claimant is considered to be entitled to compensation of Rs.4,24,03,868/- (0.8 * 5,30,04,835) for idle machinery.”*

28. The above will show that the Arbitral Tribunal did state that the calculations submitted by the respondent in different alternatives i.e., Alternatives 1 & 2 were taken into account based on the comparative study of the compensation sought by the respondent as per submissions made along with its Statement of Claim. Subsequently as in the two Alternatives which it has compiled and the fact that the respondent has not accounted for all its parameters in its quantification, it had applied the mitigation factor of 0.8 to the compensation worked out by the respondent for the period between January 2014 to April 2015 in the Statement of Claim amounting to ₹5,30,04,835/- and granted ₹4,24,03,868/-. In other words, it has not considered the higher amounts as depicted in the Alternatives 1 & 2. Further, the Tribunal by noting that the claimant has not accounted for certain parameters, had applied the

mitigation factor 0.8 to the amount of compensation made in the Statement of Claim to arrive at the figure of ₹4,24,03,868/-. It is clear from the finding of the Arbitral Tribunal reproduced above that the Tribunal was conscious of the various parameters, but had still applied the mitigation factor of 0.8. Whether such an application is justified, or not, cannot be the subject matter of the challenge in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 in view of the Judgment of the Supreme Court in the case of *McDermott International (supra)*, wherein it was held as under:

“115. A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our opinion, would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Indian Contract Act.”

29. Suffice to state, the scope of interference of Courts under Section 34 of the Arbitration and Conciliation Act, 1996 is very limited. For a party to successfully assail an arbitral award, it must show that the award has suffered from perversity or an error of law, or that the arbitrator has mis-conducted himself. The ground for assailing an award cannot include what the Court thinks is unjust on the facts of a case. In other words, the Court cannot substitute its view for the Arbitrator's view on facts. In this regard,

I may refer to the judgment of the Supreme Court in the case of ***NTPC Ltd. v. M/s. Deconar Services Pvt. Ltd., Civil Appeal No. 6843/2014*** decided on March 04, 2021, wherein the Apex Court held as under:

“13. From the above pronouncements, and from a catena of other judgments of this Court, it is clear that for the objector/appellant in order to succeed in their challenge against an arbitral award, they must show that the award of the arbitrator suffered from perversity or an error of law or that the arbitrator has otherwise misconducted himself. Merely showing that there is another reasonable interpretation or possible view on the basis of the material on the record is insufficient to allow for the interference by the Court [See State of U.P. v. Allied Constructions, (2003) 7 SCC 396; Ravindra Kumar Gupta and Company v. Union of India, (2010) 1 SCC 409; Oswal Woollen Mills Limited v. Oswal Agro Mills Limited, (2018) 16 SCC 219].”

30. Further, the Supreme Court in ***Associate Builders v. Delhi Development Authority, Civil Appeal No. 10531/2014*** decided on November 25, 2014, while setting aside the Judgment of a Division Bench of this Court, opined as under:

“22. 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.”

31. Hence this Court is of the view, that the Arbitral Tribunal is justified in arriving at the figure as it did and the same does not warrant any interference.

32. With regard to the challenge to the amount granted by the Arbitral Tribunal against the claim under the heading *Cost towards deployment of manpower & fixed expenses*, the submission of Mr. Kumar is that a mere application of mitigation factor of 0.8 does not address the issue of inclusion of items by the respondent without providing any details, and as such, the Arbitral Tribunal ought to have rejected the claim as being perverse. Suffice to state, the Arbitral Tribunal has only applied the mitigation factor of 0.08 on the expenses projected by the respondent. It is noted that the Arbitral Tribunal has considered the submissions made in the Statement of Claim keeping in view the supporting documents and arrived at the figure of ₹3,06,18,155/-. It then applied the

mitigation factor of 0.08 and worked out the amount to ₹2,44,94,525/-. There is some justification for the Tribunal to come to such a conclusion, more so when the Tribunal has clearly stated that the petitioner has not contested the quantification projected by the respondent herein. The law in this regard as referred to in paragraph 28 above is very clear inasmuch as the Tribunal having applied formula for working out the claim, and such application of formula not being arbitrary, the conclusion of the Arbitral Tribunal in that regard cannot be contested. In view of the above, the challenge of the petitioner with regard to this claim is also rejected.

33. Hence, the present petition filed by the petitioner is dismissed.

I.A. 19352/2022

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 28, 2022/ds