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

Judgment pronounced on: 12.07.2023

+ **O.M.P. COMM) 303/2020**

THDC INDIA LTD

..... Petitioners

Through: Mr. Parag P. Tripathi, Sr. Adv. along with Mr. Puneet Taneja, Ms. Lalit Mohini Bhat, Ms. Hetu Arora Sethi, Mr. Srinivasan Ramaswamy, Mr. Abhimanyu Verma, Mr. Amit Yadav, Mr. Manmohan Singh Narula and Ms. Laxmi Kumari, Advs.

Versus

**M/S PCL-INTERTECH LENHYDRO
CONSORTIUM JV**

..... Respondents

Through: Mr. Neeraj Kishan Kaul, Sr. Adv. and Ms. Kiran Suri, Sr. Adv. along with Mr. Purvesh Buttan, Ms. Aishwarya Kumar, Mr. Prateek Narwar, Ms. Vidhushi Garg, Ms. Meghna Mishra, Mr. Jatin Mongia, Mr. Dheeraj P. Deo, Ms. Palak Sharma, Mr. Tarun Mehta, Mr. Deepak Joshi and Mr. Raghav Agarwal, Advs.

**CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA**

JUDGMENT

1. The present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 assails an award dated 17.12.2010 passed by an Arbitral Tribunal, pursuant to an arbitration agreement incorporated in the



Contract Agreement dated 14.11.2002 entered into between the parties.

The background facts:-

2. The contract between the parties is a construction contract, involving construction of “Civil Works of Dam, Spillway and Power House of 400 MW Koteswar Hydro Electric Project at Koteswar, Uttarakhand”. A letter of award (hereinafter referred to as “LoA”) was issued in favour of the Respondent on 31.8.2002, followed by contract agreement dated 14.11.2002; the contract period was 45 months from the date of LoA. The contract sum was Rs. 334,51,66,092/- [Rupees Three Hundred Thirty Four Crores Fifty One Lakhs Sixty Six Thousand and Ninety Two Only].
3. The contract contains an arbitration clause for resolution of disputes through arbitration by an Arbitral Tribunal comprising of three arbitrators, each party appointing one arbitrator and the two appointed arbitrators appointing the presiding arbitrator.
4. A total of 14 claims were raised by the respondent; 6 counter claims were raised by the petitioner, which have been adjudicated by the Arbitral Tribunal vide the impugned award.
5. The scope of work as elaborated in the “special conditions of contract” is as under:-

“i. Construction of river diversion works, i.e., lining of diversion tunnel along with intake structure and outlet works, upstream and downstream cofferdams. Sain Nala Cofferdam and its diversion, and concrete plug in diversion tunnel.

ii. Construction of concrete gravity dam comprising non-overflow blocks, spillway and stilling basin with training walls etc., under-sluices, bridge on the spillway, including foundation and abutment treatment and underground grouting works.

iii. Construction of power house complex, comprising power intakes, 4



Nos. shafts and penstocks, power house (4 x 100 MW), access tunnel, tail race channel, transformer platform over control rooms, switch yard platform, cable trench / gallery and permanent service road from dam crest to left abutment, power house and switch yard.

The nature of work includes dewatering and pumping, excavation and disposal, underground excavation of embankment, concreting, drilling and grouting, reinforcements etc., as set out in pages 336 & 337 of Volume-1 of the contract.

The exclusions from the contract are also agreed as specified at page-337 and these exclusions are: supply and installation of gates, guides; hoisting system for spillway intake structure, draft tubes; turbines, governors, generators, various electrical & mechanical systems; transformers, switch yard structures, internal and external electrification in dams, etc., as detailed in page-337 of Volume-1 of the contract.

The Major components under the scope of work are; Completion of the balance works of river diversion tunnel, construction of a concrete dam of 97.5mtrs height and 253mtr long, along with power intakes and spillway, sluice blocks, stilling basin for energy dissipation down stream of spillway; four numbers of pen stocks, pressure shafts and steel lined pressure tunnels; a surface power house complex to house, the turbines, governors, generators, electrical equipment etc., to accommodate 4 units of 100 MW each capacity as detailed in Sec. A.2 Page-T7 of Volume-2 of the contract.”

6. The work envisaged under the contract could not be completed in the original contract period of 45 months [the commencement date being 31.08.2002 and the 45 month expiring on 31.05.2006] as per the original schedule agreed between the parties. The completion period was extended by the petitioner on the request of the claimant twice. Two “no claim certificates” came to be furnished by the respondent during the course of the contract, hereinafter referred to as NCC-1 and NCC-2 respectively.

7. According to the respondent/claimant, inordinate delay was occasioned on account of circumstances not attributable to the claimant. As per the respondent/claimant, the circumstances which caused delay were as



under:-

“i. The Respondent was not ready with the possession of site for handing over to the Claimant and even land acquisition was not made.

ii. In this the main contention is that the dam site area, borrow areas B1 & B2 located in Mulani & Gairogisera villages were not handed over. Further, the disposal area for the muck was also not handed over.

iii. Delay in release of approved constructions drawings and their frequent revisions.

iv. Delay due to adverse geological conditions, slope failure and execution of increased quantities of excavation and slope stabilization works.

V. Delay in giving decisions and changes in concrete placement methodology.

vi. Delay due to changes in specification for cement from OPC/PPC to slag cement.

vii. Delay due to changes in fineness modulus of sand and the finalization of concrete mix designs.

viii. Delay due to introduction of newer materials / items for slope stabilization measures such as geo-textiles / geo-grids, dry boulder pitching etc., due to adverse geological conditions.

ix. Delay due to frequent obstruction by villagers, including strikes etc.,

x. Delay due to adverse climatic conditions i.e., cloudburst/heavy rainfalls etc., including damages to slopes and access roads.

xi. Delay due to treatment of cracks in the foundation blocks of dam.”

8. The case set up by the claimant was that on account of the aforesaid delays, it is entitled to the following claims:-

CLAIMS	DESCRIPTION	AMOUNT IN RS.
CLAIM-1	Compensation for losses suffered due to non-handing over of land on right bank of village Pendaras.	Rs. 19,72,92,148/-



CLAIM-2	Right and left bank excavation and slope stabilization extra rates and payments for working in hazardous conditions outside the project area	Rs. 4,94,78,982/-
CLAIM-3	Payment for construction of approach road on right bank from Baily bridge to permanent road	Rs. 14,39,800/-
CLAIM-4	Payment for construction of diversion structure: Upstream dyke.	Rs. 76,59,144/-
CLAIM-5	Payment for construction of approach (haul road) for development of B-1 & B-2 quarries.	Rs. 2,03,20,771/-
CLAIM-6	Payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works.	Rs. 45,31,500/-
CLAIM-7	Compensation for losses suffered due to abandonment of cable-way/ cable crane system for Koteswar dam and power house and extra payment for replacement of concrete by Rotec.	Rs. 2,00,00,000/-
CLAIM-8	Compensation for losses suffered due to idling of plant and machinery	Rs. 27,96,41,427/-
CLAIM-9	Compensation for losses suffered due to idling; Man power resources.	Rs. 17,28,64,620/-
CLAIM-10(A)	Compensation for losses suffered due to overheads.	Rs. 20,93,20,000/-
CLAIM-10(B)	Compensation for losses suffered due to non-realization of profit.	Rs. 31,44,30,000/-
CLAIM-11	Compensation for losses suffered due to undue increase in cost of input materials, during the 45 months original stipulated completion time in the contract.	Rs. 4,51,33,232/-
CLAIM-12	Compensation for losses suffered due to undue increase in cost of input materials: by way of revision of rates for works executed after the expiration of original stipulated completion time of 45 months in the contract (i.e., after May, 2006).	Claim is for actual quantity executed after May-2006



CLAIM-13(A)	Compensation towards extra costs / losses suffered on mobilization advance towards interests and BG's.	Rs. 10,59,30,259/-
CLAIM-13(B)	Compensation towards extra costs / losses suffered on performance B.G. due to 40 months delay.	Rs. 1,67,25,830/-
CLAIM-13(C)	Compensation for losses suffered due to 40 months delay on insurances.	Rs. 1,92,75,923/-
CLAIM-13(D)	Compensation for losses suffered due to the Interest levy on Risk and cost advance.	
CLAIM-14	Interest on Claims.	
CLAIM-15	Compensation on account of the cost incurred towards this Arbitral proceedings.	

9. Certain preliminary objections were raised by the petitioner as regards maintainability of claims which have been noticed and dealt with in the arbitral award. These preliminary objections, as set out in the award, were on account of :-

“A. No claim certificate issued by the claimant at the time of approval of sub- Contractor.

B. Arbitration proceedings have been instituted/claims have been lodged against persons who are not parties to the arbitration agreement /contract.

C. Claimant being an unregistered partnership is barred by the provisions of Section 69 of Partnership Act to institute/ lodge any claims against THDC.”

10. The petitioner refuted the contentions raised by the Respondent/ Claimant as regards the aforesaid delays and instead asserted that delay was occasioned on account of following circumstances:-



“i. The Joint Venture (JV) Partners of the Claimant are M/s. IntertechLenhydro who were the Russian partners &M/s. PCL. Based on the past experience of the Russian partner of the JV only this JV was qualified and the work was awarded. But the Russian partner was not present to provide the technical expertise on which the JV was qualified to execute the work as per the responsibilities and experience on which the JV was qualified.

ii. The Claimant had sublet the work right from the beginning to M/s. Ritwik Swathi JV (hereinafter referred to as RSJV) without approval although this was ratified by the Respondent as a fait accompli.

iii. The Claimant failed to mobilize the required men, material and ensure presence of technical experts from M/s. Intertech Lenhydro who were required, under the contract, to be present and caused delays in the completion of the project.

iv. The Claimant failed in the proper methodology for planning of the concreting causing the delay.”

11. The petitioner raised the following counter claims against the respondent:-

COUNTER CLAIMS	DESCRIPTION	AMOUNT IN RS. CRORES	INTEREST AMOUNT IN RS. CRORES
Counter Claim-1	Claim for Rs. 33.19 Cr towards advances made under the Risk and Cost Account	28.06	5.13
Counter Claim-2	Claim for Rs. 12.30 Cr towards Deferred Recovery of Mobilization Advance.	6.35	5.95
Counter Claim-3	Claim for Rs. 10.45 Cr. Towards Deferred recovery of Equipment Advance.	10.45	-
Counter Claim-4	Claim for Rs. 11.73 Cr. Towards Departmentally issued steel at the request of the Claimant on Deferred cost recovery	11.53	0.20
Counter Claim-5	Interest for the amount claimed against the claim 1 to 4		



Counter claim-6	Cost of arbitration		
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12. In the above context, the arbitral award dated 17.12.2010, rendered by 2 out of the 3 arbitrators (hereinafter referred to as the impugned award) pronounces upon the aforesaid claims, also dealing with the preliminary objections raised by respective parties and renders elaborate factual findings.

Findings regarding delays:-

13. The impugned arbitral award analyses each and every delay alleged by the respondent/claimant and renders a factual finding with regard thereto. As regards, the delay in giving possession of work sites and borrow area sites, the impugned award concludes as under:-

“61. Taking an overall view of above situation we find that the borrow areas B1 & B2 for extraction of aggregates were not available until the evacuation was made, thereby the land for the borrow areas and the quarries for extraction of aggregates was not handed over to the Claimant unhindered for execution of the work and that the land in the working area of the site was also not handed over unhindered till April-2005 when the Village Pendaras was admittedly fully evacuated. The delay claimed on account of the non handing over of land and the borrow areas by the Claimant is from September-2002 to May-2005 accounting for 32 months for handing over of Pendaras village and from September-2002 to November-2006 for giving possession of the lands for the borrow areas B1 & B2. The effective delay is from September-2002 to November-2006 i.e., for a period 50 months as the 32 months delay in handing over of the Pendaras village is a concurrent and over lapping delay with the handing over of borrow areas B1 & B2 and this delay of 50 months according to us is not attributable to the Contractor for the reason of not handing over the land on the right bank around Pendaras Village and not giving possession of land in the borrow areas of B1 & B2.”

14. As regards delay/s due to geological reasons, slope failures on right bank and left bank and their stabilization, the impugned award holds as under:-



“64. We have examined the various documents relied on by the parties and after hearing the rival contentions of the parties we find that the actual conditions at site leading to the failure of the slopes and the slope stabilization methods adopted to the excavated slopes involving flattening of slopes resulting in increased quantity of excavation, additional item of installation of geo-grid and geo-textiles, providing dry stone and boulder pitching that were executed based on the design drawings issued would lead us to a conclusion that there were delays not attributable to the Claimant due to the changed conditions at site due to the geological features. The total delay is claimed from Nov-2005 to Dec-2007 accounting for 24 months. As the delay from Sep-2002 to Nov-2006 is an overlapping delay which period is already covered in the delay in handing over of possession of land and borrow areas and the right bank, the net delay on account of the delay due to geological reasons is from Nov-2006 till Dec- 2007 which accounts for a net delay of 13 months.”

15. The impugned award proceeds to discuss the other circumstances which caused delay, and proceeds to hold as under:-

“65. From the above we find that a net delay of 63 months from September-2002 to December-2007 on the grounds of delays in handing over of land on right bank around Pendaras village, delay in giving possession of borrow areas B1 & B2 and delay due to adverse geological reasons is not attributable to the Claimant. The Claimant has put forth additional grounds of delay as per page-349 of C-1-2 and C-1:

- (a) Delay in giving decision for concrete placement methodology from Nov-2004 to March-2006 accounting to 17 months.*
- (b) Delay due to treatment of cracks in the foundation blocks of the Dam from Oct-2006 to Mar-2007 accounting to 6 months.*
- (c) Change in specification of cement & FM of sand from Oct-2006 to Oct- 2007 accounting to 12 months.*
- (d) Stoppage of work by local public - the delay continued through out the execution of works however these are claimed as overlapping delays.*
- (e) Delay in release of construction drawings - the delay continued through out the execution of works however these are claimed as overlapping delays.*

66. The Claimant submits regarding delay in giving decision and changes in concrete placement methodology that under the contract volume-1 pages 95 to 155 the construction methodology proposed for



the placement of concrete in dam, power house and associated works at page-122 was through a twin cable way of 20 ton capacity and a span of $\pm 360\text{m}$ across the river keeping in view the limits of excavation as per the tender drawing for the length of the dam which was 253m at the top level of elevation 618.5m. The Claimant further submits that letter dated 11.03.2002 at page-159 of Volume-1 of the contract addressed to the Respondent informed alternate methodologies for concrete placement viz; (i) concrete placement by cable way & (ii) concrete placement by erecting trestle bridges over which moving cranes would carry the concrete. Further as per the enclosure to the said letter based on the discussions held with the Respondent the Claimant submits that it was decided that both alternatives (i) & (ii) would be kept open and a final decision to use either of these alternatives shall be taken after the award of work and consultations with Respondent of THDC and that as desired by THDC at the pre-award stage, the Claimant had submitted the methodology of concreting with both the alternatives which was also reiterated by him in their letter dated 20.07.2002 under para-3 at page 169 of volume-1 of the contract stating that the methodology will be finalized jointly with project authorities on award of work. The Claimant's contention is that owing to the site conditions and the adverse geological conditions met with at site concreting by cable way was not possible as the excavations were to be made much beyond the original limits and heights as contemplated in the tender. There is a separate claim by the Claimant on this account under CLAIM-7 for having purchased the cable way equipment but not capable of being utilized at the site. The Respondent refutes the contentions of the Claimant that there was any delay by the Respondent as it was the Claimant who was responsible for the delay in not mobilizing the required equipment and not obtaining the approval from the Respondent, not making the presence of the Joint venture partners to obtain their technical advise and expertise on which basis the Claimant JV was qualified. At this juncture for determining the delay we find that it suffices to say that the delay on account of this decision even if agreed to is an overlapping delay as the delay claimed is from Nov-2005 to Mar-2006 and therefore it does not affect the net cumulative delay of 63 months not attributable to the Claimant.

67. Similarly regarding the delay due to treatment of cracks in the foundation blocks of the dam, the delay from Oct-2006 to Mar-2007 and the delay in the change in specification of cement and FM of sand from Oct-2006 to Oct-2007 stated by the Claimant as not attributable to him but is refuted by the Respondent, both parties relying on various documents. The fact is that this is an overlapping delay which is covered with in the 63 months of net delay. Hence, we find that insofar as these delays are concerned the net delay comprising all the delays



and ignoring the over lapping delays is 63 months which is not attributable to the Claimant. The Claimant had sought for extension of the contract up to September-2009 i.e., for a period of 40 months in his letter for seeking the second extension while the Respondent has granted an extension EOT2 up to June-2009 i.e., for a period of 37 months from the original period of the contract ending on 31.05.2006. It is submitted by the Claimant that for the present, in this Arbitration before this Tribunal the subject of delays placed is to the tune of 40 months as per the claim statement. Hence, we are limiting our jurisdiction only up to September-2009 while we were informed by both the parties that the work is in progress and is in the final stage of completion at the end of the proceedings in 2010.

68. In the light of the above observations and findings relying on the pleadings, arguments put forth by the parties and the facts and circumstances of the case our answer to Question-2 is the affirmative. We hold that the Respondent is responsible for delay and committed breach of the obligations under the contract as established by the Claimant.”

16. Thus, the responsibility for the delays that had been occasioned was laid squarely at the doorstep of the Petitioner herein, based on an appreciation of the material/ evidence on record.

Breaches alleged by the petitioner:-

17. The impugned award also proceeds to consider the breaches and delays alleged by the petitioner as highlighted in the statement of defence and renders elaborate, reasoned findings thereon which are summarised hereunder:-

18. Regarding the alleged breach owing to absence of one of the joint venture partner/s of the petitioner, M/s Intertech Service (Intertech) & M/s Institute Len Hydro projects (Len Hydro), the impugned award holds as under:-

“73. We have heard the rival contentions of the parties and perused the documents relied upon by them in the proceedings. The main issue to be addressed under this question, according to us, is whether the non



presence of the JV partners even at the repeated requests of the Respondent was a breach of contract or a cause for delay attributable to the Claimant. We have already traversed on the various delays caused due to non handing over of site, non handing over of borrow area, varying adverse geological conditions, delays in drawings, delays in decisions etc., and have held that a delay of 63 months from September-2002 to December-2007 is not attributable to the Claimant. We do not find much force in the proposition that the presence of Russian JV partners could have shifted a part of delay of 63 months held as not attributable to the Claimant as being made attributable to the Claimant. Since, we find that the delay of 63 months as not attributable to the Claimant all other factors causing delay are only the overlapping delays which would have no effect on the basic causes of delays of not handing over the site, not handing over the borrow areas for the development of quarry and production of aggregates, adverse geological conditions that resulted in increased quantities due to flattening of slopes, additional items of work done such as use of geo-grids & geo-textiles etc., could not have compensated these delays by the presence of the Russian partners. We accordingly hold that there has been no breach on the part of the Claimant as alleged by the Respondent that was responsible for the delay attributable to the Claimant."

19. Regarding unauthorized subletting of the work to Rithwik-Swathi JV [hereinafter referred to as RSJV] by the Claimant, which is an aspect strenuously highlighted by the petitioner in these proceedings, the tribunal holds as under:-

"74. The Respondent submits that the Claimant has sublet the work under a contract to M/s. Rithwik-Swathi JV (RSJV) which is a joint venture company and that RSJV was executing the work since the beginning as a sub-Contractor of the Claimant. The Respondent states that this sub-Contractor had stopped the work since the Claimant had not made payments to RSJV and the salaries and dues were not paid since February-2006 as per the letter dated 27.04.2006 at page- 47 Book-11 from a group of persons purporting to be employees of RSJV. The Respondent also relies on the letter at page-48 of Book-11 from RSJV workers union stating that no payments to the workers were made and a letter dated 28.04.2006 written by Rithwik-Swathi JV to the Engineer-in-Charge of the Respondent, copy of which was filed on 05.04.2009 before the Tribunal, wherein RSJV had brought to the notice of the Respondent that they (RSJV) are carrying out the



construction work as sub Contractor of M/s. PCL-Intertech Len Hydro Consortium JV with their men and machineries and had expressed that the Claimant JV had unnecessarily retained heavy amounts due to them and the Claimants are not caring for them. Therefore RSJV had requested the Respondent to intervene in the matter and to resolve the situation in the interest of the project. Based on these letters the Respondent sent a fax message to the CMD of the Claimant on 28.06.2006 stating that such subletting of the total work to M/s. Rithwik-Swathi JV is without prior information and consent of the Respondent. It was notified that this is a breach of the contract under Clause-56 which states that the Contractor shall not, with out prior written consent of Engineer-in-charge, sublet any portion of the contract and further had sought clarifications on the matter from the Claimant. On 29.04.2006 the Respondent notified to the Claimant inviting reference to the unauthorized subletting of the work and requested the Claimant to attend a meeting on 02.05.2006 at their Noida office to resolve the issues. The meeting took place on 02.05.2006 wherein the representatives of M/s. PCL and their sub Contractor working at site viz; Ritwik-Swathi JV (RSJV) were present. While great concern was expressed by the Respondent the ultimate outcome of this meeting was that THDC noted that RSJV had been working at the Koteshwara Project along with M/s. PCL since beginning. It was agreed in the meeting that "keeping in view the association (of) sub Contractor, THDC expressed that since the engagement has already been made and the matter being fait accompli THDC has no objection to regularize the engagement". In the said meeting the parties agreed that "M/s. PCL and their sub-Contractor M/s. Rithwik-Swathi JV will immediately resume the work at site so that the valuable working season is not further lost".

75. Both the parties acted upon this minutes of meeting and it was signed by the Claimant PCL-Intertech Len Hydro Consortium JV, the Respondent THDC & the Joint Venture partners of M/s. Ritwik-Swathi JV on 02.05.2006. Further, the Respondent in his letter dated 22.05.2006, inviting reference to this meeting dated 02.05.2006, notified the Claimant at page-67 of Book-II, giving approval for the engagement of sub-Contractor of RSJV as per agreement Clause-56 of GCC and stated that "as per agreement Clause-56 of GCC regularizing of engagement of Sub-Contractor RSJV i.e., Rithwik-Swathi JV is agreed".

76. The facts being as above we refer to Clause-56 which reads as below:

"56.0 SUB-LETTING:

The Contractor shall not without the prior written consent of the



Engineer-in-charge sublet any portion of the contract. Any subletting shall in no way absolve the Contractor of any of his responsibilities under this contract. The provision of labour on a piece work basis shall not be deemed to be a subletting under this Clause".

We find that this Clause specifies that the contract shall not be sublet without prior written consent of the Engineer-in-charge in any part of the contract. Further the Clause also specifies that any subletting shall in no way absolve the Contractor of his responsibilities under this contract. It is also a term of this Clause that the provision of labour on a piece work basis shall not be deemed to be subletting of the work. In this case the Respondent produced in Book-Ill pages-2 to 9a copy of the agreement dated 16.11.2002 for subletting between M/s. PCL & M/s. Rithwik-Swathi JV. The agreement between the Claimant and the Respondent is entered on 14.11.2002. Further we find that the meeting held on 02.05.2006 the Claimant and the Respondent along with the authorized representatives of RSJV have noted that RSJV has been working at the Koteshwara Dam project along with M/s. PCL since beginning and have agreed that "keeping in view the association of M/s. PCL sub-Contractor THDC expressed that since the engagement has already been made and the matter being fait accompli THDC has no objection to regularize the engagement". This has been signed by the authorized representatives of the Claimant, the Respondent as well as the RSJV. It is only after the parties came to consensus regarding this matter the official communication reiterating and regularizing the same was made on 22.05.2006 by the Respondent addressed to the Claimant inviting reference to Clause-56 of GCC. We further notice that as per the Contract between the Claimant and the Respondent dated 14.11.2002 page- 6 Vol-1 of the contract under Article-1.0 para-1.3 it is agreed that "Any modifications / Amendments to the contract shall be affected only by a written instrument signed by the authorized representatives of both the parties". While we find that under Clause-56 there is no provision for regularizing a sub-contract but the parties have the authority to exercise their powers as per Article-1 para-1.3. Hence according to us we find that such exercise of the authority is Permissible under the provisions of the contract under Article-1.3. Therefore, we find that the Respondent along with the Claimant have exercised this authority to modify Clause-56 of the contract and agreeing for regularizing the engagement of the sub-Contractor RSJV being fully aware of the fact that the RSJV was working on the site from the beginning. Further the Respondent has agreed to this engagement as a fait accompli which as per Law Lexicon 3rd edition-2005 means "Fact or deed accomplished, presumably irreversible". Hence, we find that objection by the Respondent on this issue is not sustainable. Thus the Respondent having effectively modified the Clause-56 as per



Article-1.3 would have no case to plead that this sub contracting is against the provision under Clause-56 of the contract and this contention of the Respondent deserves to be rejected and accordingly we reject this contention. From the materials placed before us, we are of the considered opinion that RSJV was executing the work as Sub-Contractor right from the beginning and the Respondent never objected and finally regularized the Sub-Contract. Once having regularized it is not open for the Respondent to resist the claim on that ground.”

20. In the above backdrop, the impugned award goes on to deal with the claims and counter-claims. The summary of the award as regards the claims, is as under:-

Claims	Description	Claim as per the Award	Interest awarded till date of award
Claim-1	Compensation for losses suffered due to non-handing over of land on right bank of village pendaras.	Rs. 12,59,58,440/-	Rs. 5,56,55,996/-
Claim-2	Right and left bank excavation and slope stabilization –extra rates and payments for working in hazardous conditions outside the project area.	Rs. 82,97,680/-	Rs. 36,66,412/-
Claim-3	Payment for construction of approach road on right bank from Baily bridge to permanent road.	Claim Rejected	NIL
Claim-4	Payment for construction of diversion structure: Upstream dyke.	Rs. 11,27,653/-	Rs. 4,98,265/-



Claim-5	Payment for construction of approach (haul road) for development of B-1 and B-2 quarries.	Rs. 1,16,02,113/-	Rs. 51,26,510/-
Claim-6	Payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works.	Rs. 16,87,500/-	Rs. 7,45,638/-
Claim-7	Compensation for losses suffered due to abandonment of cable-way/cable crane system for Koteshwar dam and power house and extra payment for placement of concrete by Rotec.	Claim Rejected	Nil
Claim-8	Compensation for losses suffered due to idling of plant and machinery.	Rs. 24,36,00,000/-	Rs. 8,99,37,120/-
Claim-9	Compensation for losses suffered due to idling; Man power resources.	Claim Rejected	Nil
Claim-10(A)	Compensation for losses suffered due to overheads.	Rs. 20,93,20,000/-	Rs. 7,72,80,944/-
Claim-10(B)	Compensation for losses suffered due to non-realization of profit.	Claim Rejected	Nil



Claim-11	Compensation for losses suffered due to undue increase in cost of input materials, during the 45 months original stipulated completion time in the contract.	Claim Rejected	Nil
Claim-12	Compensation for losses suffered due to undue increase in cost of input materials: by way of revision of rates for works executed after the expiration of original stipulated completion time of 45 months in the contract (i.e., after May, 2006).	Claim awarded	The interest on this claim awarded is at 12% simple interest on the balance amount of each bill after setting of the amount of risk and cost advance applicable towards each bill and it shall be computed based on the actual quantities and the bills.
Claim-13(A)	Compensation towards extra costs/losses on mobilization advance towards interest and BG's.	Rs. 10,03,54,982 /-	Rs. 3,70,51,059/-
Claim-13(B)	Compensation towards extra costs/losses suffered on performance B.G. due to 40 months delay.	Rs. 1,11,50,553/ -	Rs. 41,16,784/-



Claim-13(C)	Compensation for losses suffered due to 40 months delay on insurances.	Claim rejected	Nil
Claim-13(D)	Compensation for losses suffered due to the interest levy on Risk and Cost advance.	Relief granted by setoff of the claim under Claim-12	

21. With regard to the issue of interest, the award grants pre-award/pendente lite interest at the rate of 12% and also post-award interest at the rate of 18% percent, till date of payment.

22. The conclusions in the award as regards the counterclaims are as under:-

“220. In the light of the above findings the award of the counter claim is summarized and made as follows:

Counter Claims	Description	Counter claim as per the Award	Interest awarded for the post award period only
Counter Claim-1	Claim for Rs. 33.19 Cr towards advances made under the Risk and Cost Account	Rs. 28.06Cr	18%
Counter Claim-2	Claim for Rs. 12.30 Cr towards Deferred recovery of Mobilization Advance.	Rs. 6.35Cr	18%
Counter Claim-3	Claim for Rs. 10.45 Cr towards Deferred recovery of Equipment Advance.	Rs. 10.45Cr	18%
Counter Claim-4	Claim for Rs. 11.73 Cr towards Departmentally issued steel at the request of the Claimant on Deferred cost recovery	Rs. 11.53Cr	18%



Counter Claim-5	Interest for the amount claimed against the claim 1 to 4	Nil	18%
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23. As in the case of the claims, post-award interest at the rate of 18% per annum was awarded in respect of the counter-claims as per Section 31(7) (b) of the Act (as it then stood). Pendente lite/pre-award interest was not granted in respect of the counter-claims.

24. It is in the aforesaid conspectus that the present petition has been filed by the petitioner.

Submissions on behalf of the petitioner:-

25. Broadly, the following submissions have been made by the learned senior counsel for the petitioner:-

Submission regarding offloading/ subcontracting:-

26. It is contended that the respondent sublet and thereby offloaded the entire contract to RSJV and accordingly, reduced its stake to only 5 percent in terms of the back to back agreement with RSJV, almost in the immediate aftermath of the contract agreement dated 14.11.2002.

27. Accordingly to the petitioner, this was a fundamental breach since the contract was awarded on the basis of technical knowhow and experience that could be brought by the lead partner i.e. Intertech LenHydro Consortium. It is further submitted that the agreement dated 16.11.2002 whereby the contract was offloaded to RSJV contemplates that all the claims received from the petitioner shall go to RSJV (the Sub Contractor) after deducting 5%, which alone shall go to the respondent.

28. It is further submitted that since the entire contract was offloaded and the works were executed by RSJV, the respondent has no right to make the



claims and therefore, the claims made before the Arbitral Tribunal were not maintainable. It is further submitted that the claims were also not maintainable for the reason that the respondent never incurred loss on account of any increase in the rate of BOQ items since the works were executed by the petitioner by utilizing the vendors, man power and machinery already mobilized and available at site. For any additional machinery, material and man power, the petitioner mobilized the same by making the direct payments to vendors of the contractor/ Respondent.

Submissions on Claim No. 12:-

29. The award in respect of claim no.12 has been assailed on the ground that the same results in re-writing of the contract between the parties inasmuch as rate for approximately 95 BOQ items have been revised thereby. It is further submitted that the contract already contains a clause for price escalation and therefore, revision of rates was not proper.

30. It is further contended that if at all revision of rates was to be sought, the same should not to have been done by the sub-contractor since the respondent had completely effaced itself from the site.

31. It is contended that the sub-contractor has neither made any claims against the respondent nor has it made any claims directly against the petitioner. In fact, the petitioner has been making payments directly to the respondent, vendors, suppliers and PRWs as agreed between the parties on 17.03.2007.

32. It is contended that in the circumstances, the claims were not even maintainable since the respondent never incurred any loss on account of any increased cost in execution of BOQ items. It is contended that in the light of these factual aspects, the reliance placed by the Arbitral Tribunal on the



various judgments referred to in the award, including the judgment in the case of *K. N. Sathyapalan (dead) by LRs Vs. State of Kerala*¹, is entirely misplaced.

Submissions on No Claim Certificate:-

33. It has been strenuously contended on behalf of the petitioner that the no claim certificate was furnished by the respondent in the background of the controversy regarding offloading/subletting and by issuing the no claim certificate, the respondent avoided imminent action of termination of contract.

34. It is contended that the furnishing of the no claim certificate was part of a package deal wherein under, the petitioner regularized the engagement of the sub-contractor and the respondent gave up its right to raise claims upon the petitioner. In the face of this factual position, the conclusion in the impugned award that the no claim certificate was given under coercion, is stated to be perverse. It is contended on behalf of the petitioner that in view of its factual version regarding the circumstances in which the no claim certificate came to be issued, the said no claim certificate could not be linked with the issue of time extension and was in fact linked to the offloading/sub-letting in favour of M/s RSJV.

Interest on claims:-

35. The petitioner contends that the grant of pre-award/pendente-lite interest is contrary to the legal position laid down by the Supreme Court of India in :-

i. *Jai Prakash Associates Ltd. Vs. Tehri Hydro Development*

¹ (2007) 13 SCC 43



Corporation Ltd. (THDC)²

ii. *Reliance Cellulose Products Ltd. v. Oil & Natural Gas Corporation Limited³*

iv. *National Thermal Power Corporation Ltd. Vs. Patel Engineering Ltd⁴*

Counter-claims; Interest on risk and Cost advance:-

36. It is contended by the learned counsel for the petitioner that the impugned award grievously urges in rejecting the counter-claim seeking interest at the rate of 16% on the risk and cost advance “towards payments to vendors and suppliers”.

Other claims:-

37. Apart from the aforesaid, the finding in the impugned award in respect of the individual claims has also been assailed:-

- a) With regard to the claim no.8 and claim no.10 (towards idling/loss of overheads), the award is stated to be based on no evidence.
- b) The award in respect of the claim no.1, whereby the Arbitral Tribunal awarded a sum of Rs. 12.59 Crores towards the cost incurred by the respondent on “controlled blasting for excavation”, is assailed on the ground that it re-writes the contract between the parties.
- c) The award in respect of claim nos. 2, 4, 5 and 6 is assailed on the ground that the same is without any cogent basis and contrary to the terms of the contract.
- d) With regard to the claim no.13(D), it is contended that since the respondent had itself sought financial assistance from the petitioner, it

² 2019 SCC Online 143

³ (2018) 9 SCC 266

⁴ 2021 SCC Online Del 4827



was unwarranted for the Arbitral Tribunal to award any amount on the premise that interest was wrongly levied on the risk and cost account maintained by the petitioner.

- e) The maintainability of all the claims has been questioned on the basis that the Respondent furnished NCC-1 and NCC-2 and also on the basis that the respondent is an unincorporated entity.

38. Finally, it is contended that the award of 18% for the post-award period is excessive. In the circumstances, the petitioner submits that the majority award suffers from patent illegality and is contrary to the fundamental policy of Indian Law, and therefore liable to be set aside.

Submissions on behalf of the respondent:-

39. Learned senior counsel for the respondent has strongly refuted the contentions made on behalf of the petitioner. As regards the issue of no claim certificate, it has been emphasized that the same was not voluntarily given. It is submitted that under clause 58 of the contract between the parties, extension could only be given for delays on the part of the petitioner. Further, there is no provision in the contract for furnishing a no claim certificate as a pre-condition for grant of time extension or as a pre-condition for regularization of any sub-contracting. Attention is drawn to the letter dated 04.12.2006 addressed by the petitioner, wherein, it is stated that *“time extension has been given as per the provision of the contract in view of the delay in handing over of the excavation area”*.

40. It is submitted that the Arbitral Tribunal has submitted cogent findings of fact with regard to the issue of furnishing of no claim certificate. Attention has been drawn to the sequence of events leading upto the issuance of the no claim certificate to contend that the plea of the so-called



“package deal” is unjustified and contrary to the record.

41. It is submitted that the request seeking time extension (EOT-1) was made as far back as 28.11.2005 and in response thereto, vide letter dated 21.03.2006, the petitioner insisted for a no claim certificate as a pre-requisite for extension of time. This was before the regularization of sub-contracting; it was only on 22.05.2006 that the decision was communicated ratifying the sub-contracting.

42. It is submitted that neither in the minutes of the meeting nor in its letter communicating the approval of sub-contracting, there is any mention of NCC or the so-called package deal. It is further submitted that there is no reference to the so-called package deal in any of the subsequent correspondence including the communication whereby claims sought to be raised by the respondent were rejected in the first instance by the Engineer-in-chief and thereafter by the CMD of the petitioner.

43. In support of its contention with regard to the conclusions drawn in the impugned award with regard to the NCC, the learned senior counsel for the respondent has relied upon the following judgements:-

1. *NTPC Ltd. Vs. Reshmi Construction*⁵
2. *Ambica Construction Vs. Union of India*⁶
3. *K.N. Sathyapalan (dead) by LRs Vs State of Kerala*⁷
4. *Pure Helium India Pvt. Ltd. Vs. ONGC*⁸
5. *National Insurance Company Limited Vs. Boghara Polyfab Pvt. Ltd.*⁹
6. *NHAI Vs. Elsamex-TWS-SNC (JV)*¹⁰

⁵ (2004) 2 SCC 663

⁶ (2006) 13 SCC 475

⁷ (2007) 13 SCC 43

⁸ (2003) 8 SCC 593

⁹ (2009) 1 SCC 267

¹⁰ 2014 SCC Online Del 4475



44. With regard to the claims being barred on account of the alleged unauthorized sub-contracting of the work to RSJV, it is submitted that the sub-contractor was regularized “right from the beginning” and as such, the sub-contracting has no bearing on the entitlement of the respondent to the claims sought to be raised. It is submitted that it is the petitioner's own case that the sub-contracting did not absolve the respondent under the contract. In this regard, reference has been made to the letter dated 22.05.2006 addressed by the petitioner. It is further submitted that the petitioner itself filed its counter claims against the respondent and not against the sub-contractor. Also, attention has been drawn to the fact that no objection to non-joinder of the sub-contractor was ever raised before the Arbitral Tribunal and therefore, the plea is not maintainable at this stage.

45. As regards the issue whether the respondent/claimant was disentitled to raise any claims on account of being an unincorporated entity, reliance has been placed on the following judgments:-

1. *Firm Ashok Traders Vs. Gurumukh Das Saluja*¹¹
2. *Kamal Pushp Enterprises Vs. D. R. Construction Co.*¹²
3. *Noida Toll Bridge Company Ltd. Vs. MitsuiMarubeni Corporation*¹³
4. *New Horizon Ltd. & Ors v. UOI*¹⁴
5. *GVPREL-MEE (JV) General Power of Attorney Holder Hyderabad Vs. Government of Andhra Pradesh*¹⁵
6. *Faqirchand Gulati Vs. Uppal Agencies Pvt. Ltd. and Ors*¹⁶
7. *Union of India Vs. Susaka (P) Ltd.*¹⁷

¹¹ (2004) 3 SCC 155

¹² AIR 1996 MP 139

¹³ 2005 SCC Online Del 977

¹⁴ (1995) 1 SCC 478

¹⁵ 2005 SCC Online AP 531

¹⁶ (2008) 10 SCC 345



46. With regard to the claim no.12, it is submitted that the same is well founded in the context of elaborate factual findings rendered in the award as regards the inordinate delay on account of breaches attributable to the petitioner. It is submitted that the impugned award is consistent with the settled proposition of law laid down by the Supreme Court and by various High Courts in a number of cases. It is further emphasized that the impugned award balances the rights of the parties by shifting the base date (to the detriment of the respondent) for the purpose of computing the entitlement of the respondent to price escalation in the light of revision of rates. Learned senior counsel for the respondent has relied upon the following judgments in support of his submissions:-

1. *State of Karnataka Vs. RN Shetty & Co*¹⁸
2. *KN Satyapalan Vs. State of Kerala*¹⁹
3. *NHAI Vs. Elsamex-TWS-SNC (JV)*²⁰

47. As regards interest, it is contended that the award of pendente-lite interest is in accordance with law and that the Arbitral Tribunal has rightly placed reliance on the judgment of the Supreme Court in the case of *State of UP Vs. Harish Chandra & Co.*,²¹. It is submitted that the cases relied upon by the petitioner viz *Sayeed Ahmed & Co. Vs. State of UP*²²; *Tehri Hydro Development Corporation Ltd. & Anr. Vs. Jai Prakash Associates Limited*²³; *Jai Prakash Associates Limited Vs. Tehri Hydro Development*

¹⁷ (2018) 2 SCC 182

¹⁸ AIR 1991 KAR 96

¹⁹ (2007) 13 SCC 43

²⁰ 2014 SCC Online Del 4475

²¹ (1999) 1 SCC 63

²² (2009) 12 SCC 26

²³ (2012) 12 SCC 10



Corporation²⁴, are all distinguishable in the facts and circumstances of the present case.

48. It is submitted that in any event, the judgment/s relied upon by the petitioner have all been rendered after the impugned award was passed and that when the impugned award was passed, it was perfectly consistent with the prevalent law.

49. As regards denial of interest component under counter claim no.1, it is contended that the same is predicated on factual findings rendered by the tribunal which do not warrant any interference under Section 34 of the Arbitration and Conciliation Act, 1996. It is submitted that the challenge to the other claims awarded by the Arbitral Tribunal are also misconceived inasmuch as factual issues have been sought to be re-agitated by the petitioner.

Analysis and Findings:-

50. At the outset, it is important to consider the scope of the present proceedings under Section 34 of Arbitration and Conciliation Act, 1996. The award in the present case is dated 17.12.2010.

51. It has been held by the Supreme Court in the case of **Ssangyong Engg. & Construction Co. Ltd. vs. NHAI**²⁵, as under:-

“19. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] [“Saw Pipes”] and ONGC v. Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] [“Western Geco”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court

²⁴ (2019) 17 SCC 786

²⁵ (2019) 15 SCC 131



on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.”

52. Section 34 of the Arbitration and Conciliation Act, 1996 as it stood on the date of award and on the date of filing of the present petition, reads as under:-

“34. (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that;

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

“Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was



induced or affected by fraud or corruption or was in violation of section 75 or section 81.”

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

53. In the context of the above statutory prescription, the Supreme Court in **Associate Builders vs. DDA**²⁶, after minutely analysing the legal position enunciated by the Supreme Court in the cases of ONGC Ltd. Vs Saw Pipes Ltd.,²⁷ Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation²⁸, McDermott International Inc. Vs. Burn Standard Co. Ltd²⁹.; Centrotrade Minerals & Metals Inc. Vs. Hindustan Copper Ltd³⁰., DDA Vs. R.S. Sharma and Co³¹. ; J.G. Engineers (P) Ltd. Vs. Union of India³², Union of India Vs L.S.N.

²⁶ (2015) 3 SCC 49

²⁷ (2003) 5 SCC 706

²⁸ (2006) 4 SCC 445

²⁹ (2006) 11 SCC 181

³⁰ (2006) 11 SCC 245

³¹ (2008) 13 SCC 80

³² (2011) 5 SCC 758



Murthy³³, P.R. Shah, Shares & Stock Brokers (P) Ltd. Vs. B.H.H. Securities (P) Ltd³⁴. held as under:-

33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.

The Supreme Court also cited with approval the dictum laid down in *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342]*, wherein it has been held as under:-

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable..... Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

It was further held in *Associated Builders* (supra) as under:-

“Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in a way that it could be said to be something that no fair minded or reasonable person could do...”

54. In *Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd*³⁵, it was again reiterated by the Supreme Court as under:-

“11. Section 34 of the Arbitration and Conciliation Act, 1996

³³ (2012) 1 SCC 718

³⁴ (2012) 1 SCC 594

³⁵ (2015) 5 SCC 739



corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The arbitrator's decision is generally considered binding between the parties and therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator.... ”

55. Again in **Madhya Pradesh Power Generation Company Ltd. &Anr. Vs. Ansaldo Energia SPA & Anr**³⁶, it was observed as under:-

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

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

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

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

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

(e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the court. Error of construction is within the jurisdiction of

³⁶ (2018) 16 SCC 661



the arbitrator. Hence, no interference is warranted.

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

56. In **Atlanta Limited vs. Union of India**³⁷; it has been held as under:-

"19. It is also a well-settled principle of law that challenge cannot be laid to the award only on the ground that the arbitrator has drawn his own conclusion or failed to appreciate the relevant facts. Nor can the Court substitute its own view on the conclusion of law or facts as against those drawn by the arbitrator, as if it is sitting in appeal. This aspect has been highlighted in State of Rajasthan v. Puri Construction Co. Ltd. [State of Rajasthan v. Puri Construction Co. Ltd., (1994) 6 SCC 485] , where it has been observed thus : (SCC pp. 500-501, para 26)

"26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. In Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala, (1989) 2 SCC 38] it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court

³⁷ (2022) 3 SCC 739



cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a Judge on the evidence before the arbitrator.”

20. *As long as the arbitrator has taken a possible view, which may be a plausible view, simply because a different view from that taken in the award, is possible based on the same evidence, would also not be a ground to interfere in the award. In Arosan Enterprises Ltd. v. Union of India [Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449] , this Court has held as follows : (SCC p. 475, para 36)*

“36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, the question of interference of the court would not arise at all. In the event, however, there are reasons the interference would still be not available within the jurisdiction of the court unless of course, there exists a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.”

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22. *In a recent ruling in NTPC [NTPC Ltd. v. Deconar Services (P) Ltd., (2021) 19 SCC 694 : 2021 SCC OnLine SC 498] , decided by a three-Judge Bench of this Court, drawing strength from the decision in Kwaliti Mfg. Corpn. [Kwaliti Mfg. Corpn. v. Central Warehousing Corpn., (2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] , it has been held thus : (NTPC case [NTPC Ltd. v. Deconar Services (P) Ltd., (2021) 19 SCC 694 : 2021 SCC OnLine SC 498] , SCC para 13)*

“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 [State of U.P. v. Allied Constructions, (2003) 7 SCC 396] ; Ravindra Kumar Gupta & Co. v. Union of India [Ravindra Kumar Gupta & Co. v. Union of India, (2010) 1 SCC 409 : (2010) 1 SCC (Civ) 130] and Oswal Woollen Mills Ltd. v. Oswal Agro Mills Ltd. [Oswal Woollen Mills Ltd. v. Oswal Agro Mills Ltd., (2018) 16 SCC 219 : (2019) 1 SCC (Civ) 426]).”

57. The legal position is also well settled that Section 34 of the Arbitration and Conciliation Act, 1996 cannot be held to include within it a power to modify an award. In this regard, reference may be made to the judgement of Supreme Court in, ***The Project Director, National Highways No.45 E and 220 National Highways Authority of India vs. M. Hakeem & Anr***³⁸.

Objections raised by the Petitioner regarding the Respondent being an unincorporated entity:-

58. As regards the preliminary objections raised by the petitioner to the effect that the respondent/claimant was barred from raising the claim by virtue of Section 69 of the Partnership Act being an unincorporated entity, the same has been dealt with extensively in the impugned award. Amongst other rulings on the point, the Arbitral Tribunal has relied upon the judgment of the Supreme Court in the case of ***Kamal Pushp Enterprises vs. D.R. Construction Co***³⁹, in which it has been held as under;

“9. The prohibition contained in Section 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any court by an unregistered firm, and it had no application to the proceedings before

³⁸ (2021) 9 SCC 1

³⁹ (2000) 6 SCC 659



*an arbitrator and that too when the reference to the arbitrator was at the instance of the appellant itself. If the said bar engrafted in Section 69 is absolute in its terms and is destructive of any and every right arising under the contract itself and not confined merely to enforcement of a right arising from a contract by an unregistered firm by instituting a suit or other proceedings in court only, it would become a jurisdictional issue in respect of the arbitrator's power, authority and competency itself, undermining thereby the legal efficacy of the very award, and consequently furnish a ground by itself to challenge the award when it is sought to be made a rule of court. The case before us cannot be said to be one such and the learned counsel for the appellant though was fully conscious of this fact, yet tried to assert that it is open to the appellant to take up the objection based upon Section 69 of the Partnership Act, at any stage even during the post-award proceedings to enforce the award passed. The award in this case cannot either rightly or legitimately be said to be vitiated on account of the prohibition contained in Section 69 of the Partnership Act, 1932 since the same has no application to proceedings before an arbitrator. At the stage of enforcement of the award by passing a decree in terms thereof what is enforced is the award itself which crystallises the rights of parties under the Indian Contract Act and the general law to be paid for the work executed and not any right arising only from the objectionable contract. It is useful in this connection to refer to the decision of this Court in *Satish Kumar v. Surinder Kumar* [AIR 1970 SC 833 : (1969) 2 SCR 244] wherein it has been stated in unmistakable terms that an award is not a mere waste paper but does create rights and has some legal effect besides being final and binding on the parties. It has also been held that the award is, in fact, a final adjudication of a court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award which is on the face of it regular, is conclusive upon the merits of the controversy submitted for arbitration. Consequently, the post-award proceedings cannot be considered by any means to be a suit or other proceedings to enforce any rights arising under a contract. All the more so when, as in this case, at all stages the respondent was only on the defence and has not itself instituted any proceedings to enforce any rights of the nature prohibited under Section 69 of the Partnership Act, before any court as such. We see no infirmity or error whatsoever in the decision of the courts below to call for our interference in this appeal. The appeal fails and shall stand dismissed."*

59. Further, the Arbitral Tribunal has relied upon the judgment of the Supreme Court in *Firm Ashok Traders & Ors. vs. Gurmukh Das Saluja &*



Ors⁴⁰, wherein it has been held as under:-

“12. In our opinion, which we would term as prima facie, the bar enacted by Section 69 of the Partnership Act does not affect the maintainability of an application under Section 9 of the A&C Act.

13. The A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of the A&C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? “Party” is defined in clause (h) of sub-section (1) of Section 2 of the A&C Act to mean “a party to an arbitration agreement”. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of court under Section 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36.....the relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of the A&C Act.”

60. The impugned award takes note of the following aspects emphasized by the respondent/claimant before the Arbitral Tribunal with regard to this issue:-

“42. The Claimant while refuting the contentions of the Respondent submits that this application of the Respondent is not maintainable on the following grounds, (i) JV is not a partnership firm and the Partnership Act does not apply, (ii) the said application is misconceived, (iii) Sec. 69(2) &(3) of Partnership Act does not apply to arbitration, (iv) The application is filed after filing of defense statement and the Respondent's are barred from raising the same, (v) Even

⁴⁰ (2004) 3 SCC 155



assuming that Sec. 69 applies to the present case the Claimant contends that he is covered under Sec. 69(4) that is an exception. The Claimant refers to the contract volume-1 page-236 Clause-13 where the information and instruction to tenderers are given by Respondent Clause-13(iii) is applicable for partnerships and Clause-13(v) is applicable for joint ventures or group of firms and contends that a differentiation that the Respondent himself has made in Clause-13(iii) Respondent has sought for a certified copy of the partnership deed which is applicable to partnership firm, while in Clause-13(v) the partnership firm is differentiated and it is stated that if the tender is by a group of firms / joint ventures the sponsoring firm shall submit complete information pertaining to each firm in the group (as per agreement between group of firms) and state the responsibilities of the firm for tendering and completion of contract etc. Therefore it is contended by the Claimant that the Respondent himself had made a clear distinction between a partnership firm as at Clause-13(iii) and Joint Venture as at Clause-13(v) even at the stage of tendering itself. The nomenclature partner in the JV agreement, it is contended, will not make the joint venture a partnership firm. Relying on the power of attorney executed by the JV at page-82 of the contract document the Claimant states that PCL a company incorporated under the Companies Act 1956 intends to form an Unincorporated Joint Venture with Intertech-Len Hydro Corporation, Russia for the purpose of bidding and implementation of this project and hence the JV is not a partnership firm. Further reliance is placed on page-250 of the contract document by the Claimant referring to Clause-I(ii) states that "Contractor" means the person or persons, firm or company, group of firms or joint venture who have been awarded the works by THDC and his successors and permitted assigns" and contends that even as per the contract the firm or a company is distinguished from group of firms or joint venture hence on this ground also the JV should not be held to be a partnership firm. The expression joint venture is explained in para-24 of (1995) 1 SCC 478: New Horizon Ltd., Vs Union of India which was relied by the Claimant to submit that in the circumstances in the present case the Claimant is a joint venture. It is further argued with reference to the partnership act under Sec. 6 the mode of determining the existence of partnership is to be determined with regard to the real relationship between the parties by all relevant facts taken together and the explanation 1 & 2 under Sec. 6 specifies mere sharing of profits or gross returns does not make such persons are partners and hence mere sharing of profit does not constitute a partnership. In the JV agreement of the Claimant there is no Clause for retirement of partner as is necessary under Sec. 32 of the Partnership Act. Hence, the Claimant argued that the JV is not a partnership firm. While the Respondent refutes these contentions and submits that even when the name is joint



venture the constituents are partners and are bound by the partnership act as all the ingredients necessary for partnership are included in the joint venture, even when there is no provision for retirement, dissolution of the joint venture as is necessary for a partnership firm.”

61. The tribunal also took note of the contention that in any event the respondent/claimant are covered under the exemption carved out under Section 69-4 (a) of the Partnership Act as the respondent joint venture has two partners who have their addresses in Russia and are of foreign origin.

62. The Arbitral Tribunal also noted as under:-

“49. Sec. 69(4) of the Partnership Act is an exception to the earlier provisions of the act, in other words, in respect of firm or partners in a firm if they have no place of business in India then Sec. 69 will have no application. Admittedly, the Joint Venture is between PCL and IntertechLenhydro Consortium, the later entity is a Russian entity having no place of business in the territory of India to which the Indian Partnership Act apply. Sub Sec. 4 of Sec. 69 is a general exception to rule laid down in Sub Sec. 1 and Sub Sec. 2 of the said section. Even if the joint venture is held to be a partnership firm yet one of the constituents of the Joint Venture, namely, IntertechLenhydro Consortium not having any place of business in India would be competent to file proceeding before an Arbitral Tribunal to enforce rights arising from the contract between Joint Venture and the Respondent, even if the said Joint Venture is not a registered body. The bar of the non registration engrafted in Sec. 69 of the Partnership Act will have no application. In aforesaid premises, we are of the considered opinion that the preliminary objection of the Respondent that Arbitral Tribunal is not maintainable as the Joint Venture is unregistered partnership firm is not sustainable. We are of the opinion that the claim of the Claimant has to be adjudicated on merits and cannot be thrown out on the grounds of maintainability.”

63. Having considered the above circumstances, the Arbitral Tribunal concluded as under:-

“50. In the light of the above facts and circumstances we find that:
(i) The parties have consciously agreed to under the contract for resolution of the disputes through arbitration as per Clause-60(ii) of Volume-1 of the contract.
(ii) The parties have appointed their arbitrators without any



intervention of the court for resolution of disputes as per the agreement and the tribunal is constituted without any intervention of the Court.

(iii) The claims brought up before the tribunal by the parties cannot be termed as a suit before a court as per Sec. 69(2) and hence the proceedings are not proceedings before a court included in 'other proceedings' under Sec. 69(3) relying upon the squarely applicable decision in the case of Noida Toll Bridge by the Delhi High Court which relied on the Apex Court decision of Kamal Pusph Enterprises.

51. From the above we find that the view of (2000) 6 SCC 659: Kamal Pushp Enterprises Vs D.R. Construction Co. and 2008 (10) SCC 345: Fakir Chand Gulati Vs Uppal Agency Pvt. Ltd., of the Apex court would lend support to the view that the Arbitral proceedings before this tribunal, where the arbitrators are appointed by the parties as per the agreed procedure under the contract and the tribunal has been constituted by the two appointed arbitrators, cannot be considered as a suit before a court as per Sec. 69(2) or it would come under the term other proceedings to enforce the provision of Sec. 69(2) as specified in Sec. 69(3) of the Partnership Act based on the facts and circumstances brought out above. Accordingly we reject the additional ground of the Respondent regarding the bar on non registration of the Claimant JV."

64. No fault, either factual or legal can be found with the aforesaid conclusions drawn by the Arbitral Tribunal.

Sub-contracting : whether bars claims?

65. Having considered the submissions of the petitioner with regard to the aspect of sub-contracting of the contract to RSJV, I am unable to accept that the sub-contracting debarred the Respondent/ Claimant from raising/ pursuing any claim/s against the Petitioner.

66. At the outset, it is important to refer to the minutes of the meeting dated 02.05.2006, whereby the decision was taken to regularise the sub-contract. The said minutes records as under:-

*"MINUTES OF THE MEETING HELD ON 02.05.2006 WITH M/S
PCL-JV REGHAR4DING KOTESHWAR HEP (400 MW)*



The meeting was called by THDC vide letter No. THDC/KDP/PLG/06-07/8-11/31. Dated 29.04.2006 to review the progress status of construction of civil works of Koteswar Dam, Spillway and Power House at THDC Noida Office wherein representatives of M/s PCL and their sub-Contractor work M/s Rithwik Swathi JV (RSJV) attended the meeting. The list of participants is placed at Annexure-1

Following issues were discussed and decided :

THDC expressed that as per the Agreement No. THDC/RKSH/CD-197/AG dated. 14.11.2002 the civil works were scheduled to be completed by May, 2006 However as per the status of works which was discussed, it is anticipated that the works under the Agreement shall be completed by March, 2008. THDC also expressed that the pace of work by M/s PCL/sub contractor engaged by M/s PCL is not in tune with time schedule which was discussed during the meetings taken by CMD, THDC on 16.11.2005 & 04.03.2006. THDC further practically stopped their operations and valuable time is being lost. The excavation activities for the foundation in the main area have been almost completed and still concrete works has yet not started. The concrete work which commenced in the power dam area is also almost stand-still

THDC expressed concern at the stoppage of work. THDC took strong exception to the engagement of sub Contractor by M/s PCL without obtaining prior approval. It was informed by M/s PCL that the formal engagement of the Sub-Contractor under Clause 56 of the Contract Agreement has not been accomplished since certain issues were being resolved with their sub-contractor viz M/s Rithwik Swathi JV. THDC noted that M/s Rithwik Swathi JV has been working at the Koteswar Project alongwith M/s PCL since beginning.

Keeping in view the association of M/s PCL sub-contractor THDC expressed that since engagement has already been made and the, matter being fait accompli THDC has no objection to regularize the engagement.

On the progress of commissioning the project, it was agreed that M/s PCL and the Sub-contractor M/s Rithwik Swathi JV will immediately resume the technical man-power and the equipment, which is required for the construction of Dam, Spillway and Power House shall be made available to match the construction requirements

PCL have also informed that the order for placing of concrete was tied up with M/s Rotec industries INC, USA. The Letter of Credit would be opened by their sub-contractor for which PCL will extend necessary cooperation and documentation. PCL have also assured that all necessary



steps would be taken for starting concreting.

1. M/S PCL Intertech Len Hydro Consortium JV (R.D. Soni)
2. M/s Rithwik Swathi JV
 - a) M/s Rithwik Projects Ltd. (C.M.Ramesh)
 - b) M/s Swathi Constructions Pvt. Ltd. (P. Pulla Rao)
3. THDC Ltd. (M.S. Gusain)"

67. Significantly, in the letter dated 22.05.2006, it was communicated to the respondent as under:-

*"Tehri Hydro Development Corporation Ltd.
 (A Joint Venture of Govt. of India & Govt. of U.P.)
 Koteswar Hydro Electric Project
 Koteswar, Tehri Garhwal (Uttaranchal) Pin-249 001
 Phone: (01378) 231445, Fax: (01378) 231337"*

NO: THDC/KHEP/DGM/D&PH/PCL/06/92 Dated: 22 May, 2006

*The Chairman & Managing Director
 M/s PCL intertechLenhydro Consortium (JV)
 Raghava North Block, 7th Floor
 R.R. Tower, Chirag Ali Lane
 Hyderabad – 500001 (A.P.)*

Sub:- Regarding engagement of sub contractor.

Ref:- Your letter no.PCL/KOT/F-4/20 dt. 20.05.2006.

With reference to your above letter on subject cited above you may refer meeting held on 02.05.2003 at THDC Noida office wherein it was directed that THDC has no objection to regularize the engagement as the mater being fait accompli.

As per agreement clause No.56.0 of GCC, regularizing of engagement of sub contractor (RSJV) i.e. Ritwik Swathi JV is agreed.

However, engagement of sub contractor shall no way absolve the M/s PCL – IntertechLenhydro Consortium (JC) of any of his responsibilities under the contract.

(U.K. Thakur)
 DGM (D&PH)"

68. It can be seen from the above, that it was the respondent's own stand



that engagement of the sub-contractor shall not absolve the respondent of any of its responsibilities under the contract. Also the petitioner itself has filed its counter claim against the respondent and not against the sub-contractor. No objection regarding non-joinder of the sub-contractor was raised before the Arbitral Tribunal.

69. Moreover, it is the respondent's own case that in consideration for regularizing the sub-contracting, the respondent itself submitted no claim certificates to the petitioner, and the said no claim certificates are sought to be enforced against the Respondent. Clearly, therefore, the petitioner continued to deal with the respondent for the purpose of the work even after the sub-contracting was regularized. In fact, in the Statement of Defence filed by the Petitioner before the Arbitral Tribunal it was clearly averred that:-

“....the respondent agreed to regularise the engagement of the subcontractor from the very beginning and the same was also formally notified by the respondent vide its letter dated 3.5.2006 to the claimant and its sub-contractor. However, it was also noted that the engagement of the sub-contractor shall in no way absolve the PCL-IntertechLenhydro JV of any of its responsibilities under the contract.....”

70. In ***Hudson's Building and Engineering Contracts*** (11th Edition), it has been emphasised that no privity of contract between and owner and another contractor can arise out of a sub-contract concluded between the owner's main contractor and the other contractor. It has been observed therein as under :-

“13.016. It cannot be over-emphasized that no privity of contract between an owner and another contractor can arise out of a sub-contract concluded between the owner's main contractor and the other contractor. Where the sub-contractor has been selected by the owner, as in the case of nominated sub-contracts, early attempts were made to



argue that the main contractor or the A/E had on the facts contracted as an agent or trustee of the owner, and at one time this view appears to have prevailed in the courts, at least in relation to nominated or selected sub-contractors. However, the later cases made it clear that only the most special and unusual facts, showing that the owner expressly or by some unusual conduct authorized the main contractor or the A/E so to contract, would justify such a finding, which is contrary to the purpose of the usual main contract and the practice and expectation when negotiating contracts informally between the various parties in the construction industry.

The history of the courts finally (and rightly) rejecting the notion of privity between a building owner and his selected sub-contractor is shown in the cases illustrated at the end of the present subsection, but under the present system of nomination, which is widely used and understood in the industry, it can often happen that architects need to obtain quotations from and negotiate with tendering sub-contractors (particularly those whose work or products are subject to long delivery dates) during the planning stage of a project at a time when the identity of the ultimately successful tendering main contractor may still be unknown. In such cases it is generally well understood by the parties that the sub-contractor will in due course be required to enter into a sub-contract with the successful main contractor when appointed.....

71. In the case of ***Davis vs. Collins***⁴¹, it was held as under:-

“.....
There is a well-known division of contracts for work and labour into two broad classes. One class is where the work and labour can, on the true construction of the contract, only be performed by the contracting party himself or by some staff that he employs. The other class is where, from all the circumstances of the case, including of course the true construction of the contract, **it is to be inferred that it is a matter of indifference whether the work should be performed by the contracting party or by some sub-contractor whom he employs.**
.....”

72. In the present case, the Petitioner having regularised the sub-contracting, and having insisted that the same will not absolve the Petitioner of any of its responsibilities under the contract, it became a matter of

⁴¹[1945] 1 All ER 247



indifference whether the work was performed by the Respondent itself or through its sub-contractor. The sub-contracting did not absolve the Respondent from its obligations under the contract; equally, it did not obliterate the Respondent's right to raise claims upon the Petitioner.

73. The impugned award, has dealt extensively with the objection raised by the petitioner before the Arbitral Tribunal regarding sub-letting of the work to RSJV in paragraphs 74-76 (reproduced hereinabove), and has concluded as under:-

- (i) The Petitioner regularised the engagement of sub-contractor;
- (ii) The same was done under Clause 56 of the GCC in terms of which the sub-contracting in no way absolved the Contractor of any of his responsibilities under the Contract;
- (iii) The petitioner agreed for regularising the engagement of the sub-contractor being fully aware of the fact that the sub-contractor was working on the site from the beginning.

The above findings rendered by the Arbitral Tribunal cannot be interfered in these proceedings so as to reach the conclusion that sub-contracting disentitled the Respondent from raising any claims.

No claim certificate: whether a quid pro quo for regularising sub-contracting

74. As regards NCC-1 being in the nature of a *quid pro quo* in return for the petitioner regularizing the sub-contracting, the following facts are relevant:-



- (i) The first request for time extension was made by the respondent vide communication dated 28.11.2005 wherein after setting out the various delays that had been occasioned, it was requested as under:

“The contractual responsibility of contractor are dependent on timely fulfilment of certain obligations by the Employer for the timely achievement of planned schedules and programs, the Employer has to timely fulfill its part of the contractual obligations as explained herein above and in our earlier correspondence. The contract has got delayed mainly for the reasons beyond our control and therefore the Extension of Time in terms of GCC Clause 58 is requested.

In view of facts stated above, you are requested to kindly accord approval of Extension of Time from Mile Stone 2 to 6 as 30.6.2008 and merge Mile Stone 2 to 6 into a single mile Stone and grant Extension of Time in respect of the above Mile Stone upto 30.6.2008. The revised Construction Program is being modified taking into view the development on 15.11.05 and would be submitted shortly.”

- (ii) It was in response to this letter, that the petitioner addressed a communication dated 21.03.2006 stating as under:-

*“Tehri Hydro Development Corporation Ltd.
(A Joint Venture of Govt. of India & Govt. of U.P.)
Koteshwar Hydro Electric Project
Koteshwar, Tehri Garhwal (Uttaranchal) Pin-249 001.
Phone: (01378) 231343, 231300, 231445, Fax: (01378) 235343, 231337*

To,

*PCL-IntertechLenhydro Cons. (J.V.)
Camp-Koteshwar Dam Project
Koteshwarpuram.*

Sub:- Extension of time - regarding

In continuation of your letter no. PCL/Kot./F-4/438 dt. 28.11.2005 you are requested to submit the no claim certificate for the period for which time extension has been sought.

*Sr. Manager (D&PH)
KHEP-Koteshwar”*



75. By this time the controversy regarding the sub-contracting had not broken out. According to the petitioner itself, it was only on 27.04.2006 that it received a communication from a group of persons purporting to be employees of RSJV, whereupon the petitioner acquired knowledge as to the sub-contract. This aspect is noted in paragraph-74 of the impugned award. Thereafter, a meeting is stated to have been held on 02.05.2006 wherein it was decided to regularize the engagement of the sub-contractor. A letter to this effect was thereafter addressed on 03.05.2006 followed by another letter dated 22.05.2006. The extension of time (EOT-1) was granted on 16.06.2007, which was obviously after issuance of the concerned no claim certificate (NCC-1), which was itself undated and reads as under:-

***“PCL – INTERTECHLENHYDRO
CONSORTIUM JOINT VENTURE***

*Camp Office: Koteswar Dam, Post – POKHRI Distt. Tehri Garhwal (Uttaranchal)
E-mail : pclilc@sancharnet.in Ph.: Office : 01376-231242, 231388, Fax:01376-231547*

NO CLAIM CERTIFICATE

NAME OF CONTRACTOR: M/s P.C.L. IntertechLenhydro Consortium J.V.

AGREEMENT NO. & DATE: THDC/RKSH/CD-197 dtd. 14.11.2002

DATE OF START AS PER AGREEMENT: 31.08.2002

DATE OF COMPLETION AS PER AGREEMENT: 31.05.2006

Mile Stone	Date as per agreement	Provisional extension granted	Date under which extension now applied for
I	31/10/2003	28/12/2003	28/12/2003
II	31/12/2004	31/12/2005	31/12/2006
III	30/04/2006	-	31/01/2008
IV	31/12/2004	30/04/2006	30/11/2006
V	31/12/2005	-	30/09/2007
VI	31/05/2006	-	31/03/2008

Details of reasons for which extension is applied for: Reasons are explained in our letter no.PCL/KOT/F4-438 dtd: 28/11/2005



Certified that we shall not demand my claim and / or compensation whatsoever in future in account on account of grant of this time extension nor claim any increase in the rates entered in our contract for the work in the extended period.

For PCL IndertechLenhydro Consortium J.V.

*(SARAT RAO)
Project Director”*

76. Significantly, the above no claim certificate referred to a communication dated 28.11.2005 whereby the time extension had originally been sought. There is no reference in the said no claim certificate to the intervening developments regarding regularization of the sub-contractor.

77. It is in this background that the Arbitral Tribunal considered the objection as to whether the claims referred by the respondent were precluded on account of the said no claim certificate being issued as part of a “package deal” whereby the Respondent/ Claimant gave up its claims in return for regularisation of sub-contracting.

78. It is also notable that when the occasion arose for the respondent to raise financial claims upon the petitioner, the same came to be discussed during the meeting dated 17.03.2007, the minutes of which, inter-alia, record as under:-

- *“The discussions were held on above claims/payments. It was informed by the project that the claims from Sl. No. 1 to 7 had already been rejected by project, however these issues are being raised by the contractor again & again. For Sl. No. 8 the details about analysis of rates of placement of Geogrid is yet to be submitted by the contractor. For Sl. No. 9 ie. payment of dry stone pitching 75% payment of provisional rates has already been released and request of the contractor for release of payment on account of extra efforts due to typical location of site and uneven surface is being examined by the project. For Sl. No. 10 ie payment of extra lead for disposal of muck is under consideration of the project and will be settled by end of Mar-07.*
- *It was instructed by the CMD to the Project that all the above mentioned claims/payments should be analysed immediately and*



decision should be conveyed to the contractor by the end of Mar-07. In case the contractor is not satisfied with the decisions of THDC, he may opt for redressal of the same as per contract provision."

79. It is notable that while recording the aforesaid minutes, that the respondent would opt for redressal/adjudication of its claims in terms of the contract provisions, there was no observation made to the effect that the claims were precluded in view of the alleged *quid pro quo* arrangement/ understanding, at the time of regularization of the sub-contract. Even when the claims were thereafter raised before the concerned Engineer-in-chief, the rejection order thereon did not contain anything to this effect. When the said rejection order of Engineer-in-chief was appealed before the CMD of the petitioner, the same was also rejected vide communication/order dated 04.06.2007. However, again, the said communication makes no mention of the NCC or the so-called package deal. Notably, EOT-1 was granted on 16.06.2007 whereas the regularization of the sub-contract had taken place on 02.05.2006 itself. There was no reason why future correspondence would not explicitly refer to the *quid pro quo*/package deal arrangement. Indeed, there was no reason for the petitioner to not draw up/execute an agreement/document clearly stating that in consideration with regularization of the sub-contract, the respondent/contractor had agreed to give up all its outstanding claims.

80. In these circumstances, in these proceedings, this Court is unable to conclude, in derogation of the factual findings rendered in the impugned award, that there is any inter-connection, as alleged by the petitioner, between the no claim certificate/s and the regularisation of sub-contracting.



Whether Claims are precluded/ barred on account of the No Claim Certificate/s [NCC-1 and NCC-2]

81. The relevant findings in the impugned award on this issue are as under:-

- (i) There is no provision in the contract for furnishing of a no claim certificate for the purpose of grant of time extension, yet the Petitioner insisted on such no claim certificate and withheld the grant of EOT till the same was furnished;
- (ii) From the correspondence, particularly, letter dated 4.12.2006 of the Respondent, it is evident that the first EOT was given in lieu of delay in handing over of the requisite excavation area and the no claim certificate sought was not as per the contract, and was not given voluntarily;
- (iii) EOT-1 was sought by the Respondent/Claimant on 28.11.2005, no claim certificate was sought by the Petitioner on 21.3.2006 as a pre-condition for grant of EOT-1, and the same was granted only on 16.6.2007 i.e. after nearly 18 months of delay;
- (iv) EOT-1 had been withheld on account of non-furnishing of NCC-1; and on the very date on which EOT-1 was granted after furnishing of NCC-1, arbitration was invoked by the Respondent/ Claimant; such invocation of Arbitration was itself the instantaneous protest to NCC-1 being sought;
- (v) By the time EOT-1 was granted, application for EOT-2 was already pending which subsumed the period covered by EOT-1; EOT- 2 was sought on 14.2.2007 even before EOT-1 was approved. NCC-2 was requested by the Petitioner on 4.10.2007



and furnished by the Respondent on the same day. Only thereafter EOT-2 was given on 15.11.2007. This shows that the furnishing of NCC was in the nature of a pre-condition imposed by the Petitioner for grant of EOT. This was not contemplated under the contract, in terms of which grant of EOT was to be governed by GCC Clause 58.

- (vi) NCC-2 which was furnished as a pre-condition for EOT-2, in fact, subsumed the period covered by EOT-1, and specifically states that the same is without prejudice to the rights of the Respondent under the Contract.
- (vii) The Tribunal finally held that the scenario under which the No Claim Certificate was sought for *“persuades us to come to a conclusion that the said certificate was given not voluntarily but under compulsion faced with the huge investment already made by the Claimant and the various hindrances attributed to the respondent...”*

82. The impugned award also relied upon, and applied the law laid down in the following judgements to reach the aforesaid conclusion:-

- (1) *NTPC Ltd. Vs. Reshmi Constructions*⁴²
- (2) *Ambica Constructions Vs. Union of India.*⁴³
- (3) *K.N. Sathyapalan (dead) By LRs Vs. State of Kerala*⁴⁴,
- (4) *Pure Helium India Pvt. Ltd. Vs. ONGC*⁴⁵,
- (5) *National Insurance Company Limited Vs. Boghara Polyfab Pvt. Ltd*⁴⁶.

⁴² (2004) 2 SCC 663

⁴³ (2006) 13 SCC 475

⁴⁴ (2007) 13 SCC 43

⁴⁵ (2003) 8 SCC 593

⁴⁶ (2009) 1 SCC 267



83. In *M/s. Sab Industries Limited vs. M/s Gas Authority of India Ltd.*⁴⁷, a Division Bench of this court, in the context of the Arbitral Tribunal having rejected the plea that claims were barred on account of a no claim certificate, and the Single Judge of this court having set aside the award on that count, held that it was impermissible under Section 34 to carry out a full scale reappraisal of the award; the examination of the award must be only from the lens of “patent illegality”. In this regard, it was observed as under:-

“16. In the present case-unlike in Master Construction (supra) and Genus Power Infrastructure (supra) the dispute was not at the stage of referring the matter to arbitration; instead it was at the stage of objections to the award. Having overruled GAIL's plea with respect to non-arbitrability, the Tribunal proceeded to consider the claims on the merits and rendered its findings. These materials were in the form of running bills, joint surveys and minutes of meetings, recommendations/verifications of the consultants, etc. After taking note of all these facts, the Tribunal awarded some amounts to SAB. This distinction, to the Court's mind, makes all the difference. The learned Single Judge, in this case, did not examine the correctness of those findings from the lens of “patent illegality” or the other relevant factors which would render an arbitral award invalid or unenforceable in terms of the settled law (Oil and Natural Gas Commission v. Saw Pipes, (2003) 5 SCC 705). The court highlighted that:

“Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.” (paragraph 30)

17. In Oil and Natural Gas Commission (supra), the Supreme Court set aside the arbitral award on the ground that the tribunal had failed to consider Sections 73 and 74 of the Contract Act, and relevant precedents, in awarding damages. What is “patent illegality” has been clarified in subsequent cases. Several later judgments have highlighted that Section 34 permits an extremely narrow window for the court to set aside the arbitral tribunal's award. Firstly, the court does not act as if it were an appellate court, revisiting the evidence and undertaking an extensive factual review of the merits of the dispute with the mandate to

⁴⁷2015 SCC OnLine Del 12752



cure or correct the errors (Ref *Sumitomo Heavy Industries v. ONGC Ltd.* (2010) 11 SCC 296 and *Kwality Manufacturing Corporation v. Central Warehousing Corporation* (2009) 5 SCC (Civ) 406). The Court can set aside an award if it finds that the tribunal has made an error on the face of the contract, or provided a “patently illegal” interpretation of the law. Equally, if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction (Ref *MSK Projects (I) (JV) Ltd.* (supra); *G. Ramachandra Reddy v. Union of India* (2009) 6 SCC 414; *McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181 and *Renusagar Power Co. Ltd. v. General Electric Co.* (1984) 4 SCC 679). In *Mc Dermott International* (supra), the Supreme Court clarified the Court's inherent limitation by reason of Section 34 in such matters:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325]).

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

18. Secondly, unless the Tribunal commits a patent error of law in adjudicating upon a question submitted to it, the Court will not intervene (*J.G. Engineers Pvt. Ltd. v. Union of India* (2011) 5 SCC 758). The expression “patently” illegal was explained as an error “which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice.”

19. The impugned judgment in this case went by a bare reading of the pleadings and the judgments of the Supreme Court to conclude that SAB was precluded from claiming the amounts in the light of the NDC.



*As is evident from the above discussion, the judgments of the Supreme Court were rendered in the context of fact situations where demands for arbitration were in issue; here, however, there was a reference. The merits of both questions - arbitrability (whether SAB's claim was not maintainable because of accord and satisfaction on account of NDC) as well as the merits of the award had to be considered. However, the Single Judge - in a linear manner, if one may so describe it-held that since the dispute could not be arbitrable, the award was patently illegal. **This Court holds that once the arbitrator considered GAIL's plea and overruled it, that fell within his jurisdiction.** Unlike at the stage of making a reference, the parties had proceeded further. We note that the final bill was paid in October, 1999 and the statement of claim in arbitration was made in 2001-clearly within the period of limitation. Consequently, the mere fact that the NDC had not been protested contemporaneously, or that there was no specific plea about coercion in the statement of claim, did not result in waiver. The arbitrator accepted SAB's plea that without signing the dotted line, it could not have secured the amounts released to it; that was a finding of fact. Such finding could not be said to be patently illegal. This Court notices, however, that the merits of each of the claims made in the award, had not been gone into by the learned single judge, who rested his decision on the narrow ground of non-arbitrability due to accord and satisfaction."*

84. It is also notable in the facts of **M/s. Sab Industries Limited (Supra)**, as in the present case, the plea regarding the NCC being vitiated had not been specifically taken in the statement of claims, and it was only taken in response to the NCC being cited against the Claimant. In that context, it was observed by the Division Bench as under:

"15. Before proceeding with the facts of this case, it would be useful to recollect that in arbitration proceedings, the rigid rules of pleadings cannot be over-emphasized. Indeed, even provisions of the Code of Civil Procedure are inapplicable (Section 19). However, it is accepted that principles of pleadings are to be broadly followed. The mere fact that SAB did not specifically urge that it was a victim of coercion, or the nature of coercion it was subjected to, in its statement of claim, is not determinative of the issue. Even in proceedings before the Court, departures from the strict rule of pleadings are recognized. For instance, in Kalyan Singh Chouhan v. C.P. Joshi AIR 2011 SC 1127, it was held that:



“23. There may be an exceptional case wherein the parties proceed to trial fully knowing the rival case and lead all the evidence not only in support of their contentions but in refutation thereof by the other side. In such an eventuality, absence of an issue would not be fatal and it would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated. (vide : NagubaiAmmal v. B. Shama Rao AIR 1956 SC 593; NedunuriKameswaramma v. Sampati Subba Rao AIR 1963 SC 1 884; Kunju Kesavan v. M.M. Philip AIR 1964 SC 164; Kali Prasad Agarwalla (dead) by L.Rs. v. Bharat Coking Coal Ltd. AIR 1989 SC 1530; Sayed Akhtar v. Abdul Ahad, (2003) 7 SCC 52; and Bhuwan Singh v. Oriental Insurance Co. Ltd. AIR 2009 SC 2177)”

85. Likewise, in **Delhi State Industrial & Infrastructure vs. Sukumar Chand Jain**⁴⁸, it was held by a Division Bench of this court, in the context of an Arbitral Tribunal having pronounced upon the issue as to whether the no claim certificate barred the Claims, and the single judge having dismissed the Petitioner under Section 34, held as under:-

“19. It is necessary to bear in mind that neither the Commercial Court, considering the application for setting aside an award under Section 34 of the A&C Act, nor the appellate court, considering an appeal under Section 37 of the A&C Act, is required to re-evaluate the evidence and re-adjudicate the disputes between the parties. The learned Commercial Court had rightly held that the scope of examination under Section 34 of the A&C Act was limited to ascertaining whether the Arbitral Award is required to be set aside on the grounds as set forth under Section 34 of the A&C Act. As noted above, one of the disputes required to be addressed by the Arbitral Tribunal was whether the agreement stood discharged by accord and satisfaction. The Arbitral Tribunal had considered the evidence led by the parties and had answered the question in favour of the respondent (claimant). As noted above, it is not in dispute that the NCC had been issued in a standard pre-printed format as provided by DSIIDC. It is also conceded by the learned counsel for DSIIDC that, as a matter of practice, DSIIDC does not clear the Final Bills unless an NCC has been issued by the concerned contractor. Thus, indisputably, the respondent would not be able to recover the amounts as admittedly due to it unless it furnished an NCC, as

⁴⁸2023 SCC OnLine Del 226



demanded by DSIIDC. It also established from the record that the appellant had raised a claim for escalation in the cost of steel and cement and DSIIDC had summarily rejected the same on the ground that no such payment could be made under the agreement. The respondent had continued to pursue DSIIDC in respect of the said claim and the Arbitral Tribunal had found that there was no reason for the respondent to voluntarily give up the said claim.

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22. In view of the given facts, we are unable to accept that the decision of the Arbitral Tribunal to accept the respondent's contention that the NCC was issued under economic duress is patently illegal and vitiates the impugned award. The view expressed by the Arbitral Tribunal is a plausible one. It is based on the evidence and material placed on record."

86. In *Wishwa Mittar Bajaj and Sons Vs. Union of India*⁴⁹, a Division Bench of this court while dealing with an appeal arising out of a Section 34 Petition wherein the Single Judge had set aside the arbitral award on the basis of a no claim certificate and acceptance of full and final payment in lieu of the said certificate, held as under:-

"15. Having regard to the law declared and the surrounding circumstances, it is clear that even though the works were executed long before, some-time in end 2002, in respect of which the final bill was submitted in April, 2003, the Appellant had no option but to execute and claim the amounts in terms of the printed "no claim" format.Having regard to all these aspects, this Court is of the view that the Arbitrator did not err, or act contrary to public policy or the substantive law in India, as to entail setting aside of the award in respect of the claim of Rs. 5,38,000/- by the learned Single Judge.

18. It is settled legal position that the Court while exercising jurisdiction under Section 34 of the Act does not second guess the arbitrator's decision as if in an appeal to re-assess the material evidence and the terms of the contract assessed and interpreted by the arbitrators. It is also established that the court, while exercising jurisdiction under Section 34 of the Act, would not substitute its opinion for that of the arbitrators. In Hindustan Iron Co. v. K.

⁴⁹ 2013 SCC Online Del 1409



Shashikant & Co., 1986 Supp SCC 506 : AIR 1987 SC 81 the Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. It is only an error of law and not a mistake of fact, committed by the arbitrator, which is justiciable in the application/objection before the Court. If there is no legal proposition either in the award, or in any document annexed with the award, which is erroneous; and the alleged mistakes or alleged errors, are only mistakes of fact; and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court.....”

19 Following the above judgment's, this Court holds that the questions whether the claims were tenable or not are based on the Contract itself and were arbitrable. The question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the Contract. These words are wide enough to cover the dispute sought to be referred. The interpretation or construction of a contract or a contractual clause is the province of the Arbitrator to whom a dispute is referred for final determination by the parties. The construction imparted by the Arbitral Tribunal to a contract or a contractual clause should remain impervious to another view which may happen to be preferred by the Court. Though the condition 65 of IAFW-2249 (General Conditions of Contract) forming part of the contract agreement states that no further claims shall be made by the contractor after the submission of the final bill, whether the no claim certificate and acceptance of final payment was under protest or not is a question of fact. Once the Arbitrator found that these were arbitrable, and the claims tenable, the Court did not have the jurisdiction to examine the merits, re-appreciate the evidence on record and arrive at contrary findings; clearly, there was nothing in the award disclosing that it was contrary to public policy in the sense understood by the law, to warrant interference under Section 34. In the present case the award is sufficiently reasoned and is not without application of mind. The Single Judge should not have interfered with it. The impugned judgment is consequently set aside and the award is also upheld [...]"

87. It is evident from the aforesaid, that once an Arbitral Tribunal has ruled/pronounced on the issue as to whether the concerned no claim certificate is vitiated and/ or bars the claim, this Court, while exercising



jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996, would be loathe to substitute its views for that of the Arbitrator.

88. It is also notable that the no claim certificate/s were sought in the backdrop of the inordinate delays that had been occasioned in execution of the works. Elaborate findings of fact have been rendered in the award in terms of which the Petitioner was found responsible for the said delays. It was on account of these delays that EOT was required and for which NCC was sought by the Petitioner from the Respondent. The findings on facts rendered in the impugned award on the issues of delay, EOT, NCC are all inter-related and it would be difficult to re-appraise the same in these proceedings.

Omission to conduct cross examination

89. It is also notable that in the Rejoinder filed on behalf of the Respondent before the Arbitral Tribunal, in response to the Petitioner/s reliance on the non-claim certificate/s, it was categorically pleaded as under:-

“The respondent suggested claimant to apply for provisional extension of time and insisted to sign a no claim certificate and this fortifies the fact that it was not voluntary on the part of claimant. In spite of compelling circumstances, claimant managed to express his opposition and resistance in the form of protest/by reserving rights. Therefore, it is not correct to say that ‘no claims certificate’ extracted from claimant would, clear the liability of respondent to pay damages for delays. It is submitted that the conduct of claimant in no way be considered as voluntary and there is no free consent in giving the so called no claims certificate and it is not tenable in the eye of law. Even so, as per the legal position just obtaining a ‘no claim certificate’ does not bar the claimant from his entitlement of legitimate claims.



Regarding that 'No Claim Certificate' furnished by claimant, it is a submission made purely at the behest of the superior muscle powered dictum of the respondent each time while causing grant of extension of time, even when the delays are either due to the reasons/factors not attributable to a contractor/claimant, or due to reasons/factors beyond the control of contractor/claimant. Here it is to further clarify that the compelling need to furnish "No' Claim Certificate" as per the instructions of the Respondent, even though the same was at variance from the contract as well as whether justified or not, arose purely due to the often widely practiced threatening inflictions such as i. Levy of liquidated damages, ii. Suspension of payments, iii. Even encashment of Bank Guarantees etc., as these could have totally crippled the finances leading to stoppage of activities at site under the contract, creating further complications and further hurt the business/reputation as the whole. As such under these circumstances, the Claimant purely in the interest of keeping the sustenance of activities even in the face of several types. of hindrances and difficulties, he was left with the loan option of complying to the dictum of Respondent even though it was an unjust and unfair act."

90. It is also notable that in the background of the divergence in the respective position of the parties on the aforesaid aspects (relating to NCC/sub-contracting), the Respondent/ Claimant filed affidavits of evidence of two witnesses i.e. Mr. Kuljeet Singh Narula and Mr. Kadiyala Harinath Babu.

91. In the affidavit of evidence filed on behalf of Shri Kuljeet Singh Narula it was specifically stated as under:-

"42. I submit that the work was delayed beyond the schedule due to reasons attributable to respondent. The respondent granted provisional extension of time, but with a threat to levy liquidated damages by reserving the rights thereto for a later stage in some of the mile stone shifting / grant of extension of time letters. This predicament was totally unforeseen and sudden and situation had come to such a pass that if no payment is received at that juncture, losses would multiply and entire set up would crumble under the weight of mounting losses. As claimant continued the work in the face of hindrances, respondent was trying to delay interim payments under one reason or other. Therefore, in these circumstances, claimant was forced to do whatever was insisted upon to get some relief for rotation



of cash. The respondent suggested claimant to apply for provisional extension of time and insisted to sign and claim certificate and this fortifies the fact that it was not voluntary on the part of claimant. In spite of compelling circumstances, claimant managed to express his opposition and resistance in the form of protest/by reserving rights. Therefore, it is not correct to say that 'no claims certificate' extracted from claimant would clear the liability of respondent to pay damages for delays. It is submitted that the conduct of claimant in no way be considered as voluntary and there is no free consent in giving the so called 'no claims certificate' and it is not tenable in the eye of law. Even so, as per the legal position just obtaining a 'no claim certificate' under coercion and duress does not bar the claimant from his entitlement of legitimate claims. Here it is to further clarify that the compelling need to furnish "No Claim Certificate" as per the instructions of the Respondent, even though the same was at variance from the contract as well as whether justified or not, arose purely due to the often widely practiced threatening inflictions such as i. Levy of liquidated damages, ii. Suspension of payments, iii. Even encashment of Bank Guarantees etc., as these could have totally crippled the finances leading to stoppage of activities at site under the contract, creating further complications and further hurt the business/reputation as the whole. As such under these circumstances, the Claimant purely in the interest of keeping the sustenance of activities even in the face of several types of hindrances and difficulties, he was left with the loan option of complying to the dictum of Respondent even though it was an unjust, unfair and illegal act.

92. On the issue of sub-contracting, it was averred in the said Affidavit as under:-

45. The GCC 56 of Contract provides for subcontracting the works and the respondent did not raise any objection ever before in this regard. The allegation by respondent of deploying RSJV as subcontractor is in itself as a breach, is motivated and an afterthought, as evident from the following:

Respondent was very well aware of the fact that since 2002 RSJV was working as a subcontractor to claimant, but he did not deliberately bother or worry about this, since the works proceeded to the practically feasible extent even in the face of sustained impediments.

Respondent recognized RSJV as subcontractor of claimant. In this connection the minutes of the meeting held on 02.05.2006



with M/s PCL-JV produced at Document .33, Page 54 of Book No.II as well as letter No.THDC/KTJEP/DGM/D&PH/PCL/06/92 dated 22.05.2008 (Document 37, page 67 of Book No.II) submitted along with reply on behalf of respondent to the statement of claims is referred to and the relevant portions are extracted below.....:

From all the above, it is evident that the subcontracting of works to M/s Ritwik Swathi JV performed by the claimant under this contract was duly authorized by the respondent that too after satisfying themselves from the performances/ progress achieved in the face of impediments and difficult geological conditions in the field, as such the contentions of respondent alleging unauthorized subcontracting of work is motivated and an after thought and also contrary to the contract. The right of the respondent, if any, to object to sub contracting is waived off”

93. Surprisingly, the petitioner’s counsel stated in the 5th and 6th sitting of the Arbitral Tribunal on 03.10.2008 that he does not intend to cross-examine the respondent/claimant’s witnesses. The same would have enabled the petitioner to elicit relevant aspects of the matter to establish its case before the Arbitral Tribunal.

94. Regarding the necessity and the purpose of cross-examination in Arbitration, reference may be apposite to views expressed by various authors as under:-

(i) **“Redfern and Hunter on International Arbitration, 6th Edn. Pp 6.76 and 6.198:**

Summary:

6.76 It follows that fact-finding is one of the most significant functions of an arbitral tribunal and it is a function that all tribunals take seriously. The relevant facts are determined by international arbitral tribunals either following the presentation by the parties (usually via experienced counsel) with the assistance of the parties, to ascertain the evidence that they consider necessary to establish the relevant facts.

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6.198 The practice of arbitral tribunals varies as regards hearings in such situations. Much will depend on the form in which the written stages of the arbitration have taken place. If the written stages have been comprehensive, the arbitral tribunal may feel justified in holding a brief and purely formal hearing prior to issuing its award. If, on the other hand, the written pleadings have been skeletal, formal documents in which only the issues have been defined and no documentary or witness evidence has been submitted in writing, the arbitral tribunal would probably consider it necessary to hear oral evidence before being satisfied that the participating party has discharged the burden of proof in relation to its claims (or defences).

- (ii) ***Malhotra, Commentary on the Law of Arbitration, 4th Edition Vol. 1 pg. no.695:***

“Oral testimony of the witnesses in cases involving complex facts is not only useful but also invaluable. It is usual for the arbitral tribunal to hear the evidence of witnesses at a formal hearing of the case. The tribunal may put questions to witnesses during the course of evidence, or after the parties have completed their cross-examination. If the tribunal adopts inquisitorial approach, it will take the lead in conducting the cross-examination of the witness.”

- (iii) ***Bernstein, Handbook of Arbitration and Dispute Resolution Practice fourth edn., 2003, pp. 303-304, paras 2-798 and 2-799:***

“[...] Some time is wasted in most cross-examinations. Much time is wasted in some cross examinations. Cross-examination is at the heart of the English adversary system and some waste of time, owing to the imperfections of advocates or witnesses, or both, is unavoidable. But efficiently and properly done and confined to the material issues, it is probably the best procedure for arriving at the truth.”

95. Given that the Petitioner (and also the Respondent) failed to exercise its right to conduct cross-examination of the respective witnesses, despite serious controversy on factual issues surrounding NCC, sub-contracting etc., the scope for interfering with factual findings rendered in the impugned award, is all the more narrower.



Claim No.12

96. Claim no.12 pertains to revision of rates beyond the contract for reasons of delay, not attributable to the respondent/claimant. The petitioner has objected to the findings rendered by the Arbitral Tribunal qua this claim. Essentially, the petitioner has urged that revision of rates results in re-writing of the contract, especially since the contract between the parties contains a price escalation clause. With regard to this claim, the Arbitral Tribunal has *inter-alia* held as under:-

“156. In so far as CLAIM-12 is concerned the claim is for revision of rates beyond the contract period for reasons of delays not attributable to the Claimant as observed by us in the earlier paras while delays were discussed and we have held that a delay of 63 months is not attributable to the Claimant for the reasons recorded there under. The EOT1 & EOT2 given by the Respondent are under Clause-58 of the contract where the Respondent is empowered to give the extension only for the delays that are not attributable to the Claimant. The contention of the Respondent that the no claim certificate NCC1 given by the Claimant at the time for according the EOT1 by the Respondent has been held us in the earlier paras that such NCC will not disentitle the Claimant for the reasons recorded therein regarding the Extension of Time EOT2 also the No Claim Certificate NCC2 is held by us that it will not disentitle the Claimant to his claims. Further, we see from Clause-36(c) at page-288 that “price adjustment shall apply only for work carried out within the stipulated time or Extension granted by the corporation and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor”. Hence, we find from this Clause conjointly read with Clause-58 of the contract when the extension of time is given under Clause-58 for reasons not attributable to the Contractor withholding of or freezing the indices is against the provision of the contract and the Respondent has committed a breach in freezing the indices while according EOT2.

157. The rates quoted by the Claimant are admittedly for completion of the work within 45 months which could not be completed for several reasons and delays not attributable to the Claimant as held by us earlier for non-fulfilment of several obligations, under the contract by the Respondent. In a contract of this nature when the obligation of the



Respondent are not fulfilled and because of this if the contract is extended, even though at the request of the Claimant, admittedly for reasons not attributable to the Claimant, to hold that the rates quoted at the time of bidding should remain valid for any length of time is an unfair proposition and is not acceptable under the facts and circumstances of this case where the extension is much more than the original period of 45 months contract for reasons not attributable to the Claimant.

158. *The Claimant relies on 2006 (12) SCALE 654: Satyapalan Vs State of Kerala, where the Apex court under para-26 held that "ORDINARILY, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and M/s. Alopiparshad's case (supra) and also Patel Engg.'s case (supra). As was pointed out by Mr. Dave, the said principle was recognized by this court in P.M. Paul's (supra), where a reference was made to a retired Judge, this court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation Clause. The said principle was reiterated by this court in T.P. George's case (supra)". We rely on this judgment. Further, in the case of AIR 1991 KAR 96: State of Karnataka Vs R. N. Shetty & Co., relied by the Claimant, we find that the Arbitrators in that case had considered revised rates in respect of quantities of work that were executed beyond the contract period and awarded revised rates in respect of the works executed after the contract period rates which are just and fair towards payment of compensation to the Contractor which the Court upheld. Further in that case the arbitrators have added the price escalation that has taken place there after by revising the base date to the date of the revised rates being made applicable after the contract period. In challenging to the award the court held "in the circumstances it cannot be stated that the arbitrators had committed any illegality" by approving the principle adopted by the Arbitrator in revising the rates after the contract period and also adding the price variation by shifting the Base date for price variation as just and fair. Even in the present case before us the CLAIM-12 is for a just and fair compensation based on the cost of materials, labour, etc., worked out on an accepted principle of rate analysis considering the input rates that were prevalent on 31.05.2006 which is the end of contract period in respect of works carried out*



beyond the original contract period. We have examined these rates and the various invoices, rate analysis based on which the rates for the BOQ items executed beyond 31.05.2006 are shown at pages-686 to 689 of C-1-3 for the 95 items. We find that the rate analysis for these items submitted in pages-724 to 801 of C-1-3 is in conformity with the accepted principles of deriving the rate and also as per CWC guidelines. However, we find that in the rate analysis of each item an additional amount of 9.77% of the prime cost is added towards the interest burden on account of Bank Guarantee cost, margin money cost, insurance cost, etc., and we find that this addition is not allowable accordingly we award the rates for these items by deleting appropriately this 9.77% [....]

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161. These rates are based on the price indices prevailing as on 31.05.2006 and the execution of the works will be subject to the price variations. As the price variation Clause in the contract considers the base index and prices as on 30 days prior to the date of submission of the bid allowing the same base date for price variation Clause would not be appropriate as the relevant base dates would be only those prevailing on 31.05.2006 for the revised rates awarded. Hence, we find that the same price variation formula would apply even in the extended period with the necessary change in the base date for the revised rates beyond the contract period for reasons explained above. The base prices and indices shall be as on 31.05.2006 and not prior to the date of submission of bid i.e., 01.01.2002. We consider that this as reasonable just and appropriate in view of the facts and circumstances of the case and accordingly award the rates as given in the table above for the items executed beyond the contract period with the base price and indices for price adjustment as per Clause-36 being considered as 31.05.2006.

162. In respect of other minor items not listed above for which the rate analysis has not been submitted but only an increase of 100% is asked above the BOQ rates we reject this claim as it is not substantiated and allow only the BOQ rates with price adjustment as per Clause-36 with the BOQ rate and base indices as on 01.01.2002.

163. The Supreme Court in Satyapalan's case (2007) 13 SCC 43, relying upon the earlier decision in P.M. Paul's case and P.P. George case accepted the contention of the Contractor that even in the absence of any price escalation Clause and with a specific prohibition to the contrary the Contractor would be entitled to claim on account of escalation costs and it would not be beyond the jurisdiction of the Arbitrators to allow such case. On the materials on record, we are of the considered opinion that the Contractor was unable to fulfill his obligation under the contract and could not execute the project in time and did incur extra cost and as such the Arbitral Tribunal was entitled



to compensate the Contractor for the extra costs incurred as a result of failure of the Employer to live up to its obligation. We have no doubt in our mind that the Claimant was prevented by unforeseen circumstances from completing the work within the stipulated period and this delay could have been prevented by THDC and therefore the Tribunal was duty bound to find out the reasonable basis for compensation in respect of the CLAIM-12 and that is what we have arrived at in preceding paragraphs.”

97. It can be seen, that the award passed by the Arbitral Tribunal qua this claim is pursuant to its findings with regard to the various delays that were occasioned and which have found to be not attributable to the respondent/claimant. The tribunal goes on to rely upon ***K.N. Sathyapalan (Supra)*** to hold that the rates quoted at the time of bidding could not remain valid indefinitely particularly in the light of the delay that was occasioned for reasons not attributable to the respondent/claimant. Accordingly, the tribunal proceeds to pronounce upon the rate analysis based on which the revised rates were claimed by the respondent/claimant and found, as a matter of fact, that the said rates were in conformity with the accepted principles of deriving the rate and also as per the CWC guidelines. The tribunal found that in the rate analysis of each item, an additional amount of 9.77% had been added towards the interest burden on account of bank guarantee costs etc. which was found to be unjustified and the tribunal accordingly deleted the same and accordingly worked out the revised rates which were made out from the actual contract executed and beyond the contract period ending 31.05.2006.

98. Further, relying upon the judgment in the case of ***State of Karnataka Vs. R.N. Shetty & Co***⁵⁰, the Arbitral Tribunal proceeds to direct that since

⁵⁰ AIR 1991 KAR 96



the rates that have been derived were based on price analysis prevailing as on 31.05.2006, the same shall be subject to price variation in accordance with the price variation formula contained in the contract. Further, for the purpose of applying for the price variation formula, the tribunal directed that the relevant base dates would be those prevailing on 31.05.2006. Evidently, this was directed by the tribunal since the rates derived by the Arbitral Tribunal were based on the price index prevailing on 31.05.2006 and as such for the purpose of price variation beyond 31.05.2006, it was untenable to retain the base date as originally envisaged.

99. In the case of *NHAI vs. Elsamex-TWS-SNC-JV*⁵¹; a Division Bench of this court considered claims virtually on the same lines as the present claim. The claims that fell for consideration therein were as under:-

- “a) Claim No.1 : Financial compensation due to delay in execution in terms of revised rates for the quantities executed after contract period in respect of the BOQ items (amount claimed-Rs.84,33,52,141/-)*
b) Claim No.2 : Payment of adjustment of the above revised rates from the base date adopted for derivation to the billed date as applicable under Sub-Clause 70.1 of Contract.”

100. In the background of the Arbitral Tribunal having awarded amounts under the above mentioned claims, a Single Judge of this court dismissed the petition under Section 34 of the Act. In that context, the Division Bench observed as under:-

“31. The learned Single judge has further rightly held, while making a distinction between Claim No. 1 and Claim No. 2 in paras 11 and 12 of the impugned order, as below : -

“11. The above submissions cover Claim No. 2 (payment of price adjustment) as well as Claim No. 1 concerning payment of revised rates for the quantities executed after the contract period. A distinction has to be drawn between these two claims. Claim No. 2

⁵¹2014 SCC Online Del 4475



for price adjustment is referable to sub-Clause 70.1 of the Conditions of Particular Application ('COPA') of the contract with the base date as applicable for the revised rate in respect of items of work executed beyond the contract period. Claim No. 1 was for revision of BOQ rates since the original contract period of 33 months was extended by 47 months due to delays not attributable to the respondent. In dealing with Claim No. 1 the AT has referred to a decision of the Supreme Court in K.N. Sathyapalan v. State of Kerala 2006 Scale 12654 where it was held that even in the absence of clause for escalation of rates, the Contractor should be compensated for the losses suffered by him on account of increase in cost during the extended period."

12. This Court is unable to find any error in the above reasoning of the AT. The claim for price adjustment with reference to sub-Clause 70.1 COPA was indeed a distinct claim and that was quantified using the base date as on 4th February 2004 in respect of the work done and covered by the IPCs 19 to 32."

32. The case law reported as K.N. Sathyapalan v. State of Kerala : (2007) 13 SCC 43 as considered by the Arbitral Tribunal and also the Learned Single Judge explains that the arbitral tribunal was correct in allowing the above said claims. It clearly states that in absence of escalation clause, the contractor should be compensated for the losses suffered by him on account of increase in cost during the extended period. The relevant portion is as quoted below:

"32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopiparshad case and also Patel Engg. Case. As was pointed out by Mr. Dave, the said principle was recognized by this court in P.M. Pail where a reference was made to a retired judge of this court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned judge, this court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this court in T.P. George case."



33. The above principle was reiterated in *State of Karnataka v. R.N. Shetty and Co., Engineers and Contractors* : AIR 1991 Karnataka 96. The relevant portion is reproduced below:

“17. The effect of extension of time on damages claimed by the contractors has been exhaustively considered by several authors in several standard text books and a few of them are Halsbury's Law of England 4th edition, para 1281, Keating on Building Contracts at para 161 and Hudson on Building and Engineering Contracts, 10th edition at page 647, which view is reiterated in Emden on Building Contracts. All these text books are to the effect that when the time fixed by the contract ceases to be applicable on account of some act or default of the employer, a provision is generally inserted to extend the time. When the power to extend time has been properly exercised, the contractor will be liable to pay liquidated damages. In a true sense and on an examination of the matter in its proper perspective, what comes up for consideration in such a case is the determination of the question as to what are the rates applicable as a result of the extension of time granted and not awarding of damages as such. The enhancement in the rates itself will constitute the damages. When the contract itself does not bar such rates being given and the arbitrators in the case on hand on a consideration of the material on record, have arrived at the rate at which the contractors will be entitled for payment of extension of the contract time because of certain lapse on the part of the appellants and that rate being just and proper one, it cannot be said that the arbitrators have committed any error apparent on the face of the record calling for interference at the hands of this Court.”

34. In view of the above, the learned Single Judge has not committed any error in upholding the award and also the methodology adopted by the arbitral tribunal in awarding the said claims. The learned Single Judge has rightly upheld that the rate analysis submitted by the respondent was based on CWC and MORTH guidelines which are followed for all National Highways work. In paras 143 to 147 of the impugned Award, the Arbitral Tribunal has explained the manner in which it has only partially accepted the rate analysis submitted by the respondent. In para 149, the Arbitral Tribunal has recomputed the rates for each bill, item wise.”

101. The above observations of Division Bench would apply in the context of Claim No.12. Incidentally, the Arbitral Tribunal in the present case, has also relied upon *State of Karnataka vs. R.N. Shetty & Co., Engineers and*



*Contractors*⁵², the same judgment relied upon by the Division Bench in *NHAI Vs. Elsamex-TWS-SNC (JV) (Supra)*.

102. The findings/conclusions drawn by the Arbitral Tribunal are based on a detailed consideration of the rate analysis submitted for each item and premised on the factual finding/s regarding the delay that was occasioned, for reasons not attributable to the respondent.

103. There is nothing ex-facie perverse about the aforesaid findings and it cannot be said that the view taken by the Arbitral Tribunal is not even a possible view so as to warrant interference under Section 34 of the Arbitration and Conciliation Act, 1996.

104. Since the award is evidently based on the consideration of the relevant rate analysis for each item of work, it is futile for the petitioner to contend that revision of rates is precluded on account of payment made by the petitioner to the vendors of M/s RSJV or to take the plea that no loss was incurred on account of increased cost of execution. It is impermissible in these proceedings to embark upon a minute factual re-appraisal or to embark upon a merit based review of the rate analysis of each BOQ item, as undertaken by the Arbitral Tribunal. The same is clearly beyond the ambit of Section 34 of Arbitration & Conciliation Act., 1996.

Challenge qua the award on other claims

105. The petitioner has also challenged the award *qua* other claims adjudicated by the Arbitral Tribunal particularly claim no.8 (towards idling of plant and machinery) and claim no.10 (towards the losses suffered due to overheads).

⁵²AIR 1991 Kar 96



106. Perusal of the award *qua* claim no.8 reveals that the same is based on the details and particulars of the plant and machinery deployed as referred to in the correspondence/documents placed on record before the Arbitral Tribunal. The award specifically notes as under:-

“130. We have heard the parties based on the documents and the submissions made. We find that the Claimant has produced the documents, details and the invoices in ANNEXURE-198&ANNEXURE-199 with regard to CLAIM-8 & CUIM-9. We have examined the delays on various counts as claimed by the Claimant and after detail examination of all the delays considering the over lapping delays we have held in earlier paras that there is a net delay of 63 months not attributable to the Claimant which includes the period from the beginning of contract from September-2002 to December-2007. All other delays are only overlapping delays. The claim made under CLAIM-8 by the Claimant is for the delay of idling of plant & machinery for two stretches viz;

(A) 26.177 months in the original 45 months period of the contract. Hence, the Respondent's contention that the entire contract period is taken as idling is not acceptable. This 26.177 months idling period is determined based on the weighted average period by considering the product of the sum of the cost of plant & machinery and the deployment months divided by the sum of the cost of plant & machinery to obtain weighted average period of machinery. This is worked out from the fundamentals and hence the weighted average delay for the equipment deployed for 26.177 months up to May-2006 is reasonable. The loss claimed is for this 26.177 months idling which amounts to Rs. 19.47Cr as per ANNEXURE-198 at page 587 of C-1-3 which we consider as reasonable.

(B) 11.012 months in the period beyond the original contract period from June-2006 to May-2007 i.e., for a period of 12 months beyond the original contract period and adopting the same procedure as in (A) above the claim is Rs. 8.495Cr. As the period from September-2002 to December-2007 amounting to 63 months is a delay that is not attributable to the Claimant, the losses suffered due to the idling of plant and machinery from June-2006 to May-2007 falls within this period. However, it is not justifiable that 11 months of idling of plant & machinery would occur in the period of 12 months from June-2006 to May-2007. However, considering the proportion of the delay with respect to the total period as in (A) above i.e., 26 months to 45 months is 58% of the total period is the idling period under (A) above the



period of delay in the 12 months accounts to 6.35 months as against 11 months. Correspondingly the claim amount works out to $8.495 \times (6.35/11.012) = \text{Rs. } 4.89\text{Cr.}$

131. *Thus the total amount allowable under CLAIM-8 is Rs. $(19.47 + 4.89) = \text{Rs. } 24.36\text{Cr.}$*

132. *In the light of the above circumstances and the reasons recorded therein we award an amount of Rs. 24.36Cr towards this CLAIM-8 as against the claim of Rs. 27,96,41,427/-."*

107. The law is well settled that the Arbitral Tribunal is the sole judge of the quality and quantity of evidence. The merit based review, as sought by the Petitioner, has been frowned upon by the Supreme Court in a catena of cases.

108. The same also applies to the challenge *qua* other claims including claim no.10 (towards losses suffered due to delays on overhead and profits), claim no.1 (towards losses suffered due to non handing over of land on right bank of village Pendaras); claim no.2 (towards extra rates and payments for working in hazardous condition outside the project area in respect of right and left bank excavation and slope stabilization), Claim no. 4 (towards Payment for construction of diversion structure upstream of dyke), claim no. 5 (towards payment for the construction of approach (haul road) for the development of B-1 and B-2 quarries), claim no. 6 (towards payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works), claim no.10(A) (towards losses suffered due to overheads), claim no.13(A) (towards extra costs/losses suffered on mobilization Advance towards interest and BG's, claim no.13(B) (towards extra costs/losses suffered in performance BG due to 40 months delay) and claim no. 13(D) (towards losses suffered due to the interest levy on risk and cost advance). It



is noticed that for adjudicating each of the aforesaid claims, the impugned award takes note of the respective contentions of the parties and then proceeds to adjudicate claims based on the documents/material on record. Reasons have also been given in the impugned award in support of the conclusion in respect of each claim.

109. For instance, for the purpose of claim no.10(A) (**towards losses suffered due to overheads**), the tribunal proceeded to apply a formula taking into account the provisions of overheads in the contractual rates, the delay that was occasioned, the total contract sum involved and the contract period, and on that basis have computed the proportionate loss of overheads taking into account the delay that was occasioned. It cannot be said that the view taken by the Arbitral Tribunal is not even a possible view so as to warrant interference under Section 34 of the Arbitration and Conciliation Act, 1996.

110. Likewise, while adjudicating claim no.1, the tribunal, after arriving at a factual conclusion with regard to the manner in which the excavation work was carried out and recourse to control blasting was necessitated, proceeds to work out the amount payable to the claimant for the same taking into account the nearest possible rate for the corresponding item in the contract. Again, it cannot be said that either the conclusion or the methodology adopted in the impugned award is not plausible.

111. For claim no.4, the tribunal has interpreted the relevant specification regarding the “backfill” in respect of the upstream dyke and has come to the conclusion that the item of dyke envisages rock muck corresponding to item at serial no. 13.4 of the schedule of quantities towards the cofferdam works and it cannot be treated as “backfill”. In the circumstances, the tribunal



applied the relevant rate applicable to “rock muck” and worked out the entitlement of the respondent.

112. As regards claim no.5, the tribunal found that the respondent/claimant had to construct a haul road which was greater in length viz-a-viz that envisaged at the time of entering into contract. After working out the total additional length of the road constructed by the respondent, the tribunal works out the entitlement of the respondent based on the applicable excavation rates and the cost of maintenance. Again, no fault can be found with the approach of the Arbitral Tribunal.

113. Likewise, for the purpose of claim no.6, the tribunal works out the extra cost incurred by the respondent for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works.

114. For the purpose of claim no.13(A), the tribunal takes note of the relevant contract provisions with regard to mobilization advance and reached the conclusion that in a situation the work is extended beyond the contract period for no fault of the contractor, and on account of breaches on the part of the employer, and the mobilization advance would not be recovered within the contract period, the respondent could not be burdened with the interest on mobilization advance for the period of delay beyond the original contract period. Again, it cannot be said that the view of the Arbitral Tribunal is not even a possible view to take in the facts and circumstances of the case.

115. Likewise, the tribunal found merit in the claim towards the cost of extension of bank guarantee during the extended period of contract for which amounts were awarded to the respondent vide claim no.13(B).

116. Similarly, for the purpose of Claim 13(D), while considering claim



towards losses suffered due to interest levy on risk and cost advance, the tribunal while allowing the said claim has taken note of the fact that the risk and cost advance was given towards materials. It is observed that the payment for the same was given directly by the petitioner to the vendors and that the claimant/respondent was never in receipt of the said amount. Further, it was held that the provision under the contract for 16% interest was only towards mobilization advance, while the material advance as per clause 9(ii) & clause 9(iii) of the contract was meant to be on an interest free basis. The tribunal went on to state that as per the minutes of the meeting held on 17.03.2007 no mention of any such interest was made. As a result, it was held that the interest of 16% was never agreed upon by both parties, nor was it ever communicated to the respondent/claimant. It was noticed that till 09.07.2007, by which time 84 invoices had already been paid, no issue of interest had ever been raised. The tribunal went on to conclude, based upon a reading of the correspondence/ minutes of meetings etc. that the risk and cost advance was intended to be interest free advance. It cannot be said that the view taken by the Arbitral Tribunal is not a possible view to take in the present facts and circumstances.

117. In the circumstances, this court concludes that the challenge of the petitioner to the aforesaid claims is beyond the scope of Section 34 of the Arbitration and Conciliation Act, 1996.

Award in respect of counter claims

118. Likewise, while adjudicating the counter claims qua the advances made to the respondent under the risk and cost account, the tribunal, based on the correspondence /material on record, concludes as under:-

“207.[....] (i) this risk and cost advance is given towards the materials



(ii) the payment of the cost towards the materials is made directly by the Respondent to the respective vendors, (iii) the Claimant is not in receipt of this amount, (iv) the provision under the contract @16% is only towards mobilization advance, (v) while the material advance is an interest free advance as per the contract, (vi) this is a special arrangement towards procuring materials as per the minutes of the meeting held on 17.03.2007 where no mention of interest is made, (vii) the interest of 16% is not agreed in the minutes of meeting held on 17.03.2007, (viii) nor this is communicated to the Claimant and agreed, (ix) till 09.07.2007 by which time nearly 84 invoices have been paid and no issue of interest has been raised while making payment towards the cost, (x) When the issue of interest was raised by the Respondent on 09.07.2007 the Claimant has protested against this interest as the interest at 16% was never discussed or highlighted in the meeting nor the minutes of the meeting was communicated to the Claimant, (xi) as per the contract Clause-9(ii) & 9(iii) advances towards equipment or secured advance towards materials is interest free, (xii) the board of the Respondent in its resolution dated 12.03.2008 resolved that in case of any additional cash deficit arising during construction, essential material inputs such as steel etc., shall be provided by THDC and issued to Contractor, as reproduced earlier, with a commitment of the Contractor for its adjustment from all his dues/claims, what-so-ever, (xiii) even the Board resolution which is subsequent to the letter dated 09.07.2007 also does not specify any interest to be charged on this special advance. In the light of the above we are of the opinion that the risk and cost advance which is a special advance provided towards materials and machinery is to be interest free advance and cannot be considered on the same footing as mobilization advance in so far as interest is concerned and further this risk and cost advance is to be recovered on the same criteria as that of the secured advance for materials as per Clause-9(iii). While awarding the interest on revised rates under CLAIM-12 we have allowed for the interest to be calculated after a setoff is made towards the amount of risk & cost advance.

208. In view of the above the interest of Rs. 5.13Cr does not deserve to be considered and therefore it is rejected.

209. In the light of the above we allow the principal amount of Rs. 28.06Cr advanced by the Respondent towards risk and cost account as asset off against the claims, awarded to the Claimant. ”

119. The petitioner seeks to re-agitate the issue of the interest on the risk and cost advance and essentially calls upon this Court to arrive at a different



view as regards thereto. Again, this cannot be permitted in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

Interest

120. As regards the issue of interest, the petitioner has relied upon the following clauses in the contract to contend that the contract between the parties specifically barred award of pendente lite /pre-award interest:-

“Clause 50.0 Interest ON MONEY DUE TO THE CONTRACTOR

No omission on the part of the Engineer-in-charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears, nor upon any balance which may on the final settlement of his account, be due to him.

Clause 51.0 NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC.

No claim for interest or damage will be entertained or be payable by the Corporation in respect of any amount or balances which may be lying with the Corporation owing to any dispute, difference or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer-in-Charge in making intermediate or final payments or in any other respect what-so-ever.

121. It is contended on behalf of the petitioner that as per the law laid down by the Supreme Court of India in the case of ***Secretary Irrigation Department, Government of Orissa & Ors. Vs. G C. Roy***⁵³, it is beyond the jurisdiction of an Arbitral Tribunal to award the pendente lite interest in derogation of the agreement between the parties. The petitioner has further relied upon the following judgments that the power to award interest by an Arbitral Tribunal is subject to an agreement between the parties.

⁵³ (1992) 1 SCC 508



- i. *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation*⁵⁴,
- ii. *Jaiprakash Associates Ltd. v. Tehri Hydro Development Corporation Ltd. (THDC)*⁵⁵,
- iii. *Reliance Cellulose Products Ltd. v. Oil & Natural Gas Products Limited*.⁵⁶

122. It has been further contended that reliance placed by the Arbitral Tribunal on the judgment of Supreme Court of India in the case of *State of U.P. Vs. Harish Chandra and Co*⁵⁷, is misplaced for the following reasons:-

- “i. *Harish Chandra*, (1999) 1 SCC 63 was a judgment which was delivered in the context of the Arbitration Act, 1940. The 1940 Act contained no provision akin to Section 31 (7)(a) of the 1996 Act. Section 29 of the 1940 Act does not make the power to grant interest to award subject to the agreement between the parties.
- ii. The award in the instant case has been passed under the 1996 Act. Section 31(7)(a) of the 1996 Act makes the power to grant interest subject to an agreement between the parties. There is thus a clear difference in the statutory scheme of the 1940 and 1996 Acts.
- iii. The law prevailing as on the date of the passing of the award was *Sayed Ahmed*, (2009) 12 SCC 26 and it was therefore binding on the Tribunal as on the date of passing of the award.
- iv. The 1996 Act is very different from the 1940 Act and therefore the provisions of the 1996 Act have to be interpreted and construed independently of the 1940 Act.
- v. In the case of *Harish Chandra* as well, the Hon'ble Supreme Court holds that in case there is an agreement between the parties barring the payment of interest, the same cannot be granted, however, relying upon clause 1.9 as available in the said agreement, the Hon'ble Court interpreted the said clause to not to bar payment of interest to the contractor in all circumstances.
- vi. In *Harish Chandra*, there is no clause akin to Clause 50.”

123. It has also been contended that identical clauses as also in the judgments of *Harish Chandra (supra)* and *Sayed Ahmed (Supra)*, were

⁵⁴ (2022) 9 SCC 286

⁵⁵ (2019) 17 SCC 786

⁵⁶ (2018) 9 SCC 266

⁵⁷ (1999) 1 SCC 63



also the subject matter of consideration by the Supreme Court in ***Jai Prakash Associates Ltd. Vs. THDC***⁵⁸, wherein, the Supreme Court has held that the said clause 50 and 51 impose a bar on the power of the tribunal to grant pendente lite interest. In this regard, reference is made to the following portion of the above-mentioned judgment:-

“17. In this whole conspectus and keeping in mind, in particular, that present case is regulated by the 1996 Act, we have to decide the issue at hand. At this stage itself, it may be mentioned that in case Clauses 50 and 51 of GCC put a bar on the Arbitral Tribunal to award interest, the Arbitral Tribunal did not have any jurisdiction to do so. As pointed out above, right from the stage of arbitration proceedings till the High Court, these clauses are interpreted to hold that they put such a bar on the Arbitral Tribunal. Even the majority award of the Arbitral Tribunal recognised this. Notwithstanding the same, it awarded the interest by relying upon Port of Calcutta case [Port of Calcutta v. Engineers-De-Space-Age, (1996) 1 SCC 516] . The High Court, both Single Bench as well as Division Bench, rightly noted that the aforesaid judgment was under the 1940 Act and the legal position in this behalf have taken a paradigm shift which position is clarified in Sayeed Ahmed & Co. case [Sayeed Ahmed & Co. v. State of U.P., (2009) 12 SCC 26 : (2009) 4 SCC (Civ) 629] . This rationale given by the High Court is in tune with the legal position which stands crystallised by catena of judgments as noted above.”

124. Reference has also been made to the judgment of this court in the case of ***National Thermal Power Corporation Vs. Patel Engineering Ltd***⁵⁹, in which this Court has observed as under:-

“70. The controversy relating to interest revolves around the interpretation of Clauses 77 and 78 of the COPA. The said clauses are set out below:

77. INTEREST ON MONEY DUE TO THE CONTRACTOR

Omission on the part of the Engineer to pay the amount due upon measurement or otherwise shall neither vitiate or make the contract void, nor shall the Contractor be entitled to interest upon any

⁵⁸ (2019) 17 SCC 786

⁵⁹ 2021 SCC Online Del 4827



guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.

78. NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC.

No claim for interest or damage will be entertained or be payable by the Employer in respect of any amount or which may be lying with the Employer owing to any dispute, difference between the parties or in respect of any delay or omission on the part of the Engineer in making interim or final payments or in any other respect whatsoever.”

71. The aforesaid clauses are similarly worded as Clauses 50 and 51 of the GCC and were subject matter of interpretation by the Division Bench of this Court in Jai Prakash Associates - Del. In that case, the Arbitral Tribunal had allowed the appellants' claim for reimbursement on account of fluctuation in foreign exchange and had also awarded interest at the rate of 10% per annum.

72. Tehri Hydro Development Corporation (THDC) had filed a petition under Section 34 of the A&C Act impugning the arbitral award. The same was considered by a Coordinate Bench of this Court and the court had accepted THDC's challenge and had set aside the arbitral award to the extent it awarded interest in favour of the appellant (Tehri Hydro Development Corporation India Ltd.v. Jai Prakash Associates Ltd., (2011) 184 DLT 468). Jai Prakash Associates Ltd. had preferred an appeal against the said decision to the Division Bench of this Court. The main issue urged before the Court was with regard to the applicability of the decision of the Supreme Court in State of U.P. v. Harish Chandra & Co. (supra) as it was, inter alia, contended on behalf of the appellant that the clause interpreted by the Supreme Court in State of U.P. v. Harish Chandra & Co. (supra) was somewhat similar to Clause 51 of GCC in that case (which is identically worded as Clause 78 of the COPA in this case). ”

73. The Division Bench of this Court did not accept the said contention and held that the clause considered by the Court in State of U.P. v. Harish Chandra & Co. (supra) prohibited grant of interest in respect of money or balance lying with the government owing to any dispute or difference and thus, it applied only to specified type of amount. The Court rejected the contentions that there was any conflict between the decisions of the Supreme Court in State of U.P. v. Harish Chandra & Co. (supra) and Jai Prakash Associate Ltd. -I.



77. The controversy considered by the Division Bench of this Court *Jai Prakash Associates - Del* and by the Supreme Court *Jai Prakash Associates Ltd-II* was centered around the interpretation of the last six words of Cause 51 of the GCC- “or in any other respect whatsoever”. Clause 51 of the GCC in those cases is identically worded as Clause 78 of the COPA in this case and Clause 1.2.14 of GCC considered in *Jai Prakash Associate Ltd. -I*. It was contended by the appellant (in *Jai Prakash Associates - Del* and *Jai Prakash Associates Ltd.-II*) that the said words must take colour from the preceding category namely monies lying with employer owing to dispute in respect of delay or omission on the part of the engineer in making interim or final payments. As is apparent from the above quoted extract of the decision in *Jai Prakash Associates - Del*, the Division Bench of this Court had rejected the contention that the rule of *ejusdemgeneris* would apply as the court found that the necessary conditions for application of the said rule were lacking. The said view was affirmed by the Supreme Court in *Jai Prakash Associates Ltd-II* (*supra*). The Court referred to its earlier decision in *BHEL v. Globe Hi-Fabs Ltd.*, (2015) 5 SCC 718, wherein similar clauses had been interpreted and it was held that the same cannot be held *ejusdemgeneris* along with the words ‘earnest money’ and ‘security deposit’ “[...]”

78. It is also relevant to refer to the decision of the Supreme Court in *Reliance Cellulose Products Ltd. v. Oil and Natural Gas Corporation Ltd.*, (2018) 9 SCC 266. In that case, the Court had considered a clause which provided that the payment would be made within thirty days of the receipt of stores and inspection at site “but any delay in payment will not make the Commission liable for any interest.” The Court found that the said clause was much narrower than the clauses prohibiting interest considered by the Supreme Court in *Ambica Construction v. Union of India*, (2017) 14 SCC 323 and *Jai Prakash Associate Ltd. -I* (*supra*). According to the Supreme Court, the clauses in that case were distinguishable as the clause in *Jai Prakash Associate Ltd.-I* was much wider. Paragraph 25 of the said decision is relevant and is set out below:

“25. In the present case, Clause 16 of the General Conditions of Contract only speaks of any delay in payment not making ONGC liable for interest. There is nothing in this clause which refers even obliquely to the arbitrator's power to grant interest. This Court finds that the aforesaid clause is narrower than the clause considered by the three-Judge Bench in *Second Ambica Construction* case which states that no interest will be payable on amounts payable to the contractor under the contract. Clause 16 in the present case confines itself only to delay in payment and not to any other amounts payable



to the contractor under the contract. Also, unlike the clause in Tehri Hydro Development Corporation Ltd., Clause 16 does not contain language which is so wide in nature that it would interdict an arbitrator from granting pendente lite interest. It will be remembered that the clause in Tehri Hydro Development Corpn. Ltd. spoke of no claim for interest being entertained or payable in respect of any money which may be lying with the Government owing to disputes, difference or misunderstanding between the parties and not merely in respect of delay or omission; Further, the clause in Tehri Hydro Development Corpn. Ltd. goes much further and makes it clear that no claim for interest is payable "in any other respect whatsoever". It is, thus, clear that Clause 16 cannot possibly interdict the payment of pendente lite interest on the facts of the present case."

79. *In view of the aforesaid decisions of the Supreme Court (Reliance Cellulose Products Ltd. v. Oil and Natural Gas Corporation Ltd. (supra) and Jai Prakash Associates Ltd-II), the question whether Clause 78 of the COPA has to be interpreted in wide terms, is no longer res integra. In view of the authoritative decision of the Supreme Court in this regard, the impugned award to the extent that it holds that Clause 78 of COPA is not applicable is difficult to sustain.*

80. *It also follows that the earlier decisions of this court in NTPC v. Patel Engineering Ltd. : OMP (COMM) No. 743/2013, decided on 21.02.2015; NTPC v. Patel Engineering Ltd. : FAO(OS) No. 219/2015, decided on 24.04.2015; and NTPC v. Patel Engineering Ltd. : OMP (COMM) No. 156/2018 (supra), which were rendered prior to the Supreme Court's decision in Jai Prakash Associates Ltd.-II, would no longer hold the field in so far as the question of pre-award interest is concerned.*

81. *Considering the above, the pre-award interest granted by the Arbitral Tribunal to PEL cannot be sustained. The same is prohibited by the terms of the Contract and thus the impugned award to that extent is liable to be set aside."*

125. A perusal of the judgment in the case of ***Jai Prakash Associates Ltd. Vs. Tehri Hydro Development Corporation (supra)***, reveals that the Supreme Court considered the very same clause which falls for consideration in the present case. In the context of *pari-materia* contractual provision/s, the Supreme Court concluded as under:-



“17. In this whole conspectus and keeping in mind, in particular, that present case is regulated by the 1996 Act, we have to decide the issue at hand. At this stage itself, it may be mentioned that in case Clauses 50 and 51 of GCC put a bar on the Arbitral Tribunal to award interest, the Arbitral Tribunal did not have any jurisdiction to do so. As pointed out above, right from the stage of arbitration proceedings till the High Court, these clauses are interpreted to hold that they put such a bar on the Arbitral Tribunal. Even the majority award of the Arbitral Tribunal recognised this. Notwithstanding the same, it awarded the interest by relying upon Port of Calcutta case [Port of Calcutta v. Engineers-De-Space-Age, (1996) 1 SCC 516] . The High Court, both Single Bench as well as Division Bench, rightly noted that the aforesaid judgment was under the 1940 Act and the legal position in this behalf have taken a paradigm shift which position is clarified in Sayeed Ahmed & Co. v. State of U.P., (2009) 12 SCC 26 : (2009) 4 SCC (Civ) 629] . This rationale given by the High Court is in tune with the legal position which stands crystallised by catena of judgments as noted above.

18. Another reason given by the High Court is equally convincing. Clauses 50 and 51 of GCC are pari materia with Clauses 1.2.14 and 1.2.15 of GCC in THDC case [Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd., (2012) 12 SCC 10 : (2013) 2 SCC (Civ) 122] . Those clauses have been interpreted by holding that no interest is payable on claim for delayed payment due to the contractor. Same construction adopted in respect of these clauses, which, in fact, is a case between the same parties, is without any blemish.”

126. In the light thereof, it is apparent that clause 50 and 51 (*supra*) constitutes a clear bar on an award of pendente-lite interest. In the circumstances, the Arbitral Tribunal clearly appears to have acted in gross violation of the settled legal position in granting pendente lite/pre-award interest to the respondent. In particular, the conclusion of the Arbitral Tribunal that “*having examined the two clauses, namely, Clause 50 and 51, we are of the considered opinion that those clauses cannot be interpreted to hold that the parties agreed that Arbitral tribunal is debarred of any power to grant interest*” is in direct contravention of the aforesaid pronouncement



by the Supreme Court in the case of **Jai Prakash Associates Ltd. (supra)**.

127. In the circumstances, the award to the extent it grants pendente lite/pre-award interest is liable to be set aside.

128. As far as the grant of post award interest at the rate of 18% is concerned, Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 (as it then stood) provided as under :-

“31. Form and contents of arbitral award. –

(7) (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen percentum per annum from the date of the award to the date of payment.”

129. Given that the petitioner was charging 16% interest on the mobilization advance availed by the respondent [as noticed in paragraph 192 of the award] and considering that even in respect of the counter-claims, the impugned awards grants post award interest at the same rate, and also taking into account the scope of the present proceedings, this court is not inclined to interfere with the grant of post award interest. This Court is also mindful of the observations of the Supreme Court in **Bharat Heavy Electricals Limited Vs. Global Hi-Fabs Limited**⁶⁰ as under:-

“17. On the facts of the case we agree with the submission of Mr Gourab Banerji that interest is only payable from the date of the award. However, we do not agree with him that the interest should be reduced because of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 which clearly states that rate of interest will be 18% p.a. Shri Gourab Banerji submitted that in some decisions, a lesser interest has been awarded. We cannot see how a lesser interest can be awarded when the statute specifically provides that the rate of interest will be 18% p.a. and the arbitrator has accepted and awarded this rate of interest. Judges cannot legislate or amend the law by judicial decisions.

⁶⁰ (2015) 5 SCC 718



They have to maintain judicial discipline and give their decisions in accordance with law. Hence the lesser rate of interest cannot be awarded because that would be amending the law which is not within the powers of the judiciary.”

130. In a recent judgement in the case of **Indian Oil Corpn. Ltd. Vs. U.B. Engineering Ltd. & Anr.**⁶¹, referring to the judgement in **Bharat Heavy Electricals Limited (Supra)**, it was held by the Supreme Court as under:-

“8. Now so far as the next question/issue whether the High Court was justified in reducing the interest from 18% to 9% is concerned, the same is also unsustainable in view of the statutory provision contained in Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) which was applicable pre-amendment Act, 2015. As per Section 31(7)(b) of the Act, the sum directed to be paid by the arbitral award shall, unless the award otherwise directs, carry interest @ 18% p.a. from the date of the award to the date of payment.

9. In the present case, learned Arbitrator specifically awarded the interest @ 18% p.a. from the date of award to the date of payment. Therefore, the same was absolutely in consonance with the statutory provision applicable.

10. Even the said issue is also now not res integra in view of the decision of this Court in the case of Bharat Heavy Electricals Limited vs. Globe Hi-fabs Limited (2015) 5 SCC 718. An identical question came to be considered in the aforesaid decision and it is held that the award shall contain the interest @ 18% p.a. from the date of award till the actual payment. In para 17, it is observed and held as under:-

“17. On the facts of the case we agree with the submission of Mr. Gourab Banerji that interest is only payable from the date of the award. However, we do not agree with him that the interest should be reduced because of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 which clearly states that rate of interest will be 18% p.a. Shri Gourab Banerji submitted that in some decisions, a lesser interest has been awarded. We cannot see how a lesser interest can be awarded when the statute specifically provides that the rate of interest will be 18% p.a. and the arbitrator has accepted and awarded this rate of interest. Judges cannot legislate or amend

⁶¹ Civil Appeal Nos. 2921-2922 of 2022



the law by judicial decisions. They have to maintain judicial discipline and give their decisions in accordance with law. Hence the lesser rate of interest cannot be awarded because that would be amending the law which is not within the powers of the judiciary”.

11. In that view of the matter even the impugned judgment and order passed by the High Court reducing the interest @ 9% from that of 18% p.a. from the date of award till the actual payment is also unsustainable and the same deserves to be quashed and set aside.

12. In view of the above and for the reasons stated above, the present appeals succeed. The impugned judgment and order holding that the appellant-Claimant shall not be entitled to the interest on interest of Rs.2,27,58,137.08 from the date of award till realization is hereby quashed and set aside. The impugned judgment and order passed by the High Court reducing the interest from 18% to 9% from the date of award till realization is also hereby quashed and set aside. The award passed by the learned Arbitrator is hereby restored.”

Conclusion:-

131. In the circumstances, the present petition is partly allowed; the impugned award is set aside to the extent it grants pendente lite/pre-award interest to the respondent. No ground is found to interfere with the rest of the impugned award.

132. The present petition is accordingly disposed of in the above terms.

JULY 12, 2023
Rohit & Cl

SACHIN DATTA, J