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

Date of Decision: 03.05.2023

(17)+ O.M.P. (COMM) 110/2018 & I.A. 3350/2018

M/S. INDIAN OIL CORPORATION LTD Petitioner
Through: Mr.I.S.Alag, Sr. Adv. with
Ms.Prachi Vashisht, Adv.
versus

M/S. IL&FS PARADIP REFINERIES WATER LTD.
..... Respondent
Through: Mr.T.Srinivasa Murthy,
Mr.Piyush Joshi, Ms.Sumiti
Yadava, Ms.S.Umarwadia,
Ms.Trushita Shrivastava, Advs.

(18)+ O.M.P. (COMM) 111/2018 & I.A. 3441/2018

IL&FS PARADIP REFINERY WATER LIMITED ...Petitioner
Through: Mr.T.Srinivasa Murthy,
Mr.Piyush Joshi, Ms.Sumiti
Yadava, Ms.S.Umarwadia,
Ms.Trushita Shrivastava, Advs.
versus

INDIAN OIL CORPORATION LIMITED Respondent
Through: Mr.I.S.Alag, Sr. Adv. with
Ms.Prachi Vashisht, Adv.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

1. These petitions have been filed challenging the Arbitral Award dated 08.10.2017 passed by the learned Arbitral Tribunal adjudicating the disputes that had arisen between the parties in relation to the

Build-Own-Operate-Transfer basis Agreement dated 29.01.2010 (in short 'BOOT Agreement') entered into between the parties for the purpose of providing raw water facility at Indian Oil Corporation Ltd. (hereinafter referred to as the 'petitioner'). In terms of the BOOT Agreement, IL&FS Paradip Refineries Water Ltd. (hereinafter referred to as the 'respondent') was to construct/develop 5 facilities, that is, (a) water intake structure; (b) laying of about 93 KM water pipeline; (c) construction of water reservoir at the refinery; (d) water treatment plant; and, (e) three treated water sumps.

2. The respondent, before the learned Arbitral Tribunal, had raised the following claims:

"Claim 1 : Refund of deductions made by Respondent in respect of payment made to OFDC totaling Rs.25,53,22,969/-.

Claim 2 : Balance payment for the extra work done in respect of laying of Cuttack City pipe line amounting to Rs.32,62,62,322/-.

Claim 3 : Interest Claim for the additional finances arranged for carrying out extra work for laying the Cuttack City pipe line amounting to Rs.12,47,62,438/-.

Claim 4 : Claim for interest occasioned due to extended construction period amounting to Rs.143,83,00,000/-

Claim 5 : Various claims for variations involving additional costs amounting to Rs.15,75,00,000/-

Claims 6 & 7: Interest on the amounts claimed @ 18% from the date the payment became due and future interest @ 18% from the date of Award till the date of payment have been prayed for.

Claim No.8 is for awarding costs of arbitration.

3. I must herein note that Claim no.5 reproduced hereinabove had various sub-heads to the said claim.

4. The petitioner in turn had raised the following counter claims:

“Counter-Claim No.1: For a sum of Rs.3,93,38,124/- towards excess amount paid/ being paid by the Respondent-Corporation on account of de-scoping of work;

Counter-claim No.2: And/or in the alternative for refund of excess amount @ Rs.1,31,127/- per month being paid by the Respondent to the Claimant from June 2014 till the date of passing of the Award, with further directions that subsequent thereto, the monthly EMI to be paid by the Respondent to the Claimant shall be reduced by an amount of Rs.1,31,127-08 ps per month.

Counter-claim No.3: Interest @ 18% on the excess amount(s) paid from June 2004 till the passing of Award, to be calculated from the date of payment till date of refund.”

5. By the Impugned Award, the learned Arbitral Tribunal rendered the following Award on the above claims and counter-claims.

“14.2 In the light of the foregoing discussion, the findings on **Issue Nos.1 & 4** covering Claim Nos.1 to 5 are set out below. As regards interest, which is the subject matter of Claim Nos. 6 and 7, the directions given are set out in the next paragraph.

Issue No.1

Claim No.1: Allowed. The Claimant is entitled to receive from the Respondent a sum of Rs.25.62 Crores with simple interest @ 12% from 01.09.2014 up to the date of the Award and till the date of payment subject to the direction given in the award as to the rate of interest after the expiry of four (4) months from the date of award.

Claim No.2: Partly allowed. The Claimant is entitled to receive from the Respondent a sum of Rs. 7.93 Crores in respect of the de-scoped work It shall carry simple interest @ 12% from 01.01.2016 onwards till the date of payment subject to the direction given in the award as to the rate of Interest after the expiry of four (4) months from the date of award.

Claim No.3: Partly allowed. The Claimant is entitled to receive from the Respondent a sum of Rs.7.49 Crores with simple Interest of 12% per annum from 01.01.2016 onwards the date of payment subject to the direction given in the award as to the rate of interest after the expiry of four (4) months from the date of award.

Claim No.4: Rejected. No relief is granted.

Claim No.5 (ii): Partly allowed. The Claimant is entitled to receive from the Respondent a sum of Rs.5.40 Crores with simple Interest @ 12% per annum from the date of commercial operation that is to say from 01.06.2014 onwards till the date of payment subject to the direction given in the award as to the rate of interest after the expiry of four (4) months from the date of award.

Claim No.5 (iv): Allowed. A sum of Rs.1,32,93,000/- shall be refunded to the Claimant with simple interest 12% per annum from 15.06.2016 till the date of payment subject to the direction given in the award as to the rate of Interest after the expiry of four (4) months from the date of award.

Claim No.5 (v) Rejected. No relief is granted.

Claim No.5 (vi): Rejected. No Relief is granted

Claim No. 5(viii): The Claimant is entitled to receive from the Respondent a sum of Rs. 11 Lakh with interest @ 12% per annum from 01.12.2011 till the date of payment subject to the direction given in the award as to the rate of interest after the expiry of four (4) months from the date of award.

Claim Nos.6&7: Interest at the rate and from the period indicated in respect of the amounts awarded against Claim Nos.1, 2, 3 & 5 is awarded with an added direction that in case the amount awarded together with specified interest is not paid within four (4) months from the date of Award, the outstanding amount shall thereafter carry simple interest @ 15% per annum.”

Issue No.2: Counter-claim allowed to the extent of Rs. 2 crores with interest at 12% per annum from 01.10.2016 till the date of this Award.

Issue No.3 (Claim No.8): In the circumstances of the case, we consider it just and proper to direct that the parties shall bear their own costs. Accordingly, the issue is answered by holding that no costs are payable.”

CLAIM NO.1:

6. The petitioner challenges the Impugned Arbitral Award on Claim no.1 of the respondent, which was for the refund of the amount of Rs.25.53 crores deducted for the payment made by the petitioner to the Orissa Forest Development Corporation (in short, ‘OFDC’) for obtaining the No Objection Certificate (hereinafter referred to as ‘NOC’) from OFDC.

7. The learned senior counsel for the petitioner, placing reliance on Clause 1.3.1 of the Request for Proposal-Bid Document Volume-1 (hereinafter referred to as the “RFP”), submits that the requisite permissions from the Government of Orissa had been obtained by the petitioner. Clause 1.3.1 of the RFP states that any further mandatory permission, amendment, or statutory permission clearance, if required, shall be obtained by the respondent in conjunction with the petitioner. He submits that, therefore, the responsibility of obtaining any further permission was of the respondent. He submits that Clause 1.3.5 of the

Leave Permission had been obtained from various Departments of the Odisha Government by the petitioner, had further provided that there may be detour of the pipeline route in some section due to widening/expansion of road undertaken by the State Government/NHAI. It further provided that necessary approval based on methodology on the execution, engineering details, and junction details shall also be required from the concerned authorities during the execution of the work. He submits that, therefore, in terms of Clause 1.3.1 read with Clause 1.3.5 of the RFP, it was the responsibility of the respondent to obtain necessary NOC.

8. Further, drawing the attention of the Court to Clause 29.6 of the 'Request for Proposal-Bid Document, Volume-IV', he submits that the respondent was responsible for preparation of the Permit Packages and to obtain all necessary permissions from the concerned authorities for installation of pipelines and also bear the cost of the same. It further provided that it would be the responsibility of the respondent to ensure that the Permit Packages are prepared in accordance with the project schedule and submitted to the petitioner. The respondent was to remain responsible for the content of Permits and for ensuring that the submission thereof is made in a timely manner. He submits that therefore, it was the responsibility of the respondent to obtain necessary permission from the OFDC and to bear the cost of the same.

9. On the other hand, the learned counsel for the respondent submits that the petitioner had obtained way-leave permission in February, 1997. The Engineer-in-Chief (Water Resources) had also given the permission by its communication dated 03.01.1998. However, by a communication dated 01.01.2010, the office of the Engineer-in-Chief (Civil), Govt. of Orissa, informed the petitioner that

pipeline in relation to the road line alignment earlier finalized and the petitioner was required to send a fresh proposal. The said approval was obtained on behalf of the petitioner by the respondent, incurring an additional cost, of which reimbursement was sought by the respondent. He submits that as it was the responsibility of the petitioner to obtain necessary permit from the Government of Orissa and it was the representation of the petitioner that such permission had been duly obtained prior to the Agreement, it remained the responsibility of the petitioner to which the respondent could not be saddled with under Clause 1.3.5.

10. I have considered the submissions made by the learned counsels for the parties.

11. The learned Arbitral Tribunal, on appreciating various Clauses of RFP, including Clause 1.3.1 and 29.6, has observed as under:-

"2.5A In RFP Vol.1, at clause 1.3.1, the permissions available with IOCL were referred to. Four items were referred to; (1) in-principle approval from water resources Department from Govt of Orissa for drawing water from Mahanadi river (2) in-principle way leave permission from the Department of Water Resources and Works Department, Govt of Orissa for laying of pipeline for major portion of the pipeline route (3) in-principle approval from Department of Railways for crossing railway line and (4) sanction of 7 Acres of land by District Office, Cuttack. Para 5 of clause 1.3.1 then says. "All further mandatory permissions, amendments and statutory clearances, if required, shall be obtained by BOOT contractor in conjunction with IOCL". Para 5 of cl 1.3.1 was relied upon by the Respondent to contend that it was the duty of the Claimant to obtain subsequent permissions and statutory clearances. We do not think that the Respondent can draw support from para 5 of cl 1.3.1. Far from supporting the Respondent, it fortifies the

contention of the Claimant. The in-principle way leave permission granted originally by the Govt of Orissa in the year 1997 was revoked in view of the change in ground conditions and IOCL was asked to seek fresh approval and moreover, the NOC from OFDC was also insisted upon for granting a fresh in-principle approval. We have already referred to the letters/orders issued by the concerned authorities of Govt of Orissa. In fact, even by the date of entering into the Agreement, the in-principle way leave permission was withdrawn by the State Government. In all fairness, it should have been brought to the notice of the Claimant. However, it is not the case of the Claimant that the failure to intimate withdrawal of permission at that stage has made material difference for the Claimant. The permission was revoked between the date of Letter of Acceptance and the formal execution of Agreement. Leaving that aspect aside, the Arbitral Tribunal is of the considered view that para 5 of Clause 1.3.1 which speaks of **further mandatory permissions** does not come to the aid of the Respondent. The in-principle way leave permission from the Govt of Odisha is the basic and initial permission required to go ahead with the works. When the in-principle way leave permission itself has been withdrawn, it goes to the root of the matter. The expression 'all further mandatory permissions' has reference to the permissions other than those specified in the earlier four causes of 1.3.1. Further, a reference to Art 2.2 of the Conditions of Contract makes the position further clear. Art 2.2 bears the heading "Conditions precedent for IOCL". The in-principle way leave permission from Govt of Orissa for laying water pipeline along S.H.No. 12 and from Department of Water Resources for laying water pipeline from the intake site is one of the condition precedents. Art 2.3 requires each party to make all reasonable endeavours at its respective cost and expense to comply in full with the conditions precedent relating to and prior to financial closure. Therefore, in terms of Article 2.2 (iii) r/w Clause 2.3 of the Conditions of Contract (at page 164 of Vol 1),

obtaining the in-principle way leave permission is the obligation of the Respondent and the same has to be obtained 'at its respective cost and expense'. Obtaining permission for way leave was part of the in-principle approval which the Respondent was required to obtain. The in-principle approval was a permit/ permission based on which, the Claimant could have started the work. It is nobody's case that the payment to OFDC was not towards obtaining such permission/approval. It is therefore the responsibility of Respondent to pay the amount to OFDC because it has to bear the cost in terms of clause 5.1.c (page 177 of Vol)."

(Emphasis supplied)

12. The learned Arbitral Tribunal has held that the NOC from OFDC is a pre-requisite for obtaining the Way-Leave permission from the Government of Orissa and is an integral part of the basic Way-Leave Permission, which was to be obtained by the petitioner. Due to subsequent events, fresh permission had to be obtained from the Government of Orissa, which entailed a condition to secure a fresh NOC from OFDC. It held that Clause 29.6 of the RFP presupposes that the basic permit required for laying the pipeline had already been obtained by the petitioner. The subsequent part of Clause 29.6 deals with other permissions that may be still required. The learned Arbitral Tribunal on a detailed consideration of all the submissions of the petitioner finally held as under:-

“2.23 In the light of the above discussion, the Arbitral Tribunal records the finding that the payment made to OFDC for obtaining the NOC which was made a pre-requisite by the State Government for grant of way-leave permission was the obligation of Respondent itself and the Respondent paid the same in discharge of such obligation. The same cannot be recovered from the Claimant by way of deduction from EMIs or otherwise.

Further, the recovery of interest on the amount of Rs.18.62 Crores paid to OFDC is, in the view of the Tribunal, wholly unjustified. The entire amount claimed by the Claimant has to be refunded to the Claimant with interest from the date of last deduction which was in August 2014. That is to say, the Claimant is entitled to receive from the Respondent a sum of Rs.25.62 Crores with simple interest 12% from 01.09.2014 up to the date of the Award and till the date of payment subject to the direction given in the award as to the rate of interest after the expiry of four (4) months from the date of award.”

13. In ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)***, (2019) 15 SCC 131, the Supreme Court has clarified the limited extent of jurisdiction that this Court exercises in interfering with an Arbitral Award. It has *inter alia* held that the interpretation of the contractual term is the domain of the Arbitral Tribunal. The Court would not interfere with an Arbitral Award merely because it finds the interpretation placed by the Arbitral Tribunal to be incorrect. Difference has to be appreciated between a case where the Arbitral Tribunal acts contrary to the contractual terms and a case where the Arbitral Tribunal interprets the contractual terms, though in a manner which may be found by the Court to be such with which it may not concur. Mere error in interpretation of the Agreement will not entitle the Court to interfere with an Arbitral Award, unless such interpretation is found to be completely perverse. Applying the above test to the facts of the present case, the learned Arbitral Tribunal has interpreted various terms of the Agreement to find that it was the duty of the petitioner to obtain the necessary permissions, including permission from OFDC. Merely because the said permission was

relieved of its obligation and, therefore, had to bear the expenses for obtaining the fresh NOC. I find no fault in the said interpretation to the terms of the Agreement and as applied to the facts of the case. In any case, the same cannot give a ground to the petitioner to challenge the finding of the learned Arbitral Tribunal on this account.

14. I, therefore, reject the challenge of the petitioner on Claim No.1.

CLAIM NO.2

15. The next challenge of the petitioner to the Impugned Arbitral Award is on Claim No.2 of the respondent, which was of the payment for extra work done in respect of laying of Cuttack City pipeline, amounting to Rs.32,62,62,322/-. The challenge to the Impugned Arbitral Award is to the extent that it awards the claim of the respondent to the de-scoped work.

16. At the outset it is to be noted that the petitioner had stated that the de-scoped work was of an amount of Rs.13.62 crores whereas, the respondent claimed that it was only to the tune of Rs.2.47 crores. The learned Arbitral Tribunal has granted the claim of the respondent holding as under:-

“3.38 In the light of the above analysis, what follows is that the relief shall be granted to the extent of de-scoped work. The claimed amount attributable to this item is Rs.13.62 Crores less admitted/paid amount of Rs. 2.47 Crores (i.e. Rs.11.15 Crores), but relief cannot be given for the entirety of the said amount. The dispute in regard to the value of de-scoped work turns mainly on the rate to be applied. This fact is evident from the Minutes dated 12.02.2015 (Ex.C.59) and other correspondence. The Claimant as well as the Respondent have only made notional estimate. It is not demonstrated by the Claimant by any process of reasoning or by reference to any material that the rate sought to be applied by the Claimant is more appropriate than the rate suggested by the

Respondent. The Auditor's certificate in a matter like this is not of much assistance to us as the auditors went by the workings given by the Claimant based on the rate adopted by it. That is why, the auditor has chosen guarded language while certifying the cost of de-scoped work at Rs.2.47 Crores. The relevant extract of the auditor's certificate is found at para 3.11 supra. Therefore, we have to strike a balance and award on approximate basis a part of differential/ disputed amount i.e., Rs.11.15 Crores. The Tribunal considers it reasonable to reduce roughly 1/3rd of the claimed amount and therefore awards a sum of Rs. 7.93 Crores in respect of the de-scoped work. It shall carry interest @ 12% from 01.01.2016 onwards till the date of payment and if the said amount is not paid within four months from the date of award, it shall carry interest @ 15% p.a. thereafter the date 01.01.2016 has been chosen because the Respondent has released the payment in December 2015 to the extent of Rs.60.31 Crores by taking the value of de-scoped work at Rs.13.61 Crores."

(Emphasis supplied)

17. The learned senior counsel for the petitioner submits that the learned Arbitral Tribunal has erred in awarding the above claim in favour of the respondent on two major accounts:-

- a) That in view of the settlement arrived at between the parties and as recorded in the Minutes of Meeting dated 12.02.2015, the respondent was estopped from making any further challenge for de-scoped work;
- b) Without prejudice to the above and in any case, the learned Arbitral Tribunal has awarded the claim of the respondent on *ad-hoc* basis without there being any evidence led by the respondent for the said claim.

18. The learned senior counsel for the petitioner submits that

19. Pursuant to the various meetings and discussions held between the

parties on the amount payable to the respondent by the petitioner for the additional work between Ch.0 to 7 Km, the de-scoping work, as also for reconciliation of the pipes, the same resulted in an amicable settlement as recorded in the Minutes of Meeting dated 12.02.2015. All three of the above disputes were amicably settled between the parties, whereafter the petitioner even proceeded to make the payment to the respondent based on such settlement. He submits that the respondent accepted the said payment without any protest, as is evident from its letter dated 10.11.2015. The respondent challenged the said settlement claiming that it was obtained by exercise of coercion on the respondent. The learned Arbitral Tribunal, however, rejected such challenge in the Impugned Arbitral Award. The learned Arbitral Tribunal, however, arbitrarily held that the settlement was only with respect to the additional work and not for the de-scoped work. He submits that this is totally contrary to a bare reading of the Minutes of Meeting dated 12.02.2015, which required no further interpretation. He submits that once the parties had settled their disputes on the de-scoped work, it was not open to the learned Arbitral Tribunal to award the same in favour of the respondent, more so on *ad-hoc* basis as has been done.

19. On the other hand, the learned counsel for the respondent submits that the learned Arbitral Tribunal has rightly found that there was no settlement on the de-scoped work. He submits that, in any case, this would be an issue of interpretation of a document, on which the learned Arbitral Tribunal is the final authority. He submits that this Court will not interfere with an Arbitral Award merely because it does not find favour with the interpretation placed on the document by the learned Arbitral Tribunal. In support he places reliance on the

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judgment of the Supreme Court in ***UHL Power Company Limited v. State of Himachal Pradesh***, (2022) 4 SCC 116.

20. On the issue of the amount being awarded on *ad-hoc* basis, the learned counsel for the respondent, placing reliance on the judgments of the Supreme Court in ***A.T. Brij Paul Singh And Ors. v. State Of Gujarat***, (1984) 4 SCC 59; and ***Mohd. Salamatullah and Others v. Government of Andhra Pradesh***, (1977) 3 SCC 590, and of this Court in ***Good Value Engineers v. M.M.S. Nanda, Sole Arbitrator and Anr.***, 2009 SCC OnLine Del 3969; ***Delhi Development Authority v. Anand and Associates***, ILR (2008) II Delhi 627; and ***Kalyan Chandra Goyal v. Delhi Development Authority and another***, 1999 SCC OnLine Del 142, submits that the learned Arbitrator can award amounts on rough and ready figures; the learned Arbitrator is not to enter into the minutest of details while awarding such amount; and the learned Arbitrator can always resort to honest guess work for awarding an amount in favour of one of the parties.

21. I have considered the submissions made by the learned counsels for the parties.

22. On the issue of whether the respondent was *estopped* from raising its claim for de-scoped work, and whether there was a full and final settlement of the said issue between the parties and as recorded in the Minutes of Meeting dated 12.02.2015, it would be necessary to first quote the said Minutes of Meeting dated 12.02.2015 on this aspect. The relevant extract from the Minutes of Meeting is as under:-

“2. Descoping work between Ch. 0 to 7 Km
During the meeting on dtd 10th/11th Dec’
14, detailed estimation/ calculation was
shown to M/s. IPRWL and it was
explained that total deduction should be
Rs. 21.88Cr. (excluding tax& duties)
with return of unused pipe. M/s. IPRWL

did not agree and expressed various rate considered for de-scoping by IOCL is on higher side.

M/s. IPRWL has expressed that they had to incur higher cost towards encasing of 1300 mm/dia pipeline below railway line w.r.t. pushing cost which is not claimed in the additional work and hence cost of pushing of only 1100mm Dia pipe to be deducted instead of both. After review of the matter, above point was found reasonable and hence IOCL has agreed to consider cost of pushing of 1100mm Dia pipe out of two below the railway line for which an amount of Rs. 36.22 Lakh would be reduced from de-scoping work

M/s. IPRWL further informed that cost deduction for cleaning flushing and cleaning of debris item under item under miscellaneous work for parallel line which was in original alignment is unjustified. They informed that cleaning, flushing job could have been carried out during the flushing of whole system at a time without any extra cost. Similarly no extra cost would have been involved for debris removal as two pipe lines were to be put in the same trench. Total resources mobilization for cleaning of debris for the area would have been the same. They requested not to add these items in the deduction part. After review of the matter, above point was found reasonable and hence IOCL has agreed to reduce the amount of Rs. 7,21,884/- on account of Cleaning, flushing and cleaning of debris item under miscellaneous work from descoping work.

During the detailed deliberation in the meeting on 12th Feb' 15, M/s. IPRWL informed that the rate considered for recovery of morrum & sand against SI No. 1 of relaying of road is on higher side. It was also informed that the rate paid to the contractor for similar works in other locations is much less as morrum & sand was readily available in nearby areas. Therefore CPWD SOR

item no. 16.74.1 may be considered for morrum. M/s. IPRWL mentioned that during making payment for sand filling item ICOL has considered average rate paid to the various sub-contractors of M/s. IPRWL which is coming to Rs. 267/m³. But during deduction, IOCL has considered the rate of same sand filing item as Rs. 749.30/m³. They requested IOCL to consider same rate for both payment to IPRWL and deduction as well. IOCL reviewed the matter as above and it was felt that point raised by M/s. IPRWL is logical. The item rate for morrum as requested by M/s. IPRWL is nearly similar item and could be considered. Hence it was agreed by IOCL to consider the rate of Rs155.85/m² for 225mm thick in place of Rs. 904.42/m³ for morrum and Rs267/m³ for sand filling.”

23. A reading of the above extracts would clearly show that various aspects of the de-scoping work were discussed between the parties. The initial part states that the petitioner was claiming a total deduction of Rs.21.88 crores, which was not agreed to by the respondent. The parties thereafter discussed various objections of the respondent and an amicable settlement was arrived at between the parties on these aspects. The same is also evident from the subsequent portion of the Minutes of Meeting, which is reproduced hereinunder:-

“After making all modification, following values are extorted from the detailed calculation sheet which is enclosed here with.

- A. Total value against additional Cost : 81,16,16,376/-*
- B. Deduction for de-scoping work :Rs. 13,61,55,655/-.*
- C. Deduction for unadjusted quantity of pipe on reconciliation :Rs. 7,15,24,852/-.*
- D. Net amount payable to M/s. IPRWL (A-B-C) :Rs. 60,39,35,869/-.*

Moreover, M/s. IPRWL has to return 3535 mtr of 1100 dia pipe and 230 mtr 1300 dia pipe. If any, shortfall during handover/takeover, then same quantity will be recovered @ 29519.13 mtr separately.

All above, calculations were made without considering any tax component. However, IPRWL will submit further documents to IOCL for considering tax implication their additional cost before finalizing additional EMI.

XXXXX

Summary sheet for extra work in Cuttack city area as per the negotiation on 12.02.2015

Sl. No.	Brief Particulars of the work Undertaken	Order of magnitude cost indicated while taking in-principle approval for extra job	Amount claimed by M/s IPRWL	Amount worked out by IOCL	Revised amount mutually agreed	Remark
1.	Additional work	75,00,00,000	91,46,02,093	81,16,16,376	81,16,16,76	Total Amt is inclusive of piling work, laying work & addl. Piling work
2.	Deduction for descoping work	11,68,00,000	0	21,88,13,477	13,61,55,655	
3.	Net amount of additional work	₹63.32 Cr (Say 63.50 Cr.)	91,46,02,093	59,28,02,899	67,54,60,721	
4.	Deduction for unadjusted quantity of pipe on re-conciliation				7,15,24,852	
	Total (excluding tax)	63,32,00,000	91,46,02,093	59,28,02,899	60,39,35,869	**

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***M/s IPRWL has to return 3535 mtr of 1100 dia pipe and 230 mtr 1300 dia pipe. if any shortfall during handover/takeover, then that much quantity will be recovered @29519.13/mtr.”*

24. The above extracts of the Minutes of Meeting dated 12.02.2015 leaves no iota of doubt that the parties have agreed and settled on their *inter se* disputes on the issue of the effect of the de-scoping of work.

25. The facts that the parties had arrived at a settlement is also evident from the subsequent conduct of the parties in form of the petitioner and the respondent entering upon further negotiations on the amount of EMI on which the settled amount has to be paid by the petitioner to the respondent. As the parties could not settle on the amount of the EMI, the petitioner vide its communication dated 07.11.2015, informed the respondent that it would make the payment of the settled amount in lump sum. This was duly acknowledged by the respondent vide its letter dated 10.11.2015, without raising any protest on the amount that the petitioner stated to be payable in terms of the settlement between the parties. The letter dated 10.11.2015 of the respondent is reproduced hereinbelow:-

“We thank you for confirmation on approval of one time down payment of Rs.60.39 Cr towards the 'Additional cost' due to change in alignment for laying pipeline in Cuttack city.

As regards hand over of pipe, we would like to draw your kind attention to a discussion at Intake Site in May 2015, during visit of ED (I/C), ED (CG) and your goodselves, wherein on a specific query, we were advised not to shift the pipes to Paradip as IOCL would dispose/resell the pipes in as is where is basis at the existing locations near Intake premises and transport of same to Paradip is not called for.

Under the circumstances, we request you to release the sanctioned amount on the Additional costs which is pending for quite some time now. However, the pipe details and documents sought by you shall be sent in a couple of days' time for formalizing the handover of pipes."

26. The learned Arbitral Tribunal, in the Impugned Arbitral Award has rejected the submission of the petitioner of the Minutes of Meeting dated 12.02.2015, recording the final settlement of claims between the parties, observing as under:-

"3.23 First, the Minutes dated 06.01.2015 (Ex.C.58, page 655) needs to be discussed because this is one of the documents on which the Respondent places reliance at para 5.8 of written submissions. However, the Minutes do not show that the Claimant accepted the amount of Rs.81.16 Crores. The Minutes say "Since there are disagreements on either side on the cost for the above as communicated during the earlier meeting, IPRWL represented that the matter should be settled under clause 4.5.4 of Conditions of Contract." Regarding the "Summary Sheet for extra work in Cuttack City area as per the negotiations on 12.02.2015" (ExR.122 at page 180 of Respondent's additional documents) on which the Respondent places reliance, there is a column with the heading Revised amount mutually agreed. In that, the cost of additional work was shown as Rs.81.16 crores and deductions for de-scoping work were shown as Rs.13.62 crores. From the balance amount of Rs.67.55 crores, Rs.7.15 crores was deducted for unadjusted quantity of pipes. The nett amount payable was arrived at Rs. 60,39,35,869/-. This summary sheet at page 80 has not been signed by any party. Further, in the Index to Respondent's documents, it is described as "Working Sheet for Cuttack City job provided to the Claimant for its reference with MOM dated 12.02.2015" (vide Ex.C.59). At page 200 of Ex.R.122, we find various options for consideration. There is nothing in

that document evidencing full and final settlement. The contention of Respondent that the amount of Rs.60.39 Crores has been arrived at after joint calculations and mutual consensus cannot be accepted based on the said document.”

27. At the same time, the learned Arbitral Tribunal has held that the respondent accepted the amount reflected in the same document for extra work as a final settlement, by observing as under:-

“3.26 Thereafter, on consideration of the points raised by the Claimant, certain amounts were reduced from the value of de-scoping work i.e. Rs.36.22 lakhs and Rs.7.21 lakhs. The Item rate for 'morrums' as requested by the Claimant was also agreed to by the Respondent. Then, the item regarding reconciliation of pipes was discussed. At the end of deliberations, the calculations in annexure-I of deduction sheet were modified and the amounts arrived at were shown at page 663. It was noted that the calculations were made without considering the tax component. (The Claimant in fact agreed in its letter dated 03.04.2015 for processing the claims without tax component, as noted in Ex.R-18 at page 241-of Respondent's documents). At the same time, it is clear that the Claimant accepted the modified calculation of cost at Rs.81.16 Crores. Further, the letter dated 26.03.2015 (Ex.C.60) sent by Claimant shows that the figure of Rs.81.16 crores was taken as the basis for calculation of interest ("considering the exclusions by IOCL). It was also mentioned in the letter "Please note that deduction/ de-scoping cost shall not be removed from the actual cost while calculating the interest costs. Thus, the only issue raised was regarding the interest. It is therefore clear that the figure Rs.81.16 Crores offered by the Respondent towards the cost of addl. Work was agreed to by the Claimant whereas, there was no such agreement in regard to the de-scoping cost or the interest on account of additional financing.

3.27 The same cannot be said of the de-scoped work. There was explicit declaration at the meeting that the Claimant did not agree to the estimate of the value of de-scoped work. According to the Claimant, the rates adopted were on higher side. So, the dispute persisted concerning this item. What has been agreed to at the meeting held on 12.02.2015 as regards the quantum of additional cost shall be treated as accord and satisfaction of the clam. In other words, the Claimant had unequivocally accepted the 'offer of the Respondent on this point at issue, even if it was done reluctantly.

xxxxxx

3.29 It is relevant to note that either in the Minutes of the meeting dated 12.02.2015 (Ex.C.59) or in the subsequent correspondence referred to above, any indication was given that the addl. Cost of Rs.81.16 Crores was received or agreed to be received with a qualification or without prejudice. The Claimant cannot therefore resile from the agreement reached in so far as the cost of work of Rs.81.16 Crores is concerned. The Claimant unequivocally accepted the offer of the Respondent and waived its right to claim any further amount on this account.

3.30 As regards de-scoping, it cannot be said that the quantum proposed by the Respondent was accepted by the Claimant and this item also formed part of package of settlement. The Claimant's letter dated 10.11.2015 (Ex.C.64) by which, the Claimant thanked the Respondent for approval of one-time down payment of Rs.60.39 Crores and requesting for early release of the sanctioned amount cannot be stretched too far. It must be read in the light of what has been agreed to or not agreed to earlier on 12.02.2015. conveying thanks for the sanction of Rs.60 Crores down payment does not amount to the admission on the part of the Claimant that nothing more was due and that the Claimant was fully satisfied with the amount offered. Too many words cannot be read into the said letter and the letter cannot be legitimately treated as relinquishment of its claim in regard to de-scoping work or the

interest. The offer in this regard was not accepted earlier by the Claimant and the decision has not materially changed with the simple thanks-giving letter for sanction of certain amount and seeking early release of atleast the said amount.”

28. The above findings of the learned Arbitral Tribunal are completely contrary to the bare reading of the document itself. The document clearly records that from a position of disagreement, the parties proceeded to an agreement and settlement of their disputes, wherein the issues raised by the respondent on claim of descoping of work were duly considered by the petitioner and wherever found justified, were accepted. The parties then arrived at a final figure to be paid by the petitioner to the respondent. There was no dispute raised by the respondent on this final figure even in its letter dated 10.11.2015.

29. Though there can be no doubt on the proposition that the jurisdiction conferred on this Court under Section 34 of the Act is extremely narrow and does not allow for re-appreciation of evidence, at the same time, where the learned Arbitral Tribunal completely mis-reads a document in an unreasonable manner which is perverse, the Court cannot shut its eyes and allow the same to pass. It is only where two views are possible that the Court would accede to the view taken by the learned Arbitral Tribunal. However, in a situation where the document is capable of only one interpretation, the Court would not let the Award stand based on a completely perverse interpretation of that document by the learned Arbitral Tribunal. The hands-off approach of the Court also has certain limits, and the Court is not supposed to act merely as a certifying authority of the Arbitral Award.

30. In addition to the above, and as noted, the learned Arbitral Tribunal upon reaching the conclusion that the Minutes of Meeting dated 12.02.2015 did not reflect the final settlement of the dispute on de-scoping of the work between the parties, further adopted a strange formula of finding the difference between the amount claimed by the petitioner and the one offered by the respondent and awarding 2/3rd of the same in favour of the respondent.

31. While there again can be no dispute on the proposition that the Arbitral Tribunal has to be vested with jurisdiction to resort to honest guess work, after duly considering the various facts, evidence and circumstances, in awarding damages or certain nature of claims of the parties, in my view, the method adopted by the learned Arbitral Tribunal in the present case cannot be justified on these principles. The learned Arbitral Tribunal has first found the difference between the claim of the petitioner and the offer made by the respondent. These are found to be made and offered on notional estimates. The learned Arbitral Tribunal, in fact, rejects the reliance of the respondent on its Auditors certificate in support of its offer. The learned Arbitral Tribunal thereafter awards 2/3rd of such difference of respective offers, in favour of the respondent. Why only the difference was taken in the amount, and why 2/3rd of such difference was awarded, to the respondent has not been explained by the learned Arbitral Tribunal, even with reference to some evidence or some other facts on record.

32. Section 28(2) of the Act reads as under:-

“Section 28. Rules applicable to substance of dispute.

xxxxx

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.”

33. The learned Arbitral Tribunal can, therefore, decide *ex aequo et bono* only if the parties have expressly authorized the Arbitral Tribunal to do the same. In the present case, there is no such authorization placed on record by either of the parties and none has either been pleaded. The learned Arbitral Tribunal, therefore, has to decide on basis of the evidence. In such decision, some leeway and discretion has to be vested with the learned Arbitral Tribunal, however, the same would not mean that the learned Arbitral Tribunal can decide on a claim *de hors* any evidence on record and on its *ipse dixit*.

34. In **A.T. Brij Paul Singh** (supra), the Supreme Court took account of the fact that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court had accepted 15% of the value of the balance of the works contract to be reasonable measure of damages for loss of profit. In **Mohd. Salamatullah** (supra) the Court found that though there was evidence in form of deposition of PW1 before the learned Trial Court, the learned Trial Court reduced the claim under the head of damages for breach of contract to 15% for the reasons given. The High Court, even in absence of a specific ground challenging the quantum of damages, reduced the same. The Supreme Court held that the High Court had erred in reducing the amount of damages awarded. In **Good Value Engineers** (supra), the Court held that “once certain material was available before him (*sic the Arbitrator*), to resort to making an honest guesstimate to award a particular rate for jungle clearance once the area of jungle clearance exceeded well beyond the contractual area which was prescribed

justified. In *Delhi Development Authority v. Anand and Associates* (supra) the Arbitrator therein had awarded the claim towards increase in the labour charges and increase in the price of material based on “whatever is available on record”. In such circumstance, the Court held that interference with the Arbitral Award was not warranted. In *Kalyan Chandra Goyal* (supra) the Arbitrator had awarded the amount giving “strong and cogent reasons” and “on scrutiny on the analysis”. The same cannot be said in the present case. Therefore, none of the cited judgments lend support to the submissions of the respondent in support of the impugned Award on Claim no. 2.

35. For the reasons stated hereinabove, the Impugned Award on Claim No.2 cannot be sustained and is set aside.

CLAIM NO.3:

36. The next challenge of the petitioner is to Claim no.3, which was claim of interest of Rs.12.48 crores for arranging additional finances required for undertaking extra work.

37. It was the case of the respondent that for carrying out the additional work, the respondent had to incur additional costs, including in form of interest payable on funding of this extra cost. The learned Arbitral Tribunal found favour with this submission. On the quantification of the Claim, however, the learned Arbitral Tribunal held that the respondent would be entitled to only 60% of the amount claimed.

38. The learned senior counsel for the petitioner submits that the amount payable by the petitioner to the respondent for the additional work had been settled in the Minutes of Meeting held on 12.02.2015.

The learned Arbitral Tribunal, while determining the Claim no.2 of the respondent, itself held that this claim for extra work had been

settled in the said meeting. Therefore, there was no occasion for awarding the additional amount to the respondent for the additional work. He further submits that as the parties could not arrive at the rate of interest payable on the amount so settled to be paid in form of EMIs, it was decided that the petitioner would make a lumpsum payment of the amount so settled. This proposal was accepted by the respondent and the amount was paid. Thereafter, there was no occasion for the award of any interest in favour of the respondent.

39. The learned counsel for the respondent, on the other hand, submits that the amount as settled in the Minutes of Meeting dated 12.02.2015 did not include the interest component. He further submits that in terms of the contract, the payment was to be made in EMIs, and it was the petitioner who unilaterally decided to make a lump sum payment. However, only because the respondent accepted the lump sum payment, the respondent cannot be denied interest on such payment.

40. I have considered the submissions made by the learned counsels for the parties.

41. As noted hereinabove, it is the own finding of the learned Arbitral Tribunal that the Minutes of Meeting dated 12.02.2015 reflects the final settlement of the claim of the respondent towards extra work. Once the said finding is reached, there was no occasion for the learned Arbitral Tribunal to thereafter carve out exceptions to such settlement and state that such settlement would not include the claim of interest payable to the respondent for the extra work.

42. Further, as has been observed hereinabove, the petitioner offered to make the one-time payment of the settled amount vide its letter dated 07.11.2015. The said offer was accepted by the respondent

right to later claim interest on the amount which is paid in lump sum. It was not even the case of the respondent that the letter dated 10.11.2015 was not binding on the respondent on any account. Therefore, there was no occasion for the learned Arbitral Tribunal to thereafter award interest on such lump sum payment. The respondent having already received money in advance, cannot claim interest on such advance payment. This is contrary to all known principles of law and finance.

43. The Award to claim no.3, therefore, cannot be sustained and is set aside.

CLAIM NO.5 (ii)

44. The next challenge of the petitioner is to Claim no.5 (ii), which is towards Santara Creek Crossing (Change in technology).

45. In this claim, the respondent has claimed a sum of Rs.8.12 Crores, stating that the proposal alongwith the preliminary drawing for laying pipeline at Santara Creek Crossing was by open cut method. Thereafter, on a joint site visit, it was decided that instead of open cut method, HDD method shall be adopted. The respondent claimed that this resulted in change in the scope of work within the meaning of Article 4.4 and 4.5 of the Conditions of Contract, and accordingly requested the petitioner to issue an order of change in scope of work. The respondent, however, refused the claim, stating that this did not constitute a change in the scope of the contract. The learned Arbitral Tribunal, by the Impugned Award, rejected the submission made by the petitioner that the change in the method of laying of pipeline did not amount to change in the scope of work. The learned senior counsel for the petitioner submits that the above finding of the learned Arbitral

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respondent was for laying of the pipeline and, therefore, change from open cut method to tunneling method does not amount to change in the scope of work but only a change in the method of laying the pipeline.

46. The above submission of the learned senior counsel for the petitioner is disputed by the learned counsel for the respondent stating that the open cut method is the usual form of laying pipeline and as the same was not found feasible, laying of pipeline by HDD amounted to additional work, for which the respondent was entitled to be compensated.

47. I have considered the submissions made by the learned counsels for the parties. The learned Arbitral Tribunal has also considered this issue, and has observed as under:

“7.3 The Tribunal finds it difficult to accept the contention of the Respondent that there is no change in the scope of work involved here and it is only a case of change in methodology. It is an indisputable fact that laying the pipes by trenchless technology (HDD method) instead of usual open cut method is much costlier. It comes under 'additional works add services' within the meaning of Art 4.4.1. The open cut method was contemplated as per the technical specification quoted above, though it was subject to the permission being granted by the concerned authority. Initially, the concerned authority did grant permission as per the proposal made by the Claimant. However, ultimately, after joint inspection, the permission was granted subject to adoption of trenchless technology method. It does not mean that the Claimant is disentitled to demand extra cost involved in this method. The clause quoted above does not deal with the cost payable. It only speaks of open cut method subject to permission. Whether or not the scope of work has been enlarged by reason of switch -over to HDD method (trenchless technology) is the question. We are of the view that the change of methodology, if it is of

considerable magnitude cannot but be treated as an additional work within the meaning of Art 4.4.1. The subtle distinction sought to be pointed out by the Respondent between the methodology and scope cannot be upheld so as to defeat the legitimate claim. The word 'additional works', in our view, takes within its sweep the work of this nature which is substantially different from the originally contemplated methodology of laying the pipeline entailing much higher cost. Hence, the Tribunal is of the view that the Claimant is entitled to get extra cost on this account."

48. A reading of the above shows that the learned Arbitral Tribunal has found that the change of methodology of laying the pipeline amounted to additional work within the meaning of Article 4.41 of the Conditions of the Contract. The respondent was, therefore, held entitled to claim additional costs for the said work. In my view, the finding of the learned Arbitral Tribunal deserves no interference from this Court. The finding of the learned Arbitral Tribunal is on interpretation of the terms of the Contract and the evidence on record, which cannot be said to be erroneous leave alone perverse.

49. The other ground of challenge to the Award of Claim no.5 (ii) is the quantification of this claim. The learned senior counsel for the petitioner submits that the learned Arbitral Tribunal itself found that the respondent had been unable to show what would have been the cost of laying the pipeline through the open cut method. It also found that the respondent had not led any credible evidence to support the claim of Rs.8.12 Crores on this head. He submits that in spite of this finding, the learned Arbitral Tribunal again, on whimsical basis, awarded a sum of Rs.5.40 Crores to the respondent on this claim.

50. On the other hand, the learned counsel for the respondent while reiterating that it is open to the learned Arbitral tribunal to award a

claim on the basis of best judgment, submits that the respondent had led evidence in support of the claim, which though did not find favour with the learned Arbitral Tribunal but still gave an indication to the learned Arbitral Tribunal on what the difference in the cost would be in the two methods.

51. I have considered the submissions of the learned counsels for the parties. On the quantification of the claim, the learned Arbitral Tribunal has held as under:

“7.4 The quantum of reasonable cost is the next question. As pointed out by the Respondent’s counsel, no reliable data has been placed on record as to the differential cost between the open cut method and tunneling method. The Claimant has only filed the proposal given by its sub-contractor showing the estimate of expenses involved in trenchless technology method. At page 374 of the additional documents filed by the Claimant, the quotation obtained from M/s Trenchless Technologies Ltd has been furnished by the sub-contractor Lanco Infratech Ltd. The cost is shown as Rs.5.46 crores. To this amount, mobilization/ demobilization charges and service tax was added and a sum of Rs.6.47 crores has been arrived at. The cost of sand/morrum filling “as per the proposal placed” was shown as Rs.19.70 lakhs. No other details are found. It is not known how the figure of Rs.8.12 crores has been arrived at. Moreover, what is relevant is the differential cost between trenchless technology method instead of open cut method. It is not known what would be the cost of open cut method. No endeavour has been made to demonstrate the reliability of the figure of Rs.8.12 crores claimed under this head.

7.5. The Tribunal, after due consideration, is of the view that about one-third of the claimed amount shall be disallowed and it is reasonable to allow Rs.5.40 Crores with simple interest @ 12% per annum from the date of commercial operation, that is to say,

from 01.06.2014 onwards till the date of this Award subject to higher interest in case of non-payment as provided for in the relevant para dealing with Interest.”

52. A reading of the above would show that the respondent has placed on record a proposal made by the Sub-Contractor showing the estimate of expenses involved in trenchless technology method for a sum of Rs.5.46 Crores. To this amount, the respondent added further amounts towards mobilization/demobilization charges and service tax. The respondent further added cost of sand/morrum. The learned Arbitral Tribunal held that even after adding these amounts, the amount of Rs.8.12 crores cannot be reached and further details for reaching this amount have not been given by the respondent. Based on the above, the learned Arbitral Tribunal, while rejecting the quantification of the claim by the respondent, found Rs.5.40 Crore to be a reasonable amount to which the respondent would be entitled to under this claim. The amount awarded by the learned Arbitral Tribunal, therefore, cannot be said to be completely arbitrary or whimsical.

53. As discussed above, in *M/s Good Value Engineers* (supra), this Court has held that where the learned Arbitrator resorts to honest guesswork after duly considering the various facts, evidence and circumstances, such Award cannot be interfered with. Once there is some material on record, the learned Arbitrator can arrive at a conclusion based thereon, on the quantification of the claim. The same position was reiterated by this Court in *Kalyan Chandra Goyal* (supra). Unlike the Award on Claim no.2 (de-scoping of work), for Claim no.5(ii) there was material before the learned Arbitral Tribunal to determine what it found to be a reasonable compensation for the change of scope of work for the respondent. In the limited jurisdiction

vested in this Court under Section 34 of the Act, I find no reason to interfere with such finding of the learned Arbitral Tribunal.

54. Accordingly, the challenge of the petitioner to the impugned Award on Claim no.5(ii) is rejected.

CLAIM NO. 5(vii)

55. The petitioner also challenges the Award of Claim no.5 (vii), which is for the Departmental and Supervision charges paid to the East Coast Railway by the respondent. The respondent had claimed a sum of Rs.1.32 Crore under this head. The petitioner had claimed that for the purpose of laying pipeline along the railway crossing, the respondent had sought permission of the Divisional Engineer of East Coast Railway. Such permission was granted under the Agreement dated 03.11.2011 with the petitioner. The petitioner was to pay the necessary charges under this Agreement, including the payment of Departmental and Supervision charges, which were an integral part for the grant of way-leave facility. The petitioner, however, paid only a sum of Rs.1,64,834/-, which was for way-leave permission charges and security deposits. It refused to pay the Departmental and Supervision charges that were provided for in Clause 18 of the Agreement.

56. The learned senior counsel for the petitioner, placing reliance on the correspondence dated 14.06.2016 addressed by the respondent to the petitioner, submits that the respondent had claimed only a sum of Rs.7,91,516/- from the petitioner under this head, whereas, the learned Arbitral Tribunal by the Impugned Award has awarded a sum of Rs.1,32,93,000/- in favour of the respondent. He submits that therefore, there can be absolutely no justification in awarding such a

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57. He submits that the said letter shows that even as per the understanding of the respondent, the Departmental and Supervision charges were to be paid by the respondent itself. A Claim of Rs.7,91,516/- was made due to refund received by the petitioner from the East Coast Railway.

58. On the other hand, the learned counsel for the respondent submits that in terms of the Agreement dated 03.11.2011, it was the responsibility of the petitioner to pay way-leave permission charges and the security deposit. The learned Arbitral Tribunal, on interpretation of the terms of the said agreement, found that the Departmental and Supervision charges fall within the scope of the way-leave permission charges, being integrally connected therewith. He submits that this again is a finding based on the interpretation of the clause of the Agreement with which this Court will not interfere unless the same is found to be completely perverse. He further submits that even the letter dated 14.06.2016 has been considered by the learned Arbitral Tribunal to hold that the refund was on a different account and merely because certain words open to a different interpretation were used in the said letter, the same would not be an admission of liability by the respondent. He submits that the learned Arbitral Tribunal having considered the letter, this Court will not interfere with the Award merely because it would have placed a different interpretation to the contract or the letter.

59. I have considered the submissions made by the learned counsels for the parties.

60. The letter dated 14.06.2016 reads as under:

“Inviting a kind reference to your letter as cited above, we are to intimate you that we have already deposited in excess of Rs.7,91,516/- to East Coast Railway, Khurda

*towards railway crossing job at Jobra
Cuttack.*

In this connection, the reconciliation sheet as enclosed is for your ready reference. In your letter the security deposit made against proposal-II under new alignment to the tune of Rs.13,15,118/- has been paid by IPRWL vide Demand draft no.653781 date 07/06/2013 is overlooked in your letter.

Therefore, we request your good self to re-examine the same and kindly organize to refund the excess amount paid by us to the tune of Rs.7,91,516/- out of the refund amount received from East Coast Railway on date 08/06/2016 in our account through RTGS as given below:-

Bank	HDFC Bank
Branch	N.M. Road Branch, Chennai
Account No.	04418630000049
IFS Code No.	HDFC0000441

Your early action for the above refund is highly solicited.

xxxxx

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61. In Clause 7 of the table annexed to the letter dated 14.06.2016, the respondent has clearly averred that it has paid the general departmental and maintenance charges and is to pay another sum of Rs.6,88,486/- towards the same to the East Coast Railway. The learned Arbitral Tribunal has stated that the said letter was filed belatedly by the petitioner after the arguments had concluded. The learned Arbitral Tribunal still considered the effect of the said letter and held that the refund mentioned therein was on a different account and merely because it mentions that the amount is to be paid by the respondent, it would not detract from the interpretation placed on the Agreement whereunder this liability is placed on the petitioner. The finding of the learned Arbitral Tribunal on this claim is reproduced herein below:

“8.1 A sum of Rs.1.32 Crores has been claimed under this head. The pipeline was required to be laid across the canals, creek and railway crossings. For the purpose of laying the pipeline along the railway crossing, the Respondent had written a letter dated 02.02.2010 to the Divisional Engineer of the East Coast Railway requesting him to accord permission to lay the pipes of specific description between the stations Cuttack & Kendrapanda Road. The letter is Ex.C.81. An agreement was entered into on 03.11.2011 between the Respondent's authorized official and the Divisional Engineer, East Coast Railway, Khurda. The Agreement dated 03.11.2011 (Ex.C.82 at page 749) may be perused. The title is “Agreement of terms for permitting way-leaves facility....”. The preamble shows that the permission has been granted subject to terms and conditions specified therein. Clause 11 recites that way-leave permission charges and security deposit of Rs.1,64,834/- has been paid. Clause 18 further requires the 'permittee' to pay supervision and departmental charges as fixed by the Railway administration in addition to

way-leave charges mentioned in cl.11 in advance. Thus, the payment of supervision & departmental charges is integrally connected with the grant of way-leave facility and stand on the same footing as the payment made by the Respondent under cl. 11. The Respondent having admitted its liability, paid the amount of Rs.1,64,834/-. But when it came to supervision and departmental charges payable under clause 18, the Respondent took a contradictory stand. As the Respondent failed to pay the amount, the Claimant paid Rs.1.32 Crores. The additional document (now marked as Ex-R.154) belatedly filed by the Respondent after the arguments were concluded, does not come to its aid. However, as the alleged settlement and finalization of account was pleaded in the course of Respondent's counsel's argument and the document is not in dispute, the Tribunal has taken it on record for the proper appreciation of the issue. Ex.R.154 is the letter of the Claimant dated 14.06.2016 seeking refund of Rs.7.91 lakhs out of the refund amount received from Railways. The refund was on a different account. However, along with the said letter, 'payment reconciliation sheet' was enclosed. In that 'general & departmental charges' is the last item. In the remarks column, it is mentioned: 'to be payable by IPRWL'. According to the Respondent, it was a clear admission made as a result of settlement arrived at. That was not the case of the Respondent in the pleadings. From this single word, the admission of liability cannot be inferred. In any case, once it is held that the disputed amount partakes the character of way-leave charges demanded by Railways, the liability falls on the Respondent, irrespective of the expression 'payable' used in re-conciliation statement. No settlement can be inferred from the additional document filed by the Respondent.

8.2 Therefore, even if we take that additional document into account, it does not make any difference for arriving at the conclusion that the amount of Rs.1,32,93,000/- was paid to the Railway towards general and departmental charges in discharge of liability of the Respondent. The contention of the

Respondent is that the supervision and departmental charges did not come under the licence fee or statutory fee cannot be upheld. As observed earlier, it is in the same nature as way leave permission charges and broadly falls under licence fee. Hence, the said amount was paid by the Claimant to Railways for the purpose of obtaining and keeping alive the permission from the Railways. This amount of Rs. 1,32,93,000/- shall therefore be refunded to the Claimant with interest @ 12% per annum from 15.01.2016 till the date of Award and in case the same is not paid within four months from the date of Award, it shall carry simple interest of 15% per annum. The Tribunal has considered it appropriate to award pendent lite interest i.e. from the commencement of arbitration till the Award for reason that the issue regarding the payment made to Railway and the refund due was lingering even after arbitration was initiation and the Claimant did not pursue the claim for reimbursement of this amount in the interregnum.”

62. As far as the interpretation of the Agreement is concerned, as has been observed hereinabove, in the limited jurisdiction vested in this Court under Section 34 of the Act, the interpretation placed by the learned Arbitral Tribunal on the Agreement cannot be a reason to interfere with the Arbitral Award unless such interpretation is found to be completely perverse. The petitioner does not satisfy the said test. On the effect of the letter dated 14.06.2016, again, the learned Arbitral Tribunal having considered the same and concluded that the same does not amount to an admission of the respondent to bear the liability of the departmental and supervision charges, in my opinion, the same cannot be interfered with. As is recorded in the Impugned Award itself, the said letter surfaced only after the conclusion of the arguments. The learned Arbitral Tribunal still considered the effect of the letter and held that the same cannot detract from the interpretation

of the Agreement placed by the learned Arbitral Tribunal on the Agreement. I find no perversity in the view that has been taken by the learned Arbitral Tribunal on the present claim.

63. Accordingly, I find no merit in the objection of the petitioner to Claim no.5(ii). The same is rejected.

CLAIM NO. 5 (viii)

64. The last challenge of the petitioner to the Impugned Arbitral Award is to Claim no.5(viii), which is for compensatory afforestation charges. An amount of Rs.10.47 lakhs alongwith interest has been awarded in favour of the respondent on this claim.

65. The learned senior counsel for the petitioner reiterates that it was the responsibility of the respondent to obtain the necessary approvals and, therefore, for any charges that are payable for such approvals.

66. The above submission of the petitioner had been rejected by the learned Arbitral Tribunal while considering Claim No.1, which has been upheld by this present order. Therefore, I find no merit in the said challenge. The same is rejected.

CHALLENGE TO THE AWARD BY THE RESPONDENT:

CLAIM NO. 4

67. The respondent challenges the rejection of Claim no. 4 of the respondent by the learned Arbitral Tribunal. Claim no.4 of the respondent was of interest payable by the petitioner during the period of time over-run. The learned Arbitral Tribunal has rejected the said claim by holding that the time over run was due to reasons that would fall under Clauses 15.1.3 and 15.3 of the Agreement, that is, *Force*

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68. The learned counsel for the respondent challenges the finding of the learned Arbitral Tribunal, submitting that the petitioner never invoked the *Force Majeure* clauses in the Agreement. He further submits that the learned Arbitral Tribunal has erred in holding that the petitioner was not responsible for the delay that has been caused in the execution of the work. He submits that sufficient evidence had been placed on record by the respondent in support of its claim and to show that it was the petitioner who was responsible for the delay caused.

69. On the other hand, the learned senior counsel for the petitioner draws my attention to the letter dated 26.08.2011 addressed by the petitioner to the respondent, wherein the petitioner had clearly informed the respondent that *Force Majeure* event would apply to the facts and that in terms of Clause 15.3(c), both the parties would have to bear their respective costs.

70. I have considered the submissions made by the learned counsels for the parties.

71. Clause 15.1 defines the *Force Majeure* events. Clause 15.1.3(iv) states that 'Political Force Majeure event' shall include any judgment or order of competent jurisdiction, or order of any State Government or statutory body, etc.. Clause 15.3(c) states that upon the occurrence of any *Force Majeure* event, the parties shall bear their respective costs and no party shall be required to pay to the other party any cost arising out of any such *Force Majeure* event. Clauses 15.1, 15.1.3(iv) and 15.3(c) are reproduced hereinbelow:

“15.1 Force Majeure Event: *As used in the Agreement, a Force Majeure Event shall mean any occurrence of any or all of the non political events, indirect political events and/or political events as defined in clause 15.1.1, 15.1.2 and 15.1.3 respectively, which prevent the BOOT-Contractor from*

performing its obligation under this agreement and which act or event(s) are :

(i) is beyond the reasonable control and not arising out of the fault of the BOOT Contractor.

(ii) The BOOT Contractor is unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums and money and

(iii) Has a material Adverse Effect on the Project.

Xxxxxx

15.1.3 Political Force Majeure Events:

shall mean and include one or more of the following acts or events by or on account GoI, IOCL, GoO or by any other Governmental Agency vested with power.

(iv) Any judgment or order of competent jurisdictions of statutory authority in India or any order, rule, promogulation, ordinance of any State government, central Government or statuary bodies against the BOOT Contractor in any proceedings for reasons other than failure of BOOT Contractor to comply with any applicable law or applicable permits or on account of breach there of any contract or enforcement of agreement or exercise of any of its rights under the agreement by IOCL.

Xxxxxxx

15.3 Effect of Force Majeure Event after Financial Closure to COD stage: *Upon the occurrence of any Force Majeure Event during the above period the following conditions shall apply:*

(c) The Parties shall bear their respective costs and no Party shall be required to pay to the other Party any costs arising out of such Force Majeure Event."

72. The reasons for the delay have been discussed by the learned Arbitral Tribunal in the Impugned Award, and on which, there is no dispute raised by the learned counsel for the respondent. The relevant extract from the Arbitral Award is as under:

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“5.13 The Tribunal is of the view that c1 15.1.3 especially clause (iv) thereof is squarely attracted in the instant case. There is an order of the competent authority of Government of Orissa withdrawing the earlier permission and restraining IOCL to proceed on the originally approved route in the manner contemplated earlier. It may be recalled that the Government of Orissa vide its letter dated 01.01.2010 (C.67 at page 703) withdrew the permission earlier granted and wanted IOCL to seek fresh approval for laying of pipeline along a different route in view of “change in ground conditions”. The Government of Orissa, in continuation of its order, further insisted that NOC shall be obtained from Forest Department to consider the sanction of revised route alignment. OFDC, in turn, insisted on the deposit of amount towards compensatory afforestation. Therefore, by virtue of the order of competent authority of State Government and the statutory bodies, the work could not be proceeded with. The revocation of permission and the proposed regrant of permission subject to conditions were orders issued by the competent authority within the meaning of sub-clause (iv) of clause 15.1.3 and they form integral part of the proceedings on the file of the concerned Government Departments. The order operates not merely against the IOCL, but also against the BOOT Contractor who is entrusted with the job of carrying out the project works. **Further**, there was an order of the High Court staying the execution of works at the 'Intake site' and the said order was in force for considerable time. This is also a political force majeure situation contemplated by clause (iv) The Claimant in its letters dated 03.08.2011 (C.73) and 23.11.2011 (C.75) acknowledged the fact that there was a political force majeure situation.”

73. The learned Arbitral Tribunal has found that the above events would clearly fall within the ambit and scope of Clause 15.1.3(iv) and therefore, in terms of Clause 15.3(c), no claim can be raised by either

Signature Not Verified any of such force majeure event.

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74. The above finding of the learned Arbitral Tribunal is based on the interpretation of the terms of the Agreement and on the evidence led by the parties on the events resulting in delay in the execution of the work. I find the same to be not warranting any interference from this Court. The same, in fact, appears to be correct. Accordingly, the challenge of the respondent to Claim no.4 is rejected.

COUNTER CLAIM OF THE PETITIONER:

75. The next challenge of the respondent is to grant of the counter-claim of the petitioner. The petitioner had claimed that instead of two pipelines, during the execution of the project, it was decided that only a single pipeline will be laid by the respondent for a length of 7 kms in view of the directive issued by the Water Resource Department (WRD) of the Government of Odisha. The petitioner claimed that consequently there was a reduction in the scope of work and the consequential EMI was to be paid by the petitioner to the respondent on monthly basis. The respondent challenged the amount of deduction proposed by the petitioner under this head. The learned Arbitral Tribunal, by the Impugned Award, has awarded a sum of Rs.2 crores along with interest in favour of the petitioner.

76. The learned counsel for the respondent submits that the learned Arbitral Tribunal has awarded the said claim in favour of the petitioner on completely *ad hoc* basis. He submits that the learned Arbitral Tribunal found that the data/calculations given by the petitioner were on a higher side and no endeavour had been made to substantiate the relevance of some of the components thereof. Upon the said finding, the learned Arbitral Tribunal awarded *ad hoc* amount of Rs.2 crores in favour of the petitioner. He submits that the Award

on the counter-claim being without any evidence, deserves to be set aside.

77. On the other hand, the learned senior counsel for the petitioner submits that the learned Arbitral Tribunal found that certain heads under which claim had been raised were not substantiated. The learned Arbitral Tribunal, thereafter, made a reasonable estimate of the amount that the petitioner would be entitled to claim and awarded a sum of Rs.2 crores, which is clearly the best judgment analysis of the learned Arbitral Tribunal.

78. I have considered the submissions made by the learned counsels for the parties.

79. The relevant finding of the learned Arbitral Tribunal on the counter-claim is reproduced hereinbelow:

“13.8 It is only legitimate that when a part of the work has not been executed and the cost of that work has been included in the total cost and the EMIs were calculated accordingly, the excess amount attributable to the non-executed item shall be reduced from the EMIs. In fact, the Claimant does not dispute the power to reduce the EMI amount so as to address an issue that had already arisen during the contract period.

13.9 The next question is about the quantum of reduction i.e. whether the Respondent is justified in calculating the monthly maintenance cost in the manner in which it did and fixing the amount deductible at Rs.1,31,127/- per month.

13.10 It seems to us, on a perusal of the data/ calculations given by the Respondent in the light of objections raised by the Claimant, the maintenance cost of pipeline arrived at by the Respondent is on the higher side. No endeavour has been made to substantiate the relevancy of some of the

components set out in para 8 and the appropriate percentages to be applied. Further, the contention of the Claimant that it had to incur additional maintenance cost for laying single pipeline over the river bed for a stretch of 3 KM instead of laying the same underground as originally contemplated has some merit.

13.11 Taking an overall picture and on due consideration of the respective contentions, the Arbitral Tribunal is of the view that it is reasonable to award an amount of Rs.2 Crores to the Respondent (Counter-claimant) on this account. The said amount of Rs.2 crores plus interest as specified below can be deducted from the monthly EMIs payable in future. The Arbitral Tribunal is inclined to award interest on the said amount of Rs. 2 Crores only from the date of filing Counter-claim i.e. from 01.10.2016 till the date of this Award in view of the long silence on the part of the Respondent to pursue the claim after a certain stage, may be, under the bonafide impression that the one-time down payment offered would take care of everything.”

80. A reading of the above would show that the learned Arbitral Tribunal has first held that due to the change of scope of work, the petitioner would be entitled to a reduction of the EMI. No fault can be found in the said finding of the learned Arbitral Tribunal. The learned Arbitral Tribunal thereafter considered the quantification of the claim of the petitioner and found that claim made by the petitioner was on the higher side and the petitioner had failed to substantiate the relevance of some of the components of its claims. Though, the learned Arbitral Tribunal does not spell out these components, it had certain evidence before it for the quantification of the claim. As held hereinabove, if there is some evidence before the learned Arbitral Tribunal to make a best judgment analysis, this Court in exercise of its

limited powers under Section 34 of the Act will not interfere with the same.

81. Accordingly, I find no merit in the challenge of the respondent to the award of the counter-claim in favour of the petitioner.

82. There is no other challenge laid by either the petitioner or the respondent to the other heads of claims/counter-claims of either party and as awarded by the Impugned award.

83. Accordingly, the Impugned Award in so far as Claim nos.2 and 3 are concerned, is set aside. The challenge to the Arbitral Award to the remaining extent is rejected.

84. The petitions are disposed of in the above terms. The parties shall bear their respective costs.

NAVIN CHAWLA, J

MAY 03, 2023
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Date of release of order: 12th May, 2023