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

Decided on: 09.11.2023

+ O.M.P. (COMM) 455/2018 & I.A. 3244/2023.
M/S ORIENTAL STRUCTURAL ENGINEERS PVT.LTD.-M/S
KMC-JOINT VENTURE Petitioner

Through: Ms. Kiran Suri, Senior Advocate with
Mr. Hitendra Nath Rath and Ms.
Aishwarya Kumar, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
(NHAI) Respondent

Through: Mr. Manish K. Bishnoi, Mr. Nirmal
Prasad and Ms. Pallavi Singh Bishnoi,
Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"], the petitioner assails an arbitral award dated 21.04.2018, by which a three-member Arbitral Tribunal has adjudicated disputes between the parties under a Contract Agreement dated 04.11.2004 [hereinafter, "the Contract"].

A. Facts

2. The Contract was awarded by the respondent-National Highways Authority of India [hereinafter, "NHAI"] to the petitioner for construction of part of a road known as the "Allahabad Bypass Project". BCEOM-LASA JV [hereinafter, "the Engineer"] was nominated by NHAI as the Engineer under the Contract. According to the petitioner, work under the Contract was

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substantially completed by 15.10.2009 and notice was given to the Engineer for taking over the work on 15.11.2009. The Engineer issued Taking Over Certificate under Clause 48.1 of the General Conditions of Contract [hereinafter, "GCC"] on 11.12.2009. By a communication dated 15.11.2011, the Engineer enumerated a list of pending work to the petitioner prior to issuance of the Defects Liability Certificate.

3. A joint meeting was held on 25.11.2011 with regard to the remaining work to be completed. The petitioner agreed to complete the remaining work and remedy the defects. The minutes of the aforesaid meeting contain specific provisions with regard to claims for additional costs due to reduction in scope of chain link fencing and crash barrier. The consequence of these provisions is the subject matter of controversy in this petition and they will be dealt with in detail later in this judgment.

4. The Engineer issued the Defects Liability Certificate on 12.01.2012, under Clause 62.1 of the GCC. Pursuant thereto, the petitioner submitted supporting documents for draft final bill on 25.04.2012. On 06.05.2013, the Engineer issued Interim Payment Certificate No. 57 [hereinafter, IPC No. 57] against the statement submitted by the petitioner, wherein it determined the amount due to the petitioner. It recommended payment of a sum of Rs. 1,98,30,849/- against the petitioner's final bill.

5. It appears from the record that the respondent, thereafter, by a communication dated 20.06.2013, pointed out certain discrepancies to the Engineer, which resulted in a report of the Engineer dated 12.08.2013, stating that the Defects Liability Certificate was issued after joint inspection on 05.01.2012 and that IPC No. 57 was issued after detailed measurement of each item. The record reveals that a meeting was thereafter held between the



Engineer and the respondent on 09.04.2014, pursuant to which the Engineer issued a letter dated 06.05.2014, revising IPC No. 57 downwards. Significantly, the petitioner was admittedly not party to the documents and meetings dated 20.06.2013, 12.08.2013, 09.04.2014, and 06.05.2014.

6. Unaware of these developments, the petitioner sent to the respondent a letter dated 28.09.2015, demanding payment of the amount due in terms of the Engineer's certification dated 06.05.2013 [original IPC No. 57]. The petitioner relied upon Sub-Clauses 60.8(a)(i), 60.8(b) and 60.11 of the Conditions of Particular Application [hereinafter, "COPA"]. As the said letter failed to elicit a response, the petitioner issued a notice under Sub-Clause 67.1 of COPA on 05.05.2016. The matter was referred to the Dispute Review Board [hereinafter, "DRB"] under Sub-Clause 67.1 of COPA, but the DRB did not make any recommendations within the stipulated period. The petitioner, therefore, invoked arbitration by letter dated 14.10.2016.

7. Before the Arbitral Tribunal, the petitioner raised a claim of Rs. 1,98,30,849/- alongwith interest thereupon, and also sought release of retention bank guarantees and compensation for costs incurred in renewal thereof.

8. In its defence, the respondent relied upon the modification of IPC No. 57 by the Engineer on 06.05.2014 and stated that consequently, the petitioner was liable to repay the sum of Rs. 46,28,483/- to the respondent.

9. According to the petitioner, it learnt of the purported modification only from the statement of defence filed in the arbitral proceedings.

10. By the impugned award, the Arbitral Tribunal, by a majority, rejected the petitioner's claim for payment in terms of the original IPC No. 57 and directed recovery of a sum of Rs. 46,28,483/-.



11. Upon an application filed by the petitioner under Section 33 of the Act, the Arbitral Tribunal passed an additional award dated 11.06.2018, directing the respondent to release all bank guarantees and costs incurred in extension thereof.

12. The petitioner has challenged the said award by way of the present petition. It may be noted that the respondent also challenged the award by way of a petition under Section 34 of the Act [OMP(COMM) 443/2018], which was dismissed on 25.10.2018.

B. Contractual clauses

13. Several clauses of the contractual documents were cited by learned counsel for the parties. The provisions relevant for the purpose of this judgment are set out below:

“General Conditions of Contract

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48.1 Taking-Over Certificate

When the whole of the Works have been substantially completed and have satisfactorily passed any Tests on Completion prescribed by the Contract, the Contractor may give a notice to that effect to the Engineer, with a copy to the Employer, accompanied by a written undertaking to finish with due expedition any outstanding work during the Defects Liability Period. Such notice and undertaking shall be deemed to be a request by the Contractor for the Engineer to issue a Taking-Over Certificate in respect of the Works. The Engineer shall, within 21 days of the date of delivery of such notice, either issue to the Contractor, with a copy to the Employer, a Taking-Over Certificate, stating the date on which, in his opinion, the Works were substantially completed in accordance with the Contract, or give instructions in writing to the Contractor specifying all the work which, in the Engineer's opinion, is required to be done by the Contractor before the issue of such Certificate. **The Engineer shall also notify the Contractor of any defects in the Works affecting substantial completion that may appear after such instructions and before completion of the Works specified therein.** The Contractor shall be entitled to receive such Taking-Over Certificate within 21 days of completion, to the satisfaction of the Engineer, of the

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Works so specified and remedying any defects so notified.

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56.1 Works to be Measured

The Engineer shall, except as otherwise stated, ascertain and determine by measurement the value of the Works in accordance with the Contract and the Contractor shall be paid that value in accordance with Clause 60. The Engineer shall, when he requires any part of the Works to be measured, give reasonable notice to the Contractor's authorised agent, who shall:

(a) forthwith attend or send a qualified representative to assist the Engineer in making such measurement, and

(b) supply all particulars required by the Engineer.

Should the Contractor not attend, or neglect or omit to send such representative, then the measurement made by the Engineer or approved by him shall be taken to be the correct measurement of such part of the Works. For the purpose of measuring such Permanent Works as are to be measured by records and drawings, the Engineer shall prepare records and drawings as the work proceeds and the Contractor, as and when called upon to do so in writing, shall, within 14 days, attend to examine and agree such records and drawings with the Engineer and shall sign the same when so agreed. If the Contractor does not attend to examine and agree such records and drawings, they shall be taken to be correct. If, after examination of such records and drawings, the Contractor does not agree the same or does not sign the same as agreed, they shall nevertheless be taken to be correct, unless the Contractor, within 14 days of such examination, lodges with the Engineer notice of the respects in which such records and drawings are claimed by him to be incorrect. On receipt of such notice, the Engineer shall review the records and drawings and either confirm or vary them.

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62.1 Defects Liability Certificate

The Contract shall not be considered as completed until a Defects Liability Certificate shall have been signed by the Engineer and delivered to the Employer, with a copy to the Contractor, stating the date on which the Contractor shall have completed his obligations to execute and complete the Works and remedy any defects therein to the Engineer's satisfaction. The Defects Liability Certificate shall be given by the Engineer within 28 days after the expiration' of the Defects Liability Period, or, if different defects liability periods shall become applicable to different Sections or parts of the Permanent Works, the expiration of the

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latest such period, or as soon thereafter as any works instructed, pursuant to Clauses 49 and 50, have been completed to the satisfaction of the Engineer; Provided that the issue of the Defects Liability Certificate shall not be a condition precedent to payment to the Contractor of the second portion of the Retention Money in accordance with the conditions set out in Sub-Clause 60.3.

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Part-II: Conditions of Particular Application

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Sub-Clause 60.8 Time of Payment and Interest

(a) The amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 47, be paid by the Employer to the Contractor as follows:

(i) (A) in the case of Interim Payment Certificates within 42 days after the Contractor's monthly statement has been submitted to the Engineer for certification, pursuant to Sub-Clause 60.1. Provided that if the Engineer's Interim Certificate has not yet been issued within said 42 days, the Employer shall pay the amount shown in the Contractor's monthly statement and that any discrepancy shall be added to, or deducted from, the next payment to the Contractor; and

(B) in the case of any monthly statement submitted by the Contractor at a time when the Bank's loan or credit (from which part of the payments to the Contractor are being made) is suspended within 14 days after such monthly statement is submitted. Provided that if the Engineer's Interim Certificate has not yet been issued within said 14 days, the Employer shall pay the amount shown in the Contractor's monthly statement and that any discrepancy shall be added to, or deducted from, the next payment to the Contractor.

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(b) In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid in the currencies in which the payments are due. The provisions of this Sub-Clause are without prejudice to the Contractor's entitlement under Clause 69 or otherwise.

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Sub-Clause 60.11 Final Statement

Not later than 56 days after the issue of the Defects Liability Certificate pursuant to Sub-Clause 62.1, the Contractor shall submit to the Engineer for consideration a draft final statement in the number of copies stipulated in the Appendix to Bid with supporting documents showing in detail, in the form approved by the Engineer.

(a) the value of all work done in accordance with the Contract; and

(b) any further sums which the Contractor considers to be due to him under the Contract or otherwise.

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them.

The Contractor shall then prepare and submit to the Engineer the final statement as agreed (for the purposes of these Conditions referred to as the "Final Statement").

If, the following discussions between the Engineer and the Contractor and any changes to the draft final statement which may be agreed between them, it becomes evident that a dispute 'exists, the Engineer shall deliver to the Employer an Interim Payment Certificate for those parts of the draft final statement. if any, which are not in dispute. The dispute shall then be settled 'in accordance with Clause 67. The Final, Statement shall be the agreed upon settlement of the dispute.

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Sub-Clause 67.1 Disputes Review Board

Sub-Clause 67.1 is substituted by the following:

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

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Sub-Clause 67.3 Arbitration

Sub-Clause 67.3 is modified to read as follows:



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

- (i) *A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, on each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the 'Chairman of the Executive Committee of the Indian Roads Congress. For the purposes of this Sub-Clause, the term “Indian Contractor” means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.*

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- (iii) *Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.*
- (iv) *Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.*
- (v) *If one of the parties fail to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of the Institution of Engineers (India) both in cases of foreign contractors as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of the Institution of Engineers (India) making such an appointment shall be furnished to each of the parties.*
- (vi) *Arbitration proceedings shall be held at Delhi India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*
- (vii) *The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration*

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proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.”¹

C. Submissions of learned counsel

14. The principal argument of Ms. Kiran Suri, learned Senior Counsel for the petitioner, was that the Arbitral Tribunal erred in declining the relief sought by the petitioner, despite finding that the unilateral modification of IPC No. 57 by the Engineer, without notice to the petitioner, was contrary to law. She submitted that parties have followed the contractual stipulations with regard to taking of measurements, certification by the Engineer and submission of bills. The original IPC No. 57 dated 06.05.2013 was issued after the entire procedure was undertaken, and could not have been unilaterally modified by the Engineer and the respondent.

15. Ms. Suri submitted that this revised certification was contrary to the Engineer’s own initial response dated 12.08.2013 addressed to the respondent, wherein the original certification was justified. In the letter dated 06.05.2014, the Engineer took a contrary stand that work done during defect liability period, but which was not available at the end of the defect liability period, was not payable. Ms. Suri submitted that the majority award is clearly perverse, to the extent that it finds a violation of the agreement by the respondent, but nonetheless finds against the petitioner.

16. According to Ms. Suri, Clause 56.1 of the GCC clearly lays down that the measurements are within the exclusive domain of the Engineer. It was up to the respondent to raise a dispute in this connection, if it was dissatisfied

¹ Emphasis supplied.



with the certification, but the respondent could not have pressurised the Engineer into accepting the respondent's own certification.

17. Learned Senior Counsel further submitted that the finding of the Arbitral Tribunal, that the work of chain link fencing was not done, is unsupported by evidence, as the measurement books were not placed before the Arbitral Tribunal. She submitted that, in the statement of defence, the respondent relied upon a report of Central Vigilance Commission [hereinafter, "CVC"] and a circular dated 29.05.2012 of the respondent itself. The CVC report has not, in fact, been cited by the Arbitral Tribunal in support of its conclusion, and learned Senior Counsel states that the 2012 circular of NHAI is also inapplicable to the present Contract which was entered into prior in time.

18. Mr. Manish Bishnoi, learned counsel for the respondent, supported the finding of the Arbitral Tribunal that the amount claimed by the petitioner was not payable, as the work of chain link fencing was not, in fact, executed during the defect liability period. He contended that this finding is based upon an appreciation of the evidence placed before the Arbitral Tribunal, and that such appreciation was not arbitrary or capricious, calling for interference under Section 34 of the Act. He referred me in this connection to a document dated 05.12.2011, being the minutes of the meeting held on 25.11.2011, wherein it is specifically stated that the scope of work of chain link fencing stood reduced, and the petitioner agreed not to claim any additional costs in future due to such reduction, which was done at its request due to incidence of theft. This is reflected in a table [Annexure A-1], annexed to the said communication also. The minutes record that this was agreed by the parties [including the petitioner, respondent and the Engineer]



and it was specifically stated that no payment was to be made to petitioner on this account. Mr. Bishnoi submitted that this document was an admitted document and the Arbitral Tribunal has correctly come to the conclusion that no work was executed in respect of chain link fencing and crash barrier.

19. In these circumstances, Mr. Bishnoi submitted that reconciliation of the apparent discrepancies between the factual position and the original certificate [IPC No. 57 dated 06.05.2013], issued by the Engineer, is a matter of appreciation of evidence, attaching weight to each piece of evidence as may be considered appropriate. These, learned counsel suggested, are matters within the province of Arbitral Tribunal and not liable to interference by the Court, except in a case of perversity.

20. On these facts, Mr. Bishnoi submitted that a broad and liberal reading of the award is required in terms of the judgment in *Dyna Technologies (P) Ltd. vs. Crompton Greaves Ltd.*², which would show that the arbitrators have applied their mind to the controversy and arrived at a plausible conclusion. He submitted that, in these circumstances, the Arbitral Tribunal has correctly allowed the respondent's claim in the statement of defence, of a set off of the amount of Rs. 46,28,483/-, against the dues of petitioner.

21. In rejoinder, Ms. Suri submitted that IPC No. 57 prepared and certified on the basis of the agreed statement of parties, clearly showed net amount payable to the petitioner of Rs.1,98,30,849/-. In contrast, the minutes of the meeting held on 25.11.2011, relied upon by the respondent, cannot supersede the contractual certification as to the amount payable to the petitioner. She referred me to correspondence exchanged between the

² (2019) 20 SCC 1.



Engineer and the petitioner prior to the meeting held on 25.11.2011. These include copies of communication dated 22.09.2010 addressed by the petitioner to the Engineer in which the progress of work relating to chain link fencing has been detailed and the Engineer's response dated 29.09.2010 advising the petitioner that further procurement of chain link fencing material shall be in consultation with the Engineer. By a further letter dated 01.10.2010, the Engineer informed NHAI that, out of 55 km constructed in the present project [ABP-3], 19 km have been found to be damaged or stolen, out of which the petitioner was responsible for replacement of only 9 km and the respondent was responsible for replacement of 10 km. The Engineer advised that the work of chain link fencing be completed only to the extent of the material on site/order and that the petitioner also be directed not to replace the fencing. She submitted that it was in this context, that the minutes of the meeting held on 25.11.2011 were recorded which deal with an additional claim by the petitioner-contractor on account of chain link fencing.

22. Ms. Suri submitted that in these circumstances, there was no material before the Arbitral Tribunal to come to the conclusion that the work of chain link fencing had not, in fact, been completed by the petitioner, so as to override the approved certification which was in accordance with contractual specifications.

23. On the question of recovery by NHAI, as directed by the Arbitral Tribunal, Ms. Suri submitted that NHAI had made no counter-claim to this effect and its assertion in the statement of defence was only with regard to recovery to be made as a consequence of the amendment to IPC No. 57. The Arbitral Tribunal, having found the amendment to be contractually



untenable, learned Senior Counsel submitted that the aforesaid amount ought not to have been awarded to NHAI. She relied upon the judgment of the Supreme Court in *Jitendra Kumar Khan vs. Peerless General Finance and Investment Company Limited*³ to submit that the claim of the respondent did not fall within the ambit of an equitable set-off. All the respondent's claims amounting to Rs.9.54 crores having been rejected, she argued that the respondent was not entitled to adjustment of the amount of Rs. 46,28,483/- as awarded by the Arbitral Tribunal.

D. Analysis

24. The principal ground upon which the award has been challenged is that the original IPC No. 57 dated 06.05.2013 certified the petitioner's entitlement to payment for 36,405.3 Lm of chain link fencing since the last interim payment, quantified at Rs. 2,26,68,430.40/-. The relevant extract from the Bill of Quantities in IPC No. 57 dated 06.05.2013 is reproduced below:

Contract Quantity	Estimated Revised Quantities	Quantity of Work Executed			Item	Description	Unit	Rate	Contract Amount	Amount (Rs.)		
		Upto date	Upto last Certificate	For this Certificate						Upto date	Upto last Certificate	For this Certificate
82000	82000	63168.500	36405.300	26763.200	7.09	Providing fitting and fixing 3 mm dia galvanised coated chain link fencing 75 mm X 75 mm size and height 1.80 M with posts supports and allied works and accessories including necessary excavation, concrete grouting complete in all respect as per drawing, technical specifications Clause 807 and direction of the engineer.	Lm	847	69,454,000.00	53,503,719.50	30,835,289.10	22,668,430.40

³ (2013) 8 SCC 769, paragraphs 11 and 12.

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25. The above extract records that the petitioner had completed 63,168.5 Lm out of the contracted quantity of 82,000 Lm. As 36,405.3 Lm had been executed until the last certificate, the certificate in question was issued for 26,763.2 Lm and the amount payable on this account was calculated as Rs. 2,26,68,430.40/-. However, after the communications between the respondent and the Engineer, revised IPC No. 57 dated 06.05.2014 was issued which showed the quantity executed up to date as 36,405.3 Lm. It, therefore, found no amount payable under this head. Consequently, the total amount certified in this bill was a negative amount of Rs. 46,28,483/- instead of the original certified amount of Rs. 1,98,30,849/-. The relevant extract from the revised IPC No. 57 dated 06.05.2014 is as follows:

Contract Quantity	Estimated Revised Quantities	Quantity of Work Executed			Item	Description	Unit	Rate	Contract Amount	Amount (Rs.)		
		Upto date	Upto last Certificate	For this Certificate						Upto date	Upto last Certificate	For this Certificate
82000	82000	36405.300	36405.300		7.09	Providing fitting and fixing 3 mm dia galvanised coated chain link fencing 75 mm X 75 mm size and height 1.80 M with posts supports and allied works and accessories including necessary excavation, concrete grouting complete in all respect as per drawing, technical specifications Clause 807 and direction of the engineer.	Lm	847	69,454,000.00	30,835,289.10	30,835,289.10	

26. The petitioner contends that the unilateral revision of IPC No. 57 having been held by the Arbitral Tribunal to be contrary to the contractual provisions, it was obliged to allow the claim in terms of the original IPC No. 57. Ms. Suri referred to paragraphs 12 and 13 of the award in this connection, which read as follows:-

“12. The claimant's argument that they were not aware of the fact that the P.D Allahabad has returned back the original certified IPC to the Engineer and the Engineer's submission of the modified IPC by the correcting the measurements of

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chain link fencing is not as per the contract provision. The P.D Allahabad should have informed the claimant also as regards his observations for correction of item no.7.09 chain link fencing "from 4600lm to 26613 lm.

13. Although this violates the provision of agreement clause 60.4, Arbitral Tribunal observes that the contractor should be paid only for the quantities actually executed and available at site for the satisfaction of the employer. The employer cannot pay for the items of works not executed.”

27. The Tribunal, despite this finding, rejected the petitioner’s claim on the ground that it did not, in fact, execute the work for which it sought payment. This is reflected in paragraphs 5 and 6 of the award, which read as follows:-

“5. On 25.11.2011, there was a meeting attended by all concerned with the work for finalization of the bill and the Gist of meeting was well circulated by the Engineer vide letter self 05.12.2011 that the scope of chain link fencing and crash barrier works were omitted, on the request of the contractor, which was taken into consideration while determining the quantity of chain link fencing.

6. It was expressly offered by the contractor that the length of chain link fencing is reduced from its original quantity to reduced quantity in the meeting held on 25.11.2011.”

28. I am unable to accept the petitioner’s argument in view of letter dated 15.11.2011, and the minutes of the meeting held on 25.11.2011 (relied upon above), dated 05.12.2011 which were placed on record before the Arbitral Tribunal. The minutes of the meeting were admitted by the petitioner in its admission/denial of the respondent’s documents⁴. In the letter dated 15.11.2011, addressed by the Engineer to the petitioner, the Engineer referred to the petitioner’s commitment to complete outstanding works and rectification of defects within the defect liability period, which had expired on 15.09.2010. As far as chain link fencing is concerned, it was stated in a table attached to the aforesaid letter [Annexure A-1] that the balance

⁴ Petitioner’s documents, PDF page No. 333.



quantity as on 15.10.2009 was 46,000 Lm whereas on 01.10.2011 it was 2500 Lm. However, the total revised quantity was stated to be 82 km and 20 km were to be replaced. In the minutes of the meeting held ten days thereafter, on 25.11.2011, both parties and the Engineer were represented. The minutes of this meeting, dated 05.12.2011, note that the Engineer had communicated a list of pending work on 15.11.2011, which was updated and discussed in the meeting. It was thereafter specifically recorded as follows:

“(iii) The Contractor also agreed for not claiming any additional cost in future due to reduction in scope of Chain link fencing and Crash barrier, omitted on his request because of incidence of theft.”⁵

In the table attached to the minutes of meeting, the petitioner’s remark and the decision in the minutes with regard to chain link fencing are reflected as follows:

**“Contractor’s remark: In view of continuous theft, no further work on the item is required.
As discussed in meeting with Contractor/Engineer/Employer on 25.11.2011: Agreed, refer Engineer’s letter dated 29.10.2010 and no payment to be made to OSE-KMC JV”⁶**

29. I am of the view that these documents, which were before the Arbitral Tribunal, are sufficient to support its conclusion that the work of chain link fencing upon which the petitioner’s claim was based, was not, in fact, carried out by the petitioner. In proceedings under Section 34 of the Act, this Court is not required to undertake a *de novo* examination of the evidence placed before the Arbitral Tribunal. The judgments of the Supreme Court with regard to the scope of Section 34, make it clear that a finding of the Arbitral Tribunal, based on an evidentiary assessment, is not liable to

⁵ Emphasis supplied.

⁶ *Ibid.*



interference, unless shown to be perverse, in the sense that no reasonable Arbitral Tribunal could have taken the same view. The Court, in *Associate Builders vs. Delhi Development Authority*⁷ and *Ssangyong Engg. & Construction Co. Ltd. vs. NHAI*⁸ has clearly held that a finding which is based on no evidence at all can be interdicted by the Court but, where there is some evidence to support a particular view, the Arbitral Tribunal is the only arbiter of the weight to be attached to such evidence.

30. Applying this principle to the facts of the present case, the Arbitral Tribunal had before it the original IPC No. 57, which purported to certify completion of a certain quantity of work by the petitioner, and the minutes of the meeting held on 25.11.2011, which equally clearly stated that no further work was to be done by the petitioner and that the petitioner was not to be paid any additional cost due to reduction in the scope of chain link fencing. Thus, even without reference to the unilaterally revised IPC No. 57, which the Arbitral Tribunal correctly held to be contractually impermissible, there was some evidence before the Arbitral Tribunal to come to the conclusion that the petitioner was not entitled to the claim.

31. Such a result is also consistent with the mandate of the Supreme Court in *Dyna Technologies*⁹. The Court articulated the proper approach of the Section 34 Court in the following terms:

*“24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, **unless the court comes to a conclusion that the perversity of the***

⁷ (2015) 3 SCC 49, paragraphs 31 and 32.

⁸ (2019) 15 SCC 131.

⁹ Supra (note 2).

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***award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award.** Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.*

*25. Moreover, umpteen number of judgments of this Court have categorically held that the **courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists.** The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.”¹⁰*

32. Even on Ms. Suri’s submission that, in terms of the Contract, payment was to be made in accordance with the certified IPC No. 57, I am not persuaded to set aside the award. The question of whether the certification would override evidence to the contrary - here, that the petitioner had not in fact completed the work for which payment had been certified - is a matter of contractual interpretation, which is also within the province of the Arbitral Tribunal. I do not find any perversity in the approach of the Arbitral Tribunal in this regard.

33. The only remaining question is whether the Arbitral Tribunal has correctly ordered recovery of the amount of Rs. 46,28,483/- by the respondent, even in the absence of a counter-claim. Factually, the amount has been recovered by adjustment against the amount payable by NHAI to the petitioner under claim No. 2 for return of the bank guarantees and payment of costs of extension. In the statement of defence to the claim, in

¹⁰ Emphasis supplied.



paragraph 10, the respondent clearly pleaded recovery of the aforesaid amount from the retention bank guarantees provided by the petitioner. As such, the recovery of the aforesaid amount by adjustment was contemplated in the pleadings itself, and the Arbitral Tribunal has not exceeded its jurisdiction in making such an award.

34. The claims of both parties having arisen out of the same transaction, Ms. Suri's reliance upon *Jitendra Kumar Khan*¹¹ is misplaced. In fact, the judgment permits a set-off in such circumstances.

E. Conclusion

35. For the aforesaid reasons, I am of the view that the petitioner has failed to make out a case for interference with the impugned award dated 21.04.2018.

36. The petition is accordingly dismissed, but without any order as to costs.

PRATEEK JALAN, J.

NOVEMBER 9, 2023

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¹¹ Supra (note 3).