

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO.51 OF 2024

Union of India Through The
General Manager Central Railway ...Petitioner
Versus
PLR HC RBR JV ...Respondent

WITH
INTERIM APPLICATION (L) NO.20681 OF 2024
IN
COMMERCIAL ARBITRATION PETITION NO.51 OF 2024

PLR HC RBR JVApplicant
IN THE MATTER BETWEEN
Union of India Through The
General Manager Central Railway ...Petitioner
Versus
PLR HC RBR JV ...Respondent

Mr. R.V. Govilkar, Senior Advocate a/w. *N.R. Bubna, & Rui Rodrigues., Advocates for Petitioner.*

Mr. Vishwajit P. Sawant, Senior Advocate a/w. *Vasudeva Naidu i/b. Prabhakar M. Jadhav, Advocates for Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.

RESERVED ON : FEBRUARY 28, 2025.

PRONOUNCED ON : JUNE 24, 2025.

JUDGEMENT:

Context and Factual Background:

1. This is a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("***the Act***") challenging an arbitral award dated

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May 31, 2023 (“**Impugned Award**”) in connection with disputes and differences relating to an agreement dated September 24, 2018 (“**Agreement**”). The Agreement relates to work connected with the railway line between Wardha and Nanded and related to embankment, cutting including bridge approaches, trolley refuges, construction of side drains, minor bridges etc.

2. The Agreement was preceded by a tender notice dated October 25, 2017, issued by the Petitioners (collectively, “**Railways**”). The offer made by the Respondent, a joint venture (“**Contractor**”) had been accepted by a letter of acceptance dated May 24, 2018, indicating the approximate value of contract at Rs. ~124.96 crores. The completion deadline was 24 months from the date of the letter of acceptance i.e. May 23, 2020. The Agreement entailed submission of a performance bank guarantee by the Contractor in the sum of Rs. ~6.24 crores to be kept valid until July 23, 2020 – two months after the deadline. The Contractor also had to provide a security deposit of Rs. ~6.24 crores.

3. Running Account Bills (“**RA Bills**”) were to be raised by the Contractor from time to time. The Contractor completed works as assigned from time to time by the Railways officials to the extent of Rs. ~108.73 crores which was covered by the RA Bills up to the sixth RA Bill. Until this point, all bills were cleared by the Railways.

4. On April 29, 2020, the Contractor sought extension of time. The delay was attributed to the failure of the Railways to acquire forest land, revenue land and farmer land, and restrictions arising out of the lockdown imposed on account of the Covid-19 Pandemic. The request for such extension was made under Clause 17-A(ii) and Clause 17-A(iii) of the General Conditions of Contract (“**GCC**”) governing the Agreement. The former sub-clause applies where the extension is sought citing reasons for delay that are not attributable to either party, while the latter applies where the reasons for delay are attributable to the Railways. An application for a second extension was made on May 8, 2020, asking for the deadline to be shifted to January 17, 2021. The reasons set out were the same – again under Clause 17-A(ii) and Clause 17-A(iii) of the GCC and the Covid-19 lockdown, and there was no quarrel on the reasons attributed.

5. The Railways did not object to the reasoning, and by a letter dated June 29, 2020, granted extension until December 31, 2020, without imposing any penalty and accepting price variation arising due to the delay.

6. The Contractor continued to work under the extended time. A joint measurement of further work was effected on June 22, 2020, and the seventh RA Bill was prepared on July 13, 2020, based on such

measurement. The cumulative value of the work done by this RA Bill stood at Rs. ~138.78 crores. However, despite joint measurement, the Railways did not pay this bill on the premise that the excess work carried out by the Contractor fell within the ambit of restricted quantities.

7. Joint measurement was then carried out on March 16, 2021, for preparation of the eighth RA Bill, and the work that would be covered by this bill was to be valued at Rs.~8.22 crores. The eighth RA Bill was neither prepared nor approved by the Railways.

8. Thus, according to the RA Bills raised, the total value of the work carried out by the Contractor was Rs.~147 crores while what was paid by the Railways was Rs.~124.95 crores. This lies at the heart of the disputes between the parties.

9. The Railways had a change of personnel handling the project in its interaction with the Contractor, with a new Deputy Chief Engineer being appointed at Wardha in January 2021. According to the Contractor, everything changed after this, and past decisions were second-guessed. The newly appointed Deputy Chief Engineer has also been examined in the arbitral proceedings as a witness.

10. Meanwhile, the deadline was extended from time to time and the new deadline was May 31, 2021, on which date, a fresh extension was sought, again citing the same provisions of the GCC, requesting for a new deadline of December 31, 2021. The reasons cited were continued delay in land acquisition, the strict lockdown restrictions due to the Covid-19 Pandemic, approval for pending railway bridges not having been granted by the Railways, and the refusal of the Railways to prepare the eighth RA Bill despite joint measurement having been made.

11. This time, the Railways did grant an extension on July 22, 2021, but imposed a token penalty of Rs.1,000 and also refused to accept a price variation. The grant of the extension was provided in reliance upon Clause 17-B of the GCC, which governs extension of time due to delay for reasons attributable to the Contractor. Under Clause 17-B, if the delay is due to reasons not falling under Clause 17 (*force majeure*) or Clause 17-A (*extension due to modification, or for reasons attributable to neither party, or attributable to the Railways*), an extension may be granted provided the Railways is satisfied that the work can be completed within a reasonably short time. A penalty or liquidated damages in the sum of 0.5% to 1% of the contract value for each week of delay is envisaged subject to a cap of 10% on the first Rs. 2

lakh and 5% on the balance value. The provision also envisages imposition of a token penalty.

12. This led to a breakdown in the relationship between the parties – the Contractor contended that the refusal to release the eighth RA Bill despite joint measurement, the refusal to pay the approved seventh RA Bill, and the imposition of a denial of price variation made it impossible to continue to work. The Railways called for a fresh measurement despite the joint measurement having been effected in March 2021. This was protested by the Contractor, although he claims to have showed up for the measurement, which was not carried out. The Contractor pointed out that he was hard-pressed due to the severe lockdown restrictions while the Railways contended that inadequate manpower and machinery was deployed, and therefore the delay was attributable to the Contractor. The Railways wrote to the Contractor asking it to complete the work while the Contractor wrote to the Railways that the work could not be carried out under the conditions imposed by the Railways. This stand-off led to the arbitration proceedings, which led to the Impugned Award.

Core Elements of the Arbitral Claims and Proceedings:

13. In the arbitral proceedings, the Railways contended that there was no option but to grant extension from June 1, 2021 to December

31, 2021, but necessarily under Clause 17-B of the GCC. The Contractor could have well carried out work in respect of minor bridges, drain, trolley refuges and other works, the Railways contended. Deficiencies in the work were also complained of and pointed out to the Contractor, but he failed to deploy adequate manpower and machinery to have the deficiencies addressed. It was sated that the Railways, in fact, had to effect certain recoveries from the Contractor and this process was initiated on September 27, 2021. According to the Railways, the Contractor had abandoned work in November 2020. The eighth RA Bill was not prepared by the Railways because of deficiencies found in the joint measurement. The Railways contended that it would suffer losses due to the deficiencies in the work done and also due to the costs and losses, having to issue a fresh tender to complete the work left incomplete by the Contractor.

14. The Learned Arbitral Tribunal considered the evidence presented by the parties, examined the record, and has returned factual findings analysing the evidence to rule as follows:

- a) The Contractor was entitled to the value of the restricted quantities to the tune of Rs. 13,82,78,075;
- b) The Contractor had proved that he was entitled to the value of the eighth RA Bill that was never issued although covered by

- the joint measurement made on March 16, 2021 to the tune of Rs. 8,22,68,293.35;
- c) The Contractor was entitled to the price variation claim to the extent of Rs. 2.87 crores as claimed;
 - d) The Contractor was entitled to receipt of the work completion certificate in respect of the work carried out and measured jointly and recorded on March 16, 2021;
 - e) The security deposit of Rs. 6,24,78,130 ought to be refunded to the Contractor;
 - f) Costs of the arbitration were fixed at Rs. 30 lakh; and
 - g) Pre-award interest was fixed at 8% and post-award interest was fixed at 10% if the amounts declared as payable were not paid within three months from the date of the Impugned Award.

Analysis and Findings:

Additional Work and Delay:

15. The Learned Arbitral Tribunal considered the itemised heads of quantities referred to in the material on record and examined the measurement book. The actual quantity of work done as compared with the quantity of work paid for has been compared. It was found that as a matter of record, the actual work carried out had to be more than what was envisaged, and the excess work was not being paid for. The work actually done was tested, checked and confirmed by the Railways officials who had overseen and directed the execution of the work. It was seen that the Executive Engineer had certified that

necessary tests had been carried out and the results were within acceptable limits. Conformity with the Railway Standard Specification Drawings and Plans was also seen. The measurements were tested entirely and with 100% testing, they were shown as being true and correct to evidence the work carried out under the directions of the Railways' officials.

16. The Learned Arbitral Tribunal noted that the defence of the Railways was that such additional work constituted modification of the Agreement, and that the modifications ought to be in writing. Reliance was placed on Clause 41 of the GCC, to contend that unless such modifications are incorporated into a formal instrument gained by the Railways and the Contractor, the Railways would have a right to repudiate the arrangement. The Learned Arbitral Tribunal, on scrutiny of the record and the conduct of the parties and the documentary support for the work done, has noted that the extra work was indeed carried out under the instructions of the Railways' officials. The work is recorded in the measurement book, and it was the Railways that prepared the seventh RA Bill. The Railways has acknowledged the excess work done.

17. There was nothing to show that the Railways questioned why additional work was being done beyond the original stipulation. The

seventh RA Bill, prepared by none other than the Railways, did not disown the work done and instead included it. They were only awaiting internal approval under Clause 41 of the GCC, and permitting the Railways to repudiate the obligation to pay in the teeth of the demonstrated direction to carry out the work and confirmation of the work actually done, would lead to unjust enrichment of the Railways, the Learned Arbitral Tribunal concluded. The work was in conformity with the drawings and plans and indeed entirely under the oversight of the Railways and confirmed by them. The Learned Arbitral Tribunal noted that the Railways had not even pleaded that unnecessary extra work that had not been approved by the Railways had been carried out. Payments under the past RA Bills had even been made for components of the extra work. The Learned Arbitral Tribunal was convinced that in the peculiar facts of the case, the claim for the excess work must be honoured since such work had actually been carried out, measured and approved, and indeed not protested contemporaneously.

Modification and Article 299:

18. In this Petition, the Railways' contention is that unless and until there is a formal instrument confirming that the excess work may be carried out, in view of Clause 41 of the GCC, the Learned Arbitral Tribunal was necessarily wrong to allow the claim and has gone beyond

the binding terms of the contract. Learned Senior Counsel on behalf of the Railways would go so far as to say that the Impugned Award is contrary to Article 299 of the Constitution of India. In terms of Article 299(1), all contracts made in exercise of executive power of the State shall be expressed to be made in the name of the President of India or the Governor of the respective State. All assurances of property made in exercise of such executive power shall be executed on behalf of the President or the Governor or by persons so directed or authorised. Article 299(2) confers protection from personal liability on the individual occupying the office of the President and the Governor in relation to such contracts. In support of this proposition, the Railways seek to rely on the judgements rendered in *Bhikraj Jaipuria*¹; *KP Chowdhry*²; *Om Prakash*³; and *PSA Sical*⁴.

19. Upon an examination of the record considered by the Learned Arbitral Tribunal and the analysis in the Impugned Award, in my opinion, no case is made out by the Railways warranting any interference by this Court. One must not forget the scope of review in the jurisdiction under Section 34 of the Act. The findings are based on specific documentary evidence, which in turn is a cogent and clear record of empirical evidence. The parties had executed the Agreement.

¹ *Bhikraj Jaipuria vs. Union of India* – AIR 1962 SC 113

² *KP Chowdhry vs. State of MP* – AIR 1967 SC 203

³ *State of Punjab vs. Om Prakash* – AIR 1988 SC 2149

⁴ *PSA Sical vs. Board of Trustees* – AIR 2021 SC 4661

The work carried out was in line with the Agreement. The Railways' officials were actively involved in the oversight of the execution of the work. The Railways granted extensions based on the factual parameters on the ground. The finding of the Learned Arbitral Tribunal is eminently logical and plausible, and one must not forget that the work in dispute was carried out in the height of the Covid-19 Pandemic and the resultant lockdown. The contention before the Learned Arbitral Tribunal that adequate manpower and machinery was not deployed to correct deficiencies and that in fact, the Contractor ought to refund monies to the Railways rings hollow when it is seen that despite such assertions, the Railways did not make any counter-claim in the arbitral proceedings. The measurements in the measurement book were jointly taken and a pattern of oversight of additional work, its approval, and paying for excess work done, was already established by the conduct of the parties. That apart, the measurement book and the drafting of the RA Bill, which is but in the control of the Railways, also goes to show written confirmations of facts from the Railways.

20. The Learned Arbitral Tribunal is the best judge and master of the evidence before it. The view of the Learned Arbitral Tribunal that the conduct indicates consensual and well-documented expansion of scale of work and that the Railways would be unjustly enriched having

confirmed that it has indeed gotten the work done, cannot be faulted with. The Learned Arbitral Tribunal has decided that the Railways could not hide behind the defence that the Agreement ought to have been amended by a formal instrument when the measurement book and the RA Bills prepared, approved and cleared, all point to written confirmations. The absence of any confrontation as to why anything extra was being performed is also taken into account by the Learned Arbitral Tribunal. Taking a holistic view of the evidence, the Learned Arbitral Tribunal has returned a reasonable, defensible and plausible view, which cannot be faulted.

21. I am not impressed by the attempt to show that the findings are in conflict with the very contract of the parties and that Article 299 of the Constitution of India would come to the aid of upsetting the Impugned Award. Article 299 requires contracts with the State to be in writing, and stated to be with the constitutional heads of the respective units of the State – the President of India for the Centre, and the Governor for the States. Indeed, the parties executed the Agreement in the instant case. None of the grounds in the Petition make any allusion to this facet. Indeed, it is open to Learned Senior Counsel to pitch a challenge on a point of law and that too a constitutional point, but in my opinion, this is a very high-pitched argument that does not turn the needle in the Railways' favour.

22. The matter at hand does not involve a question of either the State agency forcing a bidder to perform the requirements in a tender without executing a contract or a private party forcing the State agency to respect a purported agreement without its execution. In the case at hand, the parties indeed executed the Agreement and have been implementing it. In the course of implementation, they have arrived at a clear functioning framework and the work was done in that framework. One would need to take judicial notice of the implications of the hard lock-down during the Covid-19 Pandemic and the repercussions for labour that migrated in large numbers. For the Railways to suddenly change its earlier contemporaneous stance and allege that adequate manpower was not deployed and therefore the delay should be attributed to the Contractor, and that too when under the close supervision and approval right up to the level of the Executive Engineer the work was approved, confirmed and jointly measured, the Learned Arbitral Tribunal is eminently justified in taking the view adopted in the Impugned Award.

Case Law Distinguished:

23. The facts in ***Bhikraj Jaipuria*** related to transactions in commodities in the pre-Independence era. A five-judge bench of the Supreme Court was interpreting Section 175(3) of the Government of

India Act, 1935, which was a provision akin to Article 299 of the Constitution of India. The contract in dispute was an exchange of letters between the Divisional Superintendent and a private individual for supply of foodgrains to supply them to employees of the East Indian Railways during the famine of 1943. The trial court held in favour of the supplier and the High Court held in favour of the railway administration stating that the contract was not in the prescribed form. That apart, assuming it to be valid, the High Court ruled that, on evidence, there was no basis made out, with evidence being led, to prove damages suffered by the supplier when the supply was not made within the deadline stipulated to him. The Supreme Court agreed with the High Court. In the course of dealing with that framework, essentially ruling upon the implications of Section 175(3) of the Government of India Act, 1935, the Supreme Court made observations about Article 299.

24. This case is completely distinguishable. In the matter at hand, it is nobody's case that there had been no execution of a contract at all. There was a validly tendered and accepted transaction that led to formal execution of the Agreement. That Agreement is subjected to the GCC, which contains Clause 41, which is the provision on modification. Clause 41 requires modification of agreed terms to be in writing in a formal instrument and signed by the Railways and the Contractor,

without which the Railways would have a right to repudiate the arrangement. On facts, there is a joint measurement that reduces to writing in the measurement book, the assessment of the work carried out. That joint measurement led to preparation of the seventh RA Bill which is actually drafted by the Railways. There are multiple extensions of time citing Clause 17-A(ii) and Clause 17-A(iii) which are also accepted in writing by the Railways. The cause for the delay is therefore clearly documented and accepted between the parties. The Learned Arbitral Tribunal has examined the record and also seen the witness statement and cross-examination of the the new officer of the Railways. The Railways claimed to have overpaid the Contractor in the past and that it was entitled to a refund, but strangely filed no counter-claim.

25. Taking all these facets together, the view of the Learned Arbitral Tribunal that there had been a clear understanding and that the Railways would benefit from unjust enrichment is an eminently plausible view. In my opinion, it would not be a view that is in conflict with Clause 41 of the GCC. Whether it is in conflict is a mixed question of fact and law that the Learned Arbitral Tribunal has answered in its wisdom and assessment of the evidence in a reasonable and plausible manner. In my opinion, there is nothing in the finding that is contrary to the fundamental policy of law in India, even if the Railways has

chosen to pitch the matter across the bar, as high as being in conflict with requirements under the Constitution of India.

26. ***KP Chowdhry*** is a case of a bidder seeking to raise a contractual dispute even before the contract post-tender could be signed by the Government – therefore, it is not relevant to this case. ***Om Prakash*** is a case where the winning bidder withdrew his bid and the Executive Engineer who had approved the lowest bid sought to enforce a purported agreement that was not even entered into. In fact, the Government called the contractor to attend the office within ten days to sign an agreement, but such event never took place. The Executive Engineer sought to impose a penalty in the name of the Governor. Such action was held to be untenable by the Supreme Court. Therefore, this case too is of no relevance to the matter at hand.

27. ***PSA Sical*** too is distinguishable. This was a case where a private port operator and a Port Trust had executed a license agreement. The tariff that could be charged by the port operator to shipping lines and customers was regulated by the Tariff Authority for Major Ports. The port operator sought to include the royalties payable to the Port Trust as a cost in the computation of tariff on a cost-plus basis. The tariff regulator disallowed it. This was sought to be treated as a change in law. The arbitral award held that it was indeed a change in law and

directed that the license agreement be modified from a royalty model to a revenue sharing model. The Section 34 Court upheld the award and the Section 37 Court set aside the award. The Supreme Court agreed that the arbitral award could not thrust a new contract on the parties. It had to confine itself to the contract between the parties.

28. Such an analysis has no bearing at all on the facts of the instant case. The Learned Arbitral Tribunal has done no such thing. The Learned Arbitral Tribunal has examined the evidence, including documentary and oral evidence of the parties, and returned a plausible view that the parties consented through their exchange of written communication as to the causes for the delay and that work under the instructions of the Railways had actually been carried out and now the Railways could not back out of paying for it. The Learned Arbitral Tribunal has ruled that the Railways would be unjustly enriched. The Learned Arbitral Tribunal has noted that despite arbitration having commenced, the Railways did not walk the talk about payments for any extra work having been unauthorised. The Railways chose not to test its own proposition by making a counter-claim for a refund, and leading evidence on the strength of the same principle that was sought to be relied upon. The Learned Arbitral Tribunal was eminently justified in taking the view it has taken. I see no basis for this Court to interfere with the Impugned Award.

29. As regards the work covered by the eighth RA Bill, the Learned Arbitral Tribunal has appreciated evidence contained in the measurement book, the RA Bills, and come to its view that the work had been done and ought to be paid for. This is purely a matter of evidence. The Learned Arbitral Tribunal has also examined the record to point out that the Contractor indeed reported for a joint measurement on September 9, 2021, subject to the protest that the measurement taken on March 16, 2021 was complete and did not warrant another measurement. However, measurements were not taken. Taking note of Clause 45 of the GCC, the Learned Arbitral Tribunal had found that the earlier measurement had been taken in compliance with the requirements of that provision. The Learned Arbitral Tribunal has pointed out that under Clause 45, if a measurement is scheduled by the Railways and the Contractor does not show up, the Railways is entitled to measure it on its own. However, despite the Railways' claim that the Contractor did not show up for a second measurement, no fresh measurement was carried out by the Railways on its own in reliance upon Clause 45 of the GCC (even in the absence of the Contractor, as it was entitled to).

30. The Learned Arbitral Tribunal rejected the request of the Railways to conduct a fresh measurement under the guidance of the Learned Arbitral Tribunal when the arbitration proceedings were

underway, with plausible reasons. It is seen that after mid-2021 others had been deployed on the site and two years later, any exercise to effect a measurement would be unreliable – there could be wear and tear as also additional work carried out by other contractors. That the Railways chose not to record even a unilateral re-measurement if their case that the Contractor was resisting participating in it, has weighed with the Learned Arbitral Tribunal. In that backdrop, when the joint measurement book is taken by both sides, and indeed the internal draft of the eighth RA Bill is in conformity with it, the Learned Arbitral Tribunal has found it unnecessary to doubt the empirical evidence forming part of the record.

31. Learned Counsel for the Railways in the arbitration had indicated a Rs.20-crore refund claim as being capable of pursuit against the Contractor, but the Railways chose not to actually file a counter-claim in the arbitration. There was nothing on the record to show what precise amount was to be recovered and in what manner it was said to be liable to be refunded. The ground of challenge in the Petition in this regard reiterates the pleadings that the overpayment of Rs. ~20.52 crores has been made to the Contractor, but is silent on why no counter-claim was filed in the arbitration. The Learned Arbitral Tribunal had found that the claim of overpayment was made for the first time in September 2021 more than one year after the last RA Bill

was cleared and paid. The Learned Arbitral Tribunal's assessment that this is an afterthought, which too has not been backed up with a counter-claim cannot be faulted.

32. The Petition purports that the Railways asserted with the contractor time and again about the deficiencies. However, in the absence of a measurement, even unilaterally, this facet of the matter has remained hanging. The standard for testing an arbitral award under Section 34 of the Act is not to create doubt about it but to demonstrate that the award has patently ignored vital evidence to come within the ambit of patent illegality.

33. For all the aforesaid reasons, in my opinion, the Petition falls short of the standard required under Section 34 of the Act to set aside the Impugned Award.

Price Variation:

34. As regards price variation, the Learned Arbitral Tribunal had examined the record to find that the Railways had granted extension without penalty and allowing price variation until it changed its approach in July 22, 2021. The amount already received by the Contractor under the head of price variation until the change in stance of the Railways was Rs. ~10.03 crores. The price variation component

in the seventh and eighth RA Bills was Rs. ~2.87 crores and this has been allowed in the Impugned Award. The Learned Arbitral Tribunal had observed that the price variation component was not seriously disputed by the Railways, which was primarily disputing that the extra work amounted to a modification, which was not in conformity with Clause 41 of the GCC.

35. The only ground of challenge in the Petition is that since the eighth RA Bill was under dispute, the price variation, as an interlinked element is deemed to be in dispute. On an examination of the Impugned Award, in my view, the Learned Arbitral Tribunal has not stated that the price variation is not in dispute at all. It is the Learned Arbitral Tribunal's assessment that the core issue disputed by the Railways was not the price variation. For example, there does not appear to be any issue about evidence about the quantum of the price variation being questionable, with competing claims on what the size of the variation ought to be. Evidently, this is what the Learned Arbitral Tribunal has noticed.

36. As regards the validity of the extensions and the denial of the last extension sought (without penalty and rejection of price variation), the Learned Arbitral Tribunal has noted the onset of the Covid-19 Pandemic and that the Railways did not supply certain drawings and

plans it had to provide. The five reasons cited by the Contractor were noticed – failure to process and approve the price variation; failure to complete land acquisition; strict lockdown restrictions; approval for remaining bridges being pending; and the eighth RA Bill not having been processed since March 16, 2021. Although these reasons had been accepted by the Railways in the past, agreeing that the Contractor was not at fault, the Railways now chose to grant extension invoking Clause 17-B (delay being attributable to the Contractor). The Contractor refused to carry out work at rates that had prevailed over two years ago, when in the intermittent two years, the Railways had already allowed variation. The Learned Arbitral Tribunal had come to the view that such conditions could not be imposed when the Railways had already accepted that the reasons for extension cited earlier were valid. The Learned Arbitral Tribunal has held that the Railways were not justified in imposing penalty and denying price variation without clearing dues of Rs. 22 crores that had already been accepted.

37. The Learned Arbitral Tribunal has disbelieved the contention that the Contractor had abandoned work in November 2020 – in fact, the joint measurement for the eighth RA Bill was conducted on March 16, 2021. Therefore, the Learned Arbitral Tribunal had held that the imposition of penalty and denial of price variation was completely wrong. The grounds of challenge of this facet of the Impugned Award

does not fall anywhere in the scope of Section 34 of the Act. The Petition alleges that the Contractor was lax and had failed to complete the work despite getting two extensions. There is not even a whisper about how the Railways' deviation from the track record of two extensions without penalty and with price variation is justifiable. There is no basis to accept the challenge of the Railways in this regard.

Completion Certificate:

38. Finally, as regards the work completion certificate, the Learned Arbitral Tribunal has directed such certificate to be issued for all the work measured as of March 16, 2021. The Learned Arbitral Tribunal had noted that the Contractor has indeed been paid for the work done to the extent of Rs. ~124.95 crores, and the price variation of Rs. ~10.03 crores. More than 20% extra work has been carried out with the approval of the Railways and measured and confirmed that it has been carried out. Noting and interpreting Clause 48 of the GCC, the Learned Arbitral Tribunal has noted that work completion certificate can also be given in respect of any part of the work done even before full completion of the work. There was no dispute until the payment of the seventh RA Bill over two years since the commencement of the relationship under the Agreement. Disputes only began after January 2021 when there was a change of guard at the Railways' end. Only a

portion of the original work covered by the Agreement remained and was stalled due to the complete change of face by the Railways. The Contractor could not have been expected to continue work in such circumstances – illegally invoking Clause 17-B when it had already agreed twice to Clause 17-A being applicable. I am of the view that this finding is appropriate, logical and plausible.

39. Who was responsible for the delay is a question of fact. That cannot change lightly without reason. A sudden change on the facet of cause for the delay has to be borne out by strong evidence and material on the record. The Learned Arbitral Tribunal was right in holding that the Contractor was not at fault for refusing to continue the work in such circumstances. Since the certificate of completion may be granted for a part of the work and in view of the findings agreed with above, there is no basis to disagree with the declaration that the Contractor is entitled to the completion certificate for work recorded as of March 16, 2021.

40. The contention in the Petition that Senior Engineer has to be satisfied with the work for such a certificate to be issued, is answered by the fact that this is a declaratory relief that is dependent on the reliefs referred to above. There is no real reason to object to this relief – it is merely a corollary of the finding that the Contractor had validly completed the work as evidenced in the measurement book. The

Railways not having succeeded in convincing the Learned Arbitral Tribunal on the facets discussed above, there is no merit in the challenge to the ruling that the completion certificate ought to be issued for the portion of work evidenced until the joint measurement of March 16, 2021.

Release of Security Deposit:

41. The next facet further inter-twines the logic of all that is held by the Learned Arbitral Tribunal and dealt with above. It is common ground that on March 10, 2021, the Railways also released the performance bank guarantee which was valid until July 23, 2020. The performance bank guarantee was meant to be released upon completion of the work as certified. That the Railways released the performance bank guarantee also underlines its satisfaction with the work done and measured as of March 2021. The security deposit was liable to be released one year after completion of the work. In view of the findings in the Impugned Award, the Learned Arbitral Tribunal has held that the security deposit was to be released by March 16, 2022. The performance bank guarantee having been released, there is no reason, according to the Learned Arbitral Tribunal to withhold the security deposit any further.

42. I am unable to disagree with the Learned Arbitral Tribunal. What weighs with me is the fact that the Railways chose not to even file a counter-claim in the proceedings when it was asserting that it had a right to claim the funds back. If the Railways truly believed monies were due to it, it would have filed a counter-claim. Not having found the basis to file a counter-claim and having lost in satisfying the Learned Arbitral Tribunal about the merits of its stance, there is no basis to hold on the security deposit. Even in the grounds of challenge in the Petition, the Railways have simply repeated a right to recover the alleged excessive payment. I am afraid this assertion is of no value to the Railways. Having lost the basis on which it changed its stance under the Agreement and having forced the Contractor out of the project, and having given up its right to have its stance tested with a counter-claim, there is no basis left for the Railways to hold on the security deposit. The Learned Arbitral Tribunal cannot be found fault with in returning its finding in this regard.

Costs Imposed:

43. The challenge to costs of merely Rs. 30 lakh is untenable. This is a commercial dispute and costs need to follow the event. There is nothing in the grounds of challenge in the Petition that delve into why the costs are inappropriate. The ground on this facet reiterates that the

Contractor did not show up for a repeat of a joint measurement, but does not explain why the Railways did not carry out a measurement on its own as it was entitled to under the GCC. I see no basis for interference with the facet of costs imposed.

Pre- and Post-Award Interest:

44. The challenge to interest simply states that the Railways had not wrongfully denied the Contractor's claims and therefore no interest is payable. For the reasons set out above, the Railways' contentions have been dismissed. Therefore, interest must follow for the period for which funds due to the Contractor were enjoyed by the Railways. The interest rates applied by the Contractor are reasonable – 8% pre-award, further leeway of three months to honour the award, and 10% after the said three-month period. I am not satisfied that any case for interference on this count is made out.

Evidence Procedure:

45. Before parting, I must take note of one other ground verbally canvassed by Learned Senior Counsel on behalf of Railways. It was urged that the Learned Arbitral Tribunal dispensed with the process of proof of documents which were not admitted. Learned Senior Counsel contended that the measurement book, which was disputed on

Railways' behalf has been accepted and proven documents were not segregated from unproven documents, and that the Impugned Award stands vitiated. The Impugned Award is also challenged on the premise that it does not disclose application of mind as regards the consideration of documents which were not admitted and denied, and documents whose existence was admitted but contents were denied, and documents where neither existence nor contents were admitted.

46. There is not a whisper of this element in the Petition. This appears to be an improvisation across the bar.. That apart, Learned Senior Counsel pointed to the opening paragraph in the record of proceedings when witnesses were examined, to insinuate that the Learned Arbitral Tribunal had no clue which document was admitted and which one denied, and that the outcome is completely perverse.

47. I have given careful thought to this element of the attack on the Impugned Award. I note that the Impugned Award indeed makes specific reference to specific exhibits by number and to arguments based on them. That apart, the Learned Arbitral Tribunal had chosen to write a generic opening paragraph on each date of examination of witnesses so as to not iterate at every hearing, the precise list of documents that are admitted or denied and the nature and extent of admission or denial. Such an opening paragraph would not even be

necessary on every occasion. That would not mean that the Learned Arbitral Tribunal had no regard to any basic notion of fairness and clarity on what is being considered in the course of adjudication.

48. It is trite law to state that strict rules of evidence and procedure are not applicable to arbitration. The key question is to see if the Learned Arbitral Tribunal has returned a totally perverse and palpably irrational and illogical decision. For the reasons set out above, I agree with the entire outcome in the Impugned Award and find no infirmity warranting interference under Section 34 of the Act.

Conclusion:

49. For all the aforesaid reasons, the Petition is ***dismissed*** as being devoid of merit. Since this is a commercial dispute, costs would need to follow the event. Taking into account the fact that the Learned Arbitral Tribunal has already imposed costs for the arbitration round, costs in this round are restricted to a token sum of Rs. 2.5 lakhs, which would be a reasonable and discounted estimate of costs that would be incurred in a matter of this nature, bearing in mind market rates for lawyer fees and related litigation expenses.

50. The Petition is ***finally disposed of*** in the aforesaid terms.

51. The Interim Application is taken out by the Contractor for withdrawal of amounts deposited by the Railways. Any amounts deposited in this Court along with accruals shall be released to Contractor forthwith, and in any event within a period of four weeks from today. With this direction, the captioned Interim Application stands *disposed of*.

52. Learned Counsel for the Petitioner, upon pronouncement requests for a stay of this Judgment for a period of eight weeks. Since the deadline for release of the amounts deposited in this Court is already fixed at four weeks, there would be no reason to grant such request.

53. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN J.]