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O.P.Nos.569 & 570 of 2017

In the High Court of Judicature at Madras

Reserved on 28.10.2025	Delivered on : 07.11.2025
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Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Original Petition No.569 & 570 of 2017

M/s.Chennai Metro Rail Ltd.,
Administration Building,
Chennai Metro Rail Depot,
Poonamalle High Road,
Koyambedu, Chennai-107

...Petitioner in
Both OPs

Vs

M/s.Transtonnelstroy - Afcons JV,
rep.by Afcons Infrastructure Ltd.
and comprising

1.Transtonnelstroy Ltd.,
4/1, Luganskaya Str,
Moscow, 115583, Russia.

2.AFCONS Infrastructure Ltd.,
Afcons House, 16,
Shah Industrial Estate,
Veera Desai Road,
Azad Nagar (P.O.),
Post Box No.11878,
Andheri (W), Mumbai-53.

...Respondent in
Both OPs



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PETITIONS under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the awards respectively dated 28.4.2017 and 03.6.2017 by majority of the Arbitral Tribunals, by allowing these petitions with costs throughout.

For Petitioner in
OP.No.569 of 2017 : Mr.S.Arjun Suresh

For Petitioner in
OP.No.570 of 2017 : Mr.Yashodh Vardhan, SC for
Mr.S.Arjun Suresh

For Respondent in
Both OPs : Mr.P.V.Balasubramaniam, SC for
Mr.D.Balaraman

COMMON ORDER

These petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 as amended in 2015 (for brevity, the 'Act') against the Arbitral Awards dated 28.4.2017 and 03.6.2017 passed by the respective Arbitral Tribunal.

2. Heard both.

3. The case of the petitioner is as follows :

(i) The petitioner - Chennai Metro Rail Limited (CMRL) is a company incorporated under the Companies Act, 1956 and has been



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established as a Special Purpose Vehicle (SPV) by the Government of Tamil Nadu and later it was converted into a joint venture with the Government of India, both having equal equity holding. The petitioner appointed one M/s.EMBYE, which is a consortium of consultants comprising of five companies. The said M/s.EMBYE nominated the Employer's Representative (ER) to assist the petitioner in designing, supervising, quality control, safety and contract management for the project.

(ii) On 21.4.2010, the petitioner issued two tenders for the design and construction of underground stations (a) at Shenoy Nagar, Anna Nagar East, Anna Nagar Tower and Thirumangalam and (b) at Washermenpet, Mannadi, High Court, Chennai Central and Egmore, and associated and tunnels - Corridors 1 & 2. These tenders were called respectively as UAA-05 and UAA-01 Packages of the CMRL Phase-I. These two tenders were awarded to the respondent by the petitioner.

(iii) The scope of both the works under UAA-5 and UAA-01 contracts included design, architecture, engineering, procurement, fabrication, construction, tunnelling, erection, installation, electrical, mechanical and plumbing including testing and commissioning of the



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above mentioned works.

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(iv) The contracts awarded to the respondent were design-build lumpsum turnkey contracts that were governed by the Federation Internationale Des Ingenieurs Conseils) (FIDIC) Part 1 of 1995 Edition, the General Conditions of Contract (GCC) modified via the Conditions of Particular Application (CPA) and the Employer's Requirements on price, design, interface management, etc.

(v) CPA-32 provided a mechanism for price adjustment based on fluctuations in labour, steel, cement and fuel costs, while CPA-37 dealt with reimbursement for cost variations arising from changes in law. The respondent used this price variation formula under CPA-32 and received an aggregate sum of Rs.50,79,84,951/- and another sum of Rs.59,91,55,926/- towards price variation for materials. Both clauses were mutually exclusive and once price variation formula under CPA-32 was adopted, no further claim could be made except for certain statutory taxes such as Custom Duties, Excise Duties and Output TNVAT. The respondent agreed to the tender conditions and submitted the completed bids on 05.08.2010.

(vi) During execution of works, by Notification dated 18.9.2012, the Government of Tamil Nadu amended Rule 7 of the Tamil Nadu



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Minor Mineral Concession Rules, 1959 (for short, the TNMMC Rules) imposing liability on contractors to pay the cost of minerals in addition to estimated seigniorage fees, retrospectively from 01.4.2012. The District Collector, Kanchipuram directed the respondent to remit the cost of minerals. However, the respondent refused to pay the demand. The respondent also challenged the said amendment by filing W.P.No. 30805 of 2013 before this Court.

(vii) The respondent thereafter submitted two claims reports respectively dated 14.11.2014 and 18.11.2014 requesting the ER to determine and certify the payments towards additional costs incurred by it on minor minerals. But, they were rejected vide two separate letters dated 08.1.2015. Again, vide letters respectively dated 12.12.2015 and 06.10.2015, the ER confirmed their stand that the respondent was not entitled to any claim towards additional cost of miner minerals.

(viii) Later, vide two letters both dated 08.12.2015, the respondent sought for an amicable settlement and their request was rejected by the petitioner vide two letters dated 02.2.2016. Consequently, the respondent invoked arbitration clause on 15.2.2016. Pursuant thereto, the arbitration proceedings were conducted before



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the respective Arbitral Tribunal.

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(ix) The respondent, which is the claimant, made two claims before the respective Arbitral Tribunal on the ground that CPA 32 and CPA 37 were distinct provisions, that the former dealt with the market fluctuation and the latter dealt with changes in legislation, that when there was a change in legislation by means of a Notification issued by the Government of Tamil Nadu imposing liability on the contractors to pay the additional cost on minor minerals, CPA 37 automatically kicks in and that therefore, they would be entitled to reimbursement of the additional mineral costs.

(x) Before the Arbitral Tribunal, the petitioner filed their respective statement of defence. However, ultimately, the respectful Arbitral Tribunal, vide awards respectively dated 28.4.2017 and 03.6.2017, allowed the respondent's claims. Aggrieved by the same, the petitioner filed the above petitions on the ground that the awards are in conflict with the express terms of the contracts and are patently illegal.

4. The respondent filed two separate counters in both the petitions refuting the contentions raised by the petitioner.



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5. The respective learned counsel appearing on behalf of the petitioner in both the petitions submitted as follows :

(a) The respondent made price variation claims under CPA 32 towards labour, steel, cement and fuel in their running current bills and upto March 2015, the petitioner had certified and paid a sum of Rs.130 Crores and Rs.166 Crores, as the case may be towards price variation under CPA 32.

(b) On a plain reading of Sub-Clauses 13.16.1 to 13.16.5 related to cost claims due to the change in law as amended by CPA 37, it was made clear that the respondent would not be entitled to the claims considering the fact that the amounts had already been paid for price variation under CPA 32.

(c) A harmonious reading of CPA 37 would show that the change in law would be compensated either under Sub-Clause 13.16.5 when CPA 32 was adopted or under Sub-Clauses 13.16.2 to 13.16.4 when CPA 32 was not adopted. This was in view of the fact that the payment towards additional costs on account of any changes in law under Sub-Clause 13.16.2 was subject to Sub-Clause 13.16.5. Thus, Sub-Clause 13.16.2 was governed by or was subordinate to Sub-Clause 13.16.5.

(d) Sub-Clause 13.16.5 permitted addition or reduction in costs



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due to change in law only if it fell within the three taxes namely customs duties, excise duties and output TNVAT.

(e) The interpretation of the respective Arbitral Tribunal to the effect that Sub-Clause 13.16.5 was brought in only to avoid duplication, that CPA 32 and CPA 37 were objective specific and were independent and that if the adoption of the price variation formula led to denial of adjustment under change in law clause, it would make Sub-Clause 13.16.2 redundant, is neither a possible nor a plausible view on the interpretation of Sub-Clauses 13.16.1 to 13.16.5 and is patently illegal and contrary to the Public Policy of India.

(f) The reliance placed upon the judgment of the Hon'ble Apex Court in **NHAI Vs. ITD Cementation India Ltd. [reported in 2015 (14) SCC 21]** is patently erroneous since that judgment is inapplicable to the facts of the present case as the contractual terms that were considered in that judgment were not similar to the terms of the present case under Sub-Clauses 13.16.1 to 13.16.5.

6. Per contra, the learned Senior Counsel appearing on behalf of the respondent in both the petitions submitted as follows :

(a) Sub-Clause 13.16.5 was not meant only for three taxes, but



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it was allowable for additional costs for change in law claims to the extent not covered by the price variation formula under CPA 32. CPA 32 was meant for taking care of market fluctuation whereas CPA 37 was meant to take care of changes in law to the extent not covered under the price variation formula under CPA 32.

(b) If the price variation formula under CPA 32 was adopted by the contractor, then no addition or reduction in costs due to any change in law would be allowed except for changes to the customs duty, excise duty and output TNVAT, which should be to the employer's account and to the extent that it was not covered by the price variation formula. Thus, Sub-Clause 13.16.5 was allowable for additional costs for all change in law claims.

(c) In so far as the judgment that was relied upon by the respectful Arbitral Tribunal was concerned, the Arbitral Tribunal had only adopted the principles laid down in that judgment on price adjustment costs. The respective Arbitral Tribunal had observed that the entire Sub-Clause 13.16.5 had to be read conjointly and harmoniously and interpreted based on the objective of such Sub-Clause and the intention of the parties. Therefore, the respective Arbitral Tribunal did not re-write Sub-Clause 13.16.5 as was contended



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on the side of the petitioner.

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(d) The interpretation of the contractual terms by the respective Arbitral Tribunal was reasonable and plausible, supported by reasons and therefore, there was no ground to interfere with the same under Section 34 of the Act.

7. This Court has carefully considered the submissions of the learned counsel on either side and perused the materials available on record and more particularly the impugned awards.

8. The only issue that is involved in the present case is as to whether the interpretation that was given by the respective Arbitral Tribunal to the relevant Sub-Clauses in the contracts is a possible or plausible view or the respective Arbitral Tribunal has re-written the Sub-Clauses and assigned a different meaning, which was not intended at the time when the parties entered into the contract.

9. The relevant Sub-Clauses in the GCC are extracted as hereunder :

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GCC - FIDIC Condition	
GCC 13.1(b)	GCC 13.16
<i>The contract price 13.1</i> <i>(b) the contract price shall not be adjusted for changes in cost of labour, materials or other matters</i>	<i>The contract price shall be adjusted to take account of any increase or decrease in cost resulting from changes in legislation of the country, made after the base date. Such legislation means any law, order, regulation or by-law having the force of law, including currency restrictions, which affect the contractor in the performance of his obligations.</i> <i>If the contractor suffers (or will suffer) delay and/or incurs (or will incur) additional cost resulting from such changes in legislation made after base date, the contractor shall give notice to the Employer's Representative. After receipt of such notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 to agree or determine:</i> <i>(a) any extension of time to which the contractor is entitled under Sub-Clause 8.3 and</i> <i>(b) the amount of such cost, which shall be added to the contract price and shall notify the contractor accordingly.</i>

10. The Clauses after they were modified under CPA are reproduced as hereunder :



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Modified Clauses under CPA	
CPA 32 (replaces Sub-Clause 13.1(b) of GCC)	CPA 37 (replaces Sub-Clause 13.16 of GCC)
13.1(b) I) Price Variation Formula (a) Prices payable to the contractor in accordance with the contract shall be subject to adjustment during performance of contract to reflect changes in cost of labour and material components and other inputs to the works in accordance with the following general formula for each currency specified : $[P_n = a + b(L_n/L_o) + c(S_n/S_o) + d(C_n/C_o) \pm e(F_n/F_o)]$ 'P_n' is the adjustment factor to be applied to the estimated value of work done in a month, determined by the ER 'b', 'c', 'd', 'e' are coefficients representing the estimated proportion of each cost element (labour, steel, cement and fuel) in the works or section thereof, as specified in Appendix FT-1 of the Form of Tender in the Instructions to Tenderers ('ITT') 'L_n', 'S_n', 'C_n' and 'F_n' are the current cost indices or reference prices for month 'n' determined to item 38 of	13.16.1 The contract shall be governed by the laws for the time being in force in India. 13.16.2 'Changes in law' means the occurrence or coming into force of any of the following, at any time after the base date. 1. Any new tax which is imposed after the due date of submission of tender and which impacts the performance of the contractor with increased cost or which results in extra financial gains to the contractor due to decreased cost in execution of works; and 2. Change in any law pertaining to work having the above said impact. Then such additional or reduced cost shall be certified by the employer's representative after examining records provided by the contractor and shall be paid by or credited to the employer. Subject to Sub-Clause 13.16.5 below 13.16.3 Any change in the rate of any existing tax will be considered a change in law, if so related to work. 13.16.4 Notwithstanding the forgoing, such additional or reduced cost shall not be separately paid or credited, the same shall have been taken into account



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Modified Clauses under CPA	
Appendix FT-1 of the Form of Tender in the ITT applicable to each cost element.	under any other clause under the contract.
'Lo', 'So', 'Co' and 'Fo' are the current cost indices or reference prices for month 'n' determined to item 38 of Appendix FT-1 of the Form of Tender in the ITT applicable to each cost element	13.16.5 If the price variation formula in CPA 32 is adopted by the contractor, then no addition or reduction in cost due to changes in law will be allowed except for changes to i) customs duties, ii) excise duties and iii) output TNVAT, which shall be to the employer's account, to the extent that it is not covered by the price variation formula.

11. The GCC adopted by the parties are the FIDIC conditions. However, certain clauses were amended or replaced by the CPA, which is more in the nature of special conditions of the contract.

12. Clause 13.1(b) of the GCC did not permit payment of price adjustment/price variation/price escalation. But, it permitted changes in cost due to change in legislation, which is quite clear from the GCC 13.16. These clauses came to be replaced by the CPA.

13. CPA 32 permitted price variation. But, it did not deal with change in law. That came to be dealt with only by CPA 37.



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14. Thus, on a close reading of CPA 32 and CPA 37, it could be seen that each was meant for different purposes viz. CPA 32 was meant for price variation formula and CPA 37 was meant for changes in cost due to legislation. As could be seen from the above tabular column, CPA 32 replaced Sub-Clause 13.1(b) of the GCC and CPA 37 replaced Sub-Clause 13.16 of the GCC.

15. Each and every bill that was raised by the respondent included within it the price variations related to labour, steel, cement and fuel. There is no dispute with regard to understanding the scope of CPA 32 and both sides concur with the same.

16. Before the respective Arbitral Tribunal, the main defence that was raised on the side of the petitioner was that a plain reading of Sub-Clauses 13.16.1 to 13.16.5 related only to cost claims due to change in law as amended by CPA 37 and that the respondent would not be entitled to the claim considering the fact that it was already covered under the price variation under CPA 32.

17. The long and short of the arguments advanced on the side of



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the petitioner was that as per CPA 37, Sub-Clause 13.16.5 was applicable when CPA 32 was adopted, whereas Sub-Clauses 13.16.2 to 13.16.4 were applicable when CPA 32 was not adopted. This submission was made by taking advantage of the term '**subject to Sub-Clause 13.16.5**'. It was further contended that Sub-Clause 13.16.2 was subordinate to or was governed by Sub-Clause 13.16.5. In order to substantiate the above submission, reliance was placed on the judgment of the Hon'ble Apex Court in **Radha Sundar Dutta Vs. Mohd. Jahadur Rahim [reported in 1958 SCC OnLine SC 38]**, the relevant portion of which is extracted as hereunder :

"11. Now, it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim "ut res magis valeat quam pereat". What has to be considered therefore is whether it is possible to give effect to the clause in question, which can only be by construing Exhibit B as creating a separate Patni, and at the same time reconcile the last two clauses with that construction. Taking first the provision that if there be other persons entitled to the Patni of lot



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Ahiyapur they are to have the same rights in the land comprised in Exhibit B, that no doubt posits the continuance in those persons of the title under the original Patni. But the true purpose of this clause is, in our opinion, not so much -to declare the rights of those other persons which rest on statutory recognition, but to provide that the grantees under the document should take subject to those rights. That that is the purpose of the clause is clear from the provision for indemnity which is contained therein. Moreover, if on an interpretation of the other clauses in the grant, the correct conclusion to come to is that it creates a new Patni in favour of the grantees thereunder, it is difficult to see how the reservation of the rights of the other Patnidars of lot Ahiyapur, should such there be, affects that conclusion. We are unable to see anything in the clause under discussion, which militates against the conclusion that Exhibit B creates a new Patni."

18. Sub-Clause 13.16.2 in CPA 37 is subject to Sub-Clause 13.16.5. This would only mean that Sub-Clause 13.16.2 cannot be employed wherever Sub-Clause 13.16.5 governs the field.

19. It is not in dispute that CPA 32 was invoked and the price



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adjustment claim was made by the respondent in both the cases. In order to invoke Sub-Clauses 13.16.2 to 13.16.4, it must arise out of a scenario where the parties did not adopt CPA 32.

20. The respective Arbitral Tribunal, (by a majority of 2 : 1), rendered a finding that on a plain reading of the Second Provision to Sub-Clause 13.16 of the GCC and from the term '**shall be adjusted**' in the said Sub-Clause, it was clear that providing price adjustment due to change in legislation was mandatory. Having rendered such a finding, the respective Arbitral Tribunal further went on to record that Sub-Clause 13.16.5 was included only to avoid duplication, that it was included pursuant to the clarification sought for by one of the bidders and that unless the additional cost due to change in legislation was fully or partly paid under the price variation formula, the same could not be denied by resorting to the first sentence of Sub-Clause 13.16.5.

21. The majority Members of the respective Arbitral Tribunal were of the view that if the adoption of the price variation formula by the contractor was accepted, the entitlement clause under Sub-Clause 13.16.2 would be rendered redundant.

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22. This Court must see as to whether the respective Arbitral Tribunal has re-written the relevant clauses in the contracts and hence, it is contrary to Section 28(3) of the Act and is, therefore, patently illegal.

23. Sub-Clause 13.16.5 specifically provides that if CPA 32 is adopted, then no additional cost would be paid towards any change in law as defined under Sub-Clause 13.16.2 except towards three named taxes viz. customs duty, excise duty and output TNVAT.

24. Sub-Clause 13.16.4 was incorporated to ensure that there was no duplication towards compensation for any change in law. If the price variation formula under CPA 32 is adopted, Sub-Clauses 13.16.2 to 13.16.4 will not be applicable and for any addition in cost due to change in law, Sub-Clause 13.16.5 would apply and it is more particularly restricted only with respect to three specific taxes. The change in legislation in the case in hand is the amendment to Rule 7 of the TNMMC Rules, which imposes a liability on the contractors to pay the cost of minerals in addition to seigniorage fees retrospectively



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from 01.4.2012 (by virtue of the judgment of the Division Bench of this Court in W.P.No.22782 of 2013 etc. cases dated 03.4.2025, it is made applicable prospectively).

25. Admittedly, this change in legislation does not fall within the ambit of Sub-Clause 13.16.5.

26. There is a lot of significance in the usage of the term '**subject to Sub-Clause 13.16.5**' It makes Sub-Clauses 13.16.2 subordinate to Sub-Clause 13.16.5. As a result, CPA 37 will be limited in its scope when CPA 32 is adopted. The modification to Sub-Clause 13.16.5 pursuant to a query raised by one of the bidders, which was taken note of by the respective Arbitral Tribunal, did not have any effect or impact or relevance to the dispute in hand. Such a query only resulted in the issuance of an addendum by deleting the words '**based in the Reserve Bank of India indices**' and adding the sentence '**to the extent that it is not covered by the price variation formula**'. This modification does not, in any way, impact or affect the interpretation of the clauses as it stood.



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27. For a case not covered under Sub-Clause 13.16.5, Sub-Clause 13.16.2 will apply in all force and for cases, which are covered by Sub-Clause 13.16.5, Sub-Clause 13.16.2 will apply only if it pertains to the changes made to the three taxes and that too, to the extent that it is not covered by the price variation formula.

28. In the case in hand, admittedly, the price variation formula under CPA 32 was applied and the respondent received nearly Rs.130 Crores in O.P.No.569 of 2017 and Rs.166 Crores in O.P.No.570 of 2017.

29. The respective Arbitral Tribunal gave a finding that if the contention put forth by the petitioner has to be accepted, Sub-Clause 13.16.5 should have been worded differently.

30. In the considered view of this Court, Sub-Clause 13.16.5 has been correctly worded. Sub-Clause 13.16.5 provides that if the price variation formula under CPA 32 has been adopted by the contractor, then any addition or reduction in cost due to change in law would be



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allowed only for the changes to the three taxes specified. Even for the changes to the three taxes, the eligibility and procedure is determined by Sub-Clause 13.16.2. Therefore, these sub-Clauses have been correctly worded.

31. The respective Arbitral Tribunal failed to see that CPA 32 and CPA 37 are applicable in different contexts and Sub-Clause 13.16.4 takes care of double payment by clearly stating that additional or reduced cost should not be separately paid if the same has already been taken into account in any other clauses under the contract. Thus, Sub-Clauses 13.16.1 to 13.16.5 have to be read together harmoniously.

32. In the light of the above discussions, this Court holds that the only possible interpretation that can be given to Sub-Clause 13.16.5 is that if the contractor has already claimed the price variation invoking CPA 32, then the contractor cannot claim any additional cost citing the change in law except where the change in law pertains to three taxes. This is the possible and plausible view that can be deduced on a careful reading of Sub-Clauses 13.16.1 to 13.16.5.



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33. The interpretation that was given by the respective Arbitral Tribunal in respect of Sub-Clause 13.16.5 is not in consonance with Section 28(3) of the Act and the respective Arbitral Tribunal has virtually re-written the contracts and more particularly Sub-Clause 13.16.5. As a result, the respective Arbitral Tribunal has violated the mandate of Section 28(3) of the Act.

34. The respective Arbitral Tribunal placed strong reliance upon the judgment of the Hon'ble Apex Court in ***ITD Cementation India Ltd.*** and Clause 70.8 of the contract involved therein, which was the subject matter of interpretation in that judgment, was not *in pari materia* with Sub-Clause 13.16.5 of CPA 37. Therefore, placing reliance upon that judgment of the Hon'ble Apex Court has virtually resulted in patent illegality while interpreting the scope of Sub-Clause 13.16.5

35. There is yet another issue that requires consideration of this Court. This issue was dealt with on a demurrer by assuming as if Sub-Clause 13.16.2, as modified by CPA 37, is made applicable to the



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respondent. To make a claim for the increased cost, the contractor must show that the new tax imposed after the base date impacted the performance of the contractor with increased cost and therefore, the contractor would be entitled to additional cost. This important aspect has been neither pleaded nor proved and this is yet another ground, based on which, this Court holds that the respondent cannot succeed in their claim for additional cost.

36. In the light of the above discussions, this Court holds that the awards passed by the respective Arbitral Tribunal are patently illegal since the interpretation of the sub-clauses by the respective Arbitral Tribunal is not in consonance with Section 28(3) of the Act, that the respective Arbitral Tribunal has virtually re-written the contracts and that the view taken by the respective Arbitral Tribunal is neither a possible nor a plausible view. Hence, applying the judgment of the Hon'ble Apex Court in **Delhi Metro Rail Corporation Ltd. Vs. Delhi Airport Metro Express (P) Ltd. [reported in 2024 (6) SCC 357]**, this Court holds that the interpretation of the contract by the respective Arbitral Tribunal is not even a possible view and that the awards must be held to be perverse. Such interpretation will virtually



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frustrate the very object behind Sub-Clause 13.16.5.

37. The upshot of the above discussions will lead to the only conclusion that the awards passed by the respective Arbitral Tribunal are liable to be interfered by this Court.

38. Accordingly, the awards dated 28.4.2017 and 03.6.2017 passed by respective Arbitral Tribunal are set aside and both the above original petitions are allowed with costs of **Rs.1,00,000/- (Rupees one lakh only) payable by the respondent to the petitioner in each of the petitions.**

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Neutral Citation : Yes

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