



2025:DHC:9548-DB



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

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Judgment reserved on: 18.09.2025
Judgment pronounced on: 01.11.2025

+ **FAO(OS) 38/2018**

MAPEX INFRASTRUCTURE PVT. LTD.Appellant

Through: **Mr. Arun K. Varma, Senior Advocate along with Mr. S.K. Chandwani and Mr. Sameer Chandwani, Advocates.**

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Respondent

Through: **Mr. Manish K. Bishnoi along with Mr. Khubaib Shakeel, Advocate.**

+ **FAO(OS) (COMM) 69/2018**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Appellant

Through: **Mr. Manish K. Bishnoi along with Mr. Khubaib Shakeel, Advocate.**

versus

M/S MAPEX INFRASTRUCTURE PVT. LTD.Respondent

Through: **Mr. Arun K. Varma, Senior Advocate along with Mr. S.K. Chandwani and Mr. Sameer Chandwani, Advocates.**

CORAM:

HON'BLE MR. JUSTICE ANIL KSHETARPAL

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR



J U D G M E N T

HARISH VAIDYANATHAN SHANKAR, J.

1. The present cross-appeals, filed under Section 37 of the **Arbitration and Conciliation Act, 1996¹**, challenge a **common Judgement dated 08.01.2018²** passed by the learned Single Judge of this Court in OMP 384/2015 titled “*Mapex Infrastructure Pvt. Ltd. vs. National Highways Authority of India*”, and OMP 391/2015 titled “*National Highways Authority of India vs. Mapex Infrastructure Pvt. Ltd.*”, both of which were petitions filed under Section 34 of the A&C Act.
2. The aforementioned Section 34 petitions had been instituted by the respective parties challenging a **common arbitral award dated 17.03.2015³**, rendered by a **three-member Arbitral Tribunal⁴**.
3. For the sake of convenience, clarity, and uniformity, the Appellant in FAO(OS) 38/2018, *Mapex Infrastructure Pvt. Ltd.*, shall hereinafter be referred to as “**Mapex**”, and the Appellant in FAO(OS) (COMM) 69/2018, *National Highways Authority of India*, shall hereinafter be referred to as “**NHAI**”.
4. **FAO(OS) 38/2018** has been preferred by Mapex, challenging that portion of the Impugned Judgment which pertains to OMP 384/2015, whereby the learned Single Judge dismissed its challenge to the Arbitral Award in respect of Claims 2, 6 and 7. **FAO(OS)**

¹ A&C Act

² Impugned Judgement

³ Award

⁴ Arbitral Tribunal



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(*COMM*) 69/2018 has been preferred by NHAI, challenging that portion of the Impugned Judgment which pertains to *OMP 391/2015*, whereby the learned Single Judge dismissed its challenge to the Arbitral Award in respect of Claims 3, 6, 7, 8 and 9.

BRIEF FACTS:

5. Shorn of unnecessary details, the facts germane to the institution of the present Appeals are as follows:

(a) NHAI awarded a **contract for four-laning, including strengthening of the existing two-lane pavement of National Highway No. 2 from Panagarh (Km 517) to Palsit (Km 581.457) in the State of West Bengal**⁵. The contract was awarded *vide* Letter of Acceptance dated 26.09.2001, issued in favour of the consortium M/s Gamuda-WCT Joint Venture, comprising two Malaysian companies, *Gamuda Berhad* and *WCT Engineering Berhad*. The said Letter of Acceptance was subject to the consortium promoting and incorporating a limited liability company as a Special Purpose Vehicle for execution of the Concession Agreement.

(b) Pursuant thereto, a **Concession Agreement dated 21.11.2001**⁶ was executed between NHAI and Mapex. The project was awarded on a **Build-Operate-Transfer**⁷ basis for a concession period of 17 years and 6 months, commencing from 21.06.2002

⁵ Project

⁶ The Agreement

⁷ BOT



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and ending on 20.12.2019. During this period, Mapex, as the Concessionaire, was authorized to implement, operate, and maintain the project facilities in accordance with the terms of the Agreement.

(c) Subsequently, Mapex subcontracted the construction work to **Gamuda WCT (India) Pvt. Ltd.**⁸.

(d) As per the Agreement, the construction work was to commence from the Commencement Date, i.e., 21.06.2002, and was required to be completed by **20.12.2004**, being the **Scheduled Project Completion Date**⁹. Accordingly, the **Commercial Operation Date**¹⁰ was to fall on or before the SPCD. However, the completion of the project was delayed by **171 days** beyond the scheduled date.

(e) The project was eventually completed, as certified by the **Independent Engineer**¹¹ appointed by NHAI under Article 4 of the Agreement, who assessed a delay of 171 days. Consequently, disputes arose between the parties regarding the causes and liabilities for such delay.

(f) On 18.02.2008, Mapex invoked Clause 17.2 of the Agreement, seeking resolution of disputes through arbitration. Accordingly, a three-member Arbitral Tribunal was constituted by the parties.

⁸ EPC Contractor

⁹ SPCD

¹⁰ COD

¹¹ IE



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(g) Upon completion of pleadings, production of documents, and evidence by both parties, the learned Arbitral Tribunal rendered its Award dated 17.03.2015.

(h) Being aggrieved by the said Award, both parties filed petitions under Section 34 of the A&C Act, challenging the same. The learned Single Judge of this Court, *vide* Impugned Judgment dated 08.01.2018, dismissed both petitions and upheld the Arbitral Award.

(i) Aggrieved thereby, both Mapex and NHAI have preferred the present cross-appeals under Section 37 of the A&C Act, assailing the Impugned Judgment.

6. For the sake of clarity and convenience, a concise summary, which is undisputed by the parties, as delineated in the Impugned Judgment, encapsulating the claims raised by Mapex, the findings of the learned Arbitral Tribunal on those claims, and the residual challenges pressed before the learned Single Judge in the respective Section 34 petitions, is reproduced herein below:

Cl. No.	Particulars: Claims of Mapex	Amounts Awarded by the majority of Arbitrators	Amounts Awarded by the minority Arbitrator	Objections to the Award by NHAI in OMP No. 391/2015	Objections to the Award by Mapex in OMP No. 384/ 2015
1.	Bonus for Early Completion: Rs. 403,916,667/-	Nil	Nil	Not challenged	Not challenged
2.	EPC Contractor's Time-related	Nil	Rs. 19,52,35,43	Not challenged	Challenged



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	(Prolongation) Cost: 379,281,932 /-		1/-		
3.	Concessionaire's Time-related (Prolongation) Costs: Rs.84,698,894/-	Rs. 4,79,54,64 5/-	Unanimous Award	Challenged	Not challenged
4.	Delay & Disruptions Cost: Rs.214,542,785/-	Nil	Nil	Not challenged	Not challenged
5.	Mitigation Costs for Late Delivery of Shaktigarh Bypass: Rs.122,634,977/-	Nil	Nil	Not challenged	Not challenged
6.	Additional Cost arising from Change in Law: Rs.211,378,926/- revised calculation Rs.215,326,348/-	Rs.4,82,06 ,147/-	Rs.21,13,78 ,926/-	Challenged to the amount awarded by majority Arbitrators	Partly challenged to the amount not considered by majority Arbitrators for its EPC Contractor viz-a-viz to amount awarded by the minority Arbitrator.
7.	Financing Cost: Rs.305,954,444/- revised calculation Rs.722,371,218/- as updated to 9.11.2008	Interest @12% per annum on the amounts awarded under claims No.3 &6	Interest @ 12% per annum including on the further amounts awarded under	Challenged the interest awarded by majority Arbitrators	Partly challenged the interest on Claim No.2 on the amounts not considered by majority Arbitrators



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		from 10.6.2005 till payment.	Claims No.2 & 6 from 10.06.2005 till payment.		and partly on Claim No.6
8.	Underpayment for Changed of Scope and Additional Works: Rs. 36,963,258/- amended claim for revised amount of Rs. 18,838,148/-	Rs.17,26,9 91/-	Unanimous Award	Challenged	Not challenged
9.	Interest on Deferred Payment for Changes of Scope and Additional Works: Rs.28,073,044/- revised calculation Rs. 31,151,661/- as amended Claim No.8 and updated to 9.11.2008	Interest @12% per annum on the amounts awarded under Claim No.8 from 9.07.2008 till payment	Unanimous Award	Challenged	Not challenged
10.	Interest on the amounts of aforesaid Claims No.1 to 9 at the rate of 13.5% per annum from the period between the respective dates on which the cause of action for each of	Claim is in duplication of Claim No.7	Unanimous Award	Not challenged	Not challenged.



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	the claims arose to the date of payment.				
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7. Before we proceed to consider the contentions advanced by the respective parties in their appeals, we deem it appropriate, at the very outset, to recapitulate the settled legal principles governing the scope of interference under Sections 34 and 37 of the A&C Act.

8. It is well established through a consistent line of decisions of the Hon'ble Supreme Court that proceedings under Section 34 of the A&C Act are summary in nature and cannot be equated with a full-fledged civil trial. Consequently, the scope of interference in Section 37 proceedings, which deal with appeals against orders under Section 34, is even narrower and cannot be treated as equivalent to an ordinary civil appeal. This settled legal position has been succinctly summarised by the Hon'ble Supreme Court in *Punjab State Civil Supplies Corpn. Ltd. v. Sanman Rice Mills*¹², which reads as under:

“11. Section 37 of the Act provides for a forum of appeal inter-alia against the order setting aside or refusing to set aside an arbitral award under Section 34 of the Act. The scope of appeal is naturally akin to and limited to the grounds enumerated under Section 34 of the Act.

12. It is pertinent to note that an arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law that too upon reappraisal of the evidence adduced before the arbitral trial. Even an award which may not be reasonable or is non-speaking to some extent cannot ordinarily be interfered with by the courts. It is also well settled that even if two views are possible there is no scope for the court to reappraise the evidence and to take the different view other than that has been taken by the arbitrator. The view taken by the arbitrator is normally acceptable and ought to be allowed to prevail.

¹² 2024 SCC OnLine SC 2632



13. In paragraph 11 of *Bharat Coking Coal Ltd. v. L.K. Ahuja*, it has been observed as under:

“11. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside.”

14. It is equally well settled that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited, confined to the ambit of Section 34 of the Act only and even that power cannot be exercised in a casual and a cavalier manner.

15. In *Dyna Technology Private Limited v. Crompton Greaves Limited*, the court observed as under:

“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 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.”

16. It is seen that the scope of interference in an appeal under Section 37 of the Act is restricted and subject to the same grounds on which an award can be challenged under Section 34 of the Act. In other words, the powers under Section 37 vested in the court of appeal are not beyond the scope of interference provided under Section 34 of the Act.

17. In paragraph 14 of *MMTC Limited v. Vedanta Limited*, it has been held as under:

“14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

18. Recently a three-Judge Bench in *Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking* referring to *MMTC Limited (supra)* held that the scope of jurisdiction under Section 34 and Section 37 of the Act is not like a normal appellate jurisdiction and the courts should not interfere with the arbitral award lightly in a casual and a cavalier manner. The mere possibility of an alternative view on facts or interpretation of the contract does not entitle the courts to reverse the findings of the arbitral tribunal.

CONCLUSION:

20. In view of the above position in law on the subject, the scope of the intervention of the court in arbitral matters is virtually prohibited, if not absolutely barred and that the interference is confined only to the extent envisaged under Section 34 of the Act. **The appellate power of Section 37 of the Act is limited within the domain of Section 34 of the Act. It is exercisable only to find out if the court, exercising power under Section 34 of the Act, has acted within its limits as prescribed thereunder or has exceeded or failed to exercise the power so conferred. The Appellate Court has no authority of law to consider the matter in dispute before the arbitral tribunal on merits so as to find out as to whether the decision of the arbitral tribunal is right or wrong upon reappraisal of evidence as if it is sitting in an**



ordinary court of appeal. It is only where the court exercising power under Section 34 has failed to exercise its jurisdiction vested in it by Section 34 or has travelled beyond its jurisdiction that the appellate court can step in and set aside the order passed under Section 34 of the Act. Its power is more akin to that superintendence as is vested in civil courts while exercising revisionary powers. The arbitral award is not liable to be interfered unless a case for interference as set out in the earlier part of the decision, is made out. It cannot be disturbed only for the reason that instead of the view taken by the arbitral tribunal, the other view which is also a possible view is a better view according to the appellate court.

21. It must also be remembered that proceedings under Section 34 of the Act are summary in nature and are not like a full-fledged regular civil suit. Therefore, the scope of Section 37 of the Act is much more summary in nature and not like an ordinary civil appeal. The award as such cannot be touched unless it is contrary to the substantive provision of law; any provision of the Act or the terms of the agreement.”

(emphasis supplied)

9. Guided by the above legal parameters laid down by the Hon'ble Supreme Court governing the jurisdiction and scope of interference under Section 37 of the A&C Act, we now proceed to examine the respective appeals on their merits.

CHALLENGE BY MAPEX [FAO(OS) 38/2018]:

10. The learned Senior Counsel for Mapex would submit that the main challenge of Mapex was limited to Claims 2 and 6, wherein Claim 2 was wholly rejected and Claim 6 came to be partially rejected and the same is upheld by the learned Single Judge without appreciating the material on record.

11. The learned Senior Counsel for Mapex would further submit that as regards Claim 2 before the learned Arbitral Tribunal, it pertained to the EPC Contractor's time-related (Prolongation) Costs of



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Rs. 37,92,81,932/-, which were rejected by the majority of the learned Arbitrators. It would be contended by the learned Senior Counsel that the Project was completed, as certified by the IE, achieving the COD on 09.06.2005 with a delay of 171 days, which was alleged to have been attributable to NHAI due to delay in handing over of the land and change of scope of work.

12. The learned Senior Counsel for Mapex would further submit that Claim 6 of Mapex pertained to the additional cost incurred by Mapex as well as the EPC Contractor on account of new or additional taxes and the increase in rates of taxes levied after commencement, during, and till the completion of the Project. The second portion of the claim, relating to the additional cost incurred by the EPC Contractor, came to be rejected by the learned Arbitral Tribunal on the ground that there was no evidence on record to establish that the EPC Contractor had actually incurred such losses or that Mapex had indemnified the EPC Contractor to that extent. It was further noted by the learned Arbitral Tribunal and subsequently by the learned Single Judge that the agreement between Mapex and the EPC Contractor had not been placed before the learned Arbitral Tribunal.

13. The learned Senior Counsel would urge that, despite the learned Single Judge holding that Mapex was entitled to raise claims on behalf of the EPC Contractor before the learned Arbitral Tribunal, the learned Single Judge has nonetheless rendered a contrary and inconsistent finding by upholding the Award, thereby permitting NHAI to unjustly enrich itself at the expense of Mapex.



14. The learned Senior Counsel would further argue that both the learned Arbitral Tribunal and the learned Single Judge have committed a serious error by ignoring Clause 19.3(ii) of the Agreement, which clearly stipulates that NHAI is bound to indemnify Mapex against third-party claims for loss, damages, and expenses arising due to any breach by NHAI. Clause 19.3(ii) of the Agreement is reproduced below for ready reference:

“19.3 Liability and Indemnity

(a) General Indemnity

(i) The Concessionaire shall indemnify, defend and hold NHAI harmless against any and all proceedings, actions and third party claims arising out of a breach by Concessionaire of any of its obligations under this Agreement except to the extent that any such claim has arisen due to breach by NHAI of any of its obligations under this Agreement or a Force Majeure Event which is a Political Event.

(ii) NHAI will indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of breach by NHAI, its officers, servants and agents of any obligations of NHAI under this Agreement except to the extent that any such claim has arisen due to breach by the Concessionaire of any of its obligations under this Agreement.

(b)xxxxxx

(c)xxxxx

(d)In the event that either Party receives a claim from a third party in respect of which it is entitled to the benefit of indemnity under this Article 19.3 (the ‘Indemnified Party’) it shall notify the other Party (“Indemnifying Party”) within 14 (fourteen) days of the receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party. Provided that, such approval not be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute claim it may conduct the proceedings in the name of the Indemnified Party subject to the Indemnified Party being secured against any costs involved to its reasonable satisfaction.”

15. The learned Senior Counsel would further contend that although the learned Single Judge acknowledged that any claim of the



EPC Contractor would, in effect, constitute a claim of Mapex, acknowledging the back-to-back contractual arrangement between them duly recognized under the Agreement, the learned Single Judge has nevertheless erroneously rejected Mapex's objection. In doing so, the learned Single Judge overlooked the principle laid down in ***Kheterpal Amarnath v. Madhukar Pictures***¹³, wherein the Bombay High Court held that an indemnified party need not first make payment to a third party before raising a claim against the indemnifier, and that the indemnifier cannot be permitted to unjustly enrich himself.

16. The learned Senior Counsel would further submit that the learned Single Judge has erroneously and on his own accord placed reliance on the judgment of the Hon'ble Supreme Court in ***Sharma and Associate Contractors Private Limited v. Progressive Constructions Limited***¹⁴. It would be contended that NHAI never referred to this judgment during the course of arguments before the learned Single Judge, and therefore, Mapex was not afforded any opportunity to make submissions in respect thereof. The learned Senior Counsel would further state that, in any event, the judgment in ***Sharma and Associate Contractors*** (*supra*) has no application to the facts and circumstances of the present case, as that case pertained to a *sub-sub-contract*, whereas the present case involves a *sub-contract*.

¹³ AIR 1956 BOM 106

¹⁴ (2017) 5 SCC 743



17. The learned Senior Counsel would also strongly rely upon the judgment dated 17.04.2017 of a Single Judge of this Court in ***National Highways Authority of India vs. Emas Expressway Pvt. Ltd.***¹⁵, wherein a similar arbitral award, recognizing claims of the EPC Contractor, was upheld. The said decision was later affirmed by the Division Bench of this Court *vide* order dated 08.11.2017 in FAO(OS)(COMM) No.157/2017, and the Special Leave Petition (Civil) preferred by the NHAI before the Hon'ble Supreme Court was subsequently dismissed, thereby giving finality to the same.

18. The learned Senior Counsel for Mapex would further argue that in response to Mapex's contention regarding its entitlement to pursue claims arising from the sub-contract, NHAI did not raise any objection concerning the lack of privity of contract before the learned Arbitrator, and merely issued a standard reply in its Statement of Defence.

19. **Per contra**, learned Counsel for NHAI would vehemently support the reasoning and findings of both the learned Single Judge and the learned Arbitral Tribunal with respect to the aforesaid claims *in extenso*.

20. Learned Counsel for NHAI would further contend that the entire foundation of the arguments advanced on behalf of Mapex is unsustainable, as the EPC Contract itself was never placed on record before the learned Arbitral Tribunal or the learned Single Judge.

¹⁵ OMP (COMM) No.176/2016



21. He would further submit that under Clause 19.3(a)(ii) of the Agreement, an indemnity claim requires the existence of a specific third-party claim against the Indemnified Party (*i.e.*, *Mapex*), and no such claim, nor any evidence of loss suffered by the EPC Contractor, was ever produced before the learned Arbitral Tribunal.

22. We have heard the learned counsel appearing for both parties and carefully examined the Arbitral Award, the Impugned Judgment, and the pleadings, along with the documents placed on record in support thereof, insofar as they pertain to Claims 2, 6 and 7 as challenged by *Mapex*. We have also considered the written submissions filed by the respective parties.

23. At this stage, it would be appropriate to reproduce the reasoning and findings of the learned Single Judge in relation to the challenge concerning the aforesaid claims, which read as under:

“**11.** The challenge of *MAPEX* is primarily to the denial of its claim under the majority award for claim no.2 and claim no.6.

12. Claim no.2 was with respect to the EPC Contractor’s time-related (Prolongation) Costs from 11th August, 2004 to 9th June, 2005 amounting to Rs.37,92,81,932/-. Relying upon Article 1 (Definitions and Interpretation) and Article 5.4 (a) (iv), it was stated that the Concession Agreement envisaged and authorized *MAPEX* to undertake construction work by itself or through an EPC Contractor. As the project was not completed in time due to defaults of *NHAI*, *MAPEX* was entitled to claim prolongation cost incurred by such EPC contractor. The same had also been verified by the IE. It was further submitted that these claims were payable even under section 73 of the Contract Act.

13. *NHAI*, on the other hand, had denied such claim by submitting that the EPC Contractor is not a party to the Arbitration Agreement and, therefore, its claims cannot be adjudicated by the Arbitral Tribunal. It was further submitted that there was no document showing any claim being raised by the said EPC Contractor against *MAPEX* and, therefore, the same are not payable under Section 73 of the Contract Act.



14. The majority award rejected the claim of MAPEX holding as under:-

"88. It is a provision of the concessionaire's agreement that the Claimant has to complete the project as per scope of the project under the agreement. It is further a provision under the agreement article 5.4 (iv) that the concessionaire may undertake construction works by itself or through a contractor possessing requisite technical, financial and managerial expertise /capability, but in either case the concessionaire shall remain solely responsible to meet the construction requirements. EPC contract has been defined under article 1.1 of the agreement.

Thus there is no bar on the part of the concessionaire to get the work done on his behalf. Now the next question is that, can it be paid to the EPC contractor through the concessionaire?

89. According to the claimant the EPC contractor has suffered a loss of Rs.37,92,81,932 as contained in appendix F1, F2 and F3 and it has to be paid to him through the concessionaire whereas the plea of the respondent is that EPC is neither a party to the agreement nor a party to arbitration clause under section 7 of the arbitration and conciliation act 1996. Therefore it cannot be paid. AT agrees with the respondent on this issue.

90. Further there is nothing on record to show that EPC has incurred this loss and he has been indemnified by the concessionaire to that extent. Moreover even no agreement has been placed on record which entitles EPC contractor to claim damages from the concessionaire. Thus he is not liable to be paid under section 73 of the Contract Act.

91. In view of the foregoing reasons this claim cannot be paid to the EPC contractor through the concessionaire and Award Rs nil."

15. Learned senior counsel for MAPEX has submitted that the Arbitral Tribunal has committed an error in rejecting the above claim on the ground that the EPC Contractor was not a party to the arbitration agreement. It is submitted that once it is accepted that MAPEX could appoint an EPC Contractor for undertaking the works under the agreement, all claims of such EPC Contractor could be claimed through MAPEX, who is a party to the agreement. He further relies upon the judgment dated 17th April, 2017 passed by the Single Judge of this Court in OMP (Comm.) No.176/2016 wherein this Court had rejected a challenge to an award where similar claims of EPC Contractor had been granted by the Arbitral Tribunal. He further submits that the Division Bench of



this Court vide its order dated 8th November, 2017 passed in FAO(OS) (Comm.) No.157/2017 has upheld the judgment of the Single Judge. Learned senior counsel for MAPEX has further relied upon the judgment of House of Lords in **Linden Gardens Trust Ltd. vs. Lenesta Sludge Disposals Ltd. & Ors.** (1993) 3 WLR 408 to contend that NHAI being held to be in breach of agreement in form of the delay being attributed to it, the loss suffered due to such breach has to be paid by NHAI irrespective of whether the same in turn is paid by MAPEX to the EPC Contractor or not.

16. In my view, the Arbitrators have accepted that MAPEX could have appointed an EPC Contractor on a back to back basis in accordance with the Concession Agreement. The Arbitral Tribunal, however, has rejected the claim of MAPEX on the following three grounds:-

- (a) EPC Contractor, not being a party to the contract, cannot sustain its claim before the Arbitral Tribunal.
- (b) There is nothing on record to show that the EPC has incurred any loss and has been indemnified by MAPEX to that extent.
- (c) Even no agreement entitling EPC Contractor to claim damages from MAPEX has been placed on record.

17. As far as the first reason for rejection of the claim by the Arbitral Tribunal is concerned, learned senior counsel for MAPEX rightly contends that the EPC being a back to back agreement duly recognized under the Concession Agreement, any claim of the EPC would, in fact, be a claim of the Concessionaire itself, thereby making it subject of being adjudicated in arbitration proceedings. It would be a case where the Concessionaire will agitate the claim of sub-contractor/EPC as being its own claim. In case titled **Larsen & Toubro Ltd. vs. Mohanlal Harbans Lal Bhayana** (2015) 2 SCC 461, the Supreme Court, while dealing with a similar situation of claim being raised by a sub-contractor, held as under:-

“**19.** Accordingly, while allowing this appeal and setting aside the order of the High Court, we would like to give the following directions, in order to balance the equities:

19.1. It shall be ensured by the appellant that final bill is settled by SCOPE within two months from the date of receiving the copy of this order. For this purpose, this order shall be brought to the notice of SCOPE as well so that SCOPE acts swiftly for settling the bill.

19.2. In case there are certain claims of the respondent which are not agreed to while passing the final bill and disputes remain, those will be taken up by the appellant with SCOPE immediately thereafter by invoking arbitration between the appellant and SCOPE as per the arbitration agreement between the appellant and SCOPE. In raising such disputes the appellant and the respondent



shall act in unison as per the understanding arrived at between them vide supplementary agreements. In that event, the Arbitral Tribunal shall be constituted within 2 months thereof.

19.3. In case the appellant is satisfied with the final bill and chooses not to raise the claims with SCOPE but the respondent feels that their claims are legitimate then it would be treated as dispute between the appellant and the respondent. In that event, the Arbitral Tribunal shall be constituted as per Clause 25 of the agreement dated 3-3-1998 between the parties within a period of two months of that event.

19.4. In either of the aforesaid arbitrations, the Arbitral Tribunal shall endeavour to render its award within six months from the date of the constitution of the Arbitral Tribunal.”

18. Therefore, the claim of the EPC Contractor could have been agitated through MAPEX in the arbitration proceedings.

19. However, for succeeding in the arbitration, it was for MAPEX to show whether under the terms of the sub-contract/EPC contract, the EPC Contractor was entitled to raise a claim of prolongation cost and if at all any such claim had been paid by MAPEX to such EPC Contractor. The claim of prolongation cost was in the nature of claim of damages for breach of contract under Section 73 of the Contract Act, therefore, the quantum of loss had to be proved by MAPEX, being the claimant. Principle of mitigation of loss would also apply to such situation.

20. As noted by the Arbitral Tribunal, the contract between MAPEX and EPC Contractor was not placed before the Arbitral Tribunal. Therefore, it could not be shown on record whether or not under that contract the EPC Contractor is at all entitled to claim any prolongation cost from MAPEX and if so, to what extent. It may be true that the IE, on scrutiny of the records produced by MAPEX, had recommended the claim to an extent of Rs.37,92,81,932/- as prolongation cost of EPC Contractor, but whether the same was at all payable by MAPEX to the EPC Contractor could have been adjudicated only after perusing the agreement between MAPEX and the EPC Contractor. Recently in case of *Sharma and Associates Contractors Pvt. Ltd. vs. Progressive Constructions Ltd. (2017) 5 SCC 743*, Supreme Court upheld the setting aside of an Arbitral Award which had granted a claim of revised rates in favour of a sub-contractor relying upon a clause in the Principal Contract, when the sub-contract did not have such a clause. It was held that though the sub-contract was a back-to-back Agreement, as it did not have a similar term as in the Principal Contract, such a claim could not have been allowed by the Arbitral Tribunal. In the present case, therefore, in absence of



EPC contract being on record, claim of MAPEX, in form of damages or indemnity, could not have been allowed by the Arbitral Tribunal.

21. In the case of *Linden Gardens Trust Co. (supra)*, the House of Lords dealt with the situation where there was evidence before it of loss having been suffered by the third party, however, the said party could not have recovered the same from the party in breach of the agreement. It was in that circumstance that the House of Lords held that a party to the contract could enforce such a claim on behalf of the party suffering loss and against the party in breach of the contract. The House of Lords held as under:-

“(6) What is the measure of damages in the claim by Corporation?”

McAlpine accept that, since the attempted assignment by Corporation of its rights under the contract to Investments was ineffective, corporation has retained those rights and is entitled to judgment against McAlpine for any breach of contract. But, McAlpine submits, Corporation is only entitled to nominal damages. Corporation has suffered no loss: it had parted with its interest in the property (and therefore with the works when completed) before any breach of the building contract: moreover Corporation received full value for that interest on its disposal to Investments. Therefore, it is said, neither of the plaintiffs has any right to substantial damages: Investments has incurred damage (being the cost of rectifying the faulty work) but has no cause of action; Corporation has a cause of action but has suffered no loss. If this is right, in the words of my noble and learned friend, Lord Keith of Kinkel in G. U. S. Property Management Ltd. v. Littlewoods Mail Order Stores Ltd., 1982 S. L. T. 533, 538, " the claim to damages would disappear...into some legal black hole, so that the wrongdoer escaped scot-free."

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In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit



against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."

22. Therefore, in the case before the House of Lords, the damage suffered by the party had been duly proved. In the present case, however, in absence of the agreement between MAPEX and the EPC Contractor, it could not have been said whether EPC Contractor at all is entitled to claim the prolongation cost from MAPEX.

23. Learned senior counsel for MAPEX also relied upon the general indemnity clause as contained in Article 19.3 of the Concession Agreement, the relevant portion of which is reproduced herein below:-

"19.3 Liability and Indemnity

(a) General Indemnity

(i) The Concessionaire shall indemnify, defend and hold NHAI harmless against any and all proceedings, actions and third party claims arising out of a breach by Concessionaire of any of its obligations under this Agreement except to the extent that any such claim has arisen due to breach by NHAI of any of its obligations under this Agreement or a Force Majeure Event which is a Political Event.

(ii) NHAI will, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of breach by NHAI, its officers, servants and agents of any obligations of NHAI under this Agreement except to the extent that any such claim has arisen due to breach by the Concessionaire of any of its obligations under this Agreement.

(b) xxxxxx

(c) xxxxxx



(d) In the event that either Party receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 19.3 (the 'Indemnified Party') it shall notify the other Party ("Indemnifying Party") within 14 (fourteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party. Provided that, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim it may conduct the proceedings in the name of the Indemnified Party subject to the Indemnified Party being secured against any costs involved to its reasonable satisfaction."

24. For attracting the above clause, MAPEX should at least have shown to the Arbitral Tribunal that there was a claim made by EPC Contractor against it towards the prolongation cost. In absence of such claim being shown to the Arbitral Tribunal, no fault can be found in the Arbitral Tribunal denying such a claim.

25. As far as the partial denial of claim no.6 is concerned, the same proceeds on similar basis inasmuch as the claim of additional cost arising from change of law, so far as it relates to MAPEX is concerned, was allowed whereas one claimed against EPC Contractor was disallowed.

26. Here again, in absence of the agreement between the EPC Contractor and MAPEX being filed on record, it could not be proved by MAPEX that it was liable to pay to the EPC Contractor for such additional cost.

27. The challenge to claim no.7 is confined to the aspect that if the claim under claim Nos. 2 and 6 are awarded to EPC Contractor, MAPEX would also be entitled to interest over the amount so awarded. As I find no reason to interfere with the majority award passed by the Arbitral Tribunal rejecting the claim of MAPEX towards EPC Contractor, the objection as far as claim no.7, is also liable to be rejected."

24. A careful perusal of the findings and conclusions recorded by the learned Single Judge makes it abundantly clear that the principal reason for rejecting Mapex's claims was the complete absence of any documentary or evidentiary material substantiating the EPC Contractor's alleged entitlement to prolongation costs. Neither the agreement between Mapex and the EPC Contractor was produced



before the learned Arbitral Tribunal to demonstrate whether, under the terms of that contract, the EPC Contractor was contractually entitled to claim such costs from Mapex, and if so, to what extent. Furthermore, Mapex failed to place on record any material evidence that it had, in fact, made payment to the EPC Contractor towards indemnification of any alleged losses.

25. In affirming the findings of the learned Arbitral Tribunal, the learned Single Judge also observed that the claim for prolongation costs was, in essence, a claim for damages arising out of breach of contract within the meaning of Section 73 of the **Indian Contract Act, 1872**¹⁶. Accordingly, the burden squarely rested on Mapex, being the claimant, to prove both the occurrence and the quantum of loss.

26. The learned Single Judge rightly held that Mapex had failed to discharge this burden on all material aspects. Even during the hearing before us, when specific queries were put to the learned Senior Counsel for Mapex regarding the existence and contents of the alleged sub-contract or EPC Contract, which, in our considered view, was indispensable for substantiating any claim towards prolongation costs or additional Cost arising from Change in Law, only evasive responses were offered, and the submissions merely reiterated arguments earlier advanced before the learned Single Judge.

27. We find ourselves in complete agreement with the reasoning and conclusion of the learned Single Judge. In the absence of the EPC Contract, the mere recommendation of the IE for payment of Rs.

¹⁶ Contract Act



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37,92,81,932/- as prolongation costs to the EPC Contractor cannot substitute an actual identified and quantified claim supported by the relevant documentary proof of the existence and details of such a claim. The production of the EPC Contract could have disclosed whether the EPC Contractor had any contractual entitlement to indemnification. Furthermore, in the absence of proof of actual loss suffered or indemnity paid by Mapex, the claim lacks any legal foundation.

28. We also concur with the finding that such a claim, being in the nature of damages, cannot be sustained without evidence establishing both entitlement and quantifiable loss. Mere assertions of delay, unaccompanied by proof of actual loss or contractual entitlement, fall woefully short of the evidentiary threshold required to sustain a claim for prolongation costs.

29. We also find no merit in Mapex's contention that the learned Single Judge rendered inconsistent findings by acknowledging that Mapex was entitled to raise claims on behalf of the EPC Contractor against NHAI, yet upholding the rejection of those claims. The learned Single Judge correctly held that there was no evidence to show that the EPC Contractor had suffered any loss, or that Mapex had indemnified any such loss, nor was any agreement produced demonstrating that the EPC Contractor had a contractual right to claim damages from Mapex.

30. The mere observation by the learned Single Judge that Mapex was *eligible* to raise claims on behalf of the EPC Contractor against



the NHAI does not translate into an *entitlement* to succeed on such claims. Entitlement arises only upon the establishment of substantive evidence. Eligibility alone cannot confer a right to relief.

31. As regards Mapex's reliance on ***Sharma and Associate Contractors*** (*supra*), even assuming that the ratio in that case is distinguishable or inapplicable, it would make no material difference to the outcome of this appeal. As elaborated above, Mapex's claim fails fundamentally for want of foundational materials. Consequently, it is unnecessary to examine whether the contract in ***Sharma and Associate Contractors*** (*supra*) constituted a sub-contract or a sub-sub-contract, or whether the findings therein could apply by analogy to the present facts.

32. Mapex's reliance on the judgment dated 17.04.2017 in ***Emas Expressway Pvt. Ltd.*** (*supra*) is equally misplaced. It is well settled that the jurisdiction of the Court under Sections 34 and 37 of the A&C Act is narrowly circumscribed and does not extend to reappreciating findings rendered in other arbitral proceedings arising out of allegedly similar contracts.

33. Each arbitral proceeding must be adjudicated strictly on the basis of the evidence adduced and the contractual terms governing that particular dispute. Mere similarity of contractual language or factual background cannot entitle a party to claim parity of relief. Findings in one arbitral proceeding cannot, and ought not to, be transplanted wholesale into another, since each case turns on its own facts, evidence, and circumstances.



34. Similarly, the reliance placed on *Kheterpal Amarnath (supra)* is equally misconceived. No presumption can be drawn in favour of the EPC Contractor, or by extension Mapex, entitling them to relief without proof of the extent of actual loss. Merely alleging that NHAI was unjustly enriched due to delay, without demonstrating the same through evidence, cannot sustain a claim. As observed earlier, entitlement to damages on account of prolongation must satisfy essential legal parameters, proof of breach, causation, and quantifiable loss, and cannot rest on unsubstantiated assertions or speculative inferences.

35. We also concur with the submissions of learned counsel for NHAI that Clause 19.3(a)(ii) of the Agreement unequivocally predicates the invocation of indemnity upon the existence of a third-party claim or loss. In the present case, Mapex failed to produce any evidence of such a third-party claim. The indemnity clause cannot get triggered based on an assumption or mere assertion. Clause 19.3(d) further mandates that, upon receipt of any third-party claim for which indemnity is sought, the party must, within fourteen days, notify the other party (*here*, NHAI) and refrain from settling such claim without the indemnifier's prior consent. The record reveals that Mapex neither established the existence of any such claim nor produced proof of any corresponding notice to NHAI. Consequently, this argument too is devoid of merit.

36. During the course of the hearing before us, the learned Senior Counsel for Mapex sought to advance certain new arguments that



were not urged before the learned Single Judge. It is necessary to clarify that, while exercising appellate jurisdiction under Section 37 of the A&C Act, the Court's scope of examination and interference remains narrowly confined. Arguments that do not form part of the record or the impugned judgment cannot be entertained at this stage and we do not propose to delve into the same.

37. In view of the foregoing discussion, we find no infirmity, perversity, or jurisdictional error in the findings of the learned Single Judge dismissing Mapex's objections in respect of Claims 2 and 6, both of which were governed by identical legal and evidentiary requirements. As Claims 2 and 6 fail on their own merits, Claim 7, being derivative in nature, must also necessarily fail.

CHALLENGE BY NHAI [FAO(OS) (COMM) 69/2018]:

38. The main challenge of NHAI before the learned Single Judge was mainly with respect to Claims 3, 6, 7, 8 and 9, which have been raised before us as well.

39. Before proceeding further, we deem it apposite to reproduce the examination of the learned Single Judge regarding these claims, while dismissing the contentions of the NHAI, and which reads as follows:

“29. The first challenge of NHAI is to the grant of claim no.3 in favour of MAPEX i.e. Concessionaire's time related prolongation cost. It is submitted by the learned counsel for NHAI that the Arbitral Tribunal, for the purposes of having arrived at the claim of bonus/penalty under the Concession Agreement had determined 'X' under Article 8.3 as 171 days relying upon the recommendations of the IE as contained in the letter dated 29th June, 2005. It is submitted that mere calculations of 'X' for purposes of bonus and reduction of annuity is distinct from holding



that NHAI is responsible for the delay and thereby making it liable to compensate the Concessionaire under Section 73 of the Contract Act. It is further submitted that the effect of delay is only in the form of bonus or reduction of annuity and not in form of damages.

30. It is additionally submitted that MAPEX has already been compensated for change of scope of work, for which an additional cost of Rs.1,98,93,210.26 had been paid to MAPEX and there was no evidence on record in support of the claim of further damages. It is submitted that the Arbitral Tribunal, in fact, took a contradictory stand in first rejecting to rely upon the letter dated 8th June, 2007 of IE, while at the same time granting the claim of MAPEX on the basis of the said letter itself.

31. I have considered the submission made by the learned counsel for NHAI. I am unable to agree with the same. Article 8.3 of the Concession Agreement is reproduced herein below: -

"8.3 Bonus/Reduction in Annuity

(a) The Concessionaire shall either receive bonus for early completion of the Project (the Bonus) or incur reduction in the Annuity for delayed completion of the Project (the Reduction) as the case may be.

(b) For the purpose of this Article 8.3, each Annuity Payment Period shall be deemed to be a period of 180 calendar days.

(c) The Bonus or Reduction as the case may be shall be computed as under:

(i) If COD is achieved prior to first Annuity Payment Date:

$$B \text{ or } R = [(SPCD-COD) + X] * A / 180$$

(ii) If COD is achieved between two Annuity Payment Dates:

$$B \text{ or } R = [(PAPD-COD) + X] * A / 180 \text{ Where}$$

A = Annuity,

B = Bonus,

PAPD = Previous Annuity Payment Date.

R = Reduction

SPCD = Scheduled Project Completion Date,

X = As determined by the Independent Engineer, the aggregate number of days of delay caused by;

(i) delay in delivery of the Project Site or any part thereof by NHAI,

(ii) suspension of Construction Works or part thereof by NHAI or the Independent Engineer, for reasons not attributable to the Concessionaire,

(iii) Change of Scope Order pursuant to Article 7,

(iv) stoppage of the Construction Works or part thereof on account of the Concessionaire allowing



access and use of Project Site for public purposes pursuant to Article 3.2(d),

(v) Force Majeure Event which is a Political Event or Other Event, (vi) NHAI Event of Default.

(d) If the resultant figure arrived at pursuant to computation made in accordance with the preceding sub-article is positive, the same shall be the amount of Bonus payable to the Concessionaire and if negative, the same shall be the amount of Reduction.

(e) The Bonus shall be paid or Reduction shall be effected on the first Annuity Payment Date occurring after COD.

(f) Notwithstanding anything Inconsistent contained anywhere in this Agreement, NHAI's obligation to pay Annuity shall arise subject to and only upon occurrence of COD."

32. The Arbitral Tribunal has calculated delay as 171 days on the basis of the letter dated 29th June, 2005 of the IE. Majority of this delay is on account of delay in handing over of the land and delay due to change of scope of work. The Arbitral Tribunal has further held that this delay was attributable to NHAI. A chart showing the calculation of number of days delay is reproduced hereinunder:-

Panagarh – Palsit Project
DELAY IN PROJECT WORK (X) AS ASSESSED BY
INDEPENDENT ENGINEER ON 28TH JUNE 2005
Ref: Article No. 8.3 of Concession Agreement

Sl. No.	Description	Period		Time in days	Proportionate Time Impact on the Whole Project in Days	Remarks
		From	To			
1.	Delay in handing over of land for Shaktigarh Bypass Km 573 + 226 to Km. 579 + 146	20-May-02	01-Oct-03	499	45.83	$(5.92/64.457)*499=45.83$
2.	Delay in handing over of land from Km.	05-Dec-01	03-Jan02	29	6.75	$(15/64.457)*29=6.75$



	542 + 000 to Km. 557 + 000					
3.	Delay in handing over of land from Km. 539 + 000 to Km. 542 + 000	20- Mar- 02	18- Jul02	129	5.59	$(3/64.457)*120=5.59$
4.	Delay in handing over of land from Km. 522 + 349 to Km. 526 + 700	20- Mar- 02	23- Jul03	490	33.07	$(4.35/64.457)*490=33.07$
5.	Delay due to Change of Scope			70	70	
6.	Delay due to strikes/band h			9	9	Refer to enclosures in letters of 14 & 16 June 2005
7.	Delay due to forceful stoppages			69.5	69.5	Refer to enclosures in letters of 14 & 16 June 2005
		Total delay in days			171.24	

33. The above is a finding of fact. This Court, in exercise of its powers under Section 34 of the Act, cannot convert itself into a Court of appeal and start re-appreciating the evidence to find out if a different conclusion can be arrived at from the evidence led on record. This is not the scope of challenge to an Award under Section 34 of the Act. In fact, a reading of paragraph 14.6 of the Objection Petition, being OMP no.391/2015, filed by NHAI would show that there was no challenge to delay of 171 days being attributable to NHAI.

34. As far as the second contention of the NHAI is concerned, i.e. that the agreement having provided for the effect of delay in form of bonus or reduction of annuity, claim of damages under section 73 of the Contract Act would not be maintainable, is also not acceptable. The claim of bonus is merely an incentive to the Concessionaire/ Contractor to achieve the Schedule Date of Completion of the project and similarly the reduction of annuity is a disincentive to the Concessionaire for having failed to



commission the project in a timely manner. The same, however, cannot allow a party in breach of agreement to escape the consequence of such breach. The claim of prolongation cost is in form of claim of compensation under section 73 of the Contract Act. It is an independent claim based on the breach of agreement by NHAI. Once, it is held that NHAI was in breach of contract in form of having caused delay, NHAI could not be permitted to take shelter behind clause 8.3 of the Concession Agreement to deny the legitimate claim of the Concessionaire/MAPEX arising out of such breach.

35. In *Assam State Electricity Board And Ors. vs. Buildworth Pvt. Ltd.* (2017) 8 SCC 146, Supreme Court while dealing with the claim of escalation and idling charges, held that once there was a delay in execution of the contract due to employer, the employer was liable for the consequences of the delay, namely, an increase in price and the other party would be entitled to a claim for damages.

36. In the present case, once the delay has been found attributable to NHAI, claim of MAPEX towards prolongation cost has been rightly granted by the Arbitral Tribunal.

37. It is further submitted by learned counsel for the NHAI that MAPEX had not filed any document on record in support of the quantification of its claim and in view on the same, MAPEX, even if it is assumed had suffered loss, could not have been granted the amount as directed by the Arbitral Tribunal. This submission of the learned counsel for the NHAI is again without any merit.

38. It may be correct that MAPEX did not file on record any supporting documents for its claim or a certificate of a Chartered Accountant and neither produced any Chartered Accountant in support of its quantification of the claim, however, at the same time, it cannot be lost sight of that the IE had quantified the damages suffered by MAPEX after randomly scrutinizing its books of accounts. The Arbitral Tribunal, as far as the quantification is concerned holds as under:-

"163. AT has held that delay in the completion of the project from 21st December 2004 to 9th June 2005 is attributable to the employer .AT has further held that the concessionaire is entitled for damages arising out of this delay under section 73 of the Contract Act 1872. Thus Actual loss incurred by the claimant is reimbursable to him from December 2004 to June 2005. No supporting documents have been placed before the AT for losses incurred by the claimant during this period except the recommendations of the IE which have been contested by the respondent on the ground that IE has failed to discharge his functions as contained in para 2.2 of Schedule L of the agreement. Now the question arises, is AT bound by the recommendations of the IE or work out



some other reasonable methodology within the four corners of the agreement.

164. At has applied his mind on this issue and have come to a conclusion that AT should give weightage to the recommendations of the IE where AT feels that due to inadequate data it is not possible to arrive at proper quantification and IE being present at site throughout the period of construction. IE's recommendations are for the period from 11th August 2004 to 9th June 2005 (302 days). Where as AT has held the employer attributable for delay from 21st December 2004 to 9th June 2005 (171 days). Keeping this factor in mind IE's recommendations have been modified. In claims 2,3,4, and 5 wherever the quantification is in respect of EPC has been disallowed on account of reasons recorded under claim no.2. Concessionaire's claim recommended by the IE has been modified to $171/302=0.566$. Quantification in case claim 6 pertaining to the concessionaire has been allowed as per page 328 of SOC.

39. The Arbitral Tribunal is not bound by the law of evidence. It has weighted the recommendation of the IE and found the same worthy of reliance for the purpose of quantification. It is not for this Court to arrive at a different finding in this regard.

40. Article 1 defines the term Independent Engineer as under:-

"Independent Engineer" means a reputed Person being a firm, company or a body corporate appointed in accordance with Article 4 for supervision and monitoring of compliance by the Concessionaire with the Project Requirements, more particularly to undertake, perform, carry out the duties, responsibilities, services and activities set forth in Schedule "L".

41. Clause 2.2(a)(viii) of Schedule – L further provides as under:-

"SCHEDULE – L

INDEPENDENT ENGINEER – SCOPE OF WORK

2.2 Implementation Period – Construction

a. The Independent Engineer would monitor, in accordance with Good Industry Practice, the progress in implementation and ensure compliance with the Construction Requirements. For this purpose the Independent Engineer shall undertake, inter alia, the following activities and where appropriate make suitable suggestions.

xxxxxx

(viii) review and ascertain the cost variation arising as a result of Change in Law and/or Change in Scope and determine the Additional Cost;"



42. Therefore, ascertaining cost variation arising as a result of change in law and / or change in scope and determination of the additional cost was the work assigned to the Independent Engineer. The IE, gave a detailed report under cover of its letter dated 08.06.2007 after examining the books of accounts of MAPEX, though in random. On such random checks of the original documents and accounts, the IE had certified the claims on basis of which the Arbitral Tribunal has awarded claim No. 3 in favour of MAPEX. Mr. Philip E.Konen, team leader of IE was examined as a witness by MAPEX. In his cross-examination the following questions were put to him, though in relation to the EPC Contractor's prolongation cost claims, and the same would show that the certification of the claim was on the basis of a checking of the accounts produced by MAPEX: -

"Q40. Do I take it that you did not have any evidence or documents on records to compute the prolongation cost of EPC contractor?"

Ans. I disagree. I inspected the records pertaining to these items at the Concessionaire's offices.

Q41. Have you kept any copy of the documents submitted by the EPC contractor on record?"

Ans. I do not recall, keepings copies of these documents. Our office documents were handed over to NHAI when the office was closed.

xxxxx

Q43. Can you please give the description of the books of Accounts, documents and other evidence which you perused in support of the EPC contractor's claim.

Ans. I looked at the yearly amounts and then at the monthly amounts. I then picked two or three months per year and verified the amounts for that month and if they agreed or not with the monthly summery data.

Q44. What did you pick up for two or three months as stated in your previous answer.

Ans. I looked at all the items which built up to the costs for that month. I worked backward from the total for a month I was inspecting and would check all of the items contributing to it including but not limited to salaries, expenses, supplies and so on. I do not recall in detail after 3 years.

Q45. Can you give me a description of specific document which you examined in support of EPC contractor's claim.

Ans. The books of accounts, bills and invoices.

Q46. Which particular book of accounts did you examine?"

Ans. Those of EPC contractor's document available at the Concessionaire's office showing the expenses included in the claim.



Q47. Which particular book out of contractor's document was available in the Concessionaire's office?

Ans. All of the books and records which I requested were immediately made available to me, I do not remember the title of the specific book.

Q48. According to you, you tried to verify the summary data for a particular month.

Ans. That is incorrect. After I had a monthly summarise for the year I picked months at random and verified all the costs from the bills, invoices and so forth for that specific month. I then checked whether all of the individual costs added up to the monthly total. When I had looked at the yearly amount and the monthly summary I told the Concessionaire to bring me all the data for a specific month which they were not informed of in advance. That data, produced on the spot is what I used to verify the amounts.

Q49. So, you undertook sample checking only.

Ans. Yes

xxxxxx

Q56. Please tell me how you have reached the figure of Rs. 84,698,894/- in recommending the claim of prolongation cost of Concessionaire in its favour.

Ans. By following the same procedure detailed above to verify the EPC contractor's costs for prolongation.

Q57. Did you have any material on your record in recommending the above mentioned claim referred in Q56?

Ans. I do not recall keeping separate records in my files.

Q58. I put it to you that your recommendations are baseless and without any support of documents.

Ans. I disagree entirely. I was asked for comments and recommendations and not to supply documents about the claim submitted."

43. In view of the above, in my opinion, the Arbitral Tribunal wrongly rejected to rely upon the report of the IE as contained in its letter dated 08.06.2007 for the purpose of ascertaining the damages / prolongation cost suffered by MAPEX as observed by it in paragraphs 102 and 103 of the award. However, it later rightly applied the said report, while determining the quantum of damages / prolongation cost in paragraphs 163 and 164 of the impugned award.

44. Similarly, challenge to grant of claim No.6 on account of change of law being granted by the Arbitral Tribunal without any proof of the same being placed on record is without merit.

45. Though submissions were made with respect to grant of claim no.8 in favour of MAPEX by the Arbitral Tribunal, the same were



asking this Court to re-appreciate the evidence led before the Arbitral Tribunal, which in my opinion is not permissible for this Court. The same is accordingly, rejected.

46. NHAI has further challenged the award of interest in claim Nos. 7 and 9, however, I find that the said objection is premised more on the basis that there was no evidence on record for allowing such a claim. It was further contended that in any case, interest at the rate of 12% p.a. could not have been granted. The Arbitral Tribunal has allowed claim No.7 holding as under:-

“171. This claim is in respect of financing charges incurred by the claimant on claim amounts of claims from no.1 to 6 due to delays on the part of the respondent. AT has already held under claim no. 1 that the project has been delayed by the respondent by 171 days.

All claims arising out of this delay will be payable to the claimant if tenable. Further this is BOT project and finances have to be arranged by the concessionaire from banks at interest. Thus all amounts due to the claimant under claims 1 to 6 will carry interest.

172. Whereas the respondent has contended that nothing is payable under article 5 and 9 of the agreement. AT has gone through these provisions and observe that the contention of the respondent in the instant case is not correct. The claimant has argued that additional resources were arranged through banks at interest. Thus AT holds that financing charges will be payable on the amounts of claims which AT finds due to the claimant from 10- 06-2005 till it is paid by the Respondent@ 12% simple interest per annum.”

47. The Arbitral Tribunal, therefore, has given cogent reasons for allowing the said claim. As far as the rate of interest is concerned, I do not find anything unreasonable in the same so as to warrant interference in exercise of jurisdiction under Section 34 of the Act. Interest as granted under the claim no. 9 was on the amount awarded under claim no.8, objection against which I have already rejected herein above.”

40. Claim 3 before the learned Arbitral Tribunal pertained to the Concessionaire/Mapex's time-related costs. The said claim was founded on the allegation that Mapex had incurred additional time-related expenses due to the extension of 171 days beyond the Scheduled Project Completion Date, which resulted from the breach of contractual obligations by NHAI. Upon consideration, the learned



Arbitral Tribunal awarded a sum of Rs. 4,79,54,645/- to Mapex under this head.

41. Claim 6, which was partly allowed by the learned Arbitral Tribunal, pertained to additional costs allegedly incurred by Mapex on account of a Change in Law; however, the learned Tribunal rejected that portion of the claim which related to the EPC Contractor.

42. The further challenge relates to Claims 7, 8 and 9. Among these, Claim 8 pertains to the underpayment for Change of Scope and Additional Works executed by Mapex. Claims 7 and 9 involve interest components; Claim 9 represents interest on the deferred payment arising from Claim 8, while Claim 7 concerns financing costs, i.e., interest on the amounts awarded under Claims 3 and 6.

43. Learned counsel for NHAI would contend that the learned Single Judge, while examining the reasoning adopted by the learned Arbitral Tribunal, had effectively rewritten the Award by substituting his own reasoning in place of that of the learned Tribunal. It would be argued by the learned Counsel that the learned Arbitral Tribunal's reliance on the IE's letter dated 08.06.2007 revealed a glaring inconsistency, as the learned Arbitral Tribunal had itself expressed reservations about relying upon the said letter, yet proceeded to base its quantification of damages and prolongation costs upon it.

44. It would further be submitted that although the learned Arbitral Tribunal had observed that the IE's letter could not be fully relied upon due to limitations in the data, it nevertheless relied upon that very letter for quantifying the claims.

45. Learned Counsel for NHAI would argue that the learned Single Judge, instead of identifying this reasoning as flawed, went on to



justify the reliance upon the said letter, thereby substituting or modifying the reasoning of the learned Arbitral Tribunal. It would be contended that such an exercise amounted to rewriting or varying the Arbitral Award, which is impermissible in law in view of the judgment of the Hon'ble Supreme Court in *Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*¹⁷.

46. It would also be contended by the learned Counsel for NHAI that, while analyzing the cross-examination of Mr. Philip E. Konen, the Team Leader of the IE, the learned Single Judge exceeded the limited jurisdiction conferred under Section 34 of the A&C Act, by reappreciating the evidence, an exercise that is expressly prohibited under Section 34 proceedings.

47. *Per contra*, learned Senior Counsel for Mapex would support the findings of the learned Single Judge, contending that the Single Judge had merely analyzed the findings of the learned Arbitral Tribunal without altering or substituting them. It would further be argued that such analytical scrutiny, aimed at determining the consistency and legality of the learned Arbitral Tribunal's reasoning, does not amount to rewriting or modifying the Award, and remains within the permissible scope of judicial review under Section 34.

48. We have heard the learned counsel appearing for both parties and carefully examined the Arbitral Award, the Impugned Judgment, and the pleadings, along with the documents placed on record in support thereof.

49. In the present case, it is undisputed that there was a delay of 171 days beyond the Scheduled Project Completion Date, attributable

¹⁷ (2025) 7 SCC 1



to NHAI's failure to timely hand over the land and its directions leading to a change in the scope of work. We concur with the finding of the learned Single Judge that, owing to such delay, Mapex was entitled to claim damages, and that such entitlement was not curtailed by Article 8.3 of the Agreement, which concerns bonus or reduction in annuity. Under settled principles of contract law, a party committing a breach is bound to compensate the aggrieved party, of course, subject to the parameters laid down under Section 73 of the Contract Act.

50. The core issue, therefore, is whether the learned Arbitral Tribunal rightly quantified the damages or prolongation costs in favour of Mapex by relying upon the IE's report dated 08.06.2007, which had assessed such damages after selectively examining Mapex's financial records. It is noteworthy that the author of the report, Mr. Philip E. Konen, was subjected to cross-examination before the learned Arbitral Tribunal.

51. While determining the quantum of damages, the learned Arbitral Tribunal expressly noted the inherent difficulty in precisely ascertaining the amount of prolongation costs due to accurate data. Nonetheless, the learned Arbitral Tribunal concluded that the IE's report, though not flawless, was not wholly unreliable or arbitrary. The learned Arbitral Tribunal accorded partial reliance to the report, which was supplemented with oral evidence on record. The learned Single Judge, in affirming this approach, noted that the testimony of the IE corroborated the substance of his report, thereby lending credence to the quantification adopted by the learned Arbitral Tribunal.



52. The learned Single Judge rightly observed that the IE was an entity by virtue of the Agreement between the parties, and that its assessment carried probative value, having been rendered in discharge of its contractual obligations. Hence, an outright rejection of the IE's report merely for lack of perfect accuracy would be unjustified and contrary to the intention underlying the contractual framework.

53. Upon an overall assessment, it is evident that the learned Single Judge did not substitute or rewrite the Award but merely re-examined the objections raised by NHAI within the limited framework of Section 34. The findings of the learned Arbitral Tribunal, as affirmed by the Single Judge, cannot be said to be perverse, particularly when the delay of 171 days, the breach by NHAI, the role of the IE and the entitlement of prolongation cost are matters of record and undisputed.

54. On the aspect of evidentiary sufficiency, Section 19(1) of the A&C Act, expressly provides that the Arbitral Tribunal shall not be bound by the provisions of the Code of Civil Procedure, 1908, or the Evidence Act, 1872. As observed by the Hon'ble Supreme Court in *Srei Infrastructure Finance Ltd. v. Tuff Drilling (P) Ltd.*¹⁸, the phrase "shall not be bound" denotes flexibility, empowering the Tribunal to draw upon the fundamental principles of procedural and evidentiary law without being constrained by their technical requirements. The relevant portion of the said judgment reads as under:

"17. Section 19 of the Act provides for determination of rules of procedure. Sub-section (1) of Section 19 provides that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872. The words "Arbitral Tribunal shall not be bound" are the words of amplitude and not of a restriction.

¹⁸ 1. (2018) 11 SCC 470



These words do not prohibit the Arbitral Tribunal from drawing sustenance from the fundamental principles underlying the Civil Procedure Code or the Evidence Act but the Tribunal is not bound to observe the provisions of Code with all of its rigour. As per sub-section (2) of Section 19, the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings.

26. There cannot be a dispute that the power exercised by the Arbitral Tribunal is quasi-judicial. In view of the provisions of the 1996 Act, which confers various statutory powers and obligations on the Arbitral Tribunal, we do not find any such distinction between the statutory tribunal constituted under the statutory provisions or Constitution insofar as the power of procedural review is concerned. We have already noticed that Section 19 provides that the Arbitral Tribunal shall not be bound by the rules of procedure as contained in the Civil Procedure Code. Section 19 cannot be read to mean that the Arbitral Tribunal is incapacitated in drawing sustenance from any provisions of the Code of Civil Procedure. This was clearly laid down in *Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn.*, (2009) 8 SCC 646. In para 98(n), the following was stated: (SCC p. 693)

“(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. “Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice.” (See *ICICI LTD. v. Grapco Industries Ltd.*, (1999) 4 SCC 710).”

(emphasis supplied)

55. In view of the foregoing discussion, we are of the considered opinion that the conclusion reached by the learned Single Judge, holding that the Arbitral Award suffered from neither perversity nor patent illegality, warrants no interference.

56. Since Claims 3 and 6 were determined on identical legal and evidentiary parameters and have been rightly upheld by the learned Single Judge, we see no reason to take a contrary view.



57. With respect to Claim 8, pertaining to underpayment for change of scope and additional works and the consequent award of Rs. 17,26,991/- to Mapex, the learned Single Judge rejected NHAI's objection, noting that its arguments amounted to impermissible reappreciation of evidence. We, while exercising appellate jurisdiction under Section 37, find no justification to revisit those factual findings.

58. As regards Claims 7 and 9, concerning interest at the rate of 12% per annum on the amounts awarded under Claims 3, 6 and 8, we find the reasoning and conclusion of the learned Single Judge to be sound and consistent with the settled principles governing arbitral discretion under Section 31(7) of the A&C Act. Since the principal claims have been upheld, the award of interest thereon cannot be characterized as perverse or excessive. It is well settled that under Section 31(7) of the A&C Act, the learned Arbitral Tribunal possesses broad discretion to award interest, which ought not to be interfered with unless demonstrated to be manifestly arbitrary, excessive, or contrary to the contractual stipulations.

59. In light of the above discussion, we find no merit in the Appeal filed by NHAI.

CONCLUSION:

60. For the reasons set out above, no ground is made out by either party to warrant interference with the Impugned Judgment dated 08.01.2018 passed by the learned Single Judge, which deserves affirmation.



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61. The present Appeals, along with pending application(s), if any, are disposed of in the above terms.

62. No order as to costs.

ANIL KSHETARPAL, J.

HARISH VAIDYANATHAN SHANKAR, J.
NOVEMBER 01, 2025/sm/va