IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 855 OF 2025

The President of India, through Chief Engineer (Construction)/CPM/NGP Central Railway New Administrative Building 6th Floor, Dr. D.N.Road CSMT, Mumbai 400001] **...Petitioner**

Versus

1) KEC International Ltd. Having office at: RPG House, Dr. Annie Besant Road, Worli, Mumbai 400030] **...Respondent**

Mr. N.R.Bubna a/w Ms. Pooja Malik, for the Petitioner.
Mr. Mustafa Doctor a/w Mr. Anuj Athalye, Mr. Nitin Jain, Mr. Rohan Gupta i/b Legasis Partners, for the Respondent.

CORAM : SHARMILA U. DESHMUKH
RESERVED ON : MARCH 13th,2026
PRONOUNCED ON : APRIL 22nd,2026

JUDGMENT:

1) The Petitioner, who was the Respondent in the arbitration proceedings, has filed the present Petition under Section 34 of the Arbitration and Conciliation Act, 1996, (for short "**Arbitration Act**") challenging the impugned Award dated 3rd February, 2025. For clarity, the parties are referred to by their status in arbitration proceedings.

2) The Claimant entered into Engineering Procurement and Construction contract (for short "**EPC contract**") with the Respondent

on 12th August, 2022 for construction of third railway line between Maramjhiri and Chichonda on the Itarsi Nagpur section of Central Railway covering a length of 69.80kms. The contract was lump sum EPC contract valued at Rs. 508.96 crores which was later revised to Rs. 536.23 crores due to GST revision. Vide notice dated 29th January, 2024, the Claimant invoked arbitration seeking the following:

(I) Damages:

(a) for non-handing over of site : Rs. 3,43,26,738/- calculated as per Article 8.3.1 of the contract.

(b) for delay in approval of engineering scale plan and signalling interlocking plan: Rs. 54,69,56,027/- calculated as per Article 10.2.6 of the contract.

(II) Extension of Time: In terms of Article 10.4 of the contract as under -

Sr. No.	Description	Impact		
		From	To	In days
1.	Due to re-validation of incorrect, erroneous and false data provided by Authority including but not limited to missing TBMs, incorrect OGL, PFL, PRL, EFL.	01-10-2022	Till date	429
2.	Due to non-provision of requisite / stipulated ROW;	01-10-2022	Till date	429
3.	Due to frequent /	20-10-2022	Till date	410

	unilateral Changes/ revisions in Design and Drawings at the instance of Authority on account of their requirements.			
4.	Due to Change of Scope leading to additional work	08-02-2023	Till date	410

(III) Three Monetary claims amounting to Rs. 83,99,75,134/- due to change in scope in terms or Article 13 :

(a) significant variation in scope of earthwork after the survey:

amount of claim-Rs. 60,74,52,439/

(b) changes in design/drawings of EL rooms:

amount of claim-Rs. 22,99,18,618/

(c) change in dimensions of house and rest house:

amount of claim-Rs. 26,04,077/-.

3) The parties agreed that the prayers in the statement of claim be treated as issues. The Claimant prayed for the following reliefs :-

> *(A) Declaring that the Claimant is entitled to the extension of time by 429 days or any other number, as may be deemed fit and proper, and that all milestones accordingly will be amended by the same number of days as will be awarded.*
>
> *(B) In the event that prayer (A) above is granted, then, direct or order the Respondent to return the Bank Guarantee for Rs. 53,62,31,399 /, Bank Guarantee No. 240126iBGP00016 dated 30-01-2024 that the Claimant was compelled to submit and allow the Claimant to reserve its right to claim compensation for being made to submit such a guarantee.*
>
> *(C) Declare that there shall be decided a method for classification of excavated material into - "Soil", "Soft Rock" and "Hard Rock" and quantity of excavated material classified accordingly.*

(D) Directing the Respondent to issue 'Change of Scope', including the declaration as sought for in Prayer "C" above and for:

(i) payment at the rate of Rs. 153.9 per cum. for excavation in soil or any other rate deemed fit and appropriate,
(ii) payment at the rate of Rs. 352.06 per cum. for excavation in soft rock or any other rate deemed fit and appropriate, and
(iii) payment at the rate of Rs.1262.31 per cum. for excavation in hard rock or any other rate deemed fit and appropriate for the quantity in Cutting beyond the estimated quantity at the stage of bidding and
(iv) payment at the rate of Rs. 338.88 per cum for earthwork in filling without mechanical compaction and Rs. 358.55 per cum for earthwork in filling with mechanical compaction, and
(v) direct the Respondent to effect payment accordingly for the excess quantity as and when executed and measured from time to time.

(E) Directing the Respondent to issue 'Change of Scope' Order for each of the following items and make payment for the said Order in respect of work of -

(a) Changes in the design of El buildings in the amount of Rs. 22,99,18,618/-or any other sum deemed fit.
(b) Change in the area of the Site Office and Guests house in the amounts of Rs. 26,04,077/-or any other sum deemed fit.

(F) Directing the Respondent to pay to the Claimant compensation in the amount of Rs. 3,43,26,738/ under Clause 8.3.1 or any other sum of money as may be deemed fit and proper .

(G) Directing the Respondent to pay to the Claimant compensation in the amount of Rs. 54,69,56,027/- under Clause 10.2.6 or any other sum of money as may be deemed fit and proper.

(H) Any other relief considered fit and proper under the facts and circumstances hereof.

(i) Interest pendente-lite and future interest till payment at the rate of 18 percent per annum.

4) Broadly summarizing, the findings of the Arbitral Tribunal relevant for our purpose are as under:

(I) The Claimant is entitled to extension of time and compensation of Rs 2,15,97,131/ for delay in providing ROW till 4th October, 2023 for the reason:

(a) That there is no joint verification of site and no appendix to the joint note dated 1st October, 2022 as required under Article 8.2.1.

(b) The Affidavit of Respondent admits that for a length of 150 m, hindrance free ROW is not available even as on 6th September, 2024.

(c) The letter dated 4th October, 2023 issued by the Claimant setting out that only 84.3 % ROW is available and there are various issues impacting the restricted access has not been responded and has not been denied in the Statement of Defence (SOD).

(II) For purpose of fixation of milestone, the appointed date stands modified to 4th October, 2023 for the reason:

(a) That the Respondent did not hand over a minimum 90% ROW to the Claimant.

(b) Even on 4th October, 2023, the hindrance free available length of ROW was 84.3% which is less than 90% to fix the appointed date and joint survey to be carried out which will show the date when 90% and 100% ROW has been handed over by the Respondent.

(c) That the Claimant is entitled for re-fixation of appointed

date as an interim measure and as of now extension of 368 days is allowed.

(III) The Claimant is entitled for change in scope of work under Article 13 of the Agreement as the scope of work underwent a substantial change for the reason that :

(a) That scope of work would mean the fairly accurate knowledge of original ground levels, proposed rail levels, proposed formation levels, existing rail level, distance of track , layout of yard etc which would enable the bidders to fairly assess the quantum of work to quote a lumpsum price.

(b) In terms of Clause 4.1.2, the responsibility of correct ground level rests with the Respondent. As per Clause 1.4.2(b), the clauses of the agreement will prevail over the Schedule.

(c) The original ground level have been determined after a detailed survey and the L-section and plan has been approved by the officials of the Respondent, which did not give any reason to the Claimant to doubt the same. The basic data checked, verified by officials of Respondent and approved cannot be termed as tentative.

(d) The original ground levels are matter of fact and have nothing to do with interpretation of data or tentativeness. The L section indicated original ground level and vertical and horizontal alignment which the Claimant had no freedom to modify unless directed by the Respondent.

(e) The Respondent is shifting the responsibility of correctness of survey carried out and approved by them. The validation was done by the Claimant and after validation, errors were found which changed the quantity of earth work in formation and cutting.

(f) That the Respondent has failed to furnish computation details of the estimated cost indicated in the Tender document on the ground that no separate item wise estimation of price is provided in EPF contract.

IV) The Default notice dated 7th March, 2024 and the termination notice dated 4th October, 2024 stands withdrawn for the reason:

(a) The Claimant in application under Section 17 of Arbitration Act had questioned the Respondent's Authority to issue default notice on 7th March, 2024 and vide order dated 8th May,

2024, the default notice was stayed.

(b) Under Article 21.1.2 of the contract, upon occurrence of contractor's default, the contract could be terminated. The default notice dated 7th March, 2024 was already stayed and the termination notice dated 4th October, 2024 cites the notice of 7th March, 2024. The termination notice dated 4th October, 2024 was issued without default notice and cannot be enforced.

5) The impugned Award grants the following relevant reliefs :

1)		The declared Appointed Date of 01-10-2022 is not in terms of the contract and stands null and void. The "Appointed Date" stands modified to 4-10-2023.	
2)		Date of 16-12-2022 cannot be considered as a date on which 100% Right of Way was handed over to the Claimant and stands null and void and needs to be refixed. Amount awarded for delay in handing over Right of Way is Rs 2,15,97,131/.	
3)		Default Notice dated 07-3-2024 & Termination notice dated 04-10-2024 stand withdrawn and no further action shall be taken by the Respondent in furtherance of the same.	
4)		The Claimant is entitled for change in scope of work under Article 13 of the agreement.	
5)		The cost of quantity over and above the quantities indicated in Column "A" of Annexure "F" of SOC	

	shall be determined by parties in terms of Clause 13.2.3 of Agreement.	

SUBMISSIONS **:-**

6) Mr. Bubna, learned counsel for the Petitioner/original Respondent submits that the work which was awarded was for laying down third railway line of 69.80 kms. He submits that the claim of the Claimant was on four counts :

(a) change of start of work date

(b) damages as site not given

(c) approval for change of work and compensation

(d) termination notice

7) He submits that insofar as the first claim of ROW is concerned, Annexure II to the tender notice specifically states about 66km right of way being available and about 4.128 kms was not available. He would further point out the joint note dated 1st October, 2022 recording that the Claimant accepts the right of way of 90% stretch and similarly joint note dated 16th February, 2023 accepts the right of way for 100% stretch. He points out to the communication dated 27th February, 2023 and 15th March, 2023 annexed with the affidavit-in-reply of the Claimant to contend that after executing the joint note on 1st October, 2022 and 16th February, 2023, dispute has been raised about encroachment and discrepancies at various stretches. He would further point out that in

the communication of 30th May, 2023, the Claimant raised the issue of delay on various grounds, however, did not state that 90% right of way was not made available. He would further submit that by communication dated 26th September, 2023, the Claimant's assessment increased the total affected length to 6kms which was also less than 10kms and does not say that 90% ROW was not available.

8) He would further submit that for the first time by communication dated 4th October, 2023, the Claimant has stated that ROW is not available and total ROW was issued for length of 10,977 meters with details at Annexure 1, however, Annexure 1 to the communication is claim for damages and not the details.

9) He submits that the arbitral tribunal directed joint survey for assessing whether 90% or 100% ROW has been handed over and without survey report re-fixes the appointed date as 4th October, 2023. He would further point out that, thereafter, there was a visit of tribunal during the pendency of the arbitration proceedings, however, there is no reference in the award to the result of the site visit. He submits that the Claimant commenced the work on the basis of 90% ROW, and hence, there is patent illegality in the findings of the Tribunal that 90% was not handed over. He submits that Article 8.3.1(b) provides for damages only for delay in providing ROW and the manner of computation of compensation is set out in Article 8.3.4. He submits that

the change in the appointed date and award of compensation is not in accordance with the terms of the contract.

10) He would further submit that under Article 3.8 of the tender conditions, the responsibility is upon the contractor to foresee all difficulties and it provides that the contract price shall not be adjusted. He points out that unforeseeable difficulties include physical conditions like man made or natural physical conditions including subsurface and hydrological conditions which the Claimant encounters at the site during execution of work. He would further point out the disclaimer at Article 6.1.1 that prior to the execution of the agreement, the Claimant has made an independent evaluation of the scope of project, RFP, specifications, suitability and all other information provided by the authority and acknowledges and accepts the risk of inadequacy, mistake or error in or relating to any of the matters set out in Clause 6.1.1. He would further submit that under Article 17.1.5, the contract price covers all contract obligations for the works under the agreement.

11) He would submit that the Claimant's claim for change of the scope does not fall within Article 13.1 of the agreement. He submits that Article 13.2.3 sets out the principles to be followed while determining the Claimant's quotation of cost for change of scope, which has not been followed by the learned Arbitral Tribunal.

12) He submits that as per the communication of 8th April, 2023, the

Claimant has contended that for executing the work, he is required to carry out additional work for which survey is required to be carried out. He submits that the work remains the same, and therefore, there was no case for change of scope of work. He submits that the approval for change of scope of work as per communication dated 14th March, 2023 annexed at page 1575 of the affidavit-in-reply is sought due to change of levels, alignment, etc. from the tendering stage which could not have been accepted. He submits that the Learned Arbitral Tribunal by approving the change of scope of work has converted the lump sum contract into piecemeal contract. He submits that the learned Arbitral Tribunal has applied the principles of equity and has granted piece rate which cannot be granted in EPC contract and has thus exceeded its jurisdiction.

13) He would further point out paragraph 124 of the impugned Award which speaks of monetary claim for increased quantity of work. He submits that the finding of the Tribunal in paragraph 134 that the Claimants are contesting the claim on various conditions of the contract suffers from perversity as the contract was the jurisdictional document. He submits that under the EPC contract the Respondent had to pay a lump sum price and the learned Arbitral Tribunal has re-written the EPC contract.

14) He would further submit that so far as termination is concerned,

Article 21.1.2 and 21.3 permits the termination of the contract also on the ground of convenience. He submits that as the contract is determinable, no specific performance could have been granted and only damages could have been granted for breach of contract. In support he relies upon the following decisions.

i) Central Railway-Mumbai Division vs A-1 Laundry Services[1]

ii) PSA Sical Terminals Pvt. Ltd. vs Board of Trustees of V.O. Chidambranar Port Trust Tuticorin And Others.[2]

iii) Indian Railways Catering & Tourism Corp. Ltd. vs Brandvan Food Products.[3]

iv) Indian Oil Corporation Ltd. vs Amritsar Gas Service And Others.[4]

15) *Per contra*, Mr. Doctor, Learned Senior Advocate appearing for the Claimant submits that the present arbitration was pursuant to a dispute resolution process under the tender which provides for standing arbitral tribunal constituted by the Railways themselves of retired railway officials having expert domain knowledge. He submits that the submissions canvassed by Mr. Bubna mainly rely on the documents annexed to the affidavit-in-reply which were not before the Arbitral Tribunal and the submissions canvassed today were not raised before

1 2025 SCC Online Bom 4609
2 (2023) 15 SCC 781
3 2025 SCC Online SC 2369
4 (1991) 1 SCC 533

the Arbitral Tribunal.

16) He would further point out the grounds in the Petition to contend that no ground of illegality or perversity in the impugned award are made out. He submits that the Claimant had submitted the bid on the basis of the drawings which were found to be incorrect, and therefore, there was a requirement for more excavation which necessitated change in scope of work. He submits that subsequent to the passing of the impugned Award by communication of 25th July, 2025, the Respondent has fixed the appointed date as 4th October, 2023 and accordingly, milestones have been shifted. He submits that, however, they have accepted the appointed date not on the basis of ROW but scope of work as they are aware that if they accept the appointed date of 4th October, 2023 on the basis of ROW they will be required to pay damages.

17) He would submit that the joint notes relied upon by the Respondent specifically states that the Claimant has accepted the ROW for 90% stretch based on representations of authority's engineer and also mentions that if the Claimant is unable to access the land, it shall be eligible for financial claims as well as time extension. He submits that the view taken by the Learned Arbitral Tribunal is based on the evidence on record in the form of the joint notes and the terms of the agreement to hold that the right of way was not made available which is a plausible

view and does not deserve interference. He would further submit that the communication of 4th October, 2023 relied upon by Mr. Bubna is an incomplete document as annexure 1 of the communication sets out the details of the inaccessible ROW. He would submit that before the Arbitral Tribunal there was no arguments canvassed on the various letters which are now shown to this Court and hence the Arbitral tribunal has decided the issue based upon the joint notes as well as the affidavit of 25th September, 2024 admitting that for a length of 150 meters, hindrance free ROW is not available even as on 6th September, 2024. He submits that the Tribunal has accepted the contents of the communication of 4th October, 2023 setting out that 84.3% ROW was made available as there was no denial to the contents of the same. He submits that there is no error in interpreting the appointed date based on the evidence on record. He would further submit that the declaration of the Arbitral Tribunal of 4th October, 2023 as appointed date as an interim measure stands clarified by paragraph 90(d) which provides that as on 4th October, 2023, the ROW was 84.3% and as there is no evidence that 90% ROW has been handed over, survey was required to be carried out which would have an effect of extending the appointed date beyond 4th October, 2023. He submits that, however, the appointed date of 4th October, 2023 will not change even post survey.

18) He would further point out that the contract provides for survey

after the Award and the Arbitral Tribunal has held that the data was erroneous in as much as there was significant difference in original ground levels and thereafter, fresh joint survey was done. He submits that the Arbitral Tribunal has rightly considered Article 4.1.2 that the Respondent shall be responsible for the correctness of the scope of the project. He submits that governing Article 13.1.2 speaks of the change of scope to mean change in specification of any item of works as well as any additional work which is not included in the scope of the work and as in the present case, fresh survey shows additional work to be carried out there was a change in the scope of work. He would further point out the definition of Work as contained in the contract which is defined to mean all works including survey, design and all other things necessary to complete the railway project.

19) He would further submit that in so far as the compensation for damage is concerned, the same was as per the formula agreed between the parties and was accordingly worked out.

20) He would submit that the default notice dated 7th March, 2024 was stayed by order of the Tribunal dated 8th May, 2024, and hence, there could not be any termination based on default notice of 7th October, 2024. He submits that subsequent to the Award, the work is now being carried out by the Claimant, and therefore, the issue of termination no longer survives. He submits that there is no submissions

canvassed to show perversity or illegality to warrant interference under Section 34 which operates in a very narrow field. In support he relies upon the following decisions :

i) OPG Power Generation Private Limited vs Enexio Power Cooling Solutions India Pvt. Ltd. And Anr.[5]

ii) Union of India vs Susaka Private Ltd. And Ors.[6]

iii) National Building Construction Corporation vs Sharma Enterprises[7]

21) Rival contentions now fall for my determination:

22) As the Petition assails various claims granted by the Arbitral Tribunal, I have considered the challenges under specified heads.

EXTENSION OF TIME , SHIFTING OF APPOINTED DATE AND PAYMENT OF DAMAGES:

23) The contract dated 12th August, 2022 executed between the parties was a lump sum EPC contract valued at about Rs 536.23 crores for construction of third railway line on the Itarsi Nagpur section of Central Railway covering length of 69.80 kms. Article 10.3.1 of the contract provides that the Scheduled Completion Date shall be the last day of 33rd month from the Appointed Date including any extension thereof , in default whereof the Contractor was liable to pay damages to

5 (2025) 2 SCC 417
6 (2018) 2 SCC 182
7 (2025) SCC Online Del 8505

the Authority for delay of each day. Article 10.4.1 of the contract permitted extension of time of the project completion schedule in the eventualities mentioned therein which reads as under:

> *(a) delay in providing the Right of Way, [approval of GAD by road authorities,] environmental/forest clearances, or signalling interlocking plan and route control chart in accordance with the provisions of this Agreement;*
>
> *(b) Change of Scope, unless an adjustment to the Scheduled Completion Date has been agreed under Article 13;*
>
> *(c) occurrence of a Force Majeure Event;*
>
> *(d) any delay, impediment or prevention caused by or attributable to the Authority, the Authority's personnel or the Authority's other contractors on the Site; and*
>
> *(e) any other cause or delay which entitles the Contractor to Time Extension in accordance with the provisions of this Agreement.*

24) The project completion schedule, extension of time and damages are issues intrinsically linked with the appointed date. The contract contemplates determination of the appointed date upon fulfillment of certain specified conditions as enumerated in Article 26, which is the definition clause and reads as under:

> *"**Appointed Date**" means that date which is later of:*
>
> *(a) the 15th day of the date of this Agreement,*
>
> *(b) the date on which the Contractor has delivered the Performance Security in accordance with the provisions of Article 7;*
>
> *(c) the date on which the Authority has provided the Right of Way on at least 90% (ninety per cent) of the total length of the Railway Project in conformity with the provisions of Clause 8.2; and*
>
> *(d) the date on which all Authority has provided to the Contractor the environmental and forest clearances for sections of the Railway Project comprising 90% of the length thereof in accordance with the provisions of Clause 4.3,*

25) The Arbitral Tribunal has granted extension of time from 1st October, 2022 to 19th May, 2023, which has not been seriously challenged. The substantive challenge is to shifting of the Appointed Date to 4th October, 2023 and the resultant damages being granted for delay in handing over ROW.

26) The contractual arrangement governing the obligation of handing over 90% of hindrance free ROW is found in Article 4.1.3 which provides that the Respondent shall upon receiving the performance guarantee provide to the Claimant the right of way of not less than 90% in accordance with Article 8.2 and 8.3 of the contract. Article 4.1.4 imposes a liability of damages upon the Respondent for non-compliance of contractual obligation of handing over to the Claimant the right of way of not less 90% of the total length of the railway project.

27) Article 8 governs the arrangement pertaining to the Right of Way and Article 8.2 deals with procurement of the Site. Article 8.2.1 sets out the procedure to be followed to constitute valid evidence of giving Right of Way to the Claimant. It provides for inspection of the site by the authorized representative of the Respondent and the Claimant and preparation of memorandum containing an inventory of the site. Article 8.2.1 reads as under:

> *"8.2.1. The Authority Representative and the Claimant, shall within 15 (fifteen) days of providing the Performance Security by the Claimant in accordance with the provisions of Clause 7.1, inspect the Site and prepare a*

memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road/railway works, trees and any other immovable property on or attached the Site, Subject to the provisions of Clause 8.2.3, such memorandum shall have appended thereto an appendix (the "Appendix") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been given to the Contractor. Signing of the memorandum, in 2 (two) counterparts (each of which shall constitute an original), by the authorised representative of the Parties shall be deemed to constitute a valid evidence of giving the Right of Way to the Contractor for discharging its obligation under and in accordance with the provisions of this Agreement and for no other purposes whatsoever.

……."

28) The above reproduced clause specifically provides for joint inspection by the Claimant and the Respondent's authorised representative and preparation of memorandum containing an appendix specifying those parts of the site to which vacant access and ROW has not been given. It is the memorandum, pursuant to the joint site visit, which constitutes valid evidence of giving right of way to the contractor for discharging the obligations in accordance with the agreement. Mr. Bubna has not demonstrated compliance with Article 8.2.1 of the contract and seeks to rely on the joint notes executed on 1st October, 2022 and 16th February, 2023 to contend that the Claimant had accepted that right of way was made available for 90% stretch on 1st October, 2022 and 16th February, 2023. Apart from the fact that the contractual term mandated preparation of memorandum, the contention of Mr. Bubna on the joint notes is misconceived and is based on selective reading of the joint notes. The joint note of 1st October, 2022 reads as under.

"The authority engineer hereby confirms that the ROW for the 90% length of the Project is available free from all encumbrances and infringements as on the date of this joint note. The stretch is handed over to M/S KEC on this date 1st Oct 2022 for commencing construction work and under Clauses 4.1.3 read with Clauses 8.2 and 8.3 of the agreement.

At any stage of work if M/S KEC is unable to access the land/ or part of land due to any reasons, it shall be eligible for claims (financial as well as time extension) under section 8.3.1 of the Article 8 of the contract agreement.

M/S KEC accepts the ROW for 90% stretch based on representations of Authority Engineer is made above."

29) The joint note of 16th February, 2023 is identically worded with the only change as to handing over hindrance free ROW of 100% length of the Project. The joint notes makes it clear that the Claimant had accepted the right of way for 90%/100% stretch based on the representations of the Respondent's engineer and had reserved the right to raise financial claim as well as seek time extension under Article 8.3.1 of the contract, in event the Claimant is unable to access the land or part of the land due to any reason.

30) On 4th October, 2023, the Claimant addressed a communication to the Respondent seeking change in the appointed date stating non-availability of the right of way at the site and that after conducting site survey it was found that only 84.3% of the land was made available to execute the work. The learned Arbitral Tribunal considered the joint notes in the background of the contractual arrangement contained in Article 8.2.1. It further noted the affidavit of 25th September, 2024 filed by the Respondent admitting that for a length of 150 meters the

hindrance fee ROW is not available even as on 6th September, 2024. This created a doubt in respect of the joint note of 16th February, 2023 stating that right of way for 100% length is made available free of all encumbrances and infringement. The Arbitral Tribunal further noted that there is no reply to the Claimant's letter dated 4th October, 2023 from the Respondent and there is no denial to the contents of this letter and admitted the same as evidence on record.

31) Though, Mr. Bubna would contend that alongwith the communication of 4th October, 2023, the Annexure I of ROW details was not appended and instead what was annexed was the damage claim, there were two communications addressed on 4th October, 2023, one giving the details of the available ROW and the other seeking claim for damages, which has been rightly pointed out by Mr. Doctor.

32) The re-fixation of the appointed date by the Arbitral Tribunal was based on the contractual arrangement between the parties and the consideration of the contents of the joint notes. There is no material on record to show any dispute by the Respondent to the contents of the communication 4th October, 2023 or valid evidence of giving right of way of 90% on 1st October, 2022 in the manner contemplated under Article 8.2.1 of the contract. The Arbitral Tribunal has rightly addressed the issue in accordance with the terms of the contract to hold that there is no joint verification of the site and thus non-compliance of Article 8.2.1

and has rightly accepted the contents of the communication dated 4th October, 2023.

33) The Arbitral Tribunal has further held that even on 4th October, 2023, 90% hindrance free ROW was not handed over to the Claimant and as an interim measure, the tribunal has declared that the Claimant is entitled for re-fixation of appointed date and has taken 4th October, 2023 as appointed date for the purpose of dealing with other claims. I do not find any error in the course adopted by the Arbitral Tribunal as the Arbitral Tribunal had granted damages for the delay as an interim measure pending the computation of the date on which 90% of ROW free from hindrance was handed to the Claimant. The delay in handing over the Site entitles the Claimant to damages and the computation would depend on the actual date on which 90% ROW was handed over. The communication of 4th October, 2023 states that the total length of ROW which was available was 84.3%, and hence, the Arbitral Tribunal has rightly held that the Claimant is entitled for re-fixation of appointed date which would be beyond the the date of 4th October, 2023. The Arbitral Tribunal has been constituted for the purpose of dealing with interim issues which arise during the execution of the contract and is a standing arbitral tribunal. The Arbitral Tribunal has acted in consonance with Article 10.4.5 of the contract which deals with a situation where the event or circumstance giving rise to the notice has a continuing

effect in which case the detailed claim shall be considered as interim. The Claimant would therefore be entitled for re-fixation of the appointed date and raise further claims based on the same. The findings of the Arbitral Tribunal refixing the appointed date is in consonance with the terms of the contract and does not warrant interference.

34) In so far as computation of damages is concerned, as there was delay on part of the Respondent in handing over the Site, under Article 8.3.1, the Respondent became liable to pay damages to the Claimant as per the formula set out therein. The Arbitral Tribunal has applied the formula as provided in Article 8.3.1 i.e. amount of damages in rupees per day per meter equal to 0.10 x C x 1/L x 1/N, where C = contract price: L = Length of Railway Project in meters and N=Completion period in days (Appointed Date to Scheduled Completion Date). By applying the said formula, the Arbitral Tribunal has awarded damages of Rs. 2,15,97,131/- by considering the delay of 368 days in handing over ROW.

35) Once it has been held that the Arbitral Tribunal was right in taking the appointed date as 4th October, 2023 in accordance with the contractual agreement and the computation is in accordance with the contractual terms, I find no reason to interfere with the damages of Rs. 2,15,97,131/- awarded for delay in handing over the site.

CHANGE OF SCOPE OF WORK, AWARD OF COST OF QUANTITY OF

EARTHWORK UNDER CHANGE OF SCOPE OF WORK:

1. Article 2 of the contract deals with the scope of Project. Article 2.1 defines Scope of Project as under:

> *"2.1 Scope of the Project:*
>
> *Under this Agreement, the scope of the project (the "Scope of the Project") shall mean and include:*
>
> *(a) construction of the Railway Project on the Site set forth in Schedule A and as specified in Schedule -B together with provisions of Project Facilities as specified in Schedule-C and in conformity with Specifications and Standards set forth in Schedule-D and*
>
> *(b) performance and fulfillment of all other obligations of the Contractor in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Contractor under this Agreement."*

36) The use of the expression "means and includes" in Article 2.1 makes the definition exhaustive admitting of no exceptions. The Scope of Project contemplated by Article 2 is the construction of the railway project on the Site as specified in Schedule B together with provision of project facilities as specified in Schedule C in conformity with specifications and standards set forth in Schedule D.

37) The Claimant's claim for change of scope of work is premised on the ground that the process of revalidation of survey data revealed erroneous data about the original ground level and other data provided in the bid document by way of drawings, which were duly approved by the Respondent. There was a significant difference in original ground level and ground level actually determined after survey during the

revalidation process. Simply put, the claim of the Claimant is that the Claimant interpreted and understood the implication of the tender drawings and other documents containing the relevant data as correct and subsequently during revalidation found significant variation in the earthwork quantity than that worked out by the Claimant while submitting the bid based on the tender drawings.

38) The Claimant based on fresh survey, estimated the revised quantity of earthwork as compared to the earthwork quantity estimated based on the approved tender drawing and placing responsibility on the Respondent for the erroneous data claimed entitlement for change of scope and payment of extra quantity on actual basis beyond the quantity worked out by them as per original tender drawings.

39) The claim is based on seeking declaration of Change of Scope which is governed by Article 13. Article 13.1.1. permits the Respondent to require the Claimant to make modifications or alterations to the Works before issuance of completion certificate and Article 13.1.2. defines the Change of Scope and reads as under:

> *"13.1.1: The Authority may, notwithstanding anything to the contrary contained in this Agreement require the Contractor to make modifications or alterations to the Works (**Change of Scope)** before the issue of Completion Certificate either by giving an instruction or by requesting the Contractor to submit a proposal for Change of Scope involving additional cost or reduction in cost. Any such Change of Scope shall be made and valued in accordance with the provisions of Article 13.*
>
> *"13.1.2 Change of Scope shall mean:*

(a) Change in specifications of any item of Works ;

(b) omission of any work from the Scope of the Project except under Clause 8.3.3; provided that, subject to Clause 13.5, the Authority shall not omit any work under this Clause in order to get it executed by any other entity; or

(c) any additional work, Plant, Materials or services which are not included in the Scope of the Project, including any associated Tests on completion of construction.

40) The contractual agreement between the parties relating to the Change of Scope gives the right to the Respondent to seek Change of Scope when it requires the Contractor to make modification or alteration to the Works. The Claimant gets the right to submit a proposal for Change of Scope under Article 13.1.3 which reads as under:

"13.1.3. If the Contractor determines at any time that a Change of Scope, will, if adopted (i) accelerate completion (ii) reduce the cost to the Authority of executing, maintaining or operating the Railway Project (iii) improve the efficiency or value to the Authority of the completed Railway Project or (iv) otherwise be of benefit to the Authority, it shall prepare a proposal with relevant details at its own cost. The Claimant shall submit such proposal, supported with the relevant details including the amount of reduction in the Contract Price, if any, to the Authority to consider such Change of Scope. The Authority shall, within 15(fifteen) days of receipt of such proposal, either accept such Change of Scope with modifications, if any, and initiate proceedings therefore in accordance with this Article 13 or reject the proposal and inform the Claimant of its decision. For the avoidance of doubt, the Parties agree that the Claimant shall not undertake any Change of Scope without a Change of Scope Order being issued by the Authority, save and except any Works necessary for meeting any Emergency."

41) The expression Works is defined in Article 26 as under:

*"**Works**" means all works including survey and investigation, design, engineering, procurement, construction, Plant, Materials, temporary works and other things necessary to complete the Railway Project in accordance with this Agreement.*

42) The definition of Works will have to be read with Article 13 of contract which permits the Claimant to submit proposal for Change of

Scope only where the Change of Scope would result in benefit to the Authority. The claim raised by Claimant would impose additional financial burden upon the Respondent. The Arbitral Tribunal has disregarded the express terms of the contract which clearly entitles the Claimant to seek Change of Scope, only where it results in benefit to the Respondent by way of accelerated completion, reduction of cost, improving efficiency of the completed project or otherwise beneficial to the Authority. None of these effect would arise from the claim of additional payments sought by Claimant.

43) Article 13.1.2 defines as to what is change of scope which meant only three things, i.e. (a) change in specification in any item of work. There was no case of change in the specifications set forth in Schedule - D (b) omission of any work from the scope of the project, which is also not the case of the Respondent as there is no case of omission of any work from schedule A to D and (c) any additional work, plan, material and services which are not included in the scope of the project including any associated test on completion of the construction. The additional work would mean work over and above scope of project as defined in Article 2.1 which is also not the case of the Respondent. The Claimant says that there is variation is quantity of earthwork, which means that the work remains the same but for carrying out the same work, the quantity of earthwork increased. Such eventuality is not contemplated

in the change of scope.

44) The Arbitral Tribunal noted that the contract was EPC lump sum price contract where the bidders must quote a lumpsum price. It held that it was the duty of the Respondent to precisely define the scope of Works. The Arbitral Tribunal expressed its view as to what would constitute Scope of Works. The findings of the Arbitral Tribunal in paragraph 122 reads as under:

> *" 122. This being an EPC Contract where the bidders must quote a Lumpsum Price and it is the duty of the Respondent to precisely define the scope of Works. In view of the Tribunal, in the context of the works to be executed under the present contract, the scope of Works would mean the fairly accurate knowledge of Original Ground Levels, Proposed Rail Levels, Proposed Formation Levels, Existing Rail Level, distance of track centre, dimensions of the buildings, layout of the Yard and other details that would enable the bidders to fairly assess the quantum of work to quote a Lumpsum Price. It is imperative that a LumpSum Price cannot be determined and quoted by the contractor claimant, unless they are able to determine quantities of various items of works involved to meet the Respondent's scope of work."*

45) The Arbitral Tribunal has not adjudicated the claim within the four corners of the contract but what the Arbitral Tribunal viewed would be necessary for the bidders to know to determine the quantities of various items of works involved to meet the Respondent's scope of work. The rights/obligations/ duties of the parties are set out in the contract. The Arbitral Tribunal disregarded the obligations of the Claimant which was set out in Article 3 that the contractor shall undertake the survey, investigation, design, engineering, procurement and construction of the railway project. Article 3.8 governs

unforeseeable difficulties and reads as under.

> *"3.8 Unforeseeable difficulties*
>
> *Except as otherwise specified in the Agreement:*
>
> *(a) the Contractor accepts complete responsibility for having foreseen all difficulties and costs of successfully completing the Works;*
>
> *(b) the Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs, and*
>
> *(c) the Scheduled Completion Date shall not be adjusted to take account of any unforeseen difficulties or costs.*
>
> *For the purposes of this Clause, unforeseeable difficulties include physical conditions like man-made or natural physical conditions including sub-surface and hydrological conditions which the Contractor encounters at the Site during execution of the Works."*

46) The responsibility for unforeseeable difficulty is imposed on the Claimant under the contract. The claim based of sub-surface conditions revealed during revalidation of data is an unforeseeable difficulty for which the Respondent was not responsible. The obligations of the Respondent are set out in Article 4 of the contract. Article 4.1.2 reads as under:

> *" 4.1.2. The Authority shall be responsible for correctness of scope of the project, project facilities, specifications and standards and criteria for testing of the completed Works."*

47) The Arbitral Tribunal interpreted Clause 6.1.1 to exclude Clause 4.1.2 of the contract and held that it was the Authority's obligation to define the scope accurately. Accepting the interpretation would take us back to Article 13 dealing with change of scope and unless the change falls within the said Article, the Arbitral Tribunal could not have granted declaration of change of scope.

48) The strata of ground is intrinsically linked to the earthwork in construction and the contract did not impose any obligation on the Respondent in case the strata is found to be different than that indicated in the GAD. The claim of the Claimant for change of scope and additional payment was based on the classification of the soil and the resultant earthwork quantity. The clause governing alignment drawings provide that the Claimant shall be responsible for review, verifying correctness of alignment and modifying/developing/optimizing the same with reference to design criteria as specified in design standards and other technical and geometrical obligatory requirements with respect to existing IR tracks. The earthwork clause contained in the Schedule B reads as under:

> *"1.3.10.1 The Contractor shall review, verify and revalidate all relevant factors which could have an impact on the Design and construction of the earthwork including but not limited to the topography, subsurface conditions, ground water levels, Temporary Works, dewatering, drainage, climatic conditions, the availability or lack of access, working space, storage, accommodation, restrictions imposed by the existing Indian Railways Tracks, the proximity of adjoining structures and roads, the local regulations regarding the obstruction of public highways and any other limitations imposed by the site and its surroundings, for the satisfactory completion of Works meeting with performance requirements in the stipulated time.*
>
> *It will be presumed that Contractor has taken note of all effects of these constraints on his construction operations to ensure on-time completion of the Works. No claim by the Contractor on the grounds of lack of foresight or knowledge of the site conditions or any unknown parameters shall be considered."*
>
> *"1.3.10.2 Contractor shall design the earthwork and formation and submit details along with geo-technical reports, cross-sections of the formation at an interval of 20m, borrow areas, material test reports, slope stability analysis, earth retaining structures, drainage and erosion control measures, toe protection, any ground improvement, side drains, catch water drains and planning of disposal of debris, cut spoils outside railway premises etc."*

49) The Arbitral Tribunal held in paragraph 128 to 130 as under:

> *"128. The Tribunal is of the view that Original Ground Levels are matter of fact and has nothing to do with interpretation of data or tentativeness. Respondent Railways have enclosed L-section which has indicated not only original GL but also indicates vertical and horizontal alignment and the claimant has practically no freedom to modify the alignment unless directed by the respondent to suit their requirement.*
>
> *129. The Original GL have been determined after a detail survey (called Final location Survey in Indian Railway) which is good for construction. These L-section and plan have been approved by the construction and open line officials of the respondent. Thus, Claimant had no reason to doubt its accuracy at the time of bidding.*
>
> *130. Tribunal noted that these drawings (Detail plan & L-section) were prepared after a survey was carried out and was finally approved by the Chief Engineer (construction). Before the approval of the Chief Engineer, these drawings have been scrutinized at various levels and various officials of the Respondent have signed the drawings which signifies that before signing the drawing, all the signatories must have verified each & every detail incorporated in these drawings."*

50) The findings of the Arbitral Tribunal are not based on the interpretation of the terms of the contract, in which event it would have been an error in jurisdiction incapable of being corrected under Article 34 of the Arbitration Act, unless there is error apparent. The correctness of the Scope of Project has been held by the Arbitral Tribunal to include correctness of the tender drawings as fundamental obligation of the Authority *sans* any such obligation as per the contract. The finding of the Tribunal has rendered redundant the Schedules to the Agreement providing for validation of data and resurvey by the Claimant. The impugned Award refers to the submission of the Respondent as under:

> *"Further, as per the RFP document, in the disclaimer part there is mentioned that the assumptions, assessments, statements and information contained in the bidding documents, especially the feasibility report may not be complete, accurate, adequate or correct. Each bidder should therefore,*

conduct is own investigations and analysis and should check, the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained in this RFP and obtain independent advice from appropriate sources."

51) Article 5.2 sets out the representation and warranties of the Authority and does not make any representation about the correctness of the data provided by the Authority. Article 3.8 of the contract specifically provides that the contract price shall not be adjusted to take account of any unforeseen difficulties or cost which include natural physical conditions including subsurface and hydrological conditions which the Claimant encounters at the site during execution of the work. The contract sets out the representation and warranties of the Respondent and there is no representation about the accuracy of the data in the tender documents.

52) The Arbitral Tribunal being creature of the contract was tasked with the duty to enforce the terms of the contract and could not travel beyond the four corners of the contract. The claim of the Claimant sought the change in the scope of work and item wise payment for excess earthwork quantity despite the contract being an EPC contract.

53) The Arbitral Tribunal has held against the Respondent for not providing the computation details of the estimated cost indicated in tender document given to the Claimant despite the fact that the contract was EPC contract which contemplated bidders to submit their tender bid based on their own assessments of estimate. The claim of

the Claimant was based upon the subsequent topographical survey and the response of the Respondent in its affidavit before the Arbitral Tribunal specifically set out that though the estimated cost of the work was indicated in the tender document at the time of invitation of the tender, the tenderers including the Claimant was given an opportunity to obtain clarification at the time of pre-bid meeting and that in the bid document itself it was cleared that the Claimant would himself will assess the quantum of earthwork.

54) The change of scope of work enumerated in Article 13 did not provide for change of scope to mean variation in the quantity of earthwork. There is no additional work and what is granted is the increased earthwork quantity which according to the Claimant had increased by reason of ground strata and erroneous details. There is no express provision in the contract which deals with an eventuality of variation being revealed after validation and resurvey by the Claimant. The Arbitral Tribunal has directed that the excess quantity over and above the estimated quantity as per tender drawings be computed as per Article 13.2.3 of the contract, which amounts to converting an EPC lump sum contract into an itemwise contract.

55) The Arbitral Tribunal granted the Change of Scope by applying principles of equity and fairness which was contrary to Section 28(3) of Arbitration Act. It is also pertinent that note the observations in

paragraph 135 of the impugned order , that the Claimant in their affidavit had submitted that in case of contract of identical type, the Respondent had revised sub clause 13.1.2 to include an additional clause as under.

> "*(d) Variation in the quantities of certain items (positive or negative), necessitated due to any changes in the L-section, Alignment, or ESPs of the project with respect to those attached to this document."*

56) The said pleading would in fact indicate that Article 13.1.2 dealt with only three eventualities and the change of scope of additional earthwork was not covered by Article 13.1.2. It is only when there is a revision by including a clause in respect of the various in the quantities of certain items that the same would fall within the definition of change of scope of work.

57) The Arbitral Tribunal, instead of enforcing the terms of the contract has re-written the contract by including the variation in the quantities of earthwork as a change of scope as defined under Article 13 at the behest of the Claimant, which right was not available to the Claimant under the contract and has converted the lump sum contract into item wise contract. Re-writing of contract would be breach of fundamental principles of justice entitling the Court to interfere under Section 34 of Arbitration Act. The role of arbitrator is to arbitrate within terms of the contract . A party to the agreement cannot be made liable to perform something for which it has not entered into a contract. (See

PSA Sical Terminals Pvt. Ltd. vs Board of Trustess of V.O. Chidambranar Port Trust Tuticorin And Another (2023) 15 SCC 781). Rather surprisingly, the Arbitral Tribunal has recorded in paragraph 134 that the Respondent are contesting the claim on various conditions of contract provided in the schedule and/or elsewhere in the contract, whereas, the contract was the jurisdictional document and the Arbitral Tribunal was under a duty to enforce the terms of the contract. Failure on part of the Arbitral Tribunal to decide the claim in accordance with the terms of the contract constitutes patent illegality and is also in contravention of Section 28(3) of Arbitration Act liable to be interfered under Section 34 of Arbitration Act.

TERMINATION OF CONTRACT:

58) Insofar as the termination of the contract is concerned, the contention is that the contract was determinable, and therefore, no specific performance could be granted. The Arbitral Tribunal has specifically recorded that the termination notice dated 4th October, 2024 has been issued by the Respondent under Clause 21.1.2 of the contract which permitted termination upon occurrence of Claimant's default which is not cured. As the default notice dated 7th March, 2024, itself was stayed and the termination was based upon the default notice, the termination itself was invalid. The finding of the Arbitral Tribunal was therefore based on the interpretation of the terms of the

contract as the termination could be based on issuance of default notice and failure to cure the same within a specified period, whereas, in the present case, there was no such default notice as the same was stayed. The Arbitral Tribunal has interpreted the terms of the contract and has rightly noted that in absence of any default notice, the termination was not legal. In any event, it is now pointed out that subsequent to the passing of the Award, the Claimant has proceeded with the contract.

59) One of the contentions raised was as regards absence of pleaded ground in the Petition. The Petition pleads in Ground (g) that the Tribunal has rewritten a new contract changing the scope of work, price as well as date of performance. It is pleaded in Ground (h) that the Tribunal has ignored the express contractual stipulations. The absence of clearly pleaded ground in the Petition would not lay fetters on this Court under Section 34(2A) of Arbitration Act to invalidate the Award on ground of patent illegality as the same goes to the root of the matter. In ***State of Chhattisgarh And Another vs M/s Sal Udyog Private Limited***[8] the Hon'ble Apex Court held in paragraph 24 and 25 as under:

> *"24. We are afraid, the plea of waiver taken against the appellant-State on the ground that it did not raise such an objection in the grounds spelt out in the Section 34 petition and is, therefore, estopped from taking the same in the appeal preferred under Section 37 or before this Court, would also not be available to the respondent-Company having regard to the language used in Section 34(2A) of the 1996 Act that empowers the Court to set aside an award if it finds that the same is vitiated by patent illegality appearing on the face of the same. Once the appellant-State had taken such a ground in the Section 37 petition and it was duly noted in the impugned judgment, the*

8 (2022) 2 SCC 275

> *High Court ought to have interfered by resorting to Section 34(2A) of the 1996 Act, a provision which would be equally available for application to an appealable order under Section 37 as it is to a petition filed under Section 34 of the 1996 Act. In other words, the respondent-Company cannot be heard to state that CIVIL APPEAL NO. 4353 OF 2010 the grounds available for setting aside an award under sub-section (2A) of Section 34 of the 1996 Act could not have been invoked by the Court on its own, in exercise of the jurisdiction vested in it under Section 37 of the 1996 Act. Notably, the expression used in the sub-rule is "the Court finds that". Therefore, it does not stand to reason that a provision that enables a Court acting on its own in deciding a petition under Section 34 for setting aside an Award, would not be available in an appeal preferred under Section 37 of the 1996 Act.*
>
> *25. Reliance placed by learned counsel for the respondent-Company on the ruling in the case of Hindustan Construction Company Limited(Supra) is found to be misplaced. In the aforesaid case, the Court was required to examine whether in an appeal preferred under Section 37 of the 1996 Act against an order refusing to set aside an Award, permission could be granted to amend the Memo of Appeal to raise additional/new grounds. Answering the said question, it was held that though an application for setting aside the Arbitral Award under Section 34 of the 1996 Act had to be moved within the time prescribed in the Statute, it cannot be held that incorporation of additional grounds by way of amendment in the Section 34 petition would amount to filing a fresh application in all situations and circumstances, thereby barring any amendment, however material or relevant it may be for the consideration of a Court, after expiry of the prescribed period of limitation. In fact, laying emphasis on the very expression "the Courts find that" applied in Section CIVIL APPEAL NO. 4353 OF 2010 34(2)(b) of the 1996 Act, it has been held that the said provision empowers the Court to grant leave to amend the Section 34 application if the circumstances of the case so warrant and it is required in the interest of justice. This is what has been observed in the preceding paragraph with reference to Section 34(2A) of the 1996 Act."*

60) In deciding the issue of patent illegality, in view of the expression "the Court finds that" in Section 34(2A), the Court in appropriate cases can invalidate the Award, though no specific ground is pleaded in the Petition. Dealing with the citations relied upon by Mr. Doctor, the decision in the case of ***OPG Power Generation Private Limited vs Enexio Power Cooling Solutions India Pvt. Ltd. And Anr. (supra)*** reiterates the well settled principles as to the interference of the Court on the ground of patent illegality. There is no quarrel with the law laid

down in the said decision.

61) In the case of ***Union of India vs Susaka Private Ltd. And Ors. (supra),*** the Hon'ble Apex Court was considering the issue as regards the justification of the Arbitral Tribunal in awarding interest on various claims for different period. One of the submissions raised before the Hon'ble Apex Court was that no ground under Section 34 of the Act had been made out by the Appellant therein to modify the Award to the extent of awarding interest in the claim. The Hon'ble Apex Court found that the Appellant raised the ground for the first time in Section 34 proceedings but again ground was not pressed at the time of arguments and that no such plea can be raised for the first time before the Apex Court. The said decision is not in authority for the proposition that a ground not pleaded would preclude the Court under Section 34 of the Arbitration Act from interfering with the Award even if it is found to be patent illegal. In the present case, though, not elaborately pleaded, the grounds in the Petition pleads that the Arbitral Tribunal has acted contrary to the express contractual terms and the Award amounts to rewriting of a contract not agreed to between the parties changing the scope of work, price as well as date of performance.

62) The decision in the case of ***National Building Construction Corporation vs Sharma Enterprises (supra)*** reiterated the well settled contours of Section 34 of the Arbitration Act. It held that the party

cannot be permitted to raise new pleas that were never pleaded before the Arbitrator. The submissions as regards the nature of the contract being an EPC contract and the reliance upon the schedule of the agreements in order to resist the claim on the ground that the so called changes as mentioned by the contractor does not qualify for change of scope, and thus, the question of additional scope of work/ change of scope does not arise, has been specifically pleaded in the statement of defence. It was also pleaded that in the RFP document, the disclaimer part disclaimed the accuracy, adequacy in-completeness of the information contained in the bidding document and that each bidder was required to conduct its own investigation and analysis and obtain independent advice from appropriate services. It is therefore not a case where the plea was not raised before the Arbitral Tribunal.

63) In light of the discussion above, the impugned Award to the extent that it permits the Change of Scope of Work under Article 13 of the Agreement suffers from patent illegality as it travels beyond the terms of the contract. The findings on Prayer Clause “C and “D” of the Statement of Claim are therefore required to be quashed and set aside. The Claimant had raised various claims and the claim for declaration of change of scope of work is independent of the other claims. It is therefore permissible to sever the bad part of the impugned Award as regards grant of Prayer “C’ and “D” while retaining the good part of the

Award. Hence the following order is passed:

O R D E R

(a) The Award of the Arbitral Tribunal dated 3rd February, 2025 in respect of Prayer 'C' and 'D' declaring entitlement of Claimant to change in scope of work and directing cost of quantity indicated in Column 'A' of Annexure "F" of Statement of Claim to be determined as per Clause 13.2.3 is set aside.

(b) The impugned Award is confirmed in respect of rest of the claims.

64) The Arbitration Petition is partly allowed to the above extent and stands disposed of as such. The Interim Application does not survive and stands disposed of.

(SHARMILA U. DESHMUKH, J.)