2026:DHC:5137-DB

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

% Judgment reserved on*: 12.12.2025*
Judgment delivered on*: 18.06.2026*
Judgment uploaded on*: As per Digital Signature*

\+ **FAO(OS) (COMM) 206/2023**

NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... APPELLANT

versus

PROGRESSIVE CONSTRUCTIONS LIMITED
..... RESPONDENT

Advocates who appeared in this case

For the Appellant	:	Mr. Ankur Mittal and Mr. Ankur Saboo, Advocates.
For the Respondent	:	Mr. C. Mohan Rao, Sr. Advocate with Mr. Lokesh Kumar Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. This appeal has been filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (the Act) against the order dated 26.04.2023 in *O.M.P. (COMM) 358/2019* filed under Section 34 read with 16(6) of the Act whereby a Single Judge of this Court has rejected the appellant's challenge to claims Nos.6 and 8 allowed by the Arbitral Tribunal in favour of the

respondent herein. By order dated 03.05.2023, the learned Single Judge has set aside the impugned award dated 21.02.2019 with regard to claim Nos. 5, 10, 14 and 19.

2. The facts as noted from the appeal are as under:-

a. The appellant herein is the National Highways Authority of India (*hereinafter referred to as 'NHAI' and 'employer' interchangeably*), established under the National Highways Authority of India Act, 1988.

b. The respondent- Progressive Constructions Limited *(hereinafter referred to as 'contractor' also)* is a company incorporated under the provisions of the Companies Act, 1956 and is the contractor under the Contract Agreement dated 08.09.2005.

c. The Government of India, Ministry of Road Transport and Highways (MoRTH) launched a National Highways Development Programme, which envisaged the following: i) Four/six laning and strengthening of existing National Highways connecting four metropolitan cities of Delhi-Kolkata-Chennai-Mumbai. ii) Four/six laning and strengthening of existing National Highways network from north to south and east to west connecting Srinagar to Kanyakumari and Silchar to Porbandar, respectively.

d. The appellant invited bids for the work of widening and strengthening of existing National Highways from 2 lane to 4 lane from KM 30.000 to KM 0.000 of Bijni to West Bengal Border Section of NH-31 C in Assam on East-West Corridor under Phase-

II Programme of NHDP-Construction Package EWII (AS12).

e. On 11.12.2025, the appellant issued the "Report of Handing over and taking over of the work site" pursuant to a joint site visit between the parties whereby the entire 30 KM of project stretch was handed over to the respondent; however, the contractual requirement was to handover 10 KM only at the initial stage as admitted by the respondent. Out of the said land, 6 KM of stretch from 24 KM to 30 KM required conversion permission from forest to non-forest which was obtained in the year 2010. On 07.07.2007, according to the minutes of the meeting between the parties and the Engineer, the respondent was found guilty of non-performance; primarily due to absence of adequate and qualified professionals and lack of machinery to execute the project.

f. On 05.04.2008, various Extensions of Time (EOTs) to complete the works were sought for different reasons, which were recommended by the Engineer. A detailed chart attached along with reflects that in every extension, while recommending EOTs, the Engineer categorically stated concurrent delay and held that the respondent is liable for contributing majorly to the delays on critical path, hence it is not entitled to any prolongation costs. In May 2010, forest land of 6 KM stretch was handed over. On 30.06.2011, as per the Engineer, work front available was 99.50%. On 15.11.2010, the respondent stated that the work is halted for the last 6 months due to heavy rains. In 2012, even after 6 years on the Project, the respondent did not have the required machinery and

equipment. After 18 months of handing over of the forest land, the overall progress on the Project was 61%.

g. On 18.01.2014, the Project Director (PD) held that the progress of work is negligible in last 6 months. Representatives of the respondent assured that the work will be resumed by January 2014 and the 24 KM stretch would be completed by March 2014.

h. On 05.04.2014 and 15.07.2014, noting the innumerable defaults in complying with the notices served on the respondent, the Engineer *vide* letters dated 05.04.2014 and 15.07.2014 declared the respondent as a non-performer.

i. On 25.08.2014, the Independent Engineer noted that the contractor was not working for last one year. On 30.08.2014, in the inspection note, it was noted that the progress of the work was negligible in last one year and the PD stated that the respondent has a cash flow problem, and they are not able to restart the work.

j. On 03.12.2014, the minutes of the meeting recorded that there is no progress of 4-lane project since last one year. On 16.12.2014, it was noted that, during the last year, the claimant only achieved 2% progress. The Minister agreed to give further extension to the respondent only upon its personal assurance that the work will be completed by 31.03.2016. It was decided that escalation may by granted as per the contract, but it will be frozen at the period of eligible EOT and no increase in escalation shall be payable beyond that period.

k. On 01.04.2015, the respondent failed to renew the Performance Bank Guarantee w.e.f. 01.04.2015 as per Sub-Clause 10.2 of the Conditions of Particular Application (COPA). On 15.04.2015, a Memorandum of Understanding (MOU) was entered between the parties on the following terms:

a. Payment to suppliers shall be made directly by the appellant.
b. The respondent shall extend validity of Bank Guarantees against working capital advance, mobilization advance.
c. Performance security and retention money to be as per the Contract.
d. The respondent undertook to unconditionally extend Bank Guarantee against performance security up to 31.12.2016 which is inclusive of the Defect Liability Period (DLP). However, Bank Guarantee was not extended by the respondent;

l. Thereafter, a show-cause notice dated 07.01.2016 and a final notice dated 14.01.2016 were issued by the appellant. On 18.01.2016, the respondent replied to the show-cause notice of the appellant. On 20.01.2016, comments of the Engineer on the respondent's reply to the show-cause notice and on 23.01.2016, further reply by respondent to the show-cause notice were received. On 10.02.2016, the Engineer issued a letter stating that:-

i. In the last 4 years, the contractor has performed 5.63% of work and the progress is NIL from April 2014.

ii. The contractor failed to extend performance security of ₹21.83 crore since 01.04.2015.

iii. The contractor has demobilized the machinery despite the instruction of the Engineer to the contrary.

iv. The contractor has demobilized all-key personnel and other supporting staff from the project.

v. The contractor has disposed material like aggregates, boulders from the camp.

vi. In national interest, consolidated EOT up to 24.09.2014 was granted.

vii. The MOU was entered on 15.04.2015 to complete the project by 31.12.2015 but failed to renew the performance security from 01.04.2015. As per Sub-Clause 10.2, the performance security to be valid from 365 days after expiry of the DLP.

m. On 14.03.2016, the appellant terminated the contract under Clause 63.1 (a), b (ii), (d), (f) and (h) of COPA giving 14 days' notice. On 25.04.2016, the Engineer called the respondent for a joint inspection and measurement of work at the time of termination of the contract; On 06.08.2016, the respondent invoked arbitration; On 09.06.2017, the respondent filed claims before the Arbitral Tribunal raising 21 claims. No prayer was made for declaring the termination by the appellant as illegal.

n. On 07.02.2018, the respondent filed an affidavit before the Tribunal for leading evidence on Claims No. 5, 6 and 8 only. Admittedly, the witness of the respondent did not have personal knowledge of the matter and was not present on the site at the time of execution of the work as per cross examination.

o. On 22.02.2018, an amendment application was filed by the respondent, revising Claim No. 8 from ₹63,37,75,829/- to ₹102,82,21,205/-.

p. On 24.08.2018, the respondent filed an amendment application during final arguments seeking replacement of the amount of claim for Claim No. 1 from ₹8,99,86,974/- to ₹31,41,35,273/-.

q. The Tribunal after conclusion of the arguments *vide* order dated 03.12.2018, allowed the amendment application regarding claim no.1 filed by the respondent, and stated that both the parties had declared that they have nothing more to say.

r. On 20.02.2019, The Tribunal passed the Arbitration Award, allowing Claims Nos. 1,3, 4, 5, 6, 7, 8, 9, 10, 11, 14,17, 18, 19 and 20 of the respondent and rejecting Claims Nos. 2, 12,13, 15, 16 and 21.

3. Thereafter, the appellant herein filed the petition under Section 34 read with Section 16 (6) of the Act, for setting aside the Arbitration Award dated 20.02.2019. The appellant's contention before the learned Single Judge was that the award is contrary to the agreement between the parties, in violation of Section 23 of the Act, patently illegal, in conflict with public policy and results in miscarriage of justice.

4. The learned Single Judge *vide* order dated 26.04.2023 has held as under:-

> *"4. Mr. Kapoor submits that the arbitral tribunal has awarded claim No.5 [for an extra amount to be paid to the banks for extending bank guarantees] without any evidence as to the extra amount, in fact, having been paid by the respondent. In this regard, he has drawn my attention to paragraph E-5 and E-7 of the award, which reads as follows:-*

"E-5 A reference to Annexure CA-3 on pages 204 to 209 of SOC shows the details of commission paid by the Claimant to the bank for the extension of BGs from time to time. However, no evidence for the various figures of the commission allegedly paid by the Claimant has been filed.

xxxx xxxx xxxx

E-7 AT is convinced that some commission has to be paid to the bank for extending the BGs. The claim cannot be denied simply on the plea of absence of evidence for the same by the Claimant. In the absence of the appropriate evidence filed by the Claimant, the AT restricts the claimed amount to 90% of the claim i.e. Rs.2,93,43,847/- and considers it would be fair and reasonable to award a sum of Rs.2,64,09,462/- (Rupees Two Crores Sixty Four Lakh Nine Thousand Four Hundred Sixty Two only) in favour of the Claimant."

[Emphasis supplied]

5. As far as claim No. 6 is concerned [claim for extra overhead charges], Mr. Kapoor submits that the aforesaid claims have also been upheld without evidence. Paragraph F-5 of the award deals with this claim in the following manner:-

"F-5 The AT finds that the scheduled date of the completion of work was 05.04.2008 and the work was terminated by the Respondent on 29.03.2016. The Claimant appears to have claimed prolongation for 95 months considering almost the entire period between the scheduled date of completion and the date of termination. The AT is not inclined to agree that the Respondent alone can be held as responsible for the said delay. However, the Respondent himself has mentioned in its Statement of Defence on page 26 that the Engineer had recommended consolidated extension up to 24,09.2014. Although, no decision was finally communicated by the Respondent on the said recommendation of the Engineer, it would be fair to consider that the Claimant was entitled for extension at least up to 24.09.2014. The period between the scheduled date of completion and 24.09.2014 works out to approximately 77 months. AT holds that the Respondent was responsible for the prolongation cost to the Claimant for the above period of 77 months less 10% assessed as failure on the part of the Claimant in mitigating the losses, i.e. for a period of 69.3 months, say sixty nine months only. The rate of loss as projected by the Claimant is considered reasonable. Although the Respondent has objected to applicability of the Hudson formula, the AT did not agree with the contention of the Respondent as the basis of Hudson formula has been held good by various courts of the country. Accordingly, it would

be fair and reasonable to Award a sum of Rs. 35.15 crores to the Claimant for the above claim, as worked out under: -
Loss due to overhead=0.07xRs. 218,37,82,339/30 months × 69 months
= Rs. 35,15,88,956/-
Say Rs. 35.15 crores
(Rupees Thirty Five Crores Fifteen Lakh only)
The revised figure of the claim for Rs. 53,78,51,738/- as projected by the Claimant in its affidavit dated 07.02.2018 is not being taken into consideration by the AT, while arriving at the said figure of Rs.35.15 crores."

[Emphasis supplied]

6. Claim No. 8 was for expenses incurred towards prolongation costs as a result of working in the extended period of the contract. As far as this claim is concerned, Mr. Kapoor relies upon paragraph H-5 , H-6 and H-7of the award, which read as follows:-

"H-5 The contention of the Respondent as regards the deployment machinery does not stand in view of the fact that the Respondent itself has filed the details of the machinery available at site vide its document No. RD-7 (Pages 1188 to 1190). Thus the machinery as required for the work was available till September 2015. Although. there is no specific proof of each and every machine being available at the time of scheduled date of completion of the work, the AT is inclined to believe that the said machinery was available at the site since the time of originally scheduled date of completion. Similarly, the availability of machinery at site up to March 2016 and April 2016 has also been evidenced by the Respondent vide its Document No. RD-11 (Pages 1641 to 1645). H-6 As regards revised details of the machinery tiled by the Claimant in Annexure CA-5 (amended), filed vide application dated 22.02.2018 for amendment to its Claim No. 8, the AT is not inclined to agree to the increased number of working hours shown therein for the reasons that follow. The period of prolongation as found justifiable by the AT bas been considered as 69 months beyond the scheduled date of completion, in the deliberation on Claim No. 6 hereinbefore. The AT holds the same view for allowing the claim for idling / under utilization of the machinery. The CA-5 (amended) has considered the idling period as 91.86 months approximately, say 92 months. Proportionately, the amount of claim for 69 months works out lo Rs. 77,11,651903/- say Rs.77.11 crores. H-7. In view of above the AT considers that it would be fair and reasonable to award a sum of Rs.77.11 crores (Rupees seventy seven crores

eleven lakhs only) against this claim." [Emphasis supplied]

7. I am of the view that the challenges on claim Nos. 6 and 8 do not fall within the limited grounds available to the petitioner under Section 34 of the Act.

8. As far as claim No. 6 is concerned, the respondent's claim was based on Hudson's formula. Although the respondent claimed prolongation costs for 95 months, the arbitral tribunal has held that the petitioner was responsible for prolongation only of 69 months. The reasoning given by the arbitral tribunal in paragraph F-5, extracted hereinabove, is based upon the pleadings of the petitioner itself in the statement of defence with regard to the engineer's recommendation for consolidated extension until 24.09.2014. This period has been further adjusted by 10% for the respondent's failure to mitigate its losses. The arbitral tribunal's reasoning on this aspect cannot be characterised as perverse or implausible, so as to require the interference of this Court within the narrow scope available to the petitioner under Section 34 of the Act. The arbitral tribunal has thereafter applied Hudson's formula, which is a standard formula. The arbitral tribunal's jurisdiction to accept one or the other standard formula has been accepted by the Supreme Court inter alia in Mcdermott International Inc. vs. Burn Standard Co. Ltd. & Ors. (2006) 11 SCC 181 [paragraph 106]. Hudson's formula has been specifically referred to in the said judgment. The application of Hudson's formula in this regard has been accepted by this Court inter alia in National Highways Authority of India vs. Progressive Constructions Ltd. (2015) 5 ARB LR 71 [paragraph 20]. The arbitral tribunal has applied this formula to the prolongation of 69 months, and awarded the claim partially on this basis. I am, therefore, not inclined to accept the petitioner's challenge to claim No. 6.

9. On claim No. 8 also, I do not find the petitioner's grievance to be made out. The claim has been allowed on the basis of the details of machinery supplied by the respondent itself in document No. RD-7 and the availability of the machinery at site upto March, 2016 and April, 2016 by the respondent's document No. RD-11. The claimant's version with regard to the details of the machinery available has not been accepted and the arbitral tribunal has gone by the respondent's documents. The period of prolongation of 69 months, as held by the arbitral tribunal, in answer to claim No. 6, has been applied to this claim also, and the claim has been allowed proportionately. The reasoning on this aspect is based entirely on an evidentiary assessment, which is beyond the scope of challenge under Section 34 of the Act.

10. The challenge on claims Nos. 6 and 8 is, therefore, rejected. However, on claim No. 5, I find that the petitioner's challenge

requires further consideration.
11. Issue notice limited to claim No. 5. Dr. Swaroop George, learned counsel, accepts notice on behalf of the respondent.
12. List for consideration on this issue on 03.05.2023."

ISSUES INVOLVED

5. As specifically submitted by the counsel for the appellant, the issues pressed in this appeal are only with respect to Claims No. 1, 6, 7, 8, 9 and 11.

SUBMISSIONS ON BEHALF OF THE APPELLANT

6. Mr. Ankur Mittal, the learned counsel for the appellant/NHAI, submitted that the erstwhile counsel for NHAI before the learned Single Judge was neither authorised nor had any instructions from NHAI before giving up its challenge to claims No. 1,3,4,7,9,11,17,18, and 20 as recorded in the order dated 26.04.2023. Any statement made by NHAI's counsel without authority and approval from the competent authority of NHAI is not binding on appellant.

7. He submitted that, the appellant has acted against the erstwhile counsel and has de-empanelled him and has also withdrawn all matters from him, and such a submission made by a counsel would be invalid as held in ***Himalayan Coop. Group Housing Society v. Balwan Singh and Others (2015) 7 SCC 373***.

8. He also submitted that the giving up of the claim by the erstwhile counsel is stated to be on the basis that the principal grounds raised in the petition have already been decided against NHAI in another petition under Section 34 of the Act between the same parties.

9. He submitted that the said statement by the erstwhile counsel was without any instructions, and even otherwise, was not based on any factual /

legal foundation, for the following reasons:

a. A different Tribunal was dealing with the arbitration of a contract for state of Assam in a single entry formation to widen 2 lane to 4 lane. In the said arbitration, the Tribunal has allowed the loss of profits, claim for increase in rate due to extra stay on work site, reimbursement towards royalty, reimbursement of extra VAT @1%, p*endente-lite* interest and future interest, with regard to delay analysis, completely different for different contracts. The Tribunal did not consider the pleading and the material of the appellant regarding the slow progress.

b. Another Tribunal was dealing with a project in the State of Orissa for widening 2 lane to 4/6 lane. ***The Contract Agreement was entered on 20.08.2001***. The Tribunal allowed 25% (approx.) of the claim. With regard to loss of profit (Claim No. 11), the Tribunal declined the Claim No.7 claim for increase in rate due to extra stay on work site, Claim No. 17- for reimbursement towards royalty, Claim No.18- reimbursement of extra VAT @1% were not subject matter. With regard to Claim 20- interest- only future interest was granted. With regard to delay analysis completely different for different contracts, the Tribunal gave reasoning regarding delays.

10. With regard to the finding of the Tribunal on the issue of illegal termination, he has submitted that the total stretch comprising the project highway is 30 KM. Out of 30 KM, 24 KM was handed over to respondent on or about the commencement date of 06.10.2005. The remaining 6 KM stretch was handed over in May 2010. The respondent/claimant asserts that

for all practical purposes, the handing over date should be construed as 23.12.2010. The claimant asserts that a further 365 days would have been required to complete highway works. A period of 572 days is stated to be required for completing bridge works. A small stretch of approx. 300 meters relating to toll plaza land was lastly handed over on 07.05.2013.

11. He also submitted that the following material documents were completely ignored by the Tribunal;

a. Manpower status from MPRs reflects, key professional staff was not available between 31.01.2014 – May 2015.
b. In the minutes of the meeting dated 16.12.2014, it is noted that in last one year only 2% work has been done.
c. In the show-cause notice dated 07.01.2016, it was asserted that during 2012-13, only 2.05% work has been done, and during 2013-14 only 0.93% work has been done. It is further stated that since January 2015 only 0.492% work has been done.
d. The Engineer's letter dated 10.02.2016 states in para (a) and (b), that in the last 4 years, only 5.63% work has been done.
e. In the termination letter dated 14.03.2016 in Para (f) avers that only 5.63% work has been done since 2012.

12. He submitted that, in reply to the show-cause notice dated 18.01.2016, the respondent attempted to justify its conduct by stating that work got affected by various events, including:

a. Variation works to the extent of 14.1134% requiring more time;
b. Law and order problems resulting into delay of 570 days;
c. Bandh and strikes resulted into loss of 670 days;

d. Between 20.09.2010 to 31.03.2012, work stopped due to deterioration of law and order and contractor had to demobilize;

e. Key managerial persons had to leave due to various problems such as extortion, law and order etc.;

f. Out of 18 bridges, only 7 bridges completed. 2 major bridges remain untouched;

g. Termination notice was issue dated 14.03.2016;

h. The Engineer *vide* letter dated 20.01.2016 in reply to the contractor reply to the show-cause notice dated 20.01.2016 stated that the contractor has not raised RFI (Request for work) since last one year.

13. Mr. Mittal with regard to the finding of the Tribunal on the issues of failing to carry out any obligation under the contract under Clause 63.1 (a), submitted that, in the EOTs, the Engineer held that the contractor was not available to work on the available work front, whereas, the Tribunal has only taken into consideration the progress that too the financial progress from March, 2010 to September, 2012 whereas there is close to *nil* progress after April 2012.

14. With respect to preceding the work or any section thereof, within 28 days after receiving the notice pursuant to Sub-Clause 46.1, he submitted that the Engineer has held that the contractor was not available to work on the available work front and MOU dated 15.04.2015 could not be acted upon due to the Bank Guarantee not being renewed. He also submitted that the respondent's action of abandoning the work plainly demonstrates the intention not to continue performance of his obligations under the contract.

15. He submitted that, in a letter dated 26.03.2014, the Engineer stated

that the work is almost stand still for more than 1 year. In letter dated 26.03.2014, it was stated that, key personnel have not been mobilized. The Engineer, *vide* letter dated 21.09.2015 asked the claimant to remobilize those machines removed from the site without intimation to Engineer or the appellant. Further, it stated that there are several machinery which are in breakdown, rejected and under repair.

16. Mr. Mittal submitted that the Tribunal has stated that there is no specific instance where EOTs recommended by the Engineer were not granted by the appellant for more than 3.5 years. However, there are numerous such instances recorded in the show-cause notice and termination.

17. According to him, the Tribunal observes that the respondent had executed work worth about ₹ 60 crore between September 2010 and March 2012, which indicates that the contractor was capable of executing on an average more than ₹ 3 crore per month. However, the respondent has abandoned the site since 2012 and has only achieved a progress of hardly 5.63% between 2012-2016 when, even as per the case of the respondent, the entire land (including forest land of 6 KM) was available to work upon. He also submitted that, with regard to abandoning of the project, the manpower status of the contractor's part of the MPR as relied upon by the respondent would show that it has completely abandoned the project between 31.01.2014 to 28.02.2015 and there was no key professional staff available on the site. Again, the project manager was missing from February 2016.

18. Mr. Mittal has submitted that the challenge in this appeal to the claims no. 3, 4, 17 and 18 allowed by the Tribunal are not pressed by the appellant and the challenge is confined to claims no. 1, 6, 7, 8, 9 and 11.

CLAIM-WISE SUBMISSIONS OF THE APPELLANT

Claim No. 1- Towards unpaid work including escalation

a. The claim was filed seeking payment for the works done to the tune of ₹ 3,50,47,341.99/- and a further amount of ₹ 5,49,39,632/- for alleged variations approved by the Engineer. The respondent relied upon documents which were illegible. There is no basis for the figures, the copy of which was not supplied anytime. Without admitting, even in the statement, it comes out that the respondent has done no work after May 2015. Moreover, no evidence was led by the claimant on this claim.

b. In Claim No. 11, the respondent has made a specific averment that balance work left to be executed is ₹ 51,51,93,861/-. The figure of ₹ 51.5 crore was also quoted in the reply to the show-cause notice given by the respondent on 18.01.2016. It is the respondent's own case that it had allegedly executed work to the extent of 74%. Despite that, the claimant raised a specific claim of ₹ 8.99 crore as outstanding. Further, the claimant at some other place stated that 30% of the work was yet to be executed. On 24.08.2018, at the time of conclusion of arguments before the Tribunal, the claimant moved an amendment application to revise claim no. 1 from ₹ 8,99,86,974/- to ₹ 31,41,35,273 on the following grounds:

    i. Upon termination of the contract, the measurement of the work is the responsibility of the appellant.
    ii. The value of the work done and left to be done was not

within the knowledge of the respondent. This amounted to introducing a completely new claim. The claimant alleged that since the balance work is only ₹ 51,51,93,861 which is equivalent to 23.59%, therefore, it must be assumed that it has completed the remaining 76.41% of the work. Since claimant was paid for only 68.97%, the difference of 7.44% amounting to ₹ 31,41,35,273/- should be paid.

c. As per the finding of the Tribunal, since the balance work is ₹ 51,51,93,861, which works out to be 23.59% of total work, it must be assumed that the claimant would have completed 76.41% work. Since claimant has been paid for 68.97%, it must be paid for 7.44% of the contract price equivalent to ₹ 16,24,73,398 and also the price escalation of ₹ 6,16,74,901.88, thus a total of ₹ 22,41,48,299/-. Additionally, the Tribunal also awarded the originally amount claimed amounting to ₹ 8, 99, 86,974/- as well.

d. However, the Tribunal deducted an amount of ₹ 14,27,067/- claimed by the claimant for providing and maintaining vehicles for the Employer, including the driver. As such, the total amount awarded is (₹ 22,41,48,299/- + ₹ 8,99,86,974/-) - ₹ 14,27,067/- = ₹ 31,27,08,206/-.

e. The Tribunal has not provided the opportunity of being heard to the appellant on the amended Claim No.1 despite making a specific request in this regard by the counsel for the appellant after allowing the amendment application.

f. That apart, the amendment was allowed by the Tribunal on 03.12.2018

after the arguments by both sides were concluded on 12.11.2018. It is to be noted that the parties had even filed the written arguments by the time the said order was passed. The respondent/claimant had filed its submissions on 30.08.2018, the appellant filed submissions on 29.10.2018. Before publication of the award, the counsel for the appellant *vide* e-mail dated 07.02.2019 requested the Tribunal for the hearing on the amended Claim No.1. The Tribunal's reference to "nothing more to say" is completely misconceived because of the reason that the said statement was given by the parties with regarding the argument for the amendment application not the arguments on merits for the amended claim no.1.

g. Merely because the appellant chose not to file reply to amendment application, it does not mean that the appellant has given up its right to argue the amended claim on merits. The Tribunal declined the said opportunity as noted in the impugned order, by alleging that the same is with an intention to delay the award. The award has been passed without even granting an opportunity to the appellant to argue on the amended claim, thus in violation of the principles of natural justice.

h. The Tribunal adopted some random formula to arrive at the conclusion that the unpaid work is 7.44% and awarded an amount of ₹ 22,41,48,299/- in addition to ₹ 8,99,86,974/-. The document in support of this claim was illegible. No legible copy was ever filed. No evidence was also led.

i. The impugned award is in contravention of Clause 53.4 COPA; there is

no contemporaneous record that has been produced by the claimant to support the claim. The entire award is based on assumption that since the balance work shown in ₹ 51, 51, 93,861/- which is about 23.59% therefore the work done would have been 76.41%. The claimant did not produce any proof of work done in the form of IPC, bills raised by its sub-contractor, proof of purchase of raw material, any request made by the claimant for recording of measurement before termination of the contract, which was allegedly not met by the Engineer or refused, or any other document etc.

j. The claimant was executing work and raising IPCs from time to time. The original claim was filed seeking payment of ₹ 8.99 crore which as per the claimant was outstanding. This was based on some documents filed in support of claim. No evidence was led on claim no. 1 and the matter was argued. It is during arguments that the entire basis of this claim was changed, and the amount was raised to almost 4 times the original claim.

k. The award recorded that the claimant in Statement of Claim itself has claimed that it has allegedly achieved 74% till 31.03.2026. However, ignoring the respondent-claimant's own pleading the Tribunal went on to hold that it has achieved 76.41% based on surmises and conjectures. No IPC, measurement book, invoices, vouchers etc. to prove that the claimant has achieved 76.41% progress. No iota of evidence is on record to show that the respondent has spent an amount of about ₹ 172 crore out of which only ₹ 150.61 crore has been paid.

l. There is no finding of the Tribunal on the originally claimed amount of ₹ 8,99,86,974/-, further, there is no record from the Tribunal could pick up the unique figure of ₹ 14,27,067/- deducted in reference to the alleged amount claimed by the claimant for providing and maintaining vehicles for the Employer, including the driver. The Tribunal completely ignored the material fact that no claims were made either in any IPC or even in the final bill. Therefore, under Clause 60.13 COPA, the appellant is not liable for any claims not raised in the final bill.

m. Admittedly, the appellant, *vide* letters dated 02.04.2016 and 22.04.2016 requested the Engineer to call upon the respondent to attend the site for joint measurement of the work at the time of termination. Pursuant thereto, the Engineer, *vide* letters dated 25.04.2016 and 11.05.2016 specifically called upon the respondent for a joint inspection and measurement of work at the time of termination of the contract. Despite the same, the respondent deliberately chose not to appear for the joint measurement.

n. Clause 60.1 provides that the contractor shall submit a monthly statement along with supporting documents by 7th day of each month for the work executed up to the end of the previous month. This statement reflects the work done in the previous month, with all supporting documents and valuation thereof. The last IPC submitted by the respondent was for the month of April 2014, and no further IPC was submitted. Importantly, claim no. 1 has not been awarded on the basis of any measurement made by the Engineer.

19. Mr. Mittal submitted that, it is a settled principle of law that the onus lies upon the claimant to prove its claims. However, by its own conduct, the respondent failed to adduce any evidence in respect of the balance work allegedly executed. Consequently, there was no evidence whatsoever regarding the balance work before the Tribunal. He also submitted that an Award contrary to contractual provisions is patently illegal, as held by the Supreme Court in ***ONGC v. Saw Pipes (2003) 5 SCC 705*** and ***State of Chhattisgarh v. SAL Udyog (P) Ltd., (2022) 2 SCC 275***.

20. He submitted that there is no proof of the work executed for which the claim is awarded. The Tribunal awarded Claim No. 1 on the premise that the contractor had executed 76.41% of the work. Clause 60.1 provides that the contractor shall submit a monthly statement along with supporting documents by 7th day of each month for the work executed up to the end of the previous month. However, the contractor had submitted Interim Payment Certificate ("IPC") No. 73 only up to April 2014, reflecting execution of merely 66.26% of the work.

21. He submitted that in the absence of any contemporaneous monthly statements or IPCs substantiating execution of 76.41% work, the finding of the Tribunal is unsupported by evidence and is therefore perverse. Post termination of the contract agreement, the contract for the balance work has been awarded for an amount ₹129.19 crore to Simplex Infrastructures Limited, far more than the work claimed to be completed by the claimant.

22. Mr. Mittal submitted that post amendment application, the appellant was not granted time to argue on the amended claim, the amendment application was allowed by the Tribunal *vide* order dated 03.12.2018, after the Award had been reserved and written submissions had been filed. The

claim was arbitrarily increased from ₹ 8,99,86,974/- to ₹31,41,35,273/-. He submitted that claim no.1 was not legible and legible copy of the same was never placed on record before the Tribunal. However, the list of variation orders was on record. The claimant chose not to file a single document in proof of having carried out any work but relied upon an illegible document alleged to have been issued by the Engineer.

i. ***Claim No. 6 – Claim relating to Overheads***

a. The claim was filed relating to overstay of the respondent on site with all manpower, labour, equipment, and resources between the extended period from April 2008 to December 2015 which comes out to 95 months.

b. The claim was based on average overhead expenditure of 7% of the estimated value of works based on Hudson Formula. The claimant in the Statement of Claim stated that the date of handing over of the balance 6 KM land may be construed as 12.12.2010 for all practical purposes.

c. The Tribunal, despite holding that the appellant alone cannot be held responsible for the delay, went on to award the entire recommended EOT period i.e. 77 months less 8 months of mitigation (all without any basis) i.e. 69 months as prolongation. The Tribunal applied Hudson Formula to calculate damages and awarded a sum of ₹35.15 crore towards overheads for a period of 69 months.

d. Despite the specific objection of the appellant that Hudson Formula

has no applicability in cases of concurrent delay, and is not applicable at all, a huge amount of ₹ 35.15 crore was awarded without any discussion or any basis whatsoever, which is in direct contravention of law laid down in the cases of:

i. ***Nandi Infratech Pvt. Ltd. v. R. K. Bararia and Others, 2024 SCC OnLine Del 4287- Para 52-61;***

ii. ***Batliboi Environmental Engineering Limited v. Hindustan Petroleum Limited and Anr., 2023 SCC OnLine 1366- Para 22,23, 26 and 46;***

iii. ***Unibros v. All India Radio, 2023 SCC Online SC 1366- Para 16-19;***

iv. ***Edifice Developers and Project Engineers Ltd v. M/s. Essar Projects (India) Ltd, 2013 SCC OnLine Bom 5- Para 8-11, 12;***

v. ***Essar Procurement Services Ltd. v. Paramount Constructions, Arb. Pet. No. 470 of 2012 - Para 33,34,35,104;***

vi. ***Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Limited and Others, 2019 SCC OnLine Del 8350 - Para 55,56,77 and 81;***

vii. ***Vijay Karia and Others v. Prysmian Cavi E Sistemi SRL and others, (2020) 11 SCC 1- Para 75-81;***

e. Clause 53.4 of the Contract Agreement categorically provides that the jurisdiction of the Tribunal is confined to award damages based on contemporaneous records. Thus, the contract itself excludes applicability of any formula for calculation of losses. This was completely ignored by the Tribunal. No contemporaneous

document was looked into by the Arbitral Tribunal to arrive at a huge figure of ₹ 35.15 crore. On the contrary, the Tribunal specifically arrived at a finding that it is not considering the revised figure of ₹ 53,78,51,738 projected by the respondent in its evidence affidavit. Prolongation costs were rejected throughout by the Engineer while recommending the EOTs citing concurrent delays on the part of contractor on critical path, including lack of manpower, machinery, machinery not mobilized, no work/ slow progress on available stretches also, slow progress on structures, bridges etc.

f. There is no discussion in the entire award on the EOTs recommended by the Engineer and how the rejection of prolongation costs claimed by the Engineer in its recommendation is not correct.

g. There is no discussion or finding by the Tribunal why the entire EOT recommendation is synonymous with delay of the appellant. EOTs themselves record that the contractor is to be majorly blamed for delaying the project. Reliance is placed on ***NHAI v. IRB Pathankot Amritsar Toll Road Ltd. 2023 SCC OnLine Del 3789***.

h. There is no discussion on the handing over of land. The last stretch of 6 KM even as per the claimant was available with it on 22.12.2010. The Tribunal refused to consider the revised figure of ₹53,78,51,738/- projected by respondent in its Evidence Affidavit, thus there being effectively no evidence on record to award

anything in favour of respondent.

i. The first three EOTs were duly approved by the appellant i.e. up to 06.03.2011. All these three EOTs were recommended with clear finding of the Engineer that the respondent is concurrently liable for delaying the project and is not entitled for any prolongation costs at all. The approval of these 3 EOTs was well known to the respondent who never protested or raised a claim despite specific rejection of prolongation costs by the Engineer and the appellant.

j. The NHAI approved first EOT *vide* letter dated 16.06.2008 which was intimated by the Engineer to the claimant *vide* letter dated 01.07.2008. The revised date of completion worked out as 10.05.2009 by the Engineer. The second approved EOT *vide* letter dated 27.05.2009 was intimated by the Engineer to the claimant *vide* letter dated 08.09.2009. The revised date of completion was worked out as 10.05.2010 by the Engineer. The approved third EOT *vide* letter dated 09.07.2010. The revised date of completion was worked out as 06.03.2011 by the Engineer. The arbitration was invoked only on 06.08.2016. Therefore, any claim which relates to a period prior to 06.03.2011 was hopelessly time barred.

k. The Tribunal held that cause of action would arise only at the time of submission of final bill which stage never arose in the Contract and therefore, the claim is within limitation. This finding of Tribunal is perverse. The cause of action towards prolongation for the periods covered by three extensions recommended and granted

by NHAI arose when those recommendations were made and eventually accepted by NHAI. A perusal of various Clauses of the contract including Clauses 12, 41, 44 etc would reveal that the while granting extension of time, any cost that the contractor is entitled to is also required to be added to the contract price. The cause of action crystallised on the date when EOTs recommendation rejected prolongation costs and the same were accepted by the NHAI. The cause of action does not get stretched to the date of final bill as held in ***State of Gujarat v. Kothari and Associates (2016) 14 SCC 761***. In support of his submission he has relied on; ***NHAI v. M.G. Contractors P. Ltd.- Arvind Techno Engineers P. Ltd. (JV) O.M.P. (COMM) 356/2023.***

l. The respondent before this Court has argued that MoRTH specifies certain overhead expenses, and there were key personnel were deployed at site. In fact, the manpower status forming part of the MPRs relied upon by the respondent itself shows that the contractor had abandoned the project between 31.01.2014 and 28.02.2015, with no key professional staff at site, and even the Project Manager was missing from February 2016.

ii. ***Claim No. 7- Claim for increase in rate in executing the work due to extra stay on work site***

a. The claim for the period–April 2008 to IPC-72 is that the Engineer while recommending EOT as per Clause 42.2 (a) of the contract did not determine the extra cost incurred by the claimant. The claimant

is entitled to extra cost for executing the work as also claim no. 5, 6, 8 & 10. From April 2008 to IPC-72 the claimed amount comes to ₹ 11,86,74,618/- The claim is made on the basis of alleged 10% increase in rate, on an average over the agreement rates and price adjustment given under the Contract. The Tribunal held that the claim is without any basis or evidence. However, it went on to award 5% of the alleged work done after April 2008 which was never proved by the respondent. Amounts were awarded without any basis whatsoever.

b. The award is in contravention of Clause 53.4 COPA. There was no contemporaneous document to support the claim or award. The Tribunal has completely ignored its own finding wherein it has categorically held that it is not inclined to agree that the appellant alone can be held responsible for the delay. The finding that the respondent has carried out work of ₹ 11,86,74,618/- beyond 05.04.2008 is based on no evidence whatsoever. Nothing was placed before the Tribunal to show that such amount of work executed beyond 05.04.2008.

c. The Tribunal completely failed to consider that the respondent has been given the benefit of price adjustment on the work executed in terms of the contract, and as such, any amount awarded without considering price adjustment paid to the respondent would amount to duplication. It has categorically held that the respondent has claimed 10% amount without any basis.

d. Prolongation costs were rejected throughout by the Engineer. The same was not disputed by the respondent at the relevant time. Therefore, the same is barred by limitation at least up to 06.03.2011.

iii. ***Claim No.8 - Towards Prolongation cost for idling and underutilization of machinery.***

a. The claim for a Period from May 2008 to December 2015-₹ 102,82,21,205/- (old ₹ 63,37,75,828.80/-) was filed towards idling and underutilization of machinery. The claimant did not mobilize the entire machinery and was not able to work on the available stretch. The claimant overstayed at the project site due to its own defaults. Though the machinery is stated to be owned and hired, no details were placed on record. Despite holding that the Tribunal is not inclined to agree to the increased number of working hours shown in the amended calculations, it went on to award the huge amount of ₹ 77.11 crore based on the amended calculations only.

b. The Tribunal further held that there is no proof of each and every machine being available at the time of completion of the work, but made a vague assumption that the said machinery was available at the site since the time of originally scheduled date of completion. The Tribunal made a reference to RD-11 to hold that the machinery was allegedly available.

c. CA-5 is a chart which avers certain machinery to be available and uses certain "rates" per hour and use certain "number of working

hours" to arrive at an astronomical figure of ₹ 63,37,75,828, without any proof, document or evidence whatsoever.

d. Arbitration was invoked only on 06.08.2016, thus the same is barred by limitation to the extent that despite rejection of prolongation costs, arbitration was not invoked within three years of rejection of claim. The Tribunal has failed to give any finding as to why the entire EOT period [less 9 months period towards mitigation] has been attributed to NHAI default.

e. RD-7 relates to a list of plant and machinery prepared during a surprise visit on 14.09.2015. The report shows that a number of machinery was either under breakdown or under repair. RD-11 – MPR of March 2016 and April 2016 refers to a number of machinery under breakdown.

f. The respondent alleged in its written submissions that the breakdown is only a minor problem. However, there is no explanation why almost entire machinery continued to be under breakdown/ under repair. The Tribunal did not deal with this important aspect at all, and there is no finding of the following issues:

   i. *What was the period during which various machineries were under repair;*
   ii. *What was the period during which the machineries were under breakdown?*
   iii. *Whether breakdown is a minor problem and can be ignored for awarding prolongation costs?*

g. The Tribunal went on to assume that the entire machinery was available and would qualify for prolongation cost claim. RD-11 does not support case of claimant it reflects that most of the machinery is not working. As per RD-11, 8 machines and in RD-7, 5 machines as claimed by the respondent were not found.

h. In case of idling, the party suffering would at best be entitled for depreciation in cost of machinery (in case same is owned) and interest on the cost of machinery during the period of prolongation or alternatively, the lease rent and interest on lease rent, if the same is hired.

i. In the present case the idling charges have been worked out way more than the cost of the entire machinery itself. No invoice, lease rent receipt etc. was produced by respondent. That, a machinery which was purchased as per respondent, in 2007-08, the amount claim towards prolongation is ranging from 4 -6 times and is more than the cost of machinery itself, which is most perverse, arbitrary, and illegal. The respondent has also claimed and awarded by the Tribunal the cost of the machinery in claim no.9. Reliance is placed on ***State of Orissa v. Samantary Construction 2015 SCC Online SC 856***.

j. The claimant is claiming alleged loss of opportunity to use the machinery elsewhere in other projects, while making a claim for use of machinery based on working hours of 8 to 10 hours a day for 25 days in a month. The law in this aspect is settled that, for

claiming loss of opportunity, it must be show that: (a) there was a delay in the completion of the project. (b) Delay is not attributable to the claimant. (c) claimant status as an established contractor (d) Credible evidence to substantiate the claim of loss of profitability.

k. In the evidence affidavit and in the oral arguments the claimant makes reference to the MoRTH Standard Data Book. The said Data Book would show that out of the 30 machineries for which the idling is claimed, the rates of 12 machines are not mentioned. The Tribunal has not considered this aspect. In the absence of actual evidence, a claim cannot be awarded solely based on the MoRTH Standard Data Book and has referred to ***Shivalaya Construction Company Pvt. Ltd. v. Delhi Development Authority, 2021 SCC OnLine 5303***.

l. The Tribunal has granted the claim taking the respondent as the responsible for the whole delay for 69 months till the last EOT dated 24.09.2014 recommended by Engineer.

m. In the Evidence Affidavit filed before the Tribunal with in respect to Claims no. 6 and 8 stated that the machinery was procured on 01.04.2007 and 01.04.2008. The respondent further claimed depreciation at the rate of 13.91% per annum. On the respondent's own showing, the written-down value of the machinery as on the date of termination, i.e. 14.03.2016, would be nil.

iv. ***Claim No. 9- Claim for recovery of Rs. 13,61,08,604/- towards cost of***

confiscated machinery, material, and other assets

a. Claim Period –On termination. The claim was filed towards alleged confiscated machinery, material and other assets.

b. That the Tribunal allowed the claim amounting to ₹ 7,70,80,510/- on guess work and arrived at a finding that there is no evidence produced by the respondent and agrees that there has been contradiction in CA-5 and CA-6 and therefore certain items in CA-6 have not been considered by them. However, the Tribunal failed to detail any such items. The Tribunal recorded that no evidence has been furnished by respondent, despite that awarded ₹ 7,70,80,510/.

c. That the respondent claimed that machines are owned as well as hired. However, there is no detail separately produced by respondent and claimed all the machinery as its own. The machinery in CA-5 and CA-6 are different. Some parts supplied by Kavuru Private Ltd., No details of any bill or payment made to him are on the record. Without prejudice, the respondent in the evidence affidavit has claimed depreciation @ 13.91% on the plants and machinery. The respondent further states that the plants and machineries mostly purchased in the year 2008.

d. That, the maximum value if any the machinery would have been about 7 years. The present claim is based on the alleged confiscation of the machinery pursuant to the termination of the contract on 14.03.2016. The meaning thereby that the machinery

would have no value at the time of termination of the contract.

e. That the respondent before this Court has argued that the Tribunal has awarded 15% as the salvage value as provided in the Companies Act, 2013. This contention was neither pleaded nor argued before the Tribunal, nor is there any finding to that effect in the Award; any such conclusion, in the absence of pleadings or proof of costs, it is perverse and violative of the principles of natural justice. No case of salvage was ever set up anywhere at any stage. On the contrary, the claim was towards the value of plant and machinery. The unique amount awarded by the Tribunal is arbitrary and not based on any pleadings or documents filed by either side, and there is absolutely no explanation in the award as to how that number was arrived at.

v. ***Claim No. 11- Claim for loss of profit- Rs. 5,15,00,000/-:***

a. For Claim Period – April 2008 to 21.03.2016. The claimant is entitled 10% profit on balance work of ₹ 51,51,93,861/-.

b. As per the submission of the NHAI, the claimant is only entitled to cost in terms of Clause 42.2 of GCC and Clause 1.1 (g) (i). The ample amount of material relating to the default of the claimant is placed on record. The claimant could have terminated the contract but abandoned the project, mis-utilized NHAI grant of capital assistance of ₹ 10.91 crore.

c. The Tribunal allowed the claim since it had held termination illegal.

No quantification of claim at all was carried out by the Tribunal. There was no material before the Tribunal by respondent to substantiate that it would have made 10% of profit on the balance work. No financial plan was produced by the respondent to show as to how much profit it has anticipated to have made on the project in question.

d. That, as per Clause 42.2 and 1.1 (g) (i), the respondent is only entitled to the cost and not profit. Despite the finding that the present case is a case of concurrent delay. The Tribunal has not given any concession for the defaults of the respondent while calculating the claim.

ADDITIONAL SUBMISSIONS

23. Mr. Mittal submitted that the EOTs cannot form the basis for award of claims, for the following reasons:

a. The respondent before this Court has argued that the recommendation letters issued by the Engineer were not marked to the respondent and that it had no knowledge of the EOTs. However, the respondent itself, in its Statement of Claim, expressly referred to and annexed various recommendation letters of the Engineer, including letters dated 03.03.2011 and 14.12., thereby belying its own contention. More importantly, the recommendations for grant of EOTs were treated as the sole basis by the Tribunal for holding NHAI liable for the alleged delay, notwithstanding the fact that the Engineer has recorded that the respondent was largely responsible for the delay.

b. Without prejudice, once the respondent disputes the Engineer's recommendations regarding EOTs, the same could not have been relied upon by the Tribunal for holding NHAI responsible for delay and the basis for awarding any claims.

24. He submitted that the respondent did not renew the bank guarantee at the time of termination the respondent argued that NHAI did not grant extension till March 2016 pursuant to the Ministry's meeting dated 16.12.2014. However, the respondent failed to show that MOU dated 15.04.2015 was executed in this regard, and despite mandatory requirement under the said MOU to extend the bank guarantee, the respondent failed to renew the bank guarantee, which had expired on 01.04.2015, in breach of the said MOU.

25. Mr. Mittal submitted that the appellant cited many grounds for terminating the Contract Agreement in its termination letter dated 14.03.2016. The Tribunal has dealt with those grounds extensively and as such, the appellant cannot, under S. 37 of the Act seek re-appreciation of those grounds.

26. However, the appellant only seeking to urge two grounds, which have been completely perversely dealt with by the Tribunal, as under :-

i. One of the grounds raised by the appellant to terminate the contract was that there was negligible progress between 2012 to 2016 and the total progress during this period was only 5.63%.

ii. The Tribunal dealt with the issue of failure to carry out obligations. However, the Tribunal recorded the progress made during

September 2010 to March 2012 and on this basis rejects this plea. The stand of Appellant was, on the contrary, to the effect that there was negligible progress from 2012 to 2016, which has not been gone into at all by the Tribunal, thus ignoring material plea which goes to the root of the matter.

iii. That the appellant filed multiple documents in this regard, which were completely ignored by the Tribunal:

a) Last Interim Payment Certificate (IPC) was raised by respondent was IPC-73 raised for the month of April 2014. No further IPCs were ever raised by the respondent.

b) Manpower status from MPRs reflecting that Key Professional staff was not available between 31.01.2014 – May 2015.

c) In the minutes of the meeting dated 16.12.2014, it is noted that in last one year only 2% work has been done.

d) In Show Cause Notice dated 07.01.2016, it is asserted that during 2012-13 only 2.05% work has been done, and during 2013-14 only 0.93% work has been done. It is further stated that since January 2015 only 0.492% work has been done.

e) The Engineer's letter dated 10.02.2016 states in para (a) and (b) that in the last 4 years, only 5.63% work has been done.

f) Termination letter dated 14.03.2016 state that only 5.63% work has been done since 2012.

g) In reply to the show-cause notice dated 18.01.2016, the respondent attempts to justify the less work by stating that work

got affected by various events, including:

i. Variation works to the extent of 14.1134% requiring more time.

ii. law and order problem resulting into delay of 570 days

iii. Bandh and strikes resulting into loss of 670 days.

iv. Between period 20.09.2010 to 31.03.2012, work stopped due to deterioration of law and order and contractor had to demobilize.

v. Key managerial persons had to leave due to various problems such as extortion, law and order etc.

vi. Out of 18 bridges, only 7 bridges completed. 2 major bridges remain untouched. Termination notice dated 14.03.2016.

vii. The Engineer *vide* letter dated 20.01.2016 in reply to the contractor reply to the show-cause notice dated 20.01.2016 stated that the contractor has not raised RFI (Request for work) since last one year.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

27. Mr. C. Mohan Rao, learned Senior Advocate for the respondent submitted that the claimant had made claims 1 to 21 before the Tribunal including interest and cost of arbitration. The claimant did not press for claim No. 2. The Tribunal dismissed the claim Nos. 12, 13, 15, 16 & 21 and allowed the claim Nos. 1, 3 to 11, 14, and 17 to 20. He also submitted that the appellant had confined its arguments before the learned Single Judge for the claim Nos. 5, 6, 8, 10, 14 & 19 and the learned Single Judge set aside the

award in respect of claim Nos. 5, 10, 14 & 19 and dismissed the challenge in respect of claim Nos. 6 & 8.

28. He submitted that the appellant in the present appeal has contended that the giving up of certain claims before learned Single Judge was without any authority and that no such instructions were given by the appellant. The appellant, as such sought to include those claims which were not decided by the learned Single Judge in the present appeal. He submitted that this Court has allowed the request of the appellant to include the claims which were not decided by the learned Single Judge, subject to depositing ₹ 10 lakh as costs. However, the appellant filed an affidavit giving up claims 3, 4, 17 and 18, in the present appeal. Thus the present appeal is now confined to the Claim Nos. 1, 6, 7, 8, 9 and 11.

29. Mr. Rao submitted that the findings in the impugned order of the learned Single Judge as well as the Award are pure findings of fact and thus are not amenable for interference under Section 34 or 37 of the Act. The findings reflect no illegality, much less any perversity. A perusal of the findings of the Tribunal would demonstrate that the Tribunal has considered all the facts and circumstances relevant to the issues and the contemporaneous correspondences exchanged between the parties and the other evidence filed by the parties. It is a well-settled that courts while exercising jurisdiction under section 34/37 of the Act do not to sit in appeal over the findings of the Tribunal or re-appreciate evidence as an Appellate Court. In support of this submission he has relied on the following judgment. In support of his submission he has relied on ***MMTC Ltd. v. Vedanta Ltd (SC; CA 1862 of 2014; 18.02.2019)*** & ***OPG Power***

30. Mr. Rao on the submission of the appellant on delay, EOT and Termination of Contract submitted that, the stipulated dates of start and completion are 06.10.2005 and 05.04.2008. The appellant illegally terminated the contract on 31.03.2016, w.e.f. 29 .03.2016. The appellant had commenced its arguments with a patently false statement that the entire land for 30 Kms was handed over on 11.12.2005.

31. He submitted that, it is evident from the Monthly Progress Report (MPR) of March 2016 that the appellant failed to remove encumbrances such as trees, electric poles, transformers and 20 houses even as on the date of termination of the contract in March 2016. This is also clear from the balance work contract document in which removal of encumbrances like tree cutting, utility shifting, relocation of religious places, wells tanks etc. are included in the scope of the balance work, which clearly indicates that the encumbrances were in existence even at the time of executing the balance work.

32. He submitted that the Engineer categorically stated that the appellant failed in handing over of possession as per the stipulation of the contract and that the delay in handing over of the site was governing delay and that any other delays whatsoever occurred would only overlap. This was emphasized by the respondent/claimant during arguments and written arguments before the Tribunal, which also form part of the award. The recommendation of the Engineer was relied upon by this respondent in its arguments before the Tribunal.

33. He submitted that the Tribunal after considering the material on record held that the appellant is mainly responsible for the delay as held in Paragraph No. 12.3.2.5 (ii) of the impugned award. He also submitted that, as a result of abnormal delay in handing over the site, the Engineer recommended EOTs seven times, the last being up to 24.09.2014. However, the appellant had not granted any EOTs beyond 06.03.2011 till termination of the contract on 31.03.2016. As a result of not granting any EOTs beyond 06.03.2011, the respondent had executed the work from 06.03.2011 to 31.03.2016 without there being any time granted by the appellant.

34. He submitted that the Tribunal after considering this aspect has in Paragraph 12.3.2.3 of the Award held that the Employer also did not take any further action at any stage for grant of extension of time to the contractor till the process of termination was initiated. As no eligible EOT was granted, time ceased to be the essence of the contract and time was set at large.

35. According to him, the Tribunal has dealt with the aspect of EOTs and termination of the contract elaborately and held that not approving EOTs despite recommendation of the Engineer is illegal. The Tribunal also gave elaborate reasons in support of its findings that the termination of contract is illegal in paragraph No. *12.3.2. 7* of the impugned award. It is clear that the findings of the Tribunal are based on the record and the same are neither perverse nor illegal.

36. He submitted that under Clause 63.3 of COPA read with Clause 63.2 of GCC and Clause 1.5 of GCC, the Engineer is under obligation to

determine and certify the amount earned or accrued to the contractor as on the date of termination, *ex parte* or by or after reference to parties, without any undue delay. This obligation cast on the Engineer was not discharged.

37. As per Clause 63.2, the Engineer was under obligation to determine the value of the work executed by the claimant *ex-parte* after investigation or enquires. The appellant in its termination notice dated 14.03.2016 had directed the Engineer to determine and certify the amount accrued to the claimant, under Clause 63.2 of the contract. The appellant had also issued reminders to the Engineer for determination of the amount *vide* letters dated 02.04.2016, 13.04.2016 & 22.04.2016. The Engineer *vide* letter dated 11.05.2016 had stated that the measurement and valuation of the terminated contract is being done by them. However, no such certificate was issued and no such valuation as contemplated under Clause 63.2/63.3 was placed on record before the Tribunal by the appellant. Therefore, the objection of the appellant that the claimant did not attend the joint inspection was not correct, the claimant had attended the site for joint inspection; however, the Engineer did not attend the site for joint inspection.

38. Mr. Rao submitted that the objection of the appellant that the claimant did not file IPCs is also without any basis. Clause 63.2 empowers the Engineer to take *ex-parte* measurements and not the respondent/claimant. It was the duty of the Engineer to determine the value of work as on the date of termination of the Contract. As such there is no such liability on the respondent/claimant to file any IPCs or the contemporary documents under Clause 53 .4 GCC by the claimant. He also submitted that the appellant had contended before the Tribunal that the valuation under Clause 63.2 is under

progress, which is clear from the Award.

39. He submitted that, in absence of mandatory determination and certificate by the Engineer as required under Clause 63.2 (GCC), the respondent/claimant could not make any claim for the value of work executed under BOQ items as on the date of termination. The respondent/claimant has made original claim only for the extra work done and variations which were approved by the Engineer. The appellant had contended that page 187 of the Statement of Claim was not legible, it is submitted that the said document was a letter issued by the Engineer addressed to the appellant. The appellant itself has filed the list of variations approved by it.

40. Mr. Rao submitted that the appellant filed certain documents before the Tribunal during 2018, indicating the BOQ item wise balance quantities. In the said document, the Engineer had determined the balance work quantities for every BOQ item, precisely to two decimals and determined the amount based on the quoted rates of the claimant. He also submitted that there is no provision in the Contract Agreement for execution of the balance work at the risk and cost of the respondent/claimant and the Engineer was under obligation to determine the amount of work not completed by the claimant at BOQ rates.

41. He submitted that, based on the documents filed by the appellant, the respondent/claimant on 24.08.2018 filed an application for amendment of the Claim No. 1 under Section 23(3) of the Act by including the value of the work executed under BOQ items as on the date of termination. The claimant

had also filed amended Statement of Claim in respect of Claim No. 1 on 24.08.2018.

42. He submitted that the appellant was afforded sufficient opportunity by the Tribunal to file amended Statement of Defence to the amended claim No.1. The Tribunal allowed ten days' time to the appellant for filing amended Statement of Defence in respect of claim No. 1, further time up to 24.12.2018 was allowed (page 2159). On 07.01.2019, the Tribunal sent a confirmation mail to the parties stating that no response is received from the appellant. The amendment was made by the respondent/claimant on 24.08.2018, and till 07.01.2019, the appellant despite sufficient opportunities did not file amended Statement of Defence in respect of one Item i.e., Claim No. 1. He also submitted that, it is the obligation of the Engineer to determine the value of the work done by the claimant as on the date of termination, which the appellant did not place on record. The amended claim was allowed after recording detailed reasons on amendment of the claim and time given to the appellant for filing the amended Statement of Defence.

43. Mr. Rao submitted that Claim No.6 was decided by the learned Single Judge in favour of the respondent/claimant. The appellant instead of showing how and why the findings of the learned Single Judge are incorrect, made fresh objections raising disputed questions on merits for the first time, which were not part of the Statement of Defence or the synopsis of oral arguments filed nor the same were part of the challenge petition filed by the appellant under Section 34 of the Act. The appellant has filed the particulars of the availability of key personnel during the contract period from February

2006 to February 2016. In support of the claim, the respondent/claimant had filed the books of accounts indicating the expenditure on overheads during FY 2008-09 to FY 2015-16, duly certified by the Chartered Accountant. The respondent/claimant had also relied on MoRTH Standard Data Book indicating the overheads provision on highway works at 8% for roads and at 20% - 25% for bridges and the same was argued the respondent. Whereas, the appellant for the first time before this Court in the present appeal contended that the respondent has failed to comply with the conditions under Clause 53.4 GCC. The appellant had also filed several documents indicating existence of key personnel for 10 years from 2006 to 2016, as such the objection is not tenable.

44. He submitted that the respondent/claimant had made a claim at 7% in respect of road work as well as bridge works, which is much lower than MoRTH provision and having maintained the establishment for 125 months as against the stipulated time period of 30 months, the claimant has made a claim for loss of overheads during the extended period of 95 months only and no claim is made for the loss of overheads during the stipulated period of contract (30 months). Once factual basis is made that a contractor is entitled for overhead charges for the prolongation period Hudson Formula is applicable.

45. He submitted that the delay in handing over of the site by the appellant, was governing delay and hence the question of concurrent delay does not arise. However, the Tribunal allowed the claim for loss of overheads only for 69 months i.e. the EOT recommended by the Engineer, as against 95 months claimed and proved by the claimant. In this regard the

Tribunal held that the appellant was responsible for prolongation cost to the claimant for the above period of 77 months less 10% assessed as failure on part of the claimant in mitigating losses, that is for the period of69.3 months, say 69 months only. Although the appellant has objected to applicability of the Hudson Formula, the Tribunal did not agree with the contention of the respondent as the basis of Hudson Formula has been held to be good by various courts of the country. Accordingly, the Tribunal found it fair and reasonable to award a sum of ₹ 35.15 crore to the claimant for the above claim.

46. Mr. Rao has contested the legal authorities cited by the appellant in the following manner:

a. ***Batliboi Environmental Engineers Limited v. HPCL***: In tcase, the claim includes loss of profit due to prolongation of the contract. The objection was mainly to grant of loss of profit for the prolongation period by applying Hudson Formula. In the present case, there is no claim for loss of profit due to prolongation of the contract. The only evidence filed before the Tribunal was calculations in the form of a chart. No other justification was produced before the Tribunal.

b. ***Unibros v. All India Radio***: this judgment is not applicable to the present case, since in Unibros the claim for loss of overheads due to prolongation of the contract was rejected by the Tribunal itself. In Unibros, the claim for loss of profit due to prolongation of the contract was awarded. The Supreme Court observed that *"Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum"*. In the present case, as pointed

out voluminous evidence is placed on record in support of the claim for loss of overheads due to prolongation of contract.

c. ***Edifice Developers and Project Engineers Ltd. v. Essar Projects (India) Ltd.*** (Bombay High Court; Appeal No. 11 of 2012; Arb. Pet. 313 of 2007; decided on 03.01.2013): Here, no evidence was filed before Tribunal. The claim was allowed only on the basis of Hudson's formula. The Supreme Court held that the award of the claim is on the misconceived basis that the Hudson's Formula must be applied despite the absence of evidence.

iv. ***Essar procurement Service Ltd. v. Paramount Constructions*** (Bombay High Court; Section 34 petition): The Court held that the respondent had not produced the books of account showing the expenditure incurred on overhead. The respondent/ claimant in the present case had filed the books of accounts duly certified by the Chartered Accountant; the appellant itself has filed evidence of existence of establishment from Feb 2006 to Feb 2016.

47. Mr Rao relied on the judgment of this Court, in the case of ***NHAI v. Rayalaseema Expressway Pvt Ltd. (O.M.P. (COMM) 344/2019)***; decided on 24.09.2019), to support the relevance of the Standard Data Book of MoRTH. He has also relied on the judgment of this Court in the case of ***NHAI v. BEL TBL JV., FAO(OS) 254/2016.***

48. With regard to Claim No. 7, he stated that for increase in rate in executing the work due to extra stay on work site. He submitted that this claim is also on account of prolongation of the contract. The Engineer

recommended EOT under Clause 42.2 (a) due to default of the appellant in handing over of the site for eight years. However, the Engineer did not determine the cost payable to the claimant under Clause 42.2 (b), for which the present claim is made under Clause 42.2 (b).

49. It is submitted that as a result of delay in handing over of the site that too in bits and pieces, cost of execution of works increased and had made a claim for 10% additional cost for the work executed during prolongation period beyond the original date of completion. Detailed calculations based on the IPC's in support of the claim. After considering the contentions raised by the appellant, the Tribunal allowed the claim by awarding 5% additional cost for the work executed during the prolongation period. He also submitted that the appellant has awarded the balance work of ₹ 51.52 crore to Simplex Infrastructure Limited for an amount of ₹ 129.18 crore i.e., more than 150% above the estimated cost, which clearly shows that the 5% additional cost allowed by the Tribunal on the amount of work executed during the prolongation period of the contract is very much reasonable and the same is neither perverse nor illegal and the objections are liable to be dismissed.

50. With regard to Claim No. 8 for expenses incurred towards prolongation cost as a result of working in the extended period of the contract, Mr. Rao submitted that;-

i. This claim is decided by the learned Single Judge in favor of the respondent/claimant. The appellant instead of showing how and why the findings of the learned Single Judge are incorrect made fresh objections raising disputed questions of facts for the first time.

He also submitted that the award has held that the contention of the NHAI as regards the deployment of machinery does not stand in view of the fact that the NHAI itself has filed the details of the machinery at site *vide* its document No. RD-7. Thus the machinery as required for the work was available till September 2015, although, there is no specific proof of each and every machine being available at the time of stipulated date of completion of work. Therefore, the Tribunal was inclined to believe that the said machinery was available at the site since the time originally scheduled date of completion. Similarly, the availability of machinery at site up to March 2016 and April 2016 has also been evidenced by the appellant *vide* its document No. RD-11.

ii. The existence of plant, machinery and equipment was proved on the basis of the documents filed by the appellant before the Tribunal, viz; MPRs for the period March 2006 to April 2016. The availability of equipment at site is also proved from the surprise check conducted by the appellant itself on 14.09.2015 was filed by the appellant before the Tribunal. The availability of equipment as on the date of stipulated date of completion was also proved by the claimant from the MPR for the month of March 2008. The availability of equipment after termination of the contract (31.03.2016) was also proved from the MPRs for the months of March and April 2016 filed by the appellant. Therefore, the amount initially claimed by the respondent/claimant was for ₹63,37,75,829/-. Subsequently a clerical error was noticed to the

effect that for calculating the total cost, initial period of prolongation of 05.05.2008 to 02.06.2011 was found to be missed out. This can be clearly seen from the document CA-5 and the amended CA-5. The error was rectified by an amendment application of Claim No. 8 by the claimant under Section 23(3) of the Act. The amended claim amount was ₹ 102,82,31,205/- filed on 22.02.2018.

51. In the 44th hearing of the Tribunal held on 16.06.2018, the NHAI had stated that it does not want to file any reply to the amendment application and the amendment was allowed by the Tribunal on the same day i.e., on 16.06.2018.

52. He submitted that the claim is made based on the usage charges of MoRTH Standard Data Book; the claim is made adopting 2001 usage rates of MoRTH Standard Data Book. It did not apply any cost index on the 2001 rates to make the same applicable for the claim period of 2008-2016. Further, it has claimed only 50% of the amount so arrived. He also submitted that, based on the documents filed by the NHAI, the machinery as required were available at site. However, by making reference to its finding in respect of Claim No. 6, the Tribunal allowed this Claim also only for 69 months as against the actual claim for 92 months of prolongation period. In support of the above claim, Mr. Rao placed reliance on the judgment of this Court ***NHAI v. DIC NCC N; FAO(OS) (COMM) 20/2019***, wherein this Court has upheld the similar claims based on the usage rates of the MoRTH.

53. He submitted that the NHAI had raised an objection for the first time before this Court, alleging that the amount claimed is more than the cost of

the equipment by referring to a judgment of Supreme Court in ***Samantary Construction Pvt Ltd (supra)***. He also submitted that the claim in the said judgment was due to seizure of the equipment after termination of the contract.

54. According to Mr. Rao, in case of seizure (confiscation), depreciated value should be the maximum claim as in case of Claim No. 9 in the present case. He submitted that if equipment is returned within a short period, claim for hire charges is permissible, limited to depreciated value as on the date of seizure. There is no reference to cost of equipment in the above judgment, only value of the equipment was referred. The NHAI's contention that the amount of hire charges should not be more than the original cost of the equipment is without any basis, particularly when the claimant incurred expenditure at site for 125 months as against the stipulated period of 30 months. In the present case, the claim itself is "Claim for expenses incurred towards prolongation cost as a result of working in the extended period of contract". The expenses incurred during the prolongation period are not dependent on the cost of equipment alone. The equipment with 12 years life was meant for execution of 4 such projects of 30 months each, whereas the claimant could not even complete one project, further the equipment was illegally confiscated.

55. He submitted the respondent suffered heavy losses on the account of illegal confiscation. As the respondent has also paid huge interest on the advances amounting to ₹ 43.64 crore to the appellant during the prolongation period till the date of termination. This amount of interest was enormous and is not dependent on the original cost of the equipment. He also submitted that the respondent had incurred additional expenditure in

maintaining the machinery along with complete crew for operation and maintenance for 125 months as against 30 months due to prolongation of the contract, expenditure on spares and lubricants during the prolongation of the contract which is clear from the material confiscated by the appellant after termination of the contract. He contended that this is the first time the appellant has alleged that the claim amount is more than the cost of equipment.

56. Mr. Rao submitted that the appellant has raised another objection before this Court for the first time that the MoRTH rates are not adopted by the respondent for 12 out of 30 items. The said allegation is totally false and misleading. These objections were not even raised in the present appeal and are made for the first time in the written arguments. Neither such objection was raised either before the Tribunal or before the learned Single Judge. He also submitted that, except for one item i.e., PQC Paver which is German made machinery; all other rates are taken from the MORTH Standard Data Book. For PQC paver, the reasonable market rate for the relevant period has been adopted. Where the capacity of the equipment did not match as in case of generators of 7 different capacities, batching plant etc, the claimant had adopted proportionate rates from the MORTH standard data book.

57. He submitted that the appellant had also taken another objection for the first time in its written submissions i.e., the number of equipment considered in CA-5 amended is more that the surprise checks document or the March 2016 MPR, no such objection was raised. He submitted that at the time of filing the claim, only the MPRs filed by the respondent were on record. The NHAI filed the MPRs for the period February 2006 to April 2016 during the arbitration proceedings. Subsequent to filing of the MPRs

by the appellant, the respondent/claimant had filed quantification before the Tribunal, by considering month wise availability the equipment for every month, during the prolongation period which amounts to ₹ 141.7 Cr. However, the respondent/claimant did not amend the Claim. This clearly proves that the contention of the appellant raised for the first time in its written submissions is contrary to the facts available on record. Even though, respondent/claimant maintained the plant and equipment along with complete establishment till the date of termination of the contract, the Tribunal restricted the claim to 69 months.

58. With regard to Claim No.9: Claim for recovery of cost of confiscated Machinery, Mr. Rao submitted that the appellant, in its Statement of Defence and as in the petition under Section 34 of the Act, had stated that confiscation of machinery is strictly in terms of the provisions of the contract. However, there is no such provision for confiscation of plant, machinery or material either in termination Clause 63 or otherwise anywhere in the Contract Agreement.

59. As per Clause 63.1 of COPA, the NHAI is under obligation to return the plant, equipment etc. to the claimant. Despite being under the obligation to return the plant, equipment etc., the NHAI did not even file the list of inventory of the confiscated machinery, plant equipment and material before the Tribunal. The appellant did not use any of the confiscated machinery for execution of the balance work in sub-Clause 54.9 at page 138 of balance work Contract document filed on 04. 10.2025.

60. Under the obligation to determine the value of the equipment, material and temporary works as on the date of termination under Clause 63.2 of the Contract, the appellant in its termination notice dated 14.03.2016

directed the Engineer to determine the value of plant, equipment and material at the time of termination of the contract. The appellant also issued reminders to the Engineer for determination of the amount *vide* letters dated 02.04.2016, 13.04.2016 & 22.04.2016. The Engineer *vide* letter dated 11.05.2016 had stated that the measurement and valuation of the terminated contract is being done by them. However, the appellant did not place on record the Tribunal, any such valuation under Clause 63.2.

61. Mr. Rao submitted that, immediately after termination of the contract on 31.03.2016, the claimant has made a claim for cost of confiscated equipment *vide* letter dated 08.06.2016 addressed to the NHAI for ₹13,61,08,604/-. However, the NHAI neither denied nor disputed, having confiscated the plant and equipment, the complete list of plant and equipment was available with the NHAI. However, they had suppressed the vital information required for deciding this claim.

62. He submitted that the appellant itself has filed list of major plant and equipment as available at site after termination of the contract during March and April 2016, including the details of invoices of the major plant and equipment before the Tribunal. The Tribunal had taken into consideration all the objections raised by the appellant held that, in light of the above it is submitted that the award in respect of the Claim No. 9 is neither perverse nor illegal and hence the objections of the appellant are liable to be dismissed.

63. Mr. Rao submitted that, Claim No. 11; Claim for loss of profit on the balance work due to illegal termination of the Contract by the appellant, the claim is due to illegal termination of the contract and thereby preventing the claimant from execution of the balance work and not due to prolongation of

the contract as sought to be contended by the appellant. Thus the references to delay, prolongation period or Clause 42.2 are not relevant to this claim. The Tribunal held that the termination is illegal hence the claimant is entitled for claim for loss of profit for the balance work as on the date of termination of the contract. In support of this, he has placed reliance on the Supreme Court Judgment in ***Dwaraka Das v. State of M.P. [(1999) 3 SCC 500]*** & ***National Highways Authority of India v. BEL-ACC (JV) [2012 SCC OnLine Del 5530***.

64. He submitted that the standard data book of MoRTH indicates 10% as contractor's profit, which substantiates the claim of the claimant for loss of profit at the rate of 10%. The Tribunal had allowed the loss of profit after deducting another 10% from the amount claimed on account of mitigation of losses, i.e., the Tribunal has allowed only 9% as against 10% claimed, which is neither perverse nor illegal and hence the objections in respect of this claim are liable to be rejected.

65. Mr. Rao submitted that the Tribunal found that the appellant/Engineer is guilty of not taking action/not discharging obligation in terms of the contract. No effort was made by the appellant to bring the objections within the scope of Section 34 and Section 37 of the Act. A mere perusal of the award shows that the award is well reasoned and does not suffer from any illegality or perversity, and is not maintainable. The present appeal is an attempt to reopen issues of fact determined by the Tribunal.

66. He seek the present appeal under Section 37 of the Act needs to be dismissed with costs.

ANALYSIS AND CONCLUSION

67. Having heard the counsel for the parties, we note that in the impugned order, the learned Single Judge states that the challenge in the petition under Section 34 of the Act was confined to the conclusion drawn by the Tribunal in respect of Claims No. 5, 6 and 8. The challenge to Claims No. 6 and 8 was rejected. Notice was only issued by the learned Single Judge with regard to Claim No. 5. Later notice was also issued with regard to Claims Nos. 10, 14 & 19. So, in effect, the learned Single Judge has decided the petition with regard to Claims No. 5, 10, 14 & 19.

68. The conclusion drawn by learned Single Judge that the petition be confined to Claims No. 5,10,14 & 19 was with the consent of the counsel for the parties. The arbitral award dated 21.02.2019 was set aside in respect of Claims No. 5, 10, 14 & 19.

69. This appeal under Section 37 of the Act has been filed with the following prayers:-

> *"a) Allow the present appeal and set aside the arbitral award dated 21.02.2019 passed by the Ld. AT in respect of claims no. 6 and 8 and upheld by Impugned judgment/Order dated 26.04.2023 passed by Ld. Single Judge while exercising jurisdiction under Section 34 of the Act.*
> *b) Pass an order to set aside the claim nos. 1, 3, 4, 7, 9, 11, 17, 18, and 20 allowed by the Ld. AT in the award dated 21.02.2019 and have not been adjudicated on merits by the Ld. Single Judge while exercising jurisdiction under Section 34 of the Act.*
> *c) Pass such other order or orders as tis Hon'ble Court may deem fit and proper in the facts and circumstances of the present case;"*

70. However, during the course of arguments, the learned counsel for the appellant stated that the appellant is confining its challenge in this appeal to Claims No. 1, 6, 7, 8, 9 & 11. Accordingly, we have heard the counsel for the parties on the said claims.

71. At the outset, we find it necessary to state the scope of judicial review available to courts under Section 34 and Section 37 of the Act. In ***Somdatt Builders NCC-NEC v. National Highways Authority of India; 2025 INSC 113***, the Supreme Court has held as under:

> *"36. In MMTC Ltd. Vs. Vedanta Ltd., this Court held that as far as Section 34 is concerned, the position is well settled that the court does not sit in appeal over an arbitral award and may interfere on merits only on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. Even then, the interference would not entail a review on the merits of the dispute but would be limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse or when the conscience of the court is shocked or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. As far as interference with an order made under Section 34 by the court under Section 37 is concerned, it has been held 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.*
>
> *...*
>
> *39. In Reliance Infrastructure Ltd. (supra), this Court referring to one of its earlier decisions in UHL Power Company Ltd. Vs. State of Himachal Pradesh13, held that scope of interference under Section 37 is all the more circumscribed keeping in view the limited scope of interference with an arbitral award under Section 34 of the 1996 Act. As it is, the jurisdiction conferred*

on courts under Section 34 of the 1996 Act is fairly narrow. Therefore, when it comes to scope of an appeal under Section 37 of the 1996 Act, jurisdiction of the appellate court in examining an order passed under Section 34, either setting aside or refusing to set aside an arbitral award, is all the more circumscribed.

40. Again in M/s Larsen Air Conditioning and Refrigeration Company (supra), this Court reiterated the position that Section 37 of the 1996 Act grants narrower scope to the appellate court to review the findings in an arbitral award if it has been upheld or substantially upheld under Section 34.

42. As already discussed above, the Arbitral Tribunal had interpreted Clause 51 in a reasonable manner based on the evidence on record. This interpretation was affirmed by the learned Single Judge exercising jurisdiction under Section 34 of the 1996 Act. Therefore, Division Bench of the High Court was not at all justified in setting aside the arbitral award exercising extremely limited jurisdiction under Section 37 of the 1996 Act by merely using expressions like 'opposed to the public policy of India', 'patent illegality' and 'shocking the conscience of the court'. As reiterated by this Court in Reliance Infrastructure Ltd. (supra), it is necessary to remind the courts that a great deal of restraint is required to be shown while examining the validity of an arbitral award when such an award has been upheld, wholly or substantially, under Section 34 of the 1996 Act. Frequent interference with arbitral awards would defeat the very purpose of the 1996 Act."

72. As seen from the above, the scope for interference with an arbitral award under both Section 34 and Section 37 of the Act is extremely narrow. It is only if the findings of the arbitrator are arbitrary, capricious or perverse or when the conscience of the court is shocked or when the illegality is not trivial but goes to the root of the matter, that the Court shall choose to interfere. We shall examine the contentions put forth by the parties within the contours of the law as observed above.

TERMINATION OF THE CONTRACT

73. First, we shall deal with the issue with regard to termination of the contract. The appellant has challenged the finding of the Tribunal that the termination of the contract is illegal, by stating that one of the grounds raised by the appellant to terminate the contract was that there was negligible progress in work between the years 2012 and 2016 inasmuch as the total progress during this period was only 5.63%. Though the Tribunal dealt with the issue of failure to carry out the obligations and recorded the progress made during the period between September 2010 and March 2012, it did not deal with the contention of the appellant that there was negligible progress between the years 2012 and 2016. This, according to Mr Mittal, is a material plea which goes to the root of the matter. He has submitted that the following aspects were ignored by the Tribunal:

> *"1) Last Interim Payment Certificate (IPC) was raised by respondent was IPC-73 raised for the month of April 2014. No further IPCs were ever raised by the respondent., (Pg. 4867- 4868, pdf pg. 4875-4876 of pleading, vol-1).*
> *2) Page 3642 – 3657, pdf pg. 3650-3665 of pleading, vol-1 – Manpower status from MPRs reflecting that Key Professional staff was not available between 31.01.2014 – May 2015.*
> *3) Page 3045, pdf pg. 3053 of pleading, vol-1 - In MoM dated 16.12.2014, it is noted that in last one year only 2% work has been done.*
> *4) Page 3173, pdf pg. 3181 of pleading, vol-1 - In Show Cause Notice dated 07.01.2016, at para (d) page 3176, it is asserted that during 2012- 13 only 2.05% work has been done, and during 2013-14 only 0.93% work has been done. It is further stated in para (m) on page 3178 that since January 2015 only 0.492% work has been done.*

5) Page 3224, pdf pg. 3232 of pleading, vol-1 – IE Letter dated 10.02.2016 states in para (a) and (b) that in the last 4 years, only 5.63% work has been done.
6) Page 2623/ 2626, pdf pg. 2631/2634 of pleading, vol-1 – Termination letter dated 14.03.2016 in Para (f) avers that only 5.63% work has been done since 2012.
7) Page 3189, pdf pg. 3197 of pleading, vol-1 – In reply to SCN dated 18.01.2016, the respondent attempts to justify the less work by stating that work got affected by various events, including:
a) Para 10- page 3191, pdf pg. 3197 of pleading, vol-1- variation works to the extent of 14.1134% requiring more time.
b) Para 11 – page 3192, pdf pg. 3200 of pleading, vol-1 – law and order problem resulting into delay of 570 days.
c) Bandh and strikes resulting into loss of 670 days – Para 12/ page 3194, pdf pg. 3202 of pleading, vol-1
d) Para 4- page 3197, pdf pg. 3205 of pleading, vol-1 – period between 20.09.2010 to 31.03.2012 – work stopped due to deterioration of law and order and contractor had to demobilize. e) Para j -page 3198, pdf pg. 3206 of pleading, vol-1- Key managerial persons had to leave due to various problems such as extortion, law and order etc.
8) Out of 18 bridges, only 7 bridges completed. 2 major bridges remain untouched. Termination notice dated 14.03.2016, Para (b), pg. 2623 @2626, pdf pg. 2631@2634 of pleading, vol-1.
9) The Engineer vide letter dated 20.01.2016 in reply to the contractor reply to SCN dated 20.01.2016 stated that the contractor has not raised RFI (Request for work) since last one year. (Pg. 3205 @3207, pdf pg. 3217@3215 of pleading, vol-1)"

74. The Tribunal had held that the termination of the contract by the appellant is illegal, primarily for the reason that there was a considerable delay on the part of the appellant in approving the EOTs. We note that the appellant had approved EOTs no.1, 2 & 3 as recommended by the Engineer.

The Engineer *vide* letter dated 28.02.2008 had recommended EOT No.1, for a time of 400 days, revising the completion date to 10.05.2009. The Engineer again *vide* letter dated 06.05.2009 recommended EOT No.2, for a time of 365 days, revising the completion date to 10.05.2010. Further, *vide* letter dated 03.05.2010 the Engineer had recommended EOT No.3, for a time of 300 days, revising the completion date to 06.03.2011. These three EOTs were approved by the appellant, thereby bringing the approved completion date to 06.03.2011.

75. Subsequently, the Engineer *vide* letter dated 03.03.2011 had recommended extension for a period of 195 days, revising the completion date as 17.09.2011. The Engineer *vide* letter dated 14.12.2012 recommended extension for a period of 14 months plus 25 days, changing the date of completion to 15.01.2013. Subsequently, *vide* letter dated 14.05.2013, the Engineer recommended extension for 208 days revising the date of completion as 11.08.2013. On 07.09.2013, the Engineer again recommended an extension of 201 days, revising the completion date to 28.02.2014.

76. The Tribunal, noting the EOTs recommended by the Engineer, held as under:-

> *"(iii) The contract stipulates under clause 2.1(v) of COPA that the Engineer has to obtain prior approval of the Employer before determining any Extension of Time under Clause 44. When the Engineer makes a recommendation for grant of EOTunder the above clause, the Employer has only two options: (i) approve the proposal as recommended or (ii) approve with changes giving reasons for the same. As the Engineer is the entity specifically appointed to be fully conversant with conditions al site and administer the contract correctly, the question of the*

Employer outrightly rejecting the recommendation of the Engineer does not
arise. In any case, the decision of the Employer regarding grant of EOT has to be conveyed to the Contractor within a reasonable time so as to facilitate smooth implementation and progress of the project. It is also essential that when EOTis granted, a revised date of completion is also fixed so that all parameters of the contract can be adjusted accordingly.
(iv) It may be seen from the above table that the first three EOTS amounting to 1065 days were granted by the Employer based on the recommendation of the Engineer. Thereafter the Engineer had recommended EOT for a further period of 1292 days against the EOT applications nos. 4, 5, 6 and 7, but there was no response from the Employer. It is difficult to understand the inaction of the Employer in this regard for a period of more than 32 years, which was in clear contravention of the provisions of the contract. The Employer also did not take any further action at any stage for grant of extension of time to the Contractor till the process of termination was initiated. As no eligible EOT was granted, time ceased to be the essence of this contract and time was set at large.
(v) In para 3(iii) of the Minutes of the meeting with the Minister of Road Transport & Highways held on 16.12.2014. (R-192, page 912 of RD-6) it is recorded as follows: 'The contractor sought extension of time for completion of the project upto March 2016. It was agreed that the contractor should complete the project by December 2015. Admissible extension of time as per-recommendations of Engineer / RO may be granted with escalation as per the contract. The Claimant requested for further EOT up to 31.03.2016 for completing the work and also submitted detailed programme for completion of remaining work vide document No.C-64 dated 15.05.2015 (pages 518-560 of SOC). However, neither the Engineer nor the Employer took any action for deciding and granting the EOT as per clear directions given in the MoM of the Minister's meeting, thus showing utter disregard and

dereliction of responsibility towards the interests of the project. The Contractor was thus denied even the outside chance of completing the project by December 2015.

(vi) The Respondent has argued that even though no formal approval was given by the Employer, the EOT as recommended by the Engineer should have been deemed by the Contractor to have been granted. This is an entirely fallacious and unacceptable argument. Without a properly granted EOT in place, no contractor can proceed with the work knowing that he is under constant threat of being adversely affected by various punitive provisions of the contract.

(vii) In view of the above, it is therefore evident that there have been serious laxity and lapses on the part of the Employer as well as the Engineer in the delays in execution of the project and the Contractor alone is not to blame for the ultimate fate of the project. Once it was decided in December 2014 that the completion date of the project should be extended to December 2015, and the Contractor should be given admissible EOT, in all fairness to the Contractor, he should have been intimated about the EOT immediately. Thereafter, concerted efforts should have been made by all the three parties concerned to ensure substantial progress, if not completion of the project in the remaining period of one year. This would have yielded a far better result than that obtained by hasty termination of the contract, which appears to have been carried out without any such efforts being made."

77. The Tribunal further examined the grounds raised by the appellant in support of the termination of the contract, and held as under:

"12.3.2.4 The contract was terminated by the Employer/Respondent vide letter dated 14.03.2016 (page 737, RD 5) stating that "the NHAI is satisfied that the Contractor has committed breach of the contractual provisions entitling the Employer/NHAI to terminate the contract under Sub-Clause 63.1(a), (b) (ii), (d), (f) and (h) of COPA"

The Clause 63.1 of COPA reads as follows:

63. Default of Contractor

The Employer shall be entitled to terminate the contract if the Contractor:

(a) Fails to carry out any obligation under the contract

(b) without reasonable excuse foils-

(ii) to proceed with the works, or any section thereof, within 28 days after receiving notice pursuant to Sub-Clause 46.1

(d) Abandons the work or otherwise plainly demonstrates the intention not to continue performance of his obligations under the contract

(f) Despite previous warning from Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the contract.

(h) Has foiled to furnish the required securities or extension thereof in terms of the contract.

12.3.2.5 In the light of all the material on record, each of the five grounds which have been cited by the Employer for terminating the contract are dealt with as follows:

A.63.1(a) Fails to carry out any obligation under the contract

(1) It is not clearly specified as to which obligation under the contract was not carried out by the Claimant. There is no doubt that the main cause for the disruption of this project was the refusal of the Employer to carry out its obligation to grant EOTs as and when they became due. Without these, the contractor was hamstrung in his efforts to proceed with the works.

(ii) As regards slow progress, there were several reasons for this which were clearly enumerated and recorded by the Engineer while recommending the grant of EOTs. The work under dispute involved 4-laning of the existing 2-lane highway. Generally in a work of this nature, the new 2-lanes are first built for the traffic to be diverted on them or on the service road before strengthening of the existing 2-

lanes is undertaken. It is thus necessary that the land for the new two lanes/service road is made available at the appropriate stages. TheRespondent's statement that 45 meters width of Right of Way in the existing 2-lane road was available at the start of work would not suffice. The stipulated schedule for handing over of the site as given at page 238 of Contract Agreement, was from 8 to 18 Kims at the start, from 18 to 30 Kms during the next 6 months (for main carriageway works) and from 0 to 8 Kms and from 18 to 30 Kins after 12 months. Thus the entire land in 30 Kms length was to be handed over on or before 12 months after the date of commencement, whereas the process of handing over of land to the Claimant continued upto 2013, i.e. even after 8 years from date of commencement. Thus, it is a fact that the main responsibility for delay in progress of the work lay with the Respondent.

(iii) It is also pertinent to note that at the time of termination, the Contractor had executed more than 70% of the work. From document RD 20 filed by the Respondent on 04.06.2018, giving value of work done against various IPCs, it can be seen that between September 2010 and March 2012 (IPCs 39 to 57), the Contractor had executed work worth about 60 crores. This indicates that given favourable circumstances the Contractor was capable of executing on an average, more than 3 crores of work per month.

(iv) Therefore, it cannot be stated with certainty that the contractor failed to carry out any obligation under the contract and hence this ground is not fully established.

B. 63.1 (b) without reasonable excuse fails-
to proceed with the works, or any section thereof, within 28 days after receiving notice pursuant 10 Sub-Clause 46.1

(i) In this connection, it is necessary to see the relevant portion of Clause 46.1 ofGCC, which reads as follows:

> *If for any reason, which does not entitle the Contractor to an extension of time, the rate of progress of the works or any Section is at any tone, in*

the opinion of the Engineer, too slow to comply with the Time for Completion, the Engineer shall so notify the Contractor who shall thereupon take such steps as are necessary, subject to the consent of the Engineer, to expedite progress, so as to comply with the Time for Completion

(ii) From the above, it can be seen that any notice pursuant to Clause46.1 can be issued to the Contractor only if (a) he is not entitled to any extension of time and (b) the Time for Completion is known against which the slow rate of progress can be measured. As mentioned earlier, in the present case, the Contractor was entitled to large extensions of time which were recommended by the Engineer but not granted by the Employer for more than 35 years. Because extensions of time were not being granted, the revised Time for Completion was also not fixed and hence, there was no way of measuring the rate of progress to decide whether it was slow or not. As such, notice pursuant to Sub-Clause 46.1 could not be issued to the Corrector. Consequently Clause 63.1(b)(ii) is not applicable at all and hence fails completely as a ground for terminating the contract.

C. 63.1 (d) Abandons the work or otherwise plainly demonstrates the intention not to continue performance of his obligations under the contract

(1) The contention of the Respondent that the Claimant had abandoned the site from 2012 and had demobilised its resources, in not home cut by the scrutiny of the Monthly Progress Reports (MPR) of September 2015 (R-295) page 1180 to 1190 (RD-7) and the MPRs of March 2015 and April 2016 (Page 1642-1645, RD-11) These show that substantial number of machines were available at site at the time of termination of the contract taking into account the balance work yet to be executed which was about 25% of the current price. Similarly some key engineers and other staff were available at site as can be seen from the MPR of February, 2016 (Page 1364-1369, RD-9). Therefore, the contention of the Respondent that the Claimant had abandoned the site, is not factually correct.

(i) On the other hand, it is seen that the Engineer had almost demobilised from the site. The Respondent itself had requested to the Engineer to re-mobilise at the site vide Minutes of Meeting dated 28.06.2015 (R-30), in pars & of which it is recorded as follows:
"M/s Louis Burger Group Inc to mobile all key personnel for supervision of the works in package AS-12 on priority. Till then, on alternative arrangement may be made from adjacent packages to supervise the works to avoid any inconvenience for smoothexecution of work in Pkg No AS-12. From this, it is clear that the Engineer had withdrawn from the site and none of his personnel were available to supervise the work.

(iii) The averment of the Claimant in Page 109 of the SoC that the Engineer expressed his inability to supervise the work vide letter dated 22.09.2014 is not specifically denied by the Respondent, it appears that even the Respondent was not giving serious attention to the administration of the contract during this period.
(iv) As mentioned in para (ii) supra, after the Minister's meeting in December 2014, the Contractor had shown willingness to carry out the remainder of the work, provided admissible EOT was granted to him and some other conditions such as direct payment to suppliers and release of pending payments were fulfilled by the MHAL However, there was no response or any action from either the Engineer or the Employer in this regard.
(v) in view of this, it would be incorrect to say that the Claimant abandoned the work and showed intention to continue performance of his obligations under the contract. Therefore, this ground is also not tenable.
D. 63.1 (f)Despite previous warning from Engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the contract.
(1) Against this Clause, the Respondent has failed to prove what obligation under the contract was persistently or flagrantly neglected by the Claimant. No specific instances

have been pointed out either in the Show Cause notice or in the Letter of Termination regarding any persistent or flagrant violation by the Claimant of any of the obligations under the Contract. On the other hand, it is seen that it was the Employer who persistently and flagrantly violated the Conditions of Contract as laid down in the Contract Agreement, by not granting legitimate EOT, as recommended by the Engineer, to the Contractor over a period of more than 35 years. This ground istherefore not sustainable.

E. 63.1 (h) Has failed to furnish the required securities or extension thereof in terms of the contract.

(1) Under this Clause, it is stated that the Bank Guarantee for Performance Security submitted by the Claimant had expired by 31.03.2015 and the Claimant did not furnish required securities thereafter. The contention of the Respondent is that it was the duty of the Claimant to extend the bank guarantee for further period.

(ii) The Performance Security to be furnished by the Contactor is stipulated in Clause 10.1 of COPA and the amount is specified in Appendix to Bic as 10% of the Contract Price. Further, Clause 102 of COPA states that the Performance Security shall be valid for 365 days after the expiry of the Defect Liability Period

(1) The Claimant's submission is that the Bank Guarantee in question furnished by the Claimant could have been encashed by the Respondent if the Claimant was not willing to extend it. The

Respondent neither sought extension of Bank Guarantees nor did it move to encash the BC. Also, the Claimant had already kept the Bonk Guarantees alive for almost 10 years. The period up to which the Claimant could be asked to extend the Performance Flack Guarantee, could have been determined only after a future date of completion had already been fixed.

(iv) It may be noted that since Extension of Time applications were pending before the Employer and not granted for many years and the question of DLP did not arise, it was not possible to define the period up to which the Bank Guarantees were to be extended In any event. nil other Bark. Guarantees were encashed by the Employer in January 2016 and hence, at the time of termination of the contract in April, 2016, the question of renewal of Bark Guarantee for Performance Security was of no relevance at all. In view of the above, mis ground is non-existent.

12.3.2.6 (i) Apart from the above, the letter of Termination suffers from the serious infirmity that it has not been signed by the authorised signatory as required under the contract. As pointed by the Claimant. The termination of the contract under Clause 631 OCC can be done only by the Employer, who is defined in the Contact Agreement is the Chairman NHAI, for which the following two clauses were cited: CT() () GCC-Employer" means the person named as such in part 2 of these conditions and the legal successors in title to such person, hot mot (except with the content of the Contractor) any assignee of such person page 42 of the Contract Agreement)
Cl. 1.1 (a) (1) COPA" The Employer is the Chairman National Highways Authority of India or his successors in office and assigns.(page 88 of the CA)
(ii) It is to be noted that the clause in COPA does not replace the clause in GCC and hence both are applicable. Taken together these clauses mean that in the present contract, the Employer is the Chairman NHAI only, as no consent of the Contractor has been taken for naming any assigns. There is also nothing on record to show that any official of the NHAT has been duly authorized to act as the assignee of the Chairman.
(iii) The Show Cause Notice and Letter of Termination, being most important documents having serious implications on the fate of the contract, should have been signed only by the Chairman or his assigns. However, they have been signed by Shri R.K. Thakur, GM (Tech), NHAI,

who is not the authorized signatory and hence they are invalid in terms of the contract.

(iv) The counter argument of the Respondent is that the contract and other documents are being signed by various officers of the NHAI with approval of the competent authority. In fact, the Claimant himself has addressed many letters to various officers of NHAI, other than the Chairman and in one case even addressed the officer as Employer. This implies that the Claimant has recognized and accepted the fact without demur, that officers other than the Chairman are also representatives and signatories of NHAI who are fully authorized to sign documents on behalf of the Employer. These arguments of the Respondent do not carry much weight. The fact that the Claimant has received letters from or addressed letters to variousofficials of the NHAI does not change the fundamental premise of the contract that the Employer is the Chairman, NHAI or his assigns only. The Respondent failed to produce any document to prove that Shri B.K. Thakur GM (Tech), NHAI, has been made the assignee of the Chairman. In any case, as per Cl. 1.1 (a) (i) GCC, this could have been done only with the consent of the Contractor, which has not been taken at any stage. The letter of termination does not bear the signature of the authorised signatory as required under the contract and therefore has to be treated as invalid.

12.3.2.7- To view of what if stated above, the AT comes to the conclusion that sufficient and inequitable grounds have not been established by the Respondent for terminating the contract and the Respondent itself cannot escape responsibility for the abrupt closure of the project. The AT therefore decides that the termination of the contract by the Respondent vide its letter dated 24.03.2016 was illegal and void."

78. As seen from the above, the Tribunal after examining the aspect of EOTs and the grounds of termination has held that the appellant cannot escape the responsibility for the abrupt closure of the project and that it

failed to establish sufficient and irrefutable grounds to justify the termination.

79. The Tribunal noted that as per the provisions of COPA, once the Engineer makes a recommendation for grant of EOT, the employer, i.e. the appellant, has only two choices – (i) to approve the proposal as recommended; or (ii) to approve the proposal with changes giving reasons for the same. In the present case, though the appellant approved the first there EOTs, it failed to provide any response with regard to the EOTs recommended after 06.03.2011. For more than 3.5 years, there was notable inaction on the part of the appellant, till the termination of the contract. It was observed that the appellant even failed to comply with the directions given in the minutes of the meeting with the Minster of Road Transport and Highways dated 16.12.2014, wherein the EOTs were directed to be granted along with escalation. As such, the respondent was denied even an outside chance of completing the project by December 2015.

80. Going by this, the Tribunal came to the conclusion that there has been serious laxity and lapses on the part of the appellant as well as the Engineer, and the respondent alone cannot be held liable for the ultimate fate of the project. Once it was decided on 16.12.2024 that the completion of the project should be extended to December 2015 and that the respondent should be given all admissible EOTs, failure to do so, needs to be attributed to the appellant.

81. Even the submission that has been raised before us on behalf of the appellant that the respondent failed to renew its bank guarantee which had expired on 01.04.2015, despite a mandatory requirement to extend the same mentioned in the MOU dated 05.04.2015, has been dealt with by the

Tribunal in Ground E reproduced above. After noting that as per Clause 10.2 of COPA, the performance security shall be valid for 365 days after the expiry of the DLP, the Tribunal held that since the EOTs were pending before the appellant for years, the question of a DLP did not arise, and as such it was not possible to define the period up to which the bank guarantees were to be extended. Further, in any event, all the other bank guarantees were encashed by the appellant in January 2016, and hence at the time of termination of the contract in April 2016, the question of renewal of the bank guarantee was of no relevance. Such being the conclusion of the Tribunal based on a factual finding, we are not inclined to accept this submission.

82. The Tribunal has dealt with in detail, the grounds raised by the appellant for terminating the contract. That apart, it noted that the termination suffers from an infirmity inasmuch as the letter of termination was not signed by the authorised signatory as required under the contract, i.e., the Chairman of the appellant-NHAI.

83. Upon a scrutiny of the above reasons recorded by the Tribunal, we find no infirmity with the conclusion of the Tribunal. The appellant has failed to put forth any justifiable reasons so as to warrant interference from this Court, insofar as the issue of termination is concerned under Section 37 of the Act.

84. Now we shall examine the issues with regard to Claims no. 1, 6, 7, 8, 9 and 11 raised by the appellant.

CLAIM NO. 1

85. Claim No. 1 is relatable to unpaid work already executed including escalation for an amount of ₹ 5,49,39,632/- and ₹ 3,50,47,342/-, totaling to

₹8,99,86,974/-, which was later amended to an amount of ₹ 31,41,35,273/-, *vide* order of the Tribunal dated 03.12.2018.

86. The submission of Mr. Mittal can be summed up as under:-

a. The Tribunal has not provided opportunity of being heard to the appellant on the amended claim no. 1 despite making specific request in that regard.

b. He had relied upon an email dated 07.02.2019, which a is request made by the counsel for the appellant to the Tribunal for hearing the amended claim no. 1 on merits based on the documents available with the Tribunal.

c. The observation of the Tribunal that the counsel for the appellant stated there is "*nothing more to say*" is completely misconceived as the said submission was made in respect of the amendment application, and not on the merits of the amended claim no. 1.

d. Mere non-filing of reply by the appellant cannot be construed to mean that the appellant has given up its right to argue the amended claim on merits.

e. Even otherwise, the Tribunal erred in adopting a random formula to arrive at the conclusion that unpaid work is 7.44%. Further, to award an amount of ₹ 22,41,48,299/- and also an additional amount of ₹8,99,86,974/-, is nothing but duplication.

f. There is no evidence or proof in support of the amount claimed of ₹8,99,86,974/-.

g. The conclusion in the award is based on the assumption that since balance work is shown as ₹ 51,51,93,861/-, which is about 23.59%, therefore, the work done would have been 76.41%. However, as the

respondent had not produced any proof of work done in the form of IPC, bills raised by it sub-contractor, proof of purchase of raw material, the Tribunal could not have arrived at the conclusion.

87. First, we shall consider the submission of Mr. Mittal that the appellant was not given any opportunity to make submissions on the merits of the amended claim. The conclusion drawn by the Tribunal can be seen from paragraphs A4, A5 and A6 at page no. 2150 of the paper-book, which we reproduce as under:-

> *"A.4 The AT, after concluding its 76th meeting, held on 07.02.2019 at New Delhi, wrote to both the Respondent and the Claimants, through its Presiding Arbitrator, Sri Ravindra Kumar, vide e-Mail dated 07.02.2019, that the Award has been finalised.*
> *A.5 After sending this e-mail, the AT received an e-mail dated 07.02.2019 from Sri Rajiv Kapoor, counsel for the Respondent on 08.02.2019, which stated that the amended Claim no.1 had to be discussed again in the light of amendments made. The Respondent also admitted that, though time was given to him to file its reply, however, he did not file any such reply, but sought to argue the amended claim orally now, based on the documents as available with the AT itself and thus requested the AT to fix some date for the same. In this connection, it is to mention that during the hearing held on 12.11.2018 both the parties had concluded arguments on the Amendment Application of the Claimant and both the parties had declared that they have nothing more to say. Even thereafter vide order dated 03.12.2018 of the AT, the Respondent was provided further opportunity to file amendments to its Statement of Defence in view of application of Claimant for amending Claim No. 1, if so considered necessary by the Respondent, within 10 days from the issue of the said order. No response, whatsoever, was*

received from the Respondent. A further opportunity was granted to the Respondent through the Minutes of Internal Meeting dated 17.12.2018 to file the amended SOD for which a further time of 7 days was allowed and it was mentioned that in case no response was received from the Respondent by 24.12.2018, it would be presumed that the Respondent had nothing further to say in this regard. No response was received from the Respondent and this fact was made clear through the minutes of internal meeting held on 07.01.2019.
A.6 In view of above, the said e-mail dated 07.02.2019 from the counsel of the Respondent cannot be understood and appears to have been given with the intention of delaying the Award. As such his request cannot be allowed for a further hearing at this stage. However, the AT has taken into consideration all the facts before it and arguments made by both the parties before publishing the Award."

88. It is a matter of record that a reply to the application for amendment was filed by the counsel for the appellant on 24.09.2018. Arguments were advanced on 01.10.2018 and on 29.10.2018. The counsel for the appellant commenced arguments against the amendment application on 31.10.2018, followed by arguments on 10.11.2018. The application for amendment was allowed *vide* order dated 03.12.2018. The conclusion drawn by the Tribunal is the following:-

"Findings / Observations of the AT
The AT after considering all the written and oral arguments put forward by both the parties, taking into account various High Court and Supreme Court Judgments cited and applying its mind to the matter, observes as follows:
(i) Section 23(3) of the Act provides that either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the

Arbitral Tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

(ii) Undoubtedly, the Amendment Application moved by the Claimant has been delayed. However, it is seen that, in general, Courts have been liberal in allowing amendments during the course of proceedings provided they do not cause injustice or prejudice to the other side.

(iii) The Claimant is willing to accept the quantification made by the Engineer of the work carried out till termination of the contract. The Claimant has taken a plea that it came to know about the quantification of the work carried out by it till the date of termination only on 04.06.2018, after receipt of Document RD-20 from the Respondent. However, AT notes from the document RD-4 dated 02.02.2018 filed by the Respondent that the fact about work carried out by it till the date of termination was already known to him through the said document. However, the fact remains that the Claimant failed to move this application earlier which he could have done. Inspite of the above position, the AT feels that it would not be correct to deny the amendment application of the Claimant in the interest of justice.

(iv) Considering all aspects, the AT comes to the conclusion that the Amendment Application dated 24.08.2018 moved by the Claimant for amending Claim No.1, under section 23(3) of the A&C Act needs to be allowed.

(v) As the Claimant is responsible for delay in moving the present Amendment Application, causing inconvenience to AT as well as the Respondent, the AT is constrained to impose costs of Rs. 30,000/- on the Claimant

9 Decision of the AT

9.1 The Application for Amendment of Claim No.1 moved by the Claimant under Section 23(3) of the Arbitration & Conciliation Act is hereby allowed.

> *9.2 The Respondent is directed to file amendments to its Statement of Defence as may be considered necessary by it within 10 days of the issue of this order. The Claimant is also directed to file amendments to its Rejoinder as may be considered necessary by it within 07 days of the receipt of amendments to its SOD by the Respondent as referred to above. It may please be noted that no extension of time whatsoever shall be given to either party beyond the dates indicated above."*

89. As seen from the above, the appellant was called upon to file an amended Statement of Defence within 10 days, i.e., before 12.12.2018. It appears that no such amended Statement of Defence was filed by the appellant. A further opportunity was given to the appellant *vide* internal minutes of the meeting dated 17.12.2018, whereby the counsel was granted 7 more days to file the amended Statement of Defence. It was mentioned that if no response was received from the appellant by 24.12.2018, it would be presumed that it had nothing further to add in this regard.

90. It appears that as there was no response from the appellant, on 07.02.2019, the Tribunal intimated the parties that it has finalised the award. On 08.02.2019 the Tribunal received a request dated 07.02.2019 from the counsel for the appellant to discuss the amended claim no. 1 afresh. We note that no stand has been taken by the appellant as to why the amended Statement of Defence was not filed between 03.12.2018 and 07.02.2019.

91. The case of the appellant is that despite receipt of the email dated 07.02.2019, the Tribunal did not grant the appellant an opportunity to argue on the merits of the amended claim no. 1, which amounts to violation of the principles of natural justice. The Tribunal in its award, stated that the appellant was given enough opportunity for its response by way of the order

dated 03.12.2018, wherein it was stated that no extension of time whatsoever will be provided to either of the parties. Still, an additional opportunity was given to the *vide* minutes of the internal meeting dated 17.12.2018 to file a response by 24.12.2018. As the appellant failed to file its amended Statement of Defence despite these opportunities, it cannot be said there is a breach of the principles of natural justice, particularly, when the appellant had almost two months to file its amended Statement of Defence. Suffice it to state, paragraph A-5 of the arbitral award reproduced above is self-speaking, and we agree with the same.

92. Now coming to the merits of the claim of the respondent for an amount of ₹ 31,41,35,273/-, the Tribunal has awarded an amount of ₹31,27,08,206/-. The breakup of the same is:

1. ₹ 16,24,73,398/- under the head 'for unpaid work already executed';
2. ₹ 6,16,74,901.88 under the head 'price adjustment'' and
3. ₹ 8,99,86,974/-, for the extra work executed and on account of variation as approved by the Engineer.

93. The plea of Mr. Mittal is primarily that no evidence was placed by the respondent in respect of the amended claim for ₹ 31,41,35,273/-. Further, he contended that awarding the amount of ₹ 8,99,86,974/-, is mere duplication as the said amount is already part of ₹ 31,41,35,273/-.

94. The Tribunal has granted the amount on the premise that the total value of work executed was 76.41%. This conclusion has been drawn primarily based on the documents filed by the appellant herein, R-132 (RD-4), R-134 and also RD-20.

95. Document R-132 (*at page 3167 of the appeal paperbook*) denotes that the physical and financial progress till August 2015 is 69.976% and 71.33%,

respectively. Having taken such a position taken before the Tribunal by filing the progress made in the work, the appellant cannot disown the same to contend the completion of work was much less than 71.33%. Further, a perusal of Document R-134 (*at page 3165 of the appeal paperbook*) filed by the appellant, reveals that the total value of balance of work remaining was ₹51,51,93,861.11/-, which, as held by the Tribunal, works out in percentage as 23.59%. If that be so, it follows logically that the amount of work actually executed was 76.41%.

96. It has come on record as per paragraph A-2 of the award that the total amount paid to the respondent up to April 2014 was ₹150,61,39,876/- as per Document RD-20 filed by the appellant itself on 04.06.2018. Though we could not find the said document on the record of this appeal, we note that it is on a perusal of this document, that the Tribunal had held that the appellant had paid a total amount of ₹150,61,39,876/- till IPC 73 for the period up to April 2014, which according to the Tribunal works out as 68.97% of the contract price. Hence, the Tribunal held that the value of the work executed but not paid is 7.441% (76.41% - 68.97%) of the contract price of ₹218,37,82,239/- which comes to ₹16,24,73,398/-. The Tribunal further worked out price adjustment as per Clause 70 of the contract to be 37.96% relying upon the price adjustment for the previous year, and arrived at a figure of ₹6,16,74,901.88/-. Therefore, it quantified the total balance amount due for balance work done under BOQ items till termination of contract at ₹22,41,48,299/-. Further it allowed ₹8,99,86,974 on account of extra work executed above BOQ rates, and on account of variations approved by the Engineer.

97. Since Claim No.1 was not pressed during the hearing before the

learned Single Judge, it is only before this Court that the appellant had effectively challenged the conclusion drawn by the Tribunal. As such, the above averments made in the petition under Section 34 of the Act also become relevant. We may reproduce the same as seen from paragraphs no. 56, 57, 58 and 59 of the petition before the learned Single Judge, as under:

> *"57. CLAIM N0.1: For unpaid work already executed including escalation: Rs. 8,99,86,974/-. At the outset, it was submitted that pursuant to termination Clause 63.2 of General Conditions of Contact (GCC), valuation of executed works at the date of Termination of the Contract is under process. The unpaid amount, if any, would be considered pursuant to Sub-Clause 63.3 of Condition of Particular Application (COPA).*
> *58. The calculation as done by the Respondent were emphatically denied and it was shown that there was no basis shown of the figures as to where these figures have been taken and no further document to establish that these figures are correct, has been filed on record as shown on page 186. Thus, these figures were disputed and the Respondent was put to strict proof thereof. Page 187 was not legible at all and could not be responded to. Thus, the claim being devoid of any basis and evidence deserves to be dismissed on this count alone. Therefore, the claim is not tenable.*
> *59. Interestingly, it is to be noted that even this statement, though it is denied, but an admission is carved out that the Respondent has done no work after May 2015 as June is a meagre work shown. However, this does not mean that the Petitioner is admitting the figures in any case and neither can the Petitioner be asked to verify the same nor to produce any document to support the claim of the Respondent as it is for the Respondent to build and prove its case and not the Petitioner."*

98. We must state here that in the appeal before us, the appellant has contended that the finding of the Tribunal that the respondent/claimant has completed 76.41% of the work is merely on surmises and conjectures, inasmuch as there was no IPC, measurement book, invoices, vouchers etc. to

prove that the respondent had actually achieved 76.41% progress. It has also been contended that there was no evidence on record to show that an amount of ₹150.61 crore has been paid to the respondent. Further, it has been submitted that the award is in contravention of Clause 63.4 of COPA which *inter alia* contemplates that there should be contemporaneous record to support any claim made.

99. Suffice it to state, the Tribunal has based its conclusion on the basis of the documents filed by the appellant itself, i.e., R-132, R-134 and RD-20. Though the appellant has raised a general contention that the award is not based on any contemporaneous records, the existence of the said documents has not been denied. In fact, no reference has been made to those documents in the petition under Section 34 of the Act and also in the appeal under consideration. We are of the view that the conclusion of the Tribunal based on these three documents is a plausible one. Nothing has been placed by the appellant before us to show that the conclusion drawn by the Tribunal is patently illegal or against the public policy of India. Therefore, the challenge to claim no. 1 is rejected.

CLAIM NO. 6

100. Claim No.6 is related to overheads due to overstay of the respondent on site, including manpower, labour, equipment and resources for the extended period from April 2008 to December 2015, which, according to the respondent/claimant goes to 95 months. The said claim was made on average overhead expenditure of 7% of the estimated value of work.

101. The Tribunal allowed the claim and awarded an amount of ₹35.15 crore in the following manner:

"F-1 The submissions made by the parties have already been recorded hereinbefore and the same are not being repeated here for the sake of brevity. Only salient issues are being deliberated upon.

F-2 In the above claim, the Claimant has claimed overhead charges during the prolongation period, considering that the same were catered for by him @7% of estimated value of work. Accordingly, he has claimed a sum of Rs. 48,40,71,752/- based on Hudson formula, detailed as under:-

Loss due to overhead=0.07xRs. 218,37,82,339/30 months x 95 months = Rs. 48,40,71 ,752/-

F-3 The Respondent has denied the claim in its entirety.

F-4 In his Rejoinder, the Claimant has more or less reiterated its contention as in its Statement of Claim.

F-5 The AT finds that the scheduled date of the completion of work was 05.04.2005 and the work was terminated by the Respondent on 29.03.2016. The Claimant appears to have claimed prolongation for 95 months considering almost the entire period between the scheduled date of completion and the date of termination. The AT is not inclined to agree that the Respondent alone can be held as responsible for the said delay. However, the Respondent himself has mentioned in its Statement of Defence on page 26 that the Engineer had recommended consolidated extension up to 24.09.2014. Although no decision was finally communicated by the Respondent on the said recommendation of the Engineer, it would be fair to consider that the Claimant was entitled for extension at least up to 24.09.2014. The period between the scheduled date of completion and 24.09.2014 works out to approximately 77 months. AT holds that the Respondent was responsible for the prolongation cost lo the Claimant for the above period of 77 months less 10% assessed as failure on the part of the Claimant in mitigating the losses, i.e. for a period of 69.3 months, say sixty nine months only. The rate of loss as projected by the Claimant is considered reasonable. Although the Respondent has objected to the applicability of the Hudson formula, the AT did not agree with the contention of the Respondent as the basis of Hudson formula has been held good by various courts or the country. Accordingly, it would be fair

and reasonable to Award a sum of Rs. 35.15 crores to the Claimant for the above claim, as worked out under:-
Loss due to overhead =0.07xRs.218,37,82,339/30 months x 69 months
= Rs.35,15,88,956/-
Say Rs. 35.15 crores
(Rupees Thirty Five Crores Fifteen Lakh only)
The revised figure of the claim for Rs. 53,78,51,738/- as projected by the Claimant in its affidavit dated 07.02.2018 is not being taken into consideration by the AT, while arriving at the said figure of Rs.35.15 crores."

102. The learned Single Judge has upheld the conclusion of the Tribunal, as can be seen from paragraph 5 *supra*. The learned Single Judge was of the view that the challenge made to the Award on Claim No.6 does not fall on the limited grounds available to the appellant under Section 34 of the Act.

103. The challenge before us primarily rests on the following grounds:

"O. Ld. AT completely ignored the fact that the Engineer's assessment of extension denied prolongation cost to the contractor due to its concurrent delays on the part of the contractor. The perusal of the award would show that there is no discussion in respect of concurrent delays as stated by the Engineer much less a finding on the same.
P. Ld. Single judge failed to appreciate that the award based on Hudson Formula and no other evidence has been set aside for lack of material on record, reliance is placed on:
- *Edifice Developers and Project Engineers Ltd v. M/s. Essar Projects (India) Ltd 2013 SCC Online Bom 5 [Para 8-11, 12(on profit)]*
- *Indo Nabin Projects Ltd v. Powergrid Corporation 2018 SCC Online Del 8405 [Para 11,12 &14]*

Q. The entire period could not be claimed by the Respondent, even if for the sake of arguments, it is taken that there were defaults on the part of the Appellant in handing over the said piece of site. Thus, the Hudson formula is not applicable at all, which would cater for a situation where the entire delay is

attributable to one party alone.
R. The Respondent has simply applied the formula mechanically without taking the realities into account. Besides, it is a settled law that the formula cannot be applied mechanically as it is and the person claiming must prove the losses and breaches of the other parties before it can claim any damages under the formula even."

104. The learned counsel for the appellant has submitted that prolongation costs were rejected throughout by the Engineer while recommending the EOTs citing concurrent delays on the part of the contractor on critical part including lack of manpower/machinery, machinery not mobilized, slow progress on available stretches and on structures, bridges etc. There is no discussion by the Tribunal as to why entire EOTs recommendation is synonymous with the delay on part of the appellant. Further, it has been contended that Hudson Formula is not applicable in cases of concurrent delay and also that the amount of ₹35.15 crore has been granted without any discussion or any basis, contrary to settled law.

105. The aforesaid being the submission of Mr. Mittal, it needs to be decided whether the claim relating to overheads due to the prolongation/extension is maintainable. Time to time, the Engineer had recommended EOTs, which were approved by the appellant till 06.03.2011 but not thereafter. One common factor that binds all the EOTs is the recommendation of the Engineer that the delay being concurrent, no prolongation costs or overhead costs were payable during the period of extended time. At no point of time did the respondent contest this conclusion of the Engineer that no prolongation costs or overheads were payable. In other words, the respondent had not contested that the delay in executing the work was concurrent and as such it shall not be entitled to prolongation

costs/overheads. No communication in this respect has been placed before us.

106. The respondent had continued executing the work during the prolongation period till 24.09.2014 without any demur or protest. Though, it is not urged by Mr. Mittal, we find that such an issue was not even raised before the Dispute Resolution Board (DRB). The justification put forth by the respondent is that the recommendations made by the Engineer are not binding on respondent/claimant and under Clause 2.6 of the GCC, such a determination is subject to challenge under Clause 67 which was done by the respondent/claimant by referring the prolongation claims before the Arbitral Tribunal. We are of the view that such challenge before the Tribunal was not maintainable, when no such challenge was made immediately after the issuance of the EOTs by the Engineer from time to time. The Tribunal could not have allowed the claims without considering and deciding the issue whether the Engineer was justified in holding that the delay was concurrent and as such the respondent shall not be entitled to prolongation cost.

107. This we say on the basis of the principles of acquiescence and waiver. The respondent did not challenge the EOTs recommended by the Engineer or seek a declaration that the Engineer could not have denied costs for the prolongation period as the prolongation was because of reasons attributable to the appellant. By knowingly sitting without any objection for years, the respondent had, by its own conduct, accepted the recommendations of the Engineer, including the rejection of prolongation/overhead costs.

108. Despite the appellant taking such a plea (*as seen from the Statement of Defence, page 1064 of the appeal paper-book*), the Tribunal has not

considered or dealt with the same, which is clearly untenable as it is expected of the Tribunal to deal with the submission advanced by a party before allowing the claim of the opposite party. Such a conclusion made without even considering the material submission made by the appellant demonstrates patent illegality, which goes to the root of the matter. Moreover, no prayer was made by the respondent challenging the EOTs to set aside the rejection of prolongation and overhead costs. In fact, we find that the learned Single Judge has also failed to address this issue in the petition under Section 34 of the Act.

109. As such, the conclusion of the Tribunal with respect to Claim No. 6 needs to be set aside.

CLAIMS NO. 7 AND 8

110. Claim No.7 is for increase in rate due to the extra stay on the work site, for an amount of Rs.11,86,74,618/-. Claim No.8 is for expenses incurred towards the prolongation cost as a result of working in the extended period of contract, quantified at Rs.63,37,75,829/-. In fact, the two claims arise from the prolongation of work from 2008 to 2016 when the contract was terminated. The learned counsel for the parties have put forth their submissions in support of their respective cases, as noted by us above. However, since both the claims arise from prolongation, our conclusion with regard to Claim No. 6 would necessarily have an impact here as well. The appellant while contesting Claims no. 7 and 8 had submitted before the Tribunal that the Engineer while recommending the EOTs categorically rejected all prolongation and overhead costs, as the delay is concurrent. As such, going by the principles of acquiescence and estoppel, having accepted

such recommendations of the Engineer, the respondent could not have raised the claims. The Tribunal has failed to even consider the submission of the appellant while deciding these claims, making the conclusion so drawn patently illegal and contrary to the public policy of India. The learned Single Judge while considering the challenge to Claim No. 8 in the petition under Section 34 of the Act has also failed to look into this issue. For this reason, the decision of the Tribunal with regard to Claims no. 7 and 8 also need to be set aside.

LIMITATION IN CLAIMS NO. 6 AND 8

111. At this stage, it is necessary to note that an issue of limitation has been raised by the appellant with regard to Claims No. 6 and 8. The contention of Mr. Mittal is that the cause of action for the respondent to raise Claims no. 6 and 8 arose when the appellant approved the third EOT, revising the date of completion to 06.03.2011. As the Engineer had rejected prolongation costs while recommending the three EOTs, any claim which relates back to a period prior to 06.03.2011 was time barred. However, we note that the appellant, in its Statement of Defence (*paragraph 28 to 45*), had submitted before the Tribunal that the cause of action arose when payment was deducted from the first IPC. Be that as it may, the conclusion of the Tribunal with respect to the issue of limitation is reproduced hereunder:

> *"12.4 LIMITATION:*
> *12.4.1 The submissions made by the parties have already been recorded hereinbefore and the same are not being repeated here for the sake of brevity. Only salient issues are being deliberated upon.*
> *12.4.2 The Respondent is vague in Para 28 of SOD while making his projection about the applicability of*

Limitation. In the said Para he has denied the claims also on the grounds, such as merit, non-adherence of contractual clauses, law of waiver and estoppels etc. He has contended that cause of action for the Claimant accrued when the amount was deducted from the first IPC. Further, Respondent has given reference of Section 43 of A&C Act, 1996 for applicability of the Limitation Act.

12.4.3 The AT does not deny applicability of the Limitation Act to arbitration proceedings also. However, the main issue is as to what is to be considered as date of cause of action. The contention of the Respondent that cause of action arose at the time of first IPC is not correct. It is an established law that any contractor can make his clans arising out of a contract at the time of submission of final bill, the stage for which did not come in the present case because of illegal termination of the contract by the Respondent. Further, the cause of action for initiating arbitration arises only when the claim is rejected by the concerned opposite party. There has been no occasion in this case in the above context. The claims in this case were projected by the Claimant under his letter dated 08.06.2016 (C-72 of SOC) to which there was no reply from the Respondent. Thereafter, the Claimant invoked arbitration vide his letter dated 06.08.2016 (C-77 of SOC).

12.4.4 Even, referring to clause 43 of A&C Act, 1996, it is provided therein that for the purpose of Limitation Act, an arbitration shall be deemed to have commenced on the date referred in Section 21 of the A&C Act.

12.4.5 Section 21 of the said Act states that date of cause of action for arbitration is the date on which the disputes are referred for arbitration to the opposite party, which is 06-08-2016 in the present case.

12.4.6 Thurs it is therefore apparent that the claims of the Claimant referred to this AT are well within the period of three years provided in the limitation Act and there is no violation of the same."

112. The Tribunal rejected the submission of the appellant that the cause of action arose at the time of the first IPC. It observed that it is settled law that a contractor can make its claims arising out of a contract at the time of submission of the final bill. In the present matter, since the contract was illegally terminated by the appellant, there was no occasion for raising the final bill. Further, it was held that cause of action for initiating arbitration arises only when the claim is rejected by the opposite party, which is not the case here.

113. Mr Mittal has attempted to argue before us that since the Engineer had rejected prolongation costs, Claims no. 6 and 8 are time-barred. However, we are not inclined to accept this argument, for the reason that such a submission was not raised either before the Tribunal or before the learned Single Judge. In fact, there is nothing on record to show that the issue with regard to limitation was raised at all in the petition before the learned Single Judge. It has been raised for the first time in this appeal under Section 37 of the Act. Be that as it may, even assuming that the claims were beyond the period of limitation, in view of our clear finding in Claims No. 6 and 8 that the respondent having accepted the rejection of prolongation costs, could not have raised the claims later, we find no reason to interfere with the conclusion of the Tribunal on the aspect of limitation. But we make it clear that the findings on limitation has no bearing on the finding given by us on the entitlement of the respondent to overheads and increase in the rate because of the prolongation, in view of the stipulations in the EOTs.

CLAIM NO. 9

114. Insofar as Claim No.9 is concerned, the same is for recovery towards the cost of confiscated machinery, material and other assets. The claim was

for ₹ 13,61,08,604/-. At the outset, it may be stated that the issue of prolongation and decision of the Engineer granting EOT without prolongation costs has no bearing insofar as this claim is concerned. The Tribunal has awarded a sum of ₹7,70,80,510/- while referring to certain judgments to hold that there is no wrong in accepting a formula based approach for assessment of the quantum of claims.

115. The Tribunal by comparing the documents CA-5 and CA-6 held that some of the items in CA-6 have not been considered, as there are some variations. The Tribunal after noting the fact that no evidence has been furnished by the claimant, on the basis of a fair assessment has awarded the said amount.

116. The case of the appellant before the Tribunal is that the confiscation is in terms of the contract and as such there is nothing illegal. This according to the appellant, is because the respondent was contractually required to complete the balance works and cannot seek refund of these goods under the garb of this claim. It was also contended that the claimant has made the claim in respect of machinery which also includes hired machinery from other agencies, but without producing any record to differentiate the two types of machinery. It is also stated that the respondent's claim is exaggerated by putting false and frivolous machinery to enrich itself. The documents CA-5 and CA-6 which have been produced by the respondent are different thereby belying the claim of the respondent as contradictory. That apart, it was represented that the claim for hired machinery is also without name of the suppliers and also without producing any bills of payment made by the respondent, on record.

117. We find that though CA-5 and CA-6 are charts filed by the respondent

referring to the value of the machinery. However, the date of purchase of the machinery and the bills in respect of said machinery and the bills of the entity which had lent the hired material to the respondent have not been placed on record. There is another aspect to this, which has been highlighted by the appellant. Many of the machinery in terms of the aforesaid documents were purchased in the year 2008 and the rate of depreciation as per the respondent itself being 13.91% per annum, during the time of termination of the contract in the year 2016, the value of the machinery would have been depreciated to *nil*.

118. The issue is even if the value of the machinery has depreciated to *nil*, whether the same shall have scrap /salvage value, which can be translated to monetary terms. The Tribunal, against the claim of ₹13,61,08,604/- has granted an amount of ₹7,70,80,510/- terming it a fair assessment. The Tribunal does not deal with the plea of the appellant that the depreciated value of the machinery would be *nil* on the date of date of termination of the contract. This itself is an infirmity in the award of the Tribunal. The Tribunal was required to deal with the said submission of the appellant at the first instance. It proceeds on the premise that the claim of ₹ 13,61,08,604/- is the depreciated value of the machinery and on that basis granted an amount of ₹7,70,80,510/-. Possibly, the appellant would be justified in saying that between the years 2008 and 2016, the machinery would have depreciated at the rate of 13.91% per annum, making it have *nil* value in 2016. In any case, the depreciated value of the goods cannot be ₹13,61,08,604/-, but the same shall surely have scrap/salvage value. Unfortunately, the conclusion drawn by the Tribunal is not on that basis. Even to conclude that the machinery has scrap/salvage value, which the

Tribunal has not done, there should be some basis.

119. The respondent failed to produce any evidence to show what the actual/depreciated value of the machinery, material and other assets were at the time of termination of the contract. In allowing the claim and awarding the amount of ₹7,70,80,510/-, the Tribunal acted without evidence. The law in this regard is quite well settled in terms of the decisions of the Supreme Court in ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***, wherein, after taking note of the judgments in the cases of ***ONGC Ltd. v. Saw Pipes Ltd.: (2003) 5 SCC 705, Hindustan Zinc Limited v. Friends Coal Carbonisation: (2006) 4 SCC 445, McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.: (2006) 11 SCC 181, Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.: (2006) 11 SCC 245, DDA v. R. S. Sharma & Co.: (2008) 13 SCC 80, JG Engineers (P) Ltd. v. Union of India: (2011) 5 SCC 758, Union of India v. Col. L.S. N. Murthy & Anr.: (2012) 1 SCC 718***, and ***ONGC Ltd. v. Western Geco International Ltd.: (2014) 9 SCC 263***, the Supreme Court held that when a Court is applying the "public policy" test to an arbitral award, it does not act as a Court of appeal and consequently, errors of facts cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers any arbitral award. However, it was also held that where-

(i) **a finding is based on no evidence**, or

(ii) an arbitral tribunal takes into account something irrelevant to the decision which would necessarily be perverse, or

(iii) ignores vital evidence in arriving at a decision;

such a decision would necessarily be perverse.

120. We are of the view that the conclusion arrived at by the Tribunal with respect to Claim No. 9 is perverse, as the same is without any basis or evidence or for that matter not even a plausible view. The conclusion drawn by the Tribunal is liable to be set aside.

CLAIM NO. 11

121. Claim No.11 is for the loss of profits that were to accrue to the respondent. The Tribunal has allowed the claim, holding that the respondent was deprived of earning profits on the execution of the balance work of ₹51,51,93,861/-, which it could not execute due to the illegal termination of the contract by the appellant. The respondent quantified its loss to be 10% of the aforesaid amount, which comes to ₹5,15,00,000/-. The Tribunal in paragraph K(5), instead of granting the amount of ₹5,15,00,000/-, has granted ₹4,63,50,000/-. As we have already upheld the conclusion drawn by the Tribunal that the termination of the contract by the appellant is illegal, the imperative consequence thereof would be that the respondent is liable to be compensated for the loss of profit caused by the illegal termination. To that extent, we agree with the conclusion drawn by the Tribunal. We do not see any reason to interfere with the same.

CONCLUSION

122. In view of the discussion above, we set aside impugned judgment of the learned Single Judge dated 26.04.2023. We also set aside the Award of the Tribunal dated 21.02.2019 to the extent of Claims No.6, 7, 8 and 9. The

2026:DHC:5137-DB

challenge made by the appellant to Claims no.1 and 11 of the Award is rejected.

V. KAMESWAR RAO, J

VINOD KUMAR, J

JUNE 18, 2026
M/RT