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

% *Judgment Pronounced on: June 09, 2014*

\+ **O.M.P. No.249/2014**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA
.....Petitioner
Through Ms.Preeti Mechan, Adv.

versus

M/S R.N SHETTY & COMPANY ..... Respondent
Through Mr.T.S.Doabia, Sr.Adv. with Mr.Sharan Thakur, Mr.Siddhartha Barua, Ms.Natasha Thakur & Mr.Siddharth Thakur, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), arising from the Arbitral Award (Majority) dated 13th November, 2013.

2. The petitioner NHAI and respondent/contractor, M/s. R.N. Shetty & Company, joint venture with Sunway Construction BHD entered into a Contract Agreement dated 28th February, 2002 for a sum of Rs.204.84 crores for the work of four laning and strengthening of 433 km to 495 km of Dharwad-Belgaum section of NH-4 in the State of Karnataka. As per the terms of agreement the date of

commencement of work was 12th April, 2002 and the date of completion was 11th October, 2004. As per the agreement, the contractor was to complete the construction of new two-lane carriage way along with the structures (Major and Minor bridges) on it and open the same for traffic by intended completion date of 11th October, 2004, i.e. 30 months from the date of commencement of the project work.

3. During the execution of work, disputes arose between the petitioner and the respondent contractor regarding additional cost arising from the compensation events as per Clause 44 and deduction of new royalty rates. The work could not be completed within the initial contract period but was completed on 10th June, 2007 (about 62 months from commencement date) and extension of time due to delays have been granted seven times till the completion of work without levying any liquidated damages, in the interest and early completion of the project to the respondent contractor as per the terms of the Contract Agreement.

4. The disputes between the petitioner and respondent contractor could not be resolved and the dispute on the claim of additional cost arising from the compensation events as per Clause 24.1 under Clause 24 of conditions of contract and the dispute on deduction of new royalty charges as per clause 24.1 under Clause 24 of conditions of contract were referred by the respondent contractors to the Dispute Resolution Board (DRB) and subsequently to the Arbitral Tribunal (Sh. N.R. Venkatesha Prasad, Presiding Arbitrator) for the

purpose of adjudication of claims of respondent. The learned presiding Arbitrator and Sh. K.S. Anantharamajah ('Majority') jointly have passed the impugned award dated 13th November, 2013 and Sh. K.N. Agrawal ('Minority') has passed a separate Award dated 13th November, 2013.

5. The claims raised by the respondent, first before the DRB and subsequently before the learned Arbitral Tribunal are as follow:

(i) Claim 1: Cost of overstay of equipments, towards the addition expenditure made and not recovered from the contract price and the price adjustment received towards the fixed charges of the machinery and plant for using the same in the extended period beyond the original intended date of completion.

(ii) Claim 2: (i) Additional overheads during the extended period beyond the original intended date of completion; and (ii) Loss of Profit at 10% for the extended period beyond the original intended date of completion.

(iii) Claim 3: Incremental Rates for certain BOQ items on account of being on site for an extended period beyond the original intended date of completion being the difference between the prime cost of actual rates worked out on the date of expiry of the original date of completion, minus the payment already received as per the rates in force during the original period.

(iv) Claim 4: Interest on the amounts allowed and determined by the Arbitral Tribunal

(v) Claim 5**:** (i) Refund of Royalty charges recovered in excess of the rates that prevailed at the time of tendering in December, 2001; and (ii) Payment of interest on the above refund amount from the date of claim to the date of payment**.**

6. After having gone through the pleadings of the parties and oral submissions, the learned Arbitral Tribunal was pleased to partly allow the claims of the respondent and passed the Arbitral Award on 13th November, 2013.

7. The claims raised by respondent/contractor and the amount awarded by the Arbitral Tribunal is as under :

Claim No.	Brief of Claim	Amount in Rs.in Crore		
		Claimed by the Respondent Contractor (In Rs.)	By Majority Award (In Rs.)	By Minority Award (In Rs.)
1.	Cost of overstay of equipments	Rs.35,57,01,412/- This amount was reduced to Rs.26,54,16,956/-	Rs.26,54,16,956/-	
2.	(i) Additional overhead cost (ii) Loss of profit	Rs.22,95,00,000/- Rs.21,84,90,000/-	Rs.13.316 crores Rs.2,01,37,012/-	
3.	Payment of incremental rates for certain BOQ items	Rs.66,92,05,495/- This amount was reduced to Rs.65,43,12,894/- during the Arbitral proceedings by the Respondent Contractors	Rs.23,15,00,058/-	
4.	(i) Payment of interest @ 12% p.a. on claimed amounts in items 1 to 3 from the date of claim to the date of award.	-	Payment at 12% simple interest p.a. on claimed amounts in items 1 to 3 from the	

			date of claim to the date of award.	
	(ii) Payment of interest @ 18% p.a. from the date of award to the date of payment on all the amounts claimed at items 1 to 3 and 4 (i), from the date of award to the date of payment.	-	Payment @ 18% simple interest p.a. from the date of award to the date of payment on all the amounts claimed at item 1 to 3 and 4 (i) from the date of award to the date of payment in accordance with the provision under section 31(7)(b) of Arbitration & Conciliation Act, 1996.	
5.	(i) Refund of Royalty amount recovered in excess of the royalty rates which were prevailing at the time of bidding. (ii) Payment of interest at 12% p.a. on the amount of Rs.1,79,78,915/- from the date of claim to the date of award. (iii) Payment of interest at 18% p.a. on all the amounts awarded under items 5(i) and (ii) above, from the date of award to the date of payment.	Rs.1,79,78,915/- - -	Rs.77,90,375/- 12% on Rs.77,90,375/- 18% simple interest p.a. from the date of award to the date of payment on the awarded amounts for claims 5(i) and 5(ii).	

8. At the time of hearing, petitioner's counsel has mainly argued that in the absence of evidence, additional cost as compensation to the respondent ought not to have been granted. There is no justification for allowing the claims of additional cost. The impugned

award, thus, is liable to be set-aside on this ground. On other claims, hardly any submissions are addressed by the learned counsel for the petitioner.

On the other hand, Mr.T.S.Doabia, learned Senior counsel appearing on behalf of respondent has refuted the submissions of the petitioner's counsel and argued that there is sufficient evidence produced by the respondent before the learned Arbitral Tribunal who have very carefully dealt with the same and then rendered their finding.

9. Let me now discuss the issue in hand in this regard. Firstly, I shall take the issue of additional cost. The said claim was allowed partly towards additional cost. The learned Arbitral Tribunal has given the following findings after discussion of evidence available on record:

> **The delay in the completion of the work was caused on account of the failures and defaults of the petitioner in fulfilling its contractual obligations.**

The learned Arbitral Tribunal has arrived at a finding of fact at several instances in the arbitral award that the responsibility for the delay in the completion of the work of the failure and defaults of the petitioner. The said findings have been concisely summarized at paragraph 4.5.0 of the arbitral award which is as under:

> "In view of our findings at paras 4.3.1, 4.3.2, 4.3.3 'C' and 4.4.0, the Respondents failed to hand over the site to the Claimants as stipulated in Clause 21 of the conditions of contract read with Clause 18 of contract

> data, instead, the site was made available in bits and pieces both in the contract period and in the extended period, and the Respondents had to withdraw a portion of the work in the contract due to the Respondents failure to solve land problems in those reaches at the time of granting fourth extension of time. The extension of time belatedly granted in four spells are attributable to the Respondents. The Claimants had to work with un-certainty and had to move men and machinery from one location to other as and when the work fronts were made available resulting in low productivity and idling. The Claimants had no other option. Under the circumstances and in view of foregoing findings the Respondents are responsible for delays, i.e. breaches of contract, preventing performance of contract leading to abnormal extension of time of 32 months and making good consequent losses to the Contractor by way of turn over etc., and therefore we hold that the Respondents are responsible for several breaches of contract as discussed above…"
>
> (Emphasis supplied)

10. The additional cost suffered in the extended period is payable to the respondent both under the express conditions of the contract agreement as also the law of the land.

The learned Arbitral Tribunal has come to its conclusion that the respondent is entitled to be compensated the 'additional cost' or increased contract price in the extended period of the contract as the defaults committed by the petitioner led to the emergence of 'compensation events' that entitled the respondent to be recompensed. The claims for over-stay of machinery, over-heads, incremental rates for certain BOQ items etc., have all been claimed

only on the basis of the additional cost that has been caused. The learned Arbitral Tribunal has recorded in the Award that specific provisions in the contract expressly entitle the Respondent to this 'additional cost'. The said findings are mentioned in para 5.0.1 of the Arbitral Award; the same are as under:

> "In view of our findings in paras herein before we are of the view that the Claimants are entitled for increased contract price in the form of compensation under clauses 28.1, 28.2, 44.2 of conditions of contract and sections 53, 54, 55 and 73 of the Indian Contract Act, 1872....." (Emphasis supplied)

The relevant contract clause in this regard is clause 44.2 which is reproduced hereunder:

> "If a compensation event would cause additional cost or would prevent the work being completed before the intended Completion Date the Contract price shall be increased and/ or the intended Completion Date is extended. The Engineer shall decide whether and by how much the contract price shall be increased and whether and by how much the intended Completion Date shall be extended." (Emphasis supplied)

11. The submission of the petitioner is that the learned Arbitral Tribunal has come to the conclusion that the respondent to certain extent is also responsible for delaying the work as its performance was not up to the mark and despite of said finding the claim was awarded in favour of the respondent. There is no force in the submission because of the reason that at the same time, it was also recorded that extension of time has been granted by the petitioner itself till the date of completion of the work and without imposition of

any liquidated damages on the respondent. The land was not made available to the respondent by the petitioner, then the delay in handing over the land is the 'governing delay' and no other alleged contemporaneous short-fall on the part of the respondent is of any relevance in determining as to who is at fault. In case the respondent were to perform all its obligations under the contract without any short fall or default, the work could still not be proceeded with on account of the non-availability of land. Therefore, the said findings are correct as governing delay of the non-availability of land, the burden of delay and its consequences cannot be put upon the respondent when the responsibility for the delay in the completion of the work lay at the doorstep of the petitioner. The said details are available.

12. The other submission of the petitioner before the learned Arbitral Tribunal was that the minute the notification under section 3(a) of the National Highway Act, 1956 was issued, the land vested with the petitioner was handed over to the respondent at that very instant. Therefore, the respondent cannot complain that the site was not handed over to in time by the petitioner.

The learned Arbitral Tribunal has found that in some areas the notification themselves were issued later in time. The Arbitral Tribunal has also come to the finding that despite the requisite notifications having been issued, the land was not in the possession of the petitioner due to lapses on the part of the petitioner in performing fundamental obligations under the land acquisition process like paying compensation to the affected land owners. The Arbitral

Tribunal has referred admitted joint statements signed by the petitioner, the respondent and the Engineer where the petitioner has categorically admitted the fact that land disputes plagued various stretches of the land whereby the respondent was prevented from carrying out the work. The Arbitral Tribunal has noticed that even the grant of the majority of the extension of time was explicitly on account of land problems. The findings of the Arbitral Tribunal in this regard are available at paragraph No. 4.3.1 of the Arbitral Award. The relevant findings arrived at by the Arbitral Award are being reproduced hereunder for ease of reference:

> "As on 15.4.2002, 10 Km. stretch of land had not been handed over by the Respondents to the Claimants as seen in the minutes of the meeting held on 15.4.2002, drawn by the Engineer vide page 699 of Rejoinder-2. Even on 7th May 2002, the said 10 kilometers had not been handed over by the Respondents as seen in the minutes of the meeting held on 7th May 2002 drawn on 8th May 2002 by the Engineer page 750 of Rejoinder-Volume 2. As seen in the letter dated 22nd July 2002 page 787 of Rejoinder Volume-2 addressed to the PD, NHAI, Dharwad, the villagers at Km. 436 near Mummigatti had stopped the work of clearing the grubbing activities for want of payment of compensation for the land acquired and the Engineer has requested the Respondents to pay compensation for the land acquired and the Engineer has requested the Respondents to pay compensation to the concerned villagers so that the Claimants can proceed with work at site. As per the contract agreement, the Respondents should have handed over a stretch of 10 Kms length of road on 12.4.2002, another stretch of 10 Kms length of road on 12.7.2002, and another stretch of 30 Kms length of road on 12.10.2002, and

the balance stretch of 12 Kms length of road on 12.1.2003. Whereas the first and second 10 KIms length of road in bits totaling to 10 Kms lengths were handed over on 11.12.2002 and 28.2.2003, 30 Kms length of road was considered as handed over on 10.7.2033 being the date of payment of compensation and the balance 12 Kms length of road was handed over on 31.12.2003 page 1106 of Rejoinder-3. The joint statement signed by Respondents, Engineer and the Claimants showing the status of land problems etc as on 15.1.2003 pages 1123 to 1127 of Rejoinder Volume-3 indicate that land problems were existing of several stretches of the road from 434 Km to 495 Km. The Claimants references from 20th July 2002 to 17th November 2003 with enclosures, pages 1133 to 1227 quoted at page 1107 of Rejoinder Volume III indicate that there were land problems etc on account of non-payment of compensation to the land owners and the contractors were prevented from carrying out the work. The minutes of the meeting Variation Committee dated 9.1.2005 C-2 page 105 enclosed to the letter dated 8th April 2005 C-2 page 102 communicating the extension of time up to 18.11.2005 indicates that the major delay of 158 days caused was due to the land acquisition and temporary obstructions among other events. The recommendation of the Engineer for extension to time up to 15th May 2006 C-2 Pages 113 to 115 enclosed to the minutes of variation committee of NHAI C-2 page 114 which granted extension of time up to 15th May 2006, C-2 page 114, indicates that the land disputes on the obstruction of service road and diversion, was cleared on 6th December 2005 which is after the expiry of 18 days from the first extension of time granted up to 18.11.2005. The recommendations of the Engineer dated 24.5.2006 C-4 pages 121 which granted extension of time upto 22.11.2006, indicates that there was land problem at nine locations as on 24.5.2006. The Engineers letter dated 15.12.2006

addressed to the Claimants C-5 pages 129-130 indicate that the Engineer has admitted that there was land compensation disputes at seven locations as on 15th December 2006. The letter dated 26th May 2007 of the Engineer addressed to the Respondents C-6 Page 132 indicates that the work of a portion of the service road was deleted where outstanding land disputes existed while recommending extension of time up to 10th June 200. Therefore, the contention of the Respondents that they had handed over the ROW along with the land for construction of new carriageway of the entire work to the Claimants on12.4.2002 and 12.6.2002 does not deserve any credence as the said dates are prior to the dates of 3D notification i.e. 17.5.2002 and 10.7.2003 and in the absence of records for having taken over the possession of land from the land owners legally or otherwise, as also the admissions made by the Engineer about the obstruction by the land owners during execution of the work to the land owners and consequent delay in making available the land as per terms of agreement, and the Respondents contention is rejected." (Emphasis supplied)

13. Under the contract, the petitioner has an obligation to hand over the site on which the work is to be performed. The petitioner, due to various reasons as mentioned in the award, was not able to handover the land in question to the respondent in time. The Arbitral Tribunal held that the respondent is not responsible for un-encumbering the land and removal of encroachments but it is only responsible to 'co-ordinate' which includes initial and frequent follow up meetings/actions/ discussions with each involved service provider/concerned authorities.

14. The said findings are mentioned at paragraph 4.3.2 (a) of the arbitral award. The same are read as under:

> "As per para 2 under item No. 18 of the contract data the contractor is responsible only to coordinate with service provider/concerned authorities for cutting of trees shifting of utilities and removal of encroachments and making the site unencumbered from the project construction area for completion of work, which includes initial and request follow up meetings/ actions/discussions with, each involved service provider/concerned authorities. Payment for removal encroachments etc by the service providers will be made by the Employer (Respondents). Therefore the Claimants are not responsible for un-encumbering the land and removal of encroachments but there are responsible only to co-ordinate which includes initial and frequent follow up meetings/ actions/ discussions with each involved service provider/concerned authorities, on which activity the Respondents have not complained against the Claimants. The contention of the Respondents that the Claimants are responsible to remove the encroachments etc., when once the land is handed over, as per clause 21 of the contract agreement read with item 18 of contract data is not correct."

15. The learned Arbitral Tribunal has discussed the claims raised by the respondent after long discussion of evidence. The relevant item wise claim raised and conclusion arrived at are mentioned below.

16. i) **<u>Claim No.1: Cost of Overstay of Equipment</u>**

For the claim towards cost incurred towards over-stay of equipment, the Ld. Arbitral Tribunal has traversed the evidence in

detail. The aspect of the existence of the relevant evidence has been concisely stated at paragraph 5.1.4 (b) (E) of the arbitral award as under:

> "Regarding the stand taken by the respondents that the claimants have not adduced any evidence to prove that only the essential machinery required to execute the balance work as per scope of work was positioned at site and was removed from site when not required, we observe that the Claimants have submitted the number of machinery and equipment that would be deployed on the work if the offer is accepted in application Form No.6 page 274-A-3 along with the bid documents. Subsequently, after the award of work, the Claimants have worked out the machinery and equipment required as per the program approved by the Engineer and accepted by the Engineer as seen in the monthly progress report of May 2002 prepared and reported. R-19 page 319. The number of machinery and equipment deployed on the work is enclosed to the monthly progress reports stating from November 2004 to 2006 furnished by the Engineer to the Employer vide C-12 at pages 167 -191. The joint statement of the machinery deployed at the site prepared jointly by the Respondents and Claimants and signed by them shows the number of machinery deployed from June 2002 to May 2007 vide R-16 at pages 1-5. It is seen that the number of machinery at site has increased from June 2002 to up to January 2005 and decreased from February 2005 to May 2007 and the extension of time up to 110th June 2007 vide C-5 on pages 124 -131 is granted. The respondents have failed to substantiate their contention with any proof. We are therefore unable to agree that there is no evidence so far as the quantum of deployment of machinery is concerned. (Emphasis supplied)

ii) **Claim No.2(a): Cost of additional over-heads**

For the claim towards cost incurred towards additional over-heads, the Ld. Arbitral Tribunal has traversed the evidence in detail. The said aspect of the existence of the relevant evidence has been concisely stated at paragraph 5.2(a)(3)(10) of the arbitral award as under:

> "We have considered the arguments and the counter arguments made by both the parties and also the documents placed before us by them including the Hudson's formula. The MORTH Data book published by the I.R.C. on behalf of the MORTH, Government of India gives the rate analysis for road and bridge works as also overhead component. The information regarding the constituents of the overheads is also submitted by the Respondents. We have come to the conclusion that there have been serious delays and defaults committed by the Respondents and as a result, the Claimant was forced to stay on the work for a much longer period of 32 months after the expiry of initial contract period of 30 months as already stated. Obviously, the Claimant was required to incur expenditure on overheads both in the offices and also at the site for a longer period than actually required. If the Respondents had fulfilled the contractual obligations, this avoidable situation would not have arisen at all." (Emphasis supplied)

The learned Arbitral Tribunal has awarded a lesser amount under the over-heads as claimed by the respondent. In this regard, the learned Arbitral Tribunal has held as under in paragraphs 10, 11 and 12 as under:

> "The MORTH data book stipulates overhead percentages of 8% for roads and 25% for bridges. In the instant case, the work consists of both road work as well as minor and major bridges. In respect of the minor bridges, the percentage of overhead is given as 20% and in respect of rehabilitation of bridges, it is mentioned as 30%.
>
> Considering all the above factors in totality, we are of the view that the contractor is entitled to over head expenditure at 8%.
>
> In view of the diversified stands taken by the Claimants and the Respondents on the quantification of the claim we have computed the amount on this claim. The computations are at Annexure – CAL-4 of Vol. II. The additional expenditure computed as above is Rs. 13.31 Crores against the claimed amount of Rs. 22.95 Crores and the expenditure of Rs. 34.50 Crores shown in Chartered Accountants certificate which amount was reduced to Rs. 23.85 Crores after review, based on the Respondents observations."
>
> (Emphasis supplied)

iii) **Claim No.2 (b): Loss of Profit**

The learned Arbitral Tribunal has only awarded the relief of damages in the form of interest as there was delay in earning the profit by the respondent as the work had to be executed beyond the original date of completion, for which the petitioner alone was responsible as held by the Arbitral Tribunal.

iv) **Claim No.3: Cost of Incremental Rates:**

For the claim towards incremental rates for certain BOQ items, the Ld. Arbitral Tribunal has discussed the evidence in detail who

have noticed the validity of the claim of the respondent at paragraph 5.3.3 (7) of the arbitral award, the same are as under:

> "While recommending for grant of extension of time, the Engineer has not said that the extension of time is granted without any financial implication. Both the Respondents and the Engineer were fully aware that the Claimants have mentioned about the claim regarding the financial implication. None of the communications in which EOT is accorded, contained rebuttal of this claim compensation. The loss has been substantiated and quantified. The clause 47 of the conditions of contract provides for the contract price adjustment as per the formula which is a function of increase or decrease in WPI. The difference between the adjusted price of the BOQ rates according to the formula and the actual rise or fall in the rate has to be absolved by either party accordingly only in the original stipulated completion period of 30 months. The Claimants are not expected to factor for any contingency either directly or indirectly to take care of these changes and nor expressed in the contract, nor the Claimant is deemed to absolve for any contingency beyond the intended date of completion. The stipulation in Clause 47 of conditions of contract, that "The contract price shall be adjusted for increase or decrease in rates and price of labour etc., "means that the C.P. will be increased or decreased as the WPI increases or decreases. Whereas the stipulation in clause 44.2 of conditions of contract, that "If a Compensation Event would cause additional cost or would prevent the work being completed before the intended completion date the contract price shall be increased and/or the intended completion date is extended, "Which means that increasing of the contract price is mandatory, if a compensation event would cause additional cost, even within the stipulated intended date of completion or "would prevent the

> work being completed before intended completion date." Any event or circumstance, as per clause 32 of condition of contract requires increase of the contract price or even if the contractor accelerates the work by putting additional efforts / resources to complete the work within the intended completion period. The Clause 47 of conditions of contract does not have any relationship to the Clause 44 of conditions of contract." (Emphasis supplied)

The aspect of the existence of the relevant evidence and the admission of the petitioner is mentioned at paragraph 5.3.3 (13) of the arbitral award, which read as under:

> "The Claimants have claimed Rs.66,92,05,459/-Vide C-17 on page 257. The Respondents have furnished a statement for 18 BOQ items, showing the BOQ rates, the rates worked out by the Respondents with reference to Dharwar NH circle for the year 2003-2004 stating that the rates worked out by the Claimants are very much on the higher side. Based on the observations of the AT, the Respondents have work out the new rates for 18 BOQ items, for the year 2003-2004 without prejudice to their stand that the claim is not supported by any provisions of the contract and have furnished the comparative statement showing the rate as in BOQ, as worked out by NHAI and as worked out by the Claimants vide R-30 on page 488. The Claimants modified their Claim of Rs.66,92,05,459/- vide C-17 on page 257 to Rs.65,43,12,894/- vide C-81 on page 2604 by the Claimants based on the oral comments of the Respondents and the AT. As per the observations of the AT in its 14th and 15th meetings, the Respondents have furnished the rates for the 18 BOQ items considering the observations of AT R-37 page 760-806. A comparative statement of BOQ rates,

> Claimants rates as claimed in C-17 page 260, the rates calculated by NHAI in R-30 and the rates calculated by NHAI as in R-37 is also furnished by Respondents R-37 page 761. The Respondents have furnished their observations on the submissions of the Respondents in C-79 pages 2543-2544. The Respondents have furnished the joint statement of incremental rates and the amount of claim which works out to Rs.23,15,00,058/- in R-42 pages 950-991 duly signed by both the parties as desired by the AT, and this is without prejudice to the stand of the Respondents' that the claim of the Claimants is not admissible, and the stand of the Claimants that their claim of Rs.65,43,12,894/- is just and reasonable and deserves to be awarded. The Claimants have also cited instances to show that the prices that had prevailed at the time of bidding and the prices that prevailed beyond the original contract period. This reveals that there are increases of prices after the expiry of the original contract period of 30 months." (Emphasis supplied)

For the claim towards cost incurred towards increased rate of royalty, the Ld. Arbitral Tribunal has discussed the evidence in detail. The learned Arbitral Tribunal has noticed the basis for awarding the claim of the Respondent at paragraph 5.5.3 (6) of the arbitral award. The same is as under:

> "We have determined the extra liability of the claimants, towards the Royalty charges on account of the delay in completion of the work for the reasons attributable to the Respondents, by working out the difference between the amount of liability of the claimants towards the royalty, that has been incurred due to grant of extension of time for the reasons attributable to the Respondents and the amount of liability towards royalty, if he was allowed to carry out

> the work without any hindrance and completed the work within original date of completion as per program as under…" (Emphasis supplied)

v) **Claim No.5: Refund of Royalty Rates:**

For the claim towards refund of the cost incurred towards increase in the rates of royalty over and above the rates prevailing at the time of tendering, the Ld. Arbitral Tribunal has referred the evidence in detail. The Ld. Arbitral Tribunal has awarded only the difference between the amount of liability of the respondent towards the royalty that had been incurred due to grant of extension of time for the reasons attributable to the petitioner and the amount of liability towards royalty, if the respondent had been allowed to carry out the work without any hindrance. The learned Arbitral Tribunal has given the reasons on the basis for awarding the claim of the respondent at paragraph 5.5.3 (6) of the arbitral award. The same are referred as under:

> "We have determined the extra liability of the claimants, towards the Royalty charges on account of the delay in completion of the work for the reasons attributable to the Respondents, by working out the difference between the amount of liability of the claimants towards the royalty, that has been incurred due to grant of extension of time for the reasons attributable to the Respondents and the amount of liability towards royalty, if he was allowed to carry out the work without any hindrance and completed the work within original date of completion as per program as under…" (Emphasis supplied)

The learned Arbitral Tribunal has held in this regard at paragraph 5.3.3 (12) of the arbitral award as under:

> "We agree that there is no provision in the agreement to revise the BOQ rates but to determine the loss on account of compensation events there is provision for increasing the contract price under Clause 44.2 of conditions of contract by the Engineer. As the Engineer failed to determine the loss on account of compensation events to increase the contract price, the Claimants approached the DRB which gave the guide lines for determining the loss on account of compensation events. Accordingly the Claimants have determined the loss in the form of incremental cost, by working out the rates for BOQ items using MORTH standard Data analysis adopting market rates excluding the overheads and profits and deducting the BOQ rates as in the contract agreement as also the overheads and profits. The incremental cost thus derived is towards the increase in the contract price."
>
> (Emphasis supplied)

17. The respondent had restricted the claim only to the additional cost suffered by it. As per award, the Arbitral Tribunal has awarded only the amount which has been verified by the petitioner itself as the correct estimation of the additional cost incurred by the respondent and filed as Exhibit R-42 before the learned Arbitral Tribunal. The respondent had excluded from the claim the elements of overheads and profits in order to avoid duplication in the claims. The petitioner had objections only towards the maintainability of the claim, which objection was rejected in view of provision in clause 44.2 of the contract agreement.

18. The aspect of the existence of evidence and the admission of the petitioner has been mentioned at paragraph 5.3.3 (13) of the arbitral award, the details of the same are as under:

> "The Claimants have claimed Rs.66,92,05,459/-Vide C-17 on page 257. The Respondents have furnished a statement for 18 BOQ items, showing the BOQ rates, the rates worked out by the Respondents with reference to Dharwar NH circle for the year 2003-2004 stating that the rates worked out by the Claimants are very much on the higher side. Based on the observations of the AT, the Respondents have work out the new rates for 18 BOQ items, for the year 2003-2004 without prejudice to their stand that the claim is not supported by any provisions of the contract and have furnished the comparative statement showing the rate as in BOQ, as worked out by NHAI and as worked out by the Claimants vide R-30 on page 488. The Claimants modified their Claim of Rs.66,92,05,459/- vide C-17 on page 257 to Rs.65,43,12,894/- vide C-81 on page 2604 by the Claimants based on the oral comments of the Respondents and the AT. As per the observations of the AT in its 14th and 15th meetings, the Respondents have furnished the rates for the 18 BOQ items considering the observations of AT. R-37 page 760-806. A comparative statement of BOQ rates, Claimants rates as claimed in C-17 page 260, the rates calculated by NHAI in R-30 and the rates calculated by NHAI as in R-37 is also furnished by Respondents. R-37 page 761. The Respondents have furnished their observations on the submissions of the Respondents in C-79 pages 2543-2544. <u>The Respondents have furnished the joint statement of incremental rates and the amount of claim which works out to Rs.23,15,00,058/- in R-42 pages 950-991 duly signed by both the parties as desired by the AT,</u>

> and this is without prejudice to the stand of the Respondents' that the claim of the Claimants is not admissible, and the stand of the Claimants that their claim of Rs.65,43,12,894/- is just and reasonable and deserves to be awarded. The Claimants have also cited instances to show that the prices that had prevailed at the time of bidding and the prices that prevailed beyond the original contract period. This reveals that there are increases of prices after the expiry of the original contract period of 30 months."
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> (Emphasis supplied)

19. It is submitted by the respondent that due to various defaults and breaches of the contract agreement on the part of the petitioner, the progress of the work was delayed and the work could not be completed within the initial contract period but was finally completed only on 10th June, 2007 (about 62 months from the commencement date). The extension of time for completion of the work was granted to the respondent by the petitioner till 10th June, 2007 as per the terms of the contract agreement, without levy of any liquidated damages. Disputes arose between the petitioner and the respondent regarding additional cost arising from the compensation events as per clause 44 in as much as the respondent had to stay and perform work on the site for a total period of about 62 months i.e. more than double the originally stipulated period of 30 months, resulting in extended stay of about 32 months.

20. The dispute also arose pertaining to deduction of new royalty rates by the petitioner from the payments being made to the respondent. Since the disputes could not be amicably resolved, the

respondent invoked the dispute resolution procedure as contained in the contract agreement.

21. The disputes were referred to a three member Dispute Review Board (DRB) constituted by the parties, which resulted in unanimous findings and recommendations in favour of the respondent. Since the petitioner refused to accept the recommendations of the DRB, the disputes were referred for the purpose of final adjudication of the claims of the respondent to a three member arbitral tribunal which was jointly constituted by the parties as provided for under the contract agreement.

22. In nut-shell the following findings arrived at on record while awarding the claims towards additional cost :

(i) Fault on the part of the petitioner causing delay in the completion of the works and leading to extended stay of the respondent on the site.

(ii) Entitlement for additional cost to the respondent under explicit conditions of the contract agreement as also the statutory entitlement under the relevant sections of the Indian Contract Act, 1872, and

(iii) Existence of voluminous evidence on the record justifying the claims made.

23. With regard to the objection of the petitioner as regards the grant of interest is concerned, the learned Arbitral Tribunal has given valid reasons for award of interest and the same cannot be faulted with. The provision for payment of interest exists in the contract agreement between the parties.

24. As regards the future interest, interest @18% is contemplated by the Act itself. Further, there are various judgments where the rate of interest @18% has been upheld by the Supreme Court. In the case of ***Deepa Bhargava and Anr. vs. Mahesh Bhargava and Ors.***, (2009) 2 SCC 294, the Supreme Court has clearly recognized such award of interest. The relevant portion of the same is reproduced as under :

> "There are a large number of decisions where interest has been directed to be paid even at the rate of 18 per cent or 21 per cent per annum."

25. It is also settled law and not necessary to repeat that the Court is not expected to sit in appeal over the findings of the Arbitral Tribunal or to re-appreciate evidence as an appellate court. Even if the additional grounds under Section 34 of the Act, as laid down by the Supreme Court in the case of ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.,*** AIR 2003 SC 2629 are considered, which are patent illegality arising from statutory provisions or contract provisions or that the award shocks the conscience of the Court, no such facts are narrated in the petition. The endeavour of the petitioner is thus to convert the challenge to the arbitral award into an appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence, and which endeavour as per the consistent dicta of the Supreme Court is impermissible in law. A recent observation of the Supreme Court in the case of ***P.R. Shah, Shares and Stock Brokers Private Limited vs. B.H.H. Securities Private***

Limited and Others, (2012) 1 SCC 594, is apposite in this regard and is reproduced as under:

> "21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at".

26. The Supreme Court has further expounded the said scope in the case of ***Markfed Vanaspati and Allied Industries v. Union of India,*** (2007) 7 SCC 679, wherein it was observed as under:

> "17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavour of the court should be to honour and support the award as far as possible".

27. The petitioner has not been able to set out any ground in the petition as to how the award is suffering from the provision of Section 34 of Act. Even, no grounds under Section 34, as laid down by the Supreme Court and no such facts are narrated in the Petition. The attempt of the petitioner is to convert the challenge to the arbitral award into an appellate proceeding and re-appreciation of evidence which is not permissible in law.

28. The Arbitral Tribunal is the final arbiter of the disputes between the parties referred to it. In the present case, the parties by themselves have agreed in the contract to accept the Award as final

and conclusive. The Supreme Court has expounded on the principle as to the sanctity of the decision of the arbitrator in the case of ***Markfed Vanaspati and Allied Industries Versus Union of India*** [(2007) 7 SCC 679], where in paragraph 17 of the said judgment it was observed as under:

> "17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavour of the court should be to honour and support the award as far as possible".

29. Even otherwise, the Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct. Nothing has been found from the material placed on record by the petitioner that there is any patent illegality that is apparent on the face of the arbitral award. It is a trite proposition that finality is attached with the decision of the Arbitral Tribunal which is the final judge of both the questions of fact and law referred to it. When the petitioner has no such contention that the Arbitral Tribunal has no jurisdiction to decide the claim, the merit of the decision of the Arbitral Tribunal cannot be challenged by a party to the contract merely because the interpretation given by the Arbitral Tribunal to the contract terms is not to its liking. In this regard, the Supreme Court has held in the case of ***Maharashtra State***

Electricity Board vs. Sterilite Industries (India) and Anr.**,** (2001) 8 SCC 482, in paragraph 9 of the said judgment, as under:

> "9. …the arbitrator's award both on facts and law is final; that there is no appeal from this verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it."

30. The respondent's argument is that in the present case there was only one interpretation possible and the same was decided to by the Arbitral Tribunal in the arbitral award. However even if it were to be assumed, without admitting, that an alternative interpretation is possible, the Supreme Court has repeatedly held that even if two interpretations are possible, if the interpretation given by the Arbitral Tribunal is a possible view, even though the Court may have a different view, the Award will not be interfered with by the Court under Section 34 of the Act. The Supreme Court in the case of ***M/s. Arosan Enterprises Ltd. Versus Union of India*****,** (1999) 9 SCC 449, in paragraph 39 of the said judgment, has held as under:

> "39. ….The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined."

31. It is also submitted by the respondent that there is no error in the interpretation of the contract clauses by the Arbitral Tribunal. However even if it were to be assumed, without admitting, that the contention of the petitioner is correct even then this Court would not

interfere with the arbitral award for the reason that it is settled law that an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction. The Supreme Court in the case of ***Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.,*** (2009) 10 SCC 63 has summarized the law on this point, in paragraph 26 of the said judgment, as under:

> "26(ii). An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award."

32. In view of the abovementioned reasons, the findings of the learned Arbitral Tribunal are on the basis of facts and interpretation of various clauses of the contract. The Arbitral Tribunal has given valid reasons by discussing the relevant clauses of the contract. The objections, thus, are without any merit and are dismissed.

33. No costs.

(MANMOHAN SINGH)
JUDGE

JUNE 09, 2014