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**(2022) 10 DEL CK 0023**

**In the Delhi High Court**

**Case No :** First Appeal From Order (OS) (COMM) No. 92 Of 2020, Civil  
Miscellaneous Application No. 4216, 4217 Of 2021

IJM Gayatri JV

APPELLANT

Vs

National Highways Authority Of India

RESPONDENT

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**Date of Decision :** 07-10-2022

**Acts Referred:**

Arbitration And Conciliation Act, 1996 — Section 31(7), 31(7)(a), 34, 34(2A), 37(1)(c)

**Citation :** (2022) 10 DEL CK 0023

**Hon'ble Judges :** Vibhu Bakhru, J; Amit Mahajan, J

**Bench :** Division Bench

**Advocate :** Angad Mehta, Manish K. Bishnoi, Nirmal Parsad

**Final Decision :** Partly Allowed

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**Judgement**

Vibhu Bakhru, J

1. M/s IJM-Gayatri (JV) (hereinafter 'IJM') has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act (hereinafter 'the A&C Act') impugning a judgement dated 12.05.2020 (hereinafter 'the impugned judgement') passed by the learned Single Judge, whereby National Highway Authority of India's (hereinafter 'NHA') application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 09.08.2017 (hereinafter 'the impugned award'), was partially allowed.

Factual Context

2. NHA issued a Notice Inviting Tender (NIT) for execution of the work relating to "widening of 4/6 lanes and upgrading of existing 2 lane Road of NH-5 in the State of Andhra Pradesh from Km. 291.000 to Km. 358.000 of Ongole-Chilakaluripet-Contract Package AP-13" (hereinafter 'the Project'), on the terms and conditions stipulated thereon. Pursuant to the said NIT, IJM submitted its bid for executing the Project works. IJM's bid was accepted by NHA and by a Letter of Acceptance dated 20.04.2001 (hereinafter 'the LoA'), the contract for

implementation of the Project was awarded to IJM for a consideration of Rs. 225,39,46,841/-.

3. Subsequently, on 25.05.2001, the parties entered into a formal agreement [being Agreement no. 0040 /NH- 5/GQ/GM (E-I) /2001] (hereinafter 'the Agreement'). In terms of the Agreement, the works were to be completed within a period of thirty-one months from the commencement date and the defect liability period was stipulated as twelve months.

4. Thereafter, on 29.05.2001, NHAI issued a notice to proceed with the work, in accordance with Clause 41.1 of the Special Conditions of Contract (hereinafter 'the SCC'). In terms of the said notice, the scheduled date of commencement of work was stipulated as 01.06.2001 and the scheduled date of completion was stipulated as 31.12.2003.

5. The Agreement provided for sectional completion of the Project and was divided into three sections, that are, Section A: Km 292.000 to Km 300.000, Section B: Km 300.000 to Km 330.000 and Section C: Km 330.000 to Km 357.979.000 and Km 291.000 to Km 292.000. Admittedly, there were certain delays in execution of the Project works and IJM sought Extension of Time for completion of the works on successive occasions, which were approved by NHAI.

6. IJM claimed that it had immediately commenced the works and duly mobilised its resources, however, the sites/stretchers were not handed over properly and/or free of encumbrances and thus, there were delays and interruptions in execution of the works on the part of NHAI. NHAI had disputed the same and according to it, the delays were on the part of IJM. The date of completion for each section was extended up to 24.03.2006, 31.12.2005 and 24.03.2006 respectively.

7. Thereafter, on 28.08.2007, IJM submitted the 'Statement at Completion', in accordance with Clause 60.10 of the Conditions of Particular Application (hereinafter 'COPA') to the Acting Resident Engineer. The Acting Resident Engineer certified certain payments, however, excluded some claims submitted by IJM with the 'Statement at Completion'.

8. Thereafter, on 21.10.2008, NHAI issued a Defect Liability Period Certificate (hereafter 'DLC'). Pursuant to the issuance of the DLC, on 27.02.2009, IJM submitted a Draft Final Statement (hereafter 'DFS'), in accordance with Clause 60.11 of the COPA and asserted the claims submitted by it along with the 'Statement at Completion'. The DFS was divided into two parts: Appendix A, which contained the final value of work done in terms of Clause 60.11(a) of the COPA; and Appendix B, which contained such further sums that IJM considered to be due to it under the Agreement in terms of Clause 60.11(b) of the COPA.

9. Thereafter, by a communication dated 02.03.2009, the Engineer effected certain recoveries from the DFS submitted by IJM. By a communication dated 03.03.2009, IJM conveyed its disagreement in respect of the recoveries effected by the Engineer and requested that the disputes be resolved in accordance with

Clause 67 of the COPA.

10. Thereafter, the said disputes were referred for adjudication to the Disputes Review Board (DRB), which was constituted on 06.01.2010. The DRB, however, failed to provide any assistance in the matter within the contractually stipulated period. Thus, on 02.07.2011, IJM invoked the agreement to refer the disputes to arbitration, in accordance with Clause 67.1 of the COPA.

#### Arbitration

11. Before the Arbitral Tribunal, IJM filed a Statement of Claims on 04.02.2011. The claims made by IJM in the Statement of Claims are tabulated below: -

##### Claim no.1

Claim for refund of Extra Seigniorage charges recovered from running bills on account of enhanced volume of Minor Minerals considering swell/bulkage factor

Rs. 90,59,253/-

##### Claim no. 2

Claim for compensation of extra cost and expenses incurred due to locking of securities due to prolongation of the contract period

Rs. 2,11,63,200/-

##### Claim no. 3

Claim for compensation of additional overhead expenses due to prolongation of the contract period

Rs. 29,05,08,704/-

##### Claim no. 4

Claim for compensation of loss of profit resulting from loss of business opportunity due to prolongation of the contract period.

Rs. 19,36,72,469/-

##### Claim no. 5

Claim for compensation of loss sustained due to loss of productivity of Plant & Machinery unutilized to the full extent due to various delays and hindrances during

the original stipulated period of contract

Rs. 10,79,46,386/-

##### Claim no. 6

Claim for refund of enhanced seigniorage charges wrongly recovered by the Acting Resident Engineer in IPC-56 in-lieu of Final Statement, the payment of

which was already made in various IPCs up to IPC-55 in-terms of Contract Clause 70.8 of COPA.

Rs. 65,46,047/-

Claim no. 7 (a)

Claim for payment of interest @ 10 % per annum compounded monthly on the pending claims 1 to 6 (Rs. 62, 88,96,059/-) from the due date till 31.01.2012 as per

Schedule VII

Rs. 19,54,50,505/-

Claim no. 7 (b)

Claim for payment of interest @ 10 % per annum compounded monthly on all the pending claims 1 to 6 for the period from 1.02.2012 i.e. the date of reference to Arbitral Tribunal till the date of actual payment

To be

quantified

12. NHAH filed its Statement of Defence and contested the claims raised by IJM, however, it did not file any counter claims.

13. The Arbitral Tribunal held that NHAH had breached its obligation under the Agreement and the delay in execution of the work were due to factors attributable to NHAH. By the impugned award, the Arbitral Tribunal allowed the claims preferred by IJM. The operative part of the impugned award reads as under: -

"8.01 The Arbitral Tribunal after applying their mind and having taken all the pleadings, arguments and documents, award as summarized below: -

Claim no.

Description of Claim

Amount claimed in Rs

Amount awarded in Rs

1

Claim for the seigniorage charges recovered from running bills on account of enhanced volume of minor minerals considering swell / bulkage factor

90,59,253/-

78,99,558/-

2

Claim for compensation of extra cost and expenses incurred due to locking of securities due to prolongation of the contract period.

2,11,63,200/-

45,27,011/-

3

Claim for compensation of additional overhead expenses due to prolongation of the Contract Period.

29,05,08,704/-

7,58,32,312/-

4

Claim for compensation of loss of profit resulting from loss of business opportunity due to prolongation of the contract period.

19,36,72,469/-

7,96,74,288/-

5

Claim for compensation of loss sustained due to loss of productivity of plant and machinery unutilized to the full extent due to various delays with hindrances during the original

stipulated period of Contract

10,79,46,386/-

8,63,57,088/-

6

Claim for refund of enhanced Seigniorage charges wrongly recovered by the Acting Resident Engineer in IPC-56 in lieu of Final

Statement, the payment of which was already made in various IPCs upto IPC-55 in terms of Contract Clause 70.8 of COPA.

65,46,047/-

65,46,047/-

7

Claim for payment of interest on claim no.1 to claim no.6.

Upto 31.07.2017 Rs.59,40,03,598/

and further at the same rate of 10%

compounded monthly from 01.08.2017, till

date of payment.

At the rate

specified in contract clause 60.8, on awards of Claim 1 and 6, from date of submission of Draft Final Statement to the Engineer, and on awards of Claim 2, 3, 4 &

5, from

31.01.2012, the

date of

reference for arbitration, till date of award. From date of award to actual date of payment, at 10% per annum simple interest on the all awards of all

claims No.1 to 6.”

Section 34 Of The A&C Act

14. NHAI challenged the impugned award by filing a petition under Section 34 of the A&C Act [being OMP COMM 428/2017 captioned National highways Authority of India v. M/s IJM Gayatri Joint Venture]. Before the learned Single Judge, NHAI had contested all the claims allowed in favour of IJM by the Arbitral Tribunal. However, by the impugned judgment, the learned Single Judge has set aside the impugned award in respect of Claim no. 4 and Claim no. 7 with respect to the interest awarded at the rate of 10% per annum compounded monthly under Clause 60.8 of the COPA on award of Claim nos. 1, 2, 3, 4 and 5.

15. Before the learned Single Judge, with respect to Claim no. 4, NHAI had contended that the finding of the Arbitral Tribunal that the delay was attributable to NHAI was perverse and contrary to the evidence available on record. NHAI had also contended that the party claiming loss/damage was required to prove the same by leading evidence and the damage could not be remote but should be in contemplation of the parties; and IJM had not proved its claim on account of compensation of loss. NHAI had further contended that said claim overlapped with the claim in respect of loss on account of idling of plant and machinery and both could not have been allowed by the Arbitral Tribunal. It referred to the decisions of Bharat Coking Coal Ltd. v. L.K. Ahuja: (2004) 5 SCC 109; NHAI v. HCC: 2016 SCC OnLine Delhi 6112; and AIR v. Unibros and Others: (2002) Suppl. Arb.LR 618 (Del.), in support of its contention.

16. NHAI had further contended that with respect to the claim for interest (Claim no.7), the award of pendente lite interest at the rate of 10%, compounded

monthly, was punitive in nature. NHAH further contended that the Arbitral Tribunal had erroneously relied on Clause 60.8 of the COPA, as the said clause was inapplicable and was stipulated for payments certified by the Engineer. NHAH had also referred to Section 31(7)(a) of the A&C Act and contended that pre-reference and pendente lite interest should be at a reasonable rate. It referred to the decisions of the Supreme Court in NHAH v. M/s. KNR Patel (JV) KNR House: Civil Appeal No. 3597/2017; Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited: (2019) 11 SCC 465; and, Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Another: (2007) 2 SCC 720, in support of its contention.

17. The learned Single Judge examined the contentions advanced by NHAH and found the same to be merited with respect to Claim nos. 4 and 7. The learned Single Judge found merit in NHAH's contention that Claim no.4 overlapped Claim no. 3. The learned Single Judge found that "The Arbitrator has allowed Claim No. 3 on account of utilization and mobilization of resources under the heading overhead charges and therefore, to claim loss of profit on mobilization of resources at the site can certainly not be allowed".

18. Additionally, the learned Single Judge found that a party claiming loss of profit must prove that another opportunity existed; there was an attempt to seize such opportunity; and by not availing this opportunity, the party had incurred a loss, which would be required to be quantified and proved. The learned Single Judge held that IJM had neither proved the loss of profit nor provided any evidence or documents to do so. The learned Single Judge referred to the decisions in the case of DDA v. PC Sharma: FAO(OS) 143/2006, decided on 02.02.2009; Kailash Nath Associates v. DDA and Anr.: (2015) 4 SCC 136; Essar Procurement Service Ltd. v. Paramount Constructions: (2016) SCC Online Bom 9697; Ajay Singh v. Suneel Darshan: (2015) SCC Online Bom 1412; and, Murlidhar Chiramjilal v. Harishchandra Dwarkada: AIR (1962) SC 366.

19. The learned Single Judge further found the award of interest at the rate of 10% per annum, compounded monthly under Clause 60.8 of the COPA, to be "certainly punitive and exorbitant". The learned Single Judge, accordingly, set aside the award to the extent that it granted interest at the rate 10% per annum, compounded monthly, on award of Claim nos. 1, 2, 3, 4 and 5; and upheld the award of simple interest at the rate of 10% per annum on Claim nos. 1 and 6 from the date of the award till the date of payment.

20. Aggrieved by the impugned judgment, IJM has filed the present appeal.

#### Reasons and Conclusion

21. NHAH has not challenged the impugned judgment. Thus, the impugned award, to the extent, not interfered with by the learned Single Judge, has attained finality. As noted above, the learned Single Judge has set aside the impugned award in respect of loss of profits on account of delay in execution of the project (Claim no.4) as well as pre-award interest on the claims awarded, in

favour of IJM.

22. In view of the above, the only controversy to be addressed is whether the impugned award could be set aside to the extent it was within the scope of Section 34 of the A&C Act.

23. The first question to be addressed is whether the award of Rs. 9,96,74,288/-, on account of loss of profits during the prolongation of the contract (Claim no.4), is patently illegal or is in conflict with the public policy of India.

24. The Arbitral Tribunal found that the contract was delayed for a period of 26 months and 24 days for reasons attributable to NHAH. The contract in question was required to be completed on or before 31.12.2003 but the original date of completion was extended till 24.03.2006. The Arbitral Tribunal held that IJM was liable to be compensated for loss of profits for the said delay. The finding of the Arbitral Tribunal that NHAH was responsible for the delay was accepted by the learned Single Judge. The controversy in regard to award of loss of profits is confined to the quantification of the damages payable as loss of profits.

25. IJM had quantified its claim for loss of profits at Rs. 19,36,72,469/-. It had assumed a profit margin of 10% and computed the amount of profit that it would earn per week by apportioning the assumed profit over the original duration of the contract (135 weeks). It had then computed the amount of profit that it could earn over the period of delay of 116 weeks. This method of computation is based on Hudson's Formula. IJM's computation of its claim is set out below-

"H.O/Profit Percentage x Contract Price x Period of Delay( in weeks) / Contract period (in weeks)

Contract price = Rs. 225,39,46,841/-

Contract Period = 01.06.2001 to 31.12.2003 = 135 weeks.

Period of Delay = 01.01.2004 to 24.03.2006 = 116 weeks

(Extended period)

Amount of Claim = 10% x 225,39,46,841 x 116 weeks

135 weeks

= Rs. 19,36,72,469/-"

26. According to the Arbitral Tribunal, the Hudson's Formula could not be worked in the manner as claimed by IJM. The Arbitral Tribunal held that the loss of profits is required to be computed with reference to the work actually executed during the prolonged period. The Arbitral Tribunal accepted that a profit margin of 10% was reasonable but did not accept that the profit that IJM could earn over the delayed period could be computed by attributing a similar profit, as a function of time, over the delayed period. The Arbitral Tribunal held that the said percentage was required to be applied to the work actually executed during the

extended period. The Arbitral Tribunal held that IJM would have executed 20% additional work during the extended period but did not do so. Accordingly, it adjusted the amount of compensation by further reducing it by 20%.

27. Paragraph nos. 4.3.7 and 4.3.8 of the impugned award are relevant and set out below:-

"4.3.7 Thus the facts and circumstances of this case allow to compensate loss of profit with 10% or 15% of work cost executed in the extended period as upheld in law cases, Dwaraka Das Vs. State of MP and another AIR 1999 Supreme Court 1031, M/s. A T. Brij Paul Singh Vs State of Gujarat AIR 1984 SUPREME COURT 1703 and Mohd. Salamatullah Vs Government of Andhra Pradesh AIR 1977 SUPREME COURT 1481. With the fact and circumstances of the case, it is felt justified to compensate the contractor for his loss of earning during forced overstay at site for the default of the Employer at the rate of 10% of cost of remaining work.

4.3.8 Further, the AT is of the opinion that the Claimant should have done about 20% more of the work executed during the extended period, up to the stipulated date of completion as

concluded in Para E 4. In view of this the AT has decided to reduce the Compensation for Loss of Profit by 20%. The cost of work executed during extended period is Rs 995, 928,597.

Compensation for loss of profit @ 10% of Rs 995,928,597 comes Rs.9,95,92,860/-, which on reduction by 20% becomes Rs.7,96,74,288"

28. IJM's claim for loss of profits is premised on the basis that had the contract been completed within the original period as contemplated, IJM would have deployed its resources in another contract to earn further profits. Since IJM was deprived of its profit, that it would have earned, it is liable to be compensated for the same. Clearly, in order to sustain a claim of such damages, it was necessary for IJM to establish (a) that the contract had been delayed and extended solely for the reason attributable to NHAI; (b) that there were opportunities to take up other contracts and execute the same; (c) that it could have executed those contracts profitably; and (d) that IJM could not take up those contracts because its resources were held up in executing the Agreement.

29. As noted above, the Arbitral Tribunal had accepted that the delay in the execution of work was on account of NHAI and this finding is not called into question. Insofar as the availability of another profitable contract is concerned, IJM had produced the details of other tenders that had been invited during the relevant period. The Arbitral Tribunal had accepted that opportunity for bidding for the other contracts existed during the relevant year. The Arbitral Tribunal also accepted that 10% was a reasonable profit margin in contracts of similar nature on the basis of MoRTH Data Book, which provided analysis for estimating the costs of similar contracts. Admittedly, the MoRTH Data Book was a valuable guide

for estimating the value of similar contracts.

30. The learned Single Judge set aside the impugned award for, essentially, two reasons. First, the learned Single Judge found that the claim of loss of profits overlapped IJM's claim for overhead expenditure during the extended period (Claim no. 3). And second, that IJM had failed to produce any evidence to establish the loss actually suffered.

31. This Court is unable to accept that IJM's claim for loss of profit overlaps its Claim no.3 (claim for compensation for additional overhead expenses due to the prolongation of the contract period) or any other claim. The learned Single Judge had held that IJM had claimed 'double benefit' as it had, on one hand, sought overhead expenses on account of mobilising resources during the extended period and, on the other hand, sought loss of profit on the ground that if the resources were deployed gainfully elsewhere, it could have earned profit. The relevant extract of the impugned judgment that sets out the said reasoning of the learned Single Judge is set out below:-

"40. Claim No. 4 is on account of Loss of Profit for Rs. 19,36,72,469/-for which the Tribunal awarded Rs. 9,96,74,288/-. In my view, the Petitioner is right in its contention that this claim is overlapping with Claim No. 3. There is merit in the contention of the Petitioner that the respondent is claiming to seek double benefit. While on one hand it is argued by the Respondent that it had mobilized his resources during the extended period and therefore, should be granted the claim under Overhead expenses, while on the other hand it is also seeking loss of profit on the ground that had these resource been gainfully deployed elsewhere he could have earned profit. The Arbitrator has allowed Claim No. 3 on account of utilization and mobilization of resources under the heading overhead charges and therefore, to claim loss of profit on mobilization of resources at the site can certainly not be allowed. I also find merit in the contention of the Petitioner that it is a settled law that a party claiming loss of profit will have to first prove the existing opportunity, and then its attempt to seize that opportunity and finally prove that by not availing the said opportunity, it has incurred a loss."

32. This Court is of the view that the aforesaid reasoning is, *ex facie*, erroneous. IJM's Claim no.3 was on account of expenditure incurred by it on overheads, as attributable to the contract in question, during the extended period. IJM had sought to sustain its claim by three methods. First was the normative method, which is premised on the basis that the head office and site office overheads amounted to 15% of the contract price. IJM had referred to the price adjustment formula, which indicated that 40% of the contract price was on account of fixed factors, which included (i) head office and site office overhead; (ii) profit; (iii) duties, taxes, insurance cost mobilisation/demobilisation charges etc. The overhead expenses during the extended period were calculated by attributing 15% of the contract price over a period of 135 weeks (Original term of the contract) and claiming that similar expenses (at the same weekly rate) would also have been incurred during the extended period of 116 weeks. The amount

calculated on the said basis worked out to be Rs. 29,05,08,704/-.

33. The second method – which was also the primary basis of its claim – was the actual expenditure. IJM supported its claims by producing vouchers and certificates of the Chartered Accountant to evidence the actual expenditure incurred on account of overheads during the extended period. On the basis of the certificates issued by the Chartered Accountant, IJM claimed that a sum of Rs. 13,86,86,086/- (which was subsequently corrected to Rs. 12,70,20,765/-) was incurred on overheads during the delayed period.

34. Lastly, IJM supported its claim for overhead expenses on the basis of MoRTH Standard Data Book, which indicated that overheads in respect of bridge works would be 25% of the contract price and for other civil works would be 8% of the contract value. Applying the said formula, the overhead expenses would amount to Rs. 27,59,83,610/-.

35. The Arbitral Tribunal examined all the three methods and awarded a sum of Rs. 7,58,32,778/- on account of overhead expenses. The said figure was arrived at by accepting the overhead expenditure to be 25% in respect of bridge works and 8% in respect of other works, as applied to the works executed during the extended period. The Arbitral Tribunal further reduced the said amount by 20% and it was of the view that IJM could have executed about 20% additional work during the extended period.

36. As noted above, the amount awarded against IJM's claim for overhead expenses is not under challenge. The question to be considered is whether IJM's claim for overhead expenses overlaps its claim for loss of profits and amounts to granting benefit twice over. It is clear that IJM sought compensation for expenses incurred on overheads and had also produced the evidence for incurring such expenditure. IJM's claim for damages was on account of compensation for the expenditure incurred on overheads, which did not include anticipated profits. IJM's Claim no.4 was for profits that it could have earned if it was not held up in executing the contract in question. This Court is unable to find any overlap between the two claims.

37. Mr. Bishnoi, learned counsel appearing for NHAI, had also referred to certain passages from Hudson's Building and Engineering Contract 11th edition, which indicated profits that might be expected to earn elsewhere on other contracts would include not only the operating margin of profit but also fixed overheads. The aforesaid contention is unmerited. The reference to profits in the passages of the text referred to by Mr Bishnoi has been used as synonymous to 'contribution', which in cost accountancy term means the total revenue generated less variable costs for carrying on the business. This is the amount that is available for meeting fixed expenses against fixed cost and profits. It is possible for a contractor to raise the claim in respect of the loss of contribution that it could have earned by engaging in another contract if the contractor was not held up on account of delay in execution of the contract. The contract price would cover

variable expenses as well as the contribution.

38. In the present case, IJM has split its claim into two components, the overhead charges and loss of profits. IJM had sought to support its claim for compensation for overhead expenses on the basis of actual expenditure incurred on overheads during the extended period. It had further claimed loss of profits that it could earn on the basis of MoRTH Standard Data Book. Plainly, there is no overlap between IJM's claim for expenses and its claim for loss of profits that it could earn, had it deployed its resources in another contract.

39. The basic approach and the general condition of preparation of MoRTH Standard Data Book in respect of road works clearly indicates that the overhead charges are separate from profits. The relevant extract from the MoRTH Standard Data Book, in respect of road works, is set out below:-

#### "A. Road Works

##### Basic Approach and General Conditions for the Preparation of Standard Data Book

The basic approach for the preparation of Standard Data Book for Road works is indicated as under:

\*\* \*\*

#### 3. Overhead Charges

The overhead charges include the following elements:

I. Site accommodation, setting up plant, access road, water supply, electricity and general site arrangements.

II. Office furniture, equipment and communications

III. Expenditure on

a) Corporate office of contractor

b) Site supervision

c) Documentation and "as built" drawings

IV. Mobilisation/de-mobilisation of resources

V. Labour camps with minimum amenities and transportation to work sites.

VI. Light vehicles for site supervision including administrative and managerial requirements.

VII. Laboratory equipment and quality control including field and laboratory testing

VIII. Minor T& P and survey instruments and setting out works, including verification of line dimensions, trial pits and bore holes, where required

IX. Watch and ward

X. Traffic management during construction

XI. Expenditure on safeguarding environment

XII. Sundries

XIII. Financing Expenditure

XIV. Sales/Turn overtax

XV. Work Insurance/compensation

3.1 For the purpose of calculation of overhead charges, the projects are categorized into 2 types as under and overhead charges, provided as indicated against each.

Category 1: Cost up to Rs. 50 crores 10 per cent

Category 2: Cost above Rs. 50 crores 8 per cent

4. Contractor Profit: 10 per cent of cost of works

Contractor profit is also added on overhead charges.

40. Similarly, in respect of the bridge work, the components of the overhead charges and contractor's profit have been reflected separately. The relevant extract of the MoRTH Data Book in respect of the bridge works is set out below.

"B-Bridge Works

Basic Approach for the preparation of Standard Data Book

The basic approach for the preparation of Standard Data Book for Bridge Works is indicated as under:

\*\* \*\*

Overhead charges

The overhead charges include the following elements:

1. Site accommodation, setting up plant, access road, water supply, electricity and general site arrangements
2. Office furniture, equipment and communications
3. Expenditure on:
  - a) Corporate office of contractor
  - b) Site supervision
  - c) Documentation and "as built" drawings
4. Mobilisation/de-mobilisation of resources

5. Labour camps with minimum amenities and transportation to work sites
6. Light vehicles for site supervision including administrative and managerial requirements
7. Laboratory equipment and quality control including field and laboratory testing
8. Minor T&P and survey instruments and setting outworks, including verification of line, dimensions, trial pits and bore holes, where required
9. Watch and ward
10. Traffic management during construction
11. Expenditure on safeguarding environment
12. Sundries
13. Financing Expenditure
14. Sales/Turn over tax
15. Work Insurance/compensation

For the purpose of calculation of overhead charges, the bridge projects may be categorized into three basic types depending upon width of carriageway, length of the bridge and the present cost.

Category- 1: Major Bridges including State of Art Bridges and Minor Bridges 25%

Category- 2: Minor Bridges included in the Road Packages 20%

Category -3 : Rehabilitation of Bridges 30%

For the bridge having more than two lanes, equivalent length and cost can be adjusted accordingly.

Contractor's Profit

Contractor's profit has been taken uniformly as 10 per cent, over the cost of items including overhead charges."

41. In view of the above, the impugned judgment, to the extent that it holds that IJM's claim for loss of profits overlaps claim for profits, cannot be sustained.

42. The next question to be considered is whether IJM had produced any material to establish the anticipated loss of profits that it could have earned if it had deployed its resources in another contract. The learned Single Judge faulted the Arbitral Tribunal in awarding the claim without any evidence. The learned Single Judge held that it was necessary for IJM to establish the loss that it had suffered and it is not open for the Arbitral Tribunal to enter an award in IJM's claim without any evidence establishing the same.

43. As noted above, in order to succeed in its claim for loss of profits, it was

necessary for IJM to establish that there were opportunities to take up other contracts, which could be executed profitably. And, it could not take up other contracts as its resources had been held up in the contract in question.

44. Insofar as the other opportunities are concerned, the Arbitral Tribunal had noted that IJM had established that there were bidding opportunities for other contracts during the relevant period. IJM established that it was open for it to bid for other contracts relating to road works/bridge works. IJM was also required to establish that it could not bid for other projects because its resources had been held up in executing the Agreement. It was, thus, necessary for IJM to establish that it had no spare capacities to take up any other contract. However, it does not appear that there is any discussion in the impugned award on this aspect. It is also relevant to note that IJM was a special purpose vehicle, therefore, the question of spare capacity will have to be considered in the context of its JV partners. If the constituent JV partners of IJM had spare capacity, it would not be open for IJM to contend that it was prevented from taking other projects as its resources had been held up in executing the Agreement.

45. In so far as the quantification of damages on account of loss of profits is concerned, it is necessary to bear in mind that unlike damages, which are based on actual expenditure incurred, it would be difficult to find direct evidence of the actual loss suffered. The loss of estimated profits would necessarily have to be determined on the basis of material such as the contractor's past performance and other material, which would indicate the quantum of anticipated profits. The contractor's past performance would reflect the profit margin on the basis of which the contractor usually takes up the assignment. It is equally open for the contractor to establish the estimated profits by other material, which would establish reasonable profits that it could earn from executing contracts of a similar nature.

46. In the present case, IJM has not produced its accounts establishing the profit margins on which it executes the contracts. Thus, there is no empirical data to establish that the profits that IJM would expect to earn from deployment of its resources in another contract. However, the MoRTH Standard Data Book does indicate the reasonable profit that is accounted for estimating the cost of works relating to construction of roads and bridges. It is not disputed that the MoRTH Standard Data Book is a valuable guide for determining the estimated value of works. The Arbitral Tribunal had accepted the profit margin as included in the estimated cost of works on the basis of the MoRTH Standard Data Book. This Court is unable to accept that the decision of the Arbitral Tribunal in this regard can be faulted.

47. This Court is unable to accept that there was no material before the Arbitral Tribunal to accept that the profit margin on similar contracts would be 10% of the total cost. However, as stated above, in order to establish a claim for loss of profits on account of prolongation of the works, it is not sufficient for the contractor to simply show that there were other opportunities available and such

opportunities, if exploited, would have yielded any profit. It is also essential for the contractor to establish that it was prevented from taking up other projects as its resources were completely deployed in executing the contract in question. As noted above, the Arbitral Tribunal has not examined this vital condition, which is essential for establishing the claim for loss of profits during prolongation of the contract. Thus, the impugned award in respect of loss of profits cannot be sustained.

48. The last question to be examined is with regard to award of interest. The Arbitral Tribunal had awarded pre-reference interest and pendente lite interest in respect of Claim no.6 at the same rate as specified in Clause 60.8 of the COPA. In respect of Claim nos. 2, 3,4 & 5, the Arbitral Tribunal had not awarded pre-reference interest but only pendente lite interest at the same rate as specified in Clause 60.8 of the COPA (being 10% compounded on monthly rests).

49. The learned Single Judge has set aside the award of interest on the ground that it was "punitive and exorbitant". The learned Single Judge had referred to the decisions of NHA I v. M/s. KNR Patel (JV) KNR House (supra) and Vedanta Limited v. Union of India: 2018 SCC OnLine Del 11253, in support of the aforesaid conclusion.

50. The parties had agreed that in the event payment of the final certificate was not made within the period of 84 (eighty-four) days in terms of Clause 60.8 of the COPA, NHA I was liable to pay 10% interest compounded on monthly rests from the date on which the final certificate was payable but had remain unpaid. There is no challenge to the validity of Clause 60.8 of the COPA on the ground that payment of interest as contemplated under the said clause is in the nature of penalty or in terrorem. It is clear that the parties were ad idem that 10% interest compounded on monthly rests is apposite compensation for delay in payment of certified bills.

51. It is also common knowledge that banks in India do provide for term loans/ working capital loans on interest, which is compounded on monthly or quarterly rests. We find no material on record which would establish that finance would be available to IJM either from the banking industry or otherwise at a rate lower than that contemplated under Section 60.8 of the COPA. Whilst the Agreement between the parties does indicate that 10% interest compounded on monthly rests was agreed between the parties, there is no material whatsoever to indicate that this rate of interest is exorbitant or punitive.

52. The learned Single Judge's decision to accept that the levy of interest is punitive and exorbitant is not based on any market data or any cogent evidence regarding the prevalent rate of interest on commercial loans. The decision in the case of NHA I v. M/s. KNR Patel (JV) KNR House (supra) is of little assistance to NHA I as the Supreme Court in that case had merely observed that "in the facts and circumstances" of the case, the interest awarded was required to be reduced to simple interest at the rate of 12% per annum. The Court had not indicated

any other reason in the said order. It is, thus, clear that the said decision was rendered in the particular facts of that case and does not lay down a rule applicable in all cases.

53. The learned Single Judge had referred to the decision in the case of *Vedanta Limited v. Union of India and Ors.* (supra). However, it is apparent that there is typographical error in the citation. The said decision was rendered in a writ petition and has no bearing on the award of interest. It is apparent that the learned Single Judge intended to refer to the decision of the Supreme Court in the case of *Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited* (supra). In that case, the Supreme Court held as under:

"9. The discretion of the arbitrator to award interest must be exercised reasonably. An Arbitral Tribunal while making an award for interest must take into consideration a host of factors, such as: (i) the "loss of use" of the principal sum; (ii) the types of sums to which the interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic standpoint; (vii) the rates of inflation; (viii) proportionality of the count awarded as interest to the principal sums awarded.

10. On the one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature."

54. In that case, the Court reduced the rate of interest. However, the Supreme Court had clarified that "the challenge on the interest awarded by the Tribunal is being considered in the peculiar facts and circumstances of the present case, and the specific clauses of the contracts in question." In that case, the Arbitral Tribunal had awarded interest at dual rates: one (9% per annum) if the award was discharged during the period of 120 days after the award was rendered and the other (15% per annum), if the award was not so satisfied. Further, the Arbitral Tribunal had awarded interest at the same rate in respect of the amount awarded in foreign currency (Euros) without taking into account the different economic conditions in which the currencies operated. The Supreme Court had, accordingly, deleted the reference to a higher rate of interest, if the award was not discharged within a period of 120 days and had modified the interest awarded on the amount awarded in Euros to LIBOR plus three percentage points as on the date of the award.

55. The said decision cannot be held to imply that award of interest at the rate of 10% per annum compounded at monthly rests is exorbitant or punitive.

56. In the case of *Punjab State Civil Supplies Corporation Limited (PUNSUP) and Anr. v Ganpati Rice Mills: SLP (C) 36655 of 2016*, decided on 20.10.2021, the Supreme Court had observed that "Section 31 (7) of the Arbitration Act, 1996 grants substantial discretion to the arbitrator in awarding interest". The said

decision has been followed by this Court in a number of decisions [See: Director General Central Reserve Police Force V. Fibroplast Marine Pvt. Ltd.: O.M.P. (Comm) 511/2019, decided on 04.05.2022; Millennium School v Pawan Dawar: OMP COMM 590/2022, decided on 10.05.2022; GAIL India Ltd v. Triveni Engineering Industries Ltd: OMP COMM 390/2020, decided on 12.05.2022]

57. In the decision of Morgan Securities And Credits Pvt Ltd v. Videocon Industries Ltd: Civil Appeal no 5437/2022, decided on 01.09.2022, the Supreme Court held as under:-

"19. Section 31(7)(a) confers a wide discretion upon the arbitrator in regard to the grant of pre-award interest. The arbitrator has the discretion to determine the rate of reasonable interest, the sum on which the interest is to be paid, that is whether on the whole or any part of the principal amount, and the period for which payment of interest is to be made - whether it should be for the whole or any part of the period between the date on which the cause of action arose and the date of the award. When a discretion has been conferred on the arbitrator in regard to the grant of pre-award interest, it would be against the grain of statutory interpretation to presuppose that the legislative intent was to reduce the discretionary power of the arbitrator for the grant of post-award interest under clause (b). Clause (b) only contemplates a situation where the arbitration award is silent on post-award interest, in which event the award-holder is entitled to a post-award interest of eighteen percent.

58. The Supreme Court, in its recent judgment in UHL Power Company v State of Himachal Pradesh: (2022) SCC OnLine SC 19, held as under:

7. As the judgment in S.L. Arora [State of Haryana v. S.L. Arora & Co., (2010) 3 SCC 690 : (2010) 1 SCC (Civ) 823] , on which reliance has been placed by the Division Bench of the High Court of Himachal Pradesh, has since been overruled by a three-Judge Bench of this Court in Hyder Consulting (UK) [Hyder Consulting (UK) Ltd. v. State of Orissa, (2015) 2 SCC 189 : (2015) 2 SCC (Civ) 38] , the findings returned by the appellate court in the impugned judgment to the effect that the Arbitral Tribunal is not empowered to grant compound interest or interest upon interest and only simple interest can be awarded in favour of UHL on the principal amount claimed, is quashed and set aside....."

59. It is well settled that an arbitral award cannot be interfered with except on the grounds as set out in Section 34 of the A&C Act. In the present case, NHAII has challenged the impugned award on the ground that it was vitiated by patent illegality on the face of the award [Section 34(2A) of the A&C Act]

60. The ground of patent illegality is narrow and cannot be construed widely. Unless it is self-evident that the award is patently illegal on the face of the record, it cannot be interfered with on the said ground. In Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation, Civil Appeal no. 3657/2022 decided on 05.05.2022, the Supreme Court had clarified that a mere error in law or in facts does not vitiate the arbitral award unless such illegality is

self-evident and goes to the root of the matter. The award of interest at the rate of 10% per annum compounded on monthly rests – which the parties had agreed is applicable in case of unpaid certified bills – does not vitiate the impugned award on the ground of patent illegality. The impugned judgment to the extent it sets aside the impugned award in respect of the interest awarded, is set aside.

61. The appeal is partly allowed and the impugned judgment is set aside to the aforesaid extent. All pending applications are disposed of.