

(2016) 05 DEL CK 0150

In the Delhi High Court

Case No : FAO(OS) No. 464 of 2015

M/s National Highways Authority of India

APPELLANT

Vs

M/s Oriental Pathways (Nagpur) Pvt. Ltd.

RESPONDENT

Date of Decision : 24-05-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2016) 3 ArbILR 448 : (2016) 6 RAJ 366

Hon'ble Judges : Gita Mittal and I.S. Mehta, JJ.

Bench : Division Bench

Advocate : Mr. Ravi Gupta, Sr. Advocate with Ms. Madhu Sweta & Mr. Saurabh Bindal, Advocates, for the Appellant; Mr. Anil Airi, Sr. Advocate with Mr. Ravi Kishan Chandna, Mr. Aman Madan & Mr. Ishan Khanna, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Gita Mittal, J.—This appeal is yet another unwarranted challenge to an order deciding NHAI's objections (under Section 34 of the Arbitration and Conciliation Act, 1996) against an arbitral award against it. In the present case, the learned Single Judge has been the impugned order dated 6th of May 2015 rejected OMP No. 1112/2014 being the objections of the National Highways Authority of India (hereinafter referred to as "NHAI") under Section 34 of the Arbitration & Conciliation Act, 1996, to the arbitral award dated 19th May, 2014.

2. The arbitral award was rendered in arbitration relating to a Concession Agreement dated 10th March, 2006 for the "Improvement, Operation and Maintenance including Strengthening and Widening of existing 2 lane Road to 4 lane Road dual carriage way from Km 50.000 to Km 100.00 of NH 6 (Kondhaili-Talegaon Section) in the State of Maharashtra on BOT basis".

3. Inasmuch as, the appellant has pressed challenged only to the award and the order relating to dispute Nos. (ii) & (iii), we confine our consideration only to the limited challenge pressed before us.

4. For the sake of convenience, we set down hereunder the dispute Nos. (ii) & (iii) as were pressed before the Arbitral Tribunal:

"(ii) Dispute pertaining to the delay in securing Environmental Clearances for the subject and the consequent requirement of extension of the Concession Period.

(iii). Dispute pertaining to the delay in notification of Toll Fees for use of the Project Highway and the consequent requirement of extension of the Concession Period."

5. Before examining the challenge, we may note a few essential dates relevant for the present consideration, which are as follows:-

30.06.2005

: Bid submission date.

10/03/06

: Date of Signing of Concession Agreement.

06/09/06

: Due date of Financial Close (Financial Close ? to be obtained within 180 days of signing of Concession Agreement).

06/09/06

: Appointed Date (= 180 days from the signing of CA ? deemed to be date of Commencement of Concession Period)

30 months

: Construction period, (Appointed date to COD) (OPNL/OSEPL completed the work in 18 months).

05/03/09

: Schedule Completion date.

18.03.2008

: Actual COD (Commercial Operations date of the project)

20 yrs

: Concession Period (commencing from appointed date i.e. 06.09.2006).

05/09/26

: Scheduled Concession Period?End date.

The above schedule shows that the date of financial close and the appointed date which was deemed to be the date of commencement of the concession period were the same under the contract.

6. Mr. Ravi Gupta, learned Senior Counsel for the appellant has extensively taken us through several terms of the contract on the aspect as to whose responsibility is to get the environmental clearances. Obligations of the NHAI have been stipulated under Chapter X of the Concession Agreement. Under Clause 10.1 (xvi), it was the obligation of the NHAI to "obtain all necessary environmental clearances/permissions in respect of the Environmental Clearances". It is also an admitted position before us that under Clause 4.1(c), all Central Government clearances and permits including those relating to environmental protection and conservation from the Ministry of Environment and Forest should have been granted to the concessionaire i.e. the respondent.

7. Mr. Ravi Gupta, learned Senior Counsel has submitted before us that the obligation under sub-clause (b), (c) & (d) of Clause 4.1 of the Concession Agreement was that of the NHAI. We find that it is so stipulated under Clause 4.3 of the Agreement.

8. As per Clause 4.1, these clearances and permissions were conditions precedent which had to be fulfilled on or before the financial close. The expression "Financial Close" has been defined as the date on which the Financing Documents providing for funding by the Senior Lenders have become effective and the Concessionaire has immediate access to such funding under the Financing Documents.

As noted above, 6th September, 2006 was stipulated as the due date of financial close in the present case. However, the NHAI has obtained environmental clearances only on 27th December, 2006 and, therefore, delayed the same by a period of 112 days.

9. The challenge before us revolves around the admitted inability of the NHAI to obtain financial clearances as stipulated under the contract. The Learned Single Judge as well as the Arbitral Tribunal have noted that by a letter dated 5th September, 2006, the respondent had informed the NHAI that its senior lenders were insisting on prior environmental clearance before executing the relevant financing documents for disbursement of funding. The respondent, therefore, submitted that NHAI's failure to obtain environmental clearances was a "material breach" of the Concession Agreement, which did have "material adverse effect". It was further their case throughout that although it was able to complete the project in 18 months, however, had the environmental clearances been obtained within time the lenders could have released the funds earlier and the project would have been completed by it within 15 months instead of the 18 month period.

10. In this regard, for the sake of clarity we extract the definition of expression "Material Breach" and "Material Adverse Effect" as stated by the parties in the Concession Agreement itself, which read as under :

"Material Breach" means a breach by either Party of any of its obligations in this Agreement which shall be deemed to have a Material Adverse Effect on the

Project and which it shall have failed to cure within the Cure Period.

"Material Adverse Effect" means material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of this Agreement."

11. Inasmuch as the submissions of the appellant have revolved on the description of the Force Majeure in the contract, we also set down hereunder the relevant portion of the Force Majeure Events under the agreement between the parties :

"XXIX. Force Majeure

29.1 Force Majeure Event: As used in this Agreement, a Force Majeure Event shall mean occurrence in India of any or all of Non Political Event, Indirect Political Event and/or Political Event as defined in Clauses 29.2, 29.3 and 29.4 respectively hereinafter which prevent the Party claiming Force Majeure (the "Affected Party") from performing its obligations under this Agreement and which act or event is (i) beyond the reasonable control and not arising out of the fault of the Affected Party, (ii) the Affected Party has been unable to overcome such act or event by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sums of money and (iii) has a Material Adverse Effect on the Project.

29.2 Non Political Force Majeure Events: For purposes of Clause 29.1 Non-Political Events shall mean one or more of the following acts or events:-

xxx xxx xxx

(v) Any judgment or order of any court of competent jurisdiction or statutory authority in India made against the Concessionaire in any proceedings for reasons other than failure of the Concessionaire to comply with any Applicable Law or Applicable Permits or on account of breach thereof, or of any contract, or enforcement of this Agreement or exercise of any of its rights under this Agreement by NHAI; or

(vi) Any event or circumstance of a nature analogous to any of the foregoing."

12. Mr. Ravi Gupta, learned Senior Counsel has also drawn our attention to the following extract of Clause 29.4 :

"29.4 Political Force Majeure Events: For purposes of Clause 29.1, Political Event shall mean one or more of the following acts or events by or on account GOI, NHAI, GOM or any other Governmental Agency:

(i) xxx xxx xxx

(ii) xxx xxx xxx

(iii) unlawful or unauthorised or without jurisdiction revocation of, or refusal to review or grant without valid cause any consent or approval required by the

Concessionaire or any of the Contractors to perform their respective obligations under the Project Agreements (other than a consent the obtaining of which is Condition Precedent) provided that such delay, modification, denial, refusal or revocation did not result from the Concessionaire's or any Contractor's inability or failure to comply with any condition relating to grant, maintenance or renewal of such consents or permits."

13. Learned Senior Counsels for both sides have placed reliance on the following extract of Clause 29.6 :-

"29.6 Effect of Force Majeure Event after Financial Close: Upon occurrence of any Force Majeure Event after Financial Close, the following shall apply:

(a) There shall be no Termination of this Agreement except as provided in Clause 29.8;

(b) Where the Force Majeure Event occurs before COD, the dates set forth in the Project Completion Schedule, and the Concession Period shall be extended by the period for which such Force Majeure Event shall subsist;

(c) Where a Force Majeure Event occurs after COD, the Concessionaire shall continue to make all reasonable efforts to collect Fees, but if he is unable to collect Fees during the subsistence of such Force Majeure Event, the Concession Period shall be extended by the period for which collection of Fees remains suspended on account thereof; and

(d) Costs arising out of or concerning such Force Majeure Event shall be borne in accordance with the provisions of Clause 29.7.

14. We may also extract the relevant terms of the contract relating to compensation under Chapter 31.2, which reads as under:-

"XXXI. Compensation For Breach Of Agreement

31.2 In the event of NHAI being in material default of this Agreement and such default is cured before Termination, NHAI shall pay to the Concessionaire as compensation all direct additional costs suffered or incurred by the Concessionaire arising out of such material default by NHAI, in one lumpsum within 30 (thirty) days of receiving the demand or at NHAI's option in 3 (three) equal semi-annual instalments with interest @ SBI PLR plus 2% (two per cent)."

15. Before us, the NHAI has challenged the Arbitral Award and the judgment of the learned Single Judge contending that the only event for grant of extension of the period Concession Agreement was stipulated under Clauses 29.6 (b) & (c) in the eventuality of a Force Majeure Event occurring before the COD or after the COD. The submission is that in the Arbitral Award the Arbitrators have concluded that NHAI was in material breach of the agreement and have proceeded to grant extension of the Concession Agreement under Clause 31.2 which is completely impermissible. The submission is that under Clause 31.2, only the monetary amount could have been granted.

16. It is additionally urged that despite the delay in obtaining the environmental clearance, the respondent had failed to make out any case of material breach and they were also not entitled to monetary damage under Clause 31.2. In support of this submission, it is urged that the respondent had commenced work on the project even before the grant of environmental clearances and that, the very fact. NHA I would submit that the very fact that the concessionaire was able to complete the project within a period of 18 months, instead of the stipulated 30 months.

17. Mr. Ravi Gupta, learned Senior Counsel would also state that consequently, the delay in obtaining environmental clearances could not be characterized as "material breach" having a "material adverse effect" for this reason. It is also the submission of Mr. Ravi Gupta that no costs ensued to the respondent as it completed the project in 18 months instead of permissible 30 months. It is submitted that consequently, there was no loss at all which was liable to be compensated. It is further submitted that Clause 31.2 spelt out that even if it could be held that there was "material breach" of the agreement, in such eventuality the concessionaire was only required to pay monetary compensation and that the Arbitral Tribunal could not have granted extension of concession period by three months. It is submitted that extension of the concession period under the Agreement is contemplated only under Clause 29.6(b) and (C) which is relatable only to the occurrence of a Force Majeure Event which was not so in the present case.

18. In this regard our attention is drawn to para Nos.2.13 to 2.16 of the claims made by the claimant before the Arbitral Tribunal which read as under :

"Material Breach

02.13: It is evident from the above that the Concession Period and the rights of the Concessionaire to perform are subject to fulfilment of the terms and conditions by the parties. Environmental clearance is a condition precedent that is required under Clauses 4.1 and 10.1 to have been obtained by NHA I well before Financial Close. NHA I's failure to do so is a Material Breach of the Concession Agreement, having a Material Adverse Effect as detailed herein below.

Additional Cost

02.14: As a result of the delay in securing Environmental Clearance, the following additional cost implications have arisen:

- (a) Increase in cost of capital to the Concessionaire due to environmental clearance delay impeding disbursement of funds to lenders;
- (b) Delayed commencement of the works causing additional overheads costs (including towards financing, guarantees, insurances etc.) to the Concessionaire;
- (c) Idling costs of site overheads including salaries of staff and workmen, plant & machinery etc. and uncompensated corporate overheads and loss of profit due to

delays faced by the EPF Contractor;

(d) Additional cost of acceleration for timely completion, towards increased resource deployment;

02.15: As a result of the continuing delay in obtaining the necessary environmental clearance by NHAI, we have been deprived of access to funds from Lenders for proceeding further with the works. We have on our part taken the risk and contributed the equity component of the financing and we have exhausted such amounts towards the pre-construction activities, utilities, relocation, obstructions removal and advances to EPC Contractor for capital expenditure and other construction activities in the Project Highway. Until the environmental clearance was secured by NHAI resulting in access to funds from Lenders, the cash flow constraint continued to cripple the progress, for no fault of ours.

02.16: The delay in obtaining the environmental clearance affected the commencement schedule by a corresponding period. During this period of delay, interest rates went up and cement and diesel prices went up, without commensurate increase in toll growth. The costs to the Concessionaire increased disproportionately higher than the projected revenues, causing an adverse effect on the economic viability of the Concession. Since we are not responsible for the delay in, securing environmental clearance, the consequent additional costs as above are due for compensation to us."

(Emphasis supplied)

19. Mr. Ravi Gupta, learned Senior Counsel has also drawn our attention to the following prayer made by the respondent contractor before the Arbitral Tribunal:-

"Prayer for Award by the Arbitral Tribunal

02:26 We hereby pray and request the Arbitral Tribunal to kindly consider the submissions made herein above in the context of the relevant Contract provisions and award payment as below by the NHAI to us :

a. That the Appointed Date, signifying the commencement of the Concession Period be reckoned as 27th December 2006 instead of 6th September 2006. That the Concession Period be considered accordingly thereafter, re-setting the end of the Concession Period by 112 days on this account;

b. That the additional costs incurred by us on account of the delay in obtaining environmental clearance be compensated to us;

c. That the additional grant to compensate the erosion of revenue gains due to delayed start of the Concession Period be paid to us;

d. That interest on the additional cost and additional grant as requested above be paid to us from the dates they became due i.e. 6th September 2006 till the date of payment, @ SBI PLR plus two per cent, as enshrined in the Concession

Agreement."

20. Let us firstly examine the following reasoning of the Arbitral Tribunal on this claim of the respondent in para Nos. 25.02 to 25.13:

"25.02: Clause 10.1 (xvi) read with Clause 4.1 of the Concession Agreement mandates that Respondent shall obtain the environmental clearance on or before the financial close. There is documentary evidence and even the Respondent has also admitted that there was delay in obtaining the environmental clearance. This clearly evidences, that Respondent has not discharged its obligation to provide environmental clearance on or before the financial close and thus, breached the provisions of the Concession Agreement. However, the Respondent is contending that this delay will not constitute any material breach of contract as there was no adverse effect on the progress of the work.

25.03: The Clause 1.1 of the Concession Agreement defines material breach as a breach by either Party of any of its obligation in this Agreement which shall be deemed to have a Material Adverse effect on the Project and which it shall have failed to cure within the Cure Period.

25.04: Compensation for breach of agreement is governed by Clause 31.2 which states that in the event of NHAI being in material default of this agreement and such default is cured before termination, NHAI shall pay to the Concessioner as compensation all direct additional cost suffered or incurred by the Concessioner arising out of such material default by NHAI.

25.05: AT has observed that Claimant was unable to get access to lender's fund till obtaining of environmental clearance; this indeed had adversely affected on the ability of the performance of the Claimant. Under no circumstances, we can assume that non-access of funds will not affect the performance of the Contractor. In view of the above, we are of the considered opinion that delay in obtaining environmental clearance is a material breach of the contract by the Respondent and it could cause material adverse effect on the ability of the contractor's performance.

25.06: From Exhibit CD-05 (Page 464) it is evident that the lender (Canara Bank) has intimated to the Respondent that "The Debt funds are available for disbursement as per the financing documents, subject to fulfilment of NHAI's obligation to satisfy Condition Precedent 4.1 (c) of the Concession Agreement". Clause 4.1(c) is a condition precedent for obtaining environmental clearance by NHAI on or before financial closure.

25.07: The facts brought on record prove that there was a delay of 112 days in obtaining the environmental clearance by NHAI, due to which the Claimant was not in a position to have access to debt funds in view of the specific condition put by the lender. The Claimant is contending that they would have been able to complete the project within 15 months duration, if there had been no delay in obtaining the Environmental clearance.

25.08: The Respondent has not controverted this agreement of the Claimant. However, the Respondent has only contended that the progress achieved in the initial period from September, 2006 to January, 2007 was within the Claimant's planned progress.

25.09: The Claimant contends that by using their equity in the initial period they were in a position to achieve the progress as planned, but when the debt funds were available they completed the work in 18 months against a planned period of 30 months. The Claimant further contend that if there had been no delay in obtaining environmental clearance and if they had access to the debt funds from day one, they would have completed the work within 15 months. There is no counter to this contention by the Respondent.

25.10: AT finds that there is substance in the contention of the Claimant. As such the Claimant has been subjected to a delay of three months in completion of the project, because of delay in obtaining the environmental clearance by the Respondent."

(Emphasis by us)

21. Having held on admitted, undisputed facts that the NHAI was in material breach of the Concession Agreement, we now come to the examination of appropriate relief by the Arbitral Tribunal in para 25.11 and thereafter of the Award which reads as under :

"25.11: Clause 31.2 of the Concession Agreement, as well as Section 73 of the Indian Contract Act, which is a basic law, recognize that the compensation is to be given for the loss/damage incurred by the injured party wherever there is breach of Contract by other party. The best mode of compensation is by way of putting the injured party (Claimant) in the same position as if there had been no breach of contract. The Claimant would have been entitled to collection of toll for additional three months if there had been no delay in obtaining the environmental clearance. So Claimant would be compensated appropriately if the Concession period is extended by three months. As such, in facts, and circumstances of the case, AT orders for extension of concession period by three months on this count.

25.12: The Claimant had deposited Rs. 8.12 lacs to various Govt. departments as per the instructions of the Respondent, though said amount was to be borne by the Respondent as per provision of Clause 10.1 (xiv), which clearly provides that Respondent had to bear all the expenses as per the demand note raised by various Govt. agencies in respect of environmental clearances, etc. The Respondent has also not denied the above deposition of the amount of the Claimant.

25.13: AT is of the view that the Claimant is entitled for the refund of Rs. 8.12 lacs paid by the Claimant to the appropriate authority for obtaining the Environmental clearance along with the interest at SBI PLR + 2% as provided in

the Concession Agreement for the delayed payments. At present the PLR as fixed and published, by the State Bank of India, is 12.25%. Therefore, allowable interest will be $12.25 + 2.00 = 14.25$. Interest so worked out is Rs. 5,86,425.00 from dt. 25.04.2009 till the date of this award. (1850 days). Respondent is directed to pay the awarded sum of Rs. 13,98,475.00 (Rs. 8,12,000.00 + Rs. 5,86,425.00) within 90 days of publishing of this award. In case, awarded sum is not paid with 90 days, Claimant is entitled to future interest @ SBI PLR + 2% p.a. on the awarded sum from the date of award till actual payment."

(Emphasis by us)

22. The parameters within which a Court shall examine the objections to an Arbitral Tribunal have been laid down by the Supreme Court in its pronouncement reported as 2015 (3) SCC 49 Associate Builders v. Delhi Development Authority inter-alia on the following terms:-

"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

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

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, it was held: (SCC p. 317, para 7)

"7. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

"In Kuldeep Singh v. Commr. of Police, it was held: (SCC p.14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever

compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact 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 his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score (1) . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.*, this Court held: (SCC pp. 601-02, para 21)

(1) Very Often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

"General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong."

It is very important to bear this in mind when awards of lay arbitrators are challenged.

"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. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. 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."

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42. In the 1996 Act, this principle is substituted by the ?patent illegality? principle which, in turn, contains three sub heads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India-

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality-for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1)-(2)

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

43. In *Mc Dermott International Inc. v. Burn Standard Co. Ltd.*, this Court held as under: (SCC pp. 225-26, paras 112-13)

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* and *D.D. Sharma v. Union of India*].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

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48. The Division Bench while considering claims 9, 10, 11 and 15 found fault with the application of Hudson's formula which was set out by the learned Arbitrator in order to arrive at the claim made under these heads. The Division Bench said that it was not possible for an Arbitrator to mechanically apply a certain formula however well understood in the trade. This itself is going outside the jurisdiction to set aside an award under Section 34 in as much as in Mc Dermott case, it was held: (SCC pp. 222-24, paras 104-06)

"104. It is not in dispute that MII had examined one Mr D.J. Parson to prove the said claim. The said witness calculated the increased overheads and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled "Change Orders, Overtime, Productivity" commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overheads and loss of profit. Mr D.J. Parson is said to have brought out the additional project management cost at US\$ 1,109,500. We may at this juncture notice the different formulae applicable in this behalf.

(a) Hudson Formula: In Hudson's Building and Engineering Contracts, Hudson Formula is stated in the following terms:

Contract head office over-

head & profit percentage

x

contract sum

Contract period

x Period of delay?

In the Hudson Formula, the head office overhead percentage is taken from the contract. Although the Hudson Formula has received judicial support in many cases, it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

(b) Emden Formula: In Emden's Building Contracts and Practise, the Emden Formula is stated in the following terms:

Head office overhead & profit

100

x

contract sum

Contract period

x Period of delay?

Using the Emden Formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organisation as a whole by the total turnover. This formula has the advantage of using the contractor's actual head office overhead and profit percentage rather than those contained in the contract. This formula has been widely applied and has received judicial support in a number of cases including *Norwest Holst Construction Ltd. v. Coop. Wholesale Society Ltd.*, *Beechwood Development Co. (Scotland) Ltd. v. Mitchell and Harvey Shopfitters Ltd. v. Adi Ltd.*

(c) Eichleay Formula: The Eichleay Formula was evolved in America and derives its name from a case heard by the Armed Services Board of Contract Appeals, *Eichleay Corporation*. It is applied in the following manner:

?Step 1

Contract billings

Total billings for contract period

x Total overhead for contract period

= Overhead allocable the contract

Step 2

Allocable overhead

Total days of contract

= Daily overhead rate

?Step 3

Daily contract overhead rate

x Number of days of delay

= Amount of unabsorbed overhead?

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overhead during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of

head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The Eichleay Formula is regarded by the Federal Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses.

105. Before us several American decisions have been referred to by Mr. Dipankar Gupta in aid of his submission that the Emden Formula has since been widely accepted by the American courts being *Nicon Inc. v. United States*, *Gladwynne Construction Co. v. Mayor and City Council of Baltimore* and *Charles G. William Construction Inc. v. White*.

106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator."

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52. It is most unfortunate that the Division Bench did not advert to this crucial document at all. This document shows not only that the Division Bench was wholly incorrect in its conclusion that the contractor has tried to pull the wool over the eyes over the DDA but it should also have realized that the DDA itself has stated that the work has been carried out generally to its satisfaction barring some extremely minor defects which are capable of rectification. It is clear, therefore, that the Division Bench obviously exceeded its jurisdiction in interfering with a pure finding of fact forgetting that the Arbitrator is the sole Judge of the quantity and quality of evidence before him and unnecessarily bringing in facts which were neither pleaded nor proved and ignoring the vital completion certificate granted by the DDA itself. The Division Bench also went wrong in stating that as the work completed was only to the extent of Rs. 62,84,845/-, Hudson's formula should have been applied taking this figure into account and not the entire contract value of Rs. 87,66,678/- into account.

xxx xxx xxx

56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the Arbitrator for having applied a formula of 20 months instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it would itself do "rough and ready

justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact."

23. The Learned Single Judge has additionally construed that the failure to obtain the environmental clearances was beyond the reasonable control of either of the parties and was also covered under Clause 29.2(6) which defined "any event or circumstance of a nature analogous to any of the foregoing as a Force Majeure Event". The learned Single Judge has also held that delay in obtaining environmental clearances was beyond the reasonable control of either of the parties and, therefore, was covered under Clause 29.2.

According to the learned Single Judge, under Clause 29.6(c) where a Force Majeure Event occurs after the commercial operation date, the concession period shall stand extended during the subsistence of such force majeure event. Consequently the learned Single Judge found no error committed by the Arbitral Tribunal in granting the relief to the respondent.

24. It is submitted by Mr. Ravi Gupta, learned senior counsel appearing for the appellant that once a specific formula is mentioned as compensation which is to be awarded upon happening of a specific contingency, the Arbitrator cannot adopt any other. It is submitted that extension of the period could be granted only for the Force Majeure event. It is submitted that the Award has to be set aside as it was not so in the present case.

25. We find that neither was there any contest to the respondent's claim that if the environmental clearances had been obtained as scheduled, the project would have been completed within 15 months or the fact that the respondent would have access to the debt funds also, if the environmental clearances had been obtained on time. Before us the NHAH also does not dispute that obtaining environmental clearances was its responsibility and that there was a delay of 112 days in obtaining the same. The Arbitral Tribunal has concluded that if the permission had been obtained in time, the respondent would have been able to collect toll for additional three months, as it would have completed the construction that much in advance. The learned Single Judge has also noted that the respondent was only seeking entitlement to additional costs during the period of delay inasmuch as interest rates as well as cement and diesel rates went up without any commensurate increase in the toll growth.

26. It is at this point that NHAH asserts its challenge to para 25.11 of the Award.

27. Para 25.11 has to be read as a whole. We are of the view that NHAI is unnecessarily quibbling with words and attempting to create issue a non-existent when none exists.

28. The Arbitral Tribunal has clearly concluded that the NHAI was in material breach of the agreement entitling the respondent to compensation by virtue of Clause 31.2. Having so concluded the Arbitral Tribunal was required to find appropriate method for computation of this compensation.

29. In Clause 25.11 of the Award, the Tribunal has adopted the mode of putting the claimant i.e. the respondent before us in the same position that it would have occupied, if there had been no breach. The Arbitral Tribunal has thereafter derived the formula for doing so by holding that the amount equivalent to 3 months of toll collection would be adequate compensation for the claimant. Having so concluded, the Tribunal has merely couched its decision for such compensation as the toll equivalent to extension of concession period by three months on this count.

30. The Learned Single Judge has observed that there was no patent illegality in the conclusions arrived at by the Arbitral Tribunal. It is also held that the Arbitral Tribunal has applied the applicable law. It was not the NHAI's objection before the learned Single Judge that the Arbitral Tribunal had overlooked any evidence on record or any provision of the concessional agreement. It has also been held that the view taken by the Arbitral Tribunal was a plausible view.

31. The findings of the Arbitral Tribunal upheld by the learned Single Judge are based on evidence and relevant material placed before the Arbitral Tribunal. It is not the NHAI's case that the Arbitral Tribunal has ignored any vital evidence. There is no challenge to the construction of the terms of the contract which the Arbitral Tribunal has done that the same is not in the manner in which a reasonable and fair person would do. The NHAI has also not urged that the arbitrators have gone beyond the nature, scope and ambit of the arbitration agreement or that the Award is contrary to law or opposed to public policy.

32. It is not disputed before us that for the period of 112 days, the delay which would have enured to the respondent was a substantial amount and that such delay has caused material adverse loss to the respondent. The Tribunal has carefully construed all relevant facts and circumstances. In fact the real impact of the award is that the respondent has been held entitled to the earnings of the toll for the period of three months. Simply because the Arbitrator has used the expression "concession period is extended by 3 months", does not change the nature of the award. The award is undeniably that of compensation under Clause 31.2. The Arbitral Tribunal has merely computed the same as an amount equivalent to the toll of three months.

33. To this extent we differ with the reasoning of the learned Single Judge, who appears to have overlooked the expression used by the Arbitrator in para 25.11 where the Tribunal refers "best mode of compensation" and goes ahead to arrive

at the above mode of computing the compensation. We are therefore, unable to argue with the learned Single Judge that the respondent has been awarded extension of contract under Clause 31.2 of the Concession Agreement.

34. It is trite that it is open to the Arbitrator to adopt any reasonable formula for arriving at the computation of the compensation. In this regard, reference may be made to the pronouncement of the Supreme Court in 2015 3 SCC 49, Associate Builders v. Delhi Development Authority extracted above.

In para 43 of the judgment, the Supreme Court has held that the construction of the contract by the Arbitrator is also within the jurisdiction of the Arbitrator. It is trite law that such construction is clearly beyond the scope of consideration by the Court while considering objections under Section 34 of the Arbitration and Conciliation Act, 1996.

In paragraph 56 of the judgment, the Supreme Court has held that the adoption and application of a formula by an Arbitrator is a pure question of fact. Clearly, the same is beyond the purview of objections under Section 34 of the Arbitration and Conciliation Act.

35. In view of the above statement of law, the objections of NHAI to the Arbitral Award were clearly beyond the scope and purview of Section 34 of the Arbitration and Conciliation Act and have been rightly rejected by the learned Single Judge.

36. We note that during the course of hearing, we had repeatedly queried NHAI if it would be satisfied if the direction was modified to read as an award of money equivalent to computed as average of the entire concession period multiplied for 112 days. This was not acceptable to NHAI.

37. Despite the well settled position in law, NHAI has dragged the respondent into this clearly unwarranted litigation. The appeal is completely devoid of factual or legal merit which renders the NHAI for punitive costs. The payment of the award amount by NHAI to the respondent has also been unreasonably delayed. This litigation falls squarely within the meaning of the expression in Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

38. The appeal is consequently, dismissed and NHAI is liable to be burdened with heavy costs which is quantified at Rs. 5,00,000/-. Therefore, while dismissing the present appeal, it is directed that the NHAI shall pay costs of Rs. 5,00,000/- to the respondent.