

(2023) 08 DEL CK 0103

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 24 Of 2023, Original Miscellaneous Petition (ENF.) (COMM.) No. 3 Of 2023

National Highway Authority Of India

APPELLANT

Vs

M/S T.K. Toll Private Limited

RESPONDENT

Date of Decision : 09-08-2023

Acts Referred:

Limitation Act, 1963 — Article 18

Arbitration and Conciliation Act, 1996 — Section 18, 34, 34(2)(a)(iii)

Citation : (2023) 08 DEL CK 0103

Hon'ble Judges : Yogesh Khanna, J

Bench : Single Bench

Advocate : Narender Hooda, Subash Bhat, Abhishek Sharma, Rashmi Chaudhary, Shaurya Lambha, Parag Tripathi, Jayant Mehta, Ankur Kashyap, Hasan Murtaza, Bushra Waseem, Sameer Sharma, Gloria

Judgement

Yogesh Khanna, J

I.A.Nos.1253/2023 in O.M.P. (COMM) 24/2023

1. This application is filed for stay of the enforcement of an arbitral award dated 01.10.2022 (hereinafter referred to as the "impugned award") as passed by Arbitral Tribunal consisting of Hon'ble Justice (Retd.) Shiva Kirti Singh, Presiding Arbitrator, Hon'ble Justice (Retd.) Amitava Roy and Hon'ble Justice (Retd.) Dilip Kumar Seth, on the ground the award passed by learned Arbitral Tribunal is patently illegal and is in contravention with the fundamental policy of Indian law and in conflict with the most basic notions of justice and morality. It is alleged the learned Arbitral Tribunal has passed the impugned award in violation of the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996.

2. The facts are:

a) On 11.12.2006 petitioner had invited bids on 11.12.2006 for design,

engineering, finance, construction, operation and maintenance of Trichy - Karur Section from km 135.800 (Excluding Lalapet ROB) to Km 218.000 of National Highway - 67 (NH - 67) in the State of Tamil Nadu under NHDP Phase IIIA on build, operate and transfer (BOT) basis. The project was to include strengthening of the existing carriageway in the aforesaid section and widening thereof to 4 lanes and its improvement, operation and maintenance through a concession on BOT basis;

b) On 05.03.2007 Reliance Energy Ltd. was declared as the successful bidder by the petitioner for the said project. The petitioner issued a letter of acceptance (LOA) in favour of Reliance Energy Ltd. As per the request of Reliance Energy Ltd., the petitioner agreed to enter into a concession agreement with the respondent on dated 19.07.2007. The parties also entered into a tripartite State Support Agreement with the Government of Tamil Nadu.

c) The construction period envisaged in the concession agreement was thirty months. On 15.01.2008 NHA declared the appointed date as 15.01.2008, hence the concession period would therefore be upto 14.01.2038 and 14.07.2010 is the scheduled date of completion as per concession agreement.

d) On 14.11.2013 a supplementary agreement was executed for issuance of a partial PCC for the partial stretch, and both parties gave up all their claims against each other for the delay and extension of scheduled project date. Thus the commercial operation date was 24.02.2014. On 17.12.2018 the respondent wrote a letter for commencement of arbitration and nomination of an arbitrator.

e) On 01.10.2022 the learned arbitrators passed the impugned award awarding a total sum of Rs.10,56,54,93,214/- to the respondent, hence the present petition challenging the said award.

3. It is argued the award is without any evidence and is based on conjectures and assumptions, shocking to known jurisprudence and is in gross contravention with the fundamental public policy of Indian Law and in conflict with the basic notions of morality and justice.

4. It is alleged while passing the arbitral award, learned Arbitrators have not considered the specific terms of the Concession Agreement and the supplementary agreement dated 14.11.2013 vide which the respondent had given up all its claims until the date of execution of the supplementary agreement dated 14.11.2013. It is alleged the learned arbitral tribunal did not consider the supplementary agreement was executed without any kind of coercion or economic duress and the respondent had voluntarily executed such supplementary agreement. It is argued the learned Arbitral Tribunal did not consider the Respondent / Claimant produced no evidence of the Supplementary Agreement been executed under coercion or economic duress and thus had no right to plead economic duress or coercion after having taken all benefits under the terms of the Supplementary Agreement dated 14.11.2013, executed under a policy of NHA.

5. It is argued the learned Arbitrators also failed to consider the claims were barred by limitation and as such not tenable.

6. It is argued there was never any coercion on the part of the petitioner making the respondent to enter into the supplementary agreement dated 14.11.2013 though it is the case of the respondent the said agreement was signed by it because the petitioner was not giving completion certificate(s). The learned counsel for the petitioner however submits if it was the case then the completion certificate was ultimately issued on 24.12.2014 and thereafter 50 letters were exchanged between the parties but never any correspondence ever showed there was any alleged coercion exercised by the petitioner upon the respondent to enter into supplementary agreement. Rather first letter was of dated 19.08.2016 which challenged the validity of the supplementary agreement dated 14.11.2013 and another letter dated 20.10.2016 of the respondent for the first time alleged the respondent had signed the supplementary agreement dated 14.11.2013 under coercion.

7. The learned counsel for the petitioner referred to clause C, D and F of the supplementary agreement between the parties to show there was no coercion exercised and the reason for entering such agreement was both parties delayed the project and had agreed not to make any claims upon each other. Such clauses C, D and F are as under:

"C. However, project completion as per date stipulated In the Agreement could not be achieved due to delays on both the parties. There was delay on the part of NHAI in handing over of the land required for the above project in time and Court intervention regarding the alignment of Trichy Bypass from Km 2+000 to Km 7+000. There was delay on the part of Concessionaire also, such as absence of Design Consultant for certain period, delay In commencement & completion of some of the structures, non completion of the work of Trichy Bypass in Km 0/0 to Km 2/0 and from Km. 7/0 to 17/305.

D. As such it is not possible to quantify- the delays attributable to NHAI and Concessionaire separately due to overlapping reciprocal obligations. F. Consequent to the submission made by the Concessionaire that all the works in the stretch from Km 154/400 to Km 218/028, except the stretch from Km 135/800 to Km 154/400 (Trichy Bypass from Km 0.00 to Km 17.305) was completed, it is mutually agreed by both the parties that the Concessionaire shall be permitted to commence commercial operations of the completed stretch."

8. Further clause 10 of the supplementary agreement notes:

"10. That there shall be no claim from both the parties for this delay and extension of Scheduled Construction Period. The Concessionaire shall not claim any loss on account of delays in completion of the project in Km 154/400 to Km 218/028 and NHAI will not levy any penalties for the same on Concessionaire. The Concessionaire further agree to forego any claim on NHAI under Clause 16.6, 35.2, 35.3, 4.2, or any other Clause of Concession Agreement dated 19"

July 2007 for delay in handing over the land for affected stretch.”

9. It is argued if there was alleged coercion then in such event the supplementary agreement ought to have been challenged immediately or upon grant of SOD on 24.02.2014 but it was never done. It is alleged limitation to challenge such supplementary agreement was only till February, 2017 and not later and the delay of three years in not alleging coercion need to be explained by the respondent which they had not done. Reliance was made to National Insurance Company Limited vs. Boghara Polyfab Private Limited 2009 (1) SCC 267, which held as under:

“(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.”

10. In Sugam Construction P Ltd. vs. Northern Railways Administration 2012 SCC OnLine Delhi 5242, it was held as under:

“20. The above submission overlooks the fact that the Petitioner does not dispute that he has received payment against the final bill in the sum of Rs.66,09,100 on 16th December 2004. Annexure R-3 to the counter affidavit is a copy of the final bill which has been signed by the Petitioner. It shows an amount of Rs.66,09,100 after deduction of all taxes and penalties. If indeed the Petitioner was compelled to receive the said payment under coercion then the Petitioner ought to have written a letter of protest to the Respondent even if not on the same date (as was done in the Reshmi Constructions case) but at least soon thereafter - may be after ten days or one month. In the present case, the Petitioner had at no point of time written to the Respondent stating that the payment it had received on 16th December 2004 by way of full and final settlement was received by him under duress or that it was not a full and final settlement payment. The plea appears to be an afterthought and not substantiated by any material other than the self serving statement of the Petitioner in the rejoinder.”

11. It is argued in commercial matters where written contracts are executed, the Court takes the plea of coercion with pinch of salt. It is argued even no declaration was ever sought qua supplementary agreement dated 14.11.2013 being void. It is submitted there was a delay on the part of respondent and this supplementary agreement was entered into to make the respondent complete the project as only then SOD could have been issued to respondent and once the respondent had entered into a supplementary agreement and acted under it, later it cannot say it was coerced to enter into such agreement.

12. Another issue raised by the learned counsel for the petitioner is qua limitation. It was argued the limitation of claims came to an end after three years from the date of completion certificate viz. 24.02.2014 and the invocation of the arbitration would not extend the limitation of such claims and hence such claims was rightly rejected by the minority.

13. Primarily the learned senior counsel for the petitioner has argued on four issues a) plea of coercion not being taken; b) limitation; c) expert advice and d) quantum report.

14. I have heard the arguments of the learned senior counsel for the petitioner and have looked into the documents on record. Admittedly, at this stage, the Court need not go into the merits as if is deciding an appeal against an award dated 01.10.2022. Admittedly, it is not the case of the petitioner the award is a fraudulent award or is wholly perverted and be not looked into.

15. On the issues so raised by the learned senior counsel for the petitioner, let me see how the learned arbitrators have dealt with these issues. On issue (a) viz. the respondent never objected to the supplementary agreement dated 14.11.2013 and rather had initiated the execution of such agreement itself by sending three drafts to the agreement, now cannot urge there was any coercion on the part of the petitioner herein.

16. The learned arbitral tribunal had dealt with this issue and had held since there was major delay of handing over of the land on the part of the petitioner hence the claimant wrote a letter dated 03.05.2012 requesting the respondent for further extension of the scheduled project completion date till 17.03.2014 and also requested for extension of the concession period for the entire period of delay of 1343 days. In this letter the status of delay in acquisition of land at seven locations was given in one chart. In the next chart a summary of the schedule of handing over of land was given to show that even by 31.03.2012 only 87% of the total stretch for the project highway had been handed over in separate phases. The details of hindrances at nine locations as on 31.03.2012 was provided in one table and in another the details of pending approvals of estimates for utility shifting was mentioned. This letter also highlights delay on account of approval of certain other proposals and in acquisition of land for the same, delay in shifting of bunds/canal, delay in finalization of alignment from Km 156 to Km 158, delay due to change of scopes and certain force majeure events were taken into consideration by the learned Arbitral Tribunal. Rather the award noted as follows:

"44.As already noted, earlier Respondent issued a policy contained in circular dated 17/24.01.2013 which approved execution of Supplementary Agreement in the given circumstances but with a mandate that such agreement must include an undertaking by the Concessionaire to forego any claims against the NHAI under any Clause of the CA, for delay in handing over the affected stretch. This document is on record and has also been marked as Exhibit RW1/C1.

45. On 28/03/2013 (CD-297) the Claimant wrote to the IC, its sixth interim application for extension of time and the concession period. The approval of extension was kept pending by NHAI as usual. On 08/08/2013 (Annexure 129 to SOD) the Claimant circulated second draft for Supplementary Agreement. In this letter the Concessionaire referred to the various letters relating to Fee notification and Supplementary Agreement and to the policy decision of the Executive Committee of NHAI and wrote that on account of requirement of compliance, the draft Fee notification and the Supplementary Agreement were modified (emphasis added). The draft did not provide for extension of the concession period by the actual period of delay and the Concessionaire agreed that there shall be no claim from both the parties for delay. On 16/10/2013 (CD-309) the Claimant circulated another Supplementary Agreement signed and executed, said to be third version, whereby the Claimant deleted Clause 7 of the second draft SA relating to waiver of claims. Some other changes were also incorporated in this copy of the SA.

46. On behalf of Claimant contents of letter dated 21/10/2013 (Annexure 130 to SOD) written by NHAI, Chennai to NHAI, HQ have been highlighted. The letter mentions that while signing the draft Supplementary Agreement the Concessionaire deleted certain para's from the draft SA submitted by the Chennai office to Headquarters. The deleted part included: -

a) "Para D- As such it is not possible to quantify the delays attributable to NHAI and Concessionaire separately due to over lapping reciprocal obligations".

b) "Para 7- However, there shall be no extension in the concession period on account of this extension i.e., it shall remain as thirty years from the Appointed date i.e., 15/01/2008".

c) "Para 9- That there shall be no claim from both the parties for this delay and extension of scheduled construction period. Concessionaire shall not claim any loss on account of delays in completion of the project and NHAI will not levy any penalties for the same on Concessionaire." Some further changes made by the Concessionaire in the Supplementary Agreement were pointed out along with comments on such changes. Thereafter in paragraph 4 (i) the Chief General Manager, Chennai wrote thus:

"Though efforts were made to obtain the concurrence of the Concessionaire to the draft supplementary agreement proposed by this office, there are certain clause / conditions on which the Concessionaire has raised objections / disagreement. Hence the Supplementary Agreement has been modified by this office, keeping in view the prevailing conditions at site and also to avoid possible claims from the Concessionaire in future. However, it is suggested that the draft supplementary agreement may be finalized in consultation with the Concessionaire and the Legal Division so as to ensure that the interest of NHAI is protected against any possible financial implication to NHAI on account of any claim from the Concessionaire".

47.The contents of Supplementary Agreement dated 14/11/2013 (CD-134) have already been noticed earlier in detail. In the Supplementary Agreement the Concessionaire has accepted to forego all its claims in terms of the CA and it has forgone the stand taken in the third version of SA circulated on 18/10/2013. In paragraph 25.82 and 25.83 of the SOC the Claimant has referred to its letter dated 28/05/2016 addressed to the respondent and the IC and another letter to the IC dated 11/04/2016 (CD-132 to 133). The Claimant has pleaded that it had explained the situation under which the Supplementary Agreement dated 14/11/2013 was signed and had justified why the said SA would not affect the contractually available right of the Claimant to claim compensation for delays not attributable to it. For this purpose, Claimant has referred to and relied upon another letter dated 20/10/2016 (CD-135) addressed to the IC.

48.After the Claimant explained the reasons for delay in completing the punch list items of work through letter dated 02/09/2014 (CD-406), Provisional Completion Certificate was issued along with letter dated 22/02/2014 (Annexure 55 to SOD). The Claimant has relied heavily upon letter dated 20/10/2016 (CD-135) to show that it had protested against the Supplementary Agreement and raised request before the IC for compensation. In this letter the Concessionaire clearly stated that the Concessionaire signed the SA fearing further delay in COD and thus it was signed under Coercion. For this purpose reference was made to its earlier letter dated 19/08/2016 Reliance has also been placed upon deposition of Respondent's witnesses to show that during cross examination it has been admitted that there is no document to show that request for SA had come from the Claimant and that the Claimant would not have recouped any part of its investment unless it was given PCC and right to collect tolls. It has also come during cross-examination of RW2 that if the SA was not signed, PCC and extension of time would not have been granted. He has also accepted that the Project could not have been completed until handing over of land even for the Trichy Bypass which was subsequently descope. It was emphasized that in the pleading of the Respondents, in para c) of the SOD it has been pleaded that "had the Claimant not given an undertaking not to make any claims against the answering Respondent, the answering Respondent would not have executed the Supplementary Agreement". Of course, It has also been pleaded in the same para that the Supplementary Agreement was signed by the Claimant voluntarily.

52.The above judgments are on similar lines and hence need not be dealt with separately. Because of a clear illustration of a case of duress, compulsion and coercion in the judgment of the Supreme Court in the case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., it is deemed necessary and relevant to refer to one of the illustrations given in paragraph 52(iv). The said illustration was in the context of as to when claims remain arbitrable even when discharge of contract by accord and satisfaction is pleaded as a defense. Illustration (iv) is as follows: - " An insured makes a claim for loss suffered. The claim is neither admitted nor rejected. But the insured is informed during discussions that unless

the Claimant gives a full and final voucher for a specified amount (far lesser than the amount claimed by the insured), the entire claim will be rejected. Being in financial difficulties, the Claimant agrees to the demand and issues an undated discharge voucher in full and final settlement. Only a few days thereafter, the admitted amount mentioned in the voucher is paid.

The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The "accord" is not by free consent. The arbitration agreement can thus be invoked to refer the disputes to arbitration."

53. In the judgement of Hon'ble Delhi High Court in the case of NHA vs. Ms. Madhucon Project Ltd. in OMP(COMM) 292/2017, there was a Supplementary Agreement having some similarity with the SA in the present case in as much as the contractor agreed to make no claim on one count because of some grant made by NHA. The contractor agreed to withdraw the claim on that head. However, before the Arbitral Tribunal Respondent of that case claimed his legitimate dues with the allegation that those were wrongly withheld by the NHA. The objection of NHA based on Supplementary Agreement was not accepted and the tribunal gave an Award in favor of the contractor. The High Court rejected the challenge of NHA by holding that the Award was correct and that a government enterprise cannot be allowed to take undue advantage and seen indulging in arm twisting of a contractor. In that case also soon after execution of the Supplementary Agreement, the NHA made payments to the contractor. In the other judgment between the same parties the appeal of NHA bearing no. 17/2018 was dismissed by the Division Bench of the High Court consisting of Hon'ble Judges S. Ravindra Bhatt and A.K. Chawla. The above judgements leave no manner of doubt that an unfair Clause of waiver introduced by a stronger party and thrust upon a weaker party by coercion and taking advantage of economic duress can be disregarded by Court regardless of other Clauses in the same agreement. Courts grant relief by ignoring forced waiver or discharge certificate and grant whatever relief the victim party is found entitled to under law and the relevant facts.

57. As far as the issue of coercion and economic duress is concerned, the relevant facts and circumstances on the basis of submission of learned counsel for the parties have already been noted. On facts, the case of the Claimant that the waiver clause in the Supplementary Agreement was accepted and the claimant signed the Supplementary Agreement with such a clause on account of coercion and economic duress is found to be more probable and convincing. The nature of the contract has an important bearing on this issue. It was not an ordinary building or construction contract where the work done is regularly measured and part payments are released. In this case, the Claimant as a Concessionaire had to arrange for the finances on an understanding that the land etc. will be made available as per promise within the stipulated time and the project will be completed as per scheduled completion date and the cost incurred shall start

coming back with timely completion certificate and toll collection. In such a scenario the Concessionaire cannot gain financially by delaying the project. The escalation clauses are of no help except to ensure that the escalation in prices is compensated. The correspondences, particularly various letters of the Independent Consultant (IC) show that the project completion was delayed for reasons beyond the control of the Claimant and its request to find out remedies for the hardship caused by delay was kept pending for decision for unnecessary prolonged period. The materials on record, mostly the letters of the IC also show the financial stress of the Claimant. Even then before signing the final draft of the Supplementary Agreement, the Claimant protested and suggested a different draft, but the suggestions were brushed aside. When the Executive Committee of the Respondent also took a hard stand by coming out with a policy circular against the request of the Claimant, it had, in practical terms no option but to accept the waiver clause in the Supplementary Agreement or else to face financial ruin and legal death.

The coercive attitude of the Respondent appears also from the fact that it did not act upon the recommendations of the IC in the matter of extension of period of completion as well as the period of Concession although the recommendations were binding because admittedly no dispute was raised against such recommendations.

58. So far as the element of delay on the part of Claimant in raising a formal protest against the waiver clause is concerned, such behavior is understandable to a large extent when the completion certificate was provisional and some part of the Project Highway remained to be completed along with some Punch List items. The correspondences made by the Claimant informing the reasons for delay in completion of the Punch List items and attributing the same to the Respondent are available on record. Even in such a situation and even before the Trichy Bypass was descope, the Claimant in 2016 raised claims as per the CA based on delay etc. by taking the plea that the waiver Clause in the Supplementary Agreement was forced upon it due to coercion and economic duress. Till then the project works were under progress and the right to raise claims under the CA had not ended. Even the period of limitation for raising the claims could have legally commenced only on completion of the project works. Clearly, the claims raised by assailing the waiver clause was not an attempt to revive a dead agreement after final settlement between the parties. In the facts of the case the element of delay by itself cannot be accepted as fatal to the plea of coercion and cannot defeat the claims if they are ultimately found to have merits. The plea taken by the Claimant that the waiver clause in the Supplementary Agreement be ignored because it was signed under economic duress and under coercion is found to have merits. This issue is decided in favor of the Claimant and against the Respondent."

17. Qua expert evidence and delay on quantum report the learned Arbitral Tribunal held:

"70. In this matter the Claimant has led evidence of an expert, Mr. Rohit Singhal. In his affidavit evidence Mr. Singhal has stated that he is the Chief Executive Officer of the company Masin Projects Pvt. Ltd. which was engaged to analyze the delay events and prepare a report. He has claimed that he and his team evaluated the pleadings and documents on record of this Arbitral Tribunal and prepared a report enclosed with his affidavit evidence. That report with the first affidavit evidence is describe as Expert Delay Report by Mr. Rohit Singhal. He has also filed an evidence affidavit with Expert Quantum Report which is in three parts, Part-A, Part-B, and Part-C. He has referred to the said reports in his examination-in-chief. These affidavits of evidence along with Delay report and Quantum report in three volumes have been taken on record and marked as Exhibit CW/1, CW/2, CW/3 and CW/4. After referring to the salient features of CA and major milestones, the expert witness has deposed that as per his Expert Delay Report the total delay attributable to the Respondent is 1668 days and delay attributable to the Claimant is 300 days. He has explained that he used Impacted as Planned Method of delay analysis which is an internationally accepted method following international guidelines of Society of Construction Law Delay Protocol. according to him, in a construction delay dispute it is important to identify critical delays from all the pleaded delays and to assess the impact of the said critical delays on the completion date of the project. He has claimed to have considered all the pleaded delays of both the parties and assessed them for criticality and the effect of critical delays on the completion date using the agreed schedule for the project.

71. CW/1, Mr. Rohit Singhal has stated in his examination-in-chief that as per his Quantum Report, the total value of the claim of the Claimant comes to INR 662.89 crores (approx.) excluding interest. He has further deposed that he has verified the actual losses suffered by the Claimant because of the alleged defaults of the Respondent and that the losses are assessed on the basis of documentary evidence which are part of the records. The quantified loss to which the Claimant has been found entitled by the expert is Rs. 628.5 crores (approx.) excluding interest.

80. Adverting to the Quantum Report on Claimant's claim, learned counsel for the Claimant has referred to Part 2.5 which deals with actual execution of the Project. It was noted that PCC was issued on 24-02-2014 against the Scheduled Completion Date of 14-07-2010, and the delay was of more than 43 months. In para 26 further claim of the Claimant for additional compensation due to overstay of the construction resources till April 2016 has been noted in respect of the work that was finally descope. In the overall assessment to the Claimant's claims covered in Part 3.3, against the total outstanding amount excluding interest claimed as Rs. 662.89crores approximately, the Quantum Report has allowed Rs. 628.5 crores approximately. As per assessment of the expert, this amount covers all the various claims except claim for Rs. 2.95 crores as detailed in appendix I because this claim was subsequently withdrawn. The above amounts are inclusive of compensation for delay in payment of grants and claim

for reimbursement of damages said to be wrong fully recovered from the Claimant towards alleged delay in completion of Punch List items. The claim for interest for the period subsequent to 01-04-2019 till the actual date of realization has also been excluded from assessment by the expert.

83. Learned Counsel for the Claimant has submitted that although CW 1, the expert witness has been cross examined on three dates but nothing of substance has been elicited to discredit the witness. On the other hand, Learned Counsel for the Respondent has argued that the Claimant has led no proof in support of its pleading made for claims under category I. According to him there is no proof led by examination of a witness that plants and machinery had to overstay leading to burden of additional cost on the Claimant. This defense is in addition to the stand that Claimant was itself responsible for delay. The delay aspect has already been examine under a separate issue. As far as proof is concerned, oral evidence on behalf of Claimant is only of an expert who has examined the pleading and documents of the parties available on record for assessing the delay and quantum of compensation. The documents as already noted, include correspondence from the Independent Consultant (IC). The documentary evidence including the assessment made by an expert on the basis of such evidence cannot be described as no proof or no evidence. Unfortunately, the Respondent has not examined its own expert, nor it has given a counter version on quantum.

84. During cross examination of CW 1, there is no specific challenge to figures arrived by the expert in his assessment of various claims for analyzing and determining the quantum. The various aspect highlighted during crossexamination have already been noticed earlier. The expert has claimed that he has analyzed all facts and considered all documents available on record. During cross-examination, such claim has not been challenged effectively by pointing out omission of any relevant fact or document. There is no cross-examination on the methodology or calculations appearing in the reports of the expert.

85. On behalf of Claimant there is a strong rebuttal to the submission that there is no proof or evidence in support of petitioners claim no. I. Paragraph 1.5 of the Quantum Report and paragraph 1.6 of the Delay Report describe the documents relied upon in the report and they include Monthly Progress Reports (MPR). Learned Counsel for the Claimant had shown that in paragraph 14.1 of the SUR rejoinder the Respondent has itself referred to and relied upon MPR's. He has further shown that RW 1, Mr. T. Sivakumar in reply to question nos. 186 to 189 has admitted the significance of MPR's for various purposes including as evidence of the resources mobilized for the construction of the Project.

86. On the issue of delay and quantum the Respondent's witnesses RW 1 and RW 2 have not stated anything which may discredit the Expert witness, CW 1. These witnesses have not assailed or contradicted the views and opinion of IC on the matter relating to extension of the scheduled date of construction and issuance

of PCC.

87. In view of discussion made above, the assessment by the expert in the Quantum Report for the outstanding amount but excluding interest with regard to various items of Claim(s) cannot be faulted on the grounds urged on behalf of the Respondent. However, an independent scrutiny by this Tribunal of the reasonableness of the assessed amount needs to be undertaken in the interest of justice. Besides such exercise, the issue of interest at the rate agreed in the CA for the pre arbitration period and also for the later period needs to be decided for claims I, II and III along with claim no. IV and V which have also been excluded by the expert from his assessment."

18. On limitation the learned Arbitral Tribunal held as under:

"30. On examining the rival submissions on the issue of limitation, it is found that the case of the respondent has no merits. Considering the nature of the CA and its extension, limitation could not have begun to run either on 14/07/2010 only because the project was not completed on the scheduled date or even on account of the letter dated 29/03/2012. Signing of the supplementary agreement on 14/11/2013 sought to redefine the rights and obligations of the parties afresh in conjunction with the provisions in the CA. Thereafter, part claim of the claimant was accepted by issuance of PCC on 22/02/2014. The project works were continued and for very unusual and special reasons the respondent descope the work of Trichy Bypass on 20/09/2018. The claimant submitted its claims to IC in accordance with provision in the CA on 19/08/2016. The claims were not accepted and finding no action, on 07/12/2017 claimant give a letter for amicable settlement in terms of Dispute Resolution Mechanism in the CA.

Thereafter on 17/12/2018 the claimant invoked arbitration clause. There was no rejection of claims made by the claimant through any letter issued by NHAI. In such circumstances, on facts the money claim sought through arbitration in 2018 cannot be held to be barred by limitation. The judgments relied on behalf of respondent were rendered in the facts of those case and lay down important propositions of law but they do not apply to the facts of the present dispute. There is no rejection of the claims made by the claimant when the project work was still going on. Even if there were claims made earlier, those remained pending and in absence of rejection by NHAI, period of limitation would not begin. The judgments cited on behalf of the claimant on this issue are more pertinent and relevant. In a matter against GMR Chennai, a concession agreement for development of Chennai Outer Ring Road was entered between the parties. The Delhi High Court held that the rejection of the monetary claim was never within the domain of the Independent Engineer. It was also held that the amount due to the claimant can be finally assessed only after completion of the construction work and not on completion of any particular phase of the work. The payable dues can be quantified only after completion of the work. Hence, till the expiry of the extended period the claims cannot be barred by limitation. In the present case that stage continued till Trichy Bypass was descope. The work

thus came to be completed on 20/09/2018. Limitation would commence thereafter.

31. The Hon'ble Delhi High Court in the case of Satender Kumar has decided that in contracts for execution of buildings works (which is much analogous to construction work) Article 18 would come into play and when no specific date for payment is fixed, limitation commences, and the cause of action accrues for the purpose of limitation on the completion of work. It was also held that arising of cause of action necessarily varies as per facts and circumstances of each case. In the facts of the present case the claims are held to be not barred by limitation. This issue is accordingly decided in favor of the claimant."

19. The learned Arbitral Tribunal had noted the respondent had issued a policy contained in circular dated 17/24.01.2013 which approved execution of Supplementary Agreement in the given circumstances but with a mandate such agreement must include an undertaking by the Concessionaire to forego any claims against the NHAI under any Clause of the CA, for delay in handing over the affected stretch.

20. As per report of Mr.Rohit Singhal, an expert, the total delay attributable to the respondent was 1668 days and delay attributable to the claimant was only 300 days, hence the learned tribunal held such a delay on the part of the petitioner could not have been condoned by respondent but only upon the pressure being exerted to execute such supplementary agreement. This fact further gets supports from the testimony of respondent's witnesses, who during cross examination admitted there is no document to show the request for supplementary agreement had come from the claimant or the claimant could have recouped any part of its investment unless it was given PCC and right to collect tolls.

21. The RW2 in his cross examination had stated if the supplementary agreement was not signed, PCC and extension of time would not have been granted. Even in the pleadings of the respondent in para C of the SOD, it was pleaded had the clamant not given an undertaking not to make any claims against the answering respondent, the answering respondent would not have executed the supplementary agreement. Thus, non execution of the supplementary agreement would have put the respondent to tremendous loss and there was no other alternative for respondent except to execute and sign such supplementary agreement.

22. The learned arbitral tribunal also noted the drafts of S.A. were amended twice and did not provide for extension of construction period and the petitioner also asserted there shall be no claim from both the parties for delay and further claims were waived off.

23. The award also noted of a letter of Chief General Manager, Chennai wherein he had categorically stated supplementary agreement has been modified by his office keeping in view the prevailing conditions at site and also to avoid possible

claims from the Concessionaire in future and efforts was being made to ensure interest of NHAI is protected against any possible financial implication to NHAI on account of any claim from the Concessionaire. Thus, the facts do show efforts were being made to protect the petitioner from possible financial implications on account of claims from the respondent on major delays.

24. Admittedly, the appointed date was 15.01.2008 and the completion date was 14.07.2010, but the fact shows delay of 1668 days on the part of the NHAI to hand over land and scheduled handing over of the land show even by 31.03.2012 i.e. much after the date of the completion only 87% of the total stretch of the highway project was handed over in separate phases. Hence, in these circumstances coupled with the fact the petitioner did not act upon the recommendations of the IC in the matter of extension of period of completion as well as the period of concession, although such recommendations were binding, hence it was noted there appear to be coercion exercised upon the respondent to make it enter into supplementary agreement. Prima facie these observations cannot be said to be perverse.

25. Further, qua limitation the learned arbitral tribunal rightly held there was no rejection of any claim made by the claimant through any letter issued by NHAI and the amount due to the claimant could be finally assessed only after completion of the construction work and till the expiry of extended period.

26. In the present case, it was held this stage continued till Trichy Bypass was descoped and thus, work came to be completed on 20.09.2018 and hence the limitation would commence only thereafter, per Article 18 of the Limitation Act.

27. Though, the petitioner has relied upon National Insurance (supra), but the learned arbitral tribunal has already dealt with this decision in para No.52 of the award dated 01.10.2022 and has relied upon to illustration (iv) of this decision and thus, has applied its mind to this decision.

28. In Sugam Construction (supra) the plea of coercion was taken only at the stage of rejoinder whereas in the present case the complainant had protested even before and after the execution of the supplementary agreement. The witness of the respondent rather had stated there was no request ever made by the petitioner for execution of the supplementary agreement, thus the facts of the case are distinguishable from Sugam Construction (supra).

29. Thus, considering the settled law viz. the grounds for interference in an arbitral award being extremely narrow and an existence of a glaring error which goes to the root of the award and apparent on the face of the award, has not been shown. This court, admittedly, cannot sit in appeal over such award and cannot interfere in finding of law and fact by the learned arbitral tribunal, thus, prima facie gives no ground to stay the award at this stage. Consequently, the application is dismissed.

EX.APPL.(OS)Nos.345/2023, 755/2023 in OMP (ENF.) (COMM.) 3/2023

30. Since a huge amount is awarded, hence, it would be appropriate to direct the NHAI to deposit 50% of the due amount along with upto date interest within four weeks from today and the remaining 50% within four weeks thereafter. The amount so deposited by the NHAI be released to respondent subject to its filing of Bank Guarantee to the satisfaction of the learned Registrar General of this Court and with an undertaking that in case petition under Section 34 of the Arbitration and Conciliation Act, 1996 is allowed the said bank guarantee be encashed.

O.M.P. (COMM) 24/2023 & OMP (ENF.) (COMM.) 3/2023

31. Reply be filed by the respondent within four weeks from today with an advance copy to learned counsel for the petitioner. Rejoinder, if any, be filed within two weeks thereafter.

32. List on 19.10.2023.