
(2022) 03 DEL CK 0032

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 373 Of 2021, I.A. No. 17100-17101 Of 2021, 663 Of 2022

National Highways Authority Of India

APPELLANT

Vs

IRB Pathankot Amritsar Toll Road Ltd

RESPONDENT

Date of Decision : 08-03-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 31A, 34, 34(2), 34(3)

Citation : (2022) 03 DEL CK 0032

Hon'ble Judges : Suresh Kumar Kait, J

Bench : Single Bench

Advocate : Sudhir Nandrajog, Nikhil Mehta, Varun Sharma, Vikram Nankani, Saurabh Kirpal, Mahesh Agarwal, Sameer Rohatgi, H.P. Chaturvedi, M.V. Ravindran, Ashish Batra, Sarthak Sachdev, Terresa R Daulat, Apoorva Agarwal

Final Decision : Dismissed

Judgement

Suresh Kumar Kait, J

1. The present petition has been filed under the provisions of Section 34 of Arbitration and Conciliation Act, 1996 challenging the arbitral award dated 13.07.2021 read with order dated 27.07.2021 passed by the learned arbitral tribunal.

2. In the present petition, it is stated that the Government of India entrusted the work of development, maintenance and management of Pathankot to Amritsar Section of National Highways No.15 from km 6.082 to km 108.502 to the petitioner, for which petitioner invited proposals for design, build, finance, operate and on transfer basis the above referred Section of NH-15, shortlisted certain bidders including consortium comprising IRB Infrastructure Ltd. and Modern Road Makers Pvt. Ltd. with IRB Infrastructure Developers Ltd. as its Lead Member (henceforth referred to as the "consortium"). After evaluation, petitioner accepted the bid of the consortium vide its letter of acceptance dated 27.07.2009. Respondent- IRB Pathankot Amritsar Toll Road Ltd., by its letter

dated 21.09.2009 also joined the consortium and thereafter, a Concession Agreement dated 16.11.2009 was entered between the parties. In terms of the aforesaid Concession Agreement, the commencement of the work was to be done on 31.12.2010 and the completion date was fixed as 910th day from the appointed date i.e. 27.06.2013. However, the work could not be completed within the time stipulated and time was extended from 05.08.2014 to 25.08.2014 to 15.10.2014 and the parties entered into a further agreement dated 05.11.2014. Though respondent claimed to have completed the work by 18.11.2014, however, vide letter dated 22.11.2014 took the plea that certain works like boundary pillars, drainage etc. are left, which do not affect the project work. Therefore, a Provisional Completion Certificate (PCC) was issued to the respondent on 27.11.2014 to commence commercial operation and toll collection. After three years of issuance of Provisional Completion Certificate, vide letter dated 19.06.2017 respondent requested for extension of Concession Period for the period of 581 days and reiterated the same request on 18.06.2018. On 07.08.2018 respondent invoked arbitration and thereafter, on 19.01.2019, approached IRC for appointment of Arbitrator. The arbitral tribunal was constituted comprising of Justice (Retd.) Ajit Prakash Shah as the Presiding Arbitrator and Shri S.S. Agarwal and Shri Navin Kumar as Arbitrators.

3. Before the arbitral Tribunal, the respondent/claimant filed the Statement of Claims and petitioner/respondent filed the Statement of Defence. Based thereupon, the arbitral tribunal framed the issues and proceeded for determination thereof. The tribunal proceedings culminated into Award dated 13.07.2021, wherein the claims raised by the respondent / claimant were granted with costs. Based upon the aforesaid averments made in the petition and aggrieved against the said arbitral award, the present petition under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 has been preferred by the petitioner.

4. Before advertng to the submissions and arguments raised on behalf of both the sides, it is pertinent to mention the issues which were subject matter of consideration and decision before the arbitral tribunal. These issues were framed by the learned arbitral tribunal on 28.01.2020 and have been enumerated in Para-10 of the impugned award and read as under:-

"1. Whether the Independent Engineer approved Extension of Time of 518 days in terms of provision of Article 14 or the Concession Agreement?

2. Whether the Supplementary Agreement dated 05.11.2014 prohibits claims of the Claimant as consequence of delay damages arising out of the overrun?

3. Whether the compensation sought by the Claimant under Clause 35.2 of the Concession Agreement towards increase in capital cost is attributable to delay on the part of NHAI in completion of the Project Highway?

4. Whether the Claims are time barred?

5. Whether the Claimant is estopped from making the Claims in view of execution of the supplementary agreement dated 05.11.2014?

6. Interest & Costs?"

5. During the course of hearing, learned senior counsel appearing on behalf of petitioner submitted that the impugned Award is against the provisions of the contract, which has been rendered in haste without appreciating the pleadings and evidence on record. The learned arbitral tribunal neither considered the objections/ submissions made on behalf of petitioner nor rejected them and thereby, the impugned Award is cryptic, non-speaking, patently illegal and in conflict of provisions of law as well as provisions of Arbitration and Conciliation Act, 1996.

6. With regard to the first issue i.e. "whether the Independent Engineer approved Extension of Time of 518 days in terms of provision of Article 14 of the Concession Agreement", learned senior counsel for petitioner submitted that 'Extension of Time' and 'Extension of Concession Period' are all together two different issues. 'Extension of Time' means extension of time for construction and 'Extension of Concession Period' means extension of toll collection period. It was next submitted that the learned Tribunal wrongly framed and dealt with the Issue no. 1, as the claim of the claimant was for the 'Extension of Concession' period but the tribunal dealt it as 'Extension of Time' only and on this ground alone, the Award in question deserves to be set aside. Also submitted that the Independent Engineer (IE) vide letter dated 23.09.2015 had recommended extension of time of 518 days without extension of concession period, however, learned tribunal on the erroneous assumption recommended the concession period, though in terms of Article 35 of the Concession Agreement, extension of concession period can be claimed only if the NHA is in material default or breach of the Concession Agreement. Learned senior counsel also relied upon communication dated 25.10.2012 of the Independent Engineer to submit that the delays were attributable to respondent only and so, extension of time to the respondent was refused. It is submitted by learned senior counsel that the learned arbitral tribunal has misinterpreted the letters dated 27.05.2013; 12.06.2013; 07.10.2013; 20.12.2013 and 23.03.2015 while assuming that the impediments for timely completion of the project are attributable to the petitioner-NHA.

7. With regard to the second issue, "Whether the Supplementary Agreement dated 05.11.2014 prohibits claims of the Claimant as consequence of delay damages arising out of time overrun", learned senior counsel submitted that the tribunal has erroneously held that the Supplementary Agreement dated 05.11.2014, was executed by the respondent/IRB under economic duress and hence, is voidable, whereas Shri Navin Kumar, learned Arbitrator has taken a different view that the respondent has failed to establish the existence of any coercion for issuance of the undertaking dated 13.10.2014 or 05.11.2014. It is also submitted that the tribunal has wrongly held that the Supplementary Agreement was not drafted or prepared by the respondent/ IRB but was by the

petitioner/NHAI, whereas the stamp paper for the Supplementary Agreement has been purchased in the name of respondent and typed thereon and it cannot be presumed that the stamp paper was in the possession of the petitioner, who got it prepared. Therefore, this finding returned by the Tribunal that the Supplementary Agreement is voidable is patently wrong and is liable to be set aside.

8. Learned senior counsel next submitted that the finding returned by the tribunal that the Supplementary Agreement was signed under duress cannot be accepted, as the Shri Navin Kumar, learned Arbitrator has taken a contrary view and it is established from the fact that safety audit report was submitted only on 18.10.2014, which is a pre-requisite for grant of PCOD and thereafter, on 21.10.2014, the project was inspected and on the next day i.e. 22.10.2014, petitioner approved the issuance of PCOD i.e. much prior to the execution of the Supplementary Agreement. Therefore, the issue of duress is an after-thought portrayed by the respondent.

9. On the aspect of delay in raising the claim regarding duress, learned senior counsel for petitioner submitted that the tribunal has erred in holding that there was no delay on the part of respondent, whereas Shri Navin Kumar, learned Arbitrator has observed that the Supplementary Agreement was signed on 05.11.2014 whereas respondent/ IRB raised the dispute under Article 44 of Concession Agreement on 18.06.2018 and the Testimony of CW-1, makes it clear that the respondent did not raise any protest almost for a period of four years against the alleged duress from the date of the signing of the Supplementary Agreement .

10. Learned senior counsel for the petitioner submitted that the finding returned by the arbitral tribunal that the Supplementary Agreement does not in any way prevent the claimant from making the claims, is patently wrong as the learned tribunal has misinterpreted construction period between the appointed date of 31.12.2010 and Schedule date of completion of 27.06.2013, whereas it should have been calculated from the appointed date of 31.12.2010 to the commercial operation date i.e. 27.11.2014 and therefore, in view of Supplementary Agreement dated 05.11.2014, the claim of respondent deserves to be rejected.

11. It was also contended by learned senior counsel for the petitioner that as per the Clause- b of Supplementary Agreement dated 05.11.2014, it was agreed by respondent that it shall not raise any claim whatsoever in this Concession Agreement i.e. idling of resources (Manpower and machinery), increase in cost of material, delay in construction of highway, etc.

12. On the third issue "Whether the compensation sought by the Claimant under Clause 35.2 of the Concession Agreement towards increase in capital cost is attributable to delay on the part of NHAI in completion of the Project Highways", learned senior counsel submitted that the learned arbitral tribunal has held that the delay has occurred due to reasons solely attributable to the petitioner and

that the respondent has claimed Rs.159.54 Crores and Rs.92.71 Crores towards extra expenditure and increase in capital cost due to time over run / delayed construction for the period 27.06.2013 to 27.11.2014, however, in the audited accounts of the respondent, there is no mention of the above said amount and even otherwise, the learned tribunal has erred in granting damages/ compensation when petitioner had extended the concession period equivalent to the construction delay, as the respondent was able to earn the toll for the same period which was originally available to it.

13. Learned senior counsel for petitioner further submitted that the tribunal erred in holding that the costs shall be solely borne by the petitioner, which is contrary to the contract entered between the parties, according to which costs were to be equally borne between the parties. Also submitted that the learned tribunal erred in granting the interest from the period starting from 27.11.2014, whereas the claims were quantified by the respondent only on 18.09.2018 and 15.05.2019.

14. On issue No.5 i.e. "whether the Claimant is estopped from making the Claims in view of execution of the supplementary agreement dated 05.11.2014", learned senior counsel for petitioner submitted that the finding of tribunal that the Supplementary Agreement was signed by the respondent under duress and so, question of estoppel does not arise, is patently wrong as respondent had voluntarily entered into Supplementary Agreement dated 05.11.2014, which was duly acted upon by the petitioner and in lieu of same, Provisional Completion Certificate and Final Completion Certificate effective from 27.11.2014 were duly issued to the respondent. Also submitted that it is after four years of execution of Supplementary Agreement dated 05.11.2014, the respondent/ claimant on 24.09.2018 for the first time has alleged that the "no claim undertaking" was given under duress. It was submitted that at the time of entering into the Supplementary Agreement, the respondent had defaulted on timely completion of project, hence it was not economic duress but it was economic for the respondent to enter into the said agreement, which is a legally binding Agreement and a valid contract and in this view, the tribunal ought not have granted claim of respondent.

15. Learned senior counsel for petitioner emphatically submitted had the Supplementary Agreement not been entered into between the parties, the petitioner would have terminated the Concession Agreement and levied damages on the respondent for delays and breaches on its part, whereas by virtue of Supplementary Agreement, both the sides had given up their claims against each other. It was submitted that if at this stage the Supplementary Agreement is rescinded declaring it to be under duress, the benefits derived there-under by the respondent have to be returned and petitioner's rights have to be restored, which were not claimed before the learned arbitral tribunal, such like, petitioner's right to terminate the Concession Agreement under Article 32 would have to be revived retrospectively; the entire toll collected by the respondent would become

unauthorized; the petitioner would become entitled to damages for non-completion of project within the scheduled time and for several material breaches etc. from the respondent.

16. On the issue "whether the claims raised by the petitioner were time barred", learned senior counsel submitted that the arbitral tribunal has failed to appreciate that the claims of respondent were highly barred by time, as the respondent itself has claimed before the tribunal that the limitation period started when the IE determined the Extension of Time i.e.11.12.2015, whereas the Extension of Time for the first time was determined on 22.12.2014 and second time on 23.03.2015 and thereby, cause of action accrued on 22.12.2014, whereas the claims were raised after lapse of four years on 18.06.2018 and arbitration was invoked vide letter dated 07.08.2018. It was also submitted that vide letter dated 18.06.2018, the respondent had invoked conciliation on the point of Extension of Concession Period only and no claim for compensation was raised and therefore, the finding of tribunal that the claims are not time barred is patently illegal.

17. To the contrary, learned senior counsel appearing on behalf of the respondent submitted that the impugned award in question is a detailed well-reasoned Award and finding of one of the Arbitrators on the issue of economic duress does not affect the conclusion thereof. It was submitted that the findings returned in the impugned Award are based on construction and/or interpretation of the Concession Agreement, duly supported by material on record including the Statement of Accounts and the oral evidence of the Chartered Accountant and Auditor and it does not at all suffers from patent illegality or perversity.

18. Learned senior counsel for respondent submitted that the Concession Agreement dated 16.11.2009 was executed between petitioner/NHAI and respondent where-under petitioner was obliged to provide to Concessionaire a valid license and hindrance free vacant Right of Way to the entire Site of the Project within 90 days from the appointed date i.e. 31.12.2010, failing which it was liable to pay damages to respondent. As per Article 12.4 read with Article10.3 construction of the Project Highway was to be completed by 910th day from the appointed date i.e. the Scheduled Four Lanning Date of 27.06.2013 and if the respondent failed to complete the project milestones within 90 days from the date fixed for such milestone, it was liable to pay damages to the petitioner/NHAI. However, if delay was due to default by petitioner/ NHAI or force majeure, then respondent was entitled to grant of extension of time determined by the Independent Engineer and accordingly all timelines would get extended.

19. Learned senior counsel for respondent next submitted that as per Article 27 read with Article 15 of the Concession Agreement, respondent was entitled to commence collection of Fee /Toll from the date of completion certificate issued by the Independent Engineer under Article 14 thereof for the entire Concession Period of 20 years from appointed date. The concession agreement in Article

35.02 further stipulated that if petitioner/ NHAI was in material default or breach of the Concession Agreement, it shall be liable to pay compensation of all direct costs, including interest payments on Debt O&M Expenses, any increase in capital costs on account of inflation and all other costs. In addition, Clause 35.03 stipulated that in the event such material default by NHAI as in Article 35.2 causes delay in achieving COD, NHAI shall, in addition to payment of compensation under Article 35.2, extend the Concession Period to the extent of delay in COD.

20. Learned senior counsel submitted that the arbitral tribunal has rightly held that due to reasons solely attributable to the petitioner, there was delay in completion of construction of the Project. It was contended that despite recommendation of the Independent Engineer for Extension of Time of 518 days, petitioner unreasonably withheld the approval contrary to the provisions of Concession Agreement till issuance of provisional completion certificate and consequently, there was delay in COD and respondent could not commence collection of fee/ toll.

21. Learned counsel for respondent submitted that on issue No.1, the learned arbitral tribunal has held that respondent is entitled to "Extension of Time" of 518 days from the scheduled completion date of 27.06.2013 on account of delays solely attributable to NHAI, which were supported by detailed, catalogued reasons, particularly letters dated 7.10.2013 & 20.12.2013 of the Independent Engineer, who confirmed the delays and hindrances due to non-availability of hindrance free work site and also upon failure of petitioner to execute relevant agreements with Railways; deposit mandatory planning and estimation charges on time, which petitioner has not been able to rebut before the learned arbitral tribunal.

22. With regard to issue No.2 & 5, learned senior counsel for respondent submitted that respondent has been able to prove before the arbitral tribunal that the supplementary agreement was signed under economic duress, which is one sided agreement drafted by the NHAI with the condition to issue the Provisional Completion Certificate. Respondent has also been able to prove that obtaining of Provisional Completion Certificate was necessary for respondent to collect the toll/ fee and to pay off the debts of lenders. Learned senior counsel submitted that the arbitral tribunal has rightly rendered the Supplementary Agreement void. Learned counsel submitted that cumulative reading of Article 35.2 & 35.3 shows that once default by NHAI is established, it must extend the Concession Period proportionately to the period of delay. It was strenuously submitted that the claims of respondent are not at all barred by limitation. It was also submitted that the scope of review of arbitral award by this Court under the provisions of Section 34 of the Act, is very limited. Learned senior counsel placed reliance upon a recent decision of Hon'ble Supreme Court in Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd. 2021 SCC OnLine SC 695 in support of above submissions.

23. The rival contentions urged on behalf of both the sides were extensively heard and material placed on record as well as decisions cited have been carefully perused.

24. Pertinently, Section 34 of the Act provides for setting aside of the arbitral award on very limited grounds, which have been enumerated in sub-Section (2) and (3) of Section 34 of the Act. Further, in catena of decisions, the Hon'ble Supreme Court has laid down the parameters to be followed while considering the petitions under the aforesaid provisions of law.

25. In a recent decision in National Highways No. 45E and 220 National Highways Authority of India Vs. M. Hakeem, 2021 SCC OnLine SC 473 the Hon'ble Supreme Court has held that under Section 34 of the Arbitration and Conciliation Act, 1996, Courts cannot modify or vary an arbitral award. It has been further held that "given the very limited judicial interference on extremely limited grounds not dealing with the merits of the award, the "limited remedy" under Section 34 is coterminous with the "limited right" namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996."

26. Applying the afore-noted ratio of law laid down by the Hon'ble Supreme Court and keeping in mind that this Court cannot in depth scrutinize the arbitral award and has only a limited scope to interfere, this Court has analysed the arbitral award to find out whether the claims raised in the present petition are valid and liable to be sustained or dismissed.

27. In the impugned award, the arbitral tribunal has noted that for executing the Project on a DBFOT basis, a Concession Agreement was signed between the parties on 16.11.2009 for a Concession Period of 20 years from appointed date i.e. 31.12.2010. The cost of the project was Rs.705 crores, its length was 102.420 km. and the date scheduled for completion of the project was 27.06.2013 and the project award parameter was the grant of Rs. 126.90 crores. The aforesaid Concession Agreement was amended vide a Supplementary Agreement dated 05.09.2013, whereby the arbitration clause was amended. Subsequently, another Supplementary Agreement was signed between the parties on 05.11.2014, which according to claimant/ respondent was signed under duress.

28. The learned tribunal has noted the claim of claimant/ respondent that the project commenced from the appointed date i.e. 31.12.2010 and the completion of the project was to be done by 27.06.2013, which was delayed on account of reasons exclusively attributable to the petitioner herein. The claimant/respondent had raised claims for Extension of Time for 518 days, damages and for extension of concession period. Thus, according to the impugned award, the claims raised by the claimant/ respondent before the arbitral tribunal were:-

i. Claim No.1, Extension of Concession Period: Since the Project had been delayed due to the Respondent's breach of reciprocal promises and obligations,

the Claimant could not achieve a timely COD. The overall effect of the delay was 518 days, as certified by the Independent Engineer, and this greatly distorted and delayed the Claimant's collection of revenue. Thus, it was not necessary to prove who caused the breach and to what extent, given that the Claimant was denied of its rightful period of commercial operation for collection of revenue. Thus, the Claimant was claiming for the extension of the Concession Period in order to secure appropriate and adequate relief.

ii. Claim No. 2, Compensation under Article 35.2 for delay: Article 35.2 obliged the Respondent to reimburse the Claimant for any extra expenditure incurred by the latter in case of a time overrun, including expenditure for overheads and other specified, relevant expenditure. Thus, the Claimant was claiming "an amount of Rs. 159.541 crores" under this clause, by relying on the annexed detailed certified and audited expenditure as per the authorized auditors.

iii. Claim No. 3, Compensation under Article 35.2 on account of inflation: Article 35.2 also provides for compensation for "any increase in capital costs on account of inflation and all other costs" to be paid to account for escalation and other costs. The Claimant calculated the same to be Rs.92.71 crores and submitted its claim.

iv. Claim No. 4, Cost of Arbitration: The Claimant sought liberty to submit a cost compilation under Section 31 A of the Arbitration and Conciliation Act, 1996 towards closure of arbitration proceedings.

29. The arbitral tribunal has also elaboratively noted the objection of the petitioner/ respondent that the claimant had signed the Supplementary Agreement dated 05.11.2014 with eyes wide open, where-under it had agreed to not raise any claim whatsoever for idling of resources, increase in cost of material, delay in highway construction etc. and also not to seek an extension of the Concession Period.

30. The tribunal has also noted that the claimant/respondent had acted upon the Supplementary Agreement and received the PCC/PCOD and was also permitted an Extension of Time up to that period without levy of penalty. Thus, the claimant/respondent had received benefits and advantages by virtue of the Supplementary Agreement.

31. To determine the claims of claimant/ respondent, the arbitral tribunal had framed six issues, which have already been noted by this Court in Para-3 above.

32. (i) With regard to the first and fifth issue, the tribunal has noted that the claimant/ respondent had commenced the work on 31.12.2010 and the date for completion of the project was scheduled as 27.06.2013. Under Article 12.4.2 of the Concession Agreement if claimant/respondent failed to achieve Project Milestone III within 90 days from 10.10.2012, it was liable to pay damages to the authority. However, claimant/ respondent achieved the Project Milestone III on 31.12.2012 i.e. within the limitation period.

(ii) The tribunal has further noted that thereafter, claimant/ respondent vide letter dated 27.05.2013, sought Extension of Time of 369 days from Independent Engineer, detailing various impediments that were attributable to the respondent, who vide letter dated 07.10.2013 granted interim extension of 264 days clarifying that such 253 days Extension of Time overlapped with the Extension of Time of 90 days assessed by it on account of the hindrances at the site and thereby, shifted the project completion date to 18.03.2014. The aforesaid proposal of Independent Engineer vide letter dated 07.10.2013 was returned by the petitioner herein, in response to which vide letter dated 20.12.2013 the Independent Engineer once again reiterated its earlier recommendation for grant of 264 days interim Extension of Time. On 18.02.2014 i.e. more than six months after the scheduled completion date, the Commissioner of Railway Safety sanction was received and the mandatory planning and estimation charges in respect thereof were deposited on 19.04.2014 and the permission for launching girders was granted after clearance was obtained from the Court on 01.08.2014. Thus, the delay of 400 days from the scheduled date of completion i.e. 27.06.2013 till 01.08.2014 was attributable only to the petitioner/NHAI. Thereafter, claimant/respondent signed an undertaking on 14.10.2014 and the Supplementary Agreement on 05.11.2014 and the Independent Engineer on 21.11.2014 sought issuance of PCOD and after necessary approval on 27.11.2014 by the Independent Engineer as well as petitioner herein, the toll collection at the Highway began from 28.11.2014.

(iii) The impugned Award notes that the Independent Engineer vide letter dated 23.03.2015 written to the petitioner/NHAI had clarified that the claimant/respondent had achieved Milestone- I before the scheduled completion date, which was authenticated by the Statutory Auditor; and had achieved Milestones- II and III within 90 days of the scheduled completion date, as per Article 12.4.2 and reiterated that the claimant/ respondent was entitled to Extension of Time of 518 days.

(iv) On the first issue, the Tribunal held as under:-

"In view of the above factual narration, the following three conclusions emerge. First, the IE was the sole competent authority under the contract to determine the issue of EOT. Second, the IE's findings that the Claimant achieved Project Milestones I, II, and III within 90 days, as per Article 12.4.2 of the CA has gone un rebutted, except making references to the previous observations of the IE. In any event, the Respondent failed to demonstrate any error or flaw in this finding of the IE. Third, the IE's finding that the Claimant is entitled to an EOT of 518 days (400 + 87+ 31 days) from the scheduled completion date of 27.06.2013 has not been rebutted by the Respondent or shown to be to erroneous, even during their cross-examination. The time taken by the Respondent to receive the CRS approval for the 5 ROBs had admittedly been "abnormally delayed", resulting in an EOT of 400 days (till 01.08.2014) which subsumed other delays. The Respondent had also failed to provide any explanation on delay of 87 days

(after receiving the Court's order dt. 01.08.2014 for completing the balance works on the ROB) and 31 days (for the period after 30.10.2014 since hindrance-free land was still not made available by NHAI to the Claimant, till the issuance of the PCC on 27.11.2014. Thus, the Claimant is entitled to EOT of 518 days with effect from the scheduled completion date of 27.06.2013 till the date of issuance of PCCIPCOD, i.e. 27.11.2014. Hence, the finding on Issue No. 1 stands concluded and the AT finds in favour of the Claimant that the IE has approved the EOT for 518 days as per Article 14 of the CA.”

33. On the afore-noted first issue, this Court finds that vide letter dated 03.09.2012 the claimant/ respondent had requested the Director/NHAI to handover the land required to enable it to complete the project on the scheduled completion date. A perusal of communication dated 23.03.2015 of the Independent Engineer to the Project Director, NHAI (Page-930 of documents) clearly shows that the reasons for grant of Extension of Time wherein it is noted that under Event-1, hindrances at the site had hampered the work of the concessionaire, which could be removed from the main carriageway in June, 2014 and there was a delay of 54 days in doing so. It is also noted that under Event-2, there was delay caused for tree cutting permission and delay of 73 days was attributable to it. Further, under Event-5, there was delay in shifting of existing Irrigation Distributary and therefore, concessionaire was entitled to extension of 90 days' time. Under Event- 6, extension of time of 13 days has been recommended for delay in possession of land due to different court cases. The Independent Engineer under Event-7 has recommended extension of time of 487 days due to delay in seeking CRS approval. In all, the Independent Engineer has recommended delay of 518 days. In the opinion of this Court, the arbitral tribunal has rightly noted that the Independent Engineer was the sole competent authority under the contract to determine the Extension of Time and since petitioner has rightly achieved Milestones I, II and III within the time prescribed as per Article 12.4.2 of the Concession Agreement, the Extension of Time of 518 days, for the reasons solely attributable to the petitioner/NHAI, and has rightly recommended Extension of Time of 518 days and thereby holding issue No.1 in favour of the claimant.

34. With regard to second issue as to whether Supplementary Agreement dated 05.11.2014 prohibits claims of claimants or not, the learned arbitral tribunal has noted that in terms of Article 14.3.1, the Independent Engineer was not required to take prior approval of petitioner-NHAI before issuing PCC/PCOD and, therefore, Independent Engineer's letter dated 13.10.2014 seeking the respondent's approval is contrary thereto and claimant/respondent signing an undertaking on the same date waiving its rights under the contract and reliance placed thereupon by the Project Director of NHAI relying to seek approval from NHAI on 14.10.2014, provided an important background to consider that the same was signed under duress. It is also noted that the failure to receive a PCC/ PCOD, prevented the claimant/ respondent from levying toll and thereby had serious economic implications and also it was under pressure to repay the

principal and interest to the banks.

(i) The Tribunal, therefore, held that only after respondent/Claimant had signed the Supplementary Agreement on 05.11.2014, the petitioner/respondent finalized the issuance of PCOD, which was approved by the Executive Committee of NHAI on 27.11.2014 and issued on the same date. The Tribunal has also held that petitioner/NHAI had set up the signing of Supplementary Agreement as a pre-condition for the issuance of PCC/PCOD.

(ii) With regard to plea of petitioner/NHAI that the Supplementary Agreement dated 05.11.2014 was drafted by the claimant/ respondent, the tribunal has opined that the stamp paper was purchased on 14.10.2014, which bears the name of claimant/respondent as the first party and name of second party is blank. The Tribunal has also relied upon noting of Mr. M.K. Jain, General Manager of NHAI vide (Tech)- P&H dated 05.11.2014 addressed to CGM (T) BSS recording that "a draft Supplementary Agreement to be signed with the concessionaire is placed for perusal please" to arrive at the finding that the Supplementary Agreement was drafted and signed on the same date and it was the petitioner/NHAI herein who had drafted the same.

35. This Court has also gone through the Supplementary Agreement dated 05.11.2014, the relevant portion of which has caught the eyes of this Court, is highlighted as under:-

"THE PARTIES HEREIN HAVE AGREED TO THE FOLLOWING:

(a) Both the parties amicably agree, for issuance of Provisional Completion Certificate the work of Design, Engineering, Finance, Construction, Operation and Maintenance of Pathankot to Amritsar Section of NH-15 from Km. 108+502 in the State of Punjab subject to completion of certain balance items as decided by Authority in its Executive Committee Meeting held on 22.10.2014.

(b) Concessionaire amicably agree that he will not raise any claims whatsoever in this Concession Agreement i.e. idling of resources (manpower and machinery), increase in cost of materials, delay in construction of highway, etc. The Concessionaire amicably agrees that he will not seek any extension in Concession Period: however, the Concessionaire shall retain his right for extension of the Concession Period on account of any valid factor arising after the actual construction of the highway/ project as per provisions of the Concession Agreement.

(c) The concessionaire also claimed that he should be given EOT for construction period without levy of penalty as delay was attributable to both the parties. It was amicably settled that the issue of grant of EOT for construction period shall be dealt separately.

(d) Concessionaire amicably agrees that it shall not raise any claim whatsoever, in any form other than for any Change of Scopes already principally approved by NHAI. A fair decision by NHAI, as per provisions of the CA, on the variations/

Change of Scopes will be acceptable to the concessionaire.

(e) The Concessionaire amicably agrees to complete the balance works mentioned in punch list, as per Concession Agreement.”

36. An undertaking from the claimant/respondent, as mentioned in Clause- (a) and (b) highlighted above, has been given and after furnishing thereof, the petitioner finalised issuance of PCC, which was issued on 27.11.2014. This Court finds that the learned arbitral tribunal has taken detailed note of the facts and circumstances in which the Supplementary Agreement dated 05.11.2014 was executed and this Court is in harmony to the said view of the arbitral tribunal.

37. On the aspect whether respondent herein had a right to claim for the losses attributable to it, the stand of petitioner/NHAI before the arbitral tribunal was that in the light of Supplementary Agreement dated 05.11.2014, the claimant/respondent had waived off its right, however, this Court finds that the Independent Engineer in letter dated 13.01.2015 had significantly stated that the claimant / respondent had achieved all the milestones within the time framed and limitation period, as prescribed under Article 12.4.2 and also recommended Extension of Time, due to various delays attributable to the petitioner. Therefore, the tribunal has rightly held that it cannot be accepted that claimant / respondent will voluntarily give up valuable claims for compensation and extension of Concession Period on account of petitioner’s default without any reciprocal consideration. The tribunal had therefore rightly held that claimant/respondent was in a precarious financial condition and that without signing the Supplementary Agreement, the respondent would not have issued the PCC/PCOD and it would not have been able to operationalise the Project Highway and start collecting toll fees. It was also rightly held that the Supplementary Agreement dated 05.11.2014 was signed by the claimant/ respondent under duress and is, therefore, rendered voidable. Also, in view of Clause (C) of the Supplementary Agreement the issue of Extension of Time is to be decided separately, which makes it further clear that the claimant/ respondent had not given up its claim for Extension of Time for construction and claim compensation for the delay caused at the hands of petitioner/ NHAI.

38. With regard to issue No.5 ‘on estoppels”, the tribunal has rightly held that petitioner/NHAI did not provide any evidence of estoppels nor any of the witness substantiated and also that once it has been held that the Supplementary Agreement was signed under duress by claimant/respondent, the question of estoppels does not arises.

39. On the aspect of claimant/respondent having raised the issue belatedly on 24.09.2018 i.e. after 04 years of signing the Supplementary Agreement, the arbitral tribunal has noted that the claimant had prayed for issuance of a completion certificate on 03.05.2017, followed by a letter dated 19.06.2017 seeking compensation for the delay of 518 days under Article 35.2 and 35.3 of the concessionaire agreement. The aforesaid letter dated 19.06.2017 to the

NHAI was after 30 month of the Supplementary Agreement and the claimant/respondent got the Completion Certificate only on 25.08.2017. The tribunal has further observed as under:-

"125. While evaluating this argument, the AT must take into account the threat of termination under Article 12.4.3 of the CA, since the delay in issuance of PCOD was more than the period of 270 days mentioned in Article 12.4.3 and the Respondent had not accepted that the delay was due to reasons solely attributable to it or due to a force majeure. In fact, even the Supplementary Agreement expressly left the question of EQT during the construction period open, thus leaving the threat of termination hanging on the Claimant. In this context, the IE's letter dated 13.01.2015 further recommending an interim EOT up till the issuance of the PCC dt. 27.11.2014 is revealing of the Respondent's intentions, since it highlighted that:

"5. It is pertinent to point out that the Authority has been insisting for imposing of Damages on the Concessionaire for delay in completing the works on the stretches made available to the concessionaire free of any obstruction. However, the Milestones as per the CA have been achieved. As such, no damages are leviable on the Concessionaire" (emphasis supplied).

In the same letter, the IE also specifically references Article 12.4.3 of the CA noting that the Project Milestones I, II, and III had been achieved, but the Scheduled Project Completion Date as per Schedule G had not been achieved. The IE subsequently recommended the interim EOT till 27.11.2014."

40. The tribunal has also taken note of the fact that despite issuance of full Completion Certificate on 25.08.2017, the issue of Extension of Time was not settled and the claimant/respondent vide letters dated 18.06.2018; 28.06.2018 and 07.08.2018 raised the disputes and sought conciliation and it is only after petitioner/NHAI failed to reply to the same, the claimant/respondent invoked arbitration vide letter dated 07.08.2018. The aforesaid reasoning makes it abundantly clear that the arbitral tribunal has rightly held that there was no delay on the part of the Claimant in raising the claim of economic duress pursuant to Supplementary Agreement dated 05.11.2014 and that claims are not barred by limitation.

41. With regard to third issue whether the compensation sought by the Claimant under Article 35.2 of the CA towards increase in capital cost is attributable to the delay caused by the NHAI in completing the Project Highway, the petitioner/NHAI has averred that the arbitral tribunal has erroneously held that the delay has occurred for the reasons solely attributable to the petitioner and therefore, compensation claimed by the claimant/ respondent towards extra expenditure and increase in capital cost due to time over run / delayed construction for the period 27.06.2013 to 27.11.2014 is liable to be rejected. Petitioner has also claimed that once petitioner had extended the concession period equivalent to the construction delay and the respondent was able to earn the toll, there was no

question of grant of compensation by the arbitral tribunal. To the contrary, stand of claimant/respondent is that in terms of Article 35.2 of the Concessionaire Agreement, if petitioner/ NHAI was in default or breach thereof, it shall be liable to pay all direct costs, including interest payments on Debt O&M Expenses, any increase in capital costs on account of inflation and all other costs. Article 35.3 further stipulates that if the delays are caused and proved in terms of Article 35.2, the petitioner/NHAI shall extend the concession period to the extent of delay in COD.

42. It is pertinent to mention here that the Independent Engineer vide its letter dated 07.10.2013 and 23.03.2015 had approved Extension of Time for 518 days. In the said letter also stated that the claimant/ respondent had reached the Milestones within the contractual limitation period. In addition, the Statutory Auditor certified the expenses for the period 27.06.2013 till 27.11.2014 and based thereupon the tribunal was right in holding that the incremental additional cost incurred by the claimant/respondent as interest and fixed overhead costs on account of the respondent's 518 days delay was Rs.159.451 crores. The tribunal further added the direct cost in respect of labour, salary (PMC), Site establishment costs, Plants & Machinery hire charges etc. to the tune of Rs.92.71 crores thereto and held that compensation of Rs. 159.541 crores + Rs. 92.71 crores = Rs. 252.251 to be paid by the petitioner/NHAI to the claimant/respondent. The concession period was also extended for 518 days for the delays attributable to the respondent.

43. In view of the above, finding that the arbitral award is based upon the evidence and material placed on record, it cannot be held to be perverse or erroneous and so is not required to be interfered with by this Court.

44. With aforesaid observations, the present petition is dismissed.