

(2019) 12 DEL CK 0402

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 184 Of 2018, Civil
Miscellaneous No. 33276 Of 2018 & 33278 Of 2018

National Highways Authority Of India

APPELLANT

Vs

Patel Knr (Jv)

RESPONDENT

Date of Decision : 24-12-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 3A(1), 34, 37

Citation : (2019) 12 DEL CK 0402

Hon'ble Judges : G.S. Sistani, J; Sangita Dhingra Sehgal, J

Bench : Division Bench

Advocate : Dr. Maurya Vijay Chandra, Dr. Amit George, Swaroop George,
Rajshree Ajay, Rishabh Dheer, Amol Acharya

Final Decision : Disposed Of

Judgement

G.S. Sistani, J

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act'), and directed against the impugned judgement dated 14.05.2018, whereby a learned Single Judge of this Court has dismissed the petition under Section 34 of the Act against the arbitral award dated 27.12.2017.

2. Some necessary facts, which are required to be noticed for the disposal of this appeal, are that the appellant is a statutory body constituted under the National Highways Authority of India Act, 1988. The respondent is a Joint Venture between M/s Patel Engineering Ltd. and M/s KNR Constructions Ltd. vide Joint Venture Agreement dated 12.06.2001.

3. The appellant on 17.10.2001 invited bids for the widening and rehabilitation of the existing two lanes carriageway of Krishnagiri - Vaniyambadi Section of National Highway 46 (NH-46) of km 0.00 to km 49.00 to four lanes. The respondent submitted its bid on 18.06.2001 and was awarded the contract by

the appellant on acceptance of their bid of Rs. 163,49,53,505/- (after deducting a rebate of 16.70% offered by the respondent) by the appellant vide Letter of Acceptance dated 20.09.2001.

4. Both the parties entered into a Contract Agreement for the execution of said work on 17.10.2001. The Agreement was of the nature of a unit rate contract, where the bidding documents included a detailed 'Bill of Quantities' (BOQ) containing items of work along with their estimated quantities to be executed by the respondent. The parties adopted the terms and conditions of the Contract as contained in the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC) amending the GCC Clauses. The time stipulated for completion of work was 30 months from the date of commencement of works viz. 21.11.2001 to 20.05.2004.

5. The execution of the work was delayed by 10 months and 11 days and was completed on 31.03.2005. The appellant vide letter dated 30.03.2004 had granted post facto extension of time to the respondent after issuance of the taking over certificate as a matter of fait accompli till the said date. The respondent claimed to have suffered huge losses by reason of the delay attributable to the appellant. A final statement for the amount of Rs. 185,60,78,542/- was submitted by the respondent vide letter dated 23.06.2008. On 24.06.2005, the Engineer issued the 'Taking-Over-Certificate'.

6. Meetings were held on 21.06.2008 and 23.06.2008 wherein the Engineer certified the final statement into two parts: Final Statement-1 for the amount of Rs. 6,01,08,801/-, which included all the works by letter dated 10.07.2008; and Final Statement-2 for an amount of Rs. 41,82,67,054/-, containing the disputed items. The said disputed items were referred to the Engineer in terms of Clause 67.1 of G.C.C. on 23.07.2008. Subsequently, vide letter dated 17.10.2008, the said claims were rejected by the appellant.

7. The respondent on 18.10.2008 invoked the arbitration clause for the disputed items in Final Statement-2 as per Clause 67.1 of GCC, appointing their nominee arbitrator.

8. In the meantime, the appellant released an amount of Rs.1,00,08,054/- towards the claim in Final Statement-1, leaving a balance amount of Rs.5,01,00,747/- as of 02.02.2009. Further on 02.05.2012 the appellant appointed its nominee arbitrator for adjudication of disputes with regards to Final Statement-2, as well as the balance amount of Final Statement-1. The nominated arbitrators jointly appointed a Presiding Arbitrator.

9. The respondent filed its Statement of Claims before the Arbitral Tribunal ('Tribunal'), including its claim regarding the delay caused in completion of the work being owed to the appellant not performing its reciprocal obligation. The appellant had filed its own Statement of Defence contesting the claims of the respondent, and alleging that it was indeed the respondent who was unable to mobilize adequate machinery and manpower, which resulted in delay in

completion of the work.

10. The Tribunal passed an award in favour of the respondent allowing six of the claims raised by it. The Tribunal awarded an aggregate sum of Rs.24,49,55,742/- in favour of the respondent. The said amount comprises of (i) Rs 4,98,54,212/- on account of the balance payment due as per the certification of the Engineer (Claim No.1); (ii) Rs 5,05,465/-on account of payment due for painting of antiglare coating on pedestrian guard railing (Claim No.3); (iii) Rs 4,11,45,930/- for payment on account of the idling of plant and machinery (Claim No.8); (iv) Rs 1,57,59,300/-on account of overhead expenses during the extended period of the contract (Claim No.9); (v) Rs 92,25,364/- as escalation for mild steel (Claim No.12); and (vi) Rs 12,84,65,471/- as interest for the period of 18.10.2008 to 27.12.2018, i.e. the date of the award, computed at the rate of 12% per annum and future interest at the rate of 10% per annum (Claim No. 14). The appellant has contested the awards made against each claim other than the award of Rs 5,05,465/- against Claim No.3.

11. The appellant herein filed an objection under Section 34 of the Act against the impugned award, to the extent of the claims that have been sustained (except one claim for painting of antiglare and pedestrian guard railing). The same was dismissed as being without merits and has led to the filing of the present appeal.

12. For the sake of clarity, it is deemed appropriate to deal with all the challenged claims in a chronological order.

Claim No. 1

13. Learned counsel for the appellant submits that the learned Single Judge erroneously dismissed the petition under Section 34 of the Act as the same was decided at the admission stage itself and without calling for the records of the Tribunal. Counsel further challenges the interpretation rendered by the learned Single Judge with respect to the interpretation of the Act as the same would then amount to depriving a litigant relief even in cases of miscarriage of justice.

14. Learned counsel further contends that the learned Single Judge erred in allowing the balance amount of Claim 1 as the respondent has not produced any evidence of payment of seigniorage charges and Claim 5 of the respondent was also rejected for the same reason by the Arbitral Tribunal('Tribunal'). Therefore, allowing Claim 1 would lead to setting up of different yardsticks for similar claims. Counsel further submits that the learned Single Judge failed to take note of the fact that the appellant had raised the contention of seigniorage charges before the Tribunal and the same was argued at length.

15. Learned counsel further contends that the Tribunal has erred in applying Doctrine of 'Contra Proferentum' as there does not exist any latent ambiguity as purported by the Tribunal. Further, application of the Doctrine should have been used as a last resort and an attempt to record reasons for preferring one

interpretation of Clause 52.2 of G.C.C. over another should also have been made.

16. Per contra, Dr. Amit George, learned counsel for the respondent submits that the contention of the appellant in respect of seigniorage charge was never raised before the Tribunal and the same cannot be allowed to be raised in an appellate proceeding. Reliance is placed on a decision of a Division Bench of this Court in *KEI Industries Ltd. v. D.V.B.*, 2012 SCC Online Del 1523, wherein the Court held that a plea which is not taken before the arbitrator cannot be allowed to be raised in challenge to the award. It is further submitted that there is no overlap between Claim No.1 and Claim No. 5 as under the former the Engineer had categorically approved the amounts for payment and under the latter the case was on a different footing.

17. In regard to Claim No.1, the engineer certified an amount payable to the respondent on account of seigniorage fee. Learned counsel for the appellant has contended that the respondent could not have been awarded the said amount as the respondent failed to produce evidence to have paid such a fee, thereby disentitling him to receive any payment towards such a fee. After perusal of the Statement of Defence filed by the appellant before the arbitrator, it is clear that the objection to seigniorage fee was never raised before the arbitrator. Therefore, in light of settled law pertaining to the narrow scope of interference by a Court in an arbitral award under Section 37 of the Act, we are of the view that the appellant cannot be permitted to raise the ground of seigniorage fee before this appellate court. The court under Section 37 can only intervene when the award of the arbitrator suffers from infirmity and is perverse to law. As in the present case the award of the arbitrator in awarding the amount of Rs. 4,98,54,212/- towards Claim No. 1, including payment towards the seigniorage fee, does not suffer from any perversity and there is no occasion for this court to intervene in the same.

18. Learned counsel for the appellant has also contended that as Claim No.5 of the respondent towards compensation for increased fees was rejected by the arbitrator, Claim No.1 should also be rejected otherwise it would amount to a contradictory stand being taken by the arbitrator. After going through the arbitral award dated 27.12.2017, it can clearly be seen that Claim No.5 was rejected since the appellant failed to notify the Engineer about the extra cost incurred on account of change of legislation. Further, in regard to Claim No.1, the arbitral award highlights that the said amount was approved by the Engineer under Clause 52.2. Therefore, both Claim No.1 and Claim No.5 pertained to separate issues and the contention of the appellant for the Tribunal taking a contradictory stand in not considering Seigniorage fee for awarding Claim No.1 is without merit.

Claims No. 8 and 9

19. Learned counsel for the appellant submits that the learned Single Judge erred in observing that Extension of Time (EOT) without levying of liquidated damages was only granted in situations where there were no delays attributable

to the contractor. Counsel submits that the purpose of granting EOT was to enable completion of the project and does not mean the acceptance of the appellant's liability to pay idling and overhead charges. Counsel further relies on Clause 42.2 to contend that prolongation costs are not automatically payable on grant of EOT, and considerations for grant of prolongation costs are different from those for grant of EOT. Further no empirical data, as established by industry methods, for calculation of prolongation overheads like balance sheet of the company, number of executed contracts, reasonable basis of allocation of overheads to the project were produced.

20. Learned counsel contends that the learned Single Judge failed to appreciate that under the terms of the contract removal of encumbrances was the obligation of the respondent; and while alternate sites for the temples and other structures were to be made available by the State Government, the same was to be coordinated by the respondent. It is also submitted that pursuant to publication of Section 3A (1) notifications the respondent was free to carry out the works and the appellant was only responsible for providing assistance to the respondent in seeking help of the state law enforcement machinery.

21. Learned counsel for the appellant further contends that the learned Single Judge has erred in its reasoning in para 43 of the impugned judgment, thereby inverting the onus of proving cause of action from the person who is seeking judgment to the opposing side and the same is against principles of natural justice.

22. Learned counsel further contends that the Tribunal misinterpreted the Contract Agreement to understand that it was the obligation of the appellant to handover an 'unobstructed site'. It is submitted that steps involved in the removal of obstruction/s was a paid item in BOQ Item No. 1.02, as well as a part of the technical specifications and therefore, this conclusion of the Tribunal is perverse. Counsel further submits that the Tribunal made a perverse observation by holding that the prolongation of the contract was due the delayed handing over of the site, as the handing over had taken place as per the contract and any obstruction/s present were removed well in time for the respondent to complete the work as per the schedule.

23. Learned counsel submits that any delay/s at the very least were concurrent, thereby disentitling the respondent for any costs. Learned counsel, while relying upon international literature, submits that in cases of concurrent delays, there exists a difference between 'excusable delays' and 'non-excusable delays' and costs may only be granted in cases of 'excusable delays', which are also only 'compensable'. Counsel further submits that in cases of concurrent delays the test for grant of extension of time is based on the principle that 'but for the contractor's delay the project would have been completed on a particular date'. The same however cannot hold true for granting costs for idling equipment and overheads. The test for the same would be beyond a point of time when 'but for the appellant's delay the project would have been completed on a particular

date'. This is for the reason that the respondent would have borne the costs despite the delay on the appellant's part, for the reason of delays caused by their own accord. Therefore, awarding costs in such scenarios would leave the Claimant in a better position than where they would have been had the contract been performed. It is contended that the same has been observed by the Engineer in its evaluation of the delay.

24. Learned counsel contends that the delay was caused owing to lack of mobilization of men and material by the respondent and not because the appellant had not handed over the work site. It is further contended that the respondent did not have a labour license till 6 months after the date of commencement. Counsel also submits that concurrently with the work that was prolonged, the respondent was also carrying out variation work requiring the same plant and machinery. The respondent was provided a lucrative rate for the same because of which there was no real economic impact on the respondent for delay in executing the BOQ rated work, and granting Claim Nos. 8 & 9 by the Tribunal resulted in double compensation to the respondent. It is also the contention of the counsel that the Tribunal failed to consider that the respondent had not put the appellant to notice under Clause 53 of the contract with respect to Claim nos. 8 & 9, which is crucial for mitigating the delay in completion of the project.

25. It is further the contention of the counsel for the appellant that the Tribunal erred in granting Claim No. 8 as admittedly for 8.58% of the work carried out during the prolongation period, there was no requirement of plant and machinery, and moreover, the said work was carried out by third parties on outsourcing basis. Counsel further contends that the Tribunal erred in granting Claim No. 9, as overhead costs for prolongation claims must be calculated using certain methods like EMDEN's formula and Hudson's formula which requires the respondent to produce data relating to its overheads.

26. Per contra, Dr. George submits that the appellant had admitted before the Tribunal as well as before the learned Single Judge that the delay was caused due to failure on part of the appellant. It is further submitted that the respondent was specifically entitled to be compensated towards the additional costs incurred in light of Clause 42.2 of the GCC. Counsel also submits that while Clauses 11.2 and 12.1 of the GCC provide for inspection of the site by the respondent before quoting its rates for the bid, however, the respondent cannot be expected to foresee a situation in the future wherein after entering into the contract the appellant fails to provide the site. It is to provide for precisely such a situation that Clause 42.2 of the GCC has been added. Reliance is placed on a decision of the Division Bench of this Court in the case of National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd.-Gammon India Ltd. reported at 198(2013) DLT738, wherein the Court upheld such an entitlement. It is further submitted that Clause 110.1 of the Technical Specifications will not bar the claim of the respondent because the delay caused due to the failure of the appellant to

acquire land, compensate the land owners, and failure to provide alternate site falls outside the scope of Clause 110.1. Furthermore, a conjoint reading of Clause 110.1 and BOQ item 1.02 highlights that the contract does not bar the respondent from claiming compensation in case of delays which are not attributable to the respondent, and such bar will only apply in case the delay is directly attributable to the failure of the respondent to perform coordination work. Also, Clause 5.2.2 of the Conditions of Particular Application (hereinafter referred to as the 'COPA') makes it clear that the GCC will prevail over the Technical Specifications. In terms of BOQ item no. 1.02, the respondent's responsibility was limited to coordination. Reliance is placed on *National Highways Authority of India v. Bridge & Roof Co. Ltd.*, 2017 SCC Online Del 7908, *NHAI v. Hindustan Construction Co. Ltd.*, 2017 (5) Arb. LR 258 (Delhi) (DB) and *National Highways Authority of India v. R.N. Shetty*, 2014 (3) ARBLR 46 (Delhi).

27. Dr. George further submits that the respondent had provided substantial evidence in the form of Monthly Progress Reports, list of machinery available on site, books of accounts etc. for the loss incurred, and the usage of the MOST data-book for calculating hire charges as a measure of cost of the said machinery by the Tribunal is unimpeachable as firstly, the respondent had submitted a detailed underlying analysis justifying applicability of the same; secondly, the appellant did not produce any evidence to prove that such determination was erroneous and thirdly, it is no longer res-integra that the Tribunal may take the assistance of the MOST data-book to determine the amount of damages payable. The contention that the MOST data-book is a privileged document was not raised before the Tribunal and this court in a number of cases has upheld the usage of the MOST/MORTH data-book to compute additional cost payable to contractors. Reliance is placed on *National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd.-Gammon India Ltd. (JV)* (supra). As regards the contention of the appellant that the delays caused were concurrent, Dr. George submits that the Tribunal, on the basis of evidence, held the respondent was solely responsible for such delays.

28. We may note that as far as Claims No.8 & 9 are concerned, the learned Single Judge has categorically held while placing reliance on the relevant extract of the arbitral award that the delay in handing over the unobstructed site resulting in prolonging the period of contract is a finding of fact and based on sufficient material and therefore not amenable to judicial review under Section 34. In our view, the finding of the learned Single Judge requires no interference. The learned Single Judge has rightly relied upon the observation of the Supreme Court of India in the case of *Associated Builders vs. Delhi Development Authority*, (2015) 3 SCC 49 where it has been authoritatively held that an Tribunal is the final adjudicator of facts and unless the conclusion is found to be perverse, it cannot be interfered with. The relevant paragraph of the award read as under:

"9.27 Having gone through the pleadings and documents and considering the respective submissions of the parties and judgments referred to by them, we find

that:

(i) The Supervision Consultant had analyzed the delay events in its letter dated 05-11-2004 (Exhibit RD-37) and stated that the total length of continuous unobstructed work fronts of 50.112 km was to be handed over within 6 months (June 2002) whereas only 20.28 km was handed over in divided stretches spread over the entire length. As per the Supervision Consultant's analysis the length in each section handed over ranged from 0.045 km to 2.2 km as against minimum of 5 km. The total length of 50.089 km was handed over for construction over a period of 30 months. As per the Respondent's admission, stretches aggregating to 11.75 km were obstructed at the time of handing over the complete stretch of 50.112 km on 27.03.2002. The phased clearance of obstructions was done from May 2003 to June 2004 (Exhibit:RD-31)

(ii) Thus, the AT is of the view that there was delay in handing over of the unobstructed site resulting in prolongation of the Contract and therefore, the Claimant is entitled to cost towards deployment of the additional resources over the extended period in terms of Clause 42.2 of the Contract. As the handing over of unobstructed site was spread over the 30 months period there was no possibility of completing the work in 30 months. The Respondent has granted extension of time up to 31.03.2005. The Contract provides for any extension of time only if there is no default or breach of the Contract by the Contractor. Hence, the Claimant's entitlement to cost towards deployment of its resources and additional overheads over the extended period up to 31.03.2005 is justified. The progress achieved till May 2004 was 80.27% (p 438 RD-31), hence about 20% work remained to be completed in the extended period. Considering the quantum of balance work, additional cost of Rs.19.20 crore on account of deployment of the machinery in the extended period appeared to be very high and the claim requires to be modified as discussed below."

29. We may also note that considering the pleadings and evidence on record, and a communication dated 05.11.2004 of the Supervision Consultant, by June, 2002, only 20.28 kms of the site had been handed over instead of 50.112 kms decided. Also, the site that was handed over was divided into several stretches over the entire land and the length of each section ranged between 0.045 kms to 2.2 kms as against minimum of 5 kms.

Learned Single Judge has also taken note of the report where it indicated that 11.75 kms was obstructed at the time of handing over of the complete stretch of 50.112 kms on 27.03.2002 and the phase clearance of the obstruction was done from May, 2003 to June, 2004. Paragraphs 25 & 26 of the order of the learned Single Judge read as under:

"25. The fact, that the acquisition of the complete stretch of site was not complete inasmuch as compensation for stretches of land had not been disbursed, was not seriously disputed. Even before this Court, Ms Anand had contended that the delay on this count had been compensated by Patel by

accelerating the progress of works.

26. Patel had also produced material to indicate that there were other obstructions on the site including temples, building, wells and other structures which had not been removed."

30. In this backdrop, the Tribunal, while placing reliance upon Clause 42.2 of the GCC, held that the contractor was entitled to costs towards entitlement of additional resources over the extended period of the GCC. The learned Single Judge, while relying upon Clause 42.2 of the GCC, has returned a categorical finding that the contractor was entitled to compensation for delay for handing over the site. The learned Single Judge also and rightly so, held that reliance on Clause 110.1 of the Technical Specifications was without any force. We find no infirmity in the view so taken by the arbitrator as also by the learned Single Judge. All the contentions sought to be raised by the counsel for the appellant have been duly considered by the learned Single Judge and the same have rightly been rejected.

31. Dr. Chandra, learned counsel for the appellant also raised an objection with regard to the manner of quantification of the amounts awarded. Learned counsel has contended that the quantification by the arbitrator is without evidence and solely rests on the MOST Standard Data Book and the same is therefore liable to be set aside. This contention has been rejected by the learned Single Judge in view of the fact that there was sufficient evidence before the Tribunal to establish the quantification of loss suffered by the respondent. The respondent had produced a list of machinery that was available at the site during the extended period, although the higher charges were computed on the basis of MOST Standard Date Book. However, the detailed analysis was submitted by the respondent and also explained. It would be useful to reproduce paras 40, 41, 42 & 43 of the order of the learned Single Judge, which read as under:

"40. The next issue raised by NHA was with regard to quantification of the amounts awarded. It was contended on behalf of the petitioner that such quantification is without any evidence and, therefore, cannot be sustained. It was earnestly contended that the Arbitral Tribunal had based his decisions solely on the MOST Standard Data Book without Patel providing any evidence. It was submitted that the MOST Standard Data Book is a privileged document and proceeds on certain assumptions and it was incumbent upon Patel to provide evidence to show that the said assumptions hold good in its case.

41. The aforesaid contention is un-merited, as Patel had produced sufficient evidence before the Arbitral Tribunal to establish the quantification of the loss suffered by it. First of all, Patel had produced the list of machinery that was available at site during the extended period. This was also a part of the MPRs submitted by the Engineer. Although, the hire charges for the said machinery were computed on the basis of the MOST Standard Data Book, detailed analysis of the same was submitted by Patel (submitted in CD No.8 and further explained

in CD No.10). Patel had computed the charges for the machinery during the entire period of execution of the works at Rs. 66,19,66,611/-. This was on the basis of BOQ quantities. It had reduced the hire charges computed as per BOQ quantities, which were computed at Rs. 33,55,90,094/-, accordingly, it was claimed that Rs. 32,63,76,773/- was the actual loss suffered. However, Patel had restricted its claim only to Rs. 19,20,57,109/-, which was the additional cost incurred during the extended period and the additional cost incurred during the original contract period was ignored.

42. The Arbitral Tribunal had further reduced the aforesaid amount on the basis of the value of the work done. The Arbitral Tribunal determined that about 20.75% of the total work was executed between 21.05.2004 to 31.03.2005 (the extended period), which worked out to Rs. 31,51,85,994/-. From the aforesaid sum, the Arbitral Tribunal had reduced the additional work of Rs. 3,03,68,275/- and, thus, determined that during the extended period, the work of the value of Rs. 31,51,85,994 of the BOQ quantities was executed. Since the hire charges for BOQ quantities was computed at Rs. 33,55,90,094/- for the entire contract value of Rs. 163,49,53,505/-, the Arbitral Tribunal applied the same proportion to the works done during the extended period and, accordingly, determined additional cost for the machinery during the extended period at Rs. 6,46,95,000/-. From the aforesaid charges, the charges for the particular machinery that demobilized (value of which was computed to be Rs. 1,81,82,208/-) was reduced. Thus, the hire charges for the machinery during the extended period was computed at Rs. 4,65,12,792/-. This was further adjusted downward for inflation at the rate of 5% and a sum of Rs. 4,11,45,930/- was found payable.

43. It is apparent from the above that the said determination is based on empirical data as to the machinery available at site and the quantum of work done during the extended period. The value of cost of such machinery has been applied on the standards as specified. This Court finds no infirmity with the approach of the Arbitral Tribunal. Standard formula for determination of damages can be adopted, as a measure of damages provided that there is sufficient evidence to apply those formulas. In the present case, the empirical data as to the machinery available at site and the work done was available and, therefore, the same has been used by the Arbitral Tribunal for computing the additional cost incurred during the extended period. The contention that the Arbitral Tribunal had erred in using MOST Standard Data Book for assuming the hire charges as a measure of cost of the said machinery is not persuasive. It is also admitted that NHAI had not produced any material to show that the cost determined on hire charges was an unreasonable measure in the facts of the present case. Thus, this Court finds no ground to interfere with the quantum of damages as awarded on account of idling of plant and machinery."

32. With regard to the submission made by Dr. Chandra, for grant of overhead charges, the learned Single Judge has taken note of the fact that the respondent had produced the balance sheet for overheads at the site during the period of 12

months. Learned Single Judge has taken note of the fact that since, the extended period was only 284 days, therefore the proportionate overhead expenditure was computed at Rs.5,78,79,094/-instead of Rs.7,43,86,684/- as claimed by the Tribunal, which would show that the Tribunal had applied its mind. The Tribunal has also taken note of the copies of the profit and loss account and the balance sheet for the work during the entire period of the contract, as well as the extended period. Learned Single Judge has noted as under:

"44.The accounts indicated that the total overhead charges incurred during the entire length of the contract was Rs. 17,07,14,045/- [Rs.42,58,589/- (2001-2002), Rs. 2,48,18,855/-(2002- 2003), Rs. 6,72,49,737/- (2003-2004) & Rs. 7,43,86,864/-(2004-2005)]. On the aforesaid basis, Patel had contended that an amount of Rs. 19,71,74,721/- was incurred as overhead expenses after accounting for head office overheads as 10% of the site expenses. Patel also pointed out that as per the MOST Standard Data Book, 8% of the contract value was considered as reasonable in respect of contracts, which are above Rs. 50 crores and, thus, a sum of Rs. 13,07,96,280/- was expected to be incurred as overhead expenses. Reducing the same from the sum of Rs. 19,71,74,721/-, Patel contended that the sum of Rs. 6,63,78,441/- was reasonable but had restricted its claim to Rs. 4,12,00,000/-. The Arbitral Tribunal did not accept the aforesaid quantification and restricted the amount to only 5% of the balance works executed during the extended period ($31,51,85,994 \times 0.05 = \text{Rs. } 1,57,59,300/-$).

45. This is not a case where Patel had not provided the necessary data for substantiating its claim; however, the Arbitral Tribunal had restricted the same only to 5% of the balance works executed. Thus, NHAI's contention that Patel had not provided data for substantiating its claim is erroneous and, thus, this Court finds it difficult to accept that any interference with the impugned award is warranted."

33. As regard the ground that delays in handing over of the site in the contract were concurrent and hence no prolongation cost was payable, the same lacks merit for the reason that this ground was not raised before the arbitrator or the learned Single Judge. Before the arbitrator the appellant urged that the delay was attributable to the respondent and the arbitrator gave a contrary observation. As before the Single Judge the appellant appreciated that the delays might have been caused due to unobstructed site being not handed over to the respondent but no compensation was payable to the respondent on account of the delays being concurrent.

Claim No.12

34. Learned counsel for the appellant contends that the learned Single Judge failed to appreciate that under Claim No.12 there exists a distinction between mild steel and steel and therefore their price variations also differ. It is submitted that mild steel is a scrap byproduct of production of steel, which is reprocessed

and is therefore, substantially lower in strength than steel. Further, the counsel submits that the Tribunal erred in allowing the claim as the same is done without providing any reasons.

35. Per contra, Dr. George submits that there is no dispute with respect to the quantification of Claim No.12 and that Mild Steel was a specified item in Schedule 2 of Section VII. It is further submitted that the appellant had been making payments towards escalation of mild steel as per Clause 70.5(ii)(b) of the contract which provides for the formula for variation in price of steel. Additionally, the contention that the escalation formula would not be applicable cannot be accepted as there is no provision in the contract that bars application of the escalation formula.

36. We note that with regard to Claim No. 12, it is the submission of the appellant that the escalation formula provided under Sub-Clause 70.5 (ii) (b) for 'Adjustments to the Contract Price for Cement & Steel' would not apply to the items made from Mild Steel. This, learned counsel for the appellant contends, is for the reason that mild steel is a reprocessed scrap byproduct of the production of steel, and is therefore lower in strength, and being two different products the price escalation formula of one cannot be applied to the other.

37. It is an admitted fact that Mild Steel is a specified material under Schedule 2 of Section VII of the Bidding Documents. Further reading of Clause 70.5 (ii) (b) makes it clear that calculations for price escalations provided under the clause pertain to specified materials, which the clause further goes on to also define. Sub-Clause 70.5 reads as under:

"Sub-Clause 70.5: Increase or Decrease of Price of Specified Materials

i) Increase or decrease of price of specified materials will be adjusted either by either an addition to or a deduction from Contract Prices. For the purpose of this Sub-Clause:

"Specified materials" means the materials stated in Schedule 2 of Section VII of the Bidding Documents and required on the site for execution and completion of the Permanent Works.

"Basic Price" means the price for "Specified materials" indicated in Schedule 2 of Section VII of the Bidding Documents."

38. The learned Single Judge in judgment dated 14.05.2018 also held that the appellant had paid the escalation in the price of mild steel but resisted the claim of the respondent on the ground that the escalation formula could not be applied to items made of mild steel. This contention was rightly rejected by the Tribunal which found that mild steel was brought at site and incorporated in the permanent works. Thus, Mild Steel being a specified material under the meaning of Sub-Clause 70.5 would therefore be liable for price escalation under the said clause. The relevant paras 49 and 50 are reproduced hereunder:

"49. It is also relevant to note that NHAI had paid the escalation in price of Mild Steel upto the 34th Interim Payment Certificate (IPC). This amount aggregated to Rs. 17,04,061/-. Patel had claimed a further amount of Rs. 75,21,303/-. There was no dispute as to the computation of the escalation payable; however, instead of payment of the said amount, NHAI had also recovered the escalation paid earlier.

50. NHAI had resisted this claim on the ground that escalation formula could not be applied to items made of mild steel. The said contention was rejected, as the Arbitral Tribunal found that mild steel was brought at site and incorporated in the permanent works."

39. There is no quarrel to the law pertaining to the narrow scope of judicial intervention in an appeal under Section 37 of the Act. A Division Bench of this Court in the case Mahanagar Telephone Nigam Ltd. vs. Finolex Limited., FAO(OS) 227/2017, dated 18.09.2017, has held as under:

"41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the Id. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse. The impugned judgement dated 11th April, 2017 of the Id. Single Judge cannot be said to suffer from any such infirmity."

40. The Apex Court in the case of MMTC Ltd. vs. Vedanta Ltd., (2019) 4 SCC 163, has also discussed the narrow scope of interference of Court under Section 34 and 37 of the Act. Para 14 is reproduced as under :

"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

41. In light of the above observations, we find no infirmity in the order passed by the Single Judge and accordingly, the present appeal stands dismissed.

C.Ms. 33276/2018 (stay) & 33278/2018 (additional documents)

42. In view of the order passed in the present appeal, both the applications stand disposed of.