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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on:31st October, 2017
Pronounced on: 24th January, 2018

+ FAO (OS) (COMM) 107/2017& CM Nos.18458-59/2017

NHAI ..... Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Adv. with Mr. Ujjawal Jha and Mr. Prateik Gaur, Advocates.

Versus

M/S. BSC-RBM-PATI JOINT VENTURE ……. Respondent

Through: Mr. Pravin H. Pareksh, Sr. Adv. with Mr. Vishal Prasad, Ms. Raveena Rai and Ms. Swati Bhardwaj, Advocates.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

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C. HARI SHANKAR, J.

1 The present appeal under Section 37 of the Arbitration and Conciliation Act, 1996, preferred at the instance of the National Highways Authority of India (hereinafter referred to as "the appellant"), challenges the judgement, dated 3rd January 2017, of the learned Single Judge, in OMP (Comm.) 232/2016. The said

OMP, filed under Section 34 of the Act by the appellant, sought to challenge award, dated 10th October 2014, read with order dated 22nd January 2015, passed by the learned Arbitral Tribunal, in the dispute between the appellant and respondent. The impugned judgement dismissed the said OMP; ergo, this appeal.

2 First, a brief factual background.

3 On 24th July 1997, an agreement was entered into, between the appellant and the respondent, (hereinafter referred to as "the agreement") whereby the appellant awarded the respondent the contract for the work of 4 laning, including strengthening of the existing two lane pavement between Raniganj and Pangarh of NH-2 in West Bengal. The total value of the contract was Rs.1,60,79,05,450/-which, after incorporation of the rebate of 2% offered by the respondent, stood reduced to Rs. 157,57,47,341/-.

4 As is, apparently, inevitable in such contracts, disputes arose between the appellant and the respondent, which stood referred to arbitration, by a three member Arbitral Tribunal, in accordance with the terms of the agreement. There were claims by the appellant, and counter-claims by the respondent. The details thereof are as under:

Claim/Counter-Claim No.	**Particulars**	**Amount (Rs)**
Claims of Appellant		
Claim No 1	Applicability of Rates for Provisional Sums	2,73,19,610/-
Claim No 2	Rates for Variations	3,40,97,324/-
Claim No 3	Payment of Removal of Unsuitable Soil	2,38,81,560/-
Counter-Claims of Respondent		
Counter Claim No 1	Rates for Variations	73,58,391/-
Counter Claim No 2	Balance payment due to account of non-payment by appellant of sums certified by Engineer in IPCs and Statement that Completion and Interim Final Statement	
Sub-Claim No 1	Excess deductions made by Engineer vide letter dated 05th January 2002	93,18,384/-
Sub-Claim No 2	Non-payment of IPC 28 amount as certified by the Engineer	37,54,453/-
Sub-Claim No 3	Non-payment of sums certified by the Engineer in Statement at Completion	97,73,511/-

5 The learned Arbitral Tribunal, by a majority of two learned Arbitrators to one, ultimately awarded, against the aforementioned claims of the appellant and the respondent the following amounts:

Claims of Appellant		
Claim/Counter Claim No.	Amount Claimed	Amount Awarded (Rs)

Claim No 1	2,73,19,610	Nil
Claim No 2	3,78,56+59	37,69,452
Claim No 3	2,38,81,560	Nil
Counter-Claims of Respondent		
Counter Claim No 1	93,18,384/-	11,14,820/-
Counter Claim No 2		41,98,683/-
Sub-Claim No. 1	73,58,391	58,83,211/-
Sub-Claim No. 2	37,54,453/-	37,54,453+interest 65,14,862/-
Sub-Claim No. 3	97,73,511	84,66713+interest Rs.18,63,592

6 Resultantly, the respondent was awarded Rs.1,75,34,669/- along with interest of Rs.2,05,39,362/-, working out to a total of Rs. 38,074,031/-

7 Against this, the appellant was awarded Rs.3,76,9452/-. In the eventuate therefore, the respondent was awarded Rs. 3,43,04,579/-

8 Except for the decision of the learned Tribunal in respect of Sub-Claim No. 1 of Counter Claim No. 2 (*supra*), the appellant challenged the entire arbitral award, by way of an application, under Section 34 of the Arbitration and Conciliation Act, 1996 ("hereinafter referred to as the Act") which was registered as OMP (COMM) 232/2016.

9 The impugned judgment, dated 3rd January 2017, of the learned Single Judge, dismissed the said OMP filed by the appellant, in *toto*. The appellant is, accordingly, before us, by means of the present appeal filed under Section 37 of the Act.

10 Before proceeding to examine the various claims – to the extent such examination would be warranted or justified in exercises of our jurisdiction under Section 37 of the Act, – we may reproduce the following passages, from our earlier decision in ***M.T.N.L. v Finolex Cables Ltd, MANU/DE/2818/2017***, wherein we have, after examining the law laid down in by various judgments rendered by the Supreme Court in this regard, delineated the contours of the jurisdiction of this Court, under Sections 34 and 37 of the Act, thus:

> "*40. The extent of jurisdiction of the court while dealing with the challenge to an arbitral award, by now, stands authoritatively examined by a plethora of pronouncements of the Supreme Court, which travel from the judgment reported at* ***1994 Supp (1) SCC 644, Renusagar Power Co. Ltd. v. General Electric Co.*** *to* ***(2015) 3 SCC 49, Associated Builders v. DDA***. *On an analysis of all the said decisions, this court has, in a recent judgment reported at* ***MANU/DE/2699/2017, NHAI v. Hindustan Construction Co. Ltd.****, delineated the following propositions :*
>
> *'36.* ***Associated Builders v. DDA, (2015) 3 SCC 49****, may justifiably be christened as the high watermark in the law relating to Section 34 of the Act, and any attempt to*

paraphrase the decision is fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in ***Shiam Cooperative Group v Kamal Construction Co. Ltd****., extracted, in extenso, the relevant paragraphs from the said decision, and respectfully culled, therefrom, the following clear principles:*

(i) The four reasons motivating the legislation of the Act, in 1996, were
(a) to provide for a fair and efficient arbitral procedure,
(b) to provide for the passing of reasoned awards,
(c) to ensure that the arbitrator does not transgress his jurisdiction, and
(d) to minimize supervision, by courts, in the arbitral process.

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if
(a) it is contrary to the fundamental policy of Indian law, or
(b) it is contrary to the interests of India,
(c) it is contrary to justice or morality,
(d) it is patently illegal, or
(e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

(a) it disregards orders passed by superior courts, or the binding effect thereof, or

(b) it is patently violative of statutory provisions, or

(c) it is not in public interest, or

(d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The "patent illegality" had to go to the root of the matter. Trivial illegalities were inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law, or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the

parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a possible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

(x) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."

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 ld. 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. Fujitshu 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."*

11 Having thus mapped out the playing field, we proceed to analyze the case of the appellant qua the various claims/counter claims, vis-a-vis, the decision of the learned Arbitral Tribunal; thereon, whereby the appellant claims to be aggrieved. We are proceeding claim/counter claim-wise, so as to avoid repetition. We would proceed to the impugned judgment, of the learned Single Judge, thereafter. We also clarify that the reference, by us, to the award of the learned Tribunal, would be to the majority – and, therefore, the operative award, as the minority dissenting award stood subsumed therein.

12 <u>Claim Nos. 1 and 3 of the appellant, for a total amount of Rs. 4,11,99,712:</u>

12.1 These claims related to payments, made to the respondents against items mentioned in Items 10.3 and 10.4 in Bill no. 10 of the Bill of Quantities (hereinafter referred to as "BOQ"). The said Items 10.3 and 10.4 of the BOQ read as under:

> *"10.03 Removal of unsuitable material at embankment foundation and disposal as per direction of the Engineer complete as per technical specification clause 301 and 305.*
> *10.4 Transportation and disposal of cut material beyond initial lead up to additional lead of 2 km. complete as per technical specification clause 301."*

12.2 It may be mentioned here, that, against Item Nos. 10.03 and 10.04 of the BOQ which dealt with "provisional sums", against the columns "Rate, Rupees in figures and words", the respondent had entered Rs. 150/- per cu.m. under Item no. 10.03 and Rs. 50/- per cu.m. under Item no. 10.04. These rates, it is important to note, had been provided by the respondent to the appellant *at the time of tender, and no objection was raised by the appellant thereto*.

12.3 Payment towards the work, admittedly done by it, under Item Nos. 10.3 and 10.4 of BOQ No. 10 (of Rs. 150/- per cu.m. and Rs. 50/- per cu.m. respectively) had been claimed, by the respondent, at the said rates. In these circumstances, the Engineer certified payment of the work, under these BOQ items, at the said rates,

claimed by the respondent, upto Interim Payment Certificate (IPC) No. 25. The appellant raised certain queries in this regard, to which the Engineer responded, *vide* letter dated 21st February 2000, elaborating his views and explaining as to why he had certified payment as claimed by the respondent against these two items. He also suggested that, in case the appellant disagreed with his recommendation, a decision under Clause 67 of the Contract Agreement, could be requisitioned. The said clause reads as under:

> *"If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.*
>
> *Unless the Contract has already been repudiated or determined, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provide, in an amicable settlement or an arbitral award.*
>
> *If either the Employer or the Contractor be dissatisfied with*

any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4, no arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

67.2 Where notice of intention to commence arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, the parties shall attempt to settle such dispute amicable before the commencement of arbitration. Provided that unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration of such dispute was given, even if no attempt at amicable settlement thereof has been made.

67.3 Any dispute in respect of which:

(a)the decision, if any, of the Engineer has not be become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2, shall be finally settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by more or more arbitrators appointed under such Rules. The said arbitrator/s shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

Neither party shall be limited in the proceedings before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.

Arbitration may be commence prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

67.4 Where neither the Employer nor the Contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 and 67.2 shall not apply

to any such reference."

12.4 Instead of requisitioning a decision under Clause 67 of the Contract Agreement, the appellant effected recoveries, *suo moto*, from IPC 26, as raised by the respondent, from March 2000 onwards. It was only on 20th February 2001, that a formal decision was sought by the appellant, from the Engineer, which the Engineer provided *vide* letter dated 8th March 2001.

12.5 The appellant, dissatisfied with the said response, of its own Engineer, invoked the arbitral clause contained in the Contract Agreement. Needless to say, it is this invocation that has culminated in the present proceeding.

12.6 Consequent to reconciliation from the Engineer, the amount withheld from IPC 26 of the respondent was released, in IPC 46, raised by the respondent for the month of August 2001. The appellant contends the said amounts were released as it was bound to pay, to the respondent, the amount certified by the Engineer. Such release, the appellant contends however, would not estop it from challenging the said claim, or the certification thereof by its Engineer thereof. We agree.

12.7 The basic objection, of the appellant, to the amounts claimed

by the respondent against BOQ Item nos. 10.03 and 10.04 (which formed subject matter of Claim nos. 1 and 3 of the appellant before the learned Arbitral Tribunal) was - and is - that the said rates were not applicable to the work performed under these BOQ items. Though, as already noted hereinabove, the rates at which the respondent claimed payment, and as certified by the Engineer of the appellant, were expressly contained in Bill No. 10 of the BOQ and were, therefore, known to the appellant at the time the tender was finalized, no objection was raised, thereto, by the appellant at that stage. Even so, the appellant objected to the rates of Rs. 150/- per cu.m. and Rs. 50/- per cu.m., invoked by the respondent in respect of these two BOQ items, on the ground that Clause 52 of the Contract Agreement required the rates, for the work in respect whereof "provisional sums" were provided in Bill No. 10, to be worked out on the basis of other items, in the BOQ, or reasonably determined from the rates of such other items.

12.8 Applying this theory, in the case of the work done in BOQ Item No. 10.03, the appellant sought to work out the rates on the basis of BOQ Item no. 2.01 which reads as under:

> *"2.10 Roadway excavation necessary for construction of roadway complete as per Technical Specification Clause 301 in*
> *(i) Ordinary soil*
> *(ii) Marshy soil"*

The rate quoted, in the BOQ, against BOQ Item No. 2.01, was Rs. 40/- per cu.m.

12.9 The contention of the appellant - which was rejected by the learned Tribunal as well as the learned Single Judge, and has been canvassed before us - is that, having quoted a rate of Rs. 40/- per cu.m, for the composite activity of excavation in ordinary soil for construction of roadway in terms of Technical Specifications (TS) Clause 301, including the cost of transportation upto a lead of 2 km, it was highly unreasonable, on the part of the respondent, to claim Rs. 150/- per cum under Item No. 10.03 of the BOQ, which involved a single activity of removal of unsuitable material at the embankment foundation in accordance with TS 301 and 305. The contention of the appellant is therefore, that the rate of removal of unsuitable material could not be more than the rate for excavation of material and the transportation thereof and that, therefore, at best, the work done by the respondent under BOQ Item No. 10.03 could have been certified @ Rs. 40/- per cu.m.

12.10 In the case of BOQ Item No. 10.04, the appellant contended, similarly, that the rate entered by hand against the said item, in the Bill of Quantities, was only in the nature of a "provisional sum" and did not, therefore, constitute the basis for making payment against the said item of work. Instead, the appellant contends that the rate,

for this item of work, should also have been derived on the basis of the rate of Rs. 600 per hour, stipulated against BOQ Item no. 9.02 (of which no copy has been placed, on record, by either party), and that the Engineer had signally erred in certifying payment, to the respondent, on the basis of the rate of Rs. 50/- per cu.m. quoted by it against the said BOQ Item. Invoking, for this purpose, Clause 52 of the Contract Agreement (which, according to the appellant, had to necessarily form the basis of payment in view of Clause 58.2 thereof), it is contended that the actual rate at which payment should have been certified, to the respondent, for work done against BOQ Item no. 10.04 was Rs. 22.50 per cu.m.

12.11 The appellant sought to support the above arguments by referring to clause 31.2 of the bidding documents which reads as under:

> *"In evaluating the bids, the Employer will determine for each bid the Evaluated Bid Price by adjusting the Bid Price as follows:*
> *(a) making any correction for errors pursuant to Clause 29.*
> *(b) excluding Provisional Sums and the provisions, if any, for Contingencies in the Summary Bill of Quantities, but including Daywork, where priced competitively;*
> *(c) making an appropriate adjustment for any acceptable variations, deviations or alternative offers submitted in accordance with Clause 18; and*
> *(d) and converting the amount resulting from applying (a) to (c) above to single currency in accordance with Clause 30; and*

(e) *applying any discounts offered by the bidder for the award of more than one contract."*

12.12 The contention of the appellant is, therefore, that "provisional sums" were excluded while evaluating the bid price and that, in fact, the appellant had been treated as the lowest bidder (L1), by ignoring the rates mentioned in BOQ No. 10. The appellant sought to contend that, if the said rates were applied, the respondent would possibly no longer be L1 and would, therefore, have not been awarded the tender in the first place.

12.13 It was also sought to be contended, by the appellant, that, under Clause 58.2 (a), read with Clause 52.1, all items of work operated under BOQ No. 10 were liable to be valued as "variations". Following thereon, it was contended that Clause 2.1 of the "Conditions Of Particular Application" (COPA) provided that, before issuing or approving variations, having financial implications (except for emergency situations), the Engineer had to obtain the specific prior approval of the appellant. No such prior approval having been taken, by the Engineer, before certifying the payment, to the respondent, against BOQ Item Nos. 10.03 and 10.04, the certification, by the Engineer, of payment thereof was itself, in the appellant's submission, vitiated. To the contention, of the respondent, that such prior approval was deemed to have been

granted, by virtue of Clause 2.1 of the General Conditions of Contract (GCC), the appellant rejoined that Clause 2.1 of the GCC had been replaced by Clause 2.1 of the COPA.

12.14 Following on the above arguments, the appellant claimed *vide* Claims 1 and 3, to be paid back the payments made, by it, to the respondent against the work done under BOQ Items 10.03 and 10.04, along with interest.

12.15 The learned Arbitral Tribunal rejected all the above submissions of the appellant.

12.16 At the outset, it set out the contents of the letter, dated 21st February 2000 *(supra)* addressed by the Engineer to the appellant, thus (in para 4 of its findings) :

> *"The Engineer in his letter dated 21st February 2000 supra replied to the Employer's queries regarding excavation of unsuitable material (Item 10.03) as follows:*
> *a) Item 10.03 refers to unsuitable material as defined by MOST Specifications clause 301 and 305. Clause 305 defines material "not suitable" for embankment construction and includes inter-alia marshy soil but also material susceptible to spontaneous combustion (i.e. coal, coal dust), materials which may generate leachate etc. e.g. excavation in front of vehicle workshops saturated with sump oil, diesel and the like; other materials such as domestic refuse etc. which really should have gone to a special tip. The rate of Rs. 150/- is therefore not unreasonable.*

b) Since the Provisional Sums formed part of the tender, the Employer would have been at liberty to query the rate entered at item 10.03 but did not.
c) A Contractor seeing the site at the time of the tender, may reasonably have supposed that some unsuitable material covered under BOQ 10.03 would be present and would have to be removed and hence operation of this Clause is not a variation.
d) At Contract signing both the Contractor and Employer might reasonably have expected there to be unsuitable material, which the Contractor would have to remove. The only unknown was how much there would be. It is apparent from driving along the site that there would be a great deal. Someone, perhaps, should have estimated a quantity. Nevertheless, the expectation of there being some, and having to remove it, is sufficient to make the rate valid and no VO necessary.
e) This like all things in this letter, is just our opinion. If NHAI like to seek a formal Engineer's Decision on this or any other matter, of course you may. No response by the NHAI to this letter from the Engineer has been filed before Arbitration Tribunal."

12.17 It was also noticed that, in a similar contract, in the adjacent stretch, the appellant had, on 20th May 2000, sought for a decision from the Engineer as to whether the rate for removal of unsuitable material and disposal thereof was payable as per BOQ Item 10.02 or BOQ Item 2.01 of the contract. The Engineer opined, on that occasion too (*vide* letter dated 2nd August 2000) that the work of removal of unsuitable material and disposal thereof merited payment under BOQ Item No. 10.02. This decision was not

disputed, or challenged, by the appellant.

12.18 Regarding the second clarification, by the Engineer, to the appellant, in response to the letter dated 20th February 2001 of the latter, the learned Arbitral Tribunal noted in paras 6 and 7 on his findings on these claim, as under:

> *"6. The Employer by its letter 20th February 2001 (Page 32 NHAI) sought Engineer's Decision, for both contracts II & III, pursuant to Clause 67.1 on the applicability of the rates of Provisional Sum Items in Bill No. 10 for payment to the contractor (without referring to the Engineer's letter of dated 21st February 2000 or the Decision given by Engineer in August 2000).*
> *By letter dated 8th March 2001 (page 36 of NHAI) the Engineer gave a Decision that:*
> *"The rates in Bill No. 10 should be used where an item of work is implemented for which provision is made in Bill No. 10 and the rates in that Bill are applicable.*
> *Whilst the Engineer should take into account the views of the Employer, the Engineer is required under the contract to determine the rate that he considers appropriate, whether or not the Employer agrees with that rate"*
> *The Engineer in his letter referred to his earlier Decision dated 02.08.2000 for Contract III and gave detailed reasons for reaching his conclusion.*
> *The Engineer stated that the acceptance of the tender, however, neither expressly nor by implication removes bill No. 10 from the tender.*
> *The Engineer also stated that where work under the Provisional Sums is to be carried out by the Contractor, the same is to be valued under Clause 52 which states that the work is to be valued at the rates and prices set out in the*

Contract if, in the opinion of the Engineer, the same shall be applicable.
Further, although the value of the items in Bill No. 10 was not included in the tender total, the rates and prices in that bill do form part of the Contract. Accordingly the Engineer is obliged to use those rates if they are applicable. We reviewed those rates and concluded that some them were applicable to work required under the contract.

7. The Engineer further stated that the earthwork was an essential part of the works to be carried out – there was no alternative but to carry out the work. It was concluded by the Engineer that this work (Removal of Unsuitable Material) was not covered by the rates in Bill No. 2 but was described ion Bill No. 10 as provisional. Under Clauses 58 and 52 of the Contract, the Engineer concluded that this work had to be valued at these provisional sum rates."

12.19 Essentially, as noted by the learned Arbitral Tribunal the contention of the appellant was - and is - that the rates quoted against the various items in Bill No.10, by hand, were not applicable in respect of any item mentioned in the said Bill and that, if work corresponding to any of the said items was performed by the respondent, the rate of payment, therefor, was required to be determined in accordance with Clause 52.1 of the contract *(supra)*.

12.20 Following on the above, the learned Arbitral Tribunal held thus:

(i) The agreement, dated 24th July 1997 signed by the appellant and the respondent – which was the last document signed by them after evaluation of the bid and clarifications – provided thus:

"2. The following documents shall be deemed to form and be read and construed as part of his Agreement viz:

a)……

f) The priced Bill of Quantities (Section VI of Bidding Documents);

g)…

l)…

3. The foregoing documents shall be construed as complementary and mutually explanatory one with another. Should any ambiguity or discrepancy be noted then the order of precedence of these documents shall, subject to conditions of Particular Application (Section III), be as listed above."

The above clause accorded primacy to the Contract Agreement, of which Bill No. 10 was a part. As such, it was not open to the appellant to wish away Bill No. 10 in the contract agreement. Had it intended to do so, it ought to have stated, explicitly in para 2 *(supra)* that Bill 1 to 9 alone would form part of the agreement, and that Bill No. 10 was not apart thereof.

(ii) Equally misconceived was the appellant's attempt to avoid the rates mentioned in Bill No 10. In actual fact, what was required to be mentioned in Bill No. 10 were only "provisional sums". The appellant was, therefore, required, when calling for bids from the

bidders, to provide provisional sums against each of the Items in Bill No. 10. However, the appellant itself required the respondent – as well as other bidders – to quote the rates of individual items in Bill No. 10. For items 10.03 and 10.04, in fact, the tender did not set any quantities, and only rates were sought. Clearly, therefore, the appellant did not adhere to Clause 58 of the contract while calling the bids. The reasoning given in the communication, dated 8th March 2001, from the Engineer to the appellant, for holding that the rates mentioned against BOQ Items 10.03 and 10.04 were admissible for work executed against the said items was, therefore, entirely in order. The learned Tribunal expressed its complete concurrence therewith.

(iii) The learned Tribunal has also concurred with the finding of the Engineer that rates for these items of work could not be determined as "variations" under Clause 52. Even otherwise, it opined, the rates for the work being available alongside BOQ Items 10.03 and 10.04, the said rates were required to be adopted as the first option, even under Clause 52.

12.21 As regards Clause 2.1 of the GCC, and the reliance, thereon, by the appellant, to contend that the work carried out by the respondent under BOQ items 10.03 and 10.04, was "varied work", which required specific prior approval of the employer, the

learned Tribunal noted the stipulation, in the very same Clause 2.1, that "any *requisite approval shall be deemed to have been* given by the *employer for any such authority exercised* by the Engineer". The submission, of the respondent, that approval was deemed to have been granted by the employer, in respect of Items regarding which authority had been exercised by the Engineer, was, therefore accepted. For the same reason, the submission, of the appellant, that the rates fixed by the Engineer were provisional, only for the purpose of making on account payments, and could not be regarded as approved rates under clause 2.1 of the COPA, was rejected.

12.22 In this context, the learned Tribunal also took stock of the well known judgment of the Supreme Court in ***Abdullah Ahmed vs. Animendra Kissen Mitter AIR 1950 SC 15***, which underscored the importance of the manner in which the parties to a contract had conducted themselves, as a guide to the manner in which they understood the words of the contract. Applying this principle, the learned Tribunal held that the appellant having released payments, at the rates mentioned against BOQ Item Nos. 10.03 and 10.04, in various IPCs up to IPC No. 25, over two years, the inevitable conclusion was that the appellant and the respondent, alike, had understood that payment for BOQ Item Nos. 10.03 and 10.04 was required to be made at the rates mentioned against the said items, and not as variations.

12.23 As a sequel to the aforementioned reasoning, the learned Tribunal rejected Claim Nos. 1 and 3 of the appellant, holding the payments, released to the respondent, by the appellant, consequent to certification thereof, by the Engineer, to have been rightly so released.

Impugned judgement of the learned Single Judge:

12.24 Regarding Claim Nos. 1 and 3 of the appellant, the impugned judgment notes the reasoning, of the learned Tribunal that (i) in view of the fact that the letter, accepting the respondent's bid, specifically mentioned that the rates quoted in the tender had been accepted and the contract agreement itself stipulated that the priced BOQ, in Section VI thereof, which included bill no. 10, would be deemed to form part of the agreement, and had to be read and construed as such, there was no merit in the appellant's argument, that the provisional sums were liable to be treated as a variation and not as part of the contract agreement, (ii) Clause 52 of the contract provided for evaluation of work validly done, at the price, set out in the contract as the first alternative, applying which indicia the rates available in Bill No. 10 had to be applied before resorting to any alternate method of valuation, (iii) the Engineer himself had held the said rates to be applicable, first in February, 2000 and again in May, 2001. (iv) The IPCs had been processed,

throughout, on the said basis, (v) obtaining of prior approval for the appellant, by the Engineer, was not obligatory. The appellant itself had required the respondent to quote the rates of all individual items, which included BOQ items 10.3 and 10.4, for which no quantities were cited in the tender, (vi) to that extent, the appellant had itself not followed Clause 58 while calling for the bids, (vii) the Engineer had, therefore, correctly concluded that items 10.2 and 10.4 could not be regarded as variations under Clause 52 and (viii) Even if they could, the rates available under BOQ Items 10.3 and 10.4 had first to be applied.

12.25 The learned Single Judge found the above view, of the learned Tribunal to be noteworthy of interference, not being contrary to the contract, implausible or perverse. The learned Single Judge observed that BOQ items 10.03 was specific to excavation of unsuitable soil, and was distinguishable from BOQ item 2.01 which talked of 'ordinary soil'. The decision, of the learned Tribunal to apply Clause 10.03 could not, therefore, be regarded as shocking to the judicial conscious, so as to warrant interference.

13 Claim No. 2 of the appellant and Counter Claim No. 1 of the respondent – rates for variation orders

13.1 These claims related to variation orders ("VOs") issued by the Engineer's Representative (hereinafter referred to as the "ER"), who had also fixed rates therefor. The appellant did not agree with the said rates and proposed, instead, its own rates for making payments to the respondents. The respondent, too, proposed its own rate in the case of many of the VOs. As this inevitably resulted in conflict, the matter was referred to the Engineer, for opinion. The Engineer, *vide* letter dated 31st January 2001, opined that, in the IPCs issued under clause 60(2) of the Conditions of Contract, the rates, as either agreed by the Contractor, or fixed by the Engineer, were required to be included. As such, until the rates were fixed by the Engineer, he opined that the provisional rates, determined by him, would constitute the basis for payment.

13.2 Dissatisfied with this opinion of the Engineer, the appellant, *vide* letter dated 19th March 2001, conveyed, to the respondent, its intention to refer the dispute to Arbitration.

13.3 The primary contention, of the appellant, in the said communication, was that in respect of VOs which entailed financial implications to the appellant, the Engineer was required to take its prior approval.

13.4 *Vide* letter dated 15th May 2001, the Engineer Representative

conveyed, to the appellant and respondent, the rates of various VOs, for effecting payment. In respect of 18 such VOs, the rates had been mutually agreed between the appellant and respondent; however, in respect of 32 VOs, the rates could not be mutually agreed upon.

13.5 As it transpired, during the pendency of this dispute, many of the amounts withheld by it, against IPCs raised by the respondent, were released by the appellant, while effecting payments against IPCs 43, 46 and 48. In view of its reservations, regarding the rates at which payment had been certified, by the Engineer against the VOs performed by the respondent, the appellant, contended that it had paid higher amounts, to the respondent, than were due to it. It was in this context that a claim, for being returned allegedly overpaid amount, was made by the appellant.

13.6 As already noted hereinabove, the appellant's primary contention, regarding the rates fixed for VOs, was that, as per Clause 52 of the GCC read with Clause 2.1 of the COPA, the Engineer was required to obtain the appellant's approval before approving any variation item having financial implication. This, the appellant contended, had not been done. The appellant, therefore, submitted its own analysis of the rates at which payments ought to have made against the VOs.

13.7 The learned Tribunal agreed with the appellant's contention that Clause 2.1 of the COPA, which had overriding effect over the corresponding provisions of the GCC, required the Engineer to obtain the appellant's approval before approving or adopting any rate for the variation items. However, this issue, it opined, had lost its significance, as the performance, by the respondent, of work against the VOs was not disputed, and the controversy was limited to the rates at which payments were to be effected thereagainst. Payments having been made by the appellant, the appellant has essentially moved the learned Tribunal seeking refund.

13.8 In these circumstances, the learned Tribunal opined that the interests of justice required it to give a just and considered award on the amounts actually payable to the respondent against the VOs excluded by it.

13.9 We find that, having thus recognised the duty cast on it, the learned Tribunal embarked on a lengthy and comprehensive exercise, VO by VO; working out the appropriate rates at which payments had to be made to the respondent. It is no part of the duty of this Court to examine the minutiae of the analytical exercise undertaken by the learned Tribunal and we, therefore, abjure from doing so. We are only required to note that, pursuant to such VO-wise analysis carried out by it, the Tribunal finally upheld the

Claim No. 2 of the appellant to the extent of Rs. 42,24,060/- and Counter Claim No. 1 of the respondent to the extent of Rs. 6,60,212/- which amounts included escalation but excluded interest.

Impugned Judgment of Learned Single Judge

13.10 The only issue, as regards Claim No. 2 of the appellant – Counter-Claim No. 1 of the respondent, related to whether prior approval, in respect of VOs which entailed financial implications, was required to be taken from the appellant by the Engineer, before recommending rates thereagainst. The learned Single Judge held, in the impugned judgment, that such prior approval was not mandatory, as has already been noted hereinabove. Further, it was found that, apart from merely averring that the rates recommended by the Engineer were unreasonable and inconsistent, nothing had been placed, by the appellant, before this Court, to arrive at a different conclusion as regards rates for variations. In these circumstances, the learned Single Judge found no error in the approach, of the learned Tribunal, which was bound to decide as per the clauses of the contract.

14. Re Sub-Claim No. 2 of Counter Claim No. 2 of the respondent- for short payment against IPC-28

14.1 The findings of the learned Tribunal, on this counter claim,

are essentially factual in nature. The claim, as raised by the respondent, sought to complain that while, in the statement compiled by the appellant and included for payment against IPC 48, it had been noted that Rs. 6,26,89,885/- had been paid against IPC 28, a perusal of the payment certification against IPC 28 revealed that though the Engineer had certified Rs.6,26,89,885/- for payment thereagainst, in actual fact, Rs.37,54,453/- had been recovered by the appellant on account of variation orders. The said amount was not reflected in the statements issued by the appellant while assessing the total recovered withheld amounts, for payment against IPC 48. As such, the payment made against the IPC 48 was erroneous, and a further amount of Rs.37,54,453/- was required to be paid to it by the appellant. It is this amount which constituted Sub-Claim No. 2 of Counter Claim No. 2 of the respondent.

14.2 The appellant did not dispute the fact that Rs.37,54,453/- had, in fact, been deducted from IPC 28, but pleaded that this was on account of a recovery. It was, however, contended that even assuming the amount was withheld by mistake, it could not be included in the counter claim as preferred before the learned Tribunal as it had become time barred.

14.3 On examination, the learned Tribunal found that, in actual fact, Rs.37,54,453/- had been deducted, by the appellant, from the

amount certified for payment, by the Engineer, against IPC 28, and was not reflected in the total amount recovered/withheld amount payable against IPC 48 or thereafter. On merits, therefore, substance was found in the claim of the respondent.

14.4 On the issue of limitation, the learned Tribunal opined the counter claim of Rs.37,54,453/- was basically an amendment to the initial counter claim by the respondent, for short payment against IPC 26 to IPC 48. The amount certified by the Engineer and short payment by the appellant already constituted part of the original counter claim of the respondent. As such, the argument of limitation was also found to be without merit.

Impugned Judgment of learned Single Judge

14.5 Regarding this, Sub-Claim, of the respondent, the learned Single Judge accepted the finding, of the learned Tribunal, that the claim of Rs. 37,54,453/- was merely an amendment to the initial Counter Claim, for short payment against IPCs 26 and 48 and could not, therefore, be regarded as time barred.

15. Re Sub-Claim No. (3) of Counter Claim No.2 of the respondent- Non payment, by appellant, of amounts certified by the Engineer in statement it completion dated 13th December 2002

15.1 Against the statement of completion submitted by the respondent on 11th December 2002, the certificate was issued, by the Engineer on 13th December 2002, certifying the said amount of Rs. 97,73,511/- for payments there against. It was pleaded, by the respondent, that the said amount had not been paid to it, despite repeated requests. It was also contended that interest was also payable, on the said amount, with effect from 05th February 2003, which was the due date for interest as indicated in the certificate of statement at completion, till 29th February 2012 which worked out to Rs. 1,90,96,893/-. As such, a total amount of Rs. 2,88,70,404/- was claimed under this head.

15.2 The learned Tribunal found that the interest of Rs. 86,76,070/- claimed by the respondent, was worked out on the basis of all short payments by the appellant, IPC by IPC, from IPC 26 to IPC 48 and had been worked out from the date, payment was due against each IPC, till 11th December 2002 which was the date of submission of statement at completion by the respondent. As such, the interest amount progressively increased with each IPC. Rs. 93,18,384/-, which was subject matter of Sub-Claim No. 1 of Counter Claim No. 2 of the respondent, was part of the total figure. Against this amount of Rs. 93,18,384/- the learned Tribunal had awarded only Rs. 41,98,683/-, under Sub-Claim No.1 of Counter Claim No. 2. As such, no interest would be payable on the

differential amount of Rs. 51,19,701/-. The interest liability thus stood reduced by Rs. 13,06,798/- Thus worked out, the learned Tribunal awarded, to the respondent, Rs. 84,66,713/-, and against Sub-Claim No. 3 of Counter Claim No. 2 raised by it.

Impugned Judgment of the learned Single Judge

15.3 It was noted, with regard to the majority award in respect of this Sub-Claim, that the contention of the appellant's interest to the extent of Rs. 86,76,070/- had been calculated on a sum which was the recovery made by the appellant as per the certification of the Engineer, was accepted by the learned Tribunal. Further, the learned Tribunal had also accepted the contention, of the appellant, that interest had wrongly been claim on amount of Rs. 51,19,701/-. Interest had proportionately been reduced, while delivering the award. Accordingly, the learned Single Judge found no error in the approach of the learned Tribunal even on this ground, noting the fact that the appellant had been unable to point out any legal infirmity therein.

16. Re-interest on Claims / Counter Claims

16.1 The issue of interest arose only qua the amounts awarded to the respondent, as the claims of the appellant stood rejected. The learned Tribunal noticed Section 31(7)(a) of the Act, which

empowered it to include interest, at a reasonable rate, for any part of the period between the date of arising of the cause of action and the date of making of award, unless agreed otherwise by the parties. Clause 60.8 of the Appendix to the bid of the contract agreement, it was noted, reflected the agreement, of the appellant and the respondent, to interest @ 12 %, compounded monthly. Even, so, the learned Tribunal held that, as considerable time had elapsed since completion of the work, the rate of 12 % compounded monthly ought to have been applied only till the date of completion in 2002. For the period thereafter, the learned Tribunal deemed simple interest @ 12% per annum to be appropriate and reasonable. On this basis, the learned Tribunal awarded interest, to the respondent, against Sub-Claim Nos. 1 to 3 of the Counter Claim No.2, w.e.f 5th February 2003, 25th April 2000 and 5th February 2003 respectively.

Impugned Judgment of the learned Single Judge

16.2 The appellant objected to the manner in which the learned Tribunal had awarded interest, contending that award of interest @12% per annum from the date of award till the date of actual payment was excessive. The learned Single Judge did not agree with the said contention.

17 Certain typographical errors which had crept into the aforementioned Award dated 10th October 2014 were corrected, by

the learned Tribunal, *vide* order dated 27th January 2015.

18. We have heard Mr. Sudhir Nandrajog and Mr. Pravin H. Pareksh, learned Senior Counsel appearing for the appellant and respondent, at length. Written submissions have also been filed by them.

19. <u>Our Findings</u>

19.1 We have already highlighted, hereinabove, the limited arena of the jurisdiction of this Court, in the matter of interference with arbitral awards, under Sections 34 and 37 of the Act. The position that emerges from the law, as it stands crystallized today, is, clearly, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. It is only where the finding is either contrary to the terms of the contract between the parties, or, *ex facie*, perverse, that interference, by this Court, is necessary. The arbitrator/Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Insofar as the ultimate view of the learned arbitrator/ Arbitral Tribunal, on any issue is concerned, so long as the view is plausible, and not merely possible, this Court would be loath to interfere therewith. We may usefully make reference, in this

regard, to the following postscript, entered by this Court in its judgment in ***P.C.L Suncon (JV) v N.H.A.I.,MANU/DE/3364/2015:***

"As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the petition before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost".

19.2 Applying the above tests, it is clear that there is no warrant for any interference by us with the impugned judgment of the learned Single Judge, which has correctly applied the law in this regard. The findings of the learned Arbitral Tribunal are clearly plausible and, in fact, are well merited on facts as well as in law.

19.3 In so far as the Claim Nos. 1 and 3, of the appellant, are concerned, we entirely endorse the findings of the learned Single Judge, the specifics of which already stand enumerated hereinbefore. The rates, specified against Item Nos. 10.03 and 10.04, in Bill No. 10 had been entered by the respondent prior to the tender being finalized and were known to the appellant at the

time of such finalization. No objection was raised by the appellant, thereto, at that stage. Clause 52 of the Contract Agreement, on which the appellant placed reliance, itself contemplated resort, to alternate modes of valuation, only where the rates were not available against the item in question. The learned Single Judge has correctly held that there could be no question of resorting to any such alternate mode of valuation, when the rates, at which payments were to be made against BOQ Item Nos. 10.03 and 10.04, were specified against the said items. The contention, of the appellant, that Bill No. 10 was not part of the contract, was obviously and argument of desperation; unsupported by any clause of the contract. Clause 31.2 of the bid documents, on which pointed reliance was placed by the appellant, does not lead to any such conclusion. All it says is that while evaluating bids, provisional sums would be excluded. We agree that the manner in which bids were to be evaluated was an in-house exercise to be undertaken by the appellant, and could not operate as an internal aid to interception of the various clauses of the contract. Even otherwise, no inference, to the effect that the rates specified against various Items in Bill No. 10, were not binding on the parties, or that they were not part of the contract, could be drawn from such a clause. This clause has, moreover, been noticed, and interpreted, by the learned Tribunal, and, the interpretation being neither perverse nor implausible, no interference, therewith, by this Court would be

justified. The learned Single Judge has also correctly endorsed the finding, of the learned Tribunal the BOQ Item No. 2.01 was not comparable to Item No. 10.03. Though, Mr. Nandrajog, learned senior counsel appearing for the appellant, in fact, emphatically pressed this point, we, on a comparison of Item nos. 10.03 and 2.01 of the BOQ find that two Items are totally different. Item No.10.03 refers to removal of unsuitable material and embankment foundation and disposal thereof. As against this Item No. 2.01 refers to roadway excavation necessary for construction of roadway, in ordinary soil and marshy soil. The attempt of Mr. Nandarjog, to equate "unsuitable material" with "marshy soil", is unsupported by any clause in the contract or any evidence on record. That apart we cannot, in exercise of our jurisdiction under Section 37 of the Act, treat 'removal of unsuitable material at embankment foundation' as equivalent to "roadway excavation necessary construction for roadway". In any event, construction of these clauses was a matter for the learned Tribunal to consider, and this Court is ill-equipped to re-appraise the evidence and reconsider these factual findings on merits. We may, however, say that, *ex facie*, on first principles and applying plain common sense, when an item of work is mentioned in a contract, a rate is specified thereagainst, and such rate was known to the contracting parties at the time of entering into the contract, any attempt, by either party, to wriggle out of the rates so specified, would not be

unconscionable in law. The learned Tribunal has effectively bound the appellant down to the rates mentioned in the contract, and we find no reason to take a contrary view.

19.4 Still less do the findings of the learned Tribunal, on the other Claims/Counter Claims, merit any interference at our hands. The Claim No. 2 of the appellant and Counter Claim No. 1 of the respondent dealt with the rates of variation orders. We are of the opinion that the learned Tribunal correctly understood its responsibility, in respect of the work done by the respondent against the various VOs as directed by the Engineers Representative, as being able to render a considered award, regarding the amounts payable against the work executed, VO-wise. Having thus charted out its responsibility correctly, we find that the learned Tribunal has entered into an exhaustive and painstaking exercise of working out the amounts payable against each VO, finally resulting in upholding of Claim No.2 of the appellant to the extent of Rs. 42,24,060/- and the Counter Claim No. 1 of the respondent to the extent of Rs. 6,60,212/- which included escalation but excluded interest. As we have already observed hereinbefore, it is no part of the duty of this Court under Section 34 or, much less, Section 37, of the Act, to enter into these calculations or specifics of the computation, and the manner in which the learned Tribunal has determined the amounts payable to the respondent by the appellant. It is noteworthy,

however, that, whereas the respondent was awarded only Rs. 6,60,212/-, the appellant had been awarded Rs. 42,24,060/-. The respondent has not challenged the award and it is the appellant alone who has sought to impugn the decision of the learned Tribunal. We are of the view that the impugned award of the learned Tribunal suffers from no infirmity whatsoever and, in fact, exhibits commendable effort, on the part of the learned Tribunal to resolve the controversy. There can be no question, therefore, of any interference therewith, by this Court, either under Section 34 or under Section 37 of the Act. Any such interference would be a gross disservice to the very institution of arbitration, and the laudable purposes for which the Act was enacted, superseding the earlier Arbitration Act of 1940, under which such challenges were the norm.

19.5 As regards Sub-Claim No. 2 of Counter Claim No. 2, of the respondent, the appellant did not dispute the fact that, in the total amount recovered/withheld by it, as reflected for payment against IPC 48, the amount of Rs. 37,54,453/- had wrongly been included. The only case of the appellant, in this regard, was that the Counter Claim by the respondent, in this regard, had become time barred. The learned Tribunal held that the said claim was basically an amendment to the earlier claim, of the respondent, for short payment against IPC 26 to IPC 48. The learned Single Judge has

found no reason to differ therewith, and we, too, concur with the said finding, which is essentially a finding of fact and cannot be said to suffer from any manifest illegality or perversity.

19.6 Similarly, the finding of the learned Tribunal, on Sub-Claim No. 3 of Counter Claim No. 2 of the respondent, in fact, accepted the submission of the appellant, that interest would not be payable on Rs. 51,19,701/-, though claimed by the respondent, as a result whereof, the respondent was awarded only a reduced award of interest of Rs. 84,66,713/-. The manner in which, the learned Tribunal worked out the said amount, as noticed in para 15.2 (*supra*) does not in our view, suffer from any illegality or infirmity, as to warrant interference by this Court.

19.7 The final finding of the learned Tribunal was on the issue of interest. The only grievance, of the appellant, was with respect to the rate and which interest had been allowed, 12% per annum in its submission, being excessive. The learned Single Judge has rejected this contention and, in our view, rightly. We agree that 12% per annum cannot be regarded as an excessive rate of interest.

20. A Final Word

20.1 Before parting with this judgment, we are constrained to note that, in case after case, we find that factual findings, in respect of which the learned Arbitral Tribunal is the final authority, are being

successively challenged, under Section 34 and thereafter, under Section 37 of the Act. This has effectively reduced the exercise of arbitration to the civil trial, and petitions under Sections 34 and 37 of the Act to first appeals and second appeals. In fact, while second appeals under Section 100 of the Civil Procedure Code, 1908, would lie only on questions of law, we find that arbitral awards are being challenged, even on facts, under Section 37 of the Act. Despite wealth of judicial authority on this point, and repeated disapproval voiced by the Supreme Court and as well as several High Courts including this Court thereon, it is almost invariably seen that every award passed by the arbitrator/Arbitral Tribunal, especially, where the awards are commercial in nature, are challenged, first before the Single Judge and thereafter before the Division Bench merely because the "aggrieved party" possess the financial wherewithal to do so. It is a matter of concern that the majority of such challenges are by public sector undertakings, the appellant before us being one of the main contributors thereto. Such attempts contribute, in a great deal to the menace of "docket explosion", which plagues our Courts and consumes valuable time which could be used for settling more important disputes. We unhesitatingly deprecate this practice.

20.2 In the result, we dismiss this appeal, which appears to us, to be an attempt to re-argue the entire dispute, *de novo*, before this

Court, with costs, which are quantified by us at Rs. 1,00,000/-. The costs would be payable, by the appellant to the respondent, within a period of four weeks.

C. HARI SHANKAR
(JUDGE)

ACTING CHIEF JUSTICE

JANUARY 24th, 2018
neelam/nitin