IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.07.2023

\+ **FAO(OS)(COMM) 129/2022 & CM Nos. 23948/2022 & 34256/2022**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Appellant

Versus

IRB PATHANKOT AMRITSAR TOLL ROAD LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. A. K. Verma, Sr. Adv. with Mr. Nikhil Mehta, Mr. Vinod Mehta & Mr. Varun Sharma, Advs.

For the Respondent : Mr. Saurabh Kirpal, Sr. Adv. with Dr. Rajeshwar Singh, Mr. Saket Sikri, Mr. Apoorv Agarwal, Mr. Sarthak Sachdev, Ms. T.R. Daulat, Mr. Mohnish Patkar, Mr. Hemant Sharma & Ms. Shabhavi Singh, Advs.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The appellant (hereafter '**NHAI**') has filed the present intra-court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act,

1996 (hereafter '**the A&C Act**') impugning a judgement dated 08.03.2022 (hereafter '**the impugned judgement**') rendered by the learned Single Judge. By virtue of the impugned judgement, the learned Single Judge has rejected the appellant's application preferred under Section 34 of the A&C Act, being OMP (COMM) 373/2021 captioned ***National Highways Authority of India v. IRB Pathankot Amritsar Toll Road Ltd.***, impugning an arbitral award dated 13.07.2021 (hereafter '**the impugned award**') read with an order dated 27.07.2021. The impugned award was made by an arbitral tribunal comprising of three arbitrators (hereafter the Arbitral Tribunal).

FACTUAL CONTEXT

2. The Government of India has entrusted NHAI with the development, maintenance and management of National Highway No.15 including a section from Km 6.082 to Km 108.502 (approximately a length of 102.420 Km). NHAI decided to augment the stretch of the said highway from Km 6.082 to 108.502 on the Amritsar to Pathankot section by four laning the same on a build, operate and transfer (hereafter '**BOT**') basis.

3. In March, 2008, NHAI invited proposals for shortlisting the bidders for the said project. NHAI considered the proposals received in response to the said notice and shortlisted bidders including the consortium constituted by IRB Infrastructure Developers Ltd. and Modern Road Makers Pvt. Ltd. with IRB Infrastructure Developers Ltd. as its lead member (hereafter '**the Consortium**').

4. Subsequently, NHAI invited bids from the shortlisted bidders for executing the project. The Consortium's bid was accepted and NHAI issued a Letter of Acceptance (hereafter '**the LoA**') dated 27.07.2009 requiring it to execute a Concession Agreement within a period of forty-five days of the issuance of the said LoA.

5. The Consortium promoted the respondent (hereafter '**IRB**') a special purpose vehicle for executing the project in question and exercising its right under the LoA. And, at the request of the Consortium, NHAI entered into a Concession Agreement dated 16.11.2009 (hereafter '**the CA**') with IRB for executing the work of design, engineering, finance, construction, operation and maintenance of the Pathankot-Amritsar section of NH-15 from Km 6.082 to 108.502 in the State of Punjab under NHDP, Phase-III on Design, Build, Finance, Operate and Transfer (hereafter '**DBFOT**') basis in terms of the CA. The concession period was agreed as twenty years from the appointed date. The appointed date was agreed as 31.12.2010 and in terms of the CA the project (construction phase) was to be completed within a period of nine hundred and ten days; that is on or before 27.06.2013 (the Project Completion Date). IRB would be entitled to collect toll for the concession period remaining after the completion of the project (Commercial Operation Date – COD).

6. The construction of the project was admittedly delayed. In terms of Clause 10.3.5 of the CA, the construction works on all lands for which Right of Way (hereafter '**the RoW**') was granted within ninety days of the appointed date, was required to be completed before the

Project Completion Date. According to IRB, 89.09% of the hindrance free length of 79.869 Km out of 102.420 Km of the highway was made available to it on or before 31.03.2011 and therefore, it was bound to complete the construction on such stretch by the COD. However, subsequently, IRB clarified that only 75.66 Km of hindrance free length had been made available within the specified period.

7. The execution of the project was substantially delayed. According to IRB, the delay was mainly for reasons attributable to "NHAI / Railway Authority / Irrigation Authority" and therefore, it was entitled to extension of time for completing the construction (hereafter '**EoT**').

8. IRB claimed that NHAI had failed to perform its obligation under the CA by not providing hindrance free / encumbrance free land and vacant RoW. Resultantly, the project could not be completed within time.

9. IRB applied for EoT for completing the works, which was recommended by the Independent Engineer (hereafter '**the IE**'). On 05.08.2014, IRB requested the IE for joint verification of the highway to conduct the remaining tests and to submit the Provisional Completion Certificate (hereafter '**PCC**') in terms of Clause 14.3 of the CA.

10. IRB states that on 07.08.2014 and on 11.08.2014 joint inspections of the project highway were carried out for issuance of the PCC (for Provisional Commercial Operation Date – PCOD). Thereafter, the IE listed out certain pending works to be completed. The

works were classified under three lists. List 'A' for the works to be completed before issuance of the PCOD; List 'B' setting out the works to be completed within ninety days of the PCOD; and List 'C' setting out the works which could not be completed on account of unavailability of unencumbered/unhindered land.

11. Thereafter, a review meeting was held between the parties for completion of the works as listed out in Lists 'A' and 'B'.

12. On 09.10.2014, NHAI requested the Safety Consultant to conduct a safety review in terms of Clause 2.9 of Schedule I of the CA. Thereafter on 13.10.2014, the IE recommended issuance of the PCC and also enclosed a punch list setting out works which required to be completed.

13. On 13.10.2014, IRB furnished an undertaking not to raise any cost claims with regard to resources (manpower and machinery) which had remained idle during the construction period.

14. Thereafter, NHAI requested the IE to provide the safety report for issuance of the PCC. The Project Director also recommended issuance of the PCC. On receipt of PCC, IRB would be entitled to provisionally place the highway on commercial operation (PCOD) and commence collection of toll.

15. IRB claims that in the meanwhile, the Safety Audit Report by the Safety Consultant was furnished and it addressed the observations raised by the Safety Consultant.

16. On 05.11.2014, the parties entered into a Supplementary Agreement (hereafter '**the Supplementary Agreement**') whereby IRB agreed not to raise any claim in respect of idling of resources (manpower and machinery), increase in costs of material, delay in construction of the highway etc. It further agreed not to seek any extension of the concession period. However, it retained the right to seek extension of the concession period on account of any valid factors arising after the actual construction of the highway project in terms of the CA.

17. Thereafter, on 27.11.2014, the IE issued the PCC and IRB commenced toll collection with effect from 28.11.2014 (PCOD). The IE recommended an interim EoT for construction upto 27.11.2014 (that is, extension of time for a period of 518 days). The IE subsequently also reiterated its recommendation for EoT by its letter dated 23.09.2015.

18. On 19.06.2017, IRB sought compensation under Clauses 35.2 and 35.3 of the CA on account of delay of 518 (five hundred and eighteen) days without quantifying the same. In addition, IRB also sought extension of concession period by 518 days to compensate the delay which it claimed was attributable to "NHAI / Railway Authority / Irrigation Authority".

19. Thereafter, IRB sent a letter dated 18.06.2018 seeking Conciliation of the disputes in terms of Clause 44.2 of the CA. By a letter dated 07.08.2018, IRB invoked the Arbitration Agreement

(Clause 44.3 of the Concession Agreement) and named Mr. S.S. Aggarwal as its nominee arbitrator.

20. By a letter dated 30.08.2018, NHAI called upon IRB to withdraw its claim. NHAI claimed that the claims were not maintainable in view of the Supplementary Agreement.

21. Initially, NHAI declined to refer the disputes to arbitration, however, subsequently, on 06.02.2019, NHAI nominated Mr. Navin Kumar as its nominee arbitrator. Both the arbitrators nominated Justice (Retd.) A.P. Shah as the presiding arbitrator and the Arbitral Tribunal was constituted on 27.02.2019.

22. The impugned award was delivered on 13.07.2021. It was by a majority comprising of Mr. S.S. Aggarwal and the Presiding Arbitrator. Mr Navin Kumar entered a dissenting opinion.

23. Thereafter, IRB filed an application under Section 33 of the A&C Act for correcting certain errors. NHAI did not oppose the said application and the Arbitral Tribunal allowed the same by an order dated 13.07.2021

DISPUTES BEFORE THE ARBITRAL TRIBUNAL

24. IRB filed its Statement of Claims before the Arbitral Tribunal raising essentially four claims. First being for extension of the concession period. IRB claimed that it is entitled to extension of the concession period by a further 518 (five hundred and eighteen) days.

IRB claimed that it could not achieve the completion of project within the contemplated time on account of delays attributable to NHAI. The same distorted its collection of revenue, which was required to be remedied by extending the concession period. Second, IRB sought compensation of ₹159.541 crores as reimbursement of extra expenditure incurred due to time overrun in terms of Clause 35.2 of the CA. Third, IRB claimed escalation amounting to ₹92.71 crores. And, fourth, IRB claimed costs of arbitration.

25. In addition, IRB also sought interest at the rate of 15% per annum on the amounts as claimed.

26. NHAI disputed the aforesaid claims made by IRB on several fronts. First, it contested that the claim relating to compensation and escalation were not maintainable in terms of the Supplementary Agreement dated 05.11.2014. Second, it denied that there was any material breach of the CA and therefore, no compensation was payable under Clause 35.2 of the CA. Third, it claimed that claims raised by IRB were beyond the period of limitation. NHAI also denied the quantification of the claims.

THE IMPUGNED AWARD

27. On 26.01.2020, the Arbitral Tribunal fixed the points of determination / issues. The same are noted in paragraph 10 of the impugned award, which is reproduced below:

"10. On 28.01.2020, the AT fixed the Points for Determination/Issues, which are as follows:

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

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

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

4. Whether the Claims are time barred?

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

6. Interest & Costs."

28. The Arbitral Tribunal by majority (the presiding arbitrator and Mr. S.S. Aggarwal) after examination of the communications issued by the IE as well as the provisions of the CA, concluded that the IE was the sole competent authority under the CA to determine EoT. The IE found that IRB had achieved milestones I, II and III within the period of ninety days as required under Clause 12.4.2 of the CA and therefore there was no default. The IE's finding that IRB was entitled to EoT of 518 (five hundred and eighteen) days from the scheduled completion date of 27.06.2013 had not been rebutted or shown to be erroneous by

NHAI. Accordingly, the Arbitral Tribunal found in favour of IRB that the IE had approved EoT of 518 days in terms of Clause 14 of the CA.

29. The Arbitral Tribunal also accepted IRB's contention that NHAI had created conditions of economic duress under which the Supplementary Agreement was signed. It also accepted the contention that NHAI had set up signing of the Supplementary Agreement as a pre-condition for issuance of the PCC/PCOD. The Arbitral Tribunal rejected NHAI's contention that the Supplementary Agreement represented any waiver of mutual rights. It did not find merit in NHAI's contention that it had waived levying of any damages for delay in completion of the construction of the project highway and although the works were incomplete, had permitted IRB to avail benefits of the PCC. The Arbitral Tribunal found that there was no occasion for NHAI to waive its rights. The Arbitral Tribunal held that the IE had found that delays in the scheduled project were on account of reasons attributable directly to NHAI and therefore, it should bear the liability and consequences of such a delay. The Arbitral Tribunal concluded that NHAI had provided no reciprocal consideration for IRB to have waived its right under the Supplementary Agreement.

30. The Arbitral Tribunal also rejected NHAI's contention that there was delay on the part of IRB in raising the claims including the claim that the Supplementary Agreement was executed by it under duress. The Arbitral Tribunal noted that IRB had requested for issuance of the PCC on 03.05.2017 after completion of the Punch List items. The same was immediately followed by a letter dated 19.06.2017 seeking

compensation for the delay of 518 days under Clauses 35.2 and 35.3 of the CA. The Arbitral Tribunal also held that there was a threat of termination under Clause 12.4.3 of the CA since the delay in completion of the project was more than 270 days and NHAI had not accepted that the delay was due to reasons solely attributable to it or due to *force majeure.*

31. The Arbitral Tribunal referred to the testimony of IRB's witness, Mr. Vinod Kumar Menon (CW1), and held that IRB did not protest against execution of the Supplementary Agreement because the issue of EoT had remained un-addressed even after the issuance of PCC/PCOD. The Completion Certificate was issued on 25.08.2017, however, prior thereto IRB had made a claim for compensation on account of delay of 518 (five hundred and eighteen) days by a letter dated 19.06.2017. The Arbitral Tribunal accepted that since NHAI did not respond to the letter dated 19.06.2017, IRB initiated Conciliation on 07.08.2018. The Arbitral Tribunal also found in favour of IRB that there was no delay on its part in raising the claim and that the Supplementary Agreement was executed under economic duress.

32. In the alternative, the Arbitral Tribunal also held that even if the Supplementary Agreement was held to be valid, it did not preclude IRB from making its claims. The Arbitral Tribunal reasoned that Clause (b) of the Supplementary Agreement whereby IRB had agreed not to raise any claims in the CA and not to seek any further extension of the concession period, was only applicable for factor arising during the period after issuance of the PCC/PCOD till full completion of the

works. Further, it did not provide for any waiver of compensation on account of NHAI's default under Clauses 35.2 and 35.3 of the CA. The Arbitral Tribunal held that the IE's determination of 518 (five hundred and eighteen) days of delay being attributable to NHAI constituted a valid factor entitling IRB to claim compensation and extension of the concession period.

33. The Arbitral Tribunal accepted that the Supplementary Agreement was executed by IRB under economic duress and, therefore, was voidable at its instance. However, even assuming that it was valid, it did not preclude IRB from raising the claims relating to time overruns.

34. The Arbitral Tribunal also rejected NHAI's defense that the claims raised by IRB were barred by limitation. The Arbitral Tribunal held that IRB had crystallized its claims by its letter dated 18.06.2018 thereby, seeking reference of the disputes to reconciliation. Since NHAI had failed to respond, IRB had invoked the arbitration clause by its letter dated 07.08.2018. The Arbitral Tribunal referred to the decision of the Supreme Court in ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority: (1988) 2 SCC 338*** and held that the right to initiate litigation for the purpose of Section 137 of the Limitation Act, 1963 would arise when the disputes between the parties had arisen. Since NHAI repudiated its claims on 07.08.2018, the claims were not barred by limitation.

35. The Arbitral Tribunal also accepted IRB's claim for escalation under Clause 35.2 of the CA.

36. The Tribunal entered an award for a sum of ₹ 252.251 crores (₹159.541 crores plus ₹92.71 crores on account of escalation) and in addition awarded interest at the rate of 9% per annum on the awarded amount from the date of the PCOD, that is from 27.11.2014.

37. Paragraph 166 of the impugned award is dispositive of the claim and is reproduced below:

> "166. In view of the AT's findings above, Issues No.1-6 are decided as follows:
>
> i. Issue No. 1 is decided in favour of the Claimant AT finds that the IE has approved the EOT for 518 days as per Article 14 of the CA.
>
> ii. Issue No. 2 is decided in favour of the Claimant. The AT finds that the Supplementary Agreement dated 05.11.2014 was executed by the Claimant under economic duress, and hence, is voidable at the instance of the Claimant. Even assuming the Supplementary Agreement is valid, a comprehensive reading of the same makes it clear that it does not prohibit the claims of the Claimant as a consequence of delay damages arising out of time overrun.
>
> iii. Issue No. 3 is decided in favour of the Claimant and the Tribunal accepts the certification by the Statutory Auditor and the total compensation payable to the Claimant is Rs. 252.251 crores.
>
> iv. Issue No. 4 is decided in favour of the Claimant and it is held that the Claimant's claims are not barred by limitation.
>
> v. Issue No. 5 is decided in favour of the Claimant since the AT has held that the Supplementary Agreement being signed under duress by the Claimant, and being voidable at its instance, the question of estoppels does not arise."

SUBMISSIONS OF COUNSEL

38. Mr. Verma, learned senior counsel appearing for NHAI assailed the impugned award, essentially, on two fronts. First, he submitted that the Arbitral Tribunal had not returned any independent finding that NHAI was responsible for the delay in completion of the construction. He submitted that the Arbitral Tribunal had simply referred to various letters issued by the IE in the context of EoT for completion of the project and none of the letters had attributed the delay to NHAI. He submitted that the Arbitral Tribunal had committed a fundamental error in accepting that the IE's recommendation for EoT also implied that IRB was entitled to compensation for the alleged additional expenditure incurred on account of delay. He submitted that the concession period could be extended and / or compensation could be awarded only in cases where NHAI was found to be in "material default" of the CA. However, the extension of time for completion of the construction could be granted in various circumstances where the delay was justified and was not attributable to IRB. The Arbitral Tribunal, thus, failed to adjudicate whether there was any material breach on the part of NHAI and the impugned award is vitiated by patent illegality. He submitted that the IE had accepted that the delay was for various reasons such as non-procurement for permission for cutting of the trees, shifting of utilities and for obtaining the necessary permits. He contended that in terms of the CA, IRB was responsible for obtaining the said permissions and thus, any delay in obtaining the same could not be construed as a breach of the CA on the part of NHAI.

39. Second, he submitted that the Arbitral Tribunal had grossly erred in holding that the Supplementary Agreement was executed under coercion. He stated that there was no specific pleading or any evidence to establish that the said agreement was signed under coercion. He contended that it is well settled that a bald statement that an agreement was signed under coercion cannot be accepted.

40. Next, he submitted that the Arbitral Tribunal had also failed to address the issue that IRB had not raised any protest or objection regarding executing the Supplementary Agreement under coercion till almost four years after the same was executed. There was no explanation whatsoever for the inordinate delay. However, the Arbitral Tribunal had brushed aside the said objection by accepting that IRB had not raised any objection on account of threat of termination of CA by NHAI and the same had continued after execution of the Supplementary Agreement. IRB had not set up any such case in its pleadings. He further submitted that the conclusion of the Arbitral Tribunal, in the alternative, that the Supplementary Agreement did not constitute a waiver of the claims under Clause 35.2 and Clause 35.3 of the CA was *ex facie* untenable as this was contrary to IRB's pleadings and no such case had been set up by IRB.

41. Mr. Verma also relied on the decision of the Supreme Court in ***New India Assurance Company Limited v. Genus Power Infrastructure Limited***[1] and the decision of this Court in ***Goyal MG***

[1] ***(2015) 2 SCC 424***

Gases Ltd. v. Double Dot Finance Ltd.[2] in support of his contention that a bald plea of coercion, duress or undue influence was not sufficient to avoid an agreement.

42. Mr Mukul Rohatgi, Mr Saurabh Kirpal, Senior Advocates as well as Dr Rajeshwar Singh, Advocate advanced submissions on behalf of IRB and countered the submissions of Mr Verma. They submitted that the Arbitral Tribunal had examined the correspondence exchanged between the parties and concluded that there was a material breach on the part of NHAI. They contended that it was not open for this Court to re-appreciate the evidence and substitute its interpretation in place of that of the Arbitral Tribunal. And, it was not permissible for this Court to interfere with the said conclusion of the Arbitral Tribunal under Section 37 of the A&C Act.

43. Further, they contended that IRB had sufficiently proved, by direct and circumstantial evidence that the Supplementary Agreement was executed under economic duress. They pointed out that the Arbitral Tribunal had concluded that the said agreement was without consideration as IRB was entitled to the PCC but the same was withheld leading to surmounting expenses and financial pressure to repay the debt to the lenders. They further contended that the Arbitral Tribunal had rightly accepted that IRB had not raised any claim of duress under threat of termination of the CA as NHAI was entitled to terminate the CA under Clause 12.4.3 of the CA, if the four laning was not completed

[2] ***2009 SCC OnLine Del 1478***

within a period of 270 days from the Scheduled Four Laning Date. They claimed that IRB's witness (CW-1) had explained the same in his evidence. The learned counsel also referred to the decisions of the Supreme Court in ***Indian Farmers Fertilizer Cooperative Limited. v. Bhadra Products***[3]***, Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd.***[4]***, Haryana Tourism Limited. v. Kandhari Beverages Limited***[5]***, Delhi Airport Metro Express Private Limited. v. Delhi Metro Rail Corporation Limited***[6]***, MMTC Limited. v. Vedanta Limited***[7]**,** and ***Atlanta Limited. v. Union of India***[8] in support of their contentions.

REASONS AND CONCLUSION

44. At the outset, it is relevant to observe that the law as to the scope of interference under Sections 34 and 37 of the A&C Act is now well settled. An arbitral award can be set aside under Section 34 of the A&C Act only on the grounds as set out under Section 34(2) or 34(2A) of the A&C Act. Further, interference under Section 37 of the A&C Act cannot travel beyond the scope as set out under Section 34 of the A&C Act[9].

45. It is also impermissible for the court to re-appreciate the evidence and re-adjudicate the disputes. The arbitrator is the final arbiter of the

[3] ***(2018) 2 SCC 534***
[4] ***(2005) 6 SCC 462***
[5] ***(2022) 3 SCC 237***
[6] ***(2022) 1 SCC 131***
[7] ***(2019) 4 SCC 163***
[8] ***(2022) 3 SCC 739***
[9] ***MMTC Limited. v. Vedanta Limited*** (*supra*)

disputes between the parties[10]. An arbitral award can be set aside on the ground that it is in conflict with the public policy of India or is vitiated by patent illegality. However, every error of law committed by the arbitral tribunal would not fall within the expression 'patent illegality' as used under Section 34 (2A) of the A&C Act[11]; patent illegality that vitiates an arbitral award goes to the root of the matter.

46. Undisputedly, it is not permissible for this Court to re-examine and re-appreciate the evidence led by the parties and re-adjudicate the disputes on merits. We must necessarily confine the examination in these proceedings to determining whether the impugned award is vitiated by patent illegality on the face of the record.

IE'S RECOMMENDATION OF EOT OF 518 DAYS

47. In the present case, the Arbitral Tribunal had at a hearing held on 28.01.2020 fixed the points for determination/issues. The issue as fixed by the Arbitral Tribunal was "*whether the Independent Engineer approved Extension of Time of 518 days in terms of provision of Article 14 of the Concession Agreement?*"

48. The Arbitral Tribunal had noted that it was IRB's case that there was a delay of 518 days, which was attributable to NHAI. The Arbitral Tribunal had examined the correspondence between IRB and the IE and determined the first point of determination / issue in favour of IRB. The

[10]***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49*** and ***State of Rajasthan v. Puri Construction Co. Ltd. & Anr.: (1994) 6 SCC 485***

[11] ***Delhi Airport Metro Express Private Limited. v. Delhi Metro Rail Corporation Limited*** (*supra*)

Arbitral Tribunal concluded in favour of IRB that *the IE had approved the EOT for 518 days as per Article 14 of the CA.*

49. The Arbitral Tribunal had concluded as above, essentially, on the basis of three letters issued by the Independent Engineer (IE) – letters dated 20.12.2013, 23.03.2015 and 23.09.2015. The Arbitral Tribunal noted that the IE in its letter dated 07.10.2013 had recommended an interim EoT of 264 days on account of force majeure event of delay in approval of CRS clearances for launching of the super structures of the five ROBs and the bypasses. The Arbitral Tribunal further observed that NHAI did not act on the said recommendation but had returned the same with certain observations. Thereafter, the IE responded to the same by a letter dated 20.12.2013.

50. The Arbitral Tribunal observed that on receipt of the said letter, NHAI had once again instructed the IE to submit a comprehensive EoT proposal and provide further justification with supporting documents. In the meanwhile, the Commissioner of Railways Safety sanction for five ROBs was received but the same was delayed as the relevant agreement between NHAI and Railways Authority was not executed. The permission to launch girders of ROB at Km 67/4-6 commenced after the orders from the court on 01.08.2014 in COCP No. 143/10 (the case between the Railways and NHAI). The Arbitral Tribunal observed that the IE had determined a delay of 400 days from the scheduled completion date (that is, 27.06.2013 till 01.08.2014) on account of delay in receiving timely CRS approval.

51. IRB had submitted an updated EoT proposal on 02.07.2014 justifying an extension of 643 days. In this regard, the IE sent a letter dated 23.03.2015 recommending an extension of 518 days. The Arbitral Tribunal took note of the said letter as well as the specific events justifying EoT of 518 days delay as set out in the said letter.

52. In addition to the above, the Arbitral Tribunal also took note of the IE's letter dated 11.12.2015 reiterating that IRB was entitled to the EOT beyond 518 days. After noting the factual narration, *inter alia*, relating to IRB's request for EOT and the IE's recommendation regarding the same, the Arbitral Tribunal arrived at three conclusions. First that the IE was the sole competent authority to determine the issue of EOT. Second that the IE's finding that IRB had achieved project milestones I, II and III within the stipulated period under Clause 12.4.2 of the CA remained unrebutted. And, third that the IE's finding that IRB was entitled to 518 days from the scheduled completion date of 27.06.2013 had remained unrebutted.

53. Paragraph 88 of the impugned award setting out the conclusion of the Arbitral Tribunal in regard to the first point of determination is set out below:

> "88. In view of the above factual narration, the following three conclusions emerge. First, the IE was the sole competent authority under the contract to determine the issue of EOT. Second, the IE's findings that the Claimant achieved Project Milestones I, II, and III within 90 days, as per Article 12.4.2 of the CA has gone unrebutted, except making references to the previous observations of the IE. In any event, the Respondent failed to

demonstrate any error or flaw in this finding of the IE. Third, the IE's finding that the Claimant is entitled to an EOT of 518 days (400 + 87+ 31 days) from the scheduled completion date of 27.06.2013 has not been rebutted by the Respondent or shown to be to erroneous, even during their cross-examination. The time taken by the Respondent to receive the CRS approval for the 5 ROBs had admittedly been "abnormally delayed", resulting in an EOT of 400 days (till 01.08.2014) which subsumed other delays. The Respondent had also failed to provide any explanation on delay of 87 days (after receiving the Court's order dt. 01.08.2014 for completing the balance works on the ROB) and 31 days (for the period after 30.10.2014 since hindrance-free land was still not made available by NHAI to the Claimant, till the issuance of the PCC on 27.11.2014. **Thus, the Claimant is entitled to EOT of 518 days with effect from the scheduled completion date of 27.06.2013 till the date of issuance of PCC/PCOD, i.e. 27.11.2014. Hence, the finding on Issue No. 1 stands concluded and the AT finds in favour of the Claimant that the IE has approved the EOT for 518 days as per Article 14 of the CA**."

[emphasis added]

54. The decision of the Arbitral Tribunal in regard to the first point of determination cannot be interfered with in these proceedings. The learned Single Judge found that the IE had determined that IRB was entitled to EoT of 518 days. The Arbitral Tribunal's conclusion in this regard is based solely on the recommendations of the IE in its letters. It is not permissible for the court to consider the evidentiary value of the letters written by IE. The Arbitral Tribunal had accepted that the said letters sent by IE are sufficient material to base its conclusion and therefore we must proceed on the same basis. The Arbitral Tribunal's conclusion cannot be faulted. However, it is important to note that the

communications issued by the IE were in connection with IRB's request for EoT for completion of the project.

55. The IE recommended that the time for completion of the project be extended till the date of issuance of the PCC. In terms of Clause 48 of the CA the Project Completion Date is defined to mean "the date on which Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Clause 14". In terms of Clause 14.2 of the CA, the Completion Certificate is required to be issued on completion of the construction works and upon the IE determining the requisite tests to be successful. In terms of Clause 14.3 of the CA, the IE may at the request of the Concessionaire issue a PCC if the tests are successful and the Project Highway can be safely and reliably placed in commercial operation notwithstanding that certain works or things forming part of the Project Highway are outstanding and not complete. There is no dispute or controversy that the IE had recommended/granted EoT for completion of the construction of the project. However, it had not recommended extension for the concession period. None of the letters of IE even remotely suggest that concession period be extended. The letters of IE do not state or suggest that NHAI is in material default of the CA.

56. The first point of determination / issue related only to the question whether the IE had granted / recommended extension of the construction period and whether IRB was entitled to such an extension. The first point of determination did not involve examination or determination of the question whether IRB was entitled to

compensation under Article 35.2 of the CA or extension of the concession period under Article 35.3 of the CA.

IE'S RECOMMENDATION OF EOT IS NOT *IPSO FACTO* MATERIAL DEFAULT BY NHAI

57. The third point of determination / issue as framed was "Whether the compensation sought by the Claimant under Clause 35.2 of the Concession Agreement towards increase in capital cost is attributable to delay on the part of NHAI in completion of the Project Highway?"

58. It is also relevant at this stage to refer to Clauses 35.2 and 35.3 of the CA and the same are reproduced below:

> **"35.2 Compensation for default by the Authority**
>
> In the event of the Authority being in material default or breach of this Agreement at any time after the Appointed Date, it shall pay to the Concessionaire by way of compensation, all direct costs suffered or incurred by the Concessionaire as a consequence of such material default within 30 (thirty) days of receipt of .the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material default but shall not include loss of Fee revenues or debt repayment obligations, and for determining such compensation, information contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant.
>
> **35.3 Extension of Concession Period**
>
> In the event that a material default or breach of this Agreement set forth in Clause 35.2 causes delay in achieving COD or leads

> to suspension of or reduction in collection of Fee, as the case may be, the Authority shall, in addition to payment of compensation under Clause 35.2, extend the Concession Period, such extension being equal in duration to the period by which COD was delayed or the collection of Fee remained suspended on account thereat as the case may be; and in the event of reduction in collection of Fee where the daily collection is less than 90% (ninety per cent) of the Average Daily Fee, the Authority shall, in addition to payment of compensation hereunder, extend the Concession Period in proportion to the loss of Fee on a daily basis. For the avoidance of 25% (twenty five per cent) in collection of Fee as compared to the Fee for four days shall entitle the Concessionaire to extension of one day in the Concession Period."

59. As is apparent from a plain reading of Articles 35.2 and 35.3 of the CA, the question whether IRB is entitled to any compensation or extension of the concession period is required to be determined on the basis whether NHAI was in "material default or breach" of the CA. IRB would be entitled to any compensation or extension of the concession period under Article 35.2 and 35.3 only if it is determined that NHAI is in material default or breach of the CA. It was thus necessary for the Arbitral Tribunal to determine whether NHAI was in material default of the CA. In addition, the Arbitral Tribunal was also required to determine the ***"****direct costs suffered or incurred****"*** by the Concessionaire (IRB) as a consequence of such material default. However, the Arbitral Tribunal did not adjudicate the question whether there was any material default on the part of NHAI. The Arbitral Tribunal determined the third point of determination / issue solely on the basis of its reasoning in respect of first point of determination / issue. Paragraph 156 of the impugned award which sets out the reasoning for accepting that IRB

was entitled to compensation under Clause 35.3 of the CA reads as under:

> "156. The AT's findings on Issue No. 3 follow from its findings on Issue No. 1 that the IE had correctly approved the EOT for 518 days in terms of Article 14 of the CA (including vide letters dt. 07.10.2013 and 23.03.2015), on account of the default on the part of the Respondent. Further, the AT has already taken cognizance of the fact that the Claimant had completed its work on the Project Milestones within the contractual limitation period and that there is no contemporaneous record to show that the Respondent had ever issued a notice for damages to be paid by the Claimant on account of delay on its part."
>
> [emphasis added]

60. The Arbitral Tribunal proceeded on the premise that the IE had recommended EoT of 518 days on account of delay attributable to NHAI. However, none of the letters of the IE, as referred to by the Arbitral Tribunal in the impugned award (in the context of issue no.1) attribute the delay of 518 days on account of any material breach of the CA on the part of NHAI. The discussions and findings in relation to issue no.1 are contained in paragraphs 71 to 88 of the impugned award. However, a reading of those paragraphs of the impugned award indicate that the discussion of the Arbitral Tribunal that IRB was entitled to EoT of 518 days delay is based entirely on the recommendations of the IE in its letters and more particularly in letters dated 20.12.2013, 23.03.2015 and 23.09.2015. As stated above, none of the letters hold that NHAI was in any material breach of the CA.

61. The letters of the IE also set out the reasons for its recommendations for EoT for construction of the Project Highway. The Arbitral Tribunal took note of the same. In paragraph 82 of the impugned award, the Arbitral Tribunal summarized the reasons justifying EoT, as recommended by the IE in its letter dated 23.03.2015. The said paragraph is reproduced below:

> "82. Thereafter on 23.03.20 15, the IE wrote another letter to the Project Director of NHAI referencing, *inter alia*, the Claimant's request dated 02.07.2014 for EOT of 643 days (up till 31.03.2015), recommending the interim EOT "*up to the issue of the Provisional Completion Certificate dt. 27.11.2014, which comes to 518 days."* As part of this letter, the IE responded to the observations made by the Respondent, and made the following recommendations for EOT for specific events:
>
> i. Event I: The delay due to impediments during execution along main carriageway in stretches of 75.66km handed over on 31.03.2011, which forced the Claimant to simultaneously work on a number of fragmented fronts. The EOT was determined as 54 days.
>
> ii. Event 2: The delay in 3D notification of missing land included in 75.66km handed over on 31.03.2011 overlapped with Event I and thus, the IE did not recommend any EOT under this event.
>
> iii. Event 3: The delay in deposition of amount under Section 3H of Structure in acquired land was not substantiated completely by the Claimant, and hence, no EOT was recommended for this event.
>
> iv. Event 4: The delay in receiving tree cutting permission along the main carriageway in stretches of 75.66km handed over on 31.03.2011 hindered the progress of the Claimant's work. The EOT was determined as 73 days.

v. Event 5: The delay in shifting the existing irrigation distributary (Sarna North), due to the delay in receiving permission from the Irrigation Authority for the shifting and for the approval of the drawings, led the IE to recommend an EOT of 90 days (from 25.09.2012 and 27.12.2012).

vi. Event 6: The delay in handing over possession of land to the Claimant due to the pendency of court cases resulted an EOT determination for 13 days.

vii. Event 7: There was delay in the completion of work on account of the Respondent's delay in receiving the CRS clearance for the five ROBs and in shifting the LC gate for the ROB at Ch 42+467. As elaborated earlier, the IE noted that the Respondent had failed to deposit the applicable charges to the Railway Authorities in a timely manner, and had then brought up the matter before the Court which only granted permission for launching the last girder of ROB on 01.08.2014 – causing further delays. The IE estimated the delay in approving the block and speed restrictions for launching the girders in the last span of ROB at Ch 42+467 to be 400 days (from 01.08.2014 till 27.06.2013). It further held that the 87 days-time period taken to complete the balance work of ROB at Ch 42+467 such as shuttering for slab work, etc. referred to earlier, was reasonable. Thus, the IE recommended that the ET of487 (400 + 87) days for Event 7 was "tenable"."

62. A plain reading of paragraph 82 of the impugned award indicates that the events of delay set out in letter dated 23.03.2015 include delay in receiving permissions for cutting trees along the main carriageway in stretches 75.66 Km, which were handed over on 31.03.2011; delay in receiving existing irrigation distributary due to delay in receiving permission from the Irrigation Authority; delay in completion of works on account of delay in receiving CRS clearance for the five ROBs and

not receiving the LC gate for ROB at Ch 42+467; and, delay in decision of certain land due to pending decision in court cases.

63. It is NHAI's case that as per Clause 4.1.3(d) of the CA, IRB was required to obtain all necessary permits as specified in Schedule-E to the CA and Clause 1.1(i) of Schedule-E to the CA expressly included "permission of the State Government for cutting trees." The IE recommended the EoT of 73 days on account of delay in securing permissions for cutting of trees and the same could, therefore, under no circumstances be presumed to be attributable to NHAI.

64. The IE also recommended the EoT of 90 days on account of delay in obtaining the permission for shifting of the existing irrigation distributary (Sarna North). According to NHAI, it was IRB's responsibility to obtain the necessary permits and permissions. NHAI, inter alia, relies on Clause 5.1.4 of the CA, which is reproduced below:

> "5.1.4 The Concessionaire shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:
>
> (a) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars and details, as may be required for obtaining all Applicable Permits (other than those set forth in Clause 4.1.2) and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
>
> (b) procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes and systems-used or incorporated into the Project Highway;

(c) perform and fulfill its obligations under the Financing Agreements;

(d) make reasonable efforts, to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;

(e) make reasonable efforts to- facilitate the acquisition of land required for the purposes of the Agreement;

(f) ensure and- procure that its Contractors comply with all Applicable Permits and· Applicable Laws in- the performance by them of any of the Concessionaire's obligations under this Agreement;

(g) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement;

(h) support, cooperate with and facilitate the Authority in the implementation and operation of the Project in accordance with the provisions of this Agreement; and

(i) transfer the Project Highway to the Authority upon Termination of this Agreement, in accordance with the provisions thereof."

65. NHAI contends that its responsibility was limited to seeking "approval of the Railway Authority in the form of general arrangement drawings" in terms of Clause 4.1.2(c) of the CA. NHAI claims that IRB was responsible for obtaining all other permissions. It is also pointed out that in terms of Clause 11.2 of the CA, IRB was required to undertake the work of shifting all utilities as well.

66. It is contended on behalf of NHAI that any delay on the part of the Railway Authorities in granting CRS clearance and / or pendency of Court cases cannot be considered as a material breach of the CA on the part of NHAI. Mr. Verma, learned senior counsel appearing for NHAI has also drawn our attention to Clause 34.4(c) of the CA and contended that any impediment in obtaining permits and licenses caused by the government department is required to be considered as a force majeure event. However, the Arbitral Tribunal had returned no finding to the aforesaid effect either. It is contended that in any view, such events could not be considered as a material breach on the part of NHAI.

67. Although, NHAI disputes that part of the delay of 518 days on account of which the IE had recommended EoT, is attributable to IRB and it was not entitled to EoT to the extent as recommended. The said contention cannot be entertained in view of the Arbitral Tribunal's conclusion in regard to issue no.1; that is, the IE is the final authority for recommending EoT and it had recommended 518 days of EoT. However, the question whether NHAI was in material breach of the CA remains unaddressed.

68. As stated above, the question whether IRB was entitled to any compensation under Clause 35.2 of the CA was required to be determined on the basis whether NHAI was in "material default or breach" of the CA. Issue no.3 could not be decided without determination of the question whether NHAI was in material default of the CA. Indisputably, the determination whether IRB was entitled to

EoT is not determinative of the question whether NHAI was in material default of the CA. IRB may be entitled to EoT on account of justifiable delays for reasons beyond its control or for reasons that were not attributable to it. But it would not be entitled to compensation under Article 35.2 of the CA on that ground. Thus, whilst IRB would be entitled to EoT for completion of construction on account of a material breach of the CA on the part of NHAI; that is not the sole reason for which EoT could be granted. It plainly follows that the recommendation to grant of EoT cannot be construed as determining that NHAI was in material default of the CA.

69. As noted above, the Arbitral Tribunal's conclusion that NHAI was in "material default or breach" (issue no.3) is premised entirely on its discussions relating to the question whether IRB was entitled to 518 days EoT. This is in turn was based on the recommendations made by the IE, which the Arbitral Tribunal found were binding.

70. There is merit in the contention that the Arbitral Tribunal has not adjudicated the essential dispute – whether NHAI was in material default of the CA, which was necessary for deciding the issue whether IRB was entitled to any compensation under Article 35.2 and extension of the concession period under Article 35.3 of the CA. Although, the events on account of which EoT was recommended has been noted by the Arbitral Tribunal *albeit* in regard to discussion relating to issue no.1 but there is no adjudication by the Arbitral Tribunal whether such events constitute a material breach on the part of NHAI. The Arbitral Tribunal proceeded on the assumption that the IE had recommended EoT of 518

days for the reasons of delay attributable to NHAI. This is plainly erroneous and IE's letters do not state so.

71. The Arbitral Tribunal could have considered the IE letter as relevant material in independently adjudicating whether NHAI was in material default. But it has not done so; it has proceeded on the basis that IE had recommended EoT on account of material default of the CA on the part of NHAI.

72. We are of the view that the Arbitral Tribunal had committed a fundamental error in essentially not addressing the real dispute – whether NHAI was in material default of the CA. Thus, the issue no.3 as framed by the Arbitral Tribunal, essentially remained unadjudicated.

73. It is also relevant to refer to the letter dated 19.06.2017 issued by IRB raising the claim for compensation and extension of the concession period. In the said letter it had referred to the letters issued by the IE and had asserted that "*all reasons quoted by the IE are not attributable to the Concessionaire and are solely attributable to NHAI / Railway Authority / Irrigation Authority*". Thus, it was also not IRB's initial claim that the delay was entirely on account of material breach of the CA on the part of NHAI.

74. It is material to note that by a subsequent letter dated 18.06.2018, IRB referred to its earlier letter dated 19.06.2017 and indicated that the disputes were required to be referred to arbitration. Thus, IRB's dispute as raised at the reference stage was not that the delay of 518 days was caused solely on the ground of material default on the part of NHAI; the

dispute raised was that the delay was attributable to "*NHAI / Railway Authority / Irrigation Authority*". The punctuation mark '/' means 'or'. Plainly, IRB would not be entitled to compensation unless it pleaded and established that NHAI was in material default of the CA.

75. It is also relevant to refer to the averments made in paragraph 4.7 of the Statement of Claims, whereby IRB had asserted that the project was delayed majorly due to reasons attributable to NHAI/Railway Authority/Irrigation Department. The relevant extract of the said paragraph are set out below:

> "4.7. The construction of the Project was delayed majorly due to the reasons attributable to the Respondent/ Railway Authority/ Irrigation Authority. Some of the major impediments examined by IE and the relevant EOT are as stated under:
>
> (i) Delay due to impediments during execution along main carriageway in stretches of 75.66 km handed over on 31/03/2011 (IE recommended EOT for 54 days)
>
> (ii) Delay in tree cutting permission along main carriageway in stretches of 75.66 Km handed over on 31/03/2011 (IE recommended EOT for 73 days)
>
> (iii) Delay in shifting of existing irrigation Distributaries (Sarna North) (IE recommended EOT for 90 days)
>
> (iv) Delay in possession of land due to pending decision of Court cases (IE recommended EOT for 13 days)
>
> (v) Delay in approval of CRS (Commissioner of Railways Safety) clearance for 5 ROBs and in shifting of LC (Level Crossing) Gate for ROB at Ch. 42.467 (IE recommended EOT for 487 days)

> …..It is seen from the above that all the reasons quoted by IE were solely attributable to the Respondent/ Railway Authority/ Irrigation Authority. However, the major hindrance was due to delay in approvals from Railway Authority for construction of the five ROBs on the bypasses which were critical for the Project."
>
> (Emphasis added)

76. As noted above, NHAI had contended that IRB was responsible for obtaining all permissions and part of the delay was admittedly on account of delay in obtaining such permissions and therefore, IRB was not entitled to the compensation as awarded. The dispute raised by NHAI is a substantial one, but it is not apposite for this Court to decide this dispute. The said dispute was required to be addressed by the Arbitral Tribunal. Since the Arbitral has failed to consider the same, the impugned award is liable to be set aside.

77. As noted at the outset, the scope of the present proceeding is limited to whether the impugned award is liable to be set aside under Section 34 of the A&C Act. In our view, the impugned award is vitiated by patent illegality on the face of the record. As is apparent the illegality is fundamental and strikes at the root of the matter.

78. There is no cavil that the grounds on which an arbitral award can be set aside under Section 34 of the A&C Act are limited. However the court's examination whether such grounds are established in a given case, under section 34 of the A&C Act, is not required to be superficial.

SUPPLEMENTARY AGREEMENT

79. The second question to be addressed relates to IRB's challenge to the Supplementary Agreement. The material findings of Arbitral Tribunal in regard to the Supplementary Agreement are three-fold. First that it was executed by IRB under coercion; second, that IRB's challenge to the Supplementary Agreement was not delayed; and third, that in any event the Supplementary Agreement did not preclude IRB from claiming any compensation for a period prior to the issuance of PCC/PCOD. NHAI's challenge to these findings are considered hereafter.

WHETHER IRB EXECUTED THE SUPPLEMENTARY AGREEMENT UNDER COERCION

80. There is no dispute that IRB had executed the Supplementary Agreement. It is also admitted that IRB had not raised any challenge to the Supplementary Agreement prior to filing of the Statement of Claims. However, in its letter dated 24.09.2018, IRB had mentioned that "its undertaking for 'no claim' was under duress".

81. Prior to executing the Supplementary Agreement dated 05.11.2014, IRB had furnished an undertaking dated 13.10.2014 to the effect that it would not raise any claim regarding idle resources. It is IRB's case that the undertaking dated 13.10.2014 was a preface to the Supplementary Agreement and was extracted as a result of coercion. It is relevant to note that IRB in its Statement of Claim has pleaded that the undertaking dated 13.10.2014 was extracted as a result of coercion and was a preface to the Supplementary Agreement. The relevant

extracts of the averments made in the Statement of Claims are set out below:

> "3.10. …… 'This document dated 13.10.2014 (Exhibit No. 4l) was by way of a preface to the Supplementary Agreement and was extracted as a result of coercion. Since the tolling for the Project was already delayed so much and with the pressure mounting from banks to start principal repayment, the Claimant was constrained to bow under the blackmailing tactics of the Respondent and· executed the Supplementary Agreement[12]."

82. The Arbitral Tribunal accepted IRB's plea that it had signed the Supplementary Agreement under coercion. The Arbitral Tribunal's conclusion is premised on the basis that the IE had sent a letter dated 13.10.2014 seeking approval for issuing the PCC. Thereafter, on the same day, IRB had signed the undertaking waiving its right under the CA and the Project Director of NHAI had relying on the undertaking sought approval of the competent authority of NHAI to issue the PCC. The Arbitral Tribunal found that the issuance of the PCC, which ought to have been rightfully issued was delayed. IRB could not collect toll without securing the PCC and the delay in issuance of the PCC had adverse economic implications for it. The Arbitral Tribunal also accepted that at the material time IRB was under increasing pressure from banks to begin the principal repayment and the interest on the construction was also mounting.

83. The Arbitral Tribunal found that NHAI had a policy (Policy dated 17.01.2013) which entailed entering into a Supplementary Agreement

[12] Paragraph 3.10 of the Statement of Claim

with the Concessionaire for forgoing any claims regarding delay in handing over any stretch of highway before handing over the same. The Arbitral Tribunal found that in the aforesaid background and the policy in vogue, NHAI had created conditions of economic duress under which the Supplementary Agreement was signed.

84. NHAI seriously disputes the Arbitral Tribunal's conclusion. It claims that there is no evidence of any coercion whatsoever and the Arbitral Tribunal has merely accepted IRB's bald statement and disregarded the testimony of four of NHAI's witnesses, who had deposed to the contrary.

85. This Court has pointedly asked the learned senior counsel for IRB whether there were any letters of the banks on record threatening the recall of loans or indicating that IRB may not be in a position to meet its commitments to the banks / financial institutions. Mr. Kirpal, learned senior counsel appearing for IRB fairly stated that there were no such documents placed on record. However, he pointed out that the Director of IRB (CW-1) had testified that NHAI had coercively extracted the undertaking. CW-1 had also affirmed that obtaining the PCC was critical to ensure viability of the Project Highway and the Supplementary Agreement was executed under coercion and duress as a pre-condition for issuance of the PCOD/PCC.

86. We find substance in Mr. Verma's contention that IRB's plea that Supplementary Agreement was signed under coercion and duress ought not have been accepted without any cogent material. It was IRB's case

that pressure from the banks were mounting and therefore, it had succumbed to the blackmailing tactics of NHAI. According to IRB it was essential that it commenced collection of the toll in order to meet the mounting liabilities. However, there is no material whatsoever to indicate that IRB's financial position was precarious and that it was not in a position to service its liabilities without immediately commencing collection of toll. In all cases, where funds due to a party are withheld or where it is put to peril of a loss by the counter party, it is implicit that there are adverse economic implications. The quintessential question is whether threat of such adverse implications is heightened to a degree so as to coerce the party to execute a waiver of its rights or enter into a settlement agreement contrary to its free will. It is difficult to accept that such a plea can be addressed in absence of any material to establish the financial predicament of the party raising the plea of economic coercion, or any material to establish the crushing nature of the adverse economic implication.

87. It is also material to note that in his affidavit and cross-examination, IRB's Director (CW-1) deposed that he had signed the Supplementary Agreement under threat that the CA would be terminated. This was not the case set up by IRB in its Statement of Claims. There is merit in the contention that this Court cannot re-evaluate or re-appreciate evidence, however, there must be some material to support the case set up by the claimant. It was IRB's case that it was under pressure of the banks and therefore, had succumbed to signing of the Supplementary Agreement. This assertion is not

supported by any credible material whatsoever. Arbitral Tribunal is "the ultimate master of the quantity and quality of evidence"[13] and an award based on "evidence which does not measure up in quality to a trained legal mind would not be held to invalid on this score" but "it is settled law that where: (i) a finding is based on no evidence; or (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse."[14]

88. In the present case the Arbitral Tribunal had also referred to the policy of NHAI to arrive at its conclusion that the Supplementary Agreement was executed under duress. IRB had made no assertion in its pleadings that NHAI's policy requires execution of the Supplementary Agreement and that NHAI had acted in accordance with that policy. On the contrary, the only mention of NHAI's Policy is in an averment in the Statement of Claims[15], whereby IRB had alleged that NHAI had not followed the process under its Circular dated 17.01.2013. Thus, NHAI had no opportunity to controvert the allegation that its policy required execution of the Supplementary Agreement, without which it could not consent of issuance of PCC, and that this policy was uniformly followed. Returning a finding, which is not supported by any averment vitiates the impugned award.

WHETHER THE PLEA OF COERCION WAS RAISED BELATEDLY

[13] ***Associate Builders v. Delhi Development Authority*** (*supra*)
[14] ***Associate Builders v. Delhi Development Authority:*** (*supra*), Paragraph 31
[15] Paragraph 7.39 of the Statement of Claims

89. The Arbitral Tribunal also rejected NHAI's contention that the challenge to the Supplementary Agreement was highly belated. The Arbitral Tribunal reasoned that IRB had issued the letter seeking compensation for delay of 518 days under Clauses 35.2 and 35.3 of the CA on 19.06.2017. The Arbitral Tribunal found that this was IRB's first protest against the Supplementary Agreement because it referred to the IE's letter dated 22.12.2014, which highlighted the execution of the said Agreement[16].

90. The Arbitral Tribunal further proceeded to hold that there was no delay on the part of IRB because the threat of termination of the CA by NHAI under Clause 12.4.3 of the CA had continued even after the Supplementary Agreement was executed. The Arbitral Tribunal also referred to CW-1's response to the aforesaid effect on being cross examined.

91. It is material to note that there is no averment in the Statement of Claims to the effect that IRB had entered into the Supplementary agreement under threat of termination of CA or that it did not raise any protest because the threat of termination of the CA had continued even after the Supplementary Agreement was executed. This was not the case set up by IRB. The Arbitral Tribunal's conclusion in this regard is contrary to IRB's case that it was coerced into entering into the Supplementary Agreement because the PCC was being withheld; without the same it could not commence collection of toll; and it was

[16] Paragraph 124 of the Impugned Award

already under pressure from its banks to commence repayment of loans. Thus, if the averments of IRB in its Statement of Claims were accepted, the coercive circumstances would cease on receipt of the PCC. Undisputedly, IRB had not set up a case that it was under NHAI's threat that the CA would be terminated.

92. Admittedly, IRB had not raised any objection regarding execution of the undertaking and the Supplementary Agreement under coercion till the filing of the Statement of Claims.

93. We are unable to accept the Arbitral Tribunal's finding, that IRB had raised its first protest against the Supplementary Agreement by its letter dated 19.06.2017. The said letter neither mentions any undertaking nor the Supplementary Agreement. The said letter mentions that the IE had determined 518 days as an interim EoT for reasons stated therein. The said reference by IRB to IE's letters can by no stretch of imagination be construed as protest against the Supplementary Agreement. According to the Arbitral Tribunal since one of the letters written by the IE also referred to the undertaking furnished by IRB, IRBs letter mentioning the IE's letter was its first protest against the Supplementary Agreement. This reasoning is incomprehensible. The finding of the Arbitral Tribunal in this regard is wholly perverse and unreasonable as tested on the anvil of the *Wednesbury* principle[17].

[17] ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation***: ***[1948] 1 KB 229***. In the said case the United Kingdom Court of Appeal held that *"if a decision on a competent matter is so unreasonable that no reasonable authority could ever come to it, then the courts can interfere*."

94. The first time IRB had mentioned the word 'duress' was in its letter dated 24.09.2018. This was also in regard to the undertakings furnished by it and did not mention the Supplementary Agreement. Admittedly, the said letter was sent almost four years after the Supplementary Agreement was executed.

95. The upshot of the aforesaid discussion is that the Arbitral Tribunal has entertained the claim for compensation of the expenditure and for extension of the concession period, which was raised for the first time after a lapse of four years after the same were given up by IRB in an agreement in writing without any averment in the pleadings explaining the delay in raising such claim.

96. The conclusion of the Arbitral Tribunal is *ex facie* vitiated by patent illegality.

97. According to IRB the Supplementary Agreement was voidable. But it had not raised any objection to void the same only on 24.09.2018 prior to filing the Statement of Claims. Plainly, it was impermissible for the Arbitral Tribunal to entertain the plea that IRB had entered into the Supplementary Agreement against its free will as it was raised belatedly and beyond a period of three years from the date of cause of action.

ALTERNATIVE INTERPRETATION OF THE SUPPLEMENTARY AGREEMENT

98. The Arbitral Tribunal also interpreted the Supplementary Agreement to mean that it only precluded IRB from raising claims for

a period after the issuance of the PCC/PCOD and did not cover the claims for the period prior to issuance of the PCC/PCOD. This interpretation is *ex facie* erroneous. It is not only contrary to the plain language of the Supplementary Agreement but is also contrary to the acknowledged case as set up by IRB; which is, that it was coerced to give up it legitimate claims and enter into the Supplementary Agreement.

99. At this stage, it is relevant to refer to the Supplementary Agreement. The same is set out below:

> "**SUPPLEMENTARYAGREEMENT**
>
> This agreement is entered into on this 05th day of November, 2014 as a Supplement to Agreement dated 16.11.2009.
>
> **Between**
>
> The National Highways Authority of India, a statutory body constituted under the provisions of the National Highways Authority of India Act, 1988, and having its principal office at Plot No.G-5&6, Sector-10, Dwarka, New Delhi-110075 (hereinafter referred to as "NHAI" which expression shall unless repugnant to the context or meaning thereof including its administrators, successors and assigns)
>
> **And**
>
> M/s IRB Pathankot Amritsar Toll Road Private Limited, a company incorporated under the provisions of the Companies Act, 1956, and having its registered office at IRB Complex, Chandiwali Farm, Chandivali Village, Andheri (East), Mumbai - 400072 (hereinafter referred to as the "concessionaire" or "Company" which expression shall unless repugnant to the context or meaning thereof include its successors and permitted substitutes) of the Other Part.
>
> **WITNESSETHAS UNDER:**

1. The Authority and the Concessionaire are individually referred as party and collectively its parties.

2. Whereas NHAI has entered into the Concession Agreement dated 16.11.2009 with the Concessionaire M/s IRB Pathankot Amritsar Toll Road Private Limited on BOT Basis for The work of Design, Engineering, Finance, Construction, Operation and Maintenance of Pathankot to Amritsar Section of NH-15 from Km. 6+082 to Km. 108+502 in the state of Punjab under NHDP-Phase-III on Design, Build, Finance, Operate and Transfer (DBFOT) Basis.

3. Whereas, for above Project a Concession Agreement dated 16th November, 2009 has been signed amongst above parties. As per Concession Agreement, the scheduled Appointed Date was 31st December, 2010 and scheduled Project completion Date was 27th June, 2013.

4. Whereas, there were some delays attributable to both the parties during construction period of the project highway and the Concessionaire claimed that he should be given BOT for construction period without levy of penalty as delay was attributable to both the parties.

5. Whereas, the Concessionaire has requested for issuance of Provisional Completion Certificate for the work of Design, Engineering, Finance, Construction, Operation and Maintenance of Pathankot to Amritsar Section of NH-15 from Km. 6+082 to Km. 108+502 in the state of Punjab.

6. Whereas, the Concessionaire vide letter dated 13.10.2014 has furnished an undertaking that Concessionaire will not raise any cost claims due to idling of resources (manpower and machinery) during the construction period of the Project Highway.

7. Whereas, the Concessionaire vide letter dated 15.10.2014 has certified that Concessionaire un-conditionally undertakes that it shall not raise any claim whatsoever, in any form other than FOR ANY VARIATIONS till date, other than the approved COS and other items. A fair decision by NHAI, as per provisions of the CA, on the variations stated in list enclosure will be acceptable to the concessionaire.

8. Whereas, the Concessionaire agrees to complete the balance works mentioned in punch list as per Concession Agreement.

NOW THE PARTIES HEREIN HAVE AGREED TO THE FOLLOWING

(a) Both the parties amicably agree, for issuance of Provisional Completion Certificate for the work of Design, Engineering, Finance, Construction, Operation and Maintenance of Pathankot to Amritsar Section ofNH-I5 from Km. 6+082 to Km. 108+502 in the state of Punjab subject to completion of certain balance items as decided by Authority in its Executive Committee Meeting held on 22.10.2014.

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

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

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

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

In witness whereof the parties hereto have executed and delivered this supplementary Agreement the day and year above written."

100. A plain reading of Clause (b) of the Supplementary Agreement indicates that IRB had agreed not to raise any claims regarding idling of resources, increase in the cost of material, delay in the construction of highway and had also agreed not to seek any extension in the concession period, however, IRB had retained its right for extension of the concession period on account of any valid factor arising after the actual construction of the highway. The Arbitral Tribunal has read the said clause to mean that it had given up its claims for the period after issuance of the PCC / PCOD till full completion of the works. Paragraph no. 141 of the impugned award setting out the Arbitral Tribunal's interpretation of the Supplementary Agreement is set out below:

> "141. Clause (b) is the most relevant for the determination of the present alternative agreement and has to be read with the previous clause. Although it stipulates that the Claimant shall not raise any claims for idling of resources, increase in cost of materials, delay in construction of highway etc, it does not specify any time period for which such a no-claim dues has been agreed. Under clause (a), the PCC/PCOD would be issued to the Claimant, subject to completion of balance punch list items and consequently, the handing over of the additional hindrance-free land by the Respondent. The **AT thus, finds that that 'no claim' agreement under clause (b) is only relevant for the balance period after the issuance of PCC/PCOD till the full completion of works. The Tribunal's findings are further substantiated by the fact that the first part of Clause (b) does not speak about the waiver for compensation on account of Authority Default under Article 35.2 and 35.3 of the CA.** Further, the second part of clause (b) makes it clear that the Claimant can seek an extension of the Concession Period on account of "any valid factor" arising "after" the actual construction of the project highway. **The AT's finding on Issue No. 1 in**

> **favour of the Claimant and upholding the IE's determination of the 518 days delay being solely attributable to the Respondent constitutes a "valid factor" that has arisen subsequent to the project construction and shall entitle the Claimant to seek an extension of Concession Period.** Moreover, even though the full Completion Certificate was issued on 17.08.2017, the issue of EOT was not settled by the Supplementary Agreement dt. 05.11.2014, and has only now been settled by the AT after the actual construction of the highway……."

101. In addition, the Arbitral Tribunal held that the since the Supplementary Agreement expressly provided that the question of EoT would be considered separately, the claims relating to extension of the concession period as well as compensation were excluded from the scope of the Supplementary Agreement. The Arbitral Tribunal reasoned that this was so because the said claims were also connected with EoT. However, no such case has been pleaded or set up by IRB. On the contrary, IRB had acknowledged that it had given up its claims relating to the delay of 518 days – that is, till the issuance of PCC – and it is clear that those were the claims that were subject matter of the proceedings before the Arbitral Tribunal. The grant of extension of time (EoT) for completion of the project is not synonymous to accepting IRB's claim for compensation or that NHAI was in material breach of the CA.

102. At this stage it is relevant to refer averments in the Statement of Claims which clearly indicates that IRB also understood the Supplementary Agreement to mean that it had given up its claim for the

delay of 518 days as determined by the IE. The relevant extracts from the Statement of Claims are set out below for ready reference:

> "3.10. Even though EOT was determined by IE as 518 days and reasons were entirely attributable to the Respondent (as is evident from the various correspondence in this regard), the Respondent insisted upon the Claimant to sign a Supplementary Agreement undertaking waiving his right to claim damages for this delay which included his legitimate entitlement to equivalent extension to the Concession Period. In addition to the Supplementary agreement the Respondent expected an undertaking to the effect that they will not raise any cost claim with regard to the resources that remain idle during the construction period of Project Highway. This document dated 13.10.2014 (Exhibit No. 4l) was by way of a preface to the Supplementary Agreement and was extracted as a result of coercion. Since the tolling for the Project was already delayed so much and with the pressure mounting from banks to start principal repayment, the Claimant was constrained to bow under the blackmailing tactics of the Respondent and· executed the Supplementary, Agreement.
>
> 4.9. …..But the Claimant was being pressurized by the Respondent to forego its rightful claims on account of the delay by signing a Supplementary Agreement if the Claimant wanted to start collecting toll on the Project. The Claimant would have suffered further losses in revenue if they had not started toll collections the interest on construction was also mounting. ….Eventually, under coercion, the Claimant signed the Supplementary Agreement on 05/11/2014 (**Exhibit-C10**) wherein the Claimant had undertaken to forego his right to raise legitimate valid claims including the extension in Concession Period on account of delay in construction of the Project and any valid factor arising after the actual construction of the Project. In the best interest of the Project, the Concessionaire had to under

duress execute the said Supplementary Agreement since it was the pre-condition unilaterally set by the Respondent for issuance of PCOD (Provisional Commercial Operation Date) for the Project. Only after this Supplementary Agreement was signed, the Respondent started the process of issuance of PCOD and finally on November 27, 2014, the PCOD was issued.

7.28. ....However, on the same day, the Claimant had to submit the undertaking through its letter no. APBOT /NHAI/P0/5056 dated 13/10/2014 (**Exhibit-C43)** to the PD/ Respondent mentioning that the Claimant would not raise any cost claim with regard to the resources (manpower & machinery) remained idle occasionally during the construction period of the Project Highway for issuance of PCOD.

It is peculiar to note that on the day of IE recommending the PCOD to the PD/ Respondent, the Claimant was also asked to submit the aforesaid undertaking by the PD/ Respondent. This was not a coincidence; rather the Claimant was coerced to forgo its legitimate claims which were consequential to the frequent delays on account of hindrances/ impediments solely attributable to the Respondent. This undertaking of the Claimant was used as leverage, to force the Claimant to act in a way contrary to their own interests and the provisions of the CA. However, since achieving the PCOD was crucial for the Project which was delayed already substantially, the Claimant had no other option but to surrender to the arbitrary, unethical demand of the Respondent. The highhandedness of the Respondent was quite evident.

7.30. The Claimant was being pressurized by the Respondent to forego its rightful claims on account of the delay by signing a Supplementary Agreement if the Claimant wanted to start collecting toll on the Project. The Claimant would have suffered further losses in revenue if they had not started toll collections the interest on construction was also mounting. It is also to be noted

that in this particular project, while the Respondent is not a beneficiary of the revenue generated, the loss to the Claimant and consequentially to the lenders due to delay in tolling is substantial. This put the Claimant in a tough position. …. Eventually, under coercion, the Claimant signed the Supplementary Agreement on 05/11/2014 (**Exbibit-C10**) wherein the Claimant had undertaken to forego his right to raise legitimate valid claims including the extension in Concession Period on account of delay, in construction of the Project and any valid factor arising after the actual construction of the Project. In the best interest of the Project, the Concessionaire had to under duress execute the said Supplementary Agreement since it was the pre-condition unilaterally set by the Respondent for issuance of PCOD for the Project. Only after this Supplementary Agreement was signed, the Respondent agreed for issuance of PCOD.

7.39. ….In the best interest of the Project, the Concessionaire had to under duress execute the said Supplementary Agreement since it was the pre-condition unilaterally set by the Respondent for issuance of PCOD for the Project. Only after this supplementary agreement was signed, the Respondent consented for issuance of PCOD.

7.41. …The undertakings. of the Claimant (as stipulated in the Supplementary Agreement) for 'No claim' were understandably under duress…"

(Emphasis added)

103. It is also relevant to refer to the affidavit furnished by IRB's Director (CW-1). In his affidavit, CW-1 had, *inter alia*, affirmed as under:

"11. I also depose that even in the month of October 2014 the Respondent had secured a short undertaking from the Claimant that *"we shall not raise any* cost *claim with*

> *regard to resources (Manpower and Machinery) remained idle occasionally during the construction period of the Project Highway".* I submit, it was clear understanding that the phrase *'during the construction period'* meant to convey the original period of construction and did not cover the extended period. The word 'occasionally' applied to the original construction period. **However, the undertaking given in context with para (b) page 3 of Supplementary Agreement (i.e. Exhibit- C10., Page no. 520 of CD-2) has been forced to cover even the period of extension as attributable to the Respondent."**
>
> (Emphasis Supplied)

104. It is apparent from the above that it was not the stated understanding of IRB that such claims were excluded from the scope of the Supplementary Agreement. On the contrary, IRB had set up a case that it was coerced to give up its legitimate claims under the Supplementary Agreement nonetheless it had claimed the same because it had executed the Supplementary Agreement under coercion and the same was voidable.

105. Plainly, the interpretation of Clause (b) of the Supplementary Agreement by the Arbitral Tribunal is contrary to its plain language. Further, as stated above, this was not the case set up by IRB.

106. In view of the above, the Arbitral Tribunal's interpretation of the Supplementary Agreement is wholly erroneous.

107. Mr. Kirpal had earnestly contended that the Arbitral Tribunal is the final arbiter of the interpretation of the agreement between the parties and its decision cannot be interfered with.

108. There is no cavil that the decision of the Arbitral Tribunal regarding interpretation of an agreement is final and the same cannot be interfered. However, it is impermissible for an Arbitral Tribunal to conjure up an interpretation of an agreement contrary to the case set up by the claimant and contrary to the understanding of both the parties, merely to support its conclusion. In the present case, as noted above, the interpretation of the Supplementary Agreement also runs contrary to its plain language and the admitted intent of the parties. If the arbitrator construes a contract in a reasonable manner, no interference would be called for in proceedings under Section 34 of the A&C act. But an arbitral award would be impeachable if the interpretation is unreasonable or such that no fair minded person would accept. In this regard, it is relevant to refer to the following observations of the Supreme Court, albeit made in the context of Section 28 (3) the A&C Act:

> "42.3 …An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."[18]

109. The aforesaid view was reiterated by the Supreme Court in a later decision in ***Delhi Airport Metro Express Pvt Ltd v. Delhi Metro Rail Corporation Ltd.***[19]

[18] ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49 at 81*** paragraph 42.3
[19] ***Delhi Airport Metro Express Pvt Ltd v. Delhi Metro Rail Corporation Ltd.*** (*supra*)

110. The learned Single Judge has declined to interfere with the impugned award principally for the reason that it had found that the Arbitral Tribunal's determination is beyond the scope of Section 34 of the A&C Act. The learned Single Judge had also accepted the interpretation that the claims raised were excluded from the scope of the Supplementary Agreement as they were connected with EoT. We are of the view that the learned Single Judge had erred in arriving at the said conclusion. The court had not considered that such interpretation of the Supplementary Agreement was contrary to IRB's pleading and the case set by it.

111. NHAI's challenge to the impugned award falls squarely within the four corners of Section 34(2A) and Section 34(2)(b)(ii) of the A&C Act.

112. For the reason stated above, the appeal is allowed. The impugned judgement and the impugned award are set aside. All pending applications are also disposed of.

113. The parties are left to bear their own cost.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 03, 2023
gsr/RK