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

% **Reserved on: 04th March, 2020**
**Pronounced on: 11th May, 2020**

\+ **O.M.P. (COMM) 279/2017**

M/S SMS LTD

..... Petitioner

Through : Mr.Paras Kuhad, Mr.Darpan Wadhwa Senior Advocates with Ms.Tahira Karanjawala, Ms.Neha Khandelwal, Mr.Dheeraj P.Deo, Mr.Karanveer Singh Anand, Mr.Jitin Chaturvedi, and Ms.Cauveri Birbal, Advocates.

versus

KONKAN RAILWAY CORPORATION LTD

..... Respondent

Through : Ms.Beena Pardesi and Mr.Keshav Ranjan, Advocates.

**CORAM:**
**HON'BLE MR. JUSTICE YOGESH KHANNA**

**YOGESH KHANNA, J.**

1. The brief facts of the case are the Northern Railway was implementing the construction of *Udhampur-Srinagar-Baramulla Rail Link* (*USBRL*) Project in the State of Jammu and Kashmir. A part of the project was being constructed by Konkan Railway Corporation Limited (*KRCL*) on behalf of Northern Railway. The work Construction of B. G. Single line tunnel No.2 (Kotli Tunnel) from Km 33.095 to 38.450 on

*Katra- Laole Section of Udhampur-Srinagar-Baramulla Rail Link Project* was awarded by KRCL to M/s SMS Infrastructure Ltd (the petitioner herein) vide Contract Agreement No.KR/PD/J&K/ CONT Tunnel(T-2) dated 23.01.2000 was at a cost of Rs.133,07,42,870/-. The completion period of the contract was 36.5 (thirty six and half) months upto 26.12.2006.

2. Upto the date of completion (DOC) i.e. till 26.12.2006 less than 10% of the work was completed, and extension was granted upto 31.12.2008 without levying any penalty. However claimants did not accept the extension up to 31.12.2008, saying any of the four options as proposed by respondent would require at least 4 years to complete the work. In view of the financial crisis faced by the petitioner and due to unsafe conditions in approach road to P2, the claimants on their own, *suspended the work in May 2007*. Subsequently, vide letter dated 05.10.2007 the aforesaid contract was foreclosed by KRCL (the respondent herein).

3. Certain disputes arose between the parties during the execution of the contract No.KR/PB/J&K/CONT./TUNNEL/T-2, dated 23.01.2004 resulting in the present arbitration proceedings.

4. It is alleged before awarding such a contract various technical surveys were needed to be conducted qua the feasibility of the contract, but instead of doing the geographical survey/ seismic survey etc. the respondent relied upon satellite images. Based on such images the technical specifications were prepared and the work was allotted to different sub-contractors for different tunnels. Construction was to be started by the petitioner from both the ends viz., portal 1-Katra and portal

2- Laole end. To approach at the portal face the roads need to be constructed at both ends. The petitioner started the work within a month of acceptance of the contract on dated 23.01.2004 and within two months it mobilized the manpower, basic material and collected it at the site. The mobilization was advanced on 16.03.2004 and thereafter the construction of road started from Katra site and Laole site.

5. It is alleged from the Laole site disputes were raised by the villagers and the work could only be started in June 2004. Special equipments for big boring in the mountain ranges required from outside the country and custom tailored goods were ordered by the petitioner. The time to bring such equipment, per contract, was nine months i.e. till the end of September 2004.

6. It was a work contract which included excaving, scaffolding, digging and removing of earth etc. which were to be done by the petitioner. The total quantity of earth to be removed was 2.7 lakh cubic feet as per the contract but when the petitioner started the Laole end phase it was at least 40 times more than the specified quantity. As per the contract the quantity could vary only upto 25% but when the earth excavation was done it exceeded to 300% of the specified work so the petitioner told the respondent the work cannot be completed within 8 months and even the earlier rates would not be acceptable. The railways appointed two more contractors for excess quantity of the work qua digging etc. and such two contractors completed their work on the Laole site in September 2006.

7. In April 2005 there was a heavy flow of water from the Katra and it damaged the Katra site tunnel work. A technical team was sent by the

respondent to supervise and till such time he gives a report the petitioner was directed to stop the work. Six months time was given to stop the water flow and this work was beyond the scope of the contract and was a *non-specified* item. One Dr.J.L. Jethwas was asked to intervene and to give a report and the petitioner was directed to carry work as per this report. The way suggested was costly and with slow pace.

8. In October 2007 the respondent stopped the work on grounds of technical impossibility and finally in 2008 the Railway stopped the construction of all the tunnels as some portals were damaged and the entire work was abandoned. The consultants from railways suggested to start work again and the same work was allotted in 2010 but till the year 2012 the railways achieved only 12% of the work.

9. The claimant M/s SMS Infrastructure Ltd. submitted its claims of Rs.75,66,55,738.00 to the Presiding Arbitrator vide its letter No.SAT/SMSIL/02 dated 31.12.2008. The claimant submitted the following documents along with its claims.

1. Statement of Claims;
2. Exhibits;
3. Copy of GCC; and
4. Copy of Contract Agreement.

10. The respondents submitted their counter statement to such claims.

11. The claimant vide its letter No.SAT/SMSIL/02 dated 24.3.2009 submitted his rejoinder to the counter statement of KRCL.

12. During the arbitration proceedings on 08.10.2010 the respondent submitted statement of counter claims for Rs.21.655 Cr against the claimant.

13. The following documents were submitted to the Arbitral Tribunal on conclusion of the hearings.

i. Written Statement and written arguments by Claimant.

ii. Written statement and summing up of written arguments by respondent.

14. The claimant also submitted a letter dated 12.3.2013 after conclusion of the hearing, whereby it requested the Tribunal to examine the enclosed KRCL's internal notings on some important issues regarding foreclosure of the contract. The respondent vide letter dated 26.06.2013 has protested against submission to the Tribunal after conclusion of hearing and requested the Tribunal not to take it on record.

15. The Tribunal also visited the worksite in October, 2010 to understand the conditions prevailing there. Both the parties were also present during the site visit.

16. During the hearings held on 28/29.10.2010 at Jammu, Dr. J.L. Jethwa, who worked as Chairman of Technical Advisory Committee (TAC) appointed by KRCL (Respondents) during the contract period allegedly deposed before the Tribunal presenting the background of the work and giving his opinion on the technical issues involved.

17. The claimant and the respondents were heard by the Tribunal at length and the Tribunal took on record various documents submitted by them. Both claimants and respondents expressed their full satisfaction with the proceedings and stated all reasonable opportunity was given to them to present their case.

18. At the outset, on commencement of the hearings the respondent brought out that all the claims fall under excepted matters, since those

were covered by specific clauses in the contract, and are therefore not arbitrable, hence were beyond the jurisdiction of the arbitrator(s).

19. In the sitting held between 20th to 28th October 2010, the SAT had directed the respondent to file their list of expected matters. However, no steps were taken by the respondent to file such list and same has been filed after 1 year and 9 months vide letter dated 11.07.2012. The SAT had also issued directions the respondent will obtain approval for the "expected" matters from the MD / KRCL.

20. During the deliberations in the sitting held on 14th / 15th December 2012, the respondent pointed out that M.D./KRCL's approval was not required. As per Supreme Court's directives, the Arbitrators were to decide whether the claims fall under expected matters and whether they were arbitrable or not.

21. The tribunal held MD/KRCL had not restrained tribunal from arbitrating on any of the claims in spite of a specific reference made to him. SAT, therefore, went on to arbitrate all the claims presented to them, on basis of merit.

**The findings of the Arbitral Tribunal are as follows:**

22. *Compensation for idling of machinery*: The Learned Tribunal held that *no joint/agreed records* were available to prove the idling, and therefore it worked out a “notional proportionate loss” that would have resulted due to underutilization. While doing so, it stressed the following points:

a) The petitioner expected to work off 85% of its machinery cost of approximately Rs. 16 crores over a period of *96* months. If the

contract had not been closed, it expected to complete the work by December 2011 as per letter dated 16.4.2007.

b) The Learned Tribunal held that the technical and special conditions of the contract had highlighted the adverse geology. Further, while it highlighted Clause *17A (iii)* of the GCC Northern Railway which provided that in the event of a delay attributable to the respondent, the petitioner would only be entitled to an extension of the date of completion, it held that in the present case where an extraordinary situation arose in the shape of a worse than expected shear zone; the remedy under Clause *17-A (ii)* did not prove to be a remedy since the contract was ultimately foreclosed.

c) It was held that the petitioner's machinery could not be fully utilized as planned and therefore in the interest of "natural justice", it considered some compensation.

d) The Learned Tribunal found that both parties had contributed to the delay. It held that there was a delay of *10* months by the respondent in arriving at the decision to foreclose the contract. It also held the petitioner had at various stages caused delays which affected the progress of the work and put the respondent to inconvenience delay in mobilization, inability to start / complete the P2 approach road in the specified period, inability to tackle shear zone, inability to do the road safety works. However, it was noted the respondent had not penalized the petitioner for any of these and gave extension without penalty, without liquidated damages. The Learned Tribunal held that since both the parties contributed to the delays at various stages, it would be fair if the

loss on account of under-utilization of machinery is shared by both parties.

e) Thus, considering the cost of machinery as Rs.16 Crores (as per joint note), *50*% of the "notional idling cost" for 10 months was worked out to Rs.70.83 lacs (i.e. 16 crores x 85/100 x (10/96) x 5) and was awarded by the Learned Tribunal for idling machinery.

23. *Compensation for idling of manpower* There is no agreed list or joint statement of the parties available on this issue. It further held the petitioner ought to have demobilized/redistributed manpower to other sites and projects on encountering the shear zone. Further, it held that even assuming the manpower deployed at Portal 1 was retained at site, at best idling of part of the labour for tunnel portion for 10 months i.e. time taken by the respondent to decide foreclosure of contract could be considered.

24. By letter dated 22.02.2013, the respondent had agreed that 34 skilled workers/supervisors were available on site as on April 2007 and based on the salary sheets supplied by the petitioner, it assessed that the cost of maintaining this workforce for 10 months after stoppage of work was approximately Rs. 13 lakhs. Therefore, the Learned Tribunal awarded only Rs.6.5 lacs to the petitioner on this account.

25. Amount awarded: Thus, the Learned Tribunal awarded a sum of Rs.0.7733 Crores (0.7083 + 0.065) to the petitioner as compensation for the losses incurred on account of idling and underutilization of men and machinery.

26. Both the parties have argued their case.

27. Before proceeding further let me examine various provisions of the contract touching various issues:

> ***Instructions to the Tenderers.***
>
> *"**2.0 Tender Documents***
>
> *2.1 xxxxx*
>
> *2.1.2 Tender documents can be obtained from the office of General Manager (Projects), Konkan Railway Corporation Ltd., ,8"* floor, Raigad Bhavan, Sector 11, .CBD-Belapur, Navi Mumbai.400 614 on any working day from 9.15 hrs, to 17.15 hrs. from 21/11/2003 to 11.00 hrs. on 8/12/2003 on payment of Rs.10,000/- (Rupees Ten Thousand only) per set The cost of this tender document is not refundable and the tender document is not transferable.*
>
> ***7.0 Study of drawings and local conditions***
>
> *7.1 xxxxx*
>
> *7.2 The tenderer/s is/are advised to visit the site of vrark and investigate actual conditions regarding nature and conditions of soil, difficulties involved due to inadequate stacking, space, due to built up area around the site, availability of materials, water and labour, probable sites for labour camps, stores, godoVwis, etc. They shpuld also satisfy themselves as to the sources of supply and adequacy for their respective purpose of different materials referred in the specifications and indicated in the drawings. The extent of lead and lift involved in the execution of works and any difficulties involved in the execution of work should also be examined before formulating the rates for complete items of work described in the schedule.*
>
> *Declaration*
>
> *I/We hereby declare and certify that 1/We have inspected/ investigated the site(s) of work and have fully familiarized myself/ourselves with all aspects of constructional features such as accessibility, working conditions, **geo-physical/terrain conditions**, sources and availability of construction materials, rates for construction materials, water, electricity including all local taxes, royalties, octrois, availability of local labour (both skilled-and unskilled) and relevant labour rates and labour laws, availability and rates of private land required for various purposes, climatic conditions and availability of working days etc. whereupon only percentage rate have been quoted by me/us."*
>
> *1.7 The information and data stated herein and incorporated in contract elsewhere is for the general guidance only and is subject to vary with more detailed site investigation.*

*3.2 Approaches*
*3.2.1 xxxxx*
*3.2.2 Approach to Laole End Portal As described in Para 8.4 of Special Conditions of Contract. Tenderers are strictly and, strongly advised to visit the location of site of work before bidding so as to familiarize themselves with the actual site condition,* ***terrain/topography, geology*** *etc.*

*3.3 Geological conditions*
*Geological records of Lower Shivalik ranges in Himalayas and investigation results available for adjacent stretches reveal presence of* ***poor and very poor rock/overburden type of strata****. A small stretch may also have fair/good strata. The strata may need provision of Permanent Steel Supports for 50% length of the tunnel. However, firms may please note that the experience in the domain of tunnelling reveals that during actual excavation, the strata likely to be met may be substantially different from the one indicated through geological survey. Corporation will therefore not entertain any claims on account of such variations. Katra end portal of the tunnel is located in* ***Reasi thrust,*** *Bore log data of one bore hole at Katra end portal location is enclosed as Annexure 11. The Katra end portal of the tunnel is located in* ***Reasi thrust*** *as indicated in Sketch enclosed as Annexure 12. Bore log data is also available in the thrust zone.*
*3.4 Climatic conditions*
*The monsoon and winter rains tend to be prolonged in the region."*

*"TECHNICAL SPECIFICATIONS FOR TUNNELLING*
*1.0 Salient Features of work*
*1.1 xxxx*
*1.2 xxxx*
*1.3 The material through which the tunnel will be excavated is presumed to encounter friable sand rock and clay - bands, Katra end portal is located in the* ***thrust zone****. The rate quoted by the contractor in the Schedule shall take into* ***account above geology*** *and* ***also all classes*** *of rock/soils and no extra payment will be made for variation in rock/soil. The Laole end portal is located on a cliff where approach road construction will be very difficult and working space available is also limited."*
*8.0 Approach Roads*
*The approach roads to tunnel portals from Katra - Reasi road are partly available. These are to be constructed and maintained by contractor as set out under Para.8.0 of Special Conditions of Contract, The contractor shall construct and maintain all other temporary site roads, in and around the various working areas, camp facilities and other temporary works al his cost.*

*1.5 Any other incidental ancillary works connected with construction of tunnel as directed by the Engineer-in-charge.*
*Note:- The above items of works shall include the following (but may not be limited to items mentioned below)*
*(i) Construction & maintenance of approach roads to reach the tunnel portals on the* ***alignment as approved by Corporation*** *including Bailey bridges, minor bridges, retaining and breast walls, gabion walls. The land for approach roads is to be arranged by contractor on lease or through private negotiations.*

*3.2 Approaches*
*3.2.1 Approach to Katra End Portal*
*The approach to this portal takes off from Katra -* ***Reasi*** *state highway at about 7 Kms. from Katra near a village known as Didimore. This approach road will be utilized up to Pai Khad for a distance of about 4 km. where it terminates near the godown of Mata Vaishnov Devi Shrine Board, The contractor will have to launch a temporary Bailey Bridge to cross the Pai Khad and extend this road up to Katra end portal of Tunnel No. 2 to carry his machinery & material, to portal location.*

*3.4 Climatic conditions*
*The monsoon and winter rains tend to be prolonged in the region.*

*8.0 Approach Roads/Service Roads*
*8.1 Contractor has to make his own arrangements for lease/acquisition of land, Right of way, statutory clearances etc. for forming approach roads/service roads. Corporation shall not make any arrangement for land and is not liable to make land available for forming Approach/service roads and it is overall Contractors responsibility. The Contractor has to make approach roads to tunnel portals as per the instructions of Engineer and shall be paid under relevant item of Schedule of items, Rates and Quantities. However, contractor/s shall make his/their arrangements for service roads, paths etc for carrying his/their tools and plants, labour and materials, etc. and will also "allow" the Corporation use of such paths and service roads, etc. for plying its own 'vehicles free of cost. the tenderer/s will be deemed to have included the cost of making any service roads, roads or paths, etc., that may be required by him/them for plying his/their vehicles for the carriage of his/their men and materials, tools, plants and machinery for successful completion of the work. Similarly, any other feeder road connecting any of the existing roads will be made by the contractor at his/their own cost including any compensation that may be required to be paid for the temporary occupation and or usage of Govt. and or private land and without in any way involving the Corporation in any dispute for damage and/or compensation.*

*8.5 The procedure of construction of approach roads and Bailey bridges will be as under-*

*8.5.1 Immediately after award of the work, the contractor shall engage his engineers/ surveyors and alignment drawing of the road will be finalized. The shortest and best possible alignment from Geo-technical and other considerations will be chosen. The contractor shall satisfy himself that route is feasible and acceptable to all concerned.*

*8.5.2 The road alignment drawings, various sections, bill of quantity of earthwork, minor and. major bridges, culverts, causeways, retaining walls, breast walls etc. will be prepared by the contractor and submitted to KRCL.*

*8.5.3 The contractor will take up the execution of the roadwork by deploying his machinery and manpower in such a way that road work is started at many places together. The location of temporary bridges & Bailey semi Permanent Bridges will be finalized and purchase order will be placed by him to receive the material in time at site."*

*7.0 Study of drawings and local conditions*

*7.1 The tentative drawings for the tunnel works enclosed herein are meant for general guidance only and the Corporation may suitably modify them during the execution of the work according to the circumstances without making the Corporation liable for any claims on account of such changes.*

*11.0 Drawings for works:*

*11.1 The Corporation reserves the right to modify the plans and drawings as referred to in the tender documents without altering the basic scope of the work. The percentage rates for the schedule items quoted by the contractor as may be accepted by the Corporation will, however, hold good irrespective of any changes, modifications, alterations, additions, omissions in the locations of structures and detailed drawings, specifications and/or the manner of executing the work.*

*11.2 It should be specifically noted that some of the detailed drawings may not have been finalized by the Corporation and will, therefore, be supplied to the contractor within 60 days from award of Contract or progressively as per the field requirement.*

*11.3 The cross section of the tunnel may have minor changes to modified horse shoe shape during course of execution."*

*3.4 Climatic conditions*

*The monsoon and winter rains tend to be prolonged in the region.*

*5.0 Damages by Accidents/Floods/Rains/Cyclones*

*5.1 The contractor shall take all precautions against damages from climatic conditions, snowing, rainfalls, accidents, floods. No compensation shall be allowed to the contractor for his tools, plant, materials, machines and other equipment lost or damaged by any cause whatsoever. The contractor shall be liable to make good the damages to any structure or part of a structure, plant or materials of every description belonging to the Corporation, lost or damaged by any cause during the course of construction work. It is essential that the contractor should take an all risk-comprehensive insurance to cover not only contractors men, materials and machinery but also to cover public property and third party risks for the duration of the contract and regularly pay all insurance premia within his quoted rates and produce proof of the same to the Corporation."*

*24.0 Price Variation*
*24.1 The rates quoted by tenderer and accepted bythe Corporation shall hold good till the completion of the work and no additional, individual claim shall be admissible (unless otherwise expressly stated elsewhere in the Tender conditions on account of fluctuation in market rates, increase in taxes/any other levies/tolls etc). In the event of work getting extended beyond the specified period of completion of work &beyond the control of contractor and accepted by the competent authority, the payment I recovery for overall market situation shall be made as per price variation clause given below only for the work executed beyond, the original specified period of completion.*

*10.0 Rates for payment*
*10.1 xxxxx*
*10.1.1 No variation in prices of material or wages escalation on any account whatsoever or compensation for 'Force Majure" etc. shall be payable, under this contract except price escalation clause payables as per price variation clause, if any, provided separately in the tender documents.*

*32.0 Variation in Quantities*
*The quantities of item/items in the schedule of Items, Rates & Quantities for the work to be executed are only approximate and are only for guidance of contractor. xxxxxx xxxxxx event of any increase or reduction in the quantity to be executed for any reason whatsoever or for non-operation of any item of work, the contractor shall not be entitled to any compensation but shall be paid only for the actual quantity of work done at the contract rate.*
*In the event of any major change in the method of tunnelling due to change in strata/rock conditions etc. the rate for tunnelling shall be reviewed and a mutually agreed rate shall be decided as extra item based on the rates set forth in the Standard Schedule*

*of rates of Northern Railway or works of similar nature carried out earlier.*

*17-A. Subject to any requirement in the contract as to completion of any portion or portions of the works before completion of the whole, the Contractor, shall fully, and finally complete the whole of the works comprised in the contract (with such modifications as may be directed under conditions of this contract) by the date entered in the contract or extended date in terms of the fol1owing clauses:-*
*(i) xxxxxx*
*(ii) Extension for delay not due to Railway / Contractor:- If in the opinion of the Engineer the progress of work has any time been delayed by any act or neglect of Railway's employees or by other contractor employed by the Railway under* ***sub-clause(4)*** *of* ***clause 20*** *of these conditions or* ***in executing the work not forming part of the contract but on which Contractor's performance necessarily depends or by reason of proceedings take or threatened by or dispute with adjoining or to neighboring owners or public authority arising otherwise through the Contractor's own default etc****. or by the delay authorized by the Engineer pending arbitration or in consequences of the Contractor* ***not having received in due time necessary instructions from the Railway for which he shall have specially applied in writing to the Engineer or his authorized representative then upon happening of any such event causing delay****, the Contractor* ***shall immediately give notice thereof in writing to the Engineer within 15 days of such happening but shall nevertheless make constantly his best endeavors to bring down or make good the delay and shall do all that may be reasonably required of him to the satisfaction of the Engineer to proceed with the works. The Contractor may also indicate the period for which the work is likely to be delayed and shall be bound to ask for necessary extension of time****. The Engineer on receipt of such request from the Contractor shall consider the same and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the type and quantum of work affected thereby.* ***No other compensation shall be payable for works so carried forward to the extended period of time, the same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.***
*Extension of time for delay due to Railway-In the event of any failure or delay by the Railway to hand over the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to* ***provide the necessary drawings or instructions*** *or any other delay caused by the Railway due to any other cause due*

*whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefore but in any case, the Railway may grant such extension or extension of the completion date as may be considered reasonable.*

*36. (1) Suspension of works - The Contractor shall on the order of the Engineer suspend the progress of the works or any part thereof for such time or times and in such manner as, the Engineer may consider necessary and shall during such suspension properly protect and secure the work so far as is necessary in the opinion of the Engineer. If such suspension is:-*

*(a)Provided for in the contract, or*

*(b) Necessary for the proper execution of works or by the reason of whether conditions or by some default on the part of the Contractor, or*

*(c) Necessary for the safety of the works or any part thereof*

*(2) The Contractor shall not be entitled to the extra costs if any, incurred by him during the period of suspension of the works; but in the event of any suspension ordered by the Engineer for reasons other than aforementioned and when each such period of suspension exceeds 14 days the Contractor shall be entitled to such extension of time for completion of the works as the Engineer may consider proper having regard to the period or periods of such suspensions and to such compensations as the Engineer may consider reasonable in respect of salaries or wages paid by Contractor to his employees during the periods of such suspensions.*

(1) *Suspension lasting more than 3 months - If the progress of the works or any part thereof is suspended on the order of the Engineer for more than three months at a time, the Contractor may serve a written notice on the Engineer requiring permission within 15 days from the receipt thereof to proceed with the works or that part thereof in regard to which progress is suspended and if such permission is not granted within that time the Contractor by further written notice so served may, but is not bound to, elect to treat the suspension where it affects part only of the works as on omission of such part or where it affects the whole of the works, as an abandonment of the contract by the Railway.*

*DETERMINATION OF CONTRACT*

*61. (1). Right of Railway to determine the contract:- The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion; the cessation of work becomes necessary owing ot paucity of funds or from any other cause what-so-ever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such determination and the reasons therefore shall be conclusive evidence thereof.*

> *(2). Payment on determination of contract by Railway:- Should the contract be determined under sub clause (1)of this clause and the Contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the works, the Railways shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Engineer. The Railway's decision on the necessity and propriety of such expenditure shall be final and conclusive.*
> *(3). The Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract."*

28. The respondent supported the impugned award by arguing the estimated cost for the entire project was Rs.155.46 Crores and despite this the bid given was Rs.144 Crores i.e. less than the estimated cost and hence the petitioner itself had decided to forgo further amount after going through the entire surveys and considering the provisions of the contract. It was argued the contract was not terminated unilaterally by the Government, but it was a combined consent as is mentioned in para *93* of the statement of claim as also in para *TT* of the grounds; wherein the petitioner has admitted the contract was terminated by both the parties. Further the contract had a risk involved and the petitioner was aware of the calculated risk and thus when the solution could not be found then both the parties agreed to terminate the contract. It was argued Jethwa's Report at page No.*626* of the petitioner's document though is shown as a *deposition* made by Mr.Jethwa before the learned arbitrator, but it was only a report and since no opportunity to cross – examine such witness was given to the respondent it cannot be relied upon. More so, the CAG report and an internal note dated *30.10.2006* of the Railways also cannot be relied upon.

29. It was submitted the contract was a risk based contract where the information supplied to the bidders was only *tentative* and they were required to understand the nature of work after visiting the sites and even the making of approach routes was the responsibility of the contractor.

30. Similarly qua CAG report it was argued if one look into the Article *149* and *151* of the Constitution, the main purpose for which CAG office is created is to look into the *accounts* and *audit* of the Government and the report other than relating to accounts cannot be looked into as the only purpose for which it is prepared is to see if there is any extravagance by the Government or if there is any divergence of funds not according to the law. Hence, it was argued the CAG report cannot throw light to the basis of awarding the contract.

31. Similarly it was argued the internal note dated 30.10.2006 also has no relevance and was ignored by the learned Arbitrator as under:-

> *"3.6 The claimant also submitted a letter dated 12.3.2013 after conclusion of the hearings, whereby it was requested that the Tribunal may also examine the enclosed KRCL's internal nothings on some important issues regarding foreclosure of the contract. The Respondent vide letter dated 26.06.2013 has protested against the submission of documents to the Tribunal after conclusion of hearing and requested the Tribunal not to take these on record."*

32. It was argued these reports cannot be looked per provisions of Section *28* of the Arbitration and Conciliation Act, 1996, as were never a part of the claim nor the petitioner ever pressed its claim on such report.

33. The learned counsel for the respondent also referred to various clauses of documents to prove her case wherein the contractors were required to comply with the Instructions to Tenderers:-

> *"**2.0 Tender Documents***

> ***2.1.1*** *The tender documents consist of Part (a) Tender form (b) Instructions to tenderer/s (c) Scope and General description of work (d) Special conditions of contract (e) Technical specifications for tunneling (f) Schedule of Items, Rates and (Quantities and other Annexures. These must be submitted as directed, in tender notice failing which the tender is liable to be rejected.*
> ***7.1*** *The* ***tentative drawings for the tunnel works*** *enclosed herein are* ***meant for general guidance only and the Corporation may suitably modify them*** *during the execution of the work according to the circumstances without making the Corporation liable for any claims on account of such changes.*
> ***4.0*** *Declaration*
> *The information given in clause 3.0 to 3.5 is for general guidance only. The tenderer/s are advised to visit the site themselves and make themselves aware and conversant of ail the data relating to site including availability and rates of all labour and material, service road, land for camp sites and service road arrangements for water, climatic conditions, labour .laws, power situation, water availability, transport and other problems etc. The tenderer/s are required to give a declaration to this effect in the Performa attached with Instructions to Tenderers."*

34. It is argued a bare perusal of the above clauses would reveal sufficient advance notice was given to the contractor not only to study the drawings, but also to visit the site; make detailed investigation by itself and then to submit the tender. It was further argued the estimated costs of the work was Rs.155.46 Crores, yet the petitioner submitted its tender bid of Rs.133.07 Crores i.e. *14.4% below* the estimated costs, knowing all the contractual conditions and thus had taken a business risk and now cannot allege loss in work.

35. Qua the allegations made by the petitioner of delay in constructing the approach roads, it was argued by the learned counsel for the respondent there was no obligation on the part of the Railways to acquire the land or get it leased so as to prepare the approach road and it was the duty of the contractor to deal with the villagers at his own costs and risk. However, if the lease rent was to be paid by the contractor to the villagers, same was to be reimbursed by the Railways / respondent.

Reference was made to the following clauses of the tender document in this regard:-

> *SCOPE AND GENERAL DESCRIPTION OF WORK*
> ***1.5*** *Any other incidental/ancillary works connected with construction of tunnel as directed by the Engineer-in-charge:*
> *(i) Construction & maintenance of approach roads to reach the tunnel portals* ***on the alignment as approved by Corporation*** *including Bailey bridges, minor bridges, retaining and breast walls, gabion walls. The land for approach roads is to be arranged by contractor on lease or through private negotiations.*
> ***3.2.1*** *Approach to Katra End Portal*
> *The approach to this portal takes off from Katra - Reasi state highway at about 7 Kms. from Katra near a village known as Didimore. This approach road will be utilized up to Pai Wiad for a distance of about 4 km. where it terminates near- the godown of Mata Vaishnov Devi Shrine Board. The contractor will have to launch a temporary Bailey Bridge to cross the Pai Khad and extend this road up to Katra end portal of Tunnel No. 2 to carry his machinery & material to portal location.*
> ***3.4*** *Climatic conditions*
> *The monsoon and winter rains tend to be prolonged in the region.*
> ***8.0*** *Approach Roads/Service Roads*
> ***8.1.*** *Contractor has to make his own arrangements for lease/ acquisition of land, Right of way, statutory clearances etc. for forming approach roads/service roads. Corporation shall not make any arrangement for land and is not liable to make land available for forming Approach/Service roads and it is overall Contractors responsibility. The Contractor has to make approach roads to tunnel portals as per the instructions of Engineer and shall be paid under relevant item of Schedule of items, Rates and quantities. However, contractor/s shall make his/their arrangements for service roads, paths etc for carrying his/their tools and plant's, labour and materials, etc. and will also allow the Corporation use of such paths and service roads, etc. for plying its own vehicles free of costs. The tenderers will be deemed to have included the cost of making any service roads, roads or paths, etc., that may be required by him/them for plying his/their vehicles for the carriage of his/heir men and materials, tools, plants and machinery for successful completion of the work. Similarly, any other feeder road connecting any of the existing roads will be made by the contractor at his/their own cost including any compensation that may be required to be paid for the temporary occupation and or usage of Govt. and or private land and without in any way involving the Corporation in any dispute for damage and/or compensation.*
> ***8.1.1*** *Annual lease phrase of private land used by Contractors for constructing approach roads connecting Highway/existing roads to tunnel portals will be reimbursed by Corporation on production of proof of actual payment made duly witnessed by Corporations representative. If the approach roads are passing through Government/forest lands, the same will be made available by N.Rly./ Corporation.*
> ***8.5.2*** *The road alignment drawings, various sections, bill of quantity of earthwork, minor and major bridges, culverts, causeways, retaining*

*walls, breast walls etc will be prepared by the contractor and submitted to KRCL.*

***8.5.3*** *The contractor will take up the execution of the roadwork by deploying his machinery and manpower in such a way that road work is started at many places together. The location of temporary bridges & Bailey semi Permanent Bridges will be finalized and purchase order will be placed by him to receive the material in time at site.*

***8.5.4*** *The Approach road is to be used for transportation of heavy machinery for the tunnel construction work as well as roads are to be used by our bridge contractors, during monsoon and winter rains, the hill slopes are subject to slip and slides and the road may get blocked/ breached for Vehicular traffic. Corporation shall not be responsible for any damage or loss .whatsoever suffered by Contractor due to slip and slides of the hill slopes during monsoon and winter rains resulting in blocked or breached roads. Contractor shall stockpile sufficient construction materials for at least 15 days and other requisites for use during the period when roads remain blocked or breached to ensure continuity of works In all weather and at all times.*

***8.6.2*** *Contractor shall perform at its own cost all remedial work as required by Engineer-in-charge in the event of damage or peril resulting from inadequate protective measures.*

***8.6.3*** *No delay in the scheduled completion of work due to interruptions of work for reasons mentioned above shall be acceptable to the Corporation and Contractor shall be liable and no extension of time will be granted.*

***8.8*** *Contractors shall plan the site location of bridges immediately after award of work and start detailed survey. They will execute the civil works for the foundation of these bridges. As soon as the site is ready for launching the Bailey type of bridges, the same will be launched on top most priority. The bridge materials will have to be procured by contractor in advance without causing any delay in the progress of approach road construction. The payment for the supply, launch & erection of the Bailey Bridges will be made as per the provision made in the Schedule B at Annexure F in India there are three reputed manufacturers of Bailey Bridges.*

*1. Garden Reach Workshop, Kolkata*
*2. M/s Bridge and Roof Co. (India) Ltd, Howrah*
*3. Titagarh Wagon Ltd."*

36. It was further argued that the contract was not terminated by the petitioner rather it was foreclosed *mutually* on 05.10.2007, as agreed by the petitioner in para No.*93* of the petition itself as also in its statement of claim in para No.*4.1.0*.

37. The learned counsel for the respondent referred to the bill of quantity to the following effect:-

| *ITEM* | *DESCRIPTION* | *UNIT* | *RATE (Rs.)* | *QTY* | *AMOUNT* |
|---|---|---|---|---|---|

| | | | | | |
|---|---|---|---|---|---|
| *2.2* | *Tunneling by Special Techniques by inducting ROAD HEADER TECHNOLOGY* | | | | |
| *a)* | *Tunnelling where immediate permanent steel supporting not Required* | *Cum* | *1786* | *165023* | *294,731,078* |
| *b)* | *Tunnelling in soils/shattered/Jointed/ weathered rocks, bouldery strata of above item 2.2, where immediate permanent steel supporting is required before proceeding for next cycle.* | *Cum* | *1990* | *47149* | *93,826,510* |
| *c)* | *Tunneling in heading in exceptionally poor/ flowing strata by advance probing, water channelising and adopting multi drift method of excavation as per site conditions.* | *Cum* | *2571* | *23575* | *60,611,325* |
| *3* | *Drilling horizontally / near horizontally probe holes for assessing the strata ahead of tunnel face* | | | | |
| *a)* | *Drilling NX size holes by diamond bit.* | *RMT* | *2500* | *50* | *125,000* |
| *b)* | *Drilling 75mm dia holes by percussion drilling* | *RMT* | *1000* | *50* | *50,000* |

38. It was argued the aspects or difficulties which could be faced were all considered by the respondent while awarding the contract and the petitioner was expected to understand the same before filling up the tender. It was a part of the contract the geological condition may be abnormal and hence rock study was all done prior to the issuance of the tender, hence such conditions were well within the knowledge of both the parties. The geological data – which is a part of the contract, mentions while constructing log/tunnel, one may be countered with irregular chips of dolomitic limestone - highly fractured rock; grey coloured dolomite - moderately jointed; dolomitic limestone – massive; siliceous dolomitic limestone – highly jointed and fractured; grey coloured dolomite moderately jointed; dolomitic limestone grey coloured – highly fractured rock etc, hence it was an enough warning to the contractor. More so, the plan shows the trace of thrust around Pie Khad Bridge site. Further per clauses No.*11.1* and *7.1* the petitioner could have changed the alignment. The above clauses run as under:-

*"7.* ***Study of drawings and local conditions***

> *7.1 The tentative drawings for the tunnel works enclosed herein are meant for general guidance only arid the Corporation may suitably modify them during the execution of the work according to the circumstances without making the Corporation liable for any claims on account of such changes.*
>
> ***11.1** The contractor will have to maintain the work for a period of 12 twelve) Months from the date of issue of completion certificates by the Engineer; except for supply of materials for which there will be no maintenance period."'*

39. However, It was argued though, the learned Tribunal uses the word *deposition of Dr.Jethwa* but his report was never proved before the learned Tribunal as per law and hence no credence can be given to it. Reference was made to the *statement of claim* wherein it was mentioned *the claimant in the interest of work again engaged the consultant Dr.Jethwa who suggested scheme based on suggestions given by him to tackle the problem.* However, such scheme were never followed by the claimant. Rather a letter dated 10.12.2006 written by the claimant to the respondent noted the claimant is *proposing four options involving mobilisation of additional resources and resorting to new technique of stabilizing the strata and excavation* and each option would require a definite period of time and claimant would continue with the work provided their cost factor is met and time limit is extended for construction of tunnel 2. A letter dated 16.04.2007 of the claimant mentions all the four options suggested by them would require estimated period of time of more than four years for completion of the project which means the maximum time extension required would be December 2011. Hence, there is no iota of the fact the claimant could have completed the work due to Act of God. Even, vide letter dated 10.12.2006 the claimant was asking for more money and time and never uttered a word about supervening impossibility. The claim petition filed

by the petitioner herein also stated the claimant was suggested safety measures and it even showed its willingness to carry out such safety measures at the proposed leads and required the respondent to give its approval and had asked for new rates for executing such safety measures. In its claim petition too it is alleged the claimant was suggested modalities to search the solutions for problem by deploying experts though it was not in the work scope.

40. In its claim petition, the petitioner raised a claim of compensation for the loss incurred on account of idling and underutilization of men and machinery to an extent of Rs.42,46,32,143/- on the plea there was delay only on the part of the respondent. The petitioner never challenged the alignment entries before the learned Arbitral Tribunal and this being a petition under Section 34 of the Act, thus, this Court cannot go beyond as to what was pleaded and argued before the learned Arbitral Tribunal. Annexure-*E1A* mentioned the detail of the machinery purchased; the date of the receipt at site, number of units kept idle till the closure of the contract and idling charges etc. Barring this document, no other document qua the purchase date, invoice etc or any document which could show the said machinery was brought at site was ever placed on record before the learned Arbitral Tribunal. Whereas in its statement of defence, the respondent specifically pleaded the claimant did not bring some of its machinery and equipments per Annexure *E1* and *E2* at site even till the foreclosure of the contract. It is alleged such machinery and equipment was brought at site with considerable delay and petitioner rather failed to bring basic machinery *per* contract required to execute the earth work.

41. Rather a letter dated 27.01.2014 written by the respondent to the claimant notes on that date only some person and two jeeps were available at the site. Rather vide letter dated 09.02.2014 the respondent requested the petitioner to submit details qua the manpower, construction programme, construction material etc along with detailed action taken report in connection with the procurement of various machinery etc.

42. Further the respondent referred to its letter dated 22.03.2004 wherein the respondent required urgent action for procurement of tunneling machinery/other machinery / equipments. Even vide letter dated 29.03.2004 the respondent had asked petitioner for its remarks on infrastructural development for fabrication of yard, lagging casting yard etc as there was delayed and no activities in connection thereof were seen at the site. The petitioner was requested to expedite the same, lest the portal development / open excavation could be delayed. Another letter dated 04.05.2004 records activities in connection with the construction of Bailey bridge across Paikha Nallah on approach road to portal I was not seen at the site and hence a detailed programme be submitted to complete the project before monsoon.

43. Again on 03.01.2004, the respondent wrote to the petitioner to employ a person with experience in tunneling with Himalayan geological to organize and speed up the work properly. On 21.08.2004 a letter was yet again written whereby the respondent informed the petitioner of its promise to deploy an excavator to make road formation between Ch.0 to 720 meter, but only a backhoe and a tripper were working whenever were free from other work. The letter also noted why such a big firm alleged

to have completed lot of national highway projects was unable to handle a small road work effectively.

44. On record there are minutes of meeting dated 24.06.2004 attended by representatives of both the parties which notes till date the contractor had not informed the Corporation/respondent about the planning and the then position of mobilisation / procurement of various machinery/ equipment as per the provisions of the Contract Agreement. On record, there is also a note of discussion held on 06.07.2004 noting the Contractor was advised to expedite the mobilisation of the equipment; construction of road etc and also making up of the construction schedule.

45. Yet again vide its letter dated 15.09.2004, the respondent wrote to the petitioner asking for comments qua start of Portal I; mobilisation of equipments and making up of sleepage complete by a Discussion Note dated 27.10.2004 wherein the respondent required the information qua the status of special tunneling machinery, Road Header, Drill Jumbo's, Electrical loader having not reached the site. No arrangement was also done for compatible DG set for special tunneling machinery. The note of discussion held on 27.10.2004 again notes the same thing. Hence there were various instances where the respondent have been requesting the petitioner to bring its machinery at the site to start the work and this was even the stand of the respondent before learned Arbitral Tribunal.

46. The learned counsel for the respondent referred to the salient features of the impugned award to press his point–

***a)*** The learned Tribunal observed the claimant had mobilized and brought to the site most of the machinery as required under the contract, but due to initial delays in mobilisation and also due to certain unavoidable delays, various Court

stay orders, forest clearance, agitation by locals and shear zone in the tunnel at P1 which were beyond the control of both parties, very little work was actually completed and some of the machines were not utilized fully, hence it was reasonable to expect that the contractor would had suffered some loss on this account.

***b)*** The learned Tribunal went on to analyze the delay of the respondent and the claimant and referred to the correspondences narrated above to say that till October, 2004 the mobilisation was inadequate and not as per the contract requirement and hence the claimant was found even after 15 months of the award of the contract was not able to start the work.

***c)*** The learned Tribunal considered the delay caused due to stay orders, agitations by locals, change in cross-section of Tunnel, various disturbances modification and delay by other agencies in not to complete P2 approach road, adverse geological etc and came to the conclusion that the delay that could be attributed to the respondent is of ten months No joint/agreed records were available to prove the idling of machineries during this period and learned Tribunal had therefore attempted to work out a notional proportionate loss that would have resulted due to underutilization, keeping in mind the reasons mentioned therein.

***d)*** The learned Tribunal further held as regards man power employed on site at various points of time during execution of the contract, there was no agreed list or joint statement of claimant and Respondent available. No records were also produced to prove idling of man power. Hence there was no way for the learned Tribunal to work out loss on this account. While it was agreed that it was difficult to mobilize and de-mobilize heavy tunneling machinery, the learned Tribunal felt that it was quite feasible to demobilize/ redistribute the manpower to other sites and projects, and any contractor of common prudence would had also done that, on facing the complications of shear zone. However, even presuming that the men deployed in the tunnel at P1 were still retained at site, the Tribunal had considered at

best, idling of part labour of tunnel portion) for *10* months (i.e. time taken by KRCL to decide foreclosure of contract). On the basis of the letter dated 22.02.2013 wherein the respondent had agreed 34 skilled workers / supervisors were available on site as on April 2007. Hence, based on the salary sheets, it was assessed the list of maintaining this workforce for 10 months after stoppage of work could be approximately Rs.13 lacs and hence, Rs.6.5 lacs was awarded to the claimant.

***e)*** The learned Tribunal also interpretated Clause *17A(iii)* of the GCC to hold that in the event of delay by the Railways, the complainant was not entitled to any compensation except extension of the date of the completion. Yet, the learned Arbitral Tribunal gave some compensation on this account, as above. The learned Tribunal dealt with each and every reasons of delay and gave its conclusion.

***f)*** Qua the claim No.2 *viz* compensation on account of excess payment of interest on mobilisation advances, the learned Tribunal held that the mobilisation amount advanced to the claimant is in the nature of the land which he would have otherwise obtained from the bank. It was incumbent on the contractor to repay the loan with interest and hence as per universally accepted financial principles, until the loan is liquidated it is obvious that the interest would continue to accrue and payable. The claim was thus rejected. Even otherwise, clause No.*28.5* of the GCC notes:-

> *"28.5 Interest will be computed on diminishing balance basis on the amount of advance outstanding. The date of issue of cheque will be reckoned as the date on which the recovery has been made for purposes of computing the outstanding and working out the interest."*

the above clause also shows interest was payable till the payment is made.

***g)*** Coming to the third head of compensation on account of *Overheads*, the learned senior counsel for the respondent referred to the claim statement made by the petitioner to the following effect:-

> *"3.4 Non completion of the execution of the total contract work in the original and extended time and closure of contract due to reasons attributable to the Respondents made the*

*Claimant suffer loss on account of overheads. The Claimant had spent on account of the overheads during the contract period as the Claimant was compelled to be on the . site though the work was not progressing as contemplated. The Claimant was also required to stay at site with all his men and machinery till the closure of contract i.e. 5/10/07* ***which is almost 10 months*** *after the-completion of original contract period. The Claimant was unable to get the amount spent on overheads reimbursed as the Claimant could not complete the project and get the contract price' in contract period. Therefore the amount already spent on account of overheads is loss incurred to the Claimant and the Respondents is responsible for such loss. The Claimant is entitled to get the compensation for the losses and the Respondents is liable to compensate the Claimant."*

***h)*** The annexures were attached in support of its claim and Annexure –III which was just a statement of chart and except this chart there was no other document was submitted to prove such a loss by the claimant. In defence, the correctness of Annexure-III was denied and they referred to clause No.*63, 61(2)* of the GCC to say these matters were *accepted matters* and could not be brought before the learned Tribunal. Even otherwise, to prove the aforesaid, the claimant never submitted any document neither the bills etc were filed before the learned Arbitral Tribunal. The petitioner ought to have filed these bills before the learned Tribunal as they filed the Dr.Jethwa Report, and hence the learned Tribunal vide impugned award held as follows:-

*"**9.3.3 Tribunal's Conclusions:***

*It is true that due to certain delays and due to complications arising out of shear zone, the claimant was required to maintain the size offices until 5-10-2007 (date of foreclosure) that is, till 10 months after DOC. A joint note dated 23.1.2013 has been submitted by the claimant and Respondent in this regard, which indicates that the covered shed area built at P1 is 9676 sqft and that at P2 is 8854 sqft. The cost of these structures as per Annexure III of the claim is Rs.15056845/- and Rs.12165850/-. No other jointly agreed details regarding overheads are available.*

*It is agreed that the claimant would have suffered some loss on this account, which he could not recover because the contract was foreclosed. It can be argued that the claimant could reasonably expect to distribute the costs of his overheads over a period up to December 2011, which is when he expected to complete the work had the contract continued with the methodology proposed by him. It is considered that at the end of the project contractor would have salvaged 15% of the input cost by way of disposal of scrap and residual materials. The proportionate loss of overheads (covered sheds) for 10 months has been assessed as*

i. *Rs.(15056845 + 12165845) * 0.85 * 10/96 == Rs.2410342.*
ii. *The Tribunal awards Rs.2410342.0 for this claim."*

***i)*** The claim No.4 was loss of profit for the balance work and the learned senior counsel for the respondent referred to clause No.*61.3* of the GCC which notes:-

i. *"**Determination of Contract:***
ii. *61.3The contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract."*

***j)*** The learned Tribunal on this issue held as under:-

i. *" **9.4.3 Tribunal's conclusion***
ii. *The Tribunal has come to the conclusion that the work was foreclosed mainly because of the adverse geology and the Respondent is in no way liable to ensure the profits for the claimant. Also, the amount is not payable in terms of clause **61.3** of the GCC Northern Railway which forms part of this contract."*

***k)*** As far as the claim No.5 which was qua the loss due to the damage and non-capitalization of material due to delay. It was decided on the basis of the joint note and no other evidence was filed before the learned Tribunal. The learned Tribunal dealt with it and notes:-

*" **9.5.3 Tribunal's conclusion***
*As per joint note dated 23.01.2013 between KRCL and SMS Infrastructure Ltd. 420.8683 MT of structural steel including scrap and 17.33 MT (346.6 bags) cement was balance at site at the time of foreclosure of contract. As per information gathered by Tribunal the rate of structural steel was Rs.33960 per MT and Rs.234 per bag during 2007 when contract was foreclosed. In terms of clause 61(3) of the Tribunal feels that it would be reasonable to pay for the cement brought at site, certified by Respondent and which would have been damaged and set by the time of foreclosure. It can safely be assumed that 50% of cost of steel would have been salvaged by contractor by selling in scrap.*
*The Tribunal awards Rs.7227448.00 against this claim."*

47. The learned counsel for the respondent thus argued clause 17A of the agreement records for delay in execution of the contract only an

extension of time shall be given. Further no profit shall be given to claimant per clause *61(3)* of the contract which read as under:

> *"61 (1)-(2)xxxxx*
> *(3)The Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit of advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract."*

48. Lastly the reference was made to *Steel Authority of India Limited vs. Gupta Brother Steel Tubes Limited* (2009) 10 SCC 63 and *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49 to argue what the Court need to see in a petition under Section 34 of the Act, hence it was argued the challenge does not fit under section 34 of the Act and need to be dismissed.

49. Heard.

50. If one pursue the provisions of the contract, one may find the petitioner was merely an executor of the contract; *viz what* is to be done, *how* is to be done, *when* is to be done. It was all to be decided by the respondent. Though the responsibility of the contractor was absolute but complete details, designs and specifications of machinery was all to be decided by the respondent. Admittedly there was delay caused due to various reasons *viz* villagers giving *dharnas*, court injunctions etc. and several months were lost but admitted petitioner had not made any claim for delay in respect of such period. The delay was *primarily* on account of faulty plans and drawings of Railways. The tunnel could never be made on the route specified of approx. *5* kms, the petitioner was to built. Admittedly the said route was ultimately *abandoned* due to *impossibility*. Further if one peruse the Jethwa report as also the report of Chief

Engineer of the respondent it could be seen the foreclosure of the contract was of the reason *the work from portal-1 could not be done without changing the methodology. The finalization of the methodologies may take one and half year*. Thus there existed impossibility of executing the work from portal-1 in terms of methodology *provided* for under the contract. Even the report of Public Accounts Committee (PAC), 2014-15 (4th report) was highly critical of lack of foundational ground work/preparation being undertaken by the Ministry of Railways before selection of an *alignment* especially in a difficult and unexplored terrain. The 49th report of the Public Accounts Committee rather noted the project was a *misadventure* and was *not based on any realistic assumptions/studies* hence, and as *admitted* consequent to the new technical status/reports of consultants, the rail route has been *realigned* at certain stretches in accordance with report of committees and M/s.Amberg Report.

51. Admittedly 7% approx of the work was done; the period of contract being 36 months, but because of various impossibilities / difficulties the Railways wanted to experiment and one of the options given would complete the contract by eight years i.e. 96 months and parties were negotiating at that stage but the learned arbitrator only on negotiations, held the period of contract to be 96 months and not 36 months and granted damages to the petitioner while considering the period of contract to be 96 months which severally decreased the claim amount of the petitioner herein.

52. It was argued various documents on record *viz* CAG Report, Jethwa's Report reveal of inherent *defects* in the *alignment*. [See Clause

7.1 (*supra*)]. Admittedly, it was the Railways to decide the *alignment*. The drawings admittedly were by the Railways, the methodology was also provided by the Railways based upon which the work was to be done. The petitioner was responsible to bring machinery, manpower etc and to complete such project based upon the methodology of the respondent, hence the petitioner has challenged the award ***a)*** being illegal and **alternatively *b)*** the amount of compensation be enhanced.

53. The Petitioner broadly sought to enforce seven claims for a principal amount of Rs.75,66,55,738/- and interest thereon, the aggregate being approximately Rs.85,65,66,610/- against which the learned Arbitral Tribunal awarded an amount of Rs.1,73,70,790/-.The claims made by the Petitioner and the amount awarded against each claim is set out herein below:-

| ***S. NO.*** | ***DESCRIPTION OF CLAIM*** | ***AMOUNT CLAIMED (RS.)*** | ***AMOUNT AWARDED (RS.)*** |
|---|---|---|---|
| *1* | *Compensation for the losses incurred on account of idling and underutilization of men and machinery* | *42,46,32,143/-* | *77,33,000/-* |
| *2* | *Compensation on account of excess payment of interest on mobilization advance* | *4,00,97,917/-* | *NIL* |
| *3* | *Compensation on account of loss of overheads.* | *13,74,10,872/-* | *24,10,342/-* |
| *4* | *Claim on account of loss of profit for the balance work* | *13,68,72,000/-* | *NIL* |
| *5* | *Claim on account of loss due to damage and non-capitalization of material due to delay.* | *1,76,42,806/-* | *72,27,448/-* |
| *6* | *Claim on interest* | *13,74,10,872/-* | *NIL* |
| *7* | *Cost of Arbitration Proceedings* | *25,00,000/-* | *NIL* |
| | ***Total*** | ***Rs.89,65,66,610/-*** | ***Rs.1,73,70,790/-*** |

54. Clause *12.1* of the Special Conditions of Contract ("*SCC*") had specifically envisaged the Petitioner would be required to bear all costs

for procuring the machinery required for the project. Clause *12.1* is quoted below:

> *"12.1 In respect of all the plant and machinery needed for this work, the contractor should make his own arrangements and ensure the expeditious progress of work and operate the same with necessary experienced manpower and consumable stores/spares at his own cost, within the quoted rates. List of machinery and equipment which should be made available at the site by the contractor for expeditious working is given at Annexure E-1 & E-2. The contractor should plan and commit the deployment of Special Tunneling machineries like Road Header, etc or give his scheme of work commensurate with the construction schedule given therein"*

55. The Contract envisaged the petitioner to provide all machinery and equipment including special tunnelling machinery. The Contract envisaged *85%* of the investment which had been made by the Petitioner towards specialized machinery to be used in the project would be recovered in its entirety upon the completion of the project which was envisaged to be in a period of *36.5* months.

56. Annexure-*E1* to the contract provided the list of the special tunnel excavation machinery which was to be deployed by the petitioner to execute the work at the Katra end. Annexure-*E2* provided the plant and machinery to be deployed by the contractor to execute the work at each face. It may be further noted under clause *28.6* of the SCC, there was a specific stipulation *the plant and equipment shall not be removed from the site of the work without prior written permission of the engineer*.

57. Now the entire investment towards the machinery to be used in the project was to be done by the petitioner. The petitioner filed statements showing the list of machinery brought at the site and the consultant appointed by the respondent having checked and signed the same. The

dates on which the various machines were brought on the site by the petitioner are also indicated in Annexure-*1A*.

58. The petitioner had also to engage manpower with varying degrees of skill for execution of the project. The relevant clauses of the SCC are quoted hereunder:

> *"16.0 The Contractor shall engage local labour for unskilled work as far as"*
> *40.0 Employment of Qualified Engineers*
> *40. 1 The Contractor shall employ sufficient number of technical staff who shall be qualified Graduate Engineers and Diploma holders as required for setting out alignment, taking the established benchmarks and the cross section levels, plotting the cross section levels, computation of quantities, taking measurements, preparation of bills and also for efficient supervision of various works at different work spots. The list of names, qualifications and experience of these personnel should be furnished along with the tender documents. The contractor should also submit a list of names of graduate engineers and diploma holders with their bio-data to the Corporation within 15 days from the date of issue of letter of acceptance for approval by the Engineer. Any further changes should be advised and got approved.*
> *56.0 Labour*
> *56.1 The Contractor shall, unless otherwise provided in the Contract, make his own arrangements for the engagement of all staff and labour, local or other and for their payment, housing, feeding and transport. The Contractor shall, if required by the Engineer-in-charge or his representative, deliver to the Engineer-in-charge or his representative a return in detail in such form and at such intervals as the Engineer-in-charge or his representative may prescribe, showing the staff and the numbers of the several classes of labour from time to time employed by the Contractor on the site and such other information as the Engineer-in-charge or his representative may require."*

59. In the technical specifications for tunnelling which formed an integral part of the contract, clause *5* read as follows: *"5.1 ... It is proposed to do shotcreting along with heading or full face tunnel in the excavated surface as decided by Engineer. Rock bolting shall also be as per necessity and requirement as directed by the Engineer-in-charge.* ***Therefore the Contractor should have adequate plant and machinery, skilled labour, materials, etc. to do complete shotcreting and rock bolting during activities of heading/full face****."*

60. As required by the above clause(s) of the contract, admittedly the petitioner had mobilized highly skilled, semi-skilled and unskilled labour to operate and maintain the machinery and execute the work. The contract envisaged a large upfront investment by the petitioner in terms of manpower and machinery. The value of the contract i.e. Rs.133 crores (approximately) was to be recovered by the petitioner, over the duration of the contract i.e. *36.5* months. The present contract was not a *turnkey* project, but a *rate* contract which is evidenced from various clauses in the contract viz. clause *2.1.1*, *2.2.1* & clause *10* of the ITT; clause *8.1, 11.1, 21.1, 46* of the SCC and Annexure F.

61. Thus, while the contract required a high upfront investment from the petitioner, it was to recover its investment gradually over the course of the contract. It is an admitted position due to various obstacles which arose during its execution, the contract was foreclosed by the respondent. It is also an admitted position only 7% approx of the work originally envisaged by the contract could be completed. Due to the foreclosure of the contract, the petitioner was unable to recover 78% (85%-7%) of the value of the contract, which it would have been able to recover, had the project been completed as originally envisaged. It may be noted even the Learned Tribunal has come to a *finding* that upto the date of completion as originally envisaged, "*less than 10% of the work was completed*".

62. Now, the fact the petitioner could only recover 7% of the contract value, although it had mobilized all the required resources, including both machinery and manpower, is clear from the fact the second tranche of the mobilization advance under clause *28.1* was to be paid on "establishment of campsite, mobilization of manpower and infrastructural facilities for

commencement of work." which in fact was paid on 16.03.2004. Further, the fact the necessary resources has been mobilized by the petitioner is also noted by the Deputy Chief Engineer and confirmed by the Chief Engineer.

63. Admittedly, as a result of the obstacles arising in the execution of the contract, the machinery and manpower which had been duly mobilized by the petitioner remained *unutilized* causing huge losses to the petitioner. These facts were pleaded by the petitioner in the statement of claim and not denied by the respondent in its statement of defence. Rather the respondent offered no remarks in its pleadings qua the consultant(s) appointed by the respondents having *checked the machinery* on behalf of the respondents and *signed the list(s)*. The respondent, however alleged the losses, if any, were on account of the petitioner.

64. The conclusions which can be drawn from the pleadings of the petitioner are : **a)** the Petitioner brought the machines on to the site from time to time and the consultant appointed by the Respondent checked and verified the same. ***b)*** the machinery brought on the site by the Petitioner was kept idle and remained under-utilized is a fact which has not been disputed by the Respondent – the only contention of the Respondent is the reason for the delay was not attributable to the Respondent. ***c)*** the Respondent has denied the claim on the ground it is the Petitioner and not the respondent who is responsible of the delay which occurred, though the quantum of the loss suffered by the petitioner had been disputed by the respondent.

65. The fact of idling of machinery has also been noted by the Deputy Chief Engineer and the Chief Engineer in their noting dated 30.10.2006.

The relevant portion of the noting of the Deputy Chief Engineer is as under: *"…. The Contractor has mobilized all required resources including equipments/machinery as laid down in Annexure E-1 & E-2 of the contract agreement. But it was not possible to utilize them due to above peculiar problem which is beyond the control of the contractor and are mostly lying idle."* The Chief Engineer also concurred with this observation and noted as under:

> *"I agree with the remarks Dy CE/Paikhad for referring the claims to Arbitrators as the* ***most of machines/ equipment*** *brought by the contractors* ***have remained idle due to reasons beyond the control of the contractors****."*

the fact of idling and underutilization of the machinery has also been noted by the learned Tribunal in the Award.

66. However, while the learned Tribunal found *(a)* the petitioner had mobilized the required resources under the Contract; *(b)* the machinery and manpower of the petitioner was idling; *(c)* the petitioner was entitled to some compensation; *(d)* under 10% of the work as contemplated under the contract could be executed till the date of completion; and *(e)* the encountering of the shear zone which ultimately caused the contract to be foreclosed by the respondent was *beyond the control* of the petitioner, ***yet*** it applied completely misplaced, ad-hoc and perverse concept of *"**notional idling cost**"* to determine the compensation to be paid to the petitioner.

67. The learned Tribunal when concluded the foreclosure of the contract *cannot be attributed* to the petitioner, it rather ought to have awarded to the petitioner the quantum claimed on account of idling of machinery and manpower in a more *practical* manner, given the

circumstances the quantum of loss claimed on account of the idling of the machinery and manpower has not been disputed by the respondent.

68. The formula of "*notional idling cost*" applied by the learned Tribunal rightly suffers from three fundamental flaws in the assumptions that it proceeds on: ***a)*** the learned Tribunal takes a period of only 10 months i.e. the time taken by the respondent to decide to foreclose the contract 05.10.2007 after the petitioner submitted its proposal containing four options to be the "delay" attributable to the respondent and applies this period in its formula. This is despite a specific finding by the learned Tribunal that on encountering the shear zone at Portal 1, from April 2005 to December 2006, both the petitioner and respondent were grappling with the situation and trying to find methods to control it. Thus, the period to be taken into consideration to compensate the petitioner for the idling on its resources should at the very least run from *April, 2005* from when, admittedly, the shear zone was encountered and the work under the contract had to cease; ***b)*** the learned Tribunal held the petitioner could work 85% of its machinery, cost of which was approximately Rs.16 crores, over a period of 96 months i.e. till December 2011 when the petitioner was expected to complete the Contract work as per letter dated 16.04.2007. This period of 96 months is completely arbitrary as the period of the contract is clearly stipulated in the contract was 36.5 Months. The figure of 96 months stated in letter dated 16.04.2007 was the minimum extension, necessary to complete the project in case it was not impossible to complete the task. It is admitted position that an extension till December 2011 was never given to the petitioner by the respondent. Thus, the period of 96 months is completely *hypothetical*

and *arbitrary*; and, ***c)*** the learned Tribunal then held as both the parties have contributed to the delays at various stages, the loss on account of under-utilization of machinery should be shared by both the parties.

69. This approach is totally flawed as the *respondent had made no investment towards the machinery and therefore multiplying the entire amount of compensation by ½ would be completely unsustainable*.

70. Thus, the learned Tribunal's conclusion the quantum of compensation to be awarded to the petitioner for idling of its machinery is Rs.70.83 lacs was perverse and incorrect.

71. Further, the finding of the learned Tribunal the petitioner ought to have demobilized/re-distributed its manpower completely disregard the fact which are established by the evidence on record. It is an admitted position when the shear zone was encountered, the petitioner was *compelled to keep the labour and staff stationed at the site* as the instructions of the respondent were to resolve the difficulties and recommence work at the earliest opportunity. Here one may refer to the respondent's letter dated 14.06.2005 and also provisions of the contract (*supra*).

72. As with the case of manpower, the assumption of 10 months of idling for manpower (as part of the formula of *"notional idling cost"* applied by the learned Tribunal) is again perverse and flawed. Further, the amount should not be halved on the assumption of *shared liability* for the delay.

73. The learned Tribunal erred in applying the concept of "*notional idling cost*" and not appreciating the admitted position where a *huge*

*upfront investment* had been made by the petitioner and only 7% of the work envisaged under the Contract could be completed and therefore the Petitioner was unable to recover *78*% (85% - 7%) of the contract value. The Contract in question being in the nature of a *rate* contract (as opposed to a *turnkey* project); the fact the Contract had to be foreclosed after only 7% of the work was completed, meant most of the *scheduled items* envisaged under the Contract were *never entrusted* to the Petitioner at all. Thus, far from being able to make profits under the Contract, the Petitioner has lost a huge amount of money which it had invested at the initial stages of the Contract even though admittedly the Contract was foreclosed for reasons beyond its control.

74. The fact the foreclosure of the project by the Respondent is in no way due to any fault of the Petitioner is, *inter-alia*, clear from the following:

75. The learned tribunal itself had noted:

> *"The T2 tunnel portal P1 and almost 300m of the tunnel lies within the Reasi thrust zone consisting of crushed dolomites with a few inclined clay bands. The reasi thrust contact on the north side and one of the clay bands have combined to present a setting where the crushed dolomites are charged with water, possibly to a height of about 110m. A crude presentation of these details has been given in Fig. 2."*

76. Admittedly the following information was also noted from a site visit by the learned Tribunal:

> ***a)*** considerable effort has gone into stabilizing the tunnel face and the roof by fore poling and grouting.
> ***b)*** water pressure is reported to have been very high at face.
> ***c)*** the tunnel remains to be excavated through water-charged dolomites in a length of 80 meters

> under a height of 110 meters before it crosses the thrust plane and enters in to a better tunneling medium.
> ***d)*** the following figs show the Kotli tunnel portal P1 lies in a very treacherous ground conditions, which are created due to the tunnel passing through a thrust zone in the lower Himalayas.
> ***e)*** out of several alternatives for tunnelling through such a bad zone, umbrella grouting of 6-8m length with chemical injection was selected on techno-economic grounds, it can be seen in Fig. 3 that full width of the tunnel heading could be stabilized. The advance was 4 m/month @ Rs.80 lakhs/m. The method could not be sustained due to irregular supply/approval for supply of PU by KRCL. A report on success of the method was supplied of KRCL.

77. Further a meaningful reading of Dr.Jethwa's report which was a part of arbitrary record unequivocally bear out: the alignment adopted by the Railways had the effect of locating *300* mtrs of Tunnel T2 Portal P1 within the REASI thrust zone consisting of crushed dolomites and the crushed dolomites being charged with water possibly to a height of about *110* mtrs; the employer failed to provide rock mass classification, as also length of tunnels expected to pass through each rock mass; the *Northern Railways had wrongfully adopted this alignment despite the tunneling experts having opined in their first meeting* on 11th October, 2004 and the second meeting on 23rd June, 2008 that the *alignment of the rail route needed to be shifted locally, so that tunneling through REASI thrust is eliminated*. Eventually, the railways *implemented the advice* for shifting alignment *after a gap of 5 years*; the Road Header provided under the contract as an equipment to be purchased and deployed by the contractor

was unsuited for deployment considering the nature of rock excavation that was required to be carried out; the conditions suitable for deployment of the road header were not present before the contractor and thus he had to withdraw from the project; that tunneling from other end, P2 portal side was delayed due to the fact the approach road to P2 had been constructed in an unprofessional way, road beams were practically absent, the slopes were prohibitively steep, etc.

78. Dr. Jethwa thus, conclusively opined the inherent impossibility of execution of contract owing to the fact *the contract was premised on an erroneous belief that the tunnel alignment passes through rocky terrain*, while as a matter of fact, a significant part of the tunnel was in fact located in the midst of water charged thrust zone of 110m height. *In other words, upto a depth of 110 mtr, no ground was available*. Owing to this fundamental fact, *it was impossible to construct the tunnel* and it was also impossible to deploy the road header. The report/deposition bears out the *Railways knew of this fact and were advised to not adopt this alignment owing to the fact a part of the alignment lay in the thrust zone*, despite that, in an act of complete disregard for the facts and reality, the Railways wrongfully adopted an alignment which partially passed through a thrust zone, thus carrying within itself the seed of impossibility.

79. The alignment as adopted, the drawing based thereon, the items of work specified in this regard etc., were thus, impossible of execution. The contract was a contract for execution of specified Items of Works and these Items of Works could not be entrusted to the contractor for

execution and the contractor was not able to execute it owing to the impossibilities referred above.

80. Admittedly, the reasons for foreclosure/Admissions in internal notings of Konkan Railways were:

***a.*** As stated above, the Deputy Chief Engineer and the Chief Engineer have both opined in Internal Note No.KR/JK/ Dy.CE/PKD/T-2/Claim dated 30.10.2006 that the Petitioner had mobilized all the required resources, but could not utilize them they were lying idle due to the peculiar problem of the Shear Zone, which was *beyond the control of the petitioner*.

***b.*** Further, in internal Note No. KR/JK/Dy.CE/PKD/T2 dated 13.07.2007, the Deputy Chief Engineer and the Chief Engineer have noted *interalia* from the period from April 2005 till date most of the resources deployed by the petitioner were idling and they were not able to utilize them. This note also records the reasons for foreclosing the Contract as being:

> *"1. The idling of resources at portal 1 and clams cannot be avoided.*
> *2. The work from portal-1 cannot be continued without changing the methodology.*
> *3. Termination of contract on risk and cost cannot be implemented due to likely change in methodology, terms and conditions in future tender.*
> *4. The finalization of new methodology after finalizing consultancy contract may take minimum one to one and half year which may further add to the claims.*
> *5. Provision of all the protective roads/tunnels and making the approach road to P-2 all weather and safe may take more than one year"*

***c.*** In the same note, the Executive Director (Project), has noted that *"If the contract is not foreclosed, the contract claims will amount to figure beyond "imagination". Hence, it is recommended M(W) foreclose the contract amicably and retender ....."*

***d.*** The notings dated 30.10.2006 and 13.07.2007, being the reasons that formed the basis of the respondent's decision to foreclose the contract, the reasons recorded under the said nothings are liable to be read as part of the foreclosure order.

***e.*** The said clearly bear out the basis of the foreclosure was the *impossibility* of executing work from Portal 1 in terms of methodology provided for under the contract and without the provisions of protective roads/tunnels and making the approach road to P2 all weather safe. The notings also bear out from the date of notings i.e. 30.10.2006 to 13.07.2007, the resources deployed by the petitioner were lying idle from April 2005 to the date of foreclosure and '*the idling of resources at P1 and claims*' was *unavoidable*. The contractual methodology became unsuitable owing to the alignment provided for passing through the shear zone, rendering the execution of contracted items impossible.

***f.*** Reference may also be had to Internal letters dated 09.08.2007 and 10.08.2007 and the JA Grade Committee Report dated 16.02.2007.

81. The failure of the contract thus was not wholly attributable to the petitioner. Rather it admittedly suffered the consequences of men and

machine remaining idle namely the inability of recovering back any part of investment made by him towards the men and machines and the contract having unequivocally provided for writing off the value of 85% of machines towards the contract and for the mobilization of men and machines in terms of Bar chart provided thereunder, the Petitioner herein are clearly entitled to more amount than awarded for the losses suffered by them on account of idling of man and machines *more so because neither the factum of the loss suffered by the petitioner nor the quantum of the loss suffered was disputed by the respondent in its statement of defence*.

82. Thus, a sum of Rs.77,33,000/- awarded by the learned Tribunal as compensation for the losses incurred on account of idling and underutilization of men and machinery is grossly inadequate given the kind of investment the petitioner had made towards this project which was ultimately foreclosed *for no fault of the petitioner*.

83. Few dates are relevant *viz* the work was allotted to the petitioner on 26.12.2003; the contract was signed on 23.01.2004; and the contract was to be completed on 27.02.2006. The petitioner was to carry the work by mobilization of equipments, setting up office, collecting manpower etc. 2.5% of mobilization advance was realised on March 2004 after satisfying the petitioner has carried out the mobilization and has collected the manpower, raw material, equipment and built the offices. The machine/equipments were customised built and were procured from across the world. The equipment was to be mobilized within 9 months and the tunneling work was to start within 145 days, including purchase

of the equipments etc. The total land to be excavated went up by 300% so the petitioner carried the excavation in excess quantity at the same rate but then refused and for this reason two other contractors were appointed by the respondent. Those contractors took two years to complete the excavation work. The contract was extended till 2008 because of massive landslides where several workers were injured and machines got destroyed and in the year 2006 the time was further extended for 18 months from Katra site.

84. Qua idling of resources Note No.KR/JK/Dy.CE/PKD/T-2/Claim dated 30.10.2006 (at page 642) rather says:

> *"Contractor mobilized all the required resources like manpower, machinery, equipments, material etc. in stages. The record of date of arrival of all the machinery I equipment are available at site. The work of tunneling commenced during October 2004. The progress of tunneling till April 2005 was 207m heading and 60m benching.* ***The heading excavation came to stand still since first week of April 2005 after intercepting a massive shear zone at Km 33/300****. Even after all the sincere efforts by the contractor the heading excavation would, not be advanced. Only the benching excavation of 101m length was carried out during May 2005 and June 2005 and thereafter no. heading or benching excavation was done.*
> *xxxxx* ***The mobilization of various resources has been done and kept in their yard at village Baga as the site was not approachable****.*
> *I agree with the remarks of Dy CE /Paikhad for referring the claims to Arbitrators as the most of machines/equipment brought by the contractors* ***have remained idle due to reasons beyond the control of the contractors****.*
> *ED/P*
> *Sd/-*
> *14/3/07"*

85. Admittedly, during the major portion of the contract due to extra-ordinary situation the staff was kept idle and under-utilized. The claimant had to mobilize highly skilled, skilled, semi-skilled and unskilled labour to execute the work. The job at tunnel required skilled labour and the claimant had to bring such labour right at the time of commencement of the contract. Admittedly there were hindrance and defects which resulted

in stoppage of work and/or execution of work but the claimant had to keep the staff present with the contemplation that the hindrances would be sorted out soon so that the claimant could work in full strength.

86. The details of the losses sustained are given in Annexure 1-A and 1-B to the claim petition. The claimant had claimed an amount of Rs.36,47,44,914/- towards idling of machinery and Rs.5,56,78,286/- on account of the idling of manpower. The project took forward in the month of October 2007 though the work was suspended in the month of May 2007. The payment to the local workers, not willing to move to other work sites, for the period from June-October 2007 along with the notice period and other retrenchments benefit to 120 local workers, as detailed in Annexure 1-B are shown to be about Rs.42,08,943/- thus the loss on account of the idling of machinery and manpower was calculated at Rs.42,46,32,143/-.

87. Letter dated 07.05.2004 written by the respondent to the petitioner notes:-

> *"Sub: Construction of BG Single Line tunnel No.2 (Kotli tunnel) from km 33.095 to 38.450 on Katra-Laole Section of USBRL project.*
> *The construction of above 5.3 km long tunnel was on critical path for commissioning of Udhampur-Srinagar-baramula Rail Link Project since inception of the project. Konkan Railway Corporation Ltd. had therefore carried out various studies to complete this tunnel in 36.5 months knowing ---that high production rates are to be achieved in Himalayan Geology. Due to that constraint a specific methodology flexible under all type of rock strain was chosen which required large scale resource mobilization. The* ***redundancy factor*** *of special --- equipments was taken into account before award of the contract.*
> *xxxxx*
> *yours faithfully*
> *Vinod Kumar*
> *General Manager Tunnels"*

88. The ***redundancy*** as stated in the letter refers to special machineries purchased only for this project. As per the agreement admittedly 85% of

cost of the machinery was to be culled out within the period of this project. Since it was customized machinery and since five tunnels were to be constructed so five different machineries were required to be purchased with specific diameters considering the density of the rocks at the spot and only skilled manpower could use such machines. Admittedly such machine could not be taken away from the project site without prior written permission of the engineer was one of the terms of the contract dated 23.01.2004.

89. *No such permission was ever given to remove such plant and machinery from the site*.

90. Admittedly letter dated 05.10.2007 was sent by the respondent to close the contract and it notes:-

> *05/10/2007*
> *M/s.SMS Infrastructre Ltd*
> *267, Fadnavis Bhavan*
> *Near Triangular Park, Dharampeth,*
> *Nagpur – 440010*
>
> *Sub: Construction of B.G. Single line Tunnel No 2 (Kotli Tunnel) from Km33.095 to to 38.450 on Katra -Laole section of' the 'USBRL Project - CA No.KR/PD/J&K?CONT/Tunnel/T2:dated 23.01.04.*
>
> *Ref: Your letter no SMSIL/KATRA/KRCL dated 04.10.2007*
>
> *The closure of the Contract Agreement No.KR/PD/J&K/ CONT/Tunnel/T2 dated 23.01.2004 has been vetted by Associate Finance and approved by DWW and MD. Thus the contract is hereby closed.*
> *Kindly acknowledge the receipt of this letter.*
> *Thanking you,*
> *Yours faithfully,*
>
> *(S.C.Rajak)*
> *General Manager (Works)*
> *For Konkan Railway Corporation Ltd"*

91. The reasons of this unilateral repudiation of the contract admittedly were as under:-

> *1. The idling of resources at portal-1 and **claims cannot be avoided**.*
> *2. The work from portal-1 cannot be continued **without changing the methodology**.'*
> *3. Termination of contract on risk and cost cannot be implemented **due to likely change in methodology** terms and conditions in future tender.*
> ***4.** The **finalization of new methodology** after finalizing consultancy contract **may take** minimum one to **one and half year which may further add to the claims.***
> *5 Provisions of all the protective works/ road tunnels and making the approach road to P-2 all weather and safe may lake more than one year.*

92. Not a single reason was attributed to the petitioner herein. The unilateral repudiation of the contract because of the wrong methodology could not have been attributed to the petitioner. Admittedly, the respondent granted extensions knowing fully well it was a *non-performing contract* as due to incorrect reasoning of the RITES, wrong methodology was adopted which was *per se* against the reports of Mr.Jethwa.

93. The petitioner had given quantum of compensation to be recovered from the respondent and the respondent though did not challenge such quantum, but had challenged the right to claim the same as the respondent alleged the petitioner was responsible for closure of the contract.

94. In clause (a) of para 9.1.3 *viz* the tribunal conclusions held:

> *"14 (a). The claimant expected to work off 85% of his machinery cost of approximately Rs.16 crore over a period of 96 months. (if the contract had not been closed and he had continued to work, he expected to complete it by Dec 2011 as per his letter dated 16-4-2007)"*

95. Above facts show that though the arbitrator work on the costing method for calculation of the loss but then went on to find out the *notional proportionate* on idling method which per se was wrong. The petitioner could not have been made liable for idling of the machinery and manpower as the problem which occurred in April 2005 *i.e.* prior to 36.5 months could not be solved even later by using different techniques and ultimately the alignment had to be changed by 400 meters. The extensions, even otherwise, were all *without levy* of any penalty and hence petitioner could not have been solely made liable for such delays. Further Mr.Jethwa's report admittedly was on record; he being chairman of a Committee constituted by respondent itself rather suggested four options and the petitioner was made to work on such option(s), later if the work could not be done, the petitioner could not be made responsible, his being a rate contract. Even internal notings of the respondent though were filed on record with rejoinder ought to have considered, were never considered. Hence, the approach of the learned Arbitrator to first take the period of contract to 96 months and then making respondent liable only for 10 months and thereafter dividing compensation to half, make no sense and is perverse; foreclosure being a unilateral decision of the respondent.

96. It is settled law that the findings of a learned Arbitral Tribunal can be interfered with under Section 34 of the Act if such findings are arbitrary or perverse and the learned Arbitral Tribunal has not adopted a judicial approach. *(Associate Builders v. DDA, (2015) 3 SCC 49)* A finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set

aside on the ground of patent illegality. *(Ssangyong Engineering & Construction Co. Ltd. v. NHAI 2019 SCC onLine SC 677).*

97. The arguments of the Respondents *viz*: ***(a)*** Dr. Jethwa's report was not admissible; ***(b)*** internal notes were not part of the record; ***(c)*** contract was foreclosed by mutual agreement; ***(d)*** claims are totally based on delay; ***(e)*** computation of damages was correct; and ***(f)*** Award fully considers the contractual clauses and the evidence on record, are factually and legally unfounded as:-

> ***(i)*** *Dr. Jethwa was not the Petitioner's witness but an independent expert relied upon in Award. (Para II (3) @ Pg. 4, BS);* ***(ii)*** *Railway internal notings represented reasons for foreclosure and were part of rejoinder;* ***(iii)*** *The Petitioner's claims are not founded on wrongful termination of contract. In fact, the contract ended on 24th December, 2006 and, thereafter it was only an extension. (Para II (4) @ Pg. 5, BS);* ***(iv)*** *Clauses relating to the geological conditions only barred the raising of claims for escalation based on difficulties of execution. Due diligence required was only as to difficulties of execution. There is no claim herein towards execution of work. All claims are only in respect of failure of contract and losses suffered during the interregnum, owing to idling. (Para 2(i), BS)*

98. Thus, the computation adopted by the Arbitral Tribunal is based on imaginary and impermissible parameters. The formula adopted of '*notional proportionate loss*' has no precedent. The Tribunal erroneously held, that idling period is deemed to be only 10 months, i.e. the period for which the Railways did not take decision on the issue of adoption of a new methodology for arriving at a new contract for tackling shear zone, and that since one of the option under exploration for arriving at a new contract based on a new methodology contemplated a period of 96 months for execution thus, the petitioner can only be awarded *10/96* part of the computed notional proportionate loss.

99. The deduction based on the aforesaid parameters is wholly unfounded in law. For the purpose of computing the damages suffered from idleness, the only enquiry that was relevant was an enquiry as to extent to which the contract remained idle *i.e.* un-operated and, the resource deployment that thus remained idle. Admittedly, the works contract could not be operated to the extent of 93% on account of shear zone etc. Resultantly, the Petitioners were denied their contracted right to recover the cost through contractual realizations to the extent of 93%.

100. The date on which the exploratory talks towards arriving at a new contract began or remained under negotiation or the fact that one of the proposals contemplated, if converted into a contract, would have had a contract period of 96 months, were not of remotest relevance for the issue of computation of damages. The Tribunals computation for claim qua manpower also suffers from the same infirmity that affects its computation of the loss towards investment on machines.

101. Similarly the overheads though calculated to Rs.1,50,56845/- and Rs.1,21,65,850/- by the Tribunal, yet with an unknown formula, by applying same principles as applied in determining cost of machinery and manpower, such claim was restricted to Rs.24,10,342/- only. Neither the Standard Data Book of Morth nor Hudson Formula was ever applied per *M/s.National Highway Authority of India v. Hindustan Construction Co. Ltd* (2016) 155 DRJ 646(DB) and *Associate Builders (supra)*.

102. In view of the above, the award passed by the learned arbitrator is not sustainable in the eyes of law as the formula applied for grant of claim for machinery, manpower and overhead is perverse. The petition

is allowed and impugned award set aside. The pending application, if any also stands dismissed. No order as to costs.

**YOGESH KHANNA, J.**

**MAY 11, 2020**
*AT*