National Highways Authority Of India vs Pune Sholapur Road Development Company ... on 14 March, 2019

Equivalent citations: AIRONLINE 2019 DEL 902

Author: Navin Chawla

Bench: Navin Chawla

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 23.01.2019
Date of Decision : 14.03.2019

\+ O.M.P. (COMM) 128/2018 & I.A. No.3857/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Petitioner

Through: Mr.Sudhir Nandrajog, Sr. Adv. with Mr.Keshav Mohan, Mr.Rishi K.Awasthi and Ms.Ritu Arora, Advs.

versus

PUNE SHOLAPUR ROAD DEVELOPMENT COMPANY LIMITED ..... Respondent

Through: Mr.Arun Kathpalia, Sr. Adv. with Mr.Kaushik Laik, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the „Act) has been filed by the petitioner challenging the Arbitral Award dated 30.11.2017 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Concession Agreement dated 30.09.2009 executed between the parties for the work of "Design, Engineering, Construction, Development, Finance, Operation and Maintenance of 4 laning of Pune - Solapur Section of NH - 9 from Km 144.400 to Km 249.000 in the State of Maharashtra under NHDP Phase III on Design, Build, Finance, Operate and Transfer (DBFOT) basis".

2. The Arbitral Tribunal by the Impugned Award granted the following claims of the respondent:-

S.NO.	Description	As claimed	As awarded
I.	Damages under Clause 8.35 4.2 of the Concession Agreement		Nil
II.	Damages under Clause 3.18 10.3.4 of the Concession Agreement		Nil
III.	Compensation under Clause 35.2 of the Concession Agreement, or otherwise under law		
A.	Loss on account of Escalation	97.12	88.38
B.	Loss of Interest during Construction	141.88	140.12
C.	Costs of underutilized and idle resources		
i.	Costs of underutilized and idle resources prior to declaration of the Appointed Date	96.73	46.98
ii.	Costs of underutilized and idle resources after declaration of the Appointed Date	115.12	70.85
D.	Costs of construction of additional diversions	1.31	Nil
E.	Loss of Toll Revenue		

i.	Loss of Toll Revenue on account of partial commercial operations of the Project Highway for reasons attributable to the Respondent	232.10	66.30
ii.	Loss of Toll Revenue on account of the delayed issuance of Provisional Certificate for reasons attributable to the Respondent	19.65	7.42
F.	Cost of maintenance of the „Existing Lanes for an extended period	1.67	Nil
G.	Cost of additional "Programme Management Fee"	40.10	12.00

	incurred or liable to be incurred by the Claimant		
H.	Cost of additional premium amounts paid by the Claimant towards renewal of its insurance policies during the Construction Period	2.31	1.44
Total Amount		759.52	433.49
IV.	Claim under Clause 35.3 for extension of the Concession Period	1198 days	Nil

3. The learned senior counsel for the petitioner submits that the Arbitral Tribunal has held that the respondent had given up its claim under Clause 4.2 and 10.3.4 of the Concession Agreement. He submits that Clause 4.2 and 10.3.4 provide for liquidated damages in the case of the petitioner failing to procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof and on the petitioner failing to provide and grant the Right of Way to the Concessionaire in respect of the land included in the Appendix to the Concession Agreement respectively. The petitioner having been found in breach of compliance of the Conditions Precedent as set out in clause 4.1.2 of the Concession Agreement for not being able to handover the land in terms of Clause 10.3.1 of the Concession Agreement, the liquidated damages only under Clause 4.2 and 10.3.4, if at all, could have been granted in favour of the respondent. The Arbitral Tribunal, however, has proceeded to award damages under Clause 35.2 of the Concession Agreement, which is a Clause providing for liquidated damages for breach other than the one for which damages have been provided in other parts of the Agreement. Relying upon the judgment of the Supreme Court in Steel Authority of India Limited v. Gupta Brothers Steel Tubes Limited, (2009) 10 SCC 63, he submits that Clause 35.2 of the Concession Agreement could not have been invoked by the Arbitral Tribunal for awarding damages in favour of the respondent.

4. Relying upon Clause 1.2.1(w) of the Concession Agreement the learned senior counsel for the petitioner submits that liquidated damages provided in the Concession Agreement have been acknowledged by the O.M.P. (COMM) No. 128/2018 Page 4 parties as genuine pre-estimate of loss. Therefore, in terms of Section 74 of the Indian Contract Act, 1872 (hereinafter referred to as the „Contract Act), damages exceeding the amount of such liquidated damages could not have been granted.

5. On the other hand, the learned senior counsel for the respondent submits that the petitioner was in breach of its representations and warranties under Clause 7.2 of the Concession Agreement. The petitioner was aware that the instant project was passing through a Wildlife Sanctuary and it had to seek clearance from the National Wildlife Board before any work could be undertaken. The above fact was known to the petitioner even prior to entering into the Concession Agreement, however, the petitioner did not disclose the above fact to the respondent at the time of entering into the Concession Agreement, thereby committing breach of its Warranties under Clause 7.2(e), (f), (g) and (i) of the Concession Agreement. He submits that the Contract, therefore, was voidable at the option of the respondent under Section 19 of the Indian Contract Act. The respondent, however, having insisted on the performance of the Contract, was entitled to claim damages dehors the contractual terms. He submits that in such circumstances Clauses 4.2 and 10.3.4 and, infact, even Clause 35.2 would have no application. In support of his submission he places reliance on the judgments of the Supreme Court in Ningawwa v. Byrappa Shiddappa Hireknrabar and Others, (1968) 2 SCR 797 of the Bombay High Court in Sorabshah Pestonji v. The Secretary of State for India, AIR 1928 BOM 17 and of O.M.P. (COMM) No. 128/2018 Page 5 this Court in Daiichi Sankyo Company Limited v. Malvinder Mohan Singh and Ors., MANU/DE/0450/2018.

6. I have considered the submissions made by the learned senior counsels for the parties. Before answering the same, certain Clauses of the Concession Agreement would require reproduction:

"Clause 4.1.2:

The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the conditions precedent required to be satisfied by the Authority prior to the Appointed Date shall be deemed to have been fulfilled when the Authority shall have:

(a) Procure for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.3.1; provided that the conditions set forth in Clause 10.3.2 shall also be satisfied on or prior to the Appointed Date;

(b) issued the Fee Notification;

(c) Deleted

(d) procured approval of the Railway authorities in the form of a general arrangement drawing that would enable the Concessionaire to construct road over bridges/under bridges at level crossings on the Project Highway in accordance with the Specifications and Standards and subject to the terms and conditions specified in such approval; and

(e) procure all Applicable Permits relating to environment protection and conservation of the Site:

(f) Execute and procure execution of State Support Agreement

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Provided that the Authority may from time to time by notice extend, for up to an aggregate of 6 (six) months, the for procuring the approval set forth in Sub-clause (d) and/or Sub-

clause (e) above and in that event the land to be covered by over bridges or the affected sections of the Project Highway, as the case may be, shall be included in the Appendix referred to in Clause 10.3 and dealt with in accordance with the provisions thereof; and provided further that upon procurement of such approval, the Concessionaire shall be entitled to a period of 12 (twelve) months therefrom for completion of the over bridges. For the avoidance of doubt, the approval specified in Sub- clauses (d) and (e) above shall cease to be a Condition Precedent upon the extension of time under this Proviso. xxxxxxx Clause 4.2: Damages for delay by the Authority In the event that (i) the Authority does not procure fulfillment of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Concessionaire or due to Force Majeure, the Authority shall pay to the Concessionaire Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day's delay until the fulfillment of such Conditions Precedent, subject to a maximum of 20% (twenty percent) of the Performance Security.

Clause 10.3.1:

Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works, trees and any other immovable property on or attached to the Site. Such memorandum shall have appended thereto an appendix (the "Appendix") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has O.M.P. (COMM) No. 128/2018 Page 7 not been granted to the Concessionaire. Signing of the memorandum, in two counterparts (each of which will constitute an original), by the

authorized representatives of the Parties shall be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire.

Clause 10.3.2:

Without prejudice to the provisions of Clause 10.3.1, the Parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way such that the Appendix shall not include more than 20% (twenty per cent) of the total area of the Site required and necessary for the Four-Lane Project Highway, and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2.

xxxxxx "Clause 10.3.4 The Authority shall make best efforts to provide and grant the Right of Way to the Concessionaire in respect of all land included in the Appendix, and in the event of delay for any reason other than Force Majeure or breach of this Agreement by the Concessionaire, it shall pay to the Concessionaire Damages in a sum calculated at the rate of Rs. 50 (Rupees fifty) per day for every 1,000 (one thousand) square meters or part thereof, commencing from the 91st (ninety first) day of the Appointed Date and until such Right of Way is procured.

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7.2 Representations and Warranties of the Authority The Authority represents and warrants to the Concessionaire that:

(a) it has full power and authority to execute, deliver and perform its obligations under this Agreement and to carry out the transactions contemplated herein and that it has taken all actions necessary to execute this Agreement, exercise its rights and perform its obligations, under this Agreement;

xxxx

(e) there are no actions, suits or proceedings pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other authority, the outcome of which may result in the default or breach of this Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform its obligations under this Agreement;

(f) it has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Instrumentality which may result in any material adverse effect on the Authority's ability to perform its obligations under this Agreement;

(g) it has complied with Applicable Laws in all material respects:

xxxxx

(i) it has the right, power and authority to manage and operate the Project Highway up to the Appointed Date;

(j) it has good and valid right to the Site, and has power and authority to grant a licence in respect thereto to the Concessionaire; and xxxxx Clause 35.2 In the event of the Authority being in material default or breach of this Agreement at any time after the Appointed Date, it shall O.M.P. (COMM) No. 128/2018 Page 9 pay to the Concessionaire by way of compensation, all direct costs suffered or incurred by the Concessionaire as a consequence of such material default within 30 (thirty) days of receipt of the demand supported by necessary particulars thereof; provided that no such compensation shall be payable for any breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt compensation payable may include interest payments on debt, O&M Expenses, any increase in capital costs on account of inflation and all other costs directly attributable to such material default but shall not include loss of Fee revenues or debt repayment obligations, and for determining such compensation, information-contained in the Financial Package and the Financial Model may be relied upon to the extent it is relevant."

7. Some findings of the Arbitral Tribunal also need to be noted at the outset:-

275. This takes us to the definition of "Right of Way", which means "the construction possession of the Site, together with all leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project Highway in accordance with this Agreement".

The definition of "Right of Way" is reproduced hereinbelow:

> "Clause 48.1: 'Right of Way' means the constructive possession of the Site, together with all way, leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction, operation and maintenance of the Project Highway in accordance with this Agreement."

276. It is, thus, clear that "Right of Way" does not merely relate to acquisition of land required for construction of the Project Highway. It means unrestricted access to the land such that the construction, operation and O.M.P. (COMM) No. 128/2018 Page 10 maintenance of the Project Highway can be undertaken in accordance with the Concession Agreement. xxxxxx

279. The Concession Agreement provides both Parties to fulfill certain Conditions Precedent before the Appointed Date. Clause 4.1.2 provides for the Conditions Precedent to be fulfilled by the Respondent which include (a) handing over of Right of Way under Clauses 10.3.1 and 10.3.2, (b) issuance of the Toll Fee Notification, (c) procurement of all Applicable Permits relating to environmental protection and conservation of Site. A combined reading of Clauses 10.3.1 and 10.3.2 suggests that the Respondent is obligated to handover at least 80% of the total area of the Project Site to the Claimant before declaring the Appointed Date. This is besides the Respondent's obligation to issue the Fee Notification and procure all Applicable Permits in relation to environmental protection and conservation of Site, which obviously would include any wildlife related clearances.....

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282. Upon declaration of the Appointed Date, the Respondent is obligated to hand over the balance 20% of the total area of the Project Site to the Claimant within 90 days therefrom, failing which the Claimant is entitled to recover liquidated damages from the Respondent as per the formula prescribed in Clause 10.3.4. xxxxxx

284. The three broad phases of the Project, as defined in Clause 48.1 of the Concession Agreement, are:

> a) The Development Period is the period commencing from the date of signing of the Concession Agreement, till the "Appointed Date".
>
> b) The Construction Period is the period from Appointed Date till the Commercial Operations Date.
>
> O.M.P. (COMM) No. 128/2018 Page 11
>
> c) The Operations Period is the period commencing from the Commercial Operations Date till the expiry or termination of the Concession Agreement.

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306. The Respondent's refutation on this aspect is untenable on facts, for the following reasons:

a) Firstly, the Respondent has not disputed or denied the existence of the letter dated 06.09.2007 issued by the MoEF. In fact, the Respondent has admitted that the management plan (2001-02) for the GIB sanctuary was prepared by one Shri N. Shendre ACG, which was duly approved by the then Chief Wildlife Warden and PCCF on 07.06.2006, wherein it was mentioned that 90% of the area of Bird Sanctuary was falling within village settlements and even towns. It is therefore, obvious, that the Respondent was fully aware of this fact well before the Concession Agreement was signed.

b) Secondly, during the course of arguments, as well as in its Written Submissions, the Respondent admitted, that, given the fact that over 90% of the bird sanctuary was falling within village settlements and hence, it was not possible for it to know that the Project Highway required a clearance from NWB. Having itself taken such a stand; we do not think that the Respondent is justified in contending that the Claimant had not undertaken a proper due diligence or that the Claimant should have known of this fact before it signed the Concession Agreement.

c) In fact the Respondent was negligent in its approach and had not, perhaps, due to an oversight, taken any steps to implement the direction/ suggestion from the MoEF which was issued to it way back in the year 2007.

d) The Respondent's contention that it could not take/procure a clearance in light of pendency of the O.M.P. (COMM) No. 128/2018 Page 12 matter before the Supreme Court and that it is protected by the maxims "actus curiae neminen gravabit" and "lexnon cogit ad impossibilia" also does not appeal to us. Firstly, the Respondent has not established, in any manner, that it had even approached the NWB for a clearance or that it was refused a clearance from NWB.

Secondly, the matter which was sub-judice before the Supreme Court was regarding rationalization/ reduction of the boundary of the sanctuary. As it eventually turned out, the Supreme Court allowed the said rationalization because of which the Project Highway fell outside the sanctuary limits. This meant that permission/clearance from NWB was obviously no longer required for undertaking the Project. Thirdly, even if it be assumed that the Respondent could not have taken a clearance from the NWB, given the pendency of the matter in the Supreme Court, the fact remains that this issue of wildlife clearance was pending even before the bidding process started. Despite such a crucial issue being pending, the Respondent failed and neglected to make any reference of the same in any of the documents. To the contrary, the Representations and Warranties in Clause 7.2. stated that the Respondent had (a) "good and valid right to the Site" (Clause 7.2 (j)) and the "power and authority to grant a license in respect thereto" to the Claimant, (b) "complied with Applicable Laws in all material respects"

(Clause 7.2(g)), and (c) provided all information with respect to the Project and that it had "no knowledge of any violation or default with respect to any... order of any Governmental Instrumentality which may result in any material adverse effect on the [Respondent's] ability to perform its obligations under this Agreement" (Clause 7.2(f)).

e) Clearly, the Respondent had failed to take any steps either to seek clearance from the NWB, or even inform the Claimant in relation thereto before signing of the Concession Agreement. Having itself defaulted in its O.M.P. (COMM) No. 128/2018 Page 13 obligations the Respondent cannot take the benefit of its own wrongs and take shelter of the two maxims. This principle has also been judicially recognized in the matter of Amarjeet Singh's case supra, although in a different context."

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309. We do agree with the Parties that, as a proposition in law, the Claimant can claim compensation for any alleged misrepresentation de hors Clause 4.2, for the losses incurred by the Claimant on account of such misrepresentation. Clearly, these are separate causes of action as Clause 4.2 does not relate to a breach of Representations and Warranties contained in Clause 7.2 of the Concession Agreement. In the case of Steel Authority of India Ltd. vs. Gupta Brother Steel Tubes Ltd, (2009) 10 SCC 63, the Supreme Court has clearly laid down that there is "no impediment for the parties to a contract to make provision of liquidated damages for specific breaches only leaving other types of breaches to be dealt with as un-liquidated". This view has also been followed by the Bombay High Court in the case of ONGC vs. Soconord OCTG, 2014 SCC OnLine Bom 1277."

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312. It is a fact that the Respondent was aware that the instant-Project was passing through a wildlife sanctuary. This was in the Respondent's knowledge almost two years before the Concession Agreement was signed. The Respondent was also aware that it had to seek a clearance from the NWB such that the Project could be undertaken. However, the Respondent, perhaps out of negligence, did not even approach the NWB to seek the said clearance. In fact, despite being asked questions on this issue, the Respondent failed to produce any document before this Tribunal which could establish to O.M.P. (COMM) No. 128/2018 Page 14 the contrary. The only excuse that the Respondent put forth was that this matter was pending before the- Supreme Court, and hence, the Respondent could not have procured a clearance from the NWB.

313. As noticed earlier, these contentions do not justify the fact that the Respondent had, in its Representations and Warranties (in Clause 7.2) clearly stated that it had

(a) "good and valid right to the Site" and the "power and authority to grant a license in respect thereto" to the Claimant, (b) "complied with Applicable Laws in all material respects". The Respondent also represented to the Claimant that "there were no actions, suits or proceedings pending or, to its knowledge, threatened against it at law or in equity before any court, the outcome

of which may result in a default or breach of the Concession Agreement or which individually or in the aggregate may result in any material impairment of its ability to perform its obligations".

314. Clearly, each of these representations were factually incorrect. The documents do not, in any manner whatsoever, contain even the slightest hint that the Project was passing through a wildlife sanctuary. Further, the Respondent's contention that the Claimant had failed to undertake a proper due diligence falls on its face in light of the Respondent's own admission that it was in possible for the Respondent to know of the existence of the · wildlife sanctuary as 90% of the said sanctuary passed through village settlements and towns. The Respondent cannot expect the Claimant to have knowledge of a fact which the Respondent itself finds difficult to have knowledge of in the first place.

315. The Respondent's contention that it had never sought to deceive the Claimant is also not tenable in law. Section 18 of the Indian Contract Act defines "misrepresentation" to include an act which causes, O.M.P. (COMM) No. 128/2018 Page 15 however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement. Section 18 of the Indian Contract Act reads:

> "Misrepresentation" means and includes (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;
>
> (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

(emphasis supplied) xxxx

323. In light of the aforesaid, we are of the view that Section 19 of the Contract Act is very clear and this case squarely falls within the ambit of the said provision. The Claimant is, thus held entitled to claim compensation from the Respondent for the losses suffered by it prior to the Appointed Date, such that it is put in the same financial position as if the Respondent had never misrepresented to the Claimant.

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337. It is important to note that the Respondent has not even denied the status of land which was in possession of the Claimant at different points in time. None of the letters, after Appointed Date, sent by the Claimant wherein the lack of adequate land was complained of, were replied to by the Respondent. Even during the course of arguments, the Respondent admitted the fact O.M.P. (COMM) No. 128/2018 Page 16 that handing over of Right of Way was indeed slow. The default of the Respondent is also expressly admitted, not just in the Provisional Certificate but also the (Final) Completion Certificate, both of which were issued after the Respondent s approval and consent.

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346. There is enough material on record to the effect that the Respondent, during the entire Construction Period, did not hand over even a single "Possession Certificate" to the Claimant. As a matter of fact the Respondent even delayed in depositing necessary amount with the competent authority under Section 3G. It also failed to ensure that the said amounts are disbursed to the landowners in a timely manner. Even as late as in February 2016, when the Final Completion Certificate was issued, the Respondent/IE had admitted that it had failed to handover Right of Way to the Claimant for certain parcels of land. Contrary to the Respondent's arguments, it was the Claimant, which on its own initiative, persuaded landowners to surrender their land- parcels, despite pendency of land acquisition proceedings at the Respondent's end."

8. The Arbitral Tribunal, relying upon Clause 48.1, has rightly held that the "Right of Way" means unrestricted access to the land such that the construction, operation and maintenance of the project highway can be undertaken in accordance with the Concession Agreement. In terms of Clause 4.1.2 (a) it was the obligation of the petitioner to procure for the Concessionaire/respondent the Right of Way to the site. In terms of Clause 10.3.2, upon the respondent achieving the financial closure, the respondent should have been granted vacant access and Right of Way to O.M.P. (COMM) No. 128/2018 Page 17 atleast 80% of the total area of the Site required and necessary for the four lane project highway.

9. In terms of Article 7.2 (a) the petitioner had represented and warranted that it has full power and authority to deliver and perform its obligations under the Agreement and carry out the transaction contemplated therein. Under Clause 7.2(g) the petitioner had warranted that it had complied with the applicable laws in all material aspect. Similarly under Clause 7.2(j) it had warranted that the petitioner has good and valid right to the site and has power and authority to grant a license in respect thereof to the Concessionaire. In terms of Clause 4.1.2(e) it was the obligation of the petitioner to procure all applicable permits relating to environmental protection and conservation of the site.

10. It is not denied that by the letter dated 06.09.2007, the Ministry of Environment and Forests (MOEF) had informed the petitioner that it will not consider the portion falling within the National Bird Sanctuary and that the petitioner should first obtain clearance from the National Wildlife Board. The petitioner however, did not take any action in accordance with this letter and instead not only floated the request for proposal but also proceeded to award the contract in favour of the respondent. It was only in the Meeting held on 12.04.2010 that the Standing Committee of National Board for Wildlife (NBWL) excluded the area falling on either side of the road within the National Bird Sanctuary (named as Package- II) and pursuant to this clearance, the petitioner advised the Team Leader by its letter dated 24.06.2010 to submit the proposal to MoEF for obtaining environmental clearance for the project. In fact, it is only by the order dated 22.07.2011 passed by the Supreme Court in I.A. No. 2882 in O.M.P. (COMM) No. 128/2018 Page 18 I.A.2342 in IA. No.2119, 1843, 1997, 2023, 2923-2925 in WP (C)202/1995, titled Central For Envir. Law, WWF-I v. Union of India & Ors., that the recommendation dated 12.04.2010 of the Standing Committee of NBWL was approved.

11. Clearly therefore, the project could not have been undertaken before the grant of such environmental clearances. The Arbitral Tribunal has held that this was not only a breach of the Conditions Precedent of the petitioner under Clause 4.1.2 thereby making Clause 4.2 applicable, but was also a fundamental breach and a case of misrepresentation under Section 18 of the Contract Act entitling the respondent to claim damages under Section 19 of the Contract Act. The Arbitral Tribunal has further held that the present case was a breach of warranty under Clause 7.2 of the Concession Agreement and therefore, Clause 4.2 shall not be applicable.

12. As noted hereinabove, in terms of Clause 10.3.1 read with 10.3.2 of the Concession Agreement, the petitioner was obliged to hand over 80% of the vacant access and Right of Way of the site prior to the Appointed Date. In the present case, the Appointed Date was declared as 28.09.2011. In the written submissions filed by the petitioner before the Arbitral Tribunal, relying upon the letter dated 13.03.2015 from the Independent Engineer, the petitioner stated that the following percentage of land was in possession of the respondent;

Arbitral Record Vol-22 "That on the facts of the instant case, 92.62% of the total project land "stood vested" and "declared" in favour of NHAI on 24.11.2011 itself. Moreover, even if the Claimant s contentions are considered (merely for O.M.P. (COMM) No. 128/2018 Page 19 the sake of the argument), then too, the documents on record clearly establish that the Claimant had sufficient land in its possession at all times. Even the IE, in its letter dated 13.03.2015, had categorically stated that the following percentages of land were in the possession of the Claimant:

1. September 2011: 4.4%

2. March 2012-25.4%

3. June 2012-33.6%

4. September 2012-40.8%

5. December 2012-60.1%

6. March 2013-65.9%

7. June 2013-68.8%

8. September 2013-71.5%

9. December 2013-75.0%

10. March 2014-75.7%"

13. A reading of the above would clearly show that the petitioner was in fundamental breach of the Agreement even in respect to its obligation under Clause 10.3.1 and

10.3.2 of the Concession Agreement. The Tribunal therefore, found that in the present case the damages cannot be confined only under Clause 10.3.4 of the Concession Agreement.

14. I do not find that the above finding of the Arbitral Tribunal warrants any interference from this Court in exercise of its power under Section 34 of the Act.

15. In Daiichi Sankyo (supra), relying upon Section 19 of the Contract Act, this Court held as under:

"37. It is also a position accepted by the parties that the petitioner has chosen not to avoid the contract and hence, damages have to be quantified under part two of the above Section, namely, he shall be put in the position, in which he would have been if the representations made had been true. What are the O.M.P. (COMM) No. 128/2018 Page 20 aspects to be considered while awarding damages under the Second Part of Section 19?

38. The Supreme Court has dealt with the second part of Section 19 of the Contract Act in the case of M/s. Trojan and Company v. Nagappa Chettiar (supra). That was a case in which the plaintiff had come into possession of property. In the hope of obtaining quick gain by speculating on the stock exchange through certain stockbrokers he entered into a series of speculative transactions. Actual facts had been misrepresented to the plaintiff on account of which the prices of shares fell drastically. The Supreme Court held as follows:-

"15. Now the rule is well settled that damages due either for breach of contract or for tort or damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Difficulty however arises in measuring the amount of this money compensation. A general principle cannot be laid down for measuring it, and every case must to some extent depend upon its own circumstance. It is, however, clear that in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the represented. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith which he had been induced to purchase by the fraud of the defendants. In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation i.e. how much worse off was his estate owing to the bargain in which he entered O.M.P. (COMM) No. 128/2018 Page 21 into. The law on this subject has been very appositely stated in McConnel v. Wright [1903 1 Ch 546] by Lord Collins in these terms:

"As to the principle upon which damages are assessed in this case, there is no doubt about it now. It has been laid down by several Judges, and particularly by Cotton, L.J. in Peek v. Derry [37 Ch D 541]; but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect to come in, but it is an action of tort - it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, prima facie, the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate final, highest standard of his loss. But, insofar as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, prima facie the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged.

16. The sole point for determination therefore in the case is whether the shares handed over to the plaintiff were an equivalent for the money paid or whether they fell short of being the equivalent and if so, to what extent. Ordinarily the market rate of the shares on the date when the fraud was O.M.P. (COMM) No. 128/2018 Page 22 practised would represent their real price in the absence of any other circumstance. If, however, the market was vitiated or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a consideration of a variety of circumstances disclosed by the evidence led by the parties. Thus though ordinarily the market rate on the earliest date when the real facts became known may be taken as the real value of the shares, nevertheless, if there is no market or there is no satisfactory evidence of a market rate for sometime which may safely be taken as the real value, then if the representee sold the shares, although not bound to do so, and if the resale has taken place within a reasonable time and on reasonable terms and has not been unnecessarily delayed, then the price fetched at the resale may well be taken into consideration in determining retrospectively the true market value of the shares on the crucial date. If there is no market at all or if the market rate cannot, for reasons referred to above, be taken as the real or fair value of the thing and the representee has not sold the things, then in ascertaining the real or fair value of the thing on the date when deceit was practised subsequent events may be taken into account, provided such subsequent events are not attributable to extraneous circumstances which supervened on account of the retaining of the thing. These, we apprehend, are the well settled rules for ascertaining the loss and damage suffered by a party in such circumstances."

39. A learned Single Judge of this Court in the case of Gaurav Monga v. Premier Inn India Pvt. Ltd. & Ors. (supra) held as follows:-

> "9. Thus, as far as India is concerned, the aforesaid provisions provide for the consequences O.M.P. (COMM) No. 128/2018 Page 23 of a pre-contract misrepresentation, which is the basis of the plaintiff's suit. Such misrepresentation makes the contract voidable at the option of the party whose consent to the contract was caused by misrepresentation and entitles that party to insist that the contract be performed and he should be put in a position in which he should have been, if the representation made had been true. However, the exception to Section 19 clarifies that if the party, whose consent to contract was caused by misrepresentation, had the means of discovering the truth by ordinary diligence, the contract is not voidable. It thus follows that even if the plaintiff's consent to accepting employment with the defendant No. 1 was caused by representations made by the defendants to the plaintiff as reproduced in the plaint and which at this stage have to be accepted as true and which have turned out to be misrepresentation, under the Indian Law, such a contract is voidable at the instance of the plaintiff and the remedy of the plaintiff is to rescind the contract of employment in accordance with Section 66 of the Contract Act or to insist that the contract be performed and that the plaintiff be put in the position in which he would have been, if the representation made had been true."

xxx "23. The field of pre-contract misrepresentation having been covered by Section 19 of the Contract Act, there can be no claim in tort on the basis thereof. Supreme Court in Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum, MANU/SC/1413/1997 : (1997) 9 SCC 552 was concerned with a claim for damages in tort on account of death owing to a roadside tree falling on the pedestrian on the way to his office. It was held that if the statute creates a right and remedy, damages are recoverable by establishing the O.M.P. (COMM) No. 128/2018 Page 24 breach of statute as the sole remedy available under the statute; but where a statute merely creates a duty without providing any remedy for breach, appropriate remedy, is inter alia the action for damages in respect of special damage suffered by an individual. It was further held that where special remedy is expressly provided, it is intended to be the only remedy and by implications excludes the resort to common law and that an action for damages will not lie if the damage suffered is not a type intended to be guarded against. A claim in tort cannot, in my opinion, be contrary to the statutory law of the land. The Legislature of our country having provided for the remedy for pre contract representation, no claim for damages for pre-contract misrepresentation can be maintained under the law of tort. A Division Bench of High Court of Bombay also, in Sorabshah Pestonji v. The Secretary of State for India: MANU/MH/0123/1927 : AIR 1928 Bom 17 (followed by me in Sikka Promoters Pvt. Ltd. v. National Agricultural Co-operative Marketing Federation of India Ltd.: MANU/DE/2026/2013 :

> (2013) 202 DLT 49, appeal where against was dismissed by Division Bench of this Court vide National Agricultural Cooperative Marketing Federation of India Ltd. v. Sikka Promoters Pvt.

Ltd. held that the only remedy of a party to a contract for omission of a material fact is one under Section 19 of the Contract Act and finding that the plaintiff therein had waited too long, the remedy of rescission was held to be no longer available and finding that the plaintiff had already been put in a position as if the representation had been true, the plaintiff was also not held entitled to relief in

that regard. The judgment of the Supreme Court of Canada in Douglas J. Queen supra on which strong reliance was placed by the counsel O.M.P. (COMM) No. 128/2018 Page 25 for the plaintiff does not show the existence, in law prevalent in Canada, of a provision as Section 19 of the Contract Act. Douglas J. Queen supra turned on a finding of existence of duty. However because of Section 19 of Contract Act there is no such duty qua matters which could have been discovered with ordinary diligence."

40. Similarly, the Nagpur High Court in Premchand v. Ram Sahai & Anr. (supra) held as follows:-

> "5. It remains however to be considered whether such misrepresentation gives the plaintiff, appellant in the present case any cause of action. I am of opinion that it does not, for two reasons :
>
> firstly, because I do not think that Ballulal was deceived by the misrepresentation and, secondly, even if he was actually deceived, I am of opinion that the exception to S. 19, Contract Act, would apply, as Ballulal had the means of discovering the truth with ordinary diligence. I would here note that under the Contract Act no distinction has been drawn as regards remedies between fraud and misrepresentation. Fraud has been defined in S. 17 of the Act and misrepresentation has been defined in S. 18 of the Act, but the remedy for both is given by the same S. 19. In English law there is a distinction between innocent misrepresentation and willful misrepresentation or fraud: as a general rule, innocent misrepresentation never gives a cause of action for damages, but it is ground for resisting an action for breach of contract or for specific performance and also for asking to have the contract set aside: see Newbigging v. A. Adam and R.S. Adam [1887] 34 Ch. D. 582 and Derry v. Peek. In the case of willful misrepresentation or fraud the injured party has two remedies: one of action for damages for deceit, which is an action in tort or ex delicto, and the other on the contract. In the second case O.M.P. (COMM) No. 128/2018 Page 26 he may treat the contract as binding and may demand fulfillment of those terms which misled him, or damages for such loss as he has sustained by their non-fulfillment, or he may avoid or repudiate the contract by taking steps to get it cancelled on the ground of fraud. He will not have any remedy however unless it can be proved that he was actually deceived.
>
> 6. Under S. 19, Contract Act, the remedy of avoiding the contract is given, and further there is a remedy that the party whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. These remedies, in substance, are the two remedies given in English law on contract in a case where consent has been induced by fraud; but both under English and Indian law it must be proved that the consent of the party who claims to avoid the contract was caused by fraud or misrepresentation and that he was actually deceived....."

41. A Division Bench of the Bombay High Court in Sorabshah Pestonji & Others v. The Secretary of State for India (supra) held as follows:-

> "13. It is, however, unnecessary for us to go into authorities on English law for it all comes back to this that under Section 19 of the Indian Contract Act the plaintiffs at most can only be entitled to be put in the same position as if the representation that was made had been true, supposing, as here, rescission is no longer open to them. In my judgment the plaintiffs had already been put in that position by Government before this suit, was ever brought. Consequently it follows that in ray judgment the conclusion arrived at by the learned O.M.P. (COMM) No. 128/2018 Page 27 District Judge was correct, and that this appeal must be dismissed with costs."

42. It would follow that the provisions of Section 19 of the Contract Act does not need much elaboration. In Gaurav Monga v. Premier Inn India Pvt. Ltd. & Ors. (supra), this court has held that if damages are recoverable by establishing a breach of statute that would be the sole remedy available. Hence, there can be no claim in tort in a case of fraud in view of the fact that the field is covered by Section 19 of the Contract Act. As this is a judgment of a Coordinate Bench of this court, it would be binding on this court.

43. Similarly, the Division Bench of the Bombay High court in Sorabshah Pestonji v. The Secretary of State of India (supra) has stated it all comes back to Section 19 of the Contract Act, and it is unnecessary to go to the authorities in English Law.

44. However, Section 19 of the Contract Act does have a grey area. The learned author Pollock and Mulla has opined that there is a lack of clarity in the said section where restitution is not literally possible.

45. This aspect was noted by the Law Commission of India in its 13th Report as follows:

> "Section 19.- The second paragraph of the section merely states what is involved in the conception of a contract being voidable. Pollock and Mulla opine that the thought underlying this paragraph is not really clear and point out cases in which restitution is not literally possible, for example, if the owner of an estate subject to a lease for an unexpired term, contracts to sell it to a purchaser who requires immediate possession and conceals the existence of the lease, the purchaser cannot be put in the same position as if the representation that there was no lease, had been true, or where A sells a house to B and by some blunder of A's agent, the annual value is represented as being Rs. 2,000 when it is in truth only Rs. 1,000. According O.M.P. (COMM) No. 128/2018 Page 28 to the letter of the present paragraph, so say the learned authors, we may insist on completing the contract and on having the difference between the actual and the stated value paid to him by A and A's successor-in-title for all time. Obviously, such could not be the intention of the Legislature. In order to clarify the intention, we suggest that a qualification be added so that the power of restitution be limited to the extent considered reasonable by the Court. In the consideration of the

this question the Court, of course, will examine, inter alia, whether it is in the power of the party against whom the contract is voidable to perform it fully."

46. Pollock & Mulla on The Indian Contract & Specific Relief Acts (15th Edition, 2017) in latest edition states as follows:

"Damages can be awarded in lieu of completion or enforcement. If the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the falsity of his own statement by way of defence or mitigation, and, if the case is a proper one for specific performance and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly. Is anything more than this meant by the declaration of the affirming party's right to 'be put in the position in which he would have been if the representations made had been true.'?

The earlier editors have opined that it is not certain that the present enactment can be literally relied upon. A sells a house to B, and by some blunder of A's agent, the annual value is represented as being Rs. 2000/- when it is in fact only Rs. 1000/-. According to the letter of the O.M.P. (COMM) No. 128/2018 Page 29 present paragraph, B may insist on completing the contract and the difference between the actual and the stated value being paid to him and his successors in title by A and A's successors in title for all time. Nothing short of that will put him 'in the position in which he would have been if the representations made had been true.' This, they had said, is not the intention of the enactment. In response to this view, the Law Commission of India recommended that the power of restitution must be limited to the extent considered reasonable by the court. It also recommended that it should be open to the Court to award compensation if it refuses to enforce the contract. While the (English) Misrepresentation Act gives power to award damages in lieu of rescission, the recommendation of the Law Commission of India has been to award compensation in lieu of performance."

47. Chitty on Contracts (32nd Edition 2015) states the principles for computation of damages by English Courts as follows:-

"Unforeseeable losses. In Doyle v. Olby (Ironmongers) Ltd., it was held that in cases of fraud the plaintiff was entitled to damages for any such loss which flowed from the defendants' fraud, even if the loss could not have been foreseen by the latter. Thus the claimant may recover not only the difference between the price paid and the value of what he received but also expenditure wasted in reliance on the contract and compensation for other opportunities passed over in reliance on it. In Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd. Lord Browne-Wilkinson described Doyle v. Olby (Ironmongers) Ltd. as restating the law correctly. He stated the principles applicable in assessing damages where O.M.P. (COMM) No.

128/2018 Page 30 a party has been induced by a fraudulent misrepresentation to buy property as follows:

"(1) The defendant is bound to make reparation for all the damage directly flowing from the transaction;

(2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction;

(3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;

(4) As a general rule, the benefits received by him include the market value of the property acquired at the date of the transaction; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;

(5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property.

(6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction;

(7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

O.M.P. (COMM) No. 128/2018 Page 31 Lost Opportunity. The points that damages for fraud will not compensate the claimant for loss of bargain but may cover loss caused by passing up other profitable opportunities are well illustrated by East v. Maurer. The plaintiffs bought a hairdressing business in reliance on a false representation that the defendant had no intention of working regularly at a second hairdressing business he owned in the same town. In fact he continued to work at the second business and the plaintiffs were forced to resell the business they had bought at a substantial loss. They were awarded damages for the difference between the price they had paid and the price they received on resale, plus expenditure wasted in attempting to improve the business and in other ways. They were also awarded the sum they could have expected to make as profit had they bought another similar business in the same area. However, they were not entitled to the higher amount they might have earned from the actual business bought had the defendant kept to his stated intention; he had not warranted that they would keep all his old customers or

that he would not compete...."

48. I may however add here that the Supreme Court in Superintendence Company of India (P.) Ltd. v. Sh. Krishan Murgai, MANU/SC/0457/1980 : (1981) 2 SCC 246 has clarified that the Contract Act is not a complete code dealing with the law relating to contracts. However, to the extent it deals with a particular subject, it is exhaustive and it is not permissible to import the principles of English Law de hors the statutory provisions unless the statute is such that it cannot be understood without the aid of English Law. The Court held as follows: -

> "25. While the Contract Act, 1872, does not profess to be a complete code dealing with the law relating to contracts, we emphasise that to the O.M.P. (COMM) No. 128/2018 Page 32 extent the Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law de hors the statutory provision, unless the statute is such that it cannot be understood without the aid of the English law. The provisions of Section 27 of the Act were lifted from Hom. David D. Field's Draft Code for New York based upon the old English doctrine of restraint of trade, as prevailing in ancient times. When a rule of English law receives statutory recognition by the Indian Legislature, it is the language of the Act which determines the scope, uninfluenced by the manner in which the analogous provision comes to be construed narrowly, or, otherwise modified, in order to bring the construction with the scope and limitations of the rule governing the English doctrine of restraint of trade.
>
> 26. It has often been pointed out by the Privy Council and this Court that where there is positive enactment of Indian Legislature the proper course is to examine the language of the statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law - or the English law upon which it may be founded. In Satyabrata Ghose v. Mugneeram Bangur, Mukherjee, J. while dealing with the doctrine of frustration of contract observed that the courts in India are to be strictly governed by the provisions of Section 56 of the Contract Act and not to be influenced by the prevailing concepts of the English law, as it has passed through various stages of the development since the enactment of the Contract Act and the principles enunciated in the various decided cases are not easy to reconcile. What he says of the doctrine of frustration under Section 56 of the Contract Act, is O.M.P. (COMM) No. 128/2018 Page 33 equally true of the doctrine of restraint of trade under Section 27 of the Act."

49. What follows from the above judgments is that a Court while awarding damages under the Second Part of Section 19 of the Contract Act would have to take care to award reasonable compensation to ensure that the plaintiff is put in the same position he would have been if the representation had been true. The loss awarded must be a natural and direct consequence of the illegal acts done by the defendant. Remote damages suffered cannot be awarded. The plaintiff would have a duty to mitigate the damages. No general principles can be laid down for quantifying damages and every case must to some extent depend, on its own circumstances.

50. I may add here regarding the reliance of the award on a judgment of the Division Bench of the Gujarat High Court in M/s. R.C. Thakkar v. The Gujarat Housing Board, (supra). The Arbitral Tribunal has concluded based on this judgment that the damages recoverable by a party defrauded under Section 19 of the Contract Act would be similar to those recoverable for fraudulent misrepresentation under general tort principles. The respondent had pleaded that this judgment of the Gujarat High Court had been overruled by the Supreme Court in Civil Appeal No. 2652/1972 dated 18.11.1986.

In my opinion, this controversy is not relevant. It is true that the judgment of the Division Bench of the Gujarat High Court was set aside by the Supreme Court as noted above. However, the judgment of the Supreme Court was confined to overturning the findings on facts of the Gujarat High Court that a fraud had been committed. The Arbitral Tribunal has noted that the measure of damages recoverable by a defrauded party under Section 19 would be the same as those recoverable for fraudulent misrepresentation under general tort principles. This position adopted by the Arbitral Tribunal is no doubt contrary to the judgment O.M.P. (COMM) No. 128/2018 Page 34 of this court in Gaurav Monga v. Premier Inn India Pvt. Ltd. & Ors (supra) where this court has taken a view that a case seeking damages on fraud and misrepresentations would be covered by Section 19 of the Contract Act and no claim for damages can be maintained under law of torts. The award, however also notes that the plaintiff is entitled to be put back in the position he would have been, had the wrong not been committed i.e. if the representations were true. It also concludes that in most cases, the measure of damages will effectively result in the same quantification as breach of torts claims. Hence, this controversy need not detain me as the Arbitral Tribunal has kept in view the provisions of section 19 of The Contract Act."

16. I have quoted the above judgment in detail as this Court has, in reaching its conclusion, relied upon various precedents, which need not be repeated here for the sake of brevity.

17. The learned senior counsel for the petitioner, only in his rejoinder submissions, submitted that, in fact, the plea relying upon Section 19 of the Contract Act had not been specifically pleaded by the respondent before the Arbitral Tribunal. He has drawn my attention to the Statement of Claim filed by the respondent before the Arbitral Tribunal to contend that the respondent had infact based its claim on Clause 4.2 and 10.3.4, though additionally claiming damages under 35.2 of the Concession Agreement. He submitted that, therefore, the Arbitral Tribunal has proceeded to grant relief in favour of the respondent more than what had been claimed for by the respondent itself.

18. On the other hand, the learned senior counsel for the respondent submits that the respondent had made all necessary pleadings for O.M.P. (COMM) No. 128/2018 Page 35 substantiating its claim under Section 19 of the Contract Act before the Arbitral Tribunal. Once all factual averments had been made, the remaining was only a question of law to be applied. Further, drawing my attention to the written submissions filed before the Arbitral Tribunal, he submits that not only did the respondent base its claim on Section 19 of the Contract Act but also the petitioner responded to the same, therefore, it is not as if the petitioner has been taken by surprise. He further submits that in the present petition, there is no ground urged by the petitioner challenging the Award for purported lack of pleading by the respondent before the Arbitral Tribunal. He submits that in the absence of

such a ground in the petition, the petitioner cannot be heard to raise such a plea before this Court.

19. I have considered the submissions made by the learned senior counsels for the parties. Having perused the contents of the written submissions filed by the parties before the Arbitral Tribunal it is clear that the petitioner was well aware of the case being set up by the respondent before the Arbitral Tribunal.

20. In Bhagwati Prasad v. Chandramaul, (1966) 2 SCR 286 the Supreme Court has held that though a plea is not specifically taken in the pleadings, the same would not necessarily disentitle a party from relying upon it if the other party knew the said plea was involved in the trial and had the opportunity to meet the same. I may only quote paragraph 10 of the judgment as under:

> "10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of O.M.P. (COMM) No. 128/2018 Page 36 substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

21. The above judgment was followed by the Supreme Court in Ram Sarup Gupta (Dead) by LRs v. Bishun Narain Inter College and Ors., (1987) 2 SCC 555, which in turn was approved in Smt. Rajbir Kaur and Anr. v. M/s S.Chokesiri and Co. (1989) 1 SCC 19.

22. It is further important to note that in the present petition, the petitioner urged no such ground of lack of pleadings to challenge the O.M.P. (COMM) No. 128/2018 Page 37 Award. Infact, as noted above, this argument has been taken only while making oral arguments in the rejoinder.

23. The Bombay High Court in its judgment dated 04.06.2007 passed in Appeal [Lodging] No. 1002/2006 in Arb. P. No.351/2005 titled M/s Thanikkudam Bhagwati Mills Ltd. v. Mrs.Reena Ravindra Khona & Ors. has held as under:

> "9. It is well-settled law that a petitioner challenging an award under the provisions of the said Act has to raise all the grounds of challenge in the petition so filed. In the absence of ground being specifically raised in the petition filed under Section 34, the petitioner is not entitled to canvass any ground extraneous to those grounds enumerated in such petition and those which are not reflected from the pleadings in the petition....."

24. In view of the above I find no merit in the objections raised by the learned senior counsel for the petitioner.

25. The learned senior counsel for the petitioner has further placed reliance on the Supplementary Concession Agreement dated 12.03.2012 executed between the parties. He submits that this Supplementary Agreement was executed between the parties pursuant to the letter dated 09.01.2012 addressed by the respondent to the petitioner agreeing to waive off the damages for delay in fulfilling Conditions Precedent by the petitioner under Clause 4.2 of the Concession Agreement as a quid pro quo for the petitioner waiving its claim for damages on the respondent for the delay in achieving the financial closure as per Clause 4.3 of the Concession Agreement. He submits that in view of such waiver, the claim of the respondent for the delay in petitioner s achieving Conditions O.M.P. (COMM) No. 128/2018 Page 38 Precedent under Clause 4.1.2 read with Clause 4.2 of the Concession Agreement could not have been granted by the Arbitral Tribunal.

26. On the other hand, the learned senior counsel for the respondent submits that the offer made by the respondent in its letter dated 09.01.2012 had been rejected by the petitioner by its letter dated 24.01.2012 and, infact, a proposal for reduction in the Construction Period and the Concession Period was proposed by the petitioner. The Supplementary Agreement was executed between the parties thereafter, giving effect to the said proposal and therefore cannot amount to a waiver of the rights of the respondent. He further submits that in any case, the letter dated 09.01.2012 had been written under economic duress and the Arbitral Tribunal, on appreciation of evidence has accepted the said plea of the respondent, which cannot be interfered with by this Court under Section 34 of the Act. He submits that there is no Clause 4.3 in the Concession Agreement which would have entitled the petitioner to levy any penalty on the respondent and, therefore, the plea of quid pro quo is totally baseless.

27. I have considered the submissions made by the learned senior counsels for the parties. The Arbitral Tribunal has also considered the issue of the letter dated 09.01.2012 and the Supplementary Agreement and has held as under:

> "307. In relation to the controversy surrounding the waiver letter dated 09.01.2012 and the Supplementary Agreement dated 12.03.2012, we feel that this issue need not be deliberated much in light of the fact that learned Senior Counsel for the Claimant had, fairly, conceded on O.M.P. (COMM) No. 128/2018 Page 39 the claims under Clauses 4.2 and 10.3.4. However, a few passing observations in this regard may be made:

a) Firstly, the Respondent's contention that a waiver need not have a valid consideration is well founded.

It is a settled law that under Section 63 of the Indian Contract Act, a promisee may dispense with or remit, wholly or in part, the performance of promise made to him or he can accept instead of it any satisfaction which he thinks fit. No consideration is necessary to constitute a waiver. This principle has been well settled in the case of Jagad Bandhu Chatterjee vs. Smt Nilima Rani ((1969) 3 SCC

445). As such the Claimant's contention that the waiver letter is unenforceable as there is no Clause 4.3 in the Concession Agreement is not tenable. We are also inclined to believe that it was indeed a typographical error and that it ought to have referred to Clause 4.1.3.

b) Secondly, we also feel that the Respondent is correct in its contention that the Claimant had not achieved Financial Close within the stipulated time frame of 180 days and hence, the waiver letter was indeed a quid pro quo arrangement. The Claimant, no doubt, entered into its Financing Agreement with its lenders and intimated the same to the Respondent on 15.02.2010, which was well within the contractual timeframe of 180 days. However, the Claimant failed to establish that it had satisfied, to the satisfaction of its lenders, the conditions precedent to the drawdowns as stipulated in the Common Loan Agreement, (which is how Financial Close is defined in Clause 48.1 of the Concession Agreement, before the 180 day time limit. From the documents on record of these proceedings, it appears that the said conditions were satisfied, to the satisfaction of the lenders, only on 07.06.2010 when the disbursement notice was issued by the O.M.P. (COMM) No. 128/2018 Page 40 Lead Bank i.e. Bank of India. Hence, even though Financial Close was achieved long before the Appointed Date was eventually declared, the fact remains that the Claimant had not achieved Financial Close within the 180 day time period.

c) The Claimant's contention that the waiver letter was issued under economic duress, however, seems to have some merit. The material on record, particularly the Monthly Progress Reports, clearly reflects that the Claimant had indeed started mobilizing its resources long before the Appointed Date. Obviously, the Claimant had to incur financial expenditure towards the same, which fact is also established from the drawdown notice issued by the Lead Bank. The escrow account/current account statements filed by the Claimant also suggest that it had incurred expenditure well before the Appointed Date was declared. The Claimant has correctly contended that economic duress does not only relate to "lack of will" but also a realization that there is "no practical choice" open to the victim. This principle is well settled in the House of Lord's decision in Universe Tankships Inc of Monrovia vs. International Transport Workers Federation & Others, (1983) 1 AC 366, which principle has also been followed and applied by the Delhi High Court in the case of Puri Construction P. Ltd vs. Larsen & Tubro (2015 SCC OnLine Del 9126, FAO (OS) 21/2009).

d) As regards the Supplementary Agreement dated 12.03.2012, we may observe that, pursuant to Clause 2 of the said agreement, the parties had agreed to reduce a period of 70 days each from the Concession Period and the Construction Period. Further, Clause 5 of this Supplementary Agreement states that "the Concessionaire shall not claim for any direct and indirect loss including interest

O.M.P. (COMM) No. 128/2018 Page 41 arising out of this Event during the period mentioned in Clause 2 of this Agreement". Clearly, the "Event" referred to in Clause 5 pertains to reduction of Construction and Concession Periods. The Claimant has not sought any compensation which conflicts with Clause 5, a fact which was also admitted by the Respondent during the course of arguments, as well as in its Written Submissions. Hence, the Supplementary Agreement does not hold much relevance in the adjudication of the disputes.

e) Be that as it may, the Claimant has admittedly conceded on its claims under Clause 4.2 and 10.3.4, and hence, we may not proceed any further on this issue."

28. A reading of the Supplementary Agreement also does not substantiate the arguments made by the learned senior counsel for the petitioner. The Supplementary Agreement was confined only to the reduction of the Concession Period and the Construction Period, with the respondent forgoing any claim arising out of "this event". The same certainly would have no effect on the claims of either party arising out of defaults of each other till that date.

29. As far as the finding of economic duress by the Arbitral Tribunal is concerned, learned senior counsel for the petitioner has submitted that the resources, if any, spent by the respondent prior to the Appointed Date, were at its own peril and therefore could not have been made the basis for claiming economic duress. He further submits that even as per the case of the respondent, the respondent became aware of the issue of lack of permission from the National Wildlife Board sometime in June 2010. The respondent, therefore, should not have spent any resources on the project beyond that date and even if it did, it cannot claim economic O.M.P. (COMM) No. 128/2018 Page 42 duress against the petitioner for having done so and further, claim damages from the petitioner for the same. He submits that not only has the Arbitral Tribunal, therefore, erred in accepting the plea of the respondent of economic duress but also in awarding damages in the form of under utilised and idle resources prior to the Appointed Date.

30. On the other hand, learned senior counsel for the respondent submits that the project was divided into three stages; Development Period; Construction Period and Operation Period. The Development Period was the period from the date of the Agreement until the Appointed Date. Within this period and in terms of Clause 12.1 of the Concession Agreement, the respondent was not only to carry out various activities in relation to the preparation for construction, but was also to achieve financial closure and in terms of Schedule G (Project Completion Schedule) expend not less than 10% of the total capital cost set forth in the Financial Package. He further submits that in fact, the Team Leader appointed for the project had been insisting upon the respondent to carry out various works prior to the Appointed Date and therefore, it is not open to the petitioner to dispute the claim of the respondent on this account.

31. I am in agreement with the submissions made by the learned senior counsel for the respondent. As noted above, the Arbitral Tribunal has accepted the plea of the respondent of economic duress in execution of the Supplementary Agreement. In reaching this conclusion, the Arbitral Tribunal has placed reliance on the Monthly Progress Report, Drawdown Notice issued by the Lead Bank and the Escrow Account/Current Account Statements. The said finding of the Arbitral Tribunal cannot be

O.M.P. (COMM) No. 128/2018 Page 43 said to perverse or unreasonable so as to warrant any interference by this Court in exercise of its power under Section 34 of the Act. The same being a finding of fact on the basis of evidence led by the parties does not warrant any interference of this Court as if sitting as a court of appeal.

32. Learned senior counsel for the petitioner has further challenged the award of damages on account of loss of toll revenue. Relying upon Clause 35.2 of the Concession Agreement, he submits that the loss of toll revenue was specifically excluded from damages to be awarded on the petitioner being found to be in material default or breach of the Agreement after the Appointed Date. He submits that the award of such damages, therefore, was in breach of the contractual terms and cannot be sustained.

33. On the other hand, learned senior counsel for the respondent has again drawn support from Section 19 of the Contract Act. Relying upon the chart showing the handing over of the land to the respondent, he submits that the present was not only a case of breach of the terms of the Agreement, but was also a case of misrepresentation. He further submits that for Clause 35.2 to come into operation at least 80% of the land should have been handed over to the respondent at the time of the Appointed Date, however, as noted from the chart reproduced hereinabove, this was not so. He further submits that the Arbitral Tribunal having interpreted the terms of the contract, it would not be open to this Court to interfere with such findings.

34. Before I proceed to examine the submissions made by the learned senior counsel for the parties, the findings of the Arbitral Tribunal on this issue are reproduced hereinblow:

O.M.P. (COMM) No. 128/2018 Page 44 "396. Having duly considered the submissions of the parties and the contractual provisions, we are of the view that the claim for the said loss of toll revenues is justified, even though we disagree on the method of computation adopted by the Claimant in relation thereto. Our reasons for the same are as follows:

> a) Clause 35.2, no doubt, states that compensation payable by the Authority/ Respondent shall "not include loss of Fee revenues". However, this expression needs to necessarily pertain to the difference between the toll fees that the Concessionaire would have ordinarily collected on entire stretch of the Project Highway, as against the toll fees that the Concessionaire actually collected (or in case the collection was suspended) for reasons attributable to the Authority's material default. This is the reason why Clause 35.3 permits the Concessionaire to claim an extension of Concession Period such that the said loss of toll fees could be recouped over a span of time. The prohibition in Clause 35.2 does not address situations like the present case, where commercial operations were commenced only on a portion of the Project Highway, and the Claimant could collect toll only on that portion, thereby being deprived of the toll fee for the balance stretch of the Highway.

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402. In these facts and circumstances, we are of the considered view that the Claimant is entitled to claim compensation for the losses suffered by it on account of partial commercial operations of the Project Highway. The Respondent's contention that the Claimant got the "benefit" of toll fee before the Scheduled Four Laning Date lacks merit. At the time the Concession Agreement was signed, the Project was scheduled to be completed by September 2012. Had the Respondent not breached its Representations, and moreover had the Respondent handed over the Right of Way within the contractually O.M.P. (COMM) No. 128/2018 Page 45 stipulated timeframe, the Claimant could have commenced collecting toll fees from September 2012. However, given that the Appointed Date itself was declared as late as in March 2012 with effect from 28.09.2011, the Construction Period got significantly delayed. The Claimant became entitled to collect toll fee, that too, only for a portion of the Project Highway as late as in end-August 2013. It was perhaps because the Claimant was proactive in undertaking construction works (on the Right of Way available with it any point of time) that the Provisional Certificate for 80.85 Kms was issued before the 840 day timeline. The Claimant cannot certainly be penalized for this effort. Moreover, the Claimant's grievance is not that it collected lesser toll on the 80.85 Kms stretch of the Project Highway. On the contrary, the Claimant's grievance is that it was deprived of the toll fees for the balance stretch of the Project Highway, which resulted in financial losses to the Claimant. The Respondent's contention, thus, is devoid of merit."

35. In the present case, as noted above, due to the petitioner not even approaching the National Wildlife Board for permission to carry out the work on project in spite of being well aware of requirement of such permission prior to issuance of the Request for Proposal as also the fact that the petitioner was in fundamental breach of the Agreement in handing over the Right of Way on the site to the respondent, the finding of the Arbitral Tribunal cannot be faulted.

36. The learned senior counsel for the petitioner next challenged the award of damages in favour of the respondent on account of the delay in the issuance of Provisional Certificate. He submits that it was only on 15.07.2013 that the Independent Engineer sought petitioner s approval for issuance of the Provisional Certificate. The same was issued by the O.M.P. (COMM) No. 128/2018 Page 46 petitioner on 23.08.2013, though the tolling could commence only on 31.08.2013. He submits that therefore, the delay between 23.08.2013 to 31.08.2013 was not attributable to the petitioner and the petitioner cannot be called upon to compensate the respondent for the same.

37. On the other hand, the learned senior counsel for the respondent has drawn my attention to the Statement of Defence filed by the petitioner before the Arbitral Tribunal wherein the petitioner itself had calculated the loss in toll revenue till 31.08.2013. He submits that the petitioner, therefore, cannot be heard in challenge to the said Award.

38. I am in agreement with the submission made by the learned senior counsel for the respondent. In the Statement of Defence filed before the Arbitral Tribunal the petitioner itself had shown calculation of damages by taking 30.08.2013 as the outer date. The petitioner only challenged this claim on the merit of the claim, which was rejected by the Arbitral Tribunal. Infact, as far as the calculation of such claim is concerned, the Arbitral Tribunal has placed reliance on the formula suggested by the petitioner and therefore, the petitioner cannot be heard in challenge to the same.

The relevant finding of the Arbitral Tribunal on this issue is reproduced herein below:

> 417. The Respondent, without prejudice, had furnished its own method of computation which was based on the "actual" toll fee collected by the Claimant in the month of September 2013. On this basis of the average daily toll was calculated, which was thereafter multiplied with 46 days (being the delay in commencement of toll collection) to arrive at a figure of Rs. 7.42 Crore.
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> 418. We feel that this method of computation is fair and reasonable. As against Claim Head III (E)(i) wherein the O.M.P. (COMM) No. 128/2018 Page 47 issue pertains to Claimant's inability to collect toll fees on the entire stretch of the Project Highway, the instant Claim Head III (E) (ii) pertains to the loss of toll collection on the same stretch of 80.85 Kms on which the tolling activities commenced belatedly. Hence, the toll actually collected in the month of September 2013 can be used to fairly arrive at an estimate of the loss of toll revenue for the period from 15.07.2013 till 31.08.2013.

On behalf of the Claimant also, during argument, this method of computation adopted by the Respondent was accepted to be fair one.

419. Accordingly we award a sum of Rs. 7.42 Crore to the Claimant towards Claim Head III (E) (ii) and the prayer for Claim Head III (E) (ii) is allowed to that extent."

39. The petitioner further challenges the Award of "Programme Management Fee" paid by the respondent to IL & FS Transportation Network Limited (ITNL), which is respondent s promoter company. Relying upon Recital (F) and (G) and Clause 7.1 (a) of the Concession Agreement, the learned senior counsel for the petitioner submits that not only was the respondent substituted for ITNL at the request of ITNL and the respondent, but also represented that it has full wherewithal to carry out its obligation under the Agreement. Therefore, the petitioner could not have been made liable for compensating the respondent of any amount paid to ITNL by the respondent.

40. On the other hand, learned senior counsel for the respondent has drawn my attention to the Letter of Award dated 27.08.2009 whereunder the petitioner had called upon ITNL to incorporate a Special Purpose Vehicle (SPV) solely for the purpose of domiciling the project. He further submits that the Agreement between the respondent and ITNL is O.M.P. (COMM) No. 128/2018 Page 48 not only a Project Agreement as defined in the Concession Agreement but was also specifically approved by the petitioner by its letter dated 23.07.2010. Therefore, in his submission, the claim has rightly been allowed by the Arbitral Tribunal.

41. I am in agreement with the submission made by the learned senior counsel for the respondent. The Arbitral Tribunal in the Impugned Award has relied upon the fact that not only was the Agreement between the respondent and the ITNL in knowledge of the petitioner but, the petitioner had even acknowledged the extension of the tenure of the same and, therefore, the petitioner was aware of the additional expenditure that the respondent had to bear on the extension of the Construction Period. The same was therefore, awarded as damages under Clause 35.2 of the

Concession Agreement. I do not find the above finding of the Arbitral Tribunal to be incorrect in any manner.

42. The last challenge of the petitioner is to the award of cost of Additional Premium Amount paid by the respondent towards renewal of its Insurance Policy during the Construction Period. The submission made is again based on the purported waiver letter dated 09.01.2012 and the Supplementary Agreement dated 12.03.2012.

43. I have already considered the effect of the above letter and the Supplementary Agreement and, therefore, find no merit in the challenge.

44. In view of the above, I find no merit in the above petition. The same is dismissed with cost quantified as Rs.75,000/-.

NAVIN CHAWLA, J

MARCH 14, 2019/rv/vp