



\* IN THE HIGH COURT OF DELHI AT NEW DELHI

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*Judgment Reserved on: 5<sup>th</sup> February, 2026*

*Judgment pronounced on: 13<sup>th</sup> February, 2026*

+ O.M.P. (COMM) 279/2019

IRCON INTERNATIONAL LTD. ....Petitioner

Through: Mr. Gaurav Pachnanda, Senior Advocate with Mr. Siddhant Goel, Mr. Mohit Goel, Mr. Karmanaya Dev Sharma, Ms. Aishna Jain and Mr. Shashwat, Advocates.

versus

AFCONS INFRASTRUCTURE LTD. ....Respondent

Through: Mr. Manu Sheshadri, Mr. Sahil Manganani, Ms. Prachi Jain and Mr. Siddharth Shekhar, Advocates.

**CORAM:**  
**HON'BLE MR. JUSTICE AMIT BANSAL**  
**JUDGMENT**

**AMIT BANSAL, J.**

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'Act') on behalf of the respondent/counter claimant in the arbitration proceedings challenging the Award dated 5<sup>th</sup> March 2019 (hereinafter '***Impugned Award***') passed by the Arbitral Tribunal. The petitioner herein (respondent/ counter claimant in the arbitration proceedings) shall hereinafter be referred to as '***IRCON***' and the respondent herein (claimant in the arbitration proceedings) shall hereinafter be referred to as '***AFCONS***'.



2. The Impugned Award was rendered while adjudicating the disputes between the parties arising out of a Contract dated 14<sup>th</sup> March 2014.

### **FACTUAL BACKGROUND**

3. Brief facts leading to the present petition are as under:

3.1. IRCON is a leading government turnkey construction company in the public sector.

3.2. The Government of India planned a railway line for joining the Kashmir valley with the Indian Railways network. For the purpose of execution/ monitoring, the work was sub-divided into four parts, out of which execution of the Katra – Banihal (111 km) tunnel was divided among three agencies in the following manner:

- Northern Railway (5 km)
- KRCL (35 km)
- IRCON (71 km)

3.3. Accordingly, IRCON, on 25<sup>th</sup> July 2013, invited bids for participation in tenders for ***construction of Tunnel T-74R balance work from ADIT between km 127/660 to km 130/950 (length 3290 meters) on Dharam-Qazigund section of Udhampur-Srinagar-Baramulla New BG Railway Line project (Package T-74R-A)*** (hereinafter ‘**Project**’).

3.4. The Project was divided into five parts – construction of ADIT (585 meters), main tunnel Banihal (1940 meters), main tunnel Katra (1350 meters), escape tunnel Banihal (1940 meters) and escape tunnel Katra (1350 meters).

3.5. The Project was required to be completed within thirty-three months from the date of issuance of letter of acceptance and the milestones in the



form of 'key dates' indicated in Appendix-XV to Instruction to Tenderer(s) (hereinafter '**key dates**'/ '**KD**') were to be duly achieved.

3.6. The tender documents disclosed the geological and other problems which could be faced by the Contractor and detailed the provisions for requisite compensation with respect to the same.

3.7. Subsequently, IRCON issued Corrigendum no.1 to the tender documents dated 7<sup>th</sup> August 2013 modifying certain functional requirements as provided in Special Conditions of Contract – Section IIA, which was duly accepted and signed by AFCONS.

3.8. AFCONS, on 13<sup>th</sup> September 2013, offered its bid for the Project.

3.9. IRCON, *vide* its letter dated 25<sup>th</sup> October 2013, sought confirmation from AFCONS with respect to adherence to tender stipulated rate of progress.

3.10. AFCONS, *vide* its letter dated 29<sup>th</sup> October 2013, submitted progress rate and time cycle for different rock classes anticipated. The said progress rate and time cycle calculation in the said letter were not in consonance with the stipulated period of completion of the Project provided in the tender documents. However, AFCONS duly confirmed and undertook that on encountering the same rock mass, it would achieve the desired rate of progress, *i.e.*, 95 meters per month in the main tunnel and 110 meters per month in the escape tunnel. This confirmation was in line with the aforesaid Corrigendum no.1 dated 7<sup>th</sup> August 2013. Therefore, the aforesaid undertaking given by AFCONS was accepted by IRCON.

3.11. The bid of AFCONS was accepted *vide* the Letter of Acceptance dated 20<sup>th</sup> January 2014. Thereafter, the parties entered into a Contract dated



14<sup>th</sup> March 2014 (hereinafter ‘*Contract*’) pursuant to which IRCON engaged AFCONS as a sub-contractor for the Project.

3.12. There was a delay in completion of the Project and in achieving the ‘key dates’ as per the terms of the Contract.

3.13. *Vide* letter dated 14<sup>th</sup> August 2014, AFCONS sought extension of time of KD-03 for 171 days from 1<sup>st</sup> August 2014 as per Clause 27 of the Special Conditions of Contract-I on the following grounds:

- a. Adverse/ unanticipated geology (rock mass/ class changes)
- b. Inclement weather conditions including exceptional rainfall
- c. Law and order issues

3.14. *Vide* letter dated 5<sup>th</sup> January 2015, IRCON informed AFCONS that the liquidated damages for delay in achieving ‘key dates’ by scheduled target shall be recovered from RA Bills as per clause 27.6 of Special Conditions of Contract-I.

3.15. *Vide* letter dated 2<sup>nd</sup> July 2015, the extension of time of KD-03 was approved by the Competent Authority for 21 days. Further, since KD-04 to KD-07 were also dependent on KD-03, the said key dates were also extended by 21 days.

3.16. Further, liquidated damages of Rs. 2,67,05,797/- were recommended to be imposed for the period of delay beyond the extended period of 21 days.

3.17. AFCONS thereafter invoked the arbitration clause on 19<sup>th</sup> November 2016 and the Arbitral Tribunal was constituted on 18<sup>th</sup> September 2017.

3.18. AFCONS filed its statement of claim dated 31<sup>st</sup> October 2017 before the Arbitral Tribunal seeking the following reliefs:

- (i) Claim no.1(A) – an overall extension for delays in the work upto 15<sup>th</sup> September 2016 without imposition of liquidated damages



- (ii) Claim no.1(B) – declaration of imposition of liquidated damages as illegal and void
- (iii) Claim no.2 – refund of liquidated damages of Rs. 9,69,18,488/- deducted by IRCON and a declaration that no further liquidated damages is deductible
- (iv) Claim no.3 – release of bank guarantee for a sum of Rs. 14,12,91,941/- submitted against liquidated damages imposed by IRCON
- (v) Claim no.4 – bank guarantee charges of Rs. 3,04,659/- paid by AFCONS for procuring the bank guarantee against liquidated damages imposed by IRCON
- (vi) Claim no.5 – refund of Rs. 74,77,654/- deducted over and above liquidated damages towards interest charges and a declaration that no such amount is further deductible
- (vii) Claim no.6(A) and 6(B) – interest
- (viii) Claim no.7 – cost of arbitration

3.19. On 1<sup>st</sup> December 2017, IRCON filed its statement of defence and counter claims before the Arbitral Tribunal for additional costs towards intentional delay on the part of AFCONS as well as interest and costs.

3.20. AFCONS filed its rejoinder and statement of defence to the counter claim of IRCON. IRCON thereafter filed its rejoinder to the statement of defence filed by AFCONS.

4. *Vide* the Impugned Award, the Arbitral Tribunal unanimously allowed the claims of AFCONS and awarded as under:



- (i) Towards Claim no.1(A) – granted extension of 484 days upto 15<sup>th</sup> September 2016 to AFCONS holding that the delay was not attributable to it
- (ii) Towards Claim no.1(B) – declared that the decision of IRCON with respect to imposition of liquidated damages on account of delay was illegal and void
- (iii) Towards Claim no.2 – directed IRCON to release the bank guarantee of Rs. 9,69,18,466/- submitted by AFCONS in favour of IRCON against the refund of liquidated damages
- (iv) Towards Claim no.3 – directed IRCON to refund the bank guarantee of Rs. 14,12,91,941/- submitted by AFCONS to IRCON

5. The Claims no.4, 5, 6(A), 6(B) and 7 were rejected by the Arbitral Tribunal.

#### **RELEVANT PROCEEDINGS**

- 6. Counsel for AFCONS entered appearance on the first date of hearing and accepted notice.
- 7. Arguments were heard on behalf of the parties and the predecessor bench pronounced the judgment on 26<sup>th</sup> April 2023 dismissing the petition.
- 8. IRCON preferred an appeal, being FAO(OS)(COMM) 124/2023, against the aforesaid judgment under Section 37 of the Act.
- 9. After some arguments before the division bench, counsel for the parties agreed that the aforesaid judgment be set aside and the matter be remanded to the single bench.
- 10. Accordingly, *vide* order dated 2<sup>nd</sup> April 2025, the aforesaid judgment was set aside and the matter was restored before the single bench for a fresh consideration.



11. Submissions were heard on behalf of the parties on 25<sup>th</sup> August 2025, 15<sup>th</sup> September 2025, 7<sup>th</sup> November 2025 and 5<sup>th</sup> February 2026, when the judgment was reserved.

### **SUBMISSIONS ON BEHALF OF IRCON**

12. Mr. Gaurav Pachnanda, senior counsel appearing on behalf of IRCON, has made the following submissions:

12.1. The Arbitral Tribunal allowed an extension of 484 days for excavation of main tunnel Banihal (KD-14) and, based on an incorrect assumption that completion of the said work is a ‘critical path’, held that the said extension would be applicable to completion of work in the other tunnels as well. Thus, a uniform extension has been granted by the Arbitral Tribunal for all four tunnels. This is despite the observation of the Arbitral Tribunal that the work in the other tunnels is independent in nature and the same would be completed before completion of work in the main tunnel Banihal.

12.2. In granting a uniform extension of time for all four tunnels, the Arbitral Tribunal has ignored the fact that the rock class and time cycle for the said tunnels are different.

12.3. The Contract has no provision for ‘critical path’ and makes it clear that construction of all four tunnels is independent of each other with separate ‘key dates’ (defined in Appendix XV) for their respective completion. Accordingly, extension of time should have been calculated independently based on length and geological conditions encountered. Thus, the Impugned Award is contrary to the provisions of the Contract and the Arbitral Tribunal has re-written the terms of the Contract.



12.4. AFCONS itself had requested for independent extension of time for different tunnels (*paragraph 41(i)(c) of Statement of Claim*) and there was no pleading for applying the concept of 'critical path'.

12.5. The effect of granting a uniform extension is that the extension granted for the other tunnels is much beyond what was sought by AFCONS in its own letter dated 24<sup>th</sup> October 2016.

12.6. IRCON had duly considered the difference between the anticipated geology and the actual geology and had granted reasonable extensions of time to AFCONS having regard to the nature and period of delay and the type and quantum of work affected thereby. Further benefits due to unfavourable weather conditions, law and order issues and additional works done for the Project were also given to AFCONS.

12.7. The methodology given in the Contract for calculation of time to be extended based on the anticipated geology and the actual geology encountered was duly accepted and signed on behalf of AFCONS. However, the Arbitral Tribunal completely ignored the said calculations while working out the permissible extension of time.

12.8. The drawing supplied at the time of tendering was only indicative in nature and not final. Thus, the Arbitral Tribunal erred in holding that the undertaking given by AFCONS to achieve the desired rate of progress would be inapplicable once the geological attributes of work were admittedly different from the contract drawings.

12.9. The Arbitral Tribunal only relied upon the progress rate given in the letter dated 29<sup>th</sup> October 2013 issued by AFCONS to calculate the extension of time. However, as per the Contract, Instructions to Tenderer(s) and Appendices would have priority over the proposal submitted by the tenderer.



Thus, Appendix XV would have a priority over the letter dated 29<sup>th</sup> October 2013 issued by AFCONS.

12.10. The delay claimed by AFCONS on the alleged ground of law and order issues are primarily related to workers strike for several reasons. The said delays pertain to poor management on the part of AFCONS and are neither *force majeure* conditions nor owe to any default on the part of IRCON. Thus, AFCONS is not entitled to any extension of time on account of the same.

12.11. The Contract does not contain any provision restricting IRCON from deducting liquidated damages without deciding extension of time. IRCON had therefore the right to impose liquidated damages pending decision on extension of time. Reliance is placed on Clause 27.6(vii) of Special Conditions of Contract-I.

12.12. AFCONS, *mala fide*, did not place on record the minutes of meetings and various letters of IRCON complaining about the slow work progress on the part of AFCONS. The Arbitral Tribunal erred in ignoring the stand of IRCON with regard to such minutes of meetings and letters.

12.13. The Impugned Award disregards the fact that AFCONS was employed under the Contract for construction of a public utility project in which case loss caused by delay is to be presumed. Instead of calling upon AFCONS to prove otherwise, the Impugned Award makes a reverse presumption of no loss suffered by IRCON.

12.14. The question of extension of time under the Contract is not a question of fact but a question of non-implementation of the formula agreed upon by the parties to calculate the extension of time.

#### **SUBMISSIONS ON BEHALF OF AFCONS**



13. Mr. Manu Seshadri, counsel appearing on behalf of AFCONS, has made the following submissions:

13.1. The Arbitral Tribunal granted extension of 484 days for completion of work in the main tunnel Banihal and since the same was the last portion of work to be completed, it was held that work in other tunnels was also to be completed within those 484 days. Thus, no additional extension of time was granted, or even required, for the remaining tunnels.

13.2. In any event, any additional extension of time would have overlapped with the extension of time granted for the main tunnel Banihal and would have led to double-counting.

13.3. The determination of 'critical path' is key in determining extension of time to be given in any complex engineering project. Further, the Arbitral Tribunal's interpretation of the 'critical path' of the Project was in line with the 'key dates' provided under the Contract.

13.4. The Contract provided that after completion of work in ADIT, work in the main tunnel Banihal was required to be completed. As any delay in execution of the main tunnel Banihal would have impacted the timeline for completion of the entire Project, KD-14 (excavation of main tunnel Banihal) was considered to be on the 'critical path' of completion which, if impacted, would have affected the completion of other parts of the Project as well.

13.5. The Arbitral Tribunal granted extension of time for excavation of main tunnel Banihal (KD-14) upto 484 days as against the extension sought for 504 days for delay upto 15<sup>th</sup> September 2016. Thus, extension of time granted to AFCONS was neither beyond what was sought by it nor was it beyond the cut-off date of 15<sup>th</sup> September 2016.



13.6. The delay in completion of the Project was not attributable to AFCONS. Prior to entering into the Contract, *vide* its letter dated 29<sup>th</sup> October 2013, AFCONS replied to the queries raised by IRCON and provided an estimated rate of progress and time cycle for execution of the Project. Accordingly, it had sought extension of time *inter alia* on account of the different geology/ rock class encountered instead of the one anticipated by the parties.

13.7. IRCON admittedly granted extension of time for delay on account of adverse geology, additional works, inclement weather and law and order issues. Thus, at this stage, IRCON cannot be permitted to object to consideration of such factors by the Arbitral Tribunal while granting extension of 484 days. Hence, the only question remained before the Arbitral Tribunal was whether the extension of time was granted in terms of the Contract.

13.8. The methodology adopted by IRCON in calculating the additional time to be granted was wrong. In any event, IRCON cannot seek to replace its interpretation or methodology for computation of delay when the Arbitral Tribunal has adopted a plausible methodology as per its interpretation of the Contract.

13.9. IRCON granted extension of time without specifying the extent of delay attributable to AFCONS and levied liquidated damages in breach of Clause 27 of the Special Conditions of Contract-I.

13.10. It is undisputed that one of the final key dates (KD-11) was achieved on time and no liquidated damages were levied on KD-11 (*refer letter dated 29<sup>th</sup> November 2016*). Liquidated damages were levied only on the intermediate key dates and as per the Contract, the same were to be refunded



to AFCONS if the subsequent final key dates were achieved in a timely manner.

13.11. The Arbitral Tribunal, in the Impugned Award, has duly dealt with the evidence on record and provided reasons with regard to change in rock mass/ rock class and extension of time on that account in terms of Clause 27 of the Special Conditions of Contract-I. Thus, there is no perversity in the Impugned Award.

13.12. The question of delay and extension of time is purely a question of fact and the same would not constitute a ground for challenge under Section 34 of the Act.

### **ANALYSIS AND FINDINGS**

14. I have heard counsel for the parties and perused the material on record.

15. The Supreme Court has defined the scope of interference by courts in a petition challenging an award passed by the Arbitrator under Section 34 of the Act in a plethora of judgments.

16. Relying on its earlier judgments in *Associate Builders v. Delhi Development Authority*<sup>1</sup>, *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHA)*<sup>2</sup> and *Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited*<sup>3</sup>, the Supreme Court, in the recent judgment in *OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited*<sup>4</sup>, has summarized the legal position with regard to scope of

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<sup>1</sup> (2015) 3 SCC 49

<sup>2</sup> (2019) 15 SCC 131

<sup>3</sup> (2024) 6 SCC 357

<sup>4</sup> (2025) 2 SCC 417



interference with an arbitral award under Section 34 of the Act. The relevant observations made by the Supreme Court in **OPG Power Generation** (supra) are set out below:

*“70. In Associate Builders certain tests were laid down to determine whether a decision of an Arbitral Tribunal could be considered perverse. In this context, it was observed that where:*

- (i) a finding is based on no evidence; or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*

*However, by way of a note of caution, it was observed that when a court applies these tests it does not act as a court of appeal and, consequently, errors of fact cannot be corrected. Though, a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It was also observed that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.*

71. In *Ssangyong*, which dealt with the legal position post the 2015 Amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

72. The tests laid down in *Associate Builders* to determine perversity were followed in *Ssangyong* and later approved by a three-Judge Bench of this Court in *Patel Engg. Ltd. v. North Eastern Electric Power Corp. Ltd.* [(2020) 7 SCC 167 : (2020) 4 SCC (Civ) 149]

73. In a recent three-Judge Bench decision of this Court in *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*, the ground of patent illegality/ perversity was delineated in the following terms: (SCC p. 376, para 39)



*“39. In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view. 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 under the head of “patent illegality”. An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within its jurisdiction or violating a fundamental principle of natural justice.”*

***Scope of interference with an arbitral award***

*74. The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award. Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon. It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub-section (2-A) of Section 34 of the 1996 Act.”*

[emphasis supplied]

17. I shall now proceed to apply the aforesaid principles in the facts and circumstances of the present case.

18. The main dispute between the parties arises from the determination of extension of time in terms of the ‘key dates’ specified under the Contract. IRCON took the position that there was a delay, which was attributable to AFCONS, beyond the extension of time granted by IRCON and hence, levied liquidated damages. The position of AFCONS is that the delay was caused due to reasons not attributable to it and hence, AFCONS was entitled to be granted extension of time. Accordingly, the levy of liquidated damages was not justified.



19. To begin with, a reference may be made to the key elements of the Contract between the parties. In terms of the Contract, the start date of the Project was 21<sup>st</sup> January 2014 and the Project was agreed to be completed within thirty-three months, *i.e.*, 19<sup>th</sup> October 2016.

20. Appendix XV of the Contract provided 17 key dates, in terms of which certain milestones under the Contract had to be achieved. For ease of reference, the same is set out below:

Key Date Nos. (KD)	Description of Works	Rate of Progress (m/month)	Cumulative Duration (in days)
1	Mobilization & Development of Portals		60
2	Start of Underground Excavation of Adit 1		60
3	Completion of Underground Excavation of Adit 1 & Junction Development ET (L=585m)	100	235
4	Start of Underground Excavation of ET towards Katra Side		235
5	Start of Underground Excavation of ET towards Banihal Side		235
6	Start of Underground Excavation of MT towards Katra Side		245
7	Start of Underground Excavation of MT towards Banihal Side		245
8	Start of Concrete lining MT towards Katra Side		566
9	Completion of Underground Excavation of ET towards Katra Side (1350m)	110	603
10	Completion of Underground Excavation of MT towards Katra Side (1350m)	95	671
11	Start of Concrete lining MT towards Banihal Side		694
12	Completion of Concrete lining MT towards Katra Side (1350m)	300	701
13	Completion of Underground Excavation of ET towards Banihal Side (1940m)	110	765
14	Completion of Underground Excavation of MT towards Banihal Side (1940m)	95	858
15	Completion of Concrete lining MT towards Banihal Side (1940m)	300	888
16	Completion of Second stage Concreting MT & ET		978
17	Completion of work & Demobilisation		1003

21. Next, a reference may be made to Clause 27 of the Special Conditions of Contract-I, which is set out below:

***“27. DELAY AND EXTENSION OF CONTRACT PERIOD***



**27.1** The time allowed for execution and completion of the works or part of the works as specified in the contract shall be strictly followed and the time shall be essence of the contract on the part of the Contractor.

**27.2** As soon as it becomes apparent to the Contractor, that the work and / or portions thereof (required to be completed earlier), cannot be completed within the period(s) stipulated in the contract as per key dates (Appendix XV to Instructions to Tenders), or the extended periods granted, he shall forthwith inform the Engineer and advise him of the reasons for the delay, as also the extra time required to complete the works and / or portions of work, together with justification therefore. In all such cases, whether the delay is attributable to the Contractor or not, the Contractor shall be bound to apply for extension well within the period of completion/extended period of completion of the whole works and / or portions thereof.

Till agreement is not reached on the extension required, the Contractor is bound to the key dates and working programme valid at the moment of application of extension.

### **27.3 Extension due to Modifications**

If any modifications are ordered by the Engineer or site conditions actually encountered are such, that in the opinion of the Engineer the magnitude of the work has increased materially, then such extension of the stipulated date of completion may be granted, as shall appear to the Engineer to be reasonable.

### **27.4 Delays not due to Employer/Contractor-**

i) If the completion of the whole works (or part thereof which as per the contract is required to be completed earlier), is likely to be delayed on account of:

- a. Any force majeure event referred to in Clause 26.0 or
- b. Delay on the part of other Contractors engaged directly by the Client/Employer, on whose Progress the performance of the Contractor necessarily depends or
- c. Any relevant order of court or
- d. Any other event or occurrence which, according to the Engineer is not due to the Contractor's failure or fault, and is beyond his control;

The Engineer may grant such extensions of the completion period as in his opinion is reasonable.

### **27.5 Delays due to Employer/Engineer**

In the event of any failure or delay by the Employer/Engineer in fulfilling his obligations under the contract, 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 thereof but in any such case, the Engineer shall grant such extension or extensions of time to complete the work, as in his opinion is/ are reasonable.



### **27.6 Delays due to Contractor and Liquidated Damages (LD):**

*i) If the delay in the completion of the whole works or a part of the works, beyond stipulated completion period as per key dates, is due to the Contractor's failure or fault, and the Engineer feels that the remaining works or the portion of works can be completed by the Contractor in a reasonable and acceptable short time, the Engineer may allow the Contractor extension or further extension of time, for completion, as he may decide, subject to the following:*

*a. Without prejudice to any other right or remedy available to the Engineer, recover by way of liquidated damages and not as penalty, a sum as mentioned below:*

*(Note: Refer to Instruction to Tenderer/s Appendix XV for key dates for completion of contract)*

#### **1) For intermediate key dates**

*(All except KD11, KD15 & KD16):*

*Equivalent to 0.015% (Zero point Zero one five percentage) of the contract value of the works, for each week or part of a week in completion of the particular stage of the work.*

*This LD shall be imposed concurrently on individual intermediate periods for different stages of work and aggregated.*

#### **2) For the Final key date linked to overall completion of the work;**

*(KD11, KD15 & KD16):*

*Equivalent to 0.15% (zero point one five percentage) of the contract value of the works, for each week or part of a week of the overall work.*

*b. The total amount of liquidated damages in respect of the works in all stages shall, however, not exceed 5% of the contract value.*

*ii) Liquidated damages recovered at Intermediate Key Dates shall be refunded to the Contractor if subsequent Key Dates are achieved without any effect on the programme of the Contractor provided further that there is no accepted claim by the Contractor on this account.*

*iii) The liquidated damages are recovered by the Employer from the Contractor for delay and not as penalty.*

*iv) The Employer may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies due, or to become due, to the Contractor. In the event of an extension of time being granted, the amount due under this Sub-Clause shall be recalculated accordingly, and any payment or deduction shall be adjusted accordingly.*

*v) The payment or deduction of such damages shall not relieve the Contractor from his obligations to complete the Works, or from any other of his duties, obligations or responsibilities under the Contract.*

*vi) The Contractor shall use and continue to use his best endeavors to avoid or reduce further delay to the Works, or any relevant Stages/key dates.*

*vii) At any time after the Employer has become entitled to liquidate*



*damages, the Employer's Representative may give notice to the Contractor, requiring the Contractor to complete the Works within a specified reasonable time. Such action shall not prejudice the Employer's entitlements to recovery of liquidated damages, under this Sub-Clause and to terminate.*

*viii) The recovery of such damages shall not relieve the Contractor from his obligation to complete the work or from any other obligation and liability under the contract.*

**27.7 Engineer's Decision on compensation payable is final.**

*The decision of the Engineer as to the compensation, if any, payable by the Contractor under this clause shall be final and binding.*

**27.8 Time shall continue to be treated as the Essence of Contract in spite of Extension of Time.**

*It is an agreed term of the contract that notwithstanding grant of extension of time under any of the sub-clauses mentioned herein, time shall continue to be treated as the essence of contract on the part of the Contractor.”*

[emphasis supplied]

22. In terms of Clause 27.2 of the Special Conditions of Contract-I, the Contractor had to apply to the Engineer for extension of time by giving reasons for delay, as also the extra time required to complete the Project. Clause 27.3 provides that the Engineer may grant reasonable extension of time if the Contractor encounters such site conditions which materially increase the magnitude of work.

23. Clause 27.6 provides for delays due to the Contractor and levy of liquidated damages. The Engineer in such cases can allow extension of time for completion of the Project without prejudice to its right to levy liquidated damages. As per Clause 27.6(i)(a), all key dates except for KD-11, KD-15 and KD-16 were intermediate key dates. The final key dates linked to the overall completion of the Project were KD-11, KD-15 and KD-16. In terms of Clause 27.6(ii), liquidated damages recovered in respect of intermediate key dates were to be refunded to the Contractor if the subsequent key dates were achieved without any effect on overall completion of the Project.



24. In terms of the Contract, *vide* letter dated 14<sup>th</sup> August 2014, AFCONS sought an extension of 171 days for delays till 1<sup>st</sup> August 2014. Subsequently, through various communications, AFCONS sought further extensions, *i.e.*, an aggregate of 504 days till 15<sup>th</sup> September 2016 on account of factors not attributable to it, which are as follows:

- a. Encountering adverse/ unanticipated geology (rock mass/ class changes)
- b. Law and order disturbances including strikes, villagers' protests, labor unrest
- c. Exceptional rainfall/ inclement weather conditions

25. *Vide* its letter dated 2<sup>nd</sup> July 2015, IRCON granted an extension of 21 days to AFCONS. Further, *vide* the letter dated 5<sup>th</sup> February 2016, IRCON provided the bifurcation for the said extension, *i.e.*, 12 days' extension was due to law and order problems and 9 days' extension due to abnormal record rainfall in the month of September 2014.

26. IRCON, while granting extension of time to AFCONS, levied liquidated damages on AFCONS. Thus, even as per IRCON, AFCONS was entitled to an extension of time. The dispute between the parties was with regard to the quantum of extension that could be granted to AFCONS, which was determined by the Arbitral Tribunal.

27. The Arbitral Tribunal observed that the original duration for completion of underground excavation of ADIT (KD-03) and underground excavation of main tunnel Banihal (KD-14) proportionately to the extent of 1121 meters was 529 days (175 days for KD-03 and 354 days for KD-14). The Arbitral Tribunal held that the total time required for achieving KD-14 was 1013 days on account of the following circumstances:



- i. 93 days' delay on account of law and order problems
- ii. 73 days' delay on account of inclement weather
- iii. 847 days' delay on account of change in geological conditions

28. Accordingly, the Arbitral Tribunal granted an extension of 484 days (1013 days – 529 days) for delay till 15<sup>th</sup> September 2016, which was not attributable to AFCONS.

29. The Arbitral Tribunal, taking note of the fact that the actual rock mass encountered by AFCONS was considerably different than that given in the tender documents, observed that the same led to additional time for completion of the Project (*refer paragraph 46-50 of the Impugned Award*). Similarly, the Arbitral Tribunal noted that law and order issues and inclement weather faced by AFCONS during completion of the Project resulted in additional time in completion of the Project (*refer paragraph 54-55 of the Impugned Award*). Hence, the Arbitral Tribunal held that AFCONS was entitled to complete the work within reasonable times in terms of Clause 27.3 of the Special Conditions of Contract-I.

30. In my opinion, the Arbitral Tribunal has carefully analyzed the evidence led on behalf of the parties and granted extension of time to AFCONS by giving cogent reasons. Any interference with the said findings would amount to re-appreciation of evidence, which is beyond the scope of jurisdiction exercised by this Court under Section 34 of the Act.

31. In this regard, a reference may be made to the judgment of the Supreme Court in **Atlanta Limited v. Union of India**<sup>5</sup>. The relevant extracts are set out below:

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<sup>5</sup> (2022) 3 SCC 739



*“28. We are of the opinion that once the learned sole arbitrator had interpreted the clauses of the contract by taking a particular view and had gone to great length to analyse several reasons offered by the appellant claimant to justify its plea that it was entitled for extension of time to execute the contract, the Division Bench of the High Court ought not to have sat over the said decision as an appellate court and seek to substitute its view for that of the learned arbitrator.*

*29. In the instant case, having gone through the award, we find that the learned sole arbitrator was lucid in his reasoning for taking a particular view on the interpretation of the terms and conditions of the contract between the parties. It was for this very reason that the learned Single Judge had forbore from interfering with the arbitral award and dismissed the petition filed by the respondent Union of India under Sections 30 and 33 of the 1940 Act. By going into the minute details of the evidence led before the learned sole arbitrator with a magnifying glass and the findings returned thereon, the appellate court has clearly transgressed the limitations placed on it. In any case, we are of the opinion that the reasons offered for taking such a view, are neither justified nor called for, for interfering with the arbitral award.”*

[emphasis supplied]

32. Reference may be also made to the order of the division bench in *National Highways Authority of India v. GS Engineering & Construction Corporation*<sup>6</sup>. The relevant extracts from *GS Engineering* (supra) are set out below:

*“The sole issue for consideration was as to whether the petitioner contributed to the delay or the blame for the delay had to be laid solely at the door of the respondent/ contractor. The Arbitral Tribunal comprising of technically qualified persons, on consideration of material placed before them found in favour of the respondent/ contractor to a certain extent and have apportioned the blame for the delay and, accordingly, found that extension was liable to be granted by the petitioner for the period for which the delay was attributable to the petitioner. It is a pure question of appreciation of evidence and can hardly be a matter of adjudication in an application under Section 34 of the said Act.”*

[emphasis supplied]

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<sup>6</sup> Order dated 22<sup>nd</sup> November 2011 in FAO(OS) 562/2011



33. The observations made in both the aforesaid judgments are in the context of extension of time granted by the Arbitral Tribunal for execution of the contract. It has been categorically held that courts cannot sit over the decision of the Arbitral Tribunal like an appellate court and substitute their own view with that of the arbitral tribunal.

34. Applying the test of ‘patent illegality’, as laid down by the Supreme Court in its various judgments referred above, this is not a case where the arbitral award has been rendered on the basis of no evidence or while ignoring vital evidence. It cannot be said that the view taken by the Arbitral Tribunal was not a plausible view. Thus, this is not a case where the Impugned Award can be set aside on the basis of patent illegality.

35. With regard to the submission of IRCON that there was nothing in the Contract which prevented IRCON from deducting liquidated damages prior to granting extension of time, the Arbitral Tribunal has held that there was no provision in the Contract which permitted IRCON to deduct liquidated damages and thereafter carry out the delay analysis and grant extension of time.

36. The relevant observations of the Arbitral Tribunal are set out below:

*“37. Even the present contract provides that under Clause 27 after an application for extension of time is made by the Contractor the Engineer is to determine the permissible extension of time and only after the employer has become entitled to liquidated damages, the employer is to give a further notice in accordance with Clause 27.6(vii). In the present case the deduction of liquidated damages that too by un-proportional and unreasonable extent was made by the Respondent and thereafter a detailed analysis of delays was carried out...”*

*“38. Thus, it is evident before at least the second extension of time was communicated, i.e. before 29<sup>th</sup> November 2016 (C-34), nothing was finally decided by the Respondent as regards attribution of delays upon the Claimant by November 2016 the Respondent had deducted more than 4.5*



*crores from the bills of the Claimant without itself carrying out a satisfactory delay analysis.*

**39.** *We do not see any provision in the contract specifically providing for the Respondent to deduct liquidated damages and thereafter carrying out an analysis of the delays thereby granting extension of time. Even otherwise that is not a position approved in law. Every action is to be preceded by a considered decision and in the present case the primary adjudicator also did not take any decision by carrying out which according to it was a rational approach to determine extension of time.*

**40.** *The levy of liquidated damages and its deductions were therefore prima facie illegal and not in accordance with the contract.”*

37. The Arbitral Tribunal has interpreted Clause 27 of the Special Conditions of Contract-I to hold that after an application for extension of time was made by the Contractor, the Engineer is to determine the permissible extension and only thereafter the Employer would become entitled to liquidated damages after giving a further notice in accordance with Clause 27.6(vii). As per the Contract, liquidated damages are levied for delays attributable to the Contractor. Therefore, unless a delay analysis is done and it is found the delay was attributable to the Contractor, liquidated damages could not have been levied.

38. I do not find any perversity in the aforesaid findings of the Arbitral Tribunal. It is a settled law that the interpretation of a contract is in the realm of the Arbitral Tribunal and the Court cannot interfere with such interpretation in a petition under Section 34 of the Act. The view taken by the Arbitral Tribunal in the Impugned Award is clearly a plausible view.

39. The next grievance of the petitioner is that the Arbitral Tribunal, while granting extension for the main tunnel Banihal, also granted similar extensions to AFCONS for other parts of the Project, *i.e.*, main tunnel Katra, escape tunnel Banihal and escape tunnel Katra, without any basis.



40. It is contended on behalf of IRCON that AFCONS itself in its statement of claim asked for a separate extension of time for each tunnel. Therefore, the grant of uniform extension for all the four tunnels by the Arbitral Tribunal is beyond the case setup by AFCONS and therefore, would amount to patent illegality.

41. The Arbitral Tribunal held that main tunnel Banihal was on the 'critical path' of completion of the Project in terms of the 'key dates' stipulated in the Contract. A perusal of the Impugned Award shows that the Arbitral Tribunal has specifically noted that in terms of the sequence of events given in the 'key dates' (Appendix XV as set out above), completion of ADIT followed by completion of main tunnel Banihal are activities which would affect the overall completion of the Project. The other tunnels which were being executed concurrently would also be completed before the completion of main tunnel Banihal. Therefore, AFCONS was denied any additional time for the aforesaid tunnel works. In fact, it was specifically held that AFCONS cannot ask for additional time for the aforesaid tunnel works and the same would have to be completed within the extended 484 days.

42. For ease of reference, the relevant observations of the Arbitral Tribunal on this aspect are set out below:

*"56. In aggregate, the Claimant is therefore entitled to complete all works upto 1121 mtrs. of underground excavation of main tunnel Banihal within 1018 days.*

$$847 \text{ days} + 73 \text{ days} + 93 \text{ days} = \mathbf{1013 \text{ days}}$$

*The reason for working out the above number of days only for adit and main tunnel Banihal is because of the fact that as per the sequence of work which can be derived from the key dates provided in the contract it is the completion of adit followed by completion of main tunnel Banihal that the overall completion would be achieved.*



***The other tunnels being executed concurrently, would complete before completion of main tunnel Banihal. In other words underground excavation of main tunnel Banihal after completion of adit and development of junction is in the critical path of completion. Therefore, the Claimant cannot request for an additional time for the other tunnel works on account of delays upto 15<sup>th</sup> September 2016 unless it could have demonstrated before us other reasons of delay which additionally affect the other tunnels beyond the affected date of main tunnel Banihal. Therefore, the Claimant is required to complete the respective tunnel excavation work to the extent of 1126 m in ETK, 1065 m in MTK and 1195 m in ETB within the aforesaid period of 484 days. The aforesaid lengths of the respective tunnel excavation work are the actual executed lengths of excavation till 15<sup>th</sup> September 2016.***

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58. *In view of what we have found in our award in the preceding paragraphs the Claimant is entitled to complete all works upto 1121 mtrs. of underground excavation of main tunnel Banihal within 484 days, considering delays in execution of the work upto 15<sup>th</sup> September 2016. Thus, the Claimant is also entitled to complete the underground excavation of main tunnel Katra for a length of 1065 m by 484 days, escape tunnel Katra for a length of 1126 m by 484 days and excavation of escape tunnel towards Banihal for a length of 1121 m by 484 days, considering delays accrued upto 15<sup>th</sup> September 2016. The aforesaid date in aggregate is counted from the date of issue of the letter of acceptance. In view of the same the Claimant would therefore be entitled to an overall extension as worked out hereunder:*

Key date	Description	Original duration	Required duration	Extension
KD-3	<i>Completion of underground excavation of adit 1 &amp; Junction Development (585M)</i>	175 days		
KD-14	<i>Completion of underground excavation of Main Tunnel Banihal (MTB) (1940 m)</i> ..... <i>Proportional days for 1121 m.</i>	<i>613 days from completion of KD-7 (page 5 and 6 of SOC) (858 – 245)</i> ..... <i>354 days</i>		
	<i>Total days required for adit plus 1121 m of Main Tunnel Banihal</i>	529 days	1013 days (para 56 of	484 days (1013- 529)



		Award	
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59. As we have already examined, the completion of main tunnel Banihal for delays upto 15<sup>th</sup> September 2016 is on critical path. Therefore, the overall extension which the Claimant should therefore be entitled to will be 484 days against its Claim of 504 days for delays upto 15<sup>th</sup> September 2016.”

[emphasis supplied]

43. It is submitted on behalf of IRCON that the Arbitral Tribunal has granted uniform extension for all four tunnels based on an incorrect assumption that the main tunnel Banihal is on the ‘critical path’. By doing so, the Arbitral Tribunal has completely rewritten the terms of the Contract. There were no pleadings made by AFCONS with regard to ‘critical path’. Therefore, the Arbitral Tribunal has wrongly granted extension of time for the other three tunnels without carrying out any delay analysis in respect of the said tunnels.

44. On the aspect of determination of ‘critical path’, both sides have placed reliance on the judgment of the Queen’s Bench Division (Technology and Construction Court) of the High Court of England and Wales in *Mirant Asia-Pacific Construction (Hong Kong) Ltd v. Ove Arup Partners International Ltd*<sup>7</sup>.

45. The relevant extracts from the said judgment are set out below:

*“[119] The term “critical path” was used frequently in the course of the hearings by programming experts and non-experts alike. I was concerned to have a precise definition of what it and associated terms meant and after the hearing the parties provided me with an agreed reading list.*

*[120] What is known as the Critical Path Method is frequently used by the construction industry both in the United States, the United Kingdom and elsewhere in planning construction projects and in analysing the causes of delay.*

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<sup>7</sup> [2007] EWHC 918 (TCC)



**[121]** *The critical path can be defined as “the sequence of activities through a project network from start to finish, the sum of whose durations determines the overall Project duration”. See BS.6079 – 2.2000 Pt 2, 2.41.*

**[122]** *In the helpful work, Delay and Disruption Contracts by Keith Pickavance, 3<sup>rd</sup> ed (2005), at para 1.17, the author makes the point that the Critical Path Method requires detailed and sophisticated analysis and that in complex projects it is unlikely that a critical path can be identified inductively, ie by assertion:*

*“It can only reliably be deduced from the mathematical sum of the durations on the contractor's programme to be completed in sequence before the completion date can be achieved.”*

*This is an important cautionary word in this case where a number of witnesses were convinced, without the benefit of any such analysis, that they knew where the critical path lay.”*

[emphasis supplied]

46. AFCONS has also placed reliance on the judgment of United States Court of Claims in ***Haney v. United States***<sup>8</sup>. The relevant extracts are set out below:

*“The normal construction procedure as anticipated by Haney was to state the contraction, then finish the work from the bottom up in accordance with a “critical path method” (CPM) of construction. The Government welcomed Haney's use of CPM as a planning and management tool. Essentially, the critical path method is an efficient way of organising and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work. (E.g., one could not carpet an area until the flooring is down and the flooring cannot be completed until the underlying electrical and telephone conduits are installed) The data is then analysed, usually by computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time with a given period without any effect on the completion of the entire project. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be delayed. These latter items of work are on the “critical path”. A delay, or acceleration, of work along the critical path will affect the entire project.”*

[emphasis supplied]

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<sup>8</sup> reported in 676 F.2d 584 (Fed. Cir. 1982)



47. ‘Critical path’ has been described in ***Society of Construction Law, Delay and Disruption Protocol (2<sup>nd</sup> Edition)*** in the following manner:

*“The longest sequence of activities through a project network from start to finish, the sum of whose durations determines the overall project duration. There may be more than one critical path depending on workflow logic. A delay to progress of any activity on the critical path will, without acceleration or re-sequencing, cause the overall project, duration to be extended, and is therefore referred to as a ‘critical delay’.”*

48. ‘Critical path’ has also been described by Keith Pickavance in ***Delay and Disruption in Construction Contracts (2<sup>nd</sup> Edition)*** in the following terms:

*“The CP is the sequence of activities which needs the longest total time to complete the project or an element thereof. A delay to progress of any activity on the critical path causes a delay to the completion of the project. There may be more than one critical path depending on the workflow logic.”*

49. From a reading of the aforesaid extracts, it is apparent that the concept of ‘critical path’ is globally recognized in the construction industry. The ‘critical path’ in a project refers to sequence of activity(ies)/ event(s) in any project which are of such nature that any delay in completion of the same would result in a delay in completion of the entire project.

50. The Arbitral Tribunal has determined the ‘critical path’ of the Project on the basis of ‘key dates’ provided in the Contract. The Arbitral Tribunal has noted that the main tunnel Banihal was the last tranche of the Project to be executed by AFCONS and any delay in completion of the same would result in an overall delay in completion of the entire Project.

51. Pertinently, the Arbitral Tribunal comprised of technically qualified members who were qualified to determine ‘critical path’ in respect of a construction project.



52. I am unable to agree with the submission of IRCON that extension of time was granted by the Arbitral Tribunal for other works without any delay analysis. The Arbitral Tribunal was correct in holding that as per the 'key dates', completion of ADIT followed by completion of main tunnel Banihal are activities which would affect the overall completion of the Project. The Arbitral Tribunal clearly noted that other tunnels were being executed concurrently and would be completed before the completion of main tunnel Banihal. Therefore, completion of the main tunnel Banihal would subsume completion of the other three tunnels. Based on the above, the determination of main tunnel Banihal as the 'critical path' by the Arbitral Tribunal would not amount to rewriting of the Contract and the said finding cannot be considered as perverse or patently illegal.

53. IRCON contends that the Arbitral Tribunal has wrongly held that no loss has been suffered on its behalf on account of delay in completion of the Project. Reliance has been placed on behalf of IRCON on the judgment of the Supreme Court in *Construction and Design Services v. Delhi Development Authority*<sup>9</sup> in support of its submission that in public utility contracts, liquidated damages may be imposed without strict proof of loss. However, this is a rebuttable presumption. In the present case, the Arbitral Tribunal has returned the finding that IRCON has not suffered any loss. The Arbitral Tribunal has observed that the only loss alleged to have been suffered by IRCON was towards supervision costs. It was held that since there were other stretches of work that were incomplete, IRCON would have

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<sup>9</sup> (2015) 14 SCC 263



incurred supervision costs in any case. The relevant observations of the Arbitral Tribunal in this regard are set out below:

*“42. The other aspect which was much highlighted by the Claimant was that the present position in law requires the Respondent to demonstrate any loss which it had suffered because of the delay complained by it against the Respondent. Although we have not dealt with in the present case the counter Claims of the Respondent, but in came to our notice that what was alleged to be a loss on the part of the Respondent was only its supervision cost. From the perspective the present delay would not either adapt to the supervision cost or affect it this is because the Respondent had to in any case supervise the works since the present work was only a part of the entire stretch of the work i.e. tunnelling and allied works assigned to it by its Employer. In such a case the Respondent’s supervision cost would have been affected for delays on account of the present work, only when the present work was left to be completed whereas the other stretches were already either complete or in their advanced stage of completion. In the present case much to the contrary it was shown before us with reference to question Nos. 104 & 105 of RW-2 that the other stretches were incomplete, whereas the Claimant has completed even the lining works, a mandatory gap between the interface had to be maintained by the Claimant to avoid propagation of cracks on the tunnel lining done by the Claimant because of the fact that the other agency were yet to even complete all blasting operation required for excavation. Certainly, therefore the other stretches would complete much after the Claimant would complete in part. This would thus have no effect additionally on the supervision cost of the Respondent because of delays in the present work. The position is all the more buttressed from the fact that the Respondent itself chose to prepare and furnish the second stage concrete lining drawings as late as by the end of December 2017 and as such it would have to bear in any event all its supervision cost till the work in accordance therewith was completed. Going by the principles laid down in Kailash Nath & Associates as well as Saw Pipes -Vs.- ONGC, it appears that the Respondent did not suffer any loss arising out of the delays exclusively did not suffer any loss arising out of the delays exclusively the present Contract. Thus, the Respondent cannot recover any liquidated damages.”*

[emphasis supplied]

54. Once again, the view taken by the Arbitral Tribunal is plausible and there is no perversity in it. Thus, the decision of the Arbitral Tribunal with regard to the question of loss suffered by IRCON due to delay in completion



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of the Project warrants no interference by this Court. In any event, the issue of grant of liquidated damages has become academic since the Arbitral Tribunal has granted an extension of 484 days to AFCONS upto 15<sup>th</sup> September, 2016 on account of delay not attributable to AFCONS.

55. In light of the discussion above, I am of the view that IRCON has failed to make out any ground for interference with the Impugned Award under Section 34 of the Act.

56. Accordingly, the petition is dismissed.

57. All pending applications stand disposed of.

**AMIT BANSAL  
(JUDGE)**

**FEBRUARY 13, 2026**

*at*