2023:CHC-OS:5117

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
ORIDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

RESERVED ON: 09.08.2023

DELIVERED ON: 29.09.2023

PRESENT:

THE HON'BLE MR. JUSTICE SHEKHAR B. SARAF

AP 40 of 2020

DAMODAR VALLEY CORPORATION

VERSUS

RELIANCE INFRASTRUCTURE LIMITED

Appearance:
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Ms. Vineeta Meharia, Adv.
Mr. Amit Meharia, Adv.
Ms. Urmila Chakraborty, Adv.
Mr. Kanishk Kejriwal, Adv.
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Ms. Subika Ray, Adv.
Mr. Sayan Dey, Adv. **..... for the Petitioner**

Mr. Harish Salve, Sr. Adv.
Mr. J.J. Bhatt, Sr. Adv.
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Ms. Anjali Chandurkar, Adv.
Mr. Atanu Roychaudhrui, Adv.
Mr. Paritosh Sinha, Adv.
Ms. Shreyashee Das, Adv.
Mr. Rohit Banerjee, Adv.
Mr. Pushan Majumdar, Adv. **..... for the Respondent/Claimant**

INDEX

Serial No.	Content	Paragraph No.	Page Nos.
1	Facts	2	4 to 10
2	Issues Framed By The Arbitral Tribunal	4	10 to 26
3	Contentions By The Petitioner	5	26 to 41
4	Contentions By The Respondent	6	42 to 66
5	Analysis and Conclusion	7	66 to 148
6	Scope Of Interference Under Section 34 Of The Act	7.1	66 to 80
7	Patent Illegality – 'On The Face of The Award'	7.2	80 to 90
8	1940 Act and 1996 Act	7.3	91 to 100
9	Discussion On Price Escalation	7.4	100 to 117
10	Letter Dated February 03, 2017	7.5	118 to 139
11	Severance Of Arbitral Awards	7.6	139 to 148
12	Issues No. 1,3,4,5 and 6 – Land – BRH – NDCT – Insulation Material Coal And Water – Other Issues On Delay -	8	148 to 157 150 to 151 152 to 153 153 to 154 154 to 155 155 to 156 156 to 157
13	Issues No. 2 Read With 12, 13, And 14	9	157 to 158

Serial No.	Content	Paragraph No.	Page Nos.
14	Issues No. 7,8,9,10, And 11	10	159
15	Issue No. 15	11	159 to 160
16	Issue No. 16	12	160 to 161
17	Issue No. 17	13	161 to 163
18	Issue No. 18	14	163 to 165
19	Issue No. 19	15	165 to 166
20	Issue No. 20	16	166
21	Issue No. 21	17	167 to 168
22	Issue No. 24	18	168 to 195
23	Issue No. 25	19	195 to 197
24	Issue No. 27	20	198 to 225
25	Issue No. 36	21	225 to 233
26	Issue No. 37	22	233 to 234
27	Issues No. 38 And 39	23	234
28	Issues No. 40 And 41	24	235
29	Issue No. 42	25	236
30	Issues No. 43 and 44	26	237
31	Issue No. 45	27	237 to 238
32	Issues No. 46 And 48	28	238 to 239
33	Issues No. 35 And 47	29	239 to 240
34	Issue No. 49	30	240
35	Issue No. 50	31	241

Serial No.	Content	Paragraph No.	Page Nos.
36	Principles	33	242 to 248
37	Epilogue	34	249 to 253
38	Conclusion and Directions	35	253 to 255

JUDGMENT

Shekhar B. Saraf, J.:

1. The award debtor Damodar Valley Corporation (hereinafter also referred to as the 'petitioner') has preferred this application being A.P. 40 of 2020 under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') against the arbitral award dated December 21, 2019 passed by the arbitral tribunal comprising of Mr. Ganendra Narayan Ray (Presiding Arbitrator), Mr. Indrajit Chatterjee (Co-Arbitrator), and Mr. Ronojit Kumar Mitra (Co-Arbitrator). The award holder/claimant in the instant application is Reliance Infrastructure Limited (hereinafter also referred to as the 'respondent').

2. Facts

2.1 I have outlined the facts leading to the instant application below:-

2.1.1 The award debtor is a statutory corporation constituted under the provisions of the Damodar Valley Corporation Act, 1948. The award holder is a company within the meaning of the Companies Act, 2013.

2.1.2 A Notice Inviting Tender (NIT) was floated by the award debtor on May 18, 2007, as part of the process of international competitive bidding for the construction of Phase - 1 of a power plant comprising two units of 600 MW each near Raghunathpur in the district of Purulia, West Bengal.

2.1.3 Pre-bid meetings were held by and between the award debtor and various bidders, including the award holder. Eventually, the award holder remained the only surviving bidder and submitted a composite proposal/bid for the said work. The award debtor accepted the said bid of the award holder and subsequently, a Letter of Acceptance (LoA) was issued by the award debtor on December 11, 2007. The total contract price as stipulated included a rupee component of INR 2271.70 crores (Rupees two thousand two hundred seventy-one crores and seventy lakhs only) and a Euro component of €271.895 million.

2.1.4 The date of commencement of work ('Zero Date') was slated to be December 14, 2007. Post the Zero Date, parties were to take certain steps towards the completion of the said project. Three Letters of Intent (LoIs) were issued to the respondent in respect

of the said project - i) For supply of indigenous equipment; ii) For supply of foreign equipment (by Shanghai Electric Corporation, China), and iii) For rendering of services in respect of the construction of the said power plant by the award holder.

2.1.5 Three detailed contracts in respect of the said power plant were executed between the award holder and the award debtor on December 6, 2008. The Zero date for both the Units was stipulated to be December 14, 2007 and the Completion Date for Unit No. 1 was stated to be November 14, 2010 and for Unit No. 2 to be February 14, 2011. It is to be noted that both the Units could not be completed within the stipulated period. During the period of construction which continued beyond the stipulated period, applications were made by the respondent for extensions. The same were granted by the petitioner, without prejudice, for completion of its work. Finally, Unit No. 1 was handed over by the respondent on May 15, 2015 whereas Unit No. 2 was handed over on February 23, 2016.

2.1.6 The award holder requested for payment of the outstanding dues as well as return of bank guarantees along with other consequential reliefs. In response, vide its letter dated February 3, 2017, the award debtor sought to levy Liquidated Damages on the award holder by attributing a delay of 468 days in completion of Unit No. 2 only.

2.1.7 By a letter dated April 3, 2017, the award holder requested the award debtor to nominate an adjudicator under Clause 6.1 of the General Conditions of Contract ('GCC') read with Clause 1 of the Special Conditions of the Contract ('SCC'). An adjudicator was appointed, but the said adjudication process could not resolve the disputes between the parties. Subsequently, vide letter dated June 15, 2017, the award holder invoked arbitration in terms of Clause 6.2 of the GCC and nominated one arbitrator. The award debtor vide its letter dated July 12, 2017 also appointed one arbitrator and thereafter, the two arbitrators, so appointed, requested the Presiding Arbitrator to constitute the Tribunal. The Presiding Arbitrator constituted the Tribunal and intimated the constitution to the parties by a letter dated August 5, 2017.

2.1.8 Amongst the issues framed by the arbitral tribunal, the award holder did not press issues no. 22, 29, 31 to 33 in the arbitral proceedings. Similarly, the award debtor did not argue issues no. 5(e), 6(c) and 6(d). Hence, these issues were not dealt with by the arbitrators.

2.1.9 On December 21, 2019, the arbitral tribunal published the award wherein the following issues were awarded in favour of the award holder:-

a. In Issues No. 2 and 12 to 14, INR 137,18,67,733/- and €13,791,641 with simple interest @ 10% p.a. from August 21, 2017 till the date of award was awarded in the favour of the claimant.

b. In Issue No. 15, INR 1,84,51,773.80/- with simple interest @ 10% p.a. from February 20, 2017 till the date of award was awarded in favour of the claimant.

c. In Issue No. 16, INR 4,28,30,000/- with simple interest @ 10% p.a. from November 11, 2016 till the date of award was awarded in favour of the claimant.

d. In Issue No. 17, INR 3,83,32,062.63/- with simple interest @ 10% p.a. from February 20, 2017 till the date of award was awarded in the favour of the claimant.

e. In Issue No. 18, INR 12,00,000/- with simple interest @ 10% p.a. from February 09, 2016 till the date of award was awarded in the favour of the claimant.

f. Issue No. 19, INR 6,10,000/- with simple interest @ 10% p.a. from November 28, 2015 till the date of award was awarded in the favour of the claimant.

g. In Issue No. 20, INR 28,12,832/- with simple interest @ 10% p.a. from November 28, 2015 till the date of award was awarded in the favour of the claimant.

h. In Issue No. 21, INR 33,20,000/- with simple interest @ 10% p.a. from November 28, 2015 till the date of award was awarded in the favour of the claimant.

i. In Issue No. 23 INR 12,04,88,400/- with simple interest @ 10% p.a. from August 26, 2010 till the date of award was awarded in the favour of the claimant.

j. In Issue No. 24, INR 183,40,27,812/- and €4,767,801.75 with simple interest @ 10% p.a. from August 23, 2017 till the date of award was awarded in the favour of the claimant.

k. In Issue No. 25, INR 29,03,09,091.86/- with simple interest @ 10% p.a. from August 23, 2017 till the date of award was awarded in the favour of the claimant.

l. In Issue No. 27, INR 126,10,84,834/- and €9,750,000 with simple interest @ 10% p.a. from August 23, 2017 till the date of award was awarded in the favour of the claimant.

m. In Issue No. 28, INR 2,49,89,529/- without any interest was awarded to the claimant.

n. In Issue No. 50, the petitioner was directed to release all the BGs of the Claimant within a month from the date of award. In default, simple interest @ 15% p.a. till realization of the entire sum.

2.1.10 Only one counterclaim of the award debtor was allowed:-

a. In Issue No. 42, the award debtor was permitted to deduct a sum of INR 6,00,00,000/- (Six crores only) from the amount payable by the award debtor to the award holder.

3. Being aggrieved by the aforesaid arbitral award dated December 21, 2019 the award debtor filed this application on January 21, 2020 under Section 34 of the Act praying for setting aside of the entire award.

4. Issues Framed By The Arbitral Tribunal

4.1 Having perused the arbitral award, I have reproduced the issues framed and dealt with by the arbitral tribunal below:-

Issue No. 1:- Whether the Claimant is entitled to extension of time for completion of the Contract, if yes, to what extent.

Issue No. 2:- If the answer to Issue No. 1 is in the affirmative, (i) whether the Claimant is entitled to a declaration that the Award Debtor cannot withhold any amount whatsoever towards purported levy of Liquidated Damages and (ii) whether the Award Debtor is liable to pay to the Claimant INR 137,10,67,733/- and €13,791,641/- or any other amount as claimed by the Claimant as per Particulars of Claim.

Issue No. 3:- Whether the Claimant is liable for breach of contract for each of the following: a) Breaching the minestrone based completion schedule; b) Executing the work with defects; c) Wilfully delaying the rectification of the defective works; d) Refusing to rectify the defective works.

Issue No. 4:- Whether the Claimant delayed the completion of works as per the completion schedule despite land being available for completion of such works on the land handed over by the Award Debtor to the Claimant.

Issue No. 5:- Whether the Claimant caused delay in project execution on account of, inter alia, each of the following activities at site:-

a) Delay in lifting of boiler drums;

b) Delay in segregation of usable insulation material from unusable insulation material;

c) Delay in replacement of damaged insulation material;

d) Delay in achieving the hydro test milestone;

e) Delay in submission of proper drawings[1];

f) Delay in project commissioning.

[1] This sub- issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.

Issue No. 6:- Whether the Claimant committed breach of contract by executing inter alia each of the following works with defects:-

a) Supplying defective bottom ring headers at the site;

b) Causing damage to insulation material at site by improper storage;

c) Erecting defective Turbine Generator foundation bolts in deviation of approved drawings[2];

d) Installing defective Motor Driven Boiler Feed Pump[3];

e) Constructing the Natural Draft Cooling Tower for Unit No. 1 in serious deviation from the contract;

f) Installing defective Electrostatic Precipitators at site.

Issue No. 7:- Whether the Claimant caused delay in the rectification of the aforesaid defects, thereby causing breach of contract.

[2] This sub- issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.
[3] This sub- issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.

Issue No. 8:- Whether the Claimant caused breach of contract by refusing to replace the damaged insulation material with material as specified under the Contract.

Issue No. 9:- Whether the aforesaid acts and/or omissions on the part of the Claimant constitute criminal negligence and/or wilful misconduct.

Issue No. 10:- Whether the Claimant caused breach of contract by delaying the sectional completion of the various activities which were milestones under the Contract.

Issue No. 11:- Whether the Claimant has established any just cause for entitlement to any extension of time under the Contracts for any particular project milestone under the L-1 and/or L-2 Schedule? If so, what extension of time is the Claimant entitled to for such particular milestone activity under the L-1 and/or the L-2 Schedule in the Contract.

Issue No. 12:- Whether the Award Debtor is entitled to a declaration to recover Liquidated Damages to the tune of INR 212.80 crores in terms of Section 9 of the SCC.

Issue No. 13:- Whether the Award Debtor is entitled to an award for recovery of a sum of INR 212.80 crores along with interest.

Issue No. 14:- Whether the Award Debtor is entitled to set-off its Liquidated Damages claim of INR 212.80 crores against the retention money under the Contract.

Issue No. 15:- Whether the additional site works carried out by the Claimant after Completion of Facilities ('hereinafter referred to as COF') set out by the Claimant in paragraph 19.2 is beyond its scope as specified in the Contract.

If so, whether the Claimant is entitled to the said amount of INR 2,86,80,183.40/- as per Particular of Claim annexed as Annexure 'J' to the SOC with further interest on the sum of INR 2,65,75,554.27/- from August 1st, 2017 till payment or realization.

Issue No. 16:- Whether the additional bays in the switchyard provided by the Claimant as set out in paragraphs 19.3 is beyond its scope as specified in the Contract.

If so, whether the Claimant is entitled to the said amount of INR 5,79,35,260.93/- as per Particulars of Claim annexed as Annexure 'K' to the SOC with further interest on the sum of INR 5,13,96,000/- from August 1, 2018 till payment or realization.

Issue No. 17:- Whether the expenses incurred for additional lead to dispose of excavated earth by the Claimant as set out in

paragraph 19.4 is beyond its scope as specified in the Contract.

If so, whether the Claimant is entitled to the said amount of INR 5,05,80,754.77/- as per Particulars of Claim annexed as Annexure 'L' to the SOC with further interest on the sum of INR 5,51,98,171.20/- from August 1, 2017 till payment or realization.

Issue No. 18:- Whether the expenses incurred for extra work of various system of the main plant package by the Claimant as set out in paragraph 19.5 is beyond its scope as specified in the Contract.

If so, whether the Claimant is entitled to the said amount of INR 25,15,66,262.38/- as per Particulars of Claim annexed as Annexure 'M' to the SOC with further interest on the sum of INR 19,88,17,092/- from August 1, 2017 till payment or realization.

Issue No. 19:- Whether the expenses incurred for supply of Air Handling Unit (AHU) by the Claimant as set out in paragraph 19.6 is beyond its scope as specified in the Contract.

If so, whether the Claimant is entitled to the said amount of INR 9,52,562.63/- as per Particulars of Claim annexed as

Annexure 'N' to the SOC with further interest on the sum of INR 7,32,000/- from August 1, 2017 till payment of realization.

Issue No. 20:- Whether the expenses incurred on account of additional mandatory spares by the Claimant as set out in paragraph 19.7 is beyond its scope as specified in the Contract.

If so, whether the Claimant is entitled to the said amount of INR 43,92,456.80/- as per Particulars of Claim annexed as Annexure 'O' to the SOC with further interest on the sum of INR 33,75,398.40/- from August 1, 2017 till payment or realization.

Issue No. 21:- Whether the expenses for providing advanced technology relays in switchgear by the Claimant as set out in paragraph 19.8 is beyond its scope as specified in the Contract?

If so, whether the Claimant is entitled to the said amount of INR 51,84,439.23/- as per Particulars of Claim annexed as Annexure 'P' to the SOC with further interest on the sum of INR 39,84,000/- from August 1, 2017 till payment of realization.

Issue No. 22[4]:- Whether the expenses for providing Fire Detection and Protection System as set out in paragraph 19.9 is beyond its scope as specified in the Contract.

If so, whether the Claimant is entitled to the said amount of INR 5,48,40,907.40/- as per Particulars of Claim annexed as Annexure 'Q' to the SOC with further interest on the sum of INR 4,11,60,000/- from August 1, 2017 till payment or realization.

Issue No. 23:- Whether there has been a delay in disbursement of advance towards 10% of the Contract Price in foreign currency, i.e. Euros being the difference in the conversion rate existing on the date on which the payment was due and the date on which payment was made.

If so, whether the Claimant is entitled to an amount of INR 27,08,77,730/- as per Particulars of Claim annexed as Annexure 'R' to the SOC with further interest on the sum of INR 12,04,88,400/- from August 1, 2017 till payment or realization.

Issue No. 24:- If the answer to Issue No. 1 is in the affirmative and if the delay is held not to be on account of the Claimant, whether the Claimant is entitled to an increase in the price of

[4] This issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.

the Contract by reason of extension of the period for achieving COF of Units 1 and II.

If so, whether there has been an increase in the price of the Contract.

If so, whether the Claimant is entitled to such increase in cost being a sum of INR 437,53,01,238/- and €9,995,875 as per Particulars of Claim annexed as Annexure 'S' to the SOC with further interest on the sum of INR 251,63,59,768/- and €6,357,069 from August 1, 2017 till payment of realization.

Issue No. 25:- Whether the Claimant is entitled to any additional costs towards construction of Ash Dyke.

If so, whether the Claimant is entitled to the said amount of INR 70,65,06,124.50/- on account of additional cost as per Particulars of Claim annexed as Annexure 'T' to the SOC with further interest on the sum of INR 29,71,07,396.31/- from August 1, 2017 till payment or realization.

Issue No. 26:- Whether there has been a delay in payment of the Claimant's bills by the Award Debtor.

If so, whether the Claimant is entitled to interest on such delayed payment of its bills.

If so, whether the Claimant is entitled to a sum of INR 36,39,16,953/- and €3,428,739 on account of interest on delayed payment of the Claimant's bills as per Particulars of Claim annexed as Annexure 'U' to the SOC.

Issue No. 27:- If the answer to Issue No.1 is in the affirmative and if the delay is held not to be on account of the Claimant, whether the Claimant is entitled to overstay compensation for such duration beyond CoF as well as completion of PG Tests.

If so, whether the Claimant is entitled to a sum of INR 210,64,59,626 and €21,000,088 on account of overstay by the Claimant at the Project Site as per Particulars of Claim annexed as Annexure 'V' to the SOC with further interest on the sums of INR 168,14,46,445/- and €13,000,000 from August 1, 2017 till payment or realization.

Issue No. 28[5]:- If the answer to Issue No. 1 is in the affirmative and if the delay is held not to be on account of the Claimant, whether the Claimant is entitled to a sum of INR 32,91,36,859/- and INR 2,49,89,529/- on account Extension of

[5] This issue has not been argued in this application and hence, not dealt by this Court.

(1) Securities provided under the Contract, i.e., Advance Bank Guarantee ('ABG'); Contract performance Bank Guarantees ('CPBG'); JDU Bank Guarantees ('JDUBG'), and

(2) Insurance Policies taken out by the Claimant during the execution of the Contract as per Particulars of Claim annexed as Annexure 'W' and W-1 to the SOC with further interest on the sums of INR 27,46,36,121/- from August 1,2017 till payment or realization.

Issue No. 29[6]:- If the answer to Issue No. 1 is in the affirmative and if the delay is held not to be on account of the Claimant, whether the Claimant is entitled to a sum of INR 2,52,47,095/- on account of extra expenditure incurred by the Claimant under the West Bengal Tax on Entry of Goods into Local Areas Act, 2012 w.e.f. April 1, 2012 as per Particulars of Claim annexed as Annexure 'X' to the SOC with further interest on the sums of INR 2,01,30,627/- from August 1, 2017 till payment or realization.

[6] This issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.

Issue No. 30[7]:- Whether the Claimant is entitled to expenses incurred on account of Fuel consumed for Reliability Trial Run ('RTR').

If so, whether the Claimant is entitled to a sum of INR 9,44,81,950.68/- for such fuel expenses as per Particulars of Claim annexed as Annexure 'Y' to the SOC with further interest on the sum of INR 7,69,50,000/- from August 1, 2017 till payment or realization.

Issue No. 31[8]:- Whether the Claimant is entitled to expenses on account of idling of resources as a result of Stoppage of works.

If so, whether the Claimant is entitled to a sum of INR 59,75,304.80/- on account of such expenses from the Award Debtor as per Particulars of Claim annexed as Annexure 'Z' to the SOC with further interest on the sum of INR 46,16,42,649.65/- from August 1, 2017 till payment or realization.

Issue No. 32[9]:- If the answer to Issue No. 1 is in the affirmative and if the delay is held not to be on account of the Claimant,

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[7] This issue has not been argued in this application and hence, not adjudicated by this Court.

[8] This issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.

whether the Claimant is entitled to interest charges on account of delayed release of COF amounts as a result of extension of Contract duration.

If so, whether the claimant is entitled to a sum of INR 65,95,27,000/- and €10,561,071 from the Award Debtor on account of such interest charges as per Particulars of claim annexed as Annexure "'AA"" to the SOC.

Issue No. 33[10]:- If the answer to Issue No. 1 is in the affirmative and if the delay is held not to be on account of the Claimant, whether the Claimant is entitled to interest charges on account of delayed release of Retention amount payable on issuance of Operational Acceptance Certificate (hereinafter referred to as 'OAC') as a result of extension of Contract duration.

If so, whether the Claimant is entitled to a sum of INR 71,99,73,461/- and €11,378,515 on account of such interest charges as per Particulars of Claim annexed as Annexure 'AB' to the SOC.

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[9] This issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.
[10] This issue was not pressed before the arbitral tribunal and hence, the Court has not adjudicated the same.

Issue No. 34[11]:- If the answer to Issue No. 1 is in the affirmative and if the delay is held not to be on account of the Claimant, whether the Claimant is entitled to expenses incurred towards Extended Warranty and Guarantee in course of extension of Contract duration.

If so, whether the Claimant is entitled to a sum of INR 74,14,93,994/- on account of such expenses as per Particulars of Claim annexure 'AC' to the SOC with further interest on the sum of INR 59,99,11,764/- from August 1, 2017 till payment or realization.

Issue No. 35:- Whether the Claimant is entitled to any further relief.

Issue No. 36:- Whether any Claim made by the Claimant is barred by limitation.

Issue No. 37:- Whether any of the claims of the Claimant is not arbitrable as contended by the award debtor in the SoD.

Issue No. 38:- Whether the Award Debtor is entitled to a sum of INR 2423.27 crores towards additional interest paid to the financial institutions/banks due to delayed completion of works attributable to the Claimant.

[11] This issue has not been argued in this application and hence, not dealt by this Court.

Issue No. 39:- Whether the Award Debtor is entitled to a sum of INR 318.05 crores being interest on such amount of INR 2423.27 crores from commercial operation date till February 16, 2018 being the finance cost incurred by the Award Debtor in order to fund the additional interest paid on account of Counter Claim II-a as reproduced above.

Issue No. 40:- Whether the Award Debtor is entitled to a sum of INR 5781.81 crores towards loss of revenue from tariff due to delay in completion of the project by the Claimant, delayed execution of works and defective works carried out by the Claimant.

Issue No. 41:- Whether the Award Debtor is entitled to a sum of INR 1085.17 crores towards financial losses suffered by the Award Debtor due to the revenue loss as mentioned in Issue No. 40 above.

Issue No. 42:- Whether the award debtor is entitled to recover the amount paid to the claimant to the tune of INR 44.71 crores in terms of the Contract for specific works/supplies which was not done by the Claimant in accordance with the terms of Contract? Whether the Award Debtor is entitled to set off the said claim against the retention money retained by it.

Issue No. 43:- Whether the Award Debtor is entitled to a sum of INR 84.93 crores towards loss of interest income for

advances made to the Claimant for works to be completed within the completion schedule, which the Claimant did not complete.

Issue No. 44:- Whether the Award Debtor is entitled to a sum of INR 4.39 crores on account of exchange rate loss on Euro element of Contract Price due to the Claimant's delay in completing the work.

Issue No. 45:- Whether the Award Debtor is entitled to a sum of INR 688 crores on account of revenue loss from April 1, 2016 caused due to lower generation of power for defective Electrostatic Precipitator in both units 1 and 2 installed by the Claimant.

Issue No. 46:- Whether the Claimant is entitled to any interest on its Counter Claim.

Issue No. 47:- What order?

Issue No. 48:- What costs?

Issue No. 49:- Whether the Claimant is entitled to a declaration that the OAC has been issued as on April 13, 2017 and May 19, 2017 being the respective dates of notice being given by the Claimant to the Award Debtor under Clause 25.2.4, GCC.

Issue No. 50:- Whether the Claimant is entitled to an order and direction directing the Award Debtor to release the Bank Guarantees (BGS) furnished by the Claimant as per statement submitted by the Claimant along with the amended SOC.

5. Contentions by the Petitioner

5.1 Mr. Ratnanko Banerjee, Senior Advocate and Ms. Vineeta Meharia, Advocate appearing for the award debtor have made the following arguments:-

5.1.1 The arbitral tribunal found that it is impossible to apportion specific delay to one party with respect to Unit No. 2. Without such apportionment, absolute liability could not be forced upon the petitioner. This is a fundamental error and patent illegality appearing on the face of the award.

5.1.2 The arbitral tribunal relied on the letter dated February 3, 2017 to come to the conclusion that the petitioner accepted its delay with respect to Unit No. 1 and only attributed a delay of 468 days with respect to Unit No. 2. The arbitral tribunal could not have relied on such a letter and construed a document used only for negotiation as an instrument of admission. It was only intended to settle the differences, without prejudice to the petitioner's rights and contentions. On the other hand, following the principle of approbate and reprobate, the averment with

respect to Unit No. 1 cannot be taken at face value without accepting the averment with respect to Unit No. 2 that assigned delay to the respondent.

5.1.3 There is an inconsistent finding that the entire land had to be handed over before any construction activity would commence. The same is evident on the face of the award which records that at least 31 activities were carried out before the entire land was handed over as majority of the land was handed over without delay.

5.1.4 The understanding as per the contractual provisions [Clause 11.2 and 40.1] and the rejection of RIL's letters dated February 27, 2008 and March 15, 2008, which wanted modification of the contract by introduction of clauses favouring escalation damages, was that the contract was a fixed price contract and the only remedy provided was grant of extensions in cases of delay.

5.1.5 In contracts with fixed price or barring price escalation, no price escalation can be awarded. Reliance was placed on ***Associated Engineering Co. -v- Government of Andhra Pradesh and Another*** reported in **(1991) 4 SCC 93**, ***New India Civil Erectors (P) Ltd. -v- Oil and Natural Gas Corporation*** reported in **(1997) 11 SCC 75**, ***Rajasthan State Mines & Minerals Ltd. -v- Eastern Engineering Enterprises and***

Another reported in **(1999) 9 SCC 283** and ***State of Orissa -v- Sudhakar Das*** reported in **(2000) 3 SCC 27** to bolster the said proposition.

5.1.6 When a remedy is provided in the contract, only that remedy can be granted. In the present case, extension was the only remedy for delay and hence, no compensation could have been granted for delay. To support this contention, reliance was placed on ***Ramnath International Construction (P) Ltd. -v- Union of India*** reported in **(2007) 2 SCC 453**, ***Union of India -v- Chandalavada Gopalakrishna Murthy and Others*** reported in **(2010) 14 SCC 633** and ***K. Marappan -v- Superintending Engineering*** reported in **(2020) 15 SCC 401** to strengthen the said argument.

5.1.7 Since the issue of firm price contract was so instrumental in deciding the dispute between the parties and the grant of delay and escalation charges (predominantly amounts awarded under Issue No. 24, 25 and 27), it should have been discussed in the award. But the arbitral tribunal has failed to discuss or even aver to the same, which indicates lack of reasoning and non-application of mind. The mandate under Section 31(3) of the Act requires the arbitral award to have reasoning which is proper, intelligible and adequate. If the award lacks such reasoning, then the award falls prey to being set aside for being perverse

and a result of non-application of mind. The Apex Court's judgement in ***Dyna Technologies Private Limited -v- Crompton Greaves Limited*** reported in **(2019) 20 SCC 1** was cited to strengthen the said argument.

5.1.8 A price escalation formula was relied upon by the arbitral tribunal to award damages in Issue No. 24 and 25, which was not provided for in the contract. In fact, price escalation in any form (damages, compensation or otherwise) was barred by the contract. Therefore, the imposition of a price escalation formula upon the petitioner is unilateral and forceful. It should be set aside as per the judgements in ***Ssangyong Engg. & Construction Co. Ltd. -v- NHAI*** reported in **(2019) 15 SCC 131**, ***PSA Sical Terminal (P) Ltd. -v- Board of Trustees of V.O. Chidambaranar Port Trust Tuticorin*** reported in **2021 SCC OnLine SC 508** and ***Chairman Board of Trustees for Shyama Prasad Mookherjee Port Kolkata -v- Universal Sea Port Private Ltd.*** reported in **MANU/WB/1546/2022**.

5.1.9 The award is also without jurisdiction, the claim of RIL all along was for escalation of price due to delay, and issues framed were also for price escalation, the evidence adduced is also for price escalation, nonetheless, Arbitrators have awarded damages against the claim of price escalation, being very well aware that price escalation was not permitted under the contract, and

hence allowed price escalation in the guise of damages, and by doing so, the arbitrators awarded something indirectly, which they cannot do directly, thereby, violating the provision of Section 34(2)(a)(iv) of the Act.

5.1.10 The amount awarded under Issue No. 24, 25, and 27 of the award is contrary to the terms of the contract and thus in violation of Section 28(3) of the Act, in addition to being patently illegal, perverse, and irrational.

5.1.11 The amount awarded under issues no. 24 and 27 have been arrived at by the Tribunal by applying an arbitrary formula of 75% on the amount claimed and DVC was not given an opportunity to deal with the arbitrary formula, thus, it is perverse and irrational. Therefore, any amount awarded on this head will be contrary to the terms of the contract and liable to be set aside.

5.1.12 The finding in paragraph 34.3(j) of the award, that the petitioner argued on the tenability of the claim but did not dispute the quantum of the claim, is completely contrary to paragraph 34.4(i) of the award.

5.1.13 There is double recovery in Issues No. 24 and 25, as price escalation is awarded for the entire plant in Issue No. 24, but it is also separately granted for the ash-dyke portion of the plant.

5.1.14 Issue No. 27 was allowed on the basis that the CA certificate was that of a statutory auditor's certificate. However, this is contrary to the express disclaimer provided in the certificate that the CA did not prepare it in the role of a statutory auditor, but merely for the purposes of the arbitration. The other additional reasons given for refuting the claim awarded under Issue No. 27 are:-

a. Mere reference to SRS 4400 model does not make the CA certificate sacrosanct.

b. CW2 has not proved the 19,000 pages which were relied upon by the CA for preparation of the certificate.

c. The CA certificate is only for Rs. 100 crores as against the claim of Rs. 168 crores and is still lesser than the amount awarded under this sub-head, that is, 126 crores approximately. Therefore, this is indicative of non-application of mind.

d. The Euro component of 13 million for SEC personnel was never proved, but merely based on a pro-rata calculation.

e. Respondent relied on the CA certificate without producing the CA as a witness to prove the certificate, and in so doing, did not allow the other side to cross-examine the CA.

5.1.15 There is repetitive recovery amongst Issues No. 24, 25 and 27 because:-

a. As per statement of claim of RIL, Issue 24 is on account of 'material and the cost towards manpower' of main plant, Issue 25 is on account of 'raw material, labour, petroleum products, etc.' of ash plant and Issue 27 is on account of 'manpower, salaries and overhead expenses including office expenses, transportation expenses, etc. for main plant and ash pond.

b. Overhead is part of the unit rate reflected in Billing Break-Up (hereinafter referred to as 'BBU') has been admitted by CW2.

c. Overhead is part of the fixed coefficient reflected in the formula applied by the respondent for the escalation price.

5.1.16 The arbitral tribunal has committed a fundamental error and patent illegality in finding that no Demineralised (hereinafter referred to as 'DM') water was available before August 9, 2013 because from the face of the award it is evident that three milestones requiring DM water were achieved prior to August 8, 2013. The arbitral tribunal committed a further fundamental error and patent illegality in recording that DVC delayed the supply of DM water due to delay in completion of the cross country pipeline. From the face of the award it is evident that

about ten milestones requiring DM water were achieved prior to completion of Cross-Country Pipeline (hereinafter referred to as 'CCP') in December, 2015.

5.1.17 The petitioner's specific case that RIL had supplied unstamped Bottom Ring Headers (hereinafter referred to as 'BRHs') as was statutorily required and upon testing the BRHs (8 in number) of both the Unit No. 1 & 2 were found to be defective (cracks) is recorded in the award. The defective BRHs had a cascading effect on COF of both Unit No. 1 & 2, causing huge delay in the hydrotest of almost 3 years in Unit 1 and 4 years in Unit 2. However, the award records that DVC did not allege breach regarding BRH problems causing delay in Unit 2. This is a patent illegality on the face of the award.

5.1.18 It was the petitioner's specific case that the National Draught Cooling Tower (hereinafter referred to as 'NDCT') of Unit 1 was defective. The petitioner directed NDCT 1 to be dismantled on October 27/28, 2013, but the respondent dismantled it on November 16, 2013. In the meantime, the milestones of Unit 1 had to be achieved by connecting NDCT 2 to NDCT 1. Defective NDCT of Unit I had a cascading effect on COF of both Unit 1 and 2. However, the award records that DVC did not allege breach regarding NDCT causing any delay in Unit 1.

5.1.19 As per terms of contract, insulation to be supplied by the respondent was to be imported. The material which was imported got damaged. The petitioner asked the respondent to replace the same but the respondent delayed the same. Ultimately, the respondent supplied indigenous insulation. The delay in replacing the damaged insulation had a cascading effect of COF of both Unit 1 and 2.

5.1.20 The arbitral tribunal held there was a Force Majeure period (October 1, 2009 to January 30, 2010) but totally ignored this period while granting escalation and overstay claims.

5.1.21 The tribunal erred in denying the petitioner of its liquidated damages in Issues No. 12, 13 and 14 by severing the letter dated February 3, 2017 and deriving a part understanding that no delay was attributable to the respondent with respect to Unit No. 1.

5.1.22 The petitioner further claimed that the Hon'ble Tribunal made a wrong approach and erred in assuming that the protocol which contained the data, recorded the achievement of the performance guarantee. Thus, the purported award on this score is based on a wrong assumption and contrary to the terms of the contract. It has been recorded to be proved in the award, with the reasoning that the petitioner did not contest it. However, it was for the respondent to prove it, rather than the

petitioner to disprove it. Furthermore, there is correspondence to indicate that the PG Tests were unsuccessful and work is still pending, which has been completely ignored by the arbitral tribunal. Therefore, the finding in Issue No. 49, which has a direct bearing on Issue No. 2 and Issue No. 50, is perverse.

5.1.23 Additionally, with respect to Issue No. 49, 2 and 50, the award is contrary to the terms of the contract and thus violative of Section 28(3) of the act, in addition to being patently illegal, perverse, and irrational. As per the terms of the contract, OAC (Operational Acceptance Certificate) is to be issued upon successful achievement of COF and successful completion of Guarantee Test (GT) and meeting of Functional Guarantee (FG). Therefore, the respondent is not entitled to issuance of deemed or actual OAC as it did not satisfy any of the conditions.

5.1.24 With regard to Issues No. 2, 14 and 33, it is argued that the release of retention money has no link with the onus of delay or with the validity of the extension of time for completion of the contract. As per the terms of the contract, the release of retention money is solely linked to the actual completion of works without defects (i.e. completion of facility and issuance of OAC). The arbitral tribunal, by linking retention money with the onus of delay and validity of EOT, has misconstrued the terms of the contract. Thus, the award directing the release of

retention money is contrary to the terms of the contract and violative of Section 28(3) of the Act.

5.1.25 The respondent is not entitled to the release of the Bank Guarantee because the work is not completed. COFs issued are provisional with the list of pending work and OACs were not issued by the petitioner. It is also claimed that the award by linking the release of BG to the onus of delay and validity of the extension of time for completion and not to the terms of the contract has violated Section 28(3) of the Act.

5.1.26 The arbitral tribunal ignored the fact that the incomplete items mentioned in the COF remained unsupplied and incomplete even on the date of passing of the award. Furthermore, the respondent did not prove or contend that deficiencies mentioned in the COF were removed or completed, during the arbitration proceeding.

5.1.27 The delay in completion of Unit No 2 would have been 3232 days up to the date of the award instead of 1835 days as wrongly held by the Tribunal. Moreover, as on date, the respondent is yet to complete the supply of mandatory spare parts.

5.1.28 The Tribunal committed an error of jurisdiction by holding that the delay was of 1835 days instead of 3232 days in respect of

Unit 2 as list of pending work was not completed even at the time of passing of the award.

5.1.29 The Performance Guarantee Test in respect of Unit No. 1 and 2 was not carried out for the below listed components:-

a. Unit No 1- (steam generator, turbine generator, coal mill, electrostatic precipitator, cooling tower, total auxiliary power consumption)

b. Unit No 2 – (steam generator, turbine generator, coal mill, electrostatic precipitator, cooling tower, total auxiliary power consumption).

c. The protocol mentioned in the award records the measurement of different parameters of the Units, but did not record as to whether they had attained the guaranteed parameters.

5.1.30 Since the performance guarantee parameters remain incomplete, the respondent is not entitled to issuance of Operational Acceptance Certificate and is also not entitled to the release of 2.5% of the FOB & Ex- works price each for Unit No 1 & 2. Moreover, the tribunal did not take into account the protocols of performance guarantee parameters that were being provided by the petitioner. Nonetheless, it was the duty of Reliance/ respondent to prove the successful Performance

Guarantee Test and achievement of parameters, without which OAC could not have been issued. However, the Tribunal could not and did not record any finding with this regard.

5.1.31 The arbitral tribunal while awarding the amount under Issue No. 15 ignored that several works done by the respondent were defective and required repair and fixing. These were within the scope of the contract and not done for operation or maintenance.

5.1.32 The amount in Issue No. 16 was granted in view of claim towards additional bays in the switchyard. Drawings were provided to the respondent and accepted without the latter raising any additional claims, thus accepting modification of specification. While the petitioner offered, vide letter dated February 3, 2017, to pay Rs. 1.04 crores for the purposes of reconciliation, the remaining claim was denied. Such work was within the scope of work under the contract.

5.1.33 Claim towards excavation, disposal of earth and area grading was entirely under the respondent's scope of work as per the contract. Any additional cost incurred by the respondent will have to be absorbed by them, therefore Issue No. 17 has been wrongly decided. Also, no bills, invoices or proof of payment were disclosed by the respondent.

5.1.34 With respect to Issue No. 18, the respondent failed to produce any bills, invoices or proof of payment, but were still awarded the amount. Furthermore, no written objection was given under Clause 39.2.3 of GCC.

5.1.35 The respondent submitted a design basis report without any cost implication, as per which supply was a natural consequence for improved operability of the plant. Therefore, the claim allowed under Issue No. 19, was barred under Clause 7.3.1.5 of the GCC.

5.1.36 Relays formed part of the bill of materials for respective equipment. The respondent did not raise any claim for additional cost towards such spares. No claim was raised even within 30 days as required under Clause 7.3.1.5 of the GCC of the Contract. Therefore, Issue No. 20 has been wrongly decided.

5.1.37 The claim towards providing newer technology relays is barred by Clause 39.1.1 of GCC, Clause 4.03.00 Vol. IIA, Sec VII Technical Specifications and Clause 7.3.1.5 of GCC. The newer technology had become industry standard by the time the portion of the plant was constructed. Claim is not based on proof of expense or payment by the respondent. The arbitral tribunal has awarded the same in Issue No. 21, without considering the above grounds. This could also not be awarded

on account of delay as there is specific finding in the award that both sides have delayed.

5.1.38 Issue No. 38, 39, 40, 41, 43 and 44 have been rejected by the arbitral tribunal on the basis (a) that there was no delay on behalf of the respondent and (b) Clause 30.1[a] prohibits it. Such finding is perverse and contradictory with the other finding of the arbitral tribunal that both the parties have committed delay.

5.1.39 The arbitral award while dealing with Issue No. 45 does not take into account Clause 27 of GCC, which covers the Defect Liability Period (hereinafter referred to as 'DLP'). Despite the same being raised, the arbitral tribunal relied on Clause 30.1 of GCC, which has no manner of application in respect of this claim. The award is contrary to the terms of the contract. Defects in respect of ESP surfaced and grievance was raised by the petitioner within the DLP. Therefore, the award also ignored vital evidence.

5.1.40 Despite the petitioner's repeated rejection of the escalation and other claims of the respondent, the respondent continued to work, thereby abandoning any right to claim escalation or alleged overstay. Every period of extension constitutes a new agreement and claims up to that period, if not made, will stand extinguished in terms of Section 55 of the Contract Act, 1872. Limitation period for the claims of the respondent arising out of

each extension period would start from the day when the respondent sought extension of the period of contract. Thus, all claims of the respondent arising out of extensions from 2011 onwards would be barred by limitation and particularly since the claim for escalation of price and idling charges, which are really the basis for Issue No. 24, 25 and 27 were all rejected by the petitioner on March 7, 2013. Therefore, these delay claims which are subject of Issue No. 24, 25 and 27 were required to be made within three years from March 7, 2013.

5.1.41 The arbitral tribunal has wrongly rejected amounts in Issue No. 38, 39, 40, 41, 43 and 44 as (i) there was no delay on part of the respondent and (ii) by placing reliance on Clause 31.1(a) of the G.C.C.

5.1.42 In terms of Section 43 of the Act, the provisions of Limitation Act, 1963 would be applicable to arbitrations 'as it applies to proceedings in court'. Therefore, the Apex Court's judgement in ***State of Gujarat -v- Kothari & Associates*** reported in **(2016) 14 SCC 761** is applicable in the instant case.

5.1.43 The arbitral tribunal failed to get into the merits of the counter claims of the petitioner with respect to Issue No. 42 and also failed to refer to the matters of record. Hence, as the award ignores vital evidence, the same is perverse for being patently illegal.

6. Contentions By The Respondent

6.1 Mr. Harish Salve and Mr. Tilak Bose, Senior Advocates have made the following submissions in favour of the award holder:-

6.1.1 The petition filed by the petitioner does not disclose nor does it make out any ground whatsoever as set out in Section 34 of the Act which would entitle the petitioner to the reliefs prayed for in the petition including setting aside of the Arbitral Award dated December 21, 2019. Furthermore, the contentions of the petitioner are alleged factual appellate grievances and do not satisfy the test of the well-settled principles of challenge against an Arbitral Award laid down under Section 34 of the Act.

6.1.2 The arbitral tribunal has come to a specific finding that there was delay on part of the petitioner in handing over land. It is also denied that the entire land was not required for setting up of the two Units. The scope of work of the respondent under the contract was to carry out the work in the entire area.

6.1.3 Merely because the respondent sought extension of time under clause 40 of the GCC, the said clause in no manner bars the respondent from making any claim for compensation/damage by reason of delay on the part of the petitioner in complying with its obligations.

6.1.4 The purported contention of the petitioner, that the COF certificates issued by the petitioner on June 10, 2015 for Unit 1 (effective from May 15, 2015) and on February 24, 2016 for Unit 2 (effective from February 23, 2016) were partial, was raised for the first time in the present proceedings. This was not the case of the petitioner before the arbitral tribunal. The purported contention of the petitioner is contrary to Clause 24 of the GCC relating to "Commissioning and Completion of the Facilities". Once the COF Certificate is issued by the Project Manager, the Unit is commissioned. Furthermore, upon completion, the Employer, that is the petitioner, is responsible for care and custody of the Facilities together with the risk of loss or damage thereto and thereafter takes over the Facilities. The said clause clearly provides for outstanding items to be completed after the COF. There is no concept of partial COF under the Contract. The said provision of the Contract clearly provides for items which are in the nature of punch list items to be completed after issuance of Completion Certificate. It is denied that the COF Certificates were partial as alleged or that they record competition of only part of the Facilities.

6.1.5 Documents enclosed from pages 495 to 499 (Vol. IV of the Petition) appear to be documents which were not a part of the record of the arbitral proceedings. Documents enclosed at page 500 (Vol. IV, Petition) appears to be an internal email of the

petitioner dated January 13/14, 2020 which cannot be a part of the record of the arbitral proceedings. Documents enclosed at page 501 (Vol. IV, Petitioner) also do not appear to be a part of the record of the arbitral proceedings. Furthermore, the Documents from pages 502 to 608 were enclosed as Exhibits to the Affidavit of Evidence filed by the petitioner's witness, RW-2 and are not a part of the COF Certificates of either Unit 1 or Unit 2 as is sought to be insinuated by the petitioner.

6.1.6 The petitioner had not at all argued or pressed their alleged contentions with regard to the alleged inferior quality of components of the Coal Mill before the arbitral tribunal in respect of which documents at page 502 to 509 have been annexed as a part of Annexure I. Documents at pages 510 to 609 relate to the alleged counter claim of the petitioner on the alleged ground that the respondent had supplied a defective ESP. The said counterclaim, the counsel submitted, has been rejected by the arbitral tribunal after elaborate discussion, and on appreciation of evidence.

6.1.7 While the respondent is not aware of and does not admit to any letter purportedly issued by the Ministry of Power to the petitioner on March 24, 2009 it appears from the record of the proceedings before the arbitral tribunal that no such alleged letter has been either referred to or relied upon by the petitioner

before the arbitral tribunal. The petitioner is not entitled to refer to any facts or documents which do not form a part of the record of proceedings before the arbitral tribunal. Without prejudice to the respondent's contention, the counsel submitted, there can be no re-appreciation of evidence.

6.1.8 Under the Provisions of Contract (Clause 26, GCC read with Clause 9, SCC), petitioner would be entitled to Liquidated Damages only for delay in the successful Completion of Facilities. The said clauses clearly show that on achieving COF, the right of the petitioner to levy Liquidated Damages comes to an end and thus the contention of the petitioner that the works were incomplete, is on a complete misinterpretation and is based on misreading of the punch list items enclosed along with the COF certificate issued in accordance with the provisions of the contract.

6.1.9 There were 2 issues raised in the pleadings before the arbitral tribunal, viz. A claim for alleged revenue loss with effect from April 1, 2016 caused allegedly by lower generation of power from alleged defective supply of Electrostatic Precipitator (ESP) in both Units 1 and 2 installed by the respondent. The arbitral tribunal came to a finding that the petitioner is not entitled to any claim under the aforesaid head for reasons elaborated in paragraph 23.3 of the award. The only other issue raised by the

petitioner was the alleged supply of defective Coal Mill before the arbitral tribunal. Though the respondent responded to the allegations contained in paragraphs 2.16 and 2.18 of the Statement of Defence and argued the same, the said issue was not at all argued by the petitioner nor did the petitioner respond to the respondent's arguments before the arbitral tribunal. Accordingly, the arbitral tribunal has not ruled on the same.

6.1.10 The contentions by the petitioner in various paragraphs relating to PG tests are contradictory and inconsistent. In any event, it is denied that the respondent had failed to carry out or achieve the required PG parameters. The arbitral tribunal has considered the entire documentary and oral evidence on record and thereafter arrived at a finding that the respondent is entitled to a declaration that OAC has been issued as on April 13, 2017 and May 19, 2017, being the respective dates of notice given by the Respondent to the petitioner under Clause 25.2.4 of GCC. The counsel submitted that in this regard, documents referred to by the petitioner have already been considered and ruled upon by the arbitral tribunal.

6.1.11 It is denied that the award of the amounts set out therein with interest at the rate of 10% p.a. from August 20, 2017 till the date of the award is without jurisdiction as alleged. The arbitral tribunal has held that while the actual difference between

contractual completion date and actual completion date is 1643 days and 1835 days in respect of Units of 1 and 2, the petitioner has accepted that there is no delay on part of the respondent for completion of Unit No. 1 and has carved out a period of only 468 days as being allegedly attributable to the respondent in Unit 2. On the aforesaid basis, it has been held by the arbitral tribunal, that the calculation and basis for the said 468 days assumes importance. It is denied that the reasoning given by the arbitral tribunal is either perverse or contrary to records as alleged or at all.

6.1.12 The Counsel denied that the respondent has left several items of work incomplete and that there is no question of the Defect Liability Period not being over as alleged. The Counsel further submitted that the PG Tests were conducted after COF was achieved in respect of both the Units and there is no question of the items mentioned in the punch list set out in COF not being attended to. The Counsel also submitted that Annexure J contains new documents which are not a part of the record of the arbitral tribunal and that the petitioner cannot refer to the same.

6.1.13 The petitioner in the respectful submission of the respondent has selectively referred to certain passages of the Award and taken them out of context to argue that the Award purportedly

holds that both the petitioner and the respondent had failed to adhere to the timelines.

6.1.14 It was not the case of the petitioner before the arbitral tribunal that there was any delay on part of the respondent in completion of Unit - 1. The delay alleged with regard to Bottom Ring Header, NDCT and Insulation Material, admittedly related to Unit - 2 and not Unit 1. The contention of the petitioner with regard to alleged breach of the Contract was restricted to the aforesaid three issues. Apart from these, the Petitioner has not contended that there was any delay in achieving COF of Unit-1 on any other ground. The arbitral tribunal has ruled the issues in favour of the respondent. On the contrary, the entire case of the petitioner in respect of which it had led evidence was that it was levying Liquidated Damages for delay in completion of Unit 2, which the arbitral tribunal held it could not prove.

6.1.15 The arbitral tribunal has come to a categorical finding that the issues regarding Bottom Ring Header, NDCT and Insulation Material did not assist the petitioner in support of its claim for liquidated damages which is only for Unit - 2. It is further clear that even with regard to Bottom Ring Header, NDCT, and Insulation Material, the respondent could have justifiable grievances. Furthermore, the finding with regard to RTR of Unit-1 is clear and categorical, which holds that the petitioner was

not in a position to arrange inputs and had agreed to a truncated RTR. A reading of the award also shows that no delay could be attributable to the respondent with regard to COF of Unit - 1 and even on the petitioner's own showing no delay could be attributable to the respondent. After having so held, the arbitral tribunal holds that delay 'if any' on the part of the respondent is subsumed in delay on part of the petitioner. The arbitral tribunal has referred to a letter dated February 3, 2017 wherein the petitioner actually offered compensation to the respondent for delay on part of it in respect of Unit - 1 thereby admitting responsibility for delay in achieving RTR of Unit - 1.

6.1.16 The Counsel submitted that the arbitral tribunal has come to a categorical finding that the issues regarding BRH, NDCT and Insulation Material did not assist the petitioner in support of its claim for liquidated damages which is only for Unit 2. After a perusal of paragraph of 14.3(m) of the Award, it is found that there is a clear and categorical finding that RTR of Unit 1 was delayed on account of the petitioner. This is a finding of fact on appreciation of evidence. It is further evident from 14.3(n) that even with regard to the BRH, NDCT, and Insulation Material, the respondent could have justifiable grievances. The finding with regard to RTR of Unit 1 is clear and categorical, which holds that the petitioner was not in a position to arrange inputs and had agreed to a truncated RTR. A reading of 14.3 (p) shows

that no delay could be attributable to the respondent with regard to COF of Unit 1 and even on the petitioner's own showing no delay could be attributable to the respondent. After having so held, the arbitral tribunal holds that the delay "if any" is subsumed in delay on part of the petitioner. Reference is made by the arbitral tribunal to the letter dated February 3, 2017 wherein the petitioner actually offered compensation to the respondent for delay on the part of the petitioner in respect of Unit 1 thereby admitting responsibility for delay in achieving RTR of Unit 1.

6.1.17 The counsel submitted that insofar, as Unit- 2 is concerned, the petitioner before the arbitral tribunal has referred to the letter dated February 3, 2017 by which it purported to levy Liquidated Damages on the respondent for alleged delay of 468 days in completion of Unit - 2. The arbitral tribunal has found that delay in RTR of Unit-2 was on the account of the petitioner and the period of delay of 468 days claimed by the petitioner as being to the account of the respondent cannot be established. The petitioner is incorrect in contending that the arbitral tribunal could not have relied upon the letter dated February 3, 2017 as the document had to be considered in its entirety and not severed for part acceptance and part rejection. The petitioner has itself relied upon the said letter in support of its case that it was entitled to levy Liquidated Damages on the

respondent for 468 days delay with regard to COF of Unit - 2. Also, the Petitioner's counter claim before the Arbitral Tribunal was based entirely on the letter dated February 3, 2017. The petitioner cannot now contend that the letter dated February 3, 2017 was merely an offer. The arbitral tribunal has considered the said letter which is a part of RW-5's evidence and has come to finding, inter alia, in paragraph 6.3 as well as paragraph 34.4 of the Award. Such a finding based on interpretation/appreciation of documentary and oral evidence, are not subject to scrutiny under Section 34 of the Act. The said letter contains various admissions on the factual aspects of the matter, such as levy of Liquidated Damages on account of alleged delay on part of the respondent of 468 Days as against the actual delay of 1835 days in the completion of Unit 2 alone; and no liquidated damages being levied for delay in completion of Unit 1. The letter is in response to the respondent's claims with regard to compensation, inter alia, for idling and overstay by reason of delay in RTR of Unit - 1 as well as civil construction with regard to the Ash Dyke. This was on the specific basis that such delay was not on the account of the respondent. The offer in any event is related to the quantum of some of the respondent's claims being accepted by the petitioner if the respondent gives up its other claims. In the submission of the respondent, the petitioner in its preliminary notes has

clearly stated that there were admissions on part of it, contained in the letter dated February 03, 2017.

6.1.18 The rejection of the petitioner's counter claim for liquidated damages by the arbitral tribunal is neither contrary to the terms of the contract nor is patently illegal, perverse, and irrational as has been argued by the petitioner. Furthermore, the rejection of the counter Claim by the arbitral tribunal is based on appreciation of evidence and after taking into account the terms of the contract.

6.1.19 The argument of the petitioner that the alleged delay on part of the respondent was not just 1835 days but was 3232 days on the date of the Award, thereby contending that there was a continuing breach on part of the respondent in any event cannot stand. This was never agitated before the arbitral tribunal and so cannot be pressed before this Court.

6.1.20 As per settled law of the Hon'ble Supreme Court, even in the absence of an escalation clause it would be within the jurisdiction of the arbitral tribunal to allow claims on account of escalation of costs for work executed during the extended period of contract. The Hon'ble Supreme Court in various judgments has held that the arbitral tribunal is vested with authority to compensate a party for extra cost incurred by such a party as a result of failure of the other party to comply with its obligations

and that when extension of time is provided for in the contract, the same is an additional remedy, and damages could be granted, including under Section 73 of the Indian Contract Act, 1872.

6.1.21 In view of respondent's entitlement as per settled law, it is not necessary for the respondent to deal with the Petitioner's contention that the respondent was purportedly aware of the bar on escalation of price and had participated in the tender process in spite of the same or the argument that the respondent sought relaxation of bar of price escalation, both pre and post award of the contract to it, but the same was rejected by the petitioner.

6.1.22 The argument of the petitioner that price escalation claimed under Issue No. 25 by the respondent amounts to double recovery since price escalation on account of delay for the whole project has been claimed under Issue No. 24 is incorrect. The Letter dated February 03, 2017 written by the petitioner itself treats the main plaint portion as well as Ash Dyke portion separately and proposes to grant additional claims in respect of the aforesaid two portions separately. The said argument of the petitioner was not raised during arbitral proceedings.

6.1.23 The petitioner has contended that the remedy which was provided under the contract for seeking extension of time has

been availed of by the respondent and that as such the respondent has not reserved its right to seek damages for price escalation. It is submitted that contemporaneously with the letters seeking time, the respondent has been agitating its claims, inter alia, relating to Price Variation for Main Plant and rate revision for Ash Dyke portion of the project by reason of delay on account of the petitioner. While the petitioner rejected such claims, eventually some portions of the respondent's claims were also admitted by the petitioner in its letter dated February 03, 2017. It is thus incorrect on the part of the petitioner to contend that the respondent had not reserved its right to seek damages or price escalation when the issue was being consistently pursued by the respondent with the petitioner.

6.1.24 Insofar as declaration of OAC is concerned, the arbitral tribunal has referred to the evidence on record as well as further supported its reasoning by CW1's Affidavit of Evidence. The same was neither contradicted nor tested by the petitioner. The arbitral tribunal records that the same do not form a part of the record of the proceedings, but have drawn an adverse inference that after RW3 was given the protocols, the petitioner has not denied the correctness of such protocols nor has RW3. The declaration given is from April 13, 2017 and May 19, 2017 when notices were given under Clause 25.2.5 of the GCC. While under

Section 34, the Court cannot re-appreciate evidence, even the documents referred to by the petitioner show that the protocols which were jointly signed were duly clarified by the respondent.

6.1.25 The arbitral tribunal has directed the petitioner to pay restitution by way of payment of differential escalation amounts and amounts incurred by it on account of delay being additional costs incurred on a reasonable basis and on the basis of evidence before it. Such computation is also not capable of being challenged under Section 34 of the Act. The arbitral tribunal has duly followed the amended provisions of Section 28(3) of the said Act and has duly taken into account the terms of the contract (the said section having been amended w.e.f. October 23, 2015). It is respectfully submitted that in terms of the contract as well as in terms of the law laid down by the Hon'ble Supreme Court, the grant of escalation or increase in charges and other amounts as have been awarded by the arbitral tribunal are perfectly within the law and there is no error apparent or anything contrary to public policy in the award of such amounts which would merit interference. There is nothing in the award to show that the conclusion of the arbitral tribunal is such that no reasonable or fair-minded person could have reached it.

6.1.26 Section 34(2A) of the Act contains the phrase "illegality appearing on the face of the award". The predecessor act being the Arbitration Act, 1940 in Section 16(c) as it then stood contained a phrase "objection to the legality of the award is apparent on the face of it". The phrase "apparent upon the face of" fell for consideration of the Hon'ble Supreme Court in the case of ***Jajodia Overseas (Pvt.) Ltd. -v- Industrial Development Corporation of Orissa Ltd.*** reported in **(1993) 2 SCC 106,** with reference to the challenge to the Award under Section 30 of the 1940 Act held that the error apparent on the fact of the award is required to be shown.

6.1.27 In the case of ***M/s. Allen Berry & Co. Pvt. Ltd. -v- Union of India*** reported in **(1971) 1 SCC 295** the Hon'ble Supreme Court ruled on "error apparent on the record". The Hon'ble Supreme Court held that the error, if any, cannot be said to be an error apparent on the face of the Award entitling the Court to consider various documents placed in evidence before the umpire, but not incorporated in the awards so as to form a part of it and then make a search if they have been misconstrued by him. The award was eventually upheld in the said decision. The Court in ***Allen Berry (supra)*** relied on the decisions in the case of ***Hodkinson -v- Fernie*** reported in **1857 (3) CB (NS) 189, *Union of India -v- Bungo Steel Furniture Pvt. Ltd.*** reported in **AIR 1967 SC 1032** and also referred to the decision in the case

of ***Champsey Bhara and Co. -v- Jivraj Ballo Spinning and Weaving Co. Ltd.*** reported in **AIR 1923 PC 66,** and **Giacomo Costa Fu Andrea *-v-* British Italian Trading Company Ltd.** reported in **AIR 1923 PC 66** and ***Giacomo Costa Fu Andrea -v- British Italian Trading Company Ltd.*** reported in **1962 (2) All ER 53.** The Counsel relied on the paragraphs 4 to 10, 14, 15, and 26 of the judgment in ***Allen Berry (supra).***

6.1.28 Instead of the phrase "...objection to the legality of the award is apparent upon the face of it" in the 1940 Act, the phrase "patent illegality appearing on the face of the award" is present in the 1996 Act. It is a well settled principle of law that use of same words in similar connection in a later statute gives rise to a presumption that they are intended to convey the same meaning as an earlier statute. When words in an earlier statute have received an authoritative exposition by a superior court, use of the same words in similar context in a later legislation will give rise to a presumption that parliament intends that the same interpretation should also be followed for construction of those words in a later statute.

6.1.29 Even the successor Act of 1996 has been subjected to several amendments from time to time to narrow the scope of challenge to an arbitral award. This exercise emanates from the report of the Law Commission dated August 2014 (paragraphs 34 to 37

at pages 21 to 22 thereof) and the Supplementary Report of February 2015 (paragraphs 7 to 10 at pages 7 to 21 thereof). Furthermore, the Counsel submit that the effect of narrowing of the scope of challenge to an arbitral award under Section 34 is discussed and adumbrated upon by the Hon'ble Supreme Court in the case of ***Ssanyong Engineering and Construction Co. Ltd. -v- National Highways Authority of India (NHAI)*** reported in **(2019) 15 SCC 131**. Paragraphs 26, 27, 30, 37, 38, 39 and 41 of the said judgment were relied upon by the Counsel in this regard.

6.1.30 What emerges from ***Ssyanyong Enginingineering (supra)*** is the various other grounds envisaged in ***ONGC -v- Saw Pipes,*** reported in **(2003) 5 SCC 705** falling under "public policy" are all restricted grounds and should be construed narrowly for the purpose of Section 34. "Perversity" is to be read in the context of patent illegality on the face of the award. Even whether or not, an award is patently illegal because of "lack of evidence" or based on no evidence is to be judged on the basis of the ground of "patent illegality appearing on the face of the award".

6.1.31 The petitioner is selectively relying upon Paragraph 10.4(f) of the award relating to delay in supply of BRH. The petitioner is misreading the award. Viewed from any angle, the contents of Paragraph 10.4 (f) cannot be construed to mean that there was

any delay on part of the respondent with regard to BRH. On the contrary, the arbitral tribunal has come to a categorical finding that the delay which could be singled out was delay on part of the petitioner in giving land to the respondent in timely manner and also supply of coal for conducting RTR. The arbitral tribunal has also stated that failure to get DM water plant ready to supply water in a timely manner was attributable to the petitioner.

6.1.32 It is an admitted position that COF of both units was not achieved as per the respective Scheduled Dates of Completion. The contract between the parties, in the submission of the respondent does not take away the right of the respondent to claim damages for the extended period of the contract for breach on account of the petitioner. It is settled law, as per various decisions of the Hon'ble Supreme Court of India that right is available to a party to claim damages if the Project gets delayed by reason of breach on part of another party in complying with its obligations. Delhi High Court in ***Rawla Construction Company -v- Union of India,*** reported in **ILR (1982) 1 Delhi 44** quotes Hudson on "Building & Engineering Contracts" which states that if the cause of delay is due to breach of contract by the employer and there is also an applicable power to extend the time, the exercise of the power will not in absence of clearest possible language deprive the

contractor of its right to damages for the breach. The Delhi High Court held that otherwise a contractor would have no remedy, however outrageous the conduct or behaviour of the employer is.

6.1.33 The Hon'ble Supreme Court in the case of ***Assam State Electricity Board & Ors. -v- Buildworth Pvt. Ltd.*** reported in **(2017) 8 SCC 146** has held that fixed price would not bind a party beyond the scheduled date of completion. Furthermore, the Hon'ble Supreme Court upheld the award wherein it was held that the provision in the contract was applicable only during the scheduled term of the contract and not in respect of the extended period. The Hon'ble Supreme Court also held that interpretation/construction of a term of the contract is within the domain of the arbitral tribunal.

6.1.34 Reliance on the 1870 judgment of the Exchequer Chamber in ***Roberts -v- The Bury Improvement Commissioners*** reported in **[L.R.] 5 C.P. 310** is placed to argue that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself**.**

6.1.35 The contention of the petitioner that decisions under the 1940 Act would not be applicable is clearly misconceived in view of the fact that the issue whether a contract is a fixed price contract containing a bar from claiming damages is unrelated to

whether the arbitration proceedings are under the 1940 Act or the 1996 Act. In-fact, five of the decisions cited by the petitioner were all rendered in a challenge to the Award under the 1940 Act.

6.1.36 Judgment of the Delhi High Court in the case ***Delhi Development Authority -v- N.N. Buildcon Pvt. Ltd.*** reported in **2017 SCC OnLine Del 11494** was placed before this Court wherein the Delhi High Court in the said case affirmed an award under Section 34 of the 1996 Act even where the clause in the agreement stipulated that no escalation could be paid for the work done during the extended period.

6.1.37 The ground of challenge under Section 28(3) of the Act read with Section 34(2)(a)(iv) of the Act has been deal with in ***SsangYong Engineering (supra),*** wherein it was held that "submission to arbitration" either refers to the arbitration agreement itself or disputes submitted to arbitration and that so long as disputes raised are within the ken of the arbitration agreement, they cannot be said to be disputes which are either not contemplated by or which fall outside the arbitration agreement. Further, where matters are connected with matters in issue, they would not readily be held to be matters that could be considered to be outside or beyond the scope of submission. The Hon'ble Supreme Court in ***Ssanyong Engineering (supra),*** while

referring to ***State of Goa -v- Praveen Enterprises*** reported in **(2012) 12 SCC 581** has held that where an arbitral tribunal has rendered an award which decides the matter either beyond the scope of arbitration agreement or beyond disputes referred to arbitral tribunal, as understood by ***Praveen Enterprises (supra)*** , the arbitral award could be said to have dealt with the decisions on matters beyond the scope of submissions to the arbitral award. It has held inter alia that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the award would be beyond the scope of submission to arbitration, if otherwise, the aforesaid mis-interpretation (which would include going beyond the terms of dispute) could be said to have been fairly comprehended as "disputes" within the arbitration agreement or which were referred to the decision of the arbitrators, as understood by authorities quoted in the judgment. To bring in by back door grounds relatable to Section 28(3) of the Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) of the Act would not be permissible, as this ground must be construed narrowly and so construed must refer only to matters which are beyond arbitration agreement or beyond reference.

6.1.38 The ground sought to be urged before this Court was not the case of the petitioner in any form before the arbitral tribunal viz.

that the correspondence prior to the contract establishes that the contract was a firm price contract (i.e. even irrespective of there being any delay on part of the petitioner) and consequently, the respondent cannot claim any loss or damages for any delay howsoever long on the part of the petitioner in fulfilling its obligations under the contract.

6.1.39 In support of its contention that the contract is a firm price contract and no compensation can be awarded, the petitioner has cited various judgements. The respondent proceeded to distinguish each of the aforesaid judgments.

6.1.40 The Price Variation formula has been applied to claim the incremental cost. The Price Variation formula itself specified the source of the indices with regard to various coefficients (Annexure 1 to Annexure 4 and 5 of CW2's evidence). For example, published price indices of industrial machinery, commodities, non-electrical machinery, industrial workers, etc. have been taken by the respondent. The computation based on the price variation formula taken by the respondent has been proved by CW - 2. He has also deposed that the price variation formula is a universal formula and applies to foreign as well as Indian supplies. In so far as application of Indian indices to incremental cost in foreign market is concerned, CW - 2 has deposed that the Indian indices were applied as it was not

known what would be the actual incremental cost in the foreign market. The petitioner has neither shown nor demonstrated as to how the price variation formula applied by the respondent though not appearing in the contract is incorrect or ought not to be followed by the arbitral tribunal. The values of the bills raised which were based on Billing Break Up (BBU), on which the formula was also applied have also not been disputed by the petitioner. The computation has not been disturbed by the petitioner in cross examination or by leading evidence of its witnesses. The petitioner has not been able to demonstrate in arbitration proceedings that the PV formula applied by the respondent cannot be considered for granting incremental cost.

6.1.41 On Issue No. 24, the findings of the arbitral tribunal inter alia at paragraph 34.4 (j) and (k) of the Award would show that the evidence of CW-2 has been accepted by the arbitral tribunal and that the quantum was not disputed, which in the submission of the respondent is a finding of fact on appreciation of the evidence in chief as well as cross examination. Insofar as Issue No. 25 is concerned, the quantum of the claim is discussed in paragraph 34.4(p) to (t) of the award. The arbitral tribunal has appreciated the documentary and oral evidence and has awarded the entire amount claimed towards price variation in Ash Dyke.

6.1.42 The Overstay claim (Issue No. 27) relates to the period from February, 2011 (which is the scheduled date of completion) till November, 2016 (respondent's activities relating to punch list items and performance guarantee tests continued). Furthermore, the claim for Overstay by the respondent had been deposed by CW-2 in his evidence in chief. Out of the total amount of INR 168,14,46,445/- claimed by the respondent, CW-2 has produced an Auditor's Certificate of INR 100,87,95,334/-. The Auditor's Certificate which had been referred to elaborately during the course of the respondent's argument is as per Standard on Related Services (SRS) 4400 'Engagement to Perform Agreed-upon Procedures regarding Financial Information' issued by the Institute of Chartered Accountants. In Paragraph 5 of the Certificate, the Chartered Accountants have stated that they have verified that the amounts in respect of Raghunathpur Project and the amounts are as per the Books of Accounts of the relevant period and pertain to the period for which claim is made.

6.1.43 Judgments of the Hon'ble Supreme Court in ***Haryana Tourism Limited -v- M/s. Kandhari Beverages Limited*** reported in **(2022) 3 SCC 237,** ***Delhi Airport Metro Express Pvt. Ltd. -v- Delhi Metro Rail Corporation*** reported in **(2022) 1 SCC 131,** ***MMTC Limited -v- Vendata Limited*** reported in **(2019) 4 SCC 163,** ***Ssanyong Engineering and Construction Co. Ltd. -v-***

National Highways Authority of India (NHAI) (supra) outline the extremely limited scope of interference with an arbitral award permissible under Section 34 of the Act.

7. Analysis and Conclusion

7.1 Scope of Interference Under Section 34 of the Act

7.1.1 The scope of permitted interference allowed under Section 34 of the Act needs deliberation before entering into the merits of the instant dispute. Both sides have extensively cited case laws to buttress their understanding of the law on Section 34, but this Court must undertake a neutral and objective assessment of the jurisprudence with respect to the same.

7.1.2 The Apex Court, in ***Ssangyong (supra)*** exhaustively dealt with the import of the 246th Report of the Law Commission on the Act and its subsequent influence on the law of setting aside. Relevant portions are extracted below:-

> *"26. The Law Commission Report, when it came to setting aside of domestic awards and recognition or enforcement of foreign awards, prescribed certain changes to the 1996 Act as follows:*
>
> * * *
>
> *35. It is for this reason that the Commission has recommended the addition of Section 34(2-A) to deal with*

purely domestic awards, which may also be set aside by the court if the court finds that such award is vitiated by "patent illegality appearing on the face of the award". In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed proviso to the proposed Section 34(2-A) that such 'an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciating evidence'. The Commission believes that this will go a long way to assuage the fears of the judiciary as well as the other users of arbitration law who expect, and given the circumstances prevalent in our country, legitimately so, greater redress against purely domestic awards. This would also do away with the unintended consequences of the decision of the Supreme Court in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] , which, although in the context of a purely domestic award, had the unfortunate effect of being extended to apply equally to both awards arising out of international commercial arbitrations as well as foreign awards, given the statutory language of the Act. The amendment to Section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court inONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] — and in order that any contravention of a term of the contract by the Tribunal should not ipso jure result in rendering the award becoming capable of being set aside. The Commission believes no similar amendment is necessary to Section 28(1) given the express restriction of the public policy ground.

* * *

39. To elucidate, para 42.1 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] ,

namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , 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. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, 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.

* * *

76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February 2013 — in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-1994 to 2004-2005. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. ***This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula dehors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or***

alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. *Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."*

Emphasis Added

7.1.3 In ***State of Jharkhand and Others -v- HSS Integrated SDN and Another*** reported in **(2019) 9 SCC 798**, the Apex Court re-iterated the assertions of law made in a catena of other judgements. The pertinent portions are cited below:-

"6.1. In Progressive-MVR [NHAI v. Progressive-MVR (JV), (2018) 14 SCC 688 : (2018) 4 SCC (Civ) 641] , after considering the catena of decisions of this Court on the scope and ambit of the proceedings under Section 34 of the Arbitration Act, this Court has observed and held that even when the view taken by the arbitrator is a plausible view, and/or when two views are possible, a particular view taken by the Arbitral Tribunal which is also reasonable should not

be interfered with in a proceeding under Section 34 of the Arbitration Act."

7.1.4 The Apex Court in ***Delhi Airport Metro Express (supra)*** again re-iterated the same position of law in a different manner. The apposite portions are replicated below:-

"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not

supplied to the other party is a facet of perversity falling within the expression "patent illegality".

* * *

49. Even assuming the view taken by the High Court is not incorrect, we are afraid that a possible view expressed by the Tribunal on construction of the terms of the Concession Agreement cannot be substituted by the High Court. This view is in line with the understanding of Section 28(3) of the 1996 Act as a ground for setting aside the arbitral award, as held in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] and thereafter upheld in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] . No case has been made out by the High Court to establish violation of Section 28(3). Having carefully examined the Concession Agreement, the findings recorded by the Tribunal and the findings recorded by the Division Bench, we are not in a position to hold that the opinion of the Tribunal on inclusion of Rs 611.95 crores under "equity" is a perverse view. It cannot be said that the Tribunal did not consider the evidence on record, especially the resolution dated 16-3-2011 passed by DAMEPL's Board of Directors. We also do not find fault with the approach of the Tribunal that the understanding of the term equity as per the Companies Act, 2013 is not relevant for the purposes of determining "adjusted equity" in light of the express definition of the term in the Concession Agreement. As has been held in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , mere contravention of substantive law as elucidated in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 :

(2015) 2 SCC (Civ) 204] is no longer a ground available to set aside an arbitral award. The support placed by the Division Bench on the interpretation of Section 28(1)(a) of the 1996 Act as adopted in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] is, therefore, no longer good law. In view of the foregoing, we set aside the findings of the High Court and uphold the award passed by the Tribunal in respect of the computation of termination payment under Clause 29.5.2."

7.1.5 The Apex Court in ***PSA Sical Terminal (P) Ltd. (supra)*** again exposited upon the scope of interference and the powers of a Court under Section 34 of the Act. The relevant paragraphs are extracted herein below:-

"85. However, ignoring the stand of TPT, by the impugned Award, the Arbitral Tribunal has thrust upon a new term in the Agreement between the parties against the wishes of TPT. The 'royalty payment method' has been totally substituted by the Arbitral Tribunal, with the 'revenue-sharing method'. It is thus clear, that the Award has created a new contract for the parties by unilateral intention of SICAL as against the intention of TPT.

* * *

87. As such, as held by this Court in Ssangyong Engineering and Construction Company Limited (supra), the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held

that a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re-writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category.

* * *

89. It has been held that the role of the Arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

* * *

92. In that view of the matter, we are of the considered view, that the impugned Award would come under the realm of 'patent illegality' and therefore, has been rightly set aside by the High Court."

7.1.6 In ***Chairman Board of Trustees for Shyama Prasad Mookherjee Port Kolkata (supra)***, I have thoroughly dealt with the law on Section 34 of the Act, contractual interpretation and restraints on the Court's and arbitrator's power. It is paramount to reproduce the relevant extracts herein below:-

"22. The arbitrator is the ultimate authority of law and facts. The symphony of an award can be composed by different notes of contractual interpretation and trade usages,

however, the tunes of trade usages cannot deafen or drown out the chords of univocal understanding between the parties. The legislative mandate and judicial pronouncements have granted the arbitrator a wide mandate to flirt around with interpretation of facts and law. However, such flirtations are to be rejected when met with resistance from the unequivocal understanding between the parties. Such resistance has to be patently evident and must go to the root of the matter.

* * *

30. Section 28(3) does lay down that an arbitral tribunal should take into account the terms of the contract and the trade usages applicable to the transaction. However, in my understanding, from a reading of the law discussed above and the section itself, 'terms of the contract' and 'trade usages' are to be considered conjunctively. The latter may assist in the understanding of the former, in situations wherein the former is ambiguous or completely silent. But, at the cost of repetition, explicit understanding of the parties as emanating from the contract, that too which have a bearing on the fundamental issues of dispute, cannot be ousted in favour of considerations of 'trade usages'. Such an understanding completely undermines party autonomy. It could never be the legislative intent. Nor has it been allowed by courts."

7.1.7 Most recently, in the case of ***Hindustan Construction Company Limited -v- National Highways Authority of India*** reported in **2023 SCC OnLine SC 1063**, the Hon'ble Supreme

Court reiterated the limited scope of interference available to the Courts under Section 34 of the Act. I have extracted the relevant paragraphs below:-

> *"26. The prevailing view about the standard of scrutiny- not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand-and not interfered with, [save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily chose the path of least interference, except when absolutely necessary]. By training, inclination and experience, judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say [under Section 37], and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible-and this court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.*
>
> *27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons,*

especially when they interpret contractual terms, ought not to be interfered with, lightly. The proposition was placed in State of UP v. Allied Constructions:

'[..] It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see Sudarsan Trading Co. v. The Government of Kerala, (1989) 2 SCC 38 : AIR 1989 SC 890). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law'

28. This enunciation has been endorsed in several cases (Ref McDermott International Inc. v. Burn Standard Co. Ltd.18). In MSK Projects (I) (JV) Ltd v. State of Rajasthan19 it was held that an error in interpretation of a contract by an arbitrator is "an error within his jurisdiction". The position was spelt out even more clearly in Associate Builders (supra), where the court said that:

'[..] if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.' "

7.1.8 Even in a case under the 1940 Act, the Hon'ble Supreme Court in its judgment in ***S.D. Shinde Tr. Partner -v- Govt. of Maharashtra and Ors.*** reported in **2023 SCC OnLine SC 1045**, propounded that the Courts while considering a challenge under Section 30 of the 1940 Act have to keep in mind that the arbitrator is the sole judge of facts and unless an error of law can be shown, interference with the arbitral award should be avoided. Relevant portions of the aforesaid judgment have been extracted below:-

"25. It is axiomatic that courts, while adjudging whether an arbitration award calls for interference has to be conscious that the arbitrator is the sole judge of facts; unless an error of law is shown, interference with the award should be avoided. In Bijendra Nath Srivastava v. Mayank Srivastava11 it was observed,

'If the arbitrator or umpire chooses to give reasons in support of his decision it would be open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator umpire on the basis of the recording of such

reasons. The reasonableness of the reasons given by the arbitrator cannot, however, be challenged. The arbitrator is the sole judge of the quality of the evidence and it will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal. [See Champsey Bhara & Co v. Jivraj Baloo Spq and Wvg. Co. Ltd. (AIR 1923 PC 66); Jivrajbhai Ujameshi Sheth v. Chintamanrao Balaji ((1964) 5 SCR 480); Sudarshan Trading Co v. Govt of Kerala ((1989) 2 SCC 38); Raipur Development Authority v. Chokamal Contractors ((1989) 2 SCC 721 : (1989) 3 SCR 144); and Santa Sila Devi v. Dhirendra Nath Sen ((1964) 3 SCR 410).'

26. It is also noteworthy that the scope of jurisdiction of a court, under Section 30/33 of the Act, never extended beyond discerning if the award disclosed an "error apparent on the face of the award" which is an "error of law apparent on the face of the award and not an error of fact. The error of law can be discovered from the award itself or from a document actually incorporated therein." (Refer to Trustees of Port of Madras v. Engineering Constructions12). In the facts of the present case, the award did not, facially disclose any error of law; damages were awarded in accordance with principles embodied in law, and the findings were based on the evidence placed before the tribunal. The ruling of the trial courts and the High Court is nothing short of intense appellate review, which is impermissible in law and beyond the courts' jurisdiction."

7.1.9 The principle which emerges from the aforesaid discussion is that the lens of examination under Section 34 of the Act is extremely narrow. Courts should exercise their powers under Section 34 of the Act as a matter of exception. Only if the decision of the arbitral tribunal is so perverse that it would shock the conscience of the court, or is so fundamentally erroneous which no trained legal mind could have arrived at, the award can be set aside under Section 34 of the Act. Courts do not act as an appellate forum under Section 34, but as mere watchdogs to ensure that there is no serious infirmity or perversity within the arbitral award. In a catena of judgments as discussed above, the Hon'ble Supreme Court has put the spotlight on the extremely limited grounds that would invite the courts to exercise their powers under Section 34 of the Act.

7.2 Patent Illegality - 'On The Face of The Award'

7.2.1 The respondent placed reliance upon the judgment of the Delhi High Court in ***Rawla Construction Co. -v- Union of India (supra)***, which elucidated that where an arbitrator has not referred to any clause of the contract, the Court is not empowered to "*read the clause of the contract first and then to arrive at the conclusion that the arbitrator has gone wrong in construing terms of the contract.*". Furthermore, the Delhi High

Court also propounded that only when the arbitrator has "*impliedly incorporated*" a provision of the contract into the award, only then can the Court look into that provision. Relevant portions from the aforesaid judgment have been reproduced below:-

> *"11. There is one point of fundamental importance in this case. The award is a non-speaking award. The arbitrator has given no reasons. He has not invited us to read clauses 9, 11 and 63 of the Conditions of Contract which are the mainstay of counsel's argument. With regard to non-speaking awards the law is clear. In Allen Berry and Co. v. Union of India, (1971) 1 SCC 295 : AIR 1971 SC 696 (3), the Supreme Court has said:*
>
> *'The question whether a contract or a clause of it is incorporated in the award is a question of construction of the award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it. The principle of reading contracts or other documents into the award is not to be encouraged or extended. The rule thus is that as the parties choose their own arbitrator to be the judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or*

incorporated in it so as to form part of it, the award will neither be remitted not set aside notwithstanding the mistake.'

12. The arbitrator has not referred to any clause of the contract. There not been incorporated in the contract. There is not permissible for the court to read the clause of the contract first and then to arrive at the conclusion that the arbitrator has gone wrong in construing terms of the contract. This principle is now well settled. The court has therefore no right to read the clauses of the contract and to find fault with the arbitrator's by adopting a line of reasoning of its own.

13. If the arbitrator says "On the wording of this clause I hold so and so, then that clause is impliedly incorporated into the award because he invites the reading of it" (Blaiber & Co. v. Leopold Newborne (London Ltd., (1953) 2 Lloyd's Rep 427 (4) at p. 429 per Denning LJ). But here there is no reference to any specific provision of the contract on which the arbitrator may be said to have based his decision. It is quite impossible to say that he has incorporated the contract in the award in the sense that he has invited those reading the award to read the contract "The principle of reading contracts or other documents into the award is not one to be encouraged or extended." I am therefore not entitled, on an award which is non-speaking, to look at the contract and search it in order to see whether there is an error of law. The award is delphic. The arbitrator has not given any reasons why he has arrived at the conclusion he did. They will always remain in the breast of the arbitrator. The route of reasoning he adopted for himself the court will never know.

The court has no means to enter his mind and to explore his thought processes."

7.2.2 I feel it is prudent to talk about the judgment of the Privy Council in ***Champsey Bhara and Company -v- Jivraj Balloo Spinning and Weaving Company Limited (supra)*** upon which reliance was placed by the respondent. The position of law present at that time which emerges from the aforesaid judgment is that an arbitration award could only be interfered with on the ground of error of law on face of the award either in a case where in the *award or in a document which is incorporated within the award*, some legal proposition is found which is the basis of the award and which is erroneous. I have extracted the relevant paragraphs from the aforesaid judgment below:-

"The law on the subject has never been more clearly stated than by Williams, J., in the case of Hodgkinson v. Fernie [3 C.B.N.S. 189 (1857).] :—

'The law has for marry years been settled and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact …. The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though

the propriety of this latter may very well be doubted, I think it may be considered as established.'

This view has been adhered to in many subsequent cases, and in particular in the House of Lords in British Westinghouse Company v. Underground Electric Bailways Company [[1912] A.C. 673.].

The question to be decided is: Does the error in law appear on the face of the award? In the British Westinghouse case [[1912] A.C. 673.], it clearly did. The arbitrator had stated a special case and got an opinion of the Divisional Court; in making his award he stated that opinion and founded his award upon it. The opinion as given was held to be erroneous, and so there was an error in law on the face of the award. In Landauer v. Asser [[1905] 2 K.B. 184.] , the state of affairs was different. The question was as to liability and interest on a policy of insurance effected by sellers for and on account of buyers, and the arbitrator framed his award thus:—

'I decide that as the parties to the contract dated the 3rd November, 1903, were by the terms thereof principals thereto, their interest and liability in insurance is defined to be the value of the invoice plus 5 per cent and that the buyers are therefore entitled to and only to the said amount, the balance one way or the other being due from or to the sellers.'...

Now the regret expressed by Williams, J., in Hodgkinson v. Fernie [3 C.B.N.S. 189 (1857).] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships'

view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake, was is by saying: "Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting cl. 52." But they were entitled to give their own interpretation to cl. 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal erroneous."

7.2.3 It was argued that, in ***M/s. Allen Berry & Co. Pvt. Ltd -v- Union of India (supra),*** the Hon'ble Supreme Court held that even an "error apparent on the record" would not entitle the Court to consider documents which were placed before the umpire i.e. the arbitrator, but which do not a form a part of or are incorporated into the award and make a search if those

documents have been misconstrued by the umpire i.e. the arbitrator.

7.2.4 In ***Jaljodia Overseas (Pvt.) Ltd -v- Industrial Development Corporation of Orissa Ltd*** reported in (**1993) 2 SCC 106,** the Hon'ble Supreme Court while dealing with a challenge to an arbitral award under Section 30 of the 1940 Act held that for the Courts to interfere with an arbitral award an "error apparent on the face of the award" must be shown. Relevant paragraphs have been extracted below:-

> *"9. That the arbitrator merely referred to the pleadings filed before him does not mean that the pleadings are incorporated in the award. As was said in the context of a contract, in a passage quoted by this Court with approval in Allen Berry and Co. v. Union of India [(1971) 1 SCC 295 : AIR 1971 SC 696] from the judgment of Diplock, L.J. in Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd. [(1962) 2 All ER 53, 62] : (SCC p. 300, para 8)*
>
> *'It seems to me, therefore, that, on the cases, there is none which compels us to hold that a mere reference to the contract in the award entitles us to look at the contract. It may be that in particular cases a specific reference to a particular clause of a contract may incorporate the contract, or that clause of it, in the award. I think that we are driven back to first principles in this matter, namely, that an award can only be set aside for error which is on its face. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and,*

by reading them together, find an error on the face of the award.'

The question whether a contract or a clause of it is incorporated in the award is a question of construction of the award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it."

The arbitrator merely referred to the fact that parties had "filed their statements" before him and that he had given "careful consideration to all the written statements, documents and evidence and the arguments". This is not such a reference as can be said to incorporate the pleadings before him in the award.

* * *

11. Even assuming the incorporation of the agreement, an error apparent upon the face of the award had to be shown. We may refer with advantage to this Court's judgment in Bungo Steel Furniture Pvt. Ltd. v. Union of India [(1967) 1 SCR 633 : AIR 1967 SC 378] . The court quoted the well-known passage from the judgment of Lord Dunedin in Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. [50 IA 324 : AIR 1923 PC 66] thus:

'An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the

award and which you can then say is erroneous. It does not mean that if in narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.'

It went on to observe:

'An award may be set aside by the court on the ground of an error of law apparent on the face of the award but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.' "

7.2.5 While the ***Rawla Construction (supra)*** judgment was an unsuccessful attempt on the part of the respondent to shut the eyes of this Court from peeking into the contract, I nevertheless want to clarify, that even on the face of it, the aforesaid judgment holds no influential value in the instant case. Firstly, the judgment was delivered in a case where the award in challenge was a non - speaking one delivered under the 1940 Act, which had no statutory requirement for the arbitrators to provide reasons for their findings unless the parties had agreed otherwise. However, in the 1996 Act by virtue of Section 31(3), and as affirmed by the Hon'ble Supreme Court in ***Dyna Technologies (supra),*** reasons have to mandatorily accompany the findings in an arbitral award unless the parties have agreed otherwise. (which is not the case here, reference is made to

Clause 6.2.9 of GCC). Secondly, while the Courts cannot embark upon a journey to interpret the terms of the contract themselves, a job which squarely falls within the domain of the arbitral tribunal, they are nonetheless empowered under Section 34 of the Act, to ensure that the arbitrators have not ventured beyond the explicit understanding between the parties contained in the contract. Finding their genesis in the contract itself, an arbitral tribunal is not entitled to venture beyond the contract. The creation cannot act against its creator.

7.2.6 While the governing law on arbitration has evolved since ***Allen Berry (supra)***, the jurisprudence on the scope of interference with arbitral awards has also evolved even though the underlying principle of limited and restrictive interference remains the same. Arbitral awards can only be interfered with in certain exceptional cases as outlined in Section 34 of the Act and further espoused by the Hon'ble Supreme Court in various judgments as discussed. But, in a fundamental shift from the principle outlined in ***Allen Berry (supra),*** Courts are now empowered under Section 34 of the Act to ascertain if a document placed in evidence before the arbitral tribunal has been fallaciously interpreted or if while arriving at its finding, arbitral tribunal has not taken into account vital evidence which was placed before it and was a part of the record of arbitral proceedings.

7.2.7 It is a well-established principle of law that the scope of examination under Section 34 of the Act is extremely limited and the Courts cannot interfere with arbitral awards in a casual and insouciant manner. Nobody is perfect and neither are arbitral awards. While arbitral awards cannot be held to the similar standards as Courts orders or judgments, there are certain principles of judicial propriety that they are expected to adhere to. To say that the courts under Section 34 can only look at the award and a document incorporated within the award, in my humble opinion, would be a fallacious reading of the law. In my view, even if a document has not been incorporated or referred to in the award, but was a part of the record of arbitral proceedings, and was within the knowledge of the arbitral tribunal, the same can be taken into account by the Court while adjudicating a challenge under Section 34. If an arbitral award has been rendered on a completely perverse interpretation of evidence presented before it, or vital evidence has not been paid heed to, then such an award would not be able to pass muster under Section 34. However, I must also clarify that no additional evidence, beyond what was before the arbitral tribunal and was a part of the record of arbitral proceedings will be ordinarily taken into account by a Court under Section 34 of the Act.

7.3. 1940 Act and 1996 Act

7.3.1 Since several judgments relied upon by the parties were delivered under the 1940 Act, this Court considers it integral to talk about the evolution of the jurisprudence on the challenge to an arbitral award on the grounds of patent illegality as it existed then and as it exists now. Under the 1940 Act, Section 30 of the said Act dealt with the grounds on which arbitral awards could be challenged. The said section has been extracted below:-

> *"**30. Grounds for setting aside award.—** An award shall not be set aside except on one or more of the following grounds, namely—*
>
> *(a) that an arbitrator or umpire has misconducted himself or the proceedings;*
>
> *(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;*
>
> *(c) that an award has been improperly procured or is otherwise invalid."*

In addition to Section 30, Section 16 of the 1940 Act permitted the Courts to remit the award back to the arbitrator on certain grounds. I have extracted the said section below:-

> *"**16. Power to remit award**.—(1) The Court may from time to time remit the award or any matter referred to arbitration*

to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) ***where an objection to the legality of the award is apparent upon the face of it."***

Emphasis Added

7.3.2 After the enactment of the Act of 1996, challenge to an arbitral award is dealt under Section 34 of the Act, including the power of the Courts to remit the matter back to an arbitrator. I have extracted the said section below for ease of reference:-

*"**34. Application for setting aside arbitral award**.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that—

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by ***patent illegality appearing on the face of the award****:*

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

Emphasis Added

7.3.3 Furthermore, Section 28(3) and 31(3) of the Act have also been extracted below:-

*"**28. Rules applicable to substance of dispute**.—(1) Where the place of arbitration is situated in India,—*

[(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]

31. Form and contents of arbitral award.—

(3) The arbitral award shall state the reasons upon which it is based, unless—

(a) the parties have agreed that no reasons are to be given; or

(b) the award is an arbitral award on agreed terms under Section 30."

7.3.4 What is evident from a reading of the 1940 Act and the 1996 Act is the common usage of the term ***"patent illegality appearing on the face of the award"*** (1996 Act) *and* ***"objection to the legality of the award is apparent upon the face of it."*** (1940 Act). In ***Lennon -v- Gibson and Howes*** reported in **AIR 1919 PC 142,** Lord Shaw propounded that use of same words in similar connect in a later statute gives rise to a presumption that they are intended to convey the same meaning as in the earlier statute. In ***H.L. D'Emden -v- F. Pedder*** reported in **1 C.L.R. 91,** it was held that:-

"When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

What can be inferred from the usage of similar words in a later enactment by the Legislature on the same subject can be that those words are intended to convey similar meaning as used in the earlier statute. However, another factor in consideration is how the usage of those words have evolved over time and how those words have been interpreted by the Courts over time. A reading of judgments delivered on 1940 Act and 1996 Act, would make it evident that while the basic intent to restrict judicial interference with arbitral awards on the ground of patent illegality to "an error apparent on the face of the award" remains the same, the scope of examination available to the Courts has been narrowly expanded. While under the 1940 Act, scope of examination was restricted to the award and the documents incorporated within the award only, under the 1996 Act, while adjudicating on whether an award delivered in a domestic arbitration has been vitiated by "patent illegality" Courts can take into account even those documents which, although not incorporated within the award, were a part of the record of the arbitral proceedings.

7.3.5 **Moreover, when a subsequent legislative enactment on a similar issue is propounded by the legislature, changes and additions made in the later legislation also need to be taken into account when inferring the meaning of similar words used in both the earlier and the later legislations. This is**

so, because a statute has to be read as a whole, and not in parts. Every section of a particular statute has to be read in consonance and harmony with the other sections.

While the usage of the term "patent illegality" appearing on the face of the award remains similar in both the 1940 Act and the 1996 Act, Section 28(3) and Section 31(3) have also been incorporated within the 1996 Act. While Section 28(3) mandates the arbitral tribunal to follow the terms of the Contract, Section 31(3) requires reasons to accompany the findings in an arbitral award.

7.3.6 The Apex Court's decision in ***Dyna (supra)*** sheds light on the requirement of giving reasons, explains the requisite characteristics of such reasons in an arbitral award and lists out the resulting consequence of it being set aside under Section 34 of the Act. The paragraphs which are germane are reproduced below:-

> *"34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.*
>
> *35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed.*

They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."

7.3.7 The Hon'ble Supreme Court in ***Indian Oil Corpn. Ltd. -v- Shree Ganesh Petroleum*** reported in **(2022) 4 SCC 463** propounded that the arbitral tribunal cannot act beyond the terms of the contract under which it has been constituted.

Relevant paragraph from the said judgment has been extracted below:–

> *"43. An Arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted.* ***An award can be said to be patently illegal where the Arbitral Tribunal has failed to act in terms of the contract or has ignored the specific terms of a contract."***
>
> ***Emphasis Added***

7.3.8 **What emerges from the aforesaid discussion is that although while looking for "patent illegality" in a challenge to an arbitral award under 1940 Act, courts were not empowered to go beyond the text of the award and the documents explicitly incorporated within it, the same is not the case while dealing with the challenge to an arbitral award under the 1996 Act. While dealing with the challenge to an arbitral award under Section 34 of the Act, if a challenge has been raised that the award is contrary to Section 28(3) and Section 31(3) of the Act, Courts cannot be stopped from going beyond the mere text of the award and the documents which have been incorporated within the award. Since, in *Associate Builders (supra)*, it has already been held that any award which is in violation of the provisions of the Act cannot be sustained, Courts are duty**

bound under Section 34 to ensure that the award is in compliance of the provisions of the Act. As a result, sometimes Courts would have to venture beyond what is just contained in the award and can look at the entire record of arbitral proceedings.

7.3.9 The proposition that emerges is that the arbitrator's decision on the facts and interpretation of the contract are final and should not be unsettled, even if alternative views are possible or more legally sound. However, if the contractual understanding is very explicit in its expression and the award goes astray, so to say, against clear provisions of the contract, then the award can be set aside. For example, if the contract is silent or ambiguous on a point, the arbitrator's approach in dealing with such silences are not to be interfered with on the grounds of patent illegality, unless they fall under other sub-heads provided under Section 34 of the Act.

7.4 Discussion on Price Escalation

7.4.1 At this juncture, it would be appropriate to set out the plethora of judgements along with their relevant portions wherein the Apex Court has set aside awards in cases where price escalation was awarded since it is one of the primary grounds on which challenge has been raised by the award debtor (petitioner) to the

arbitral award dated December 21, 2019. The cases and their relevant portions cited by the award debtor are herein produced below:-

a) Associated Engineering Company (supra) :

"21. These four claims are not payable under the contract. The contract does not postulate — in fact it prohibits — payment of any escalation under claim No. III for napa slabs or claim No. VI for extra lead of water or claim No. IX for flattening of canal slopes or claim No. II for escalation in labour charges otherwise than in terms of the formula prescribed by the contract. This conclusion is reached not by construction of the contract but by merely looking at the contract. The umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction : See Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [(1964) 5 SCR 480 : AIR 1965 SC 214] . We are in complete agreement with Mr Madhava Reddy's submissions on the point.

* * *

25. An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill and Boyd's Commercial Arbitration, 2nd edn., p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, 4th edn., para 622). A deliberate departure from contract amounts to not

only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award."

b) ***New India Civil Erectors (supra)*** :

"10. Claim 9: The appellant claimed an amount of Rs 32,21,099.89p under this head, against which the arbitrators have awarded a sum of Rs 16,31,425. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-Corporation with reference to and on the basis of the stipulation in the Corporation's acceptance letter dated 10-1-1985 which stated clearly that ***"the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work".*** *The Division Bench has held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is*

binding upon them both and the arbitrators. We are of the opinion that the learned Single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. This is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. We, therefore, affirm the decision of the Division Bench on this count as well (claim 9).'

Emphasis Added

c) ***Rajasthan State Mines (supra)*** :

'21. Despite the admission by the contractor, it is apparent that the arbitrator has ignored the aforesaid stipulations in the contract. In the award, the arbitrator has specifically mentioned that he has given due weightage to all the documents placed before him and has also considered the admissibility of each claim. However, while passing the award basic and fundamental terms of the agreement between the parties are ignored. By doing so, it is apparent that he has exceeded his jurisdiction.

22. ***Further, in the present case, there is no question of interpretation of clauses 17 and 18 as the said clauses are so clear and unambiguous that they do not require any interpretation. It is both, in positive and negative terms by providing that the contractor shall***

be paid rates as fixed and that he shall not be entitled to extra payment or further payment for any ground whatsoever except as mentioned therein. *The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may tantamount to mala fide action.*

* * *

45. In view of the aforesaid law and the facts stated above, it is apparent that the award passed by the arbitrator is against the stipulations and prohibitions contained in the contract between the parties. In the present case, there is no question of interpretation of clauses 17 and 18 as the language of the said clauses is absolutely clear and unambiguous. Even the contractor has admitted in his letter demanding such claims that the contract was signed with the clear understanding that the rate under the contract was firm and final and no escalation in rates except in case of diesel would be granted. Hence, by ignoring the same, the arbitrator has travelled beyond his jurisdiction. It amounts to a deliberate departure from the contract. Further, the reference to the arbitrator is solely based upon the agreement between the parties and the arbitrator has stated

so in his interim award that he was appointed to adjudicate the disputes between the parties arising out of the agreement. No specific issue was referred to the arbitrator which would confer jurisdiction on the arbitrator to go beyond the terms of the contract. Hence, the award passed by the arbitrator is, on the face of it, illegal and in excess of his jurisdiction which requires to be quashed and set aside."

Emphasis Added

d) State of Orissa (supra) :

"2. It is not disputed that the arbitration agreement contained no escalation clause. In the absence of any escalation clause, an arbitrator cannot assume any jurisdiction to award any amount towards escalation. That part of the award which grants escalation charges is clearly not sustainable and suffers from a patent error. The decree, insofar as the award of escalation charges is concerned, cannot, therefore, be sustained.'

e) Ramnath International (supra):

"11. Clause 11 of the General Conditions of Contract relates to time, delay and extension. We extract below the portions of clause 11 relevant for our purpose:

'11. Time, delay and extension.—(A) Time is of the essence of the contract and is specified in the contract documents or in each individual works order.

As soon as possible, after contract is let or any substantial work order is placed and before work under it is begun, the GE and the contractor shall agree upon the time and

progress chart. The chart shall be prepared in direct relation to the time stated in the contract documents or the works order for completion of the individual items thereof and/or the contract or works order as a whole. It shall include the forecast of the dates for commencement and completion of the various trades, processes or sections of the work, and shall be amended as may be required by agreement between the GE and the contractor within the limitation of time imposed in the contract documents or works order. If the work be delayed:

(i) by force majeure, or

(ii) by reason of abnormally bad weather, or

(iii) by reason of serious loss or damage by fire, or

(iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the tradesmen employed on the work, or

(v) by reason of delay on part of nominated sub-contractors, or nominated suppliers which the contractor has, in the opinion of GE, taken all practicable steps to avoid, or reduce, or

(vi) by reason of delay on the part of contractors or tradesmen engaged by the Government in executing work not forming part of the contract, or

* * *

(viii) by reason of any other cause, which in the absolute discretion of the accepting officer is beyond the contractor's control;

then in any such case the officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of works for which separate periods of completion are mentioned in the contract documents or works order, as applicable.

* * *

(B) If the works be delayed:

(a) by reason of non-availability of government stores in Schedule B or

(b) by reason of non-availability or breakdown of government tools and plant listed in Schedule C;

then, in any such event, notwithstanding the provisions hereinbefore contained, the accepting officer may in his discretion, grant such extension of time as may appear reasonable to him and the same shall be communicated to the contractor by the GE in writing. The decision so communicated shall be final and binding and the contractor shall be bound to complete the works within such extended time.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted.'

12. Clause (C) provides that where extensions have been granted by reason of the delays enumerated in clause (A) which were beyond the control of the contractor, or on account of the delays on the part of the employer specified in clause (B), the contractor is not entitled to make any claim either for compensation or otherwise, arising in whatsoever

manner, as a result of such extensions. After enumerating certain delays, sub-clause (viii) of clause (A) specifically mentions delay on account of any other cause beyond the control of the contractor. The causes for delays specified in clause (A), thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as a consequence of delays, that is Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are barred by clause 11(C).

13. We are fortified in this view by several decision of this Court. We may refer to two of them. In Associated Engg. Co. v. Govt. of A.P. [(1991) 4 SCC 93] this Court was concerned with an appeal which related to similar claims based on delays in execution. The High Court had held (State of A.P. v. Associated Engg. Enterprises [AIR 1990 AP 294 : (1989) 2 An LT 372]) thus: (AIR p. 304, para 26)

'26. Applying the principle of the above decision to the facts of the case before us, it must be held that clause 59 bars a claim for compensation on account of any delays or hindrances caused by the department. In such a case, the contractor is entitled only to extension of the period of contract. Indeed, such an extension was asked for, and granted on more than one occasion. (The penalty levied for

completing the work beyond the extended period of contract has been waived in this case.) The contract was not avoided by the contractor, but he chose to complete the work within the extended time. In such a case, the claim for compensation is clearly barred by clause 59 of the A.P. DSS which is admittedly, a term of the agreement between the parties.'

14. This Court noticed that the claims were set aside by the High Court on the ground that those claims were not supported by any agreement between the parties, and that the arbitrator had travelled outside the contract in awarding those claims. This Court held that the said claims were not payable under the contract and that the contract does not postulate, in fact prohibits, payment of any escalation under those heads. It affirmed the decision of the High Court setting aside the award of those claims."

7.4.2 Before I proceed to deal with these judgments, it will be prudent to reproduce the firm price clause present in the instant case. Clause 11.1 of the GCC, which deals with firm price, reads as follows:-

"11.1 The Contract Price shall be on firm price basis."

7.4.3 Judgments cited by the petitioner to my mind, do not help its case for the reasons as discussed:-

(a) In, ***Associate Engineerings (supra)***, a reference to paragraph 21, makes it evident that the Contract explicitly prohibited payment of any escalation. Since there was an

explicit prohibition in the contract, the award of escalation was completely outside the jurisdiction of the arbitrator.

However, in the instant case, the clause does not explicitly prohibit award of escalation.

(b) In, ***New India Civil Erectors (supra)***, the stipulation between the parties was that "the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work." In such a case, the arbitrators erred in awarding escalation even though the construction extended beyond the original contract period.

But, in a situation, where the contract itself provides that the contract shall be on a firm price basis, but is silent on escalation, then if the work extends beyond the period which the contract originally stipulated, arbitral tribunal will be empowered to award escalation costs, in its own wisdom.

(c) In, ***Rajasthan State Mines & Minerals Ltd (supra)***, Clause 18(c) of the Contract clearly stated that "(c) The rates shall remain firm, fixed and binding irrespective of any fall or rise in the cost of mining operations of the work covered by the contract or for any other reason whatsoever." However, in the instant case there is no such

stipulation prohibiting escalation for any reason whatsoever.

(d) In, ***Ramnath International (supra)***, it was provided that "No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted." In the instant case, there is no such provision.

7.4.4 In ***NTPC Limited -v- Deconar Services Pvt. Ltd.*** reported in **2021 SCC OnLine SC 498,** the decision in ***State of Orissa -v- Sudhakar Das (Dead) by Lrs (supra)*** was distinguished as follows:-

> *"23. In State of Orissa v. Sudhakar Das (Dead) by Lrs, (2000) 3 SCC 27, this Court was not seized of the issue of grant of escalation charges beyond the period of the contract or with respect to delay. As such, it has limited applicability to the present case."*

Furthermore, the Hon'ble Supreme Court in Para 25 clarified that:-

> *"25. It is clear from the above analysis that any decision regarding the issue of whether an arbitrator can award a particular claim or not, will revolve on the construction of the contract in that case, the evidence placed before the arbitrator and other facts and circumstances of the case. No general principle can be evolved as to whether some claim can be granted or not. The judgments placed on record by*

the appellant, wherein claim for escalation was denied, have to therefore be read in the context of their facts, and cannot be read in isolation. It is clear that all the judgments cited by the appellant can be distinguished on facts."

7.4.5 It was argued in its judgment in ***Assam State Electricity Board and Ors. -v- Buildworth Private Limited (supra*)**, the Hon'ble Supreme Court had held that price escalation would not bind a party beyond the scheduled date of completion. I have extracted the relevant portions from the said judgment below:-

"13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.

14. The view which has been adopted by the arbitrator is in fact in accord with the principles enunciated in the judgments of this Court. In P.M. Paul v. Union of India [P.M.

Paul v. Union of India, 1989 Supp (1) SCC 368] , a Bench of two learned Judges of this Court has held that : (SCC p. 372, para 12)

'12. … Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. … After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done.'

This Court held that the contractor was justified in seeking price escalation on account of an extension of time for the completion of work. Once the arbitrator was held to have the jurisdiction to determine whether there was a delay in the execution of the contract due to the respondent, the latter was liable for the consequence of the delay, namely, an increase in price.

15. A similar principle finds expression in another judgment of two learned Judges of this Court in Food Corporation of India v. A.M. Ahmed & Co. [Food Corporation of India v. A.M. Ahmed & Co., (2006) 13 SCC 779] : (SCC pp. 794-95, para 32)

'32. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the

arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion.'

16. In K.N. Sathyapalan v. State of Kerala [K.N. Sathyapalan v. State of Kerala, (2007) 13 SCC 43] , this Court has held that : (SCC pp. 51-52, para 32)

'32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad case [Alopi Parshad & Sons Ltd. v. Union of India, (1960) 2 SCR 793 : AIR 1960 SC 588] and also Patel Engg. case [State of U.P. v. Patel Engg. Co. Ltd., (2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was recognised by this Court in P.M. Paul [P.M. Paul v. Union of India, 1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this

Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case [T.P. George v. State of Kerala, (2001) 2 SCC 758].' "

7.4.6 It was the petitioner's contention that the judgment in ***Assam State Electricity Board -v- Buildworth Pvt. Ltd. (supra)*** does not help the respondent insofar as there were several letters by which the petitioner repeatedly rejected the claim for the respondent for price escalation. However, in my opinion, the ratio laid down in the aforesaid judgment, that is, price escalation would not bind the parties beyond the contractual period would squarely apply to the case at hand.

7.4.7 **While concluding this issue, it would be prudent to point out that the petitioner during the course of its submission before the arbitral tribunal had discounted its stand on this issue. Relevant portion from the petitioner's written submission before the tribunal on price escalation has been extracted below:-**

"A2. The contract is a firm price contract , with no price variation clause. Hence, the claim for price

variation is to be looked at from the point of view of being a claim in damages under Section 73 of the Indian Contract Act, 1872. Hence, actual loss has to be provide to have been suffered by the Claimant in order for present claim to be sustained."

As such, it can be inferred from the petitioner's aforesaid written submission that even though there was no price escalation clause in the contract, arbitral tribunal can award damages if the same can be established under Section 73 of the Indian Contract Act, 1872.

7.4.8 **It was the petitioner's argument that the arbitral tribunal had not dealt with the issue of whether the contract was a firm price contract or not, in the award and as such the award has to be sacrificed at the altar of reasonableness, in light of the Hon'ble Supreme Court's pronouncement in *Dyna Technologies (supra).* However, this argument of the petitioner cannot be sustained. Firstly, a plain reading of the relevant contractual provisions makes it evident that while there is no price escalation clause, there was also no explicit bar on award of price escalation. Moreover, in absence of an explicit prohibition, statutory right to damages in terms of Section 73 of the Indian Contract Act, 1872 still exists. As a consequence, the contract cannot be considered as a firm price contract beyond its duration. So it was not essential for the arbitral tribunal to enter into a**

detailed discussion on an issue which could be inferred merely from a bare reading of the contract. Furthermore, extensive discussion and reasons have been provided in the award on the issue of delay and entitlement of the respondent to price escalation. So, the award is not in violation of the judgment of the Hon'ble Supreme Court in *Dyna Technologies (supra)* and Section 31(3) of the Act.

7.4.9 **What is evident from the aforesaid discussion is that, while the cases cited by the petitioner contained an express prohibition on award of escalation in any case till the completion of work, there was no such explicit bar on award of escalation in the instant case. Clause 11.1 of the GCC just states that the contract shall be on a firm price basis but it remains silent on whether or not escalation can be or cannot be awarded in any case. Having held that the contract between the parties contained no explicit bar on award of escalation, this Court finds that the contract between the petitioner and the respondent cannot be termed as a firm price contract beyond the duration of work as originally stipulated in the contract. However, whether or not the respondent was entitled to price escalation will be dealt later on in the judgment during the discussion on the relevant issues.**

7.5 Letter dated February 03, 2017

7.5.1 The letter dated February 03, 2017 lies at the centre of the arbitral award dated December 21, 2019 and also the challenge against the said award before this Court and hence, it is crucial to deal with the challenge against the validity of the letter dated February 03, 2017 foremost before dealing with the challenge against the arbitral award.

7.5.2 By the said letter dated February 3, 2017 the petitioner replied to the claims and other issues raised by the respondent in connection with the construction of Phase 1 of the Raghunathpur Thermal Power Project. The petitioner in its letter alleged that the delay of 468 days against Unit 2 is attributable to the respondent and sought to levy liquidated damages of INR 212.80 crores, that is, at the rate of 5% of the contract price. Furthermore, the petitioner also offered compensation of INR 10.26 crores to the respondent on account of delay in handing over land and other inputs by the petitioner. Compensation of INR 10.26 crores was calculated as follows:-

a. Compensation for Civil Construction for Mail Plant Switch Yard only: INR 0.648 Crores.

b. Compensation for Erection Work Including Structural Steel Works For Civil Works (Including Service Tax) for Switch Yard Portion only: INR 1.040 Crores.

c. Compensation for idling/overstay charges for Delay of RTR of Unit 1: INR 0.152 Crores.

d. Compensation for Civil Construction Work for Ash Pond portion: INR 8.520 Crores.

7.5.3 Apart from the aforesaid, the petitioner alleged deviation from NIT by the respondent during execution of the project and sought recovery of a sum of INR 44.71 crores only. The petitioner rejected the claims submitted by the respondent during a meeting dated December 12, 2017 as unjustified and lastly, the petitioner asked the respondent to confirm the acceptance of the letter.

7.5.4 Several judicial pronouncements were relied upon by the petitioner to argue that the document, that is, the letter dated February 03, 2017 can only be considered in its entirety and cannot be severed for part acceptance and part rejection. I will now discuss each of these pronouncements.

7.5.5 The judgment of the Oudh Judicial Commissioner's Court in ***Kuar Nageshar Sahai -v- Shiam Bahadur and Ors.*** reported in **AIR 1922 Oudh 231** was relied upon by the petitioner to argue that the letter dated February 03, 2017 was a compromise/offer and cannot be taken as an admission. Relevant portions have been extracted below:-

"6. The next property claimed by the plaintiff is Babuapur, a hamlet of Behandar Kalan, which appears as No. 2 on List A attached to the plaint. Behandar Kalan admittedly forms part of the Baragaon estate. The plaintiffs' case is that this hamlet belonged to Narendra Bahadur and had been given to him by Wazir Chand, that it was not part of the Baragaon estate and that they were entitled to succeed to it under the will of Narendra Bahadur. In support of this argument we were referred to a jamabandi, Ex. 21, which shows that the rents of this hamlet were collected by Sarafaraz Khan ziladar and Sarfaraz Khan has himself given evidence that he was ziladar of Chandra Kuar and Narendra Bahadur and the income of Babuapur was taken by Narendra Bahadur. Two other jamabandis are referred to, Exs. 22 and 23, but the learned counsel for the plaintiffs has been unable to show us that they relate to the hamlet of Babuapur. In addition to this there is a mortgage-deed Ex. 20, executed by one Munna Singh in which it is recited that the mortgagee is borrowing money for the purpose of paying rent to Narendra Bahadur for the hamlet of Babuapur. Plaintiffs' counsel would also wish to rely on Ex. A19, the compromise alleged to have been entered into between Raj Bahadur and Nageshar Sahai, in which reference has been made to Babuapur as belonging to Narendra Bahadur. But as it has been held that compromise is not binding on the parties, any recital in it is not of much value as evidence against Nageshar Sahai. ***Parties are of ??? willing to make admissions for the purpose of effecting a compromise, to which it would be unfair to hold them if the compromise falls*** *through the only other evidence to which we have been referred is that of two witnesses, D.W. 19 and D.W. 27 both of whom are servants of the plaintiffs. On the*

other hand it is pointed out that Babuapur is admittedly a hamlet of Behandar Kalan which is one of the villages of the Baragaon estate which was owned by Wazir Chand, that there is no evidence whatsoever of any gift or transfer by Wazir Chand in favour of Narendra Bahadur, and Narendra Bahadur could not acquire any title to this hamlet during the lifetime of Chandra Kuar. In the khewat of Behandar Kalan (Ex. A-48) Mussammat Chandra Kuar is shown as the owner of the entire village and in no place in the papers is Narendra Bahadur shown as proprietor of this hamlet. The recital in the mortgage-deed and the fact that Narendra Bahadur's servants collected the rents of this hamlet are capable of explanation. Exhibits A-10 and A-11 show that when on the death of Wazir Chand mutation was effected in respect of the Baragaon taluqa in favour of Musammat Chandra Kuar she appointed Narendra Bahadur as her agent. We are clearly of opinion that there is no satisfactory evidence to show that Narendra Bahadur was the owner of this property."

Emphasis Added

7.5.6 The judgment of the High Court of Allahabad in ***Shibcharan Das -v- (Firm) Gulabchand Chhotey Lal*** reported in **AIR 1936 All 157** was also cited by the petitioner. In the said judgment, High Court of Allahabad had remarked that when negotiations are being made without prejudice, it is not open for one of the parties to give evidence of an admission by another. Relevant paragraph has been reproduced below:-

"3. The learned Subordinate Judge held in the first place that the sum stated on the face of the promissory note, viz., Rs. 4,200 had not been in fact advanced and that the sum actually lent to the defendant amounted to Rs. 3,750 only. Upon the issue directed to the amount of the consideration which actually passed, he rightly held that the onus, of showing that the sum stated on the face of the note was not in fact lent, rested upon the defendant. He, however, held that the defendant had discharged the onus and established that he had received a sum of Rs. 3,750 and not Rs. 4,200 as stated of the face of the note. The appellant has urged before us in this appeal that was should come to a contrary conclusion upon the evidence. We have considered the evidence which was placed before the learned Subordinate Judge and have come to the conclusion that the defendant ??? discharge the onus which the law ??? upon him and did establish that he ??? a sum of Rs. 450 less than that stated in the note. The evidence of the defendant himself coupled with the evidence of Johri Lal, his munim, abundant proves this. The defendant's books were produced in Court and the learned Subordinate Judge was perfectly satisfied that they were genuine and had been entered up in the ordinary course a business when this transaction took ??? in 1927. If the books were genuine, the it is clear that only the sums shown in those books were actually received by the defendant. The defendant also called a Vakil Pandit Behari Lal Sharma, who gave evidence corroborating that given by the defendant himself. ***In our judgment the witness's evidence was not admissible Negotiations were being conducted with a view to settlement, and that being so we are bound to hold that these negotiations were being conducted "without prejudice." In such***

circumstances it is not open for one of the parties to give evidence of an admission made by an other. *If negotiations are to result in a settlement each side must give away a certain amount. If one of the parties offers to take something less than what he later claims he is legally entitled, such must not be used against him; otherwise persons could not make offers during negotiations with a view to a settlement. Further, it appears to us that this vakil wat at the time of these negotiations acting on behalf of the plaintiff and conducting litigation for him and that being so he could not, by reason of Section 126 of the Evidence Act, give evidence as to communications made to him without the express consent of his client, viz., the plaintiff himself. In the present case the vakil gave evidence against his own client and clearly without the latter's consent. Even eliminating the evidence of this witness this evidence of the defendant himself and his munim, coupled with the books, does establish that the defendant received a esser sum than that which appears on he face of the note."*

Emphasis Added

7.5.7 Furthermore, Madras High Court's judgment in ***Karamadai Naicken -v- R. Raju Pillai*** reported in **AIR 1949 Mad 401** was also relied upon to argue that the letter dated February 3, 2017 must be taken as a whole and should not be read in parts.

7.5.8 The judgment of Punjab and Haryana High Court in ***Smt. Surjit Kaur -v- Gurcharan Singh*** reported in **AIR 1973 P&H 18** was relied upon by the respondent to argue that the letter dated

February 03, 2017 should not be taken as evidence. Relevant paragraph has been reproduced below:-

> *"6. A perusal of this section would show that* ***if an admission is made upon an express condition that evidence regarding it would not be given or under circumstances from which the Court could infer that the parties had agreed that the evidence regarding it would not be given, than such an admission would not be relevant.*** *In the present case, as I have already said, both the parties were trying to effect a compromise and during that interval, the said letter was written by the husband. It may be stated that the husband has frankly admitted that he did write that letter, but he claimed privilege regarding the same on the ground that it was written when the talks of a compromise were going on between the parties. It appears from the circumstances of this case that he had written this letter perhaps at the instance of the wife, because she might be ready to go back to the husband, but her father may not be giving her permission to do so, and it is quite possible that he wrote that letter just to prevail upon her father to send her back to him. Equally probable is that the father might have asked the husband to write such a letter, so that he could show it to his daughter and on its basis persuade her to go back after telling her that the husband had admitted his fault and apologised for the same. In any case, this letter, admittedly, was written during the period when the compromise talks were going on. The inference drawn by the learned Judge from all these circumstances was that the letter was written at a time when the parties had agreed that no evidence would be given regarding it. That being so, the case will be*

covered by the second condition laid down in section 23, quoted above, and as such, the husband could claim privilege regarding the same. It has been ruled in a Bench decision of the Allahabad High Court in Shibcharan Das v. (Form) Gulabchand Chhotey Lal [A.I.R. 1936 All 157.] , that where negotiations were being conducted with a view to a settlement, it should be held that those negotiations were so conducted without prejudice."

Emphasis Added

However, the said judgment could be easily distinguished on the basis that there is no such condition which is explicit or implicit in the said letter dated February 03, 2017 written by the petitioner.

7.5.9 Judgment of the Orissa High Court in ***Sri Bauribandhu Mohanty and Anr. -v- Sri Suresh Chandra Mohanty and Ors.*** reported in **1991 SCC OnLine Ori 69** was also relied upon the petition to buttress their argument against treating the letter dated February 03, 2017 as an admission. Paragraphs relied upon have been extracted below:-

"9. In the compromise petition filed on 5-3-82, there is admission of the parties regarding existence of the pathway over C.S. Plot No. 244. In the petition filed in Civil Revision No. 889 of 1989, the petitioners have averred that the compromise petition was filed having been signed by the advocates for both the parties and no sketch map was attached to it as required by the Court. It does not show that

the compromise petition was duly signed by both the parties. The compromise petition not having been signed by the parties in accordance with law and having not acted upon, obviously could not be treated as valid compromise petition intended to be used as evidence in the suit. Assuming however, that the parties had signed the said compromise petition, the question now raised is whether admissions made in such compromise petition which was not acted upon by the parties, can be allowed to be lead in evidence.

* * *

11. In view of the above discussions, there is no doubt in my mind that the statements made in the compromise petition even if treated as valid admissions, were not intended to be treated as evidence by any of the parties because of failure of the compromise petition. In view of this both the orders dated 9-8-89 and 19-8-89 passed by the learned trial Court in the suit rejecting the petitions for recalling P.W. 7 and D.W. 5 for the purpose of getting the compromise petition exhibited and for getting the admissions on the record, as evidence being contrary to Section 23 of the Act, it justified.

In the result, the Civil Revisions Nos. 889 and 890 of 1989 are dismissed, but in the circumstances, there shall be no order as to costs.

Petitions dismissed."

7.5.10 Lastly, the judgment of the Hon'ble Supreme Court in ***Union of India and Ors. -v- N. Murugesan and Ors.*** reported in **(2022) 2 SCC 25** was also relied upon by the petitioner. Hon'ble

Supreme Court in the said judgment had outlined the principle of approbate and reprobate and propounded that no party can be allowed to accept and reject the same thing. I have extracted the relevant portions below:-

> *"26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.*
>
> *27. We would like to quote the following judgments for better appreciation and understanding of the said principle:*

27.1.Nagubai Ammal v. B. Shama Rao [Nagubai Ammal v. B. Shama Rao, 1956 SCR 451 : AIR 1956 SC 593] : (AIR pp. 601-02, para 23)

'23. But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS. No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate. It is immaterial that the present appellants were not parties thereto, and the decision in Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd. [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)] , and in particular, the observations of Scrutton, LJ., at p. 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree.

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L.J. : (Verschures Creameries Ltd. case [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)] , KB p. 611)

'… Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act.'

The observations of Scrutton, L.J. on which the appellants rely are as follows : (Verschures Creameries Ltd. case [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)] , KB pp. 611-12)

'… A plaintiff is not permitted to "approbate and reprobate". The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument : Ker v. Wauchope [Ker v. Wauchope, (1819) 1 Bligh PC 1 at p. 21 : 4 ER 1 at p. 8] : Douglas-Menzies v. Umphelby [Douglas-Menzies v. Umphelby, 1908 AC 224 at p. 232 (PC)] . The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.'

It is clear from the above observations that the maxim that a person cannot "approbate and reprobate" is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury's Laws of England, Vol. XIII, p. 464, para 512:

'On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it.'

27.2. State of Punjab v. Dhanjit Singh Sandhu [State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144] : (SCC pp. 153-54, paras 22-23 & 25-26)

'22. The doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. MR. P. Firm Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216].)

23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329] .) In R.N. Gosain v. Yashpal Dhir [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under : (R.N. Gosain case [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] , SCC pp. 687-88, para 10)

'10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election

which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'.'

* * *

25. The Supreme Court in Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd. [Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] , made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

26. It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had.'

27.3.Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.

[Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] : (SCC pp. 480-81, paras 15-16)

"I. Approbate and reprobate

15. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [Nagubai Ammal v. B. Shama Rao, 1956 SCR 451 : AIR 1956 SC 593] , CIT v. V. MR. P. Firm Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216] , Ramesh Chandra Sankla v. Vikram Cement [Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706] , Pradeep Oil Corpn. v. MCD [Pradeep Oil Corpn. v. MCD, (2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712] , Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and V. Chandrasekaran v. Administrative Officer [V. Chandrasekaran v. Administrative Officer, (2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : (2013) 4 SCC (Cri) 587 : (2013) 3 SCC (L&S) 416] .]

16. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of

estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had."'

7.5.11 **In my considered opinion, the petitioner's arguments against the letter dated February 03, 2017 are nothing but an attempt to invite this Court to re-appreciate the evidentiary value of the letter dated February 03, 2017 which this Court cannot do under Section 34 of the Act. It would be prudent to refer to the judgment of the Hon'ble Supreme Court in the case of *Ravindra Kumar Gupta & Co. -v- Union of India* reported in (2010) 1 SCC 409 wherein the Hon'ble Supreme Court outlined that the Courts cannot re-appreciate evidence under Section 34 of the Act and that the Arbitrator is the sole judge of the quality and quantity of evidence.** Relevant portions have been extracted below:-

"9. The law with regard to scope and ambit of the jurisdiction of the courts to interfere with an arbitration award has been settled in a catena of judgments of this Court. We may make a reference here only to some of the judgments. In State of Rajasthan v. Puri Construction Co. Ltd. [(1994) 6 SCC 485] this Court observed as follows: (SCC p. 500, para 26)

'26. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or

has failed to appreciate the facts. In Sudarsan Trading Co. v. Govt. of Kerala [(1989) 2 SCC 38] it has been held by this Court that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. (emphasis in original) Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. ***The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a Judge on the evidence before the arbitrator.***

27. In MCD v. Jagan Nath Ashok Kumar [(1987) 4 SCC 497] , it has been held by this Court that appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. It may

be possible that on the same evidence the court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award. It has also been held in the said decision that it is difficult to give an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasies of the individual and the time and circumstances in which he thinks. In cases not covered by authority, the verdict of a jury or the decision of a Judge sitting as a jury usually determines what is 'reasonable' in each particular case. The word reasonable has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably knows or ought to know. An arbitrator acting as a Judge has to exercise a discretion informed by tradition, methodised by analogy, disciplined by system and subordinated to the primordial necessity of order in social life. Therefore, where reasons germane and relevant for the arbitrator to hold in the manner he did, have been indicated, it cannot be said that the reasons are unreasonable.'

* * *

12. In Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142] it was held: (SCC pp. 146-47, para 10)

'10. At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under Section 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it reassess or reappreciate evidence or examine the sufficiency or otherwise of the evidence. The

award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High Court was, whether there was any error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings.' "

Emphasis Added

7.5.12 Before I conclude this issue, I would like to put some observations in respect of the letter dated February 03, 2017 on record. Firstly, The letter nowhere mentions that it was a without prejudice communication, and in fact stated that:-

"*A compensation of Rs 10.16 Crs. is found to be* ***admitted*** *on account of delay in handing over land and other inputs*".

This admission was not made subject to any condition.

7.5.13 Secondly, the arbitral tribunal's treatment of the letter dated February 03, 2017 cannot be termed as severance or part-acceptance. The arbitral tribunal, after taking into consideration the contents of the letter dated February 03, 2017 has clearly held that

a. In respect of levy of liquidated damages for a delay of 468 days in respect of Unit 2 only, the arbitral tribunal held in paragraph 6.3(b) of the award that "*The Respondent, neither with the support of any document nor by leading any oral*

evidence has been able to show how it has arrived at a specific figure of 468 days."

This in my view, is a finding arrived at after consideration of material evidence placed before the arbitral tribunal and does not call for any interference.

b. In respect of admitting delay in handing over of land and other inputs, the arbitral tribunal held in paragraph 8.3(e) of the award that "*Thus, it cannot be held that the Respondent did not delay in handing over land as required by the Contract.* ..... *The documents and evidence on record show that the Claimant was not able to carry out work even all portions of land handed over by the Respondent by reason of various disturbance/hindrance/objections....*"

Clearly, after due consideration, the arbitral tribunal has held that there was clear delay in handing over land. This finding, arrived after giving due consideration to the contentions and evidence presented by both the sides does not call for any interference.

c. On Commercial implication of NIT Deviation, the Arbitral Tribunal has clearly outlined that while there may be some deviations from the NIT by the respondent, the respondent could still have justifiable grievances regarding the same.

Furthermore, delay if any caused by these deviations, gets subsumed within the larger delay caused by the petitioner in handing over of land, coal, DM water, and other inputs.

7.15.14 In light of the above discussion, one may conclude that the judgments cited by the petitioner in support of their contentions are completely distinguishable on facts. Furthermore, as stated above this Court cannot re-appreciate evidence that has been discussed by the arbitral tribunal and reasons provided for the same by the arbitral tribunal.

7.15.15 **Accordingly, this Court finds that the letter dated February 03, 2017 has been considered in its entirety and in consonance with the other material evidence on record. As has been discussed previously, arbitral tribunal is the master of all evidence placed before it and the Courts are not empowered under Section 34 of the Act to take a second look and re-appreciate the evidence placed before the arbitral tribunal. Only in a case where the evidence relied upon by the arbitral tribunal could not have been relied upon by any reasonable person, or the finding arrived after taking into account such evidence is completely perverse can the courts exercise their powers under Section 34 of the Act. However, the instant case with respect to the**

letter dated February 03, 2017 does not fall within these grounds and accordingly does not call for any interference.

7.6 Severance of Arbitral Awards

7.6.1 Since this Court, as would be seen in the foregoing paragraphs, sets aside multiple awards on different issues in the award dated December 21, 2019, this Court feels it pertinent to discuss the principle of severability when it comes to arbitral awards, and adjudge whether or not the awards which have been set aside have been done without impacting the portion of the award that has been upheld.

7.6.2 **It is a well-established principle that the Courts under Section 34 of the Act have the power to severe and partly set aside the award. A doctor treating a poisoned leg would prefer to cut the poisoned leg off to prevent the poison from spreading across the entire body. Afterall, you would not kill off the entire body just because the leg is poisoned. Similarly, in an arbitral award, there might be some issues suffering from infirmity, which would invite the Courts to exercise their powers under Section 34 of the Act. In such a case, it would be preferable to severe and set aside only those issues, rather than setting aside the arbitral award in its entirety. This also makes commercial sense**.

7.6.3 A full judge bench of the Bombay High Court in the case of ***R.S. Jiwani -v- Ircon International Ltd.*** reported in **2009 SCC OnLine Bom 2021** undertook an exhaustive review on the issue of severability of arbitral awards. Relevant portions of the said judgment have been extracted below:–

> *"17. The argument raised before us is that sub-clauses (i) to (iii) and (v) of clause (a) of sub-section (2) of section 34 are the grounds where it is mandatory for the Court to set aside the whole award and there is no other choice before the Court. It is only in the class of cases falling under section 34(2)(a)(iv) that with the aid of the proviso to that sub-section, the Court can apply principle of severability. In that case, if the matter submitted to the arbitration can be separated from the one not submitted then the Court may set aside that part of the award alone which is not submitted to arbitration. This argument is founded on the Division Bench judgment of this Court in the case of Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahiliani, 2008(7) LJ Soft, 161, and which was relied upon by the respondents for inviting the decision against the Appellant. Thus, we have to examine the provision of section 34 of the 1996 Act to find whether it permit of any other interpretation than the one put forward by the respondents. Sub-clauses (i), (ii), (iii) and (v) of clause (a) of sub-section (2) of section 34 deal with certain situations which may require the Court to set aside an award of the arbitral tribunal. These may be the cases where the party was under incapacity, the agreement is not valid under the law in force, where proper notice was not given to the party or otherwise enable to present his case, and the composition of arbitral tribunal or procedure was not*

in accordance with the agreement between the parties and lastly the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Explanation to section 34(2) which is in the nature of a declaration further explains that when an award is in conflict with the public policy of India when the award was induced or affected by (i) fraud or (ii) by corruption; or (iii) was in violation of section 75 or 81 of the Act. It is difficult for this Court to hold that under all these categories it would be inevitable for the Court to set aside the entire award. It may not be very true that even under these categories, it would be absolutely essential for the Court to set aside an award. It is true that where a party was under incapacity or was not served with the notice at all and the arbitration agreement itself was not valid that an award may have to be set aside in its entirety. But even within these clauses, there is possibility of a situation where it may not be necessary for the Court to set aside the entire award. Let us take an example that where a party is given a notice has participated in the proceedings before the arbitral tribunal but was unable to lead evidence or present himself or submit his counter claim. Would it be fair for the Court to set aside an award of the arbitral tribunal in its entirety in this situation? A party who participated in the arbitral proceeding even led evidence and cross-examined the witnesses of the claimants in relation to the claims but for any reason was not able to place his evidence on record in relation to the counter claims or he was not granted sufficient opportunity to present his case or for some reason was unable to present his case before the arbitral tribunal, would it not be just, fair, equitable and in line with the object of the Act of 1996 to consider setting aside award only regarding counter claim.

Is such a party which has succeeded in the claims made by it, which are otherwise lawful and not hit by any of the stated circumstances, should be awarded his reliefs while either rejecting or even altering the award with regard to the counter claim filed by the aggrieved party before the Arbitrator. Situation may be different where arbitration agreement is not valid. In other words, where claim is unlawful the Supreme Court in the case of Karnail Singh v. State of Haryana, 1995 Supp (3) SCC 376 held that not valid would mean unlawful and equated it to void.

"8. 'Void' dictionarily means, ineffectual, nugatory; having no legal force or binding effect, unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid. In Words and Phrases (American), Vol. 44, published by West Publishing Co., at page 319 it is stated thus:

"A 'void' thing is nothing; it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed."

What was declared void was election. That is the process which led to choosing or selecting appellant as a member was invalid. The legal effect of declaration granted by the Tribunal was that the election of the appellant became non-existent resulting automatically in nullifying the earlier declaration. The declaration did not operate from the date it was granted but it related back to the date when election was held. The legislative provision being clear and the Tribunal being vested only with power of declaring election to be void the entire controversy about voidable and void

was unnecessary. The appellant could not therefore, claim any pension under section 7A of the 1975 Act."

* * *

20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good parts of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable. In the case of Messrs. Basant Lal Banarsi Lal v. Bansi Lal Dagdulal, AIR 1961 SC 823, though the Supreme Court was dealing with an application for setting aside an award passed by the Bombay City Civil Court, contending that forward contract in groundnuts were illegal as making of such contracts was prohibited by Oil Seeds (Forward Contract Prohibition) Order, 1943 and hence arbitration clause contained in the forward contracts in groundnuts between the parties was null and void, where it was found as a matter of fact that it was not possible to segregate the dispute under the various contracts as there was direct link between them. The Supreme Court held as under:

'It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts one of which we have found to be void. But as the award was one and is not severable in respect of the

different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside.'

* * *

24. Now a further question that falls for consideration of this Court is as to whether there is anything contained in 1996 Act which prohibits in law the Court from adopting the approach applicable under the 1940 Act or prohibits applicability of principle of severability to the awards under 1996 Act. We are unable to see any prohibition much less an absolute bar in the provisions of section 34 of 1996 Act to that effect. There could be instances falling under section 34(2)(a), sub-sections (iii) and (v) where the principle of severability can safely be applied. These provisions do not specifically or impliedly convey legislative intent which prohibits the Courts from applying this principle to the awards under the 1996 Act. Again for example, an Arbitral Tribunal might have adopted a procedure at a particular stage of proceeding which may be held to be violative of principles of natural justice or impermissible in law or the procedure was not in accordance with the agreement between the parties but the parties waived such an objection and participate in the arbitration proceedings without protest, in that event it will be difficult for the Court to hold that the good part of the award cannot be segregated from the bad part.

* * *

30. If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to

a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability. We are unable to contribute to the view that the power vested in the Court under section 34(1) and (2) should be construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word "set aside" cannot be construed as to 'only to set aside an award wholly', as it will neither be permissible nor proper for the Court to add these words to the language of section which had vested discretion in the Court. Absence of a specific language further supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of Arbitration Act would stand defeated and frustrated.

* * *

33. It must be understood that the scope of judicial intervention under section 34 is very limited and cannot be equated to the powers of a civil appellate Court. The award can be set aside on the grounds stated in these provisions and that is what is emphasized by the use of expression 'only'. The Supreme Court in the case of Mc Dermott International Inc. v. Burnt Standard Co. Ltd., (2006) 11 SCC 181 has discussed in some elaboration the cases where the Court can interfere with the awards and/or set aside the award. Mere appreciation of evidence or an error simpliciter in appreciation of fact or law may not essentially fall within the class of cases which may be covered within the ambit and scope of section 34 of the Act. We will shortly proceed to

discuss this aspect of law but only insofar as it is relevant for answering the question posed before the larger Bench.

* * *

35. The Supreme Court was primarily stating the principles which have been kept in mind by the Courts while interfering with the award of the Arbitral Tribunal that it was to outline the supervisory role of the Courts within the ambit and scope of section 34. It is true that the Court like a Court of appeal cannot correct the errors of arbitrator. It can set aside the award wholly or partially in its discretion depending on the facts of a given case and can even invoke its power under section 34(4). It is not expected of a party to make a separate application under section 34(4) as the provisions open with the language "on receipt of application under sub-section (1), the Court may……." which obviously means that application would be one for setting aside the arbitral award to be made under section 34(1) on the grounds of reasons stated in section 34(2) and has to be filed within the period of limitation as stated as reply under section 34(3). The Court may if it deems appropriate can pass orders as required under section 34(4). In other words, the provisions of section 34(4) have to be read with section 34(1) and 34(2) to enlarge the jurisdiction of the Court in order to do justice between the parties and to ensure that the proceedings before the Arbitral Tribunal or before the award are not prolonged for unnecessarily. In our humble view, the Division Bench appears to have placed entire reliance on para 52 by reading the same out of the context and findings which have been recorded by the Supreme Court in subsequent paragraphs. It is also true that there are no pari materia provisions like sections 15 and 16 of the Act of 1940 in the

1996 Act but still the provisions of section 34 read together, sufficiently indicate vesting of vast powers in the Court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award. We see no reason as to why these powers vested in the Court should be construed so strictly which it would practically frustrate the very object of the Act. Thus, in our view, the principle of law stated by the Division Bench is not in line with the legislative intent which seeks to achieve the object of the Act and also not in line with accepted norms of interpretation of statute."

7.6.4 Furthermore, it has been held by the Hon'ble Supreme Court in the case of ***J.G. Engineers (P) Ltd. -v- Union of India*** reported in **(2011) 5 SCC 758** that the Courts are empowered to segregate/severe an arbitral award:-

"25. It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9."

7.6.5 **The principle which emerges is that while severing an arbitral award is a delicate procedure, insofar as, the severed/perverse part of the award is not in any way connected to the legally sound part of the award, the Courts under Section 34 are empowered to set aside only that portion of the award which suffers from some infirmity. In my opinion, such a practice should be encouraged also, as rather than setting aside the entire arbitral award, it will be more prudent to separate the good and the bad. It is better to take out the rotten apple, instead of throwing the entire basket out.**

7.6.6 Having dealt with the scope of interference available under Section 34 of the Act, the price escalation clause, the letter dated February 03, 2017, and severance of arbitral awards, I will now proceed to deal with the challenge to the impugned award dated issue wise.

8. Issue Nos. 1, 3, 4, 5, And 6

8.1 Since, these issues were dealt collectively by the arbitral tribunal, I will proceed to deal with the challenge to these issues together.

8.2 In respect of delay, the petitioner before the arbitral tribunal repeated and reiterated the letter dated February 03, 2017 and sought to levy liquidated damages in terms of the said letter before the arbitral tribunal. The respondent argued that the petitioner could not successfully establish the entire delay to be on part of the petitioner and furthermore, the petitioner did not hand over the land and other inputs on time, although it was required to do so under the contract. The respondent further contended that the delay if any on its part got subsumed within the larger delay on part of the petitioner.

8.3 Arbitral tribunal while dealing with the issue of delay held that while there was a delay of 1643 days in completion of Unit No. 1 and 1835 days in completion of Unit No. 2, no delay has been attributed by the petitioner to the respondent in respect of Unit No. 1. Furthermore, even for Unit No. 2, delay of only 468 days has been claimed in terms of the letter dated February 03, 2017. The contentions of the parties in respect of the letter dated February 03, 2017, have already been dealt with by me. Just to reiterate, arbitral tribunal held that although liquidated damages in respect of Unit No. 2 for a delay of 468 days were sought to be claimed by the petitioner in terms of the letter dated February 03, 2017, the petitioner before the arbitral tribunal neither by the way of oral testimony or evidence established as to how this delay of 468 days was calculated.

Furthermore, since the petitioner was not able to support its claim for delay of 468 days before, the arbitral tribunal held that it was not entitled to levy liquidated damages. This finding of the arbitral tribunal has been arrived after taking into account oral and written evidence. This Court finds no infirmity, patent illegality, or perversity with this finding of the arbitral tribunal.

8.4. Land

8.4.1 In respect of handing over of land, Clause 10.2 of the GCC was referred to by respondent. The same has been reproduced here for ease of reference:-

> *"10. 2 The Employer shall be responsible for acquiring and providing legal and physical possession of the site and access thereto, and for providing possession of and access to all other areas reasonably required for the proper execution of the Contract, including all requisite rights of way, as specified in Scope of Works and Supply by the Employer of the Contract Agreement. The Employer shall give full possession of and accord all rights of access thereto on or before the date(s) specified."*

8.4.2 Arbitral tribunal in respect of land also referred to the L1 & L2 Schedule to hold that Appendix 5 provides for a specific time within which the site, i.e. Main Plant land and balance land (Ash Dyke/Ash pond) was to be handed over to the respondent by the petitioner ***free from encumbrances.*** After appreciation

of evidence, the arbitral tribunal established the delay caused in handing over the land by reason of land acquisition disputes, agitation by the local people, etc. As such, the petitioner was not able to comply with its contractual obligation to hand over the land/site in time.

8.4.3 It was the case of the petitioner that majority of the land was handed over without much delay and the finding of the arbitral tribunal that entire land had to be handed over prior to commencement of any construction activity is patently illegal and suffers from a fundamental error. In my view, these arguments tantamount to nothing but a repetition of the arguments made before the arbitral tribunal. The arbitral tribunal has clearly held that:-

> "*However, it cannot be gainsaid that the land has to be handed over according to the contract prior to the claimant starting any activity on the said land. Admittedly, the Petitioner has not handed over the site in accordance with the time Schedule provided under the Contract.*"

The findings of the arbitral tribunal in respect of land have been arrived after careful consideration of the contentions of the parties and evidence placed on record. This Court finds no perversity or patent illegality with the findings of the arbitral tribunal, and as such finds no reason to interfere with the findings of the arbitral tribunal.

8.5. BRH

8.5.1 It is an undisputed fact that the BRHs were not stamped as was statutorily mandated. But, as has been held in the award, the petitioner led the respondent to believe that if the BRHs were examined and approved by CMERI, the petitioner would not object to the unstamped BRHs being used. Furthermore, it has been held by the arbitral tribunal that while the petitioner was well within its right to reject the unstamped BRHS, there was no need to put the petitioner through the process of getting the unstamped BRHs tested by CMERI. This could very well be a justifiable grievance that the respondent could have against the petitioner.

8.5.2 Furthermore, the arbitral tribunal held that since no delay has been claimed by the petitioner in achieving COF of Unit 1, even though there may be delay on part of the respondent, the same did not delay in achieving COF of Unit 1. As for Unit 2, the arbitral tribunal after referring to the correspondence including petitioner's letter dated February 27, 2013, respondent's reply dated October 10, 2013, petitioner's response dated October 28, 2013 and further response of the petitioner dated November 23, 2013 held that the delay alleged in respect of BRH does not specifically relate to Unit 2.

8.5.3 Petitioner's contention before this Court that there is patent illegality in finding of the arbitral tribunal in respect of BRH is without any merit. Accordingly, this finding calls for no interference.

8.6. NDCT

8.6.1 The arbitral tribunal held that NDCT - 1 was initially not constructed by the respondent in accordance with the contractual provisions. As a result, the respondent had to dismantle the already constructed portion of NDCT - 1 and had to reconstruct the same. Pending the reconstruction of NDCT - 1, NDCT - 2 was to be used for completion of different milestones of Unit 1.

8.6.2 Requirement of reconstruction of NDCT - 1 was held to have no effect in achieving COF of Unit 1, as no delay was alleged by the petitioner in respect of Unit 1. Even after NDCT - 1 was ready, the petitioner was not ready with the CCP. Furthermore, with reference to the Minutes of the Meeting dated May 6, 2015 and November 24, 2015, the arbitral tribunal held that the RTR of Unit 2 could be commenced only after the CCP was made ready and coal was provided. As such, the arbitral tribunal held that no delay was caused in Unit - 2 by the reason of using NDCT - 2 for completion of different milestones of Unit - 1.

8.6.3 The contention of the petitioner that the milestones of Unit 1 had to be achieved by connecting NDCT - 2 and defective NDCT of Unit - 1 had a cascading effect on COF of both Unit 1 and Unit 2, have already been dealt with by the arbitral tribunal. The petitioner under Section 34 of the Act cannot invite this Court to open the knot and reassess the findings of the arbitral tribunal. Furthermore, the petitioner has not been able to establish any patent illegality or perversity in the finding of the arbitral tribunal with regards to NDCT, which would call for this Court to exercise its power under Section 34.

8.7. Insulation Material

8.7.1 It was contended by the petitioner before this Court that insulation material to be supplied by the respondent was to be imported. However, the imported material got damaged and had to be replaced.

8.7.2 It has been established before the arbitral tribunal that the respondent had to make appropriate arrangements to ensure proper storage of the insulation material and even unseasonal rains did not absolve the respondent from this responsibility. However, the arbitral tribunal has categorically came to a finding that the respondent was making requests to the petitioner for permit to obtain indigenous material from

contractually approved vendors. While the petitioner was hesitant initially, it agreed eventually to the use of indigenous material. The initial hesitance and later acceptance of the petitioner to the use of indigenous insulation material by the respondent caused a considerable amount of delay. Furthermore, there was no specific evidence before the arbitral tribunal to establish the delay in obtaining insulation material delayed the COF of Unit 2.

8.7.3 Arguments made by the petitioner before this Court have already been taken into consideration by the arbitral tribunal. The finding of the arbitral tribunal in respect of Insulation Material does not call for any interference.

8.8. Coal and Water

8.8.1 In respect of Unit 1, the arbitral tribunal held that even if there was delay on part of the petitioner on account of BRH, NDCT - 1, and Insulation Material, the same got subsumed in the delay on part of the petitioner in providing land even if the petitioner is assumed to have provided coal and water as was required. In respect of Unit 2, the arbitral tribunal referred to the Minutes of Meeting dated January 7/13, 2015, to establish that till this date coal and water were not available for Unit 1, much less for Unit 2. For completion of RTR of Unit 2, the petitioner was

required to provide inputs but failed to do so. The aforesaid minutes also show that the further work of Unit 2 was dependent upon coal and water being made available by the petitioner.

8.8.2 After detailed consideration of all the issues in respect of delay, the arbitral tribunal arrived at a finding that the respondent was indeed entitled to extension of time till February 23, 2016.

8.9. Other Issues on Delay

8.9.1 The arbitral tribunal held that "*It is clear than neither of the parties has for some reason or the other adhered to the schedule of the contract. It is clearly a chicken and egg situation making it impossible to conclude definitely that delay is on account of the Claimant for the entire period as compared to the contractual schedule or even for the period of 468 days claimed by the Respondent.*" It was argued by petitioner that once it is held that both parties have delayed, and it is impossible to apportion the delay between the parties, then the arbitral tribunal cannot award claims for delay in favour of one of the parties.

8.9.2 **In my opinion, the petitioner is misreading the award. The arbitral tribunal, as discussed, has clearly held that even if the respondent was responsible for any delay, the same got subsumed within the larger delay on part of the petitioner**

in providing land, coal, and water. Such finding has been arrived at after detailed consideration of all the evidence and contention of the parties. No grounds have been made out by the petitioner which would invite this Court to interfere with the finding of the arbitral tribunal in respect of delay.

9. Issue Nos. 2 read with 12, 13, 14

9.1 As per the arbitral tribunal, the respondent is entitled to extension of time for completion of both the Units and that there were no delays on part of the claimant. Hence, the petitioner herein was neither entitled to impose liquidated damages nor could have set off the said damages against retention money.

9.2 The petitioner's case in respect of delay was limited to Unit 2. In fact, the petitioner vide letter dated February 03, 2017 admitted that there was no delay by the claimant in achieving COF of Unit 1 and actually offered compensation to the respondent for delay on part of their own part in respect of Unit - 1 thereby admitting responsibility for delay in achieving RTR of the said Unit. Furthermore, the petitioner by way of the said letter attributed a specific delay of 486 days in project execution with respect to Unit 2. Naturally, the petitioner was obligated to explain the calculation pertaining to the said delay which also led to imposition of liquidated damages on the claimant.

9.3 The findings of the tribunal in paragraph 14.3 (p) of the award shows that no delay could be attributed to the respondent with regard to COF of Unit 1. After having so held, the arbitral tribunal held that the delay 'if any' is subsumed in the delay on part of the petitioner. Similarly, the tribunal clearly observed that the petitioner neither with the support of any document nor by leading any oral evidence has been able to show how it had arrived at a specific figure of 468 days of delay attributed to the respondent in achieving COF of Unit 2. In paragraph 15.3 (l) of the award, the tribunal observed that being a chicken and egg situation, it was impossible to conclude definitely that the delay is on account of the claimant for the entire period as compared to the contractual schedule or even for the period of 468 days as claimed by the respondent.

9.4 In my considered view, such categorical findings by the arbitral tribunal do not suffer from any fundamental error or patent illegality. Furthermore, the Court, in paragraph nos. 8, 8.4, 8.5, 8.6, 8.7, 8.8, and 8.9 has already discussed its reasoning and rationale that such observations by the tribunal do not call for any interference in a Section 34 application.

9.5 In the light of above discussions, the findings of the arbitral tribunal on Issues No. 2, 12, 13 and 14 do not merit exercise of powers provided under Section 34 of the Act.

10. Issue Nos. 7, 8, 9, 10 and 11

10.1 The aforesaid issues relate to the larger issue of delay in COF which has already been dealt with in detail by this Court as a part of Issues No. 1 to 6. After perusal of the award and submissions, I am of the view that the findings of the arbitral tribunal were arrived at after careful consideration of contentions, materials on record and evidence. In my considered opinion, the findings of the arbitral tribunal on the said issues do not suffer from any infirmity, patent illegality or perversity. Hence, the challenge to these issues is answered in the negative.

11. Issue No. 15

11.1 The parties, neither before the Tribunal, nor before this Court, contested the fact that these works were carried out. However, the petitioner argued that these were within the scope of work of the respondent and were also done because of some parts being defective.

11.2 The tribunal has undertaken an item-wise assessment and come to a factual finding that while some works were in the nature of operation and management (Item 1 to 7 with respect to Unit 1; Items 1 to 4, 5 and 7 with respect to Unit 2) other works were actually required to be done by the petitioner but actually done by the respondent (Item 8, 9, 10 and 11 with

respect to Unit 1; Item 6 with respect to Unit 2). The petitioner has argued that the arbitral tribunal was wrong in holding that the cost was not disputed by Mr. Ananda Chatterjee (CW 1) and the amounts were proven by Mr. Newton Gonsalves (CW2), since the amounts were only reflected in a tabular format created by the respondent.

11.3 I do not find any manifest illegality in the awarding of the above amount. The additional tasks were undertaken and the amounts had to be proven in a certain manner and that manner was found sufficient by the arbitral tribunal. It is a factual determination, which does not go astray so as to shock the conscience of the Court. Therefore, interference is unwarranted. Thereby, the finding in Issue No. 15 is sustained.

12. Issue No. 16

12.1 The arbitral tribunal has found the two additional bays to be beyond the clause which provided that anything required for improved design, layout etc. is to the account of the contractor. It appears to be a reasonable interpretation of the contract. Supplements, in any form, to the two bays may have attracted this clause. But altogether two new additional bays cannot be said to attract such a clause.

12.2 The arbitral tribunal further relied upon (a) CW-2's testimony based on executed work orders, purchase orders and BBUs as approved by the respondent and (b) the letter dated February 3, 2017 wherein the petitioner agreed to pay for the civil construction and structural work relating to providing 2 additional bays to substantiate that the 2 additional bays were additional work. With respect to the letter dated February 3, 2017, I have already discussed before how the manner of reliance on a particular document/instrument is upon the arbitral tribunal, unless such reliance completely shocks the conscience of this Court. Anyway, I am not to adjudicate upon the degree of reasonableness of the arbitral tribunal's finding, but merely that it is not so unreasonable that no person could have come to such a conclusion. That does not seem to be the case herein. Correspondingly, the finding in Issue No. 16 is sustained.

13. Issue No. 17

13.1 The claim under this Issue was made as the area designated for dumping of excavated earth adjacent to the Ash Dyke was inundated with water as also the access/lead to the designated area. This required approaching the site by a longer route and the claim is the difference between the actual road to approach the designated area and the original road for carrying the

disposable earth. These facts were found to be true by the arbitral tribunal. It also found that there was no delay on part of the Claimant.

13.2 However, the fundamental error that emerges is with regards to the evidence relied upon to ascertain the quantum of damages. The arbitral tribunal places its reliance upon CW-2's testimony (which is stated to be based on executed work orders and bill/invoices) that was not disputed by the petitioner. However, the petitioner has argued that no bills/invoices were produced at all and such a finding by the arbitral tribunal was perverse and contrary to records. Furthermore, the respondent did not lead any evidence to prove otherwise either in their written or oral pleadings before this Court.

13.3 While this Court cannot go into the sufficiency of evidence, a finding based on absolute reliance on just one witness' testimony, without even looking at the documents to which the witness has referred to, is a conclusion reached on no evidence at all. If the documents were placed before the arbitral tribunal, it may have led to a different conclusion. But, the respondents, before this Court, did not indicate or refer to any document (on which the witness based his testimony) that may have been produced before the arbitral tribunal. This indicates a fundamental flaw in the decision-making process. As per the

judgement in ***Dyna (supra)***, the reasoning behind such a finding must be proper, intelligible and adequate. Anything short of these requirements lends credence to an inference of a fundamental flaw in the decision making process. In my opinion, no reasonable person could have awarded an amount based on just such evidence. The reasoning confounds me. Furthermore, contrary to the arbitral tribunal's findings, bills and invoices were not placed. The tribunal has awarded this claim without basing the same on any cogent evidence and the reasoning provided for awarding these claims is further hit by the Apex Court's judgment in ***Dyna (supra).*** Damages cannot be awarded just for the asking but must be buttressed by reliable evidence of invoices and payments. Without providing evidence that could easily be made available does not entitle the respondent to the claim.

13.4 Therefore, this finding and award granted is patently illegal, perverse, and contrary to Section 31(3) of the Act, and is accordingly set aside.

14. Issue No. 18

14.1 This claim was towards providing separate 900MW ACW pipe headers for two units in place of a common ACW Header from ACW system pump to inlet of filter. The revised drawing was for

a common header, as submitted after discussion with the respondent. However, the arbitral tribunal came to a finding that, in reality, two separate headers were provided.

14.2 Once having found that separate headers were provided, an amount had to be awarded. It would otherwise be unjust enrichment. However, the petitioner contends that bills or invoices were not produced to prove payment. The arbitral tribunal based its computation entirely based on the evidence given by CW-2 that such a claim was drawn up by reference to executed work orders. Such a finding cannot be said to be based on evidence. Mere affirmation by one witness, without production of documents, cannot be a sound basis for computation of an amount. It must be noted, that even the respondents have not indicated to this Court, as to whether such documents were placed before the arbitral tribunal. Secondly, to reiterate my conclusion on Issue No. 17, the reasoning for awarding such an amount is completely devoid of intelligibility. For these reasons, the award with respect to Issue No. 18 is set aside.

14.3 As has been discussed, a finding arrived despite lack of cogent evidence cannot be sustained and supported by the Courts under Section 34 of the Act. Reasons have to be provided not just for the sake of it but must stand on the parameters of

proper, intelligible, and adequate. This finding fails to pass muster under Section 34 of the Act, and is further dragged down by the weight of the Apex Court's judgment in ***Dyna (supra)***, and is accordingly set aside.

15. Issue No. 19

15.1 The respondent was supposed to provide at least 2 AHUs, each having a capacity of 50% common to both Units. However, they were requested for a stand-by Unit for the main control building and providing 3 AHUs with 50% capacity or 2 AHUs with 100% capacity instead of 2 AHUs with 50% capacity. The respondent complied with the request and supplied a component in addition to the contractually agreed quantum/quality.

15.2 The petitioner contends that the changes required for improved working does not attract additional liability and as per Clause 1.00.00 of Section 1 of Vol. IIA, variations were to be taken into account without any cost implication. Clause 7.1.3.5 of the G.C.C. provides a procedure for submitting the price and delivery quotation by the respondent for certain spares asked for by the petitioner. However, in my opinion, this procedure does not necessarily or expressly exclude the possibility of raising demands later on for providing such spares, if not asked for as per this procedure.

15.3 The arbitral tribunal has found that this was an additional requirement which was fulfilled, which does not amount to mere improvement and enhancement of capacity. This appears to be a possible interpretation and therefore is not deserving of interference.

16. Issue No. 20

16.1 The claim under Issue 20 was for supply of additional spares which were in addition to the mandatory spares under the contract. The arbitral tribunal came to a conclusion that the supply of such spares have not been disputed and also that they were over and above the quantities indicated under the contract. This is a finding of fact that does not warrant interference as it is not manifestly perverse or contrary to the record.

16.2 The petitioner's argument, that procedure under Clause 7.1.3.5 of the G.C.C. was not followed, stands controverted by the respondent's argument that this clause was applicable to recommended spares and not additional mandatory spares. The respondent's arguments seem to have found favour with the arbitral tribunal. The arbitral tribunal's decision of upholding the finding on Issue No. 20 is a possible one and cannot be interfered with.

17. Issue No. 21

17.1 The claim in Issue No. 21 was towards providing new technology relays. These were not contemplated and did not exist at the time when the contract was executed. They were also of a higher value.

17.2 The arbitral tribunal did not find merit in the petitioner's argument that the additional work's cost was not communicated as per Clause 7.1.3.5. of the G.C.C., on the basis that an altogether different item not contemplated under the contract was provided. Firstly, as explained before, Clause 7.1.3.5. of the G.C.C. does not bar raising of demand later on. Secondly, Clause 39.1.1 of the G.C.C. empowers the petitioner to propose and require changes, modifications etc. to the facilities. It, in no certain terms, ousts the liability of the petitioner to pay the respondent for supply of different items (not contemplated for under the contract).

17.3 The arbitral tribunal's ruling on Issue No. 21, even if not as detailed in the preceding paragraph, suggests the same in an implied manner. Implied reasoning, if found in an arbitral award, is sufficient to sustain the same. **However, the problem arises somewhere else.** The quantum has been arrived at by the arbitral tribunal on the basis that it was based on executed purchase orders. The petitioner contends that no proof of

expense or payment was produced. On a perusal of the evidence, it is found that the documents produced before the arbitral tribunal are not bills or invoices that prove the quantum of amounts incurred by the respondent. Rather, these documents are in the form of communications made by the respondent to the petitioner indicating the amount due, without providing the basis for which they have reached the quantum mentioned in those communications. A finding arrived on merely such communication is a finding based on no evidence at all. The reasoning behind granting an amount in an arbitral award, which was merely communicated by one party to another, is highly flawed. It does not meet the tests of reasoning as laid down in ***Dyna (supra)***. Therefore, the award with respect to Issue No. 21 is set aside.

18. Issue No. 24

18.1 Issue No.24 related to a claim of INR 437,53,01,238/- and €9,995,735 on account of increase in the price by reason of the extension of the period during which the work was carried out. On whether or not the petitioner was entitled to the claim on account of price escalation, arbitral tribunal held that since the respondent did not claim any delay on part of the petitioner for Unit No. 1, and no delay was found by the arbitral tribunal, with regard to Unit No. 2 and since elaborate findings have been

given in respect of delay already, the respondent was entitled to raise the claim for price escalation.

18.2 The arbitral tribunal remarked that it is a settled principle of law that when a contract has been breached, the party who is at the suffering end of such breach is entitled to receive, from the party who has caused the breach, compensation for any damage or loss caused to it. Furthermore, the arbitral tribunal held that in light of the law settled by the Hon'ble Supreme Court that in dealing with cases concerning contracts for work, a party need not prove minute details of loss and damages, and rather a particular evaluation must be undertaken. It was also held that in a contract where the value of works exceeds 4000 crores, it is not possible to present records denoting each instance of escalation. As far as quantification goes, the claim was premised on the basis of the bills raised by the petitioner on the respondent after the scheduled date of completion and a price variation formula was then applied. I feel it prudent to extract the price variation formula applied to arrive at the claim of price escalation here before proceeding further:-

EC1= EC0 [(F+a x (A1/ Ao) + b x (B1/Bo) + c x (C1/Co) + Lb x (L1/Lo))}

*Price Variation Formulation: EC1 = EC0 *PV factor*

PV Factor = [(F+a x (A1/ Ao) + b x (B1/Bo) + c x (C1/Co) + Lb x (L1/Lo))}

F= The fixed portion of the Ex-factory/ FOB component of the Contract price (F) shall be 0.15

a,b,c, are co-efficients of major materials / items involved in the Ex - factory / FOB component of the contract price. The sum of these co-efficients is 0.60. The labour component is 0.25.

Therefore, the vPrice Variation ids claimed on 0.85.

Thus, the fixed component in the formula is restricted to 0.85.

Thus, the fixed component in the formula is restricted to 0.15 and no increment is claimed on the fixed component.

Wholesale Price Index (WPI) is represented as A, B,C in the PV formula and considered from Office of Economic Advisor (Ministry of Commerce & Industry, GOI) (www.eaindustry.nic.in)

L= Labour Index, namely, Consumer Price Index (CPI) for Industrial Workers (Gen.) applicable to "All India" as published by the office of the Economic Adviser. Government of India / RBI Bulleting/ Labour Bureau Simla (www.labourbureau.nic.in)

18.3 In respect of Price Variation formula and the claim for escalation, following cross examination of CW-2 bears relevance:-

> *"Q17. If you come back to the price variation formula, can you tell us as to why the calculation is taken from June, 2009 when the contract provides for different completion dates for different activities?*
> *Ans. We have considered the invoice billed after February, 2011 only. For the purpose of the indices the base date is June, 2009. Consumer price index and wholesale price index for example were available with base date June, 2009 and the indices applied are indices from February, 2011 onwards.*
>
> *Q18. Are you suggesting that price variation claim in your affidavit is restricted to invoices raised after February 2011?*
> *Ans. No.*
>
> *Q19. On what basis have you applied the price variation formula based on Indian indices to foreign supplies under the contract?*
> *Ans. The indices have to be applied as we would not know what would be the actual incremental cost in the foreign markets.*
>
> *Q20. Is it correct that the calculations in your affidavit is based on a hypothetical application of the formula for the foreign supplies?*

Ans. No. To my understanding the price variation formula is a universal formula which we also use in other projects. So this applies both to foreign as well as Indian supplies.

Q21. In the exercise undertaken by you to make this calculation have you verified as to whether the increased amount was paid by the claimant to the foreign suppliers?
Ans. No.

Q22. In the exercise undertaken by you to make this calculation have you verified as to whether the increased amount claimed for domestic supplies was actually paid by the claimant to various domestic suppliers?
Ans. No.

Q23. Please come to the same paragraph 16.1. Would it be correct to assume that the invoices referred to in your calculation sheets were paid by the respondent to the claimant at the relevant time when the invoices were raised incrementally?
Ans. I did not verify the payments.

Q24. Can you show from your calculation sheets in your price variation claim that you have discounted the amount paid at the relevant time for each of the invoices referred in the sheets?
Ans. I have not considered the amount paid for the purpose of calculation.

Q25. So would it be correct that the calculation sheets assumes all the invoices are unpaid?

Ans. The payment aspect has not been considered by me in the calculation.

Q26. Please come to page 66. Please look at the column 'period and interest'. Can you tell us on what basis the period has been assumed for this calculation?
Ans. As the payment period was for 45 days 1 have considered 45 days from the date of invoice.

Q27. In this calculation the period assumes that the relatable invoice was wholly unpaid. Is that correct?
Ans. No

Q28. Come to the interest column. Would it be correct to say that if the payment as per the invoices is taken without the price variation claim, then this interest calculation would be incorrect as given in the calculation sheet with the affidavit?
Ans. I would like to rectify my reply to Question No. 27. It is only the incremental cost arrived by virtue of the price variation formula which is shown as unpaid and interest has been accordingly calculated on the incremental amount.

Q29. Was this incremental amount incurred by the claimant by making any additional payment?
Ans. I did not verify the same.

Q30. Please come to 16 and the calculation sheets. In cases where the cost incurred by the claimant at the relevant time was as per the cost estimated by the claimant, have those cases been excluded from the variation claim ?
Ans. I have not verified the same.

Q31. Please come to 16.2 of your affidavit. Have you verified whether the amounts mentioned in paragraph 16.2 were incurred by the claimant during the project execution?
Ans. We have calculated the amount by applying the price variation formula on the invoices raised. I have not verified for the purpose of this calculation whether the cost has been incurred by the claimant."

18.4 In respect of the price variation formula, it was argued by the petitioner that the price variation formula has not been provided in the contract and furthermore, that the formula has been unilaterally imposed on the petitioner which is not permitted. In this regard, judgments of the Hon'ble Supreme Court in ***Ssanyong (supra), and PSA Sical (supra),*** and the judgment of this Court in ***Universal Sea Port (supra)*** were relied upon by the petitioner. However, to my mind, these judgments do not help the petitioner's case. When there was no specific price variation formulation provided for in the contract, and the respondent was held entitled to damages, there had to be some formula applied, to quantify the amount of damages. In such a situation, use of a universal formula, which has also been used in other projects, cannot be termed as perverse or unreasonable. Moreover, CW-2's examination and further evidence placed in this regard has been thoroughly taken into account by the arbitral tribunal.

18.5 As far as proving the quantum goes, it has already been held by the arbitral tribunal that minute details of loss and damages need not be proven and in a contract of this nature, it is improbable to present records for each instance of escalation.

18.6 During the course of arbitral proceedings, the respondent revised the Euro claim from 6,357,069 to Euro 7,000,210 but since no formal amendment was filed, the increase in Euro figure was not taken on record.

18.7 In respect of the claims under this issue, arbitral tribunal restricted the amount awarded under this issue to 75% of the amount claimed.

18.8 It was also argued by the petitioner that the finding of the arbitral tribunal that "*While the Respondent argued on the tenability of the claim, it has not disputed the quantum of claim though in cross examination of CW. 2, the Respondent has sought to build an opinion that C.W. 2 was unaware of the basis of the claim.*" is perverse and contrary to records. The contention of the petitioner that the finding of the arbitral tribunal is perverse on the fact that it did not challenge the quantum of the claim is correct. The petitioner not only challenged the basis of the claim but also as seen in the SOD and the cross examination of CW2 did question the formula and the quantum was accordingly also challenged. However, the primary contention put forth by the

petitioner was that the contract was a firm price contract, and therefore, the entire basis of the award of this claim was wrong. The finding that the quantum was not challenged may be a perverse finding but cannot take away from the other evidence on record that has been taken into account by the arbitral tribunal for fixing the basis of this claim (delay in handing over land and other inputs) and the applicability of the formula used by the respondent. One stray comment that may be incorrect or not as per record cannot and does not make the claim awarded as wrong or illegal in any manner.

18.9 In its recent judgment in ***Batliboi Environmental Engineers Limited –v- Hindustan Petroleum Corporation Limited and Ors.*** reported in **2023 SCC OnLine SC 1208**, the Hon'ble Supreme Court has propounded as follows:-

> *"15. McDermott International Inc. refers to Sections 55 and 73 of the Indian Contract Act, 18728, which deal with the effect of failure to perform at fixed time in contracts where time is of essence, and computation of damages caused by breach of contract, respectively, and states that these Sections neither lay down the mode nor how and in what manner computation of damages for compensation has to be made. As computation depends upon attendant facts and circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall within the domain and decision of the arbitrator.*

> *16. This is without doubt, a sound legal and correct proposition. However, the computation of damages should not be whimsical and absurd resulting in a windfall and bounty for one party at the expense of the other. The computation of damages should not be disingenuous. The damages should commensurate with the loss sustained. In a claim for loss on account of delay in work attributable to the employer, the contractor is entitled to the loss sustained by the breach of contract to the extent and so far as money can compensate. The party should to be placed in the same situation, with the damages, as if the contract had been performed. The principle is that the sum of money awarded to the party who has suffered the injury, should be the same quantum as s/he would have earned or made, if s/he had not sustained the wrong for which s/he is getting compensated."*

The aforesaid paragraphs further fortify the view that the formula used by the arbitral tribunal does not require any interference by this Court.

18.10 Since, I have already dealt extensively with the price variation aspect, arguments of the petitioner in respect of price variation claimed in Issue No. 24 cannot be sustained.

18.11 It was argued by the petitioner that since the remedy provided for in the contract for delay was extension of time for completion, no other remedy could have been availed by the petitioner. I will now proceed to discuss the contractual clauses

and judicial pronouncements in this aspect which were relied upon by the petitioner.

18.12 Following clauses of the GCC and SCC were referred to by the petitioner in support of its contention that the only remedy available for delay was extension:-

> *"11. 3 Subject to GCC Sub-Clauses 9.2, 10.1 and 35 (Unforeseen Conditions) hereof, the Contractor shall be deemed to have satisfied itself as to the correctness and sufficiency of the Contract Price, which shall, except as otherwise provided for in the Contract, cover all its obligations under the Contract.*
>
> * * *
>
> *<u>40.1 The Time(s) for Completion specified in the SCC shall be extended, if the Contractor is delayed or impeded in the performance of any of its obligations under the Contract by reason of any of the following;</u>*
>
> *(a) any Change in the Facilities as provided in GCC Clause 39 (Change in the Facilities)*
>
> *(b) any occurrence of Force Majeure as provided in GCC Clause 37 (Force Majeure), unforeseen conditions as provided in GCC Clause 35 (Unforeseen Conditions), or other occurrence of any of the matters specified or referred to in paragraphs (a), (b), (c) of GCC Sub-Clause 32.2*

(c) any suspension order given by the Employer under GCC Clause 41 (Suspension) hereof or reduction in the rate of progress pursuant to GCC Sub-Clause 41.2 or

(d) any changes in laws and regulations as provided in GCC Clause 36 (Change in Laws and Regulations) or

(e) <u>any default or breach of the Contract by the Employer, specifically including failure to supply the items listed in Scope of Works and Supply by the Employer of the Contract Agreement,</u>

or any activity, act or omission of any other contractors employed by the Employer or

(f) any other matter specifically mentioned in the Contract;

by such period as shall be fair and reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by the Contractor."

18.13 The petitioner placed reliance upon the judgment of the Hon'ble Supreme Court in ***Ramnath International Construction (P) Ltd. -v- Union of India (supra)*** to argue that where the contractor seeks and obtains extension of time for execution of works, he will not be entitled to claim compensation on the ground of such delay. Since the contract in ***Ramnath International (supra)*** explicitly prohibited award of damages if the extension of time had been claimed, no damages could have been awarded in that case. However, no such provision is present in the instant case.

18.14 The judgment of the Calcutta High Court in ***Union of India -v- Budhlani Engineers*** reported in **(2008) 3 CHN 661** was further relied upon by the petitioner to advance the argument that when extension of time has already been claimed, there is no scope for claiming damages. Relevant paragraphs have been extracted below:-

> *"3. According to the respondent, it however, received part of such payment and the same was received under protest and without prejudice to its claim for further sum. The final payment was made when the respondent was forced to strike out the endorsement "with protest". The respondent apparently recorded full and final satisfaction and certificate of clearance of all dues. The respondent, however, contended that such endorsement was forced upon it by withholding the amount of the final bill.*
>
> * * *
>
> *23. In this connection, it will be profitable to refer to the sub-clauses (2) and (3) of clause 17 of the conditions of the work, which are quoted below:*
>
> *"2. Delay and extension of time.—If the Contractor be delayed at any time in the progress of the works by any act or neglect of the Railway's employees or by any other contractor employed by the Railway under sub-clause (4) of clause 20 of these conditions, or by strikes, lock-outs, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorised by the Engineer pending arbitration, or by any cause which the Engineer shall decide to justify the delay,*

then the time of completion of the works may be extended for such reasonable time as the Engineer on behalf of the Railway may decide.

3. Extension of time on Railway Account.—In the event of any failure or delay by the Railway to hand over to the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefor but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable."

24. The aforesaid two sub-clauses point out that in the event of extension of time for completion of work for any reason whatsoever as mentioned therein, there is no scope of claiming damages against the Railway for the loss of idle labour. Therefore, the claim of damages for the delay due to excess water in the site was not entertainable. In this connection, it will not be out of place to refer to the decision of the Supreme Court in the case of Ramnath International Construction (P) Ltd. v. Union of India, reported in 2007 (2) SCC 453, where the contract provided that if there was any delay, attributable either to the contractor or the employer or to both and the contractor sought for and obtained extension of time for execution on that account, he would not be entitled to claim compensation of any nature on the ground

of such delay in addition to the extension of time obtained by him. According to the Supreme Court, prayer for extension of time by the contractor amounted to a specific consent by the contractor to accept extension of time alone in satisfaction of his claim for delay and not to claim any compensation in lieu thereof.

25. We, therefore, hold that the sub-clauses (2) and (3) of clause 17 did not authorise the contractor to claim any compensation once he had applied for extension and got the extension. The Arbitrator, therefore, clearly misdirected himself in awarding compensation on that account and the learned Single Judge totally overlooked this aspect of the case. We, accordingly, set aside the award so far as it granted damages to the respondent for the suspended period of work as mentioned in claim No. 12(iv)(a)(b)(c) & (d) as the same is not tenable under the terms of the agreement."

Emphasis Added

As is evident from a reading of paragraph 23 of the above judgment, it was an explicit stipulation in the contract that in the event Railway delayed in handing over the land, the contractor will not become entitled to compensation. However, no such explicit prohibition on award of escalation is present in the instant case.

18.15 The judgment of the Hon'ble Supreme Court in ***Oil and Natural Gas Corporation -v- Wig Brothers Builders and Engineers Private Limited*** reported in **(2010) 13 SCC 377** was also relied upon by the petitioner in support of its argument that since extension of time in event of delay is the only remedy provided in the contract, compensation/damages cannot be claimed by the petitioner. Paragraphs relied upon by the petitioner have been reproduced below:-

> *"5. The award has been made with reference to several claims. The appellant has not been able to make any valid ground to attack except with reference to Claim 1. In fact, the learned counsel for the appellant rightly concentrated upon the award on Claim 1, which relates to the claim for compensation for loss on account of prolongation of the completion period on account of ONGC's failure to perform its contractual obligations. The arbitrator has held that the delay in completion was due to the fault of both the contractor and ONGC and that both are equally liable for the delay of 19 months. The arbitrator held that as both were equally liable, the contractor was entitled to compensation at the rate of Rs. 1 lakh for a period of 9½ months (that is, half of the period of delay of 19 months) in all Rs. 9,50,000.*
>
> *6. The arbitrator has observed that there is no provision in the contract by which the contractor can be estopped from raising a dispute in regard to the said claim. But Clause 5-A of the contract pertains to extension of time for completion of work and specifically bars any claim for damages. The said clause is extracted below:*

"In the event of delay by the Engineer-in-charge to hand over to the contractor possession of land/lands necessary for the execution of the work or to give the necessary notice to the contractor to commence work or to provide the necessary drawing or instructions or to do any act or thing which has the effect of delaying the execution of the work, then ***notwithstanding anything contained in the contract or alter the character thereof or entitle the contractor to any damages or compensation*** *thereof but in all such cases the Engineer-in-charge may grant such extension or extensions of the completion date as may be deemed fair and reasonable by the Engineer-in-charge and such decision shall be final and binding."*

7. In view of the above, in the event of the work being delayed for whatsoever reason, that is, even delay which is attributable to ONGC, the contractor will only be entitled to extension of time for completion of work but will not be entitled to any compensation or damages. The arbitrator exceeded his jurisdiction in ignoring the said express bar contained in the contract and in awarding the compensation of Rs. 9.5 lakhs. This aspect is covered by several decisions of this Court. We may refer to some of them.

8. In Associated Engg. Co. v. Govt. of A.P. [(1991) 4 SCC 93] this Court observed: (SCC p. 103, para 24)

"24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction."

9. In Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises [(1999) 9 SCC 283] this Court held: (SCC pp. 300 & 310, paras 22-23 & 44)

"22. … The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may tantamount to mala fide action.

23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. …

* * *

44. (h) … He cannot award an amount which is ruled out or prohibited by the terms of the agreement."

10. In Ramnath International Construction (P) Ltd. v. Union of India [(2007) 2 SCC 453] a similar issue was considered. This Court held that Clause 11(C) of the general conditions of contract (similar to Clause 5-A under consideration in this

case) was a clear bar to any claim for compensation for delays, in respect of which extensions had been sought and obtained. This Court further held that such a clause amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of claims for delay and not to claim any compensation; and that in view of such a bar contained in the contract in regard to award of damages on account of delay, if an arbitrator awards compensation, he would be exceeding his jurisdiction.

11. In view of the above, the award of the arbitrator in violation of the bar contained in the contract has to be held as one beyond his jurisdiction requiring interference. Consequently, this appeal is allowed in part, as follows:

(a) The judgment of the High Court and that of the civil court making the award the rule of the court is partly set aside insofar as it relates to the award of Rs. 9.5 lakhs under Claim 1 and the award of interest thereon."

Emphasis Added

The contract between the parties in ***ONGC -v- Wig Brothers (supra)*** specifically stated in the event of delay by the Engineer-in-charge to hand over the possession of land/lands to the contractor, the contractor will not be entitled to claim any damages. While it is true that the remedy provided for delay in the instant case was extension of time, there was no prohibition placed on award of damages in case extension of time is availed.

18.16 Additional reliance was also placed on the judgment of the Hon'ble Supreme Court in ***Union of India -v- Chandalavada Gopalakrishna Murty and Others (supra)*** to advance the argument that since in terms of the contract, extension of time was the only remedy available for delay, the contractor will not be entitled to either damages or compensation. Relevant portion has been extracted below:-

> *"6. The dispute now to be resolved is confined only to Item 1 of the claim. To answer this question, we may refer to Clause 17(3) of the contract. Clause 17(3) reads:*
>
> *'17. (3) In the event of any failure or delay by the Railway to hand over to the contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any cause, whatsoever,* ***the said failure or delay shall in no way effect or vitiate the contract or alter the character thereof or entitle the contractor to damages of compensation thereof but in any such case****, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.'*
>
> *Clause 17(3) thus clearly shows that if there is delay by the Railways the term of the contract can be extended as has been done in the present case. However, the contractor shall not be entitled to damages or compensation."*

The relevant contractual provision in the aforesaid case explicitly prohibited the entitlement of contractor to damages, but as previously discussed, the relevant contractual provision in the instant case contains no such bar.

18.17 Lastly, the petitioner also placed reliance upon the judgment of the Hon'ble Supreme Court in ***K. Marappan (Dead) Through Sole Legal Representatives Balasubramanian -v- Superintending Engineer T.B.P.H.L.C. Circle Anantapur (supra)*** in support of its contention that the contractor cannot claim compensation when extension of time has already been claimed. Relevant portion has been extracted below:-

> *"24. Since the impugned decision is based on Clause 59, it is now necessary to refer to the same. It reads as follows:*
>
> ***'59. Delays and extension of time.—No claim for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except, as hereinafter defined.*** *Reasonable extension of time will be allowed by the Executive Engineer or by the officer competent to sanction the extension for unavoidable delays, such as may result from causes, which, in the opinion of the Executive Engineer, are undoubtedly beyond the control of the contractor. The Executive Engineer shall assess the period of delay or hindrance caused by any written instructions issued by him, at twenty five per cent in excess of the actual working period so lost.*

In the event of the Executive Engineer failing to issue necessary instructions and thereby causing delay and hindrance to the contractor, the latter shall have the right to claim an assessment of such delay by the superintending Engineer of the Circle whose decision will be final and binding. The contractor shall lodge in writing with the Executive Engineer a statement of claim for any delay or hindrance referred to above, within fourteen days from its commencement, otherwise, no extension of time will be allowed.

Whenever authorised alterations or additions made during the progress of the work are of such a nature in the opinion of the Executive Engineer as to justify an extension of time in consequence thereof, such extension will be granted in writing by the Executive Engineer or other competent authority when ordering such alterations or additions.'

25. It is our view that it will not be open to a contractor to claim compensation which arises on account of the fact that the work is delayed or hindrance caused to the work from any cause whatsoever. To demystify this further, it means that should the work be delayed on account of reasons which are attributable either partially or entirely to the employer, namely, the respondent herein, the claim for compensation is barred. Equally, the clause interdicts raising claim for compensation by the contractor if the employer poses hindrance to the work. If work gets delayed on account of the contractor himself, it is axiomatic that he cannot claim compensation as it would amount to a person taking advantage of his own wrong. Delay from any cause cannot found a claim for compensation. It may also happen

that the work may get delayed not due to the fault of the employer. There may be natural causes such as natural calamities which may cause delay in carrying out the work. Even in such cases, in our view, Clause 59 would cast an embargo against a claim by the contractor. This interpretation gives full play to the words "delays from any cause whatsoever". Equally, if there is hindrance to the work from any cause whatever, a claim for compensation would not lie.

26. The heading of Clause 59 is "delays and extension of time". While compensation on account of delay and hindrance is impermissible, what Clause 59 provides, however, is that reasonable extension of time be allowed. Request for extension of time must arise from causes beyond the control of the contractor. It is further provided in Clause 59 that if delay or hindrance is caused by any written instruction by the Executive Engineer then the period of the delay or hindrance is to be assessed at 25% in excess of the actual working period so lost. It is further provided that if delay and hindrance is caused to the contractor as a result of the Executive Engineer failing to issue necessary instructions, the contractor will have the right to claim and assessment of the delay by the Superintending Engineer of the circle. The contractor is to lodge a statement of claim for any delay or hindrance within 14 days from its commencement, failing which no extension for time will be allowed. Still further Clause 59 declares that whenever authorised alterations or additions which are made during the progress of the work are of such a nature which justify an extension of time, extension can be granted in writing by the Executive Engineer or other competent authority when ordering such alterations or additions. ***In short, under***

Clause 59 while extension of time on account of delay or hindrance can be granted, claim for compensation on account of delay or hindrance on account of any cause will not lie."

Emphasis Added

In my view, this case does not help the petitioner's case since as is evident from a bare reading of the aforesaid judgment, Clause 59 clearly stated that claim for compensation on account of delay or hindrance will not lie. However, the contract in the instant case places no such prohibition on account of delay or hindrance.

18.18 While it is true that the remedy for delay in the contract was extension of time, there was no explicit indication in the contract that, extension of time was the ***only*** remedy. In absence of such indication, the arbitral tribunal cannot be held at fault for award of damages even if extension of time as a remedy for delay had already been availed of by the respondent. Moreover, the arbitral tribunal has already held that when a contract has been breached, the party at the suffering end of such breach is entitled to receive compensation. In absence of any specific prohibition on award of compensation, this Court finds no perversity or patent illegality with the finding of the arbitral tribunal on this issue.

18.19 It was argued that price escalation has been granted in garb of damages, and the award being a firm price contract, such finding of the arbitral tribunal cannot be sustained. While firm price aspect has already been deliberated in detail, but just to reiterate, the contract was a firm price contract, only for the schedule of work as stipulated in the contract. In absence of an explicit prohibition on award of escalation, arbitral tribunal was not contractually withheld from awarding price escalation. Moreover, damages have been awarded in terms of Section 73 of the Indian Contract Act, 1872. The said section has been reproduced below:-

> *"73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*
>
> *Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation*

from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

18.20 It is a well-established principle of law that if a contract has been breached, the party who has suffered such breach cannot be left hanging. Section 73 of the Indian Contract Act, 1872 is a statutory safeguard to protect the party affected by breach of contract. In absence of any explicit bar on award of damages in the contract, the arbitral tribunal cannot be faulted for award of damages. Even if extension of time as a result of breach of contractual obligations, has been availed as a remedy, it would not prevent the party who has suffered such breach from putting forward a claim for damages if there is no explicit prohibition contained in the contract. In such a situation, award of damages by the arbitral tribunal would not violate Section 28(3) of the Act, since if damages have been awarded in absence of an explicit prohibition, arbitral tribunal cannot be said to have acted contrary to the terms of the contract.

18.21 As far as the use of Indian indices for foreign supplies go, C.W. 2's testimony which has been extracted above bears relevance. C.W. 2 had deposed before the arbitral tribunal that since the

actual incremental cost for foreign supplies was not known Indian indices were used. In my view, this is not a completely perverse reasoning, on which no reliance could have been placed by the arbitral tribunal. Since the actual incremental cost for foreign supplies was not known, reliance on Indian indices cannot be termed as impractical. Moreover, argument regarding use of Indian indices for foreign supplies has already been considered by the arbitral tribunal and as such, this Court cannot reappreciate the finding of the arbitral tribunal in absence of any perversity or patent illegality.

18.22 When it comes to proving actual damages, it has been argued by the petitioner that the same has not been done in the instant case. The same has already been taken into consideration by the arbitral tribunal. Every minute detail/instance of escalation is practically impossible to establish in a work contract which runs into thousands of crores. In such a case, use of price variation formula and indices is a more practical and viable alternative. Furthermore, arbitral tribunal's assessment of damages has been arrived at after extensive consideration of material evidence and oral testimony, and the same can be perused from the record of arbitral proceedings. Moreover the arbitral tribunal has already considered and held that it is a settled law of the Hon'ble Supreme Court that an arbitral tribunal is entitled to make an assessment of what is the

damage and what should be the quantum in respect of the same.

18.23 In light of the aforesaid discussion, this Court finds no reason to interfere with arbitral tribunal's finding in respect of Issue No. 24.

19. Issue No. 25

19.1 Issue No. 25 relates to a claim of INR 29,71,07,396.31/-, which was on account of additional cost incurred towards construction of Ash Dyke. The arbitral tribunal referred to the petitioner's letter dated February 03, 2017 and remarked that the respondent itself offered the respondent a compensation of INR 8.472 crores towards ash dyke. The same was considered as an admission on part of the petitioner. The arbitral tribunal further held that the respondent was severely impeded in carrying out the works in the Ash Pond area and so, the respondent was entitled to this claim. Based on C.W.'s deposition the amount under this claim changed to INR 29,03,09,091.86/-.

19.2 Entire amount claimed under this head was awarded.

19.3 Since most of the grounds raised against the award of Issue No. 25, were similar to the ones raised against Issue No. 24, and the same having already been conclusively dealt with under Issue No. 24, I will not deal with those issues here.

19.4 It was argued that the award of Issue No. 25 amounts to double recovery since escalation for the entire project has already been claimed under Issue No. 24. Furthermore, petitioner advanced the argument that Ash Dyke was part of the Main Plant Package (MPP) and hence escalation could not have been separately claimed for Ash Dyke under Issue No. 25.

19.5 In this regard, petitioner made reference to the testimony of Mr. Partha Banerjee, RW-4 which has been extracted below:-

> *"Q2. Do you mean you had nothing to do with the construction of ash dyke, ash pond and ash corridor which are not a part of the main plant area or main plant package ? Ans. Construction of ash pond and ash corridor are part of main plant package awarded to the claimant. I approved and finalised the design and drawings of the ash pond and ash corridor."*

To my mind, this argument does not advance the petitioner's case since this is only one side of the things. While it is true that ash pond and ash corridor were indeed part of the main plant package, it is also an undisputed fact that the ash pond and ash corridor were a separate component of the package not connected to the main plant.

19.6 Firstly, it is evident from a perusal of the Statement of Defence, and other written submissions that the argument of double recovery was never raised before the arbitral tribunal and is

being argued for the first time before this Court. Secondly, the main plant land and Ash Pond land were treated differently by the petitioner itself. Apart from the letter dated February 03, 2017 where the petitioner offered respondent compensation separately for Main Plant Switch Yard Portion and Ash Pond portion, it was also the contention of the petitioner before the arbitral tribunal that there was no *"relationship and dependence between the Main Plant land and Ash Pond area since no construction and erection activity in the Main Plant area was connected with the availability of Ash Pond area"* (Paragraph 8.2(a) of the arbitral award dated December 21, 2019). Furthermore, there was a distinction made between the land designated for main plant (928.630 acres) and the balance land designated ash pond/dyke land (507.480 acres). As such, the respondent could not be placed at fault for claiming compensation/damages separately for the ash dyke and the main plant land. As a result of the respondent raising these claims under separate heads, both these issues were separately treated and dealt with by the arbitral tribunal.

19.7 In light of the aforesaid discussion, challenge to Issue No. 25 is answered in the negative.

20. Issue No. 27

20.1 Issue No. 27 related to a claim of INR 210,64,59,626/- and €21,000,088/- on account of overstay by the claimant on account of delay in achieving COF of Unit 1 and Unit 2 as well as completion of Performance Guarantee tests.

20.2 The breakup of the amount claimed under Issue No. 27 has been provided by C.W. 2 in his Affidavit of Evidence. The same has been reproduced below –

> *"19.2 The additional actual cost computed is by reason of extended period of the Contract beyond the Schedule Date of Completion which got extended, which resulted in additional costs to Claimant.* ***The same has been claimed by the Claimant in relation to the cost incurred for overstay beyond 14th February 2011 represented by vouchers, invoices, payment slips, etc. Additionally, I produce the Auditors' Certificate showing that an amount of Rs. 100,87,95,334/- has been incurred by the Claimant towards overheads, salary, and depreciation.*** *The said Certificate appears in Vol. 54A filed along with the Rejoinder. Interest calculated at the rate of 18% per annum after 45 days from 28th October 2015, i.e. the date of submission of letter claiming amounts incurred on account of overstay at that time by the Claimant is Rs. 42,50,13,181/-*
>
> *19.3* ***The Claimant has claimed proportionate cost of Euro 13,000,000/- based on the original Contract of Euro 6,000,000/- for supervising the work (Services Contract) for a period of 30 months. The amount of***

Euros 13,000,000/- is arrived at for the extended period of stay of 66 months of SEC personnel. *The Claimant has claimed interest at the rate of 18% per annum which has been calculated from the Scheduled Date of Completion up to 31st July. 2017 being a sum of Euros 8,000,088/-"*

20.3 **What would be evident from a reading of the aforementioned paragraphs is that a principal amount of INR 100 Crores (approx.) has been claimed towards overheads, salary, and depreciation for which Auditor's Certificate (hereinafter referred to as 'CA Certificate') has been adduced as evidence. For overstay, a principal amount of INR 68 Crores has been claimed for which vouchers, invoices, payment slips, etc. have been provided. In all, the total INR component claimed (excluding interest) amounts to INR 168 Crores (approx.) For the Euro component of 13 million (excluding interest) which is on account of overstay of SEC personnel, the same is a proportionate figure arrived based on the original contract of Euro 6 million.**

20.4 The award of this claim has been challenged by the petitioner on account of the claim being awarded on the basis of no evidence. It has also been alleged that there was no causal link between the purported cost incurred on account of overstay and delay. Furthermore, it has also been alleged that there is double

recovery between Issue 27 and issues no. 24 and 25 as overhead is part of the fixed coefficient reflected in the formula applied by the respondent for claiming price escalation.

20.5 It seems from a reading of the award that in addition to the auditor's certificate which was for an amount of INR 100 crores approximately., for the balance amount claimed under this issue vouchers, invoices, and payment slips were presented by the respondent. Furthermore, CW - 2's deposition has also been relied upon by the petitioner.

20.6 The CA certificate relied upon for a major part of the overhead claim has been prepared after performing following duties:-

> *"(a) Obtained the attached Annexure of statement of specific expenses incurred by EPC a division of the Company in executing Raghunathpura Thermal Power Project for the period from February 1, 2011 to November 30, 2016 which are prepared by the management and*
>
> *(b) Verified the amounts are as per the books of account of the relevant period and it pertains to the aforesaid projects."*

However, it is pertinent to note that the CA certificate does not contain any certification if these expenses were indeed made over and above the amount that has already been claimed on account of price variation/escalation.

Furthermore, the CA certificate as per its own words does not "*constitute an audit or a review made in accordance with the generally accepted auditing standard in India"* and consequently, it expresses no assurance.

20.7 It was contended that the CA certificate by itself would not amount as a sufficient evidence. The petitioner had relied on the judgment of the Hon'ble Supreme Court in ***Petlad Turkey Red Dye Works Co. Ltd. -v- Dyes and Chemical Workers Union and Ors.*** reported in **AIR 1960 SC 1006**. Relevant portions of the said judgment have been extracted below:-

> *"4. That is a distinction which the courts of law have always been careful to make. Thus, if a person is to prove that he was ill on a particular date, the mere filing of a certificate of a medical man that he was ill on that date is not accepted as evidence to show that he was ill. The correctness of the statement made in the certificate has to be proved by an affidavit or oral testimony in court by the doctor concerned or by some other evidence. There is no reason why an exception should be made in the case of balance sheets prepared by companies for themselves. It has to be borne in mind that in many cases the Directors of the Companies may feel inclined to make incorrect statements in these balance sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts a statement to be correct to prove the*

same by relevant and acceptable evidence. The mere statement of the balance sheet is of no assistance to show therefore that any portion of the reserve was actually utilized as working capital.

5. The question whether a balance sheet can be taken as proof of a claim what portion reserve has actually been used as working capital was very recently considered by us in Khandesh Spg. & Weaving Mill Co. Ltd. v. Rashtriya Girni Kamgar Sangh, Jalgaon [Civil Appeal No. 257 of 1958] . As was pointed out by Subba Rao, J. in that case the balance sheet of a Company is prepared by the Company's own officers and when so much depends on the ascertainment of what portion of the reserve was utilized as working capital, the principles of equity and justice demand that an Industrial Court should insist upon a clear proof of the same and also give a real and adequate opportunity to the labour to canvass the correctness of the particulars furnished by the employer. In that case we also considered an observation in Indian Hume Pipe Company Ltd. v. Workmen [(1959) 2 LLJ 357] which was relied upon for an argument that the balance-sheet was good evidence to prove that amounts were actually used as working capital. As was pointed out in Khandesh Spg. & Weaving Mills case [Civil Appeal No. 257 of 1958] this observation was not intended to lay down the law that a balance sheet by itself was good evidence to prove any fact as regards the actual utilisation of reserves as working capital. The observation relied on was a sentence at p. 362— "Moreover, no objection was urged in this behalf, nor was any finding to the contrary recorded by the Tribunal". If it had been intended to state as a matter of law that the balance sheet itself was good evidence to prove the

fact of utilisation of a portion of the reserve as working capital it would have been unnecessary to add such a sentence.

6. This question as regards the sufficiency of the balance sheet itself to prove the fact of utilization of any reserve as working capital was also considered by us in Management of Trichinopoly Mills Ltd. v. National Cotton Textile Mills Workers Union [Civil Appeal No. 309 of 1957] and it was held that the balance-sheet does not by itself prove any such fact and that the law requires that such an important fact as the utilisation of a portion of the reserve as working capital has to be proved by the employer by evidence given on affidavit or otherwise and after giving an opportunity to the workmen to contest the correctness of such evidence by cross-examination."

20.8 The Hon'ble Supreme Court in the case of ***Messrs. Gannon Dunkerlay & Co. Ltd. -v- Workmen*** reported in **(1972) 3 SCC 443** had stated that mere CA certificate cannot be sufficient and it has to be accompanied by actual evidence of how the CA arrived at a particular figure. I have reproduced the relevant paragraph below:-

"6. Then, there is the register Ext. C-5 which contains entries of lots of other buildings owned by the Company, including buildings which are not used for business purposes and are let out for earning extraneous income and in respect of which no rehabilitation grant has been claimed by the Company. This register is the register maintained for the purpose of calculating depreciation in respect of each building. This

register was started in the year 1955-56, and the progressive depreciation in respect of each building from that year onwards is entered in this register. The register shows original cost of buildings of the year 1947-48 at Rs 82,000 and of the year 1952-53 at Rs 50,000. Thus, there was proof available in these registers of the original cost of these three blocks of buildings. The claim of the Company for rehabilitation grant for the year 1958-59 was in respect of buildings of the value of Rs 4,95,648. As we have just indicated, the entries in register Ext. C-1 bear out the construction of buildings for the cylinder factory in 1958-59 of the value of Rs 4,54,789. ***For buildings claimed to have been constructed in that year of the value of the difference between these two amounts no documentary evidence has been produced. Reliance was placed on behalf of the Company on a certificate issued by the Chartered Accountant on April 18, 1963, in which the total original cost of the buildings used by the Company for its business purposes, after excluding those that were let out, was certified to be Rs 6,27,648. It was urged that, if, from this amount, the three amounts proved as value of buildings entered in the two registers Exts. C-1 and C-5 is deducted, the balance represents the additional buildings that were constructed in 1958-59 and which are used for business purposes by the Company. This certificate cannot be accepted as the basis for proving that buildings of that value were really constructed in the year 1958-59 and form part of the business premises of the Company. The certificate cannot be held to prove the original cost of those buildings. Even the Chartered Accountant, who gave the certificate, did***

not explain in the affidavit how he had arrived at this figure of Rs 6,27,648. Consequently, rehabilitation grant can be allowed only in respect of the three sets of buildings, mentioned above, the original cost of which has been proved by production of registers Exts. C-1 and C-5."

Emphasis Added

20.9 Additionally, the judgment of the Hon'ble Supreme Court in ***Central Bureau of Investigation -v- V.C. Shukla and Ors.*** reported in **(1998) 3 SCC 410** also bears relevance in the instant case. In the aforesaid case, the Hon'ble Supreme Court outlined that while relying upon parties' books of account there should be additional safeguard of insistence upon other evidence. Relevant paragraphs have been extracted here for ease of reference:-

"35. The probative value of the liability created by an entry in books of account came up for consideration in Chandradhar Goswami v. Gauhati Bank Ltd. [AIR 1967 SC 1058 : (1967) 1 SCR 898 : 37 Comp Cas 108] That case arose out of a suit filed by Gauhati Bank against Chandradhar (the appellant therein) for recovery of a loan of Rs 40,000. In defence he contended, inter alia, that no loan was taken. To substantiate their claim the Bank solely relied upon certified copy of the accounts maintained by them under Section 4 of the Bankers' Book Evidence Act, 1891 and contended that certified copies became prima facie evidence of the existence of the original entries in the accounts and were admissible to prove the payment of loan

given. The suit was decreed by the trial court and the appeal preferred against it was dismissed by the High Court. In setting aside the decree this Court observed that in the face of the positive case made out by Chandradhar that he did not ever borrow any sum from the Bank, the Bank had to prove the fact of such payment and could not rely on mere entries in the books of account even if they were regularly kept in the course of business in view of the clear language of Section 34 of the Act. This Court further observed that where the entries were not admitted it was the duty of the Bank, if it relied on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence.

36. The same question came up for consideration before different High Courts on a number of occasions but to eschew prolixity we would confine our attention to some of the judgments on which Mr Sibal relied. In M.S. Yesuvadiyan v. P.S.A. Subba Naicker [AIR 1919 Mad 132 : 52 IC 704] one of the learned Judges constituting the Bench had this to say:

'Section 34, Evidence Act, lays down that the entries in books of account, regularly kept in the course of business are relevant, but such a statement will not alone be sufficient to charge any person with liability. That merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in

accordance with those entries. The legislature however does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in books of account if true.'

While concurring with the above observations the other learned Judge stated as under:

'If no other evidence besides the accounts were given, however strongly those accounts may be supported by the probabilities, and however strong may be the evidence as to the honesty of those who kept them, such consideration could not alone with reference to Section 34, Evidence Act, be the basis of a decree.'

34. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness (Wigmore on Evidence, § 1546). Since, however, an element of self-interest and partisanship of the entrant to make a person — behind whose back and without whose knowledge the entry is made — liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words "such statements shall not alone be sufficient to charge any person with liability"."

20.10 It is an undisputed fact that the Indian Evidence Act, 1872 is not applicable to arbitral proceedings. While it is true that the law of evidence might not apply to proceedings before an arbitral tribunal, but principles of evidence do apply. There are certain basic principles of law of evidence that have to be adhered to even while citing evidence before an arbitral tribunal. A finding arrived at by merely relying on CA certificate without any additional evidence to back the claim, in my opinion is a finding based on no evidence at all.

20.11 At this juncture, this Court would like to make a reference to the judgment of the Delhi High Court in ***Satluj Jal Vidyat Nigam Ltd -v- Jaiprakash Hyundai Consortium and Ors.*** reported in **2023 SCC OnLine Del 4039**:-

> *"57. Entertaining financial claims based on novel mathematical derivations, without proper foundation in the pleadings and/or without any cogent evidence in support thereof can cause great prejudice to the opposite party. Especially in the context of construction contracts where amounts involved are usually astronomical, any laxity in evidentiary standards and absence of adequate diligence on the part of an arbitral tribunal in closely scrutinizing financial claims advanced on the basis of mathematical derivations or adoption of novel formula, would cast serious aspersions on the arbitral process. The present case is an example where substantial liability has sought to be fastened on one of the contracting parties based on specious paper calculations. It cannot be overemphasized that arbitral*

tribunals must exercise due care and caution while dealing with such claims."

20.12 Without any supporting evidence accompanying it, CA's certificate by itself could not have been relied upon by the arbitral tribunal to award the amount claimed in Issue No. 27. Furthermore, in absence of the CA certificate being not in accordance with proper auditing standards and without any undertaking as to whether or not the overhead expenses were indeed above and beyond the expenses already claimed for price escalation in Issues 24 and 25, the arbitral tribunal's finding in Issue No. 27 amounts to a finding without reason, which is based on no evidence at all.

20.13 Apart from a finding based on no evidence, the awarded amount in Issue 27, as per me, also amounts to double recovery, which cannot be permitted. Firstly, a look at the price variation formula as discussed above would make it apparent that overhead is actually a part of the fixed coefficient reflected in the formula applied by the respondent to claim price escalation. Labour has already been included as a component in the price variation formula. Secondly, no evidence has been provided to establish that the overstay/overhead cost is an additional expenditure over and above the amount that has already been claimed for price escalation. Allowing the respondent to enjoy the fruits of the awarded amount in Issue No. 27 in addition to

Issues No. 24 and 25, would, tantamount to unjust enrichment of the respondent at the expense of the petitioner.

20.14 The principle of unjust enrichment has been defined by the Hon'ble Supreme Court in the case of ***Mahabir Kishore & Ors. -v- State of M.P.*** reported in **(1989) 4 SCC 1** as follows:-

> *"10. Courts in England have since been trying to formulate a juridical basis of this obligation. Idealistic formulations as "aequum et bonum" and "natural justice" were considered to be inadequate and the more legalistic basis of unjust enrichment is formulated. The doctrine of "unjust enrichment" is that in certain situation it would be "unjust" to allow the defendant to retain a benefit at the plaintiff's expense. The relatively modern principle of restitution is of the nature of quasi-contract. But the English law has not yet recognised any generalised right to restitution in every case of unjust enrichment. As Lord Diplock has said, "there is no general doctrine of "unjust enrichment" recognised in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system i.e. based upon the civil law". In Sinclair v. Brougham [1914 AC 398] Lord Haldane said that law could not "de jure" impute promises to repay whether for money "had and received" otherwise, which may, if made de facto, it would inexorably avoid.*
>
> *11. The principle of unjust enrichment requires: first, that the defendants has been "enriched" by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiffs"; and thirdly, that the retention of the enrichment*

be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved."

20.15 Although, CW - 2, in its testimony as extracted below provided that overheads are not reflected in price variation, no other evidence apart from oral testimony of CW - 2 was led by the respondent before the arbitral tribunal:-

"Q 37. Can you tell us in your calculation sheets where can it be seen that these overheads are also not reflected in your calculation sheets for price variation?
Ans. Since the invoices considered in the price variation calculation are as per the rates already laid down in the BBU the incremental over heads are not considered in the price variation."

Arriving at a conclusion based on mere oral testimony of CW-2 that the overhead claims were over and above what has already been claimed for price variation is an unreasonable and perverse conclusion which no reasonable person could have arrived at.

20.16 As far as claims for overheads during the period of delay are concerned, this Court feels pertinent to make a reference to the recent judgment of the Hon'ble Supreme Court in ***Batliboi Environmental Engineers Limited (supra)***:-

"20. .....In a given case, where there is a fundamental breach by the employer, albeit, the builder/contractor does not immediately elect to treat the contract as repudiated, he may still be entitled to raise a claim for loss of profit on the uncompleted work. ***Offsite expenses or overheads are all administrative or executive costs incidental to the management supervision or capital outlay as distinguished from operating charges. These charges cannot be fairly charged to one stream of work or job, and rather be distributed as they relate to the general business or the work of the contractor/builder being undertaken or to be undertaken, as the overheads are relatable to the builder/contractor's business in entirety.***

* * *

23. Ordinarily, when the completion of a contract is delayed and the contractor claims that s/he has suffered a loss arising from depletion of her/his income from the job and hence turnover of her/his business, and also for the overheads in the form of workforce expenses which could have been deployed in other contracts, the claims to bear any persuasion before the arbitrator or a court of law, the builder/contractor has to prove that there was other work available that he would have secured if not for the delay, by producing invitations to tender which was declined due to insufficient capacity to undertake other work. The same may also be proven from the books of accounts to demonstrate a drop in turnover and establish that this result is from the particular delay rather than from extraneous causes.....

* * *

26. Hudson in his 14th Edition refers to claim for management or overheads during the period of delay. The author has referred to Hudson's formula as well as Eichleay's formula, and observes that recently limitations of Hudson's approach have received greater emphasis as the English courts have become more generous in their approach and assessment of claims for time management. ***The authors accept what has been highlighted above, and the need to take care in delay cases to avoid any double recovery, overlap with other claims, or when payments are obtained by the contractor on account of variation(s), or any damages for breach have to be concluded by using contract price.*** *"Thickening", by adding unreasonable expenses, should not be accepted. It is observed that in the total cost method, there is difficulty in linking cause and effect convincingly, albeit is more precise and factually accurate. Thus, Hudson's method should be taken as the basis for computation with caution and as a last resort, where no other way to compute damages is feasible or mathematically accurate. Inaccuracies in Hudson's computation should not be overlooked, and should be accounted and neutralized. Hudson's formula when applied should be with full care and caution not to over-award the damages."*

Emphasis Added

20.17 Other relevant portion of the CW-2's examination with respect to Issue 27 has been extracted below:-

"Q33. Please come to paragraph 19 of your affidavit. Can you tell us the different between paragraph 16 and paragraph 19 of your affidavit?
Ans. The amount considered in paragraph 19 relates to the overhead expenses incurred by the claimant during the extended period of the contract while paragraph 16 relates to the material and services incurred in the project.

Q34. Are you suggesting that these "over head expenses" relate to items which are not covered by the invoices for services?
Ans. Yes

Q35. Can you explain what are these over head expenses which you have taken into account?
Ans. The over head expenses mainly include salary, and depreciation on own assets of the corporate office and the employees at the site.

Q36. Did the contract provide for separate head for your corporate office and depreciation as items which can be billed to the respondent?
Ans. I have not verified the contract but since these were the additional expenses incurred during the extended period of the contract the same has been claimed.

* * *

Q39. Were you involved in making the auditor's certificate mentioned in paragraph 19.2 of your affidavit?
Ans. Yes

Q40. Can you tell us what are the assumptions that you gave to the auditors for the purpose of the certificate?
Ans. Since our accounts are maintained in SAP (Accounting Software) it is easy to identify the cost incurred and related to this project by the corporate office and site office.

Q41. What was the period indicated by you to the auditors to calculate this amount?
Ans. Leave is given to witness to go through the auditor's report disclosed in this proceeding.
The period is from February, 2011 till November, 2016.

* * *

Q48. Come back to your affidavit at paragraph 19.3 (1st line). On what basis have you concluded that the SEC personnel (from China) was at the project site for 66 months?
Ans. It is as per information given to my by the project team.

Q49. Is there any document which was verified by you
Ans. I have verified the original contract with SEC and apportioned the same amount over the extended period. I have not verified any document with regards to the presence of SEC personnel at the project.

* * *

Q54. Please have a look at the auditor's certificate as mentioned in paragraph 19.2 of your affidavit of evidence. Come to paragraph 7 of the document. Can you tell us why the Chartered Accountants are saying that "the above procedure do not constitute either an audit or a review?

Ans. The certificate is mainly to certify the figures are in agreement with the books of account as mentioned in paragraph 6 of the auditor's certificate.

Q55. Do you agree that the Chartered Accountant did not carry out an audit and therefore the document is not a result of any audit?
Ans. I have no idea what the Chartered Accountant has done."

20.18 As is evident from the aforesaid testimony, there was neither any evidence presented before the arbitral tribunal to establish that the SEC personnel had overstayed at the project site, nor any invoices produced which were issued by SEC or proof of any payment produced by the respondent. Moreover, there was no proper audit conducted to actually verify and establish whether these overhead expenses were based on actuals, and whether the overhead cost which has been claimed was over and above the amount already being claimed under the head of price escalation. In such a situation, arbitral tribunal's award of Issue No. 27 stands on a murky ground.

20.19 In addition to the award of INR 168,14,46,445/-, an amount of € 13,000,000 towards overstay of SEC personnel has also been awarded. No reason for award of Euro component has been provided for in the award, as has been discussed, and the CA's

certificate, even if considered as reliable evidence, is limited only to the INR component of 100 crores.

20.20 The anvils of perversity on which the evidence presented before the arbitral tribunal has to be tested is outlined in ***Associate Builders (supra).*** Relevant paragraphs have been extracted below:-

> *"31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
>
> *(i) a finding is based on no evidence, or*
>
> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
>
> *(iii) ignores vital evidence in arriving at its decision,*
>
> *such decision would necessarily be perverse.*
>
> *32. A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)*
>
> *'7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.'*

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

'10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.' "

20.21 As has been propounded by the Hon'ble Supreme Court in ***Dyna Technologies (supra),*** and as discussed previously, while there is no need for the Courts to test an arbitral award on the same rigorous parameters as Court judgments, still, the reasoning contained should be intelligible and adequate. **Proper, intelligible, and adequate are the three parameters on which any reasoned award has to stand.** If reasons have been provided, but they are unintelligible, the same would amount to giving no reasons at all. The findings of the arbitral tribunal do not pass the muster of reasonability. Award of significant monetary sums cannot be based on lacklustre evidence and vague certifications. As has been deliberated at length, while this Court cannot reappreciate evidence presented before the arbitral tribunal, a finding arrived based on unconvincing evidence is an unreasoned finding and it is well

within the limited powers of this Court under Section 34 to set aside such finding.

20.22 The Hon'ble Supreme Court in ***Ssanyong Engineering (supra)*** has held that a decision which is perverse (See, ***Associate Builders (supra)***) would amount to patent illegality appearing on the face of the award. As such, a finding which has been arrived based on no evidence at all, or after ignoring vital evidence, can be struck down under the grounds of patent illegality under Section 34(2-A) of the Act. This view was again reiterated by the Hon'ble Supreme Court in ***Parsa Kentre Collieries Limited -v- Rajasthan Rajya Vidut Utpadan Nigam Limited (supra)***. In ***Patel Engineering Limited -v- North Eastern Electric Power Corporation Limited (supra)***, the Hon'ble Supreme Court held that if a decision of the arbitral tribunal is so perverse, or so irrational, that no fair minded and reasonable personal could have possibly arrived at such a decision, then the Courts can invoke the grounds of patent illegality to set aside that decision.

20.23 Moreover, recently in its judgment in ***Batliboi Environmental Engineers Limited (supra)***, the Hon'ble Supreme Court by placing reliance on precedents reiterated that a finding which has been arrived at by placing reliance on ***thoroughly***

unreliable evidence has to be treated as perverse. Relevant paragraph has been extracted below –

> *"43. Referring to the third principle in Western Geco, it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons 1992 Supp (2) SCC 312, (for short, Gopi Nath & Sons) and Kuldeep Singh v. Commissioner of Police MANU/SC/0793/1998 : (1999) 2 SCC 10 should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality.* ***Kuldeep Singh clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it.*** *If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.*

Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned Under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious. Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the arbitral tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, 'patent illegality' refers to three sub-heads: (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to Clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the arbitral tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in

a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

Emphasis Added

20.24 There may be multiple interpretations or findings which can be arrived at based on similar evidence. This is because, not every person, thinks the same. And that is the beauty of the human mind. We all can look at the same thing, but arrive at different conclusions. As Gayle Lynne Good said, perspective can cause two people to look at the same thing and see totally different things. In a case, where the view taken by arbitral tribunal based on evidence, is a plausible view which can be arrived at after looking at such evidence, Courts would not be empowered to interfere with an arbitral award under Section 34 of the Act. However, if the view taken by the arbitral tribunal is not even a possible view, and is such which no fair minded person could have arrived at, then it would call for the Courts to exercise their powers under Section 34 of the Act. I must however clarify here that the Courts are not empowered under Section 34 to substitute their view with the tribunal's by merely stating that the view taken by the arbitral tribunal's is less probable. For a

decision of the arbitral tribunal to be interfered with by the Courts, it must be so perverse that it would shock the conscience of this Court.

20.25 While this Court has deliberated upon the arguments put forth by the counsel for both the parties, and dealt with the judicial pronouncements put forth herein before, a relevant aspect of this matter has to be dealt with by this Court. This particular issue deals with two aspects – a.) Overheads, Salaries, and Depreciation amounting to INR 100 Crores, for which C.A. Certificate has been produced for a principal amount of INR 100 Crores and for the additional cost for overstay amounting to INR 68 crores, respondent has produced vouchers, invoices, and payment slips and; b.) Payments to be made to SEC for their overstay to the tune of €13,000,000. The first thing that comes to my mind while perusing this claim of the Claimant, is that this claim is nothing but just a claim of unjust enrichment for damages that are too remote to be granted for the Raghunathpur Thermal Power Project. When the claim for escalation and prices that includes overheads and other components such as salaries, and remuneration has already been paid as compensation/damages in Issues No. 24 and 25, this particular claim is then nothing but a repetition of the same in another form. Not only is this claim remote, it is further clear from the evidence produced before the arbitral tribunal that

there is neither any evidence shown to indicate that these were additional expenses incurred by the Claimant nor any proof for such payments has been produced. In the first case, the CA's certificate for a claim of INR 100 crores is nothing but a statement based on the book of accounts of the respondent and does not anywhere state that additional Overhead expenses were incurred because of the delay in the project. The same lies true for the vouchers, invoices, and payment slips produced for the additional claim of INR 68 crores. According to me, this claim should have been out rightly rejected by the arbitral tribunal. The arbitral tribunal has failed to apply its mind correctly to this issue. In fact, this is a case of complete non application of mind as these claims are extremely remote in nature and could not have been granted under any circumstances under Section 73 of the Indian Contract Act, 1872. Coming to the claim regarding SEC personnel who were supposedly present for an additional 66 months, it is clear from the evidence of CW 2, that there is no proof that SEC personnel were actually present at the site. Not a single document in relation to invoices raised by SEC on the respondent has been produced, nor has any proof of payment to SEC for these 66 months been produced before the arbitral tribunal. It is therefore appropriate to say that the claim is not just capricious and whimsical but is also bereft of any evidence. In light of the

above observations, the claim awarded under Issue No. 27 is outrightly set aside.

21. Issue No. 36

21.1 This issue considered whether the claims made by the claimant were barred by limitation. While the arbitral tribunal answered this issue in the negative, the petitioner before this Court reiterated its challenge on the grounds of limitation. As a result of the same, I have dealt with this issue herein.

21.2 The primary contention of the petitioner on the issue of limitation was that despite its repeated rejection of escalation and other claims of the respondent, the respondent continued to work under the contract, and thereby it waived/abandoned any right to claim escalation/overheads. Every period of extension, the petitioner argued, constitutes a new agreement and claims up to that period, if not made, will stand extinguished in accordance with Section 55 of the Indian Contract Act, 1872. Hence, according to the petitioner, the limitation period for the claims of the respondent arising out of each extension period would start from the day when the respondent sought extension of the period of contract and all claims arising out of the extensions from 2011 onwards would be barred by limitation.

21.3 The petitioner put forth the judgment of the Hon'ble Supreme Court in ***State of Gujarat -v- Kothari & Associates (supra).*** I have extracted the relevant paragraphs relied upon by the petitioner below:-

> *"3. It is noteworthy that in each request for an extension, the respondent sought compensation for monetary loss due to the extended time-limit, but while allowing each extension the appellant State denied the claim for compensation each time. The respondent's case was that as per the contract period, 342 days should have been made available to it to conduct the stipulated work, but as a result of the delay in handing over the site and the materials, the respondent had to seek extensions, and nevertheless managed to complete the project in 288 working days, thus indicating that there was no laxity on its part*
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> * * *
>
> *5. The trial court found that the delay was caused by the appellant State; that work was completed by the respondent well within the number of days contractually allocated to complete it. Noting that under Section 73 of the Contract Act compensation is payable for any loss or damage for breach of a contract, the trial court granted compensation under twelve of the thirteen heads of claims itemised by the respondent. In terms of its judgment dated 4-5-1991 the trial court observed that the factual matrix pertaining to these amounts claimed have remained uncontroverted, and accordingly decreed the suit. The respondent was granted Rs 13,61,571 with interest at 12% p.a. with effect from 7-8-1983 viz. the date of the statutory notice. The appellant State*

appealed against the decree and the respondent filed a counterclaim seeking interest from the date of written demand of the suit claim instead of from the date of statutory notice. The High Court, vide its judgment dated 30-7-2003 [State of Gujarat v. Kothari & Associates, 2003 SCC OnLine Guj 127 : (2003) 3 GLH 613] , dismissed the appeal filed by the appellant State and allowed the respondent's cross-objection, granting interest thereon from 5-3-1982.

* * *

9. The period of limitation would be computed under either Article 55 or Article 113, both of which are laid out below for the facility of reference:

Description of Suit	*Period of Limitation*	*Time from which period begins to run*
55.For compensation for the breach of any contract, express or implied, not herein specially provided for.	*Three years*	*When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.*

*	*	*
113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	*Three years*	*When the right to sue accrues.*

* * *

11. It also appears to us that the contract was clearly not broken as the respondents chose to keep it alive despite its repeated breaches by the appellant State. The factual matrix presents a situation of successive or multiple breaches, rather than of a continuous breach, as each delay in handing over the canal/site by the appellant State constituted to a breach that was distinct and complete in itself and gave rise to a separate cause of action for which the respondent could have rescinded the contract or possibly claimed compensation due to prolongation of time and resultant escalation of costs. Of course the respondent is enabled to combine all these causes of action in one plaint, as postulated in CPC provided each claim is itself justiciable. Even the respondent has argued before the High Court that the suit was based on successive breaches committed by the appellant State. In our opinion, the suit was required to be filed within three years of the happening of each breach, which would constitute a distinct cause of action. Article 55 specifically states that in respect of successive breaches, the period begins to run when the breach in respect of which the suit is instituted, occurs. In this vein, Rohtas Industries Ltd. v. Maharaja of Kasimbazar, China Clay Mines [Rohtas Industries Ltd v. Maharaja of Kasimbazar, China Clay Mines, ILR (1951) 1 Cal 420] is apposite as it has held that

when a party agrees to deliver certain goods every month for a duration spanning certain years, the cause of action for breach for failure to deliver in a particular month arises at the end of that month and not at the end of the period of the contract. The situation before us is similar in that the cause of action had arisen on each occasion when the appellant State failed to hand over the site at the contractually stipulated time. Specifically, the limitation periods arose on 15-11-1976, 15-11-1977, 15-11-1978 and 15-11-1979 i.e. on the first day of each season, when the respondent State committed a breach by failing to hand over the site. Thus, the period of limitation did not commence at the termination of the contract period or the date of final payment. The High Court's conclusion that the last date of breach and last date of payment were relevant, not each cause of action, was thus patently erroneous. For each breach, a corresponding amount of damages for additional costs could have been sought. ***The suit, however, was filed on 25-1-1985, well after the limitation period of three years for even the final breach, as the various causes of action became time-barred on 15-11-1979, 15-11-1980, 15-11-1981 and 15-11-1982 respectively***

12. There is another perspective on the method or manner in which limitation is to be computed. We have already narrated that the respondent, on every occasion when the extension was sought by it, had requested to be compensated for delay. The appellant State had granted the extensions but had repudiated and rejected the respondent's claims for damages. The effect of these events would be that the cause of action for making the claim for damages indubitably arose on each of those occasions. It is certainly

arguable that the appellant State may have also been aggrieved by the delay, although the facts of the case appear to be unfavourable to this prediction, since delay can reasonably be laid at the door of the appellant. The respondent, however, could prima facie be presumed to have accepted a renewal or extension in the period of performance but with the rider that the claim for damages had been abandoned by it. If this assumption was not to be made against the respondent, it would reasonably be expected that the respondent should have filed a suit for damages on each of these occasions. In a sense, a fresh contract would be deemed to have been entered into between the parties on the grant of each of the extensions. It is, therefore, not legally possible for the respondent to contend that there was a continuous breach which could have been litigated upon when the contract was finally concluded. In other words, contemporaneous with the extensions granted, it was essential for the respondent to have initiated legal action. Since this was not done, there would be a reasonable presumption that the claim for damages had been abandoned and given a go-by by the respondent."

Emphasis Added

21.4 However, to my mind, the aforesaid judgment does not advance the petitioner's case as the same is distinguishable on facts. In ***Kothari Associates (supra),*** while granting extension, the State explicitly denied the claim of the contractor for compensation. The State in the said case further made it clear that the claim for damages would not be entertained at all. However, in the

instant case, the petitioner vide its letter dated March 07, 2013, while denying the claim of the respondent for escalation, also agreed to convene a meeting on various contractual issues raised by the respondent. Contrary to the factual situation in ***Kothari Associates (supra),*** there was no outright rejection of respondent's escalation claims by the petitioner.

21.5 It is a well-established principle of law that the period of limitation for issuing a notice under Section 21 of the Act starts from the date when negotiation efforts between the parties reaches a "breaking point" and a cause of actions arises. In the instant case, the parties were involved in negotiation right until 2017 and the letter dated February 03, 2017 bears testimony to this fact. When the petitioner by its letter dated February 03, 2017 itself demanded liquidated damages for Unit 2 and offered compensation to the respondent for Unit 1, thereby partially admitting the validity of respondent's claim, it cannot now plead before this Court that the claims of the respondent were barred by limitation.

21.6 In its judgment in ***Geo Miller and Company Private Limited -v- Chairman, Rajasthan Vidyut Utpadan Nigam Limited*** reported in **(2020) 14 SCC 643,** the Hon'ble Supreme Court propounded that the period of bona fide negotiations between the parties has to be excluded while computing the period of

limitation for reference to arbitration. Relevant paragraphs of the said judgment have been extracted below:-

> *"28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.*
>
> *29. Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably*

long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile."

21.7 In the instant case, on a perusal of the negotiation history between the petitioner and the respondent, it becomes evident that the letter dated February 03, 2017 was the last straw/breaking point between the parties. Right up to that date, both the petitioner and the respondent were involved in negotiations and discussions on their respective claims. As such the respondent was well within the contours of limitation when it invoked its right to arbitration and issued Section 21 notice accordingly on June 15, 2017.

21.8 In light of the aforesaid discussion, challenge to this issue and challenge on the grounds of limitation before this Court is answered in the negative.

22. Issue No. 37

22.1 This issue was concerned with whether any of the claims raised by the claimant are not arbitrable. The tribunal has already dealt with the issue of the non-arbitrability of the claims where such a point has been raised. Furthermore, this issue has not been argued by the petitioner before this Court, neither by way

of written submissions nor by oral pleadings. Accordingly, the challenge to this issue is answered in the negative by this Court.

23. Issue Nos. 38 and 39

23.1 The aforesaid issues were concerned with whether the petitioner was entitled to additional interest paid to the financial institutions/banks due to delay in completion of works attributable to the claimant and further interest costs incurred in order to fund such additional interest.

23.2 This Court has not found any perversity or illegality with the arbitral tribunal's findings on the point that there is no delay on part of the claimant in execution of the project. Secondly, clause 30.1 (a) of the GCC clearly indicates that the claimant is not responsible for any interest cost or any other indirect or consequential loss. The carve outs to this clause are in the cases of criminal negligence or wilful misconduct. Thorough perusal of the arbitral award and the records before me revealed that the petitioner has not been able to lead legal evidence to fulfil the aforesaid carve outs.

23.3 Hence, in the absence of any perversity or illegality in the findings of the tribunal in connection with the aforesaid issues, this Court is not inclined to interfere. Accordingly, the findings of the tribunal on these issues are sustained.

24. Issue Nos. 40 and 41

24.1 The aforesaid issues were concerned with whether the award debtor was entitled to revenue loss from tariff due to delay in completion of the project and defective works carried out by the Claimant and subsequent financial loss.

24.2 This Court has not found any perversity or illegality with the findings of the arbitral tribunal on the point that there was no delay on part of the claimant in execution of the project. Secondly, clause 30.1 (a) of the GCC clearly indicates that the claimant was not responsible for any interest cost or any other indirect or consequential loss. The carve outs to this clause are in the cases of criminal negligence or wilful misconduct. Neither the arbitral award nor the records before me reveal any such event nor the petitioner has been able to lead any evidence to fulfil the aforesaid carve outs.

24.3 Hence, in the absence of any perversity or illegality in the findings of the tribunal in connection with the aforesaid issues, this Court is not inclined to interfere. Accordingly, the findings of the tribunal on these issues are sustained.

25. Issue No. 42

25.1 The issue was whether the award debtor was entitled to recover the amount paid to the claimant for specific works/supplies which were ultimately not done by the claimant in accordance with the terms of the contract and to set off the said amount against the retention money.

25.2 It is to be noted here that the aforesaid issue was the sole counterclaim which was allowed by the arbitral tribunal in favour of the petitioner. However, the awarded sum was one-tenth of the figure claimed by the petitioner, and hence, the petitioner has challenged the findings of the tribunal on the aforesaid issue.

25.3 On perusal of the award and the records before me, I am in agreement with the view taken by the arbitral tribunal that the claim by the petitioner was devoid of substantive evidence and was based upon estimates. Moreover, the fact that this Court does not enjoy the power to modify an award, by way of increasing or decreasing the awarded sum, is no longer *res integra.* In light of the above observations, the findings of the arbitral tribunal in the aforesaid issue stand sustained.

26. Issue Nos. 43 and 44

26.1 The aforesaid issues are concerned with whether the petitioner was entitled to loss of interest income for advances made to the claimant for works to be completed within the completion schedule and to loss on account of fluctuation in exchange rate on Euro element of the Contract Price due to the Claimant's delay in completing the work.

26.2 First things first, this Court is in complete agreement with the arbitral tribunal on the point that there is no delay on part of the claimant in execution of the project. Secondly, clause 30.1 (a) of the GCC is crystal clear in indicating that the claimant is not responsible for any interest cost or any other indirect or consequential loss. Hence, in the absence of any perversity or illegality in the findings of the tribunal in connection with the aforesaid issues, this Court is not inclined to interfere with arbitral tribunal's findings.

27. Issue No. 45

27.1 This issue relates to whether the award debtor was entitled to loss of revenue from April 1, 2016 caused due to lower generation of power basis the defective Electrostatic Precipitator (ESP) installed by the claimant in both the Units.

27.2 The arbitral tribunal rejected the claim raised by the petitioner in the aforesaid issue. In my considered view, the petitioner has failed to satisfy as to how the findings of the arbitral tribunal in the aforesaid issue are perverse and/or illegal. The materials on record including petitioner's chief engineer's endorsement in relation to February 3, 2017 clearly show that the purported lower generation of electricity was an operational and maintenance issue.

27.3 In addition to the above, the aforesaid issue was raised for the first time at the stage of counter claim by the petitioner and there was no whisper of the same at any earlier stages. Lastly, the petitioner failed to prove criminal negligence or wilful misconduct on part of the respondent to overcome the carve out in clause 30.1 of the GCC.

27.4 In light of the above observations, this Court is not inclined to interfere with the findings of the arbitral tribunal in the aforesaid issue.

28. Issue Nos. 46 and 48

28.1 The aforesaid issues relate to the award of interest and costs. The arbitral tribunal, by way of reference to case laws and alluding to the rationale behind the entitlement of interest, held that the parties must be granted an interest at the rate of 10%

p.a. for the period between the date on which the cause of action arose and the date on which the award is being made, along with further interest at the rate of 12% p.a. for the period between the date of award till the date of payment.

28.2 After perusal of the cost sheet of the parties, the tribunal awarded the respondent a sum of INR 3 crores as costs for the arbitration proceedings.

28.3 In my considered view, the arbitral tribunal has judiciously exercised its power to award interest and costs. Hence, there exists absolutely no reason for this Court to interfere with the said findings of the tribunal on the aforesaid issues.

29. Issue Nos. 35 and 47

29.1 Issues No. 35 and 47 set out the claims and counter-claims allowed by the arbitral tribunal in favour of the respondent and petitioner respectively along with amount payable and interest therein. For the reasons discussed above, this Court sets aside only that portion of the award which concerns Issues No 17, 18, 21, and 27.

29.2 At the cost of repetition, the Court upholds the findings of the arbitral tribunal on all the issues discussed in the arbitral

award except awards under Issues No. 17, 18, 21, and 27 which now stands set aside.

30. Issue No. 49

30.1 The issue is regarding whether the OAC is deemed to have been issued as on April 13, 2017 and May 19, 2017 in respect of Units 1 and 2 under clause 25.2.4 of the GCC. It is a matter of fact that the contract provides for a deemed OAC to be granted from the date on which notice is given under Clause 25.2.4.

30.2 The petitioner argued that OAC is to be issued upon successful achievement of COF and successful completion of Performance Guarantee Test (PG) and meeting of Functional Guarantee (FG). As the respondent did not satisfy any of the conditions, it is not entitled to issuance of deemed or actual OAC.

30.3 In my considered view, the petitioner did not contradict evidence led by the respondent in support of this issue. Moreover, the petitioner had the opportunity to communicate its grievance with regards to the parameters of the various PG/demonstration tests. In the absence of any response to the notices issued by the respondent, the arbitral tribunal was correct in holding the said notices as date of issue of deemed OACs. This Court does not find any perversity or illegality in the said findings of the arbitral tribunal with regards to issue no. 49.

31. Issue No. 50

31.1 In this issue, the question is whether the claimant was entitled to an order directing the petitioner to release the bank guarantees which were furnished by the claimant as part of its contractual obligations.

31.2 This Court did not find any infirmity with the finding of the arbitral tribunal in Issue No. 49 which, as a declaratory relief, has a direct bearing on the issue in challenge. Relying upon clause 13.3.3 read with clause 25.2.4 of the GCC, the claimant was entitled to release of its bank guarantees. For the reasons above, this Court is not inclined to interfere with the findings of the arbitral tribunal in this issue and the same stands sustained.

32 Issues No. 5(e), 6(c), 6(d), 22, 29, 31, 32, and 33 were not dealt with by the arbitral tribunal because, either the claimant or at times the petitioner did not argue these issues before the arbitral tribunal. Issues No. 28, 30, and 34 were not argued by the parties before this Court. Issue No. 26 raised by the claimant, was answered in negative by the arbitral tribunal. This has not been challenged by the claimant before this Court. Accordingly, these issues have not been dealt with by me in this judgment.

33. Principles and Summary

33.1 I have culled out the principles emerging from the aforesaid discussion below:-

a. It is squarely within the exclusive domain of the arbitral tribunal to interpret the terms of contract. Only in a situation where arbitral tribunal interprets the contract in a completely perverse manner and wanders beyond the four corners of the contract, Courts can exercise their powers under Section 34 of the Act. Furthermore, a finding based on no evidence at all or which has been arrived at after ignoring vital evidence, can be set aside on the ground of patent illegality appearing on the face of the award. (See: ***Ssaanyong Engineering (supra)***).

b. When in a given situation, two or more views are possible and the arbitral tribunal takes any one of the possible views, Courts cannot interfere under Section 34 of the Act. Only if the view taken by arbitral tribunal is such which no reasonable person could have taken, Courts can exercise their discretion under Section 34 of the Act. (See: ***State of Jharkhand and Others -v- HSS Integrated SDN and Another (supra)***).

c. By virtue of the mandate contained in Section 31(3) of the Act, arbitral tribunal is required to give reasons in its

award. Furthermore, the reasons have to be proper, intelligible, and adequate. (See: ***Dyna Technologies (supra)***)

d. Courts under Section 34 of the Act do not sit as appellate Courts and cannot re appreciate evidence presented before arbitral tribunal. The ground of patent illegality against an arbitral award can only be invoked if the view taken by an arbitral tribunal or its interpretation of a contractual term is so perverse that it would shock the conscience of the Court, and is so irrational that no fair minded and reasonable person could have arrived at such a view. Additionally, an award without reasons would also fall within the ground of patent illegality. (See: ***Delhi Airport Metro Express (supra)***). The same was reiterated by the Hon'ble Supreme Court in ***PSA Sical Terminal (P) Ltd. (supra)***.

e. In ***Chairman Board of Trustees for Shyama Prasad Mookherjee Port Kolkata (supra),*** after extensive consideration of the law on this issue, I had outlined that arbitral tribunal is the ultimate authority on questions of law and facts. However, in no situation, the arbitral tribunal is permitted to venture beyond the explicit understanding between the parties i.e. the terms of the

contract. I had further espoused that by virtue of Section 28(3), 'terms of the contract' and 'trade usage' are to be read conjunctively. Only, in a situation where the terms of the contract are ambiguous or silent, arbitral tribunal is competent to take into account trade usage.

f. The position of law before the 1996 Act came into force, has been outlined in ***Champsey Bhara and Company -v- Jivraj Ballo Spinning and Weaving Company Limited (supra).*** In the said decision, it was held that interference with an arbitral award can only be permitted when there is an error of law either in the award or in a document incorporated within the award. While it cannot be disputed that the scope of examination under Section 34 of the Act is extremely restrictive, nevertheless, Courts under Section 34 of the Act are empowered to look beyond the plain text of the arbitral award. Courts while adjudicating an application under Section 34 are empowered to look at the entire record of the arbitral proceedings.

g. While the judgments in ***Rawla Construction Co-v- Union of India (supra)***, ***Allen Berry & Co. Pvt. Ltd -v- Union of India (supra)***, had propounded that when a particular clause has not been referred to by the arbitral tribunal, Courts are not empowered to read the clause of the

contract first and hold the arbitral tribunal's decision to be against the same then. Furthermore, it was held that documents which have not been incorporated into the award cannot be considered by the Courts. However, these principles which may have been relevant at the time when these judgments were delivered cannot be made applicable now. This is so because, both the substantive law, and the jurisprudence on interference with arbitral awards have undergone substantial change since the decisions in ***Rawla Construction (supra) and Allen Berry (supra).*** The law as it exists today permits the Courts to go beyond the mere text of the arbitral award. While it cannot be denied that even today, no additional evidence or document which was never a part of the record of arbitral proceedings can be ordinarily taken into account by the Courts, nevertheless, Courts are well within their powers under the Act to consider the entire record of arbitral proceedings, and can take into account even those documents which although may not find an explicit mention in the award, but were a part of the record of arbitral proceedings.

h. While the usage of the phrase "*patent illegality appearing on the face of the award"* is common between the 1996 Act and the 1940 Act, their interpretation cannot be similar. This is because, by virtue of the insertion of Section 28(3) and

Section 31(3) in the 1996 Act, which respectively mandate the arbitral tribunal to follow the terms of the contract and give reasons for its findings, the phrase *"patent illegality appearing on the face of the award"* has to be accorded a different meaning. A statute has to be read as a whole, and each section has to be accorded a meaning which is not in conflict with the other sections of that statute. An arbitral award in conflict with Section 28(3) and Section 31(3) can be set aside on the ground of patent illegality. As has been propounded by the Hon'ble Supreme Court in ***Associate Builders (supra),*** an award in conflict with the provisions of the Act cannot be sustained. In order to adjudge if an award is in violation of Section 28(3) and Section 31(3) of the Act, Courts at time might need to venture beyond the award itself. However, except for extremely rare situations, the boundary of examination has to be restricted to only the record of arbitral proceedings. Record of arbitral proceedings encompasses all the documents, submissions, and evidence which were presented before the arbitral tribunal.

i. In absence of an explicit prohibition, firm price component of the contract cannot be enforced for work done beyond the contractually scheduled period. Furthermore, in cases where there is no explicit prohibition in the contract on

award of damages/price escalation, arbitral tribunal cannot be faulted for awarding damages/price escalation. In absence of an explicit prohibition, and where the claims of the party seeking compensation/escalation are found to be sustainable, arbitral tribunal is well within its jurisdiction and power to award damages/price escalation.

j. Courts under Section 34 of the Act are empowered to partly set aside an arbitral award. If the issues in which the decision of the arbitral tribunal cannot be sustained are distinct and severable from the rest of the issues, then it would be prudent and encouraged to partly set aside the award. Such partial setting aside of an arbitral award would not amount to modification of the arbitral award, something which the Courts are not permitted to do under Section 34 of the Act.

k. Award of significant monetary sums cannot be granted based on vague and unreliable certifications. Arbitral tribunal in such a situation, before coming to a conclusion, must take into account documentary evidence to back its reliance placed on such certifications. Such certifications and oral testimony without any material evidence to support them have little to no evidentiary value.

l. Arbitral tribunal is the sole master of all the evidence placed before it and courts under Section 34 of the Act are generally not permitted to interfere with the arbitral tribunal's interpretation of evidence, or a finding arrived based on such interpretation. Nevertheless, if the arbitral tribunal's interpretation of evidence or a finding arrived based on such interpretation is so perverse and unreasonable that it could not have been arrived at by any reasonable mind, then the courts under Section 34 of the Act are empowered to set aside such finding. Furthermore, a finding which has been arrived in absence of any cogent evidence or if reliance has been placed on thoroughly unreliable evidence, then such a finding would be termed as a finding based on no evidence at all and will invite the courts to exercise their powers under Section 34 of the Act.

m. The limitation period for issuance of a notice under Section 21 of the Act commences from the date when the disputes between the parties reaches a "breaking point". For a reasonable person, the "breaking point" would mean a point beyond which both the parties would abandon any chance of an amicable settlement. However, while computing the "breaking point", the period during which the parties were genuinely negotiating has to be excluded.

34. Epilogue

34.1 While penning down this judgment, apart from the legal and factual disputes raised in the instant *lis*, I am also intrigued by the larger issues raised before me.

34.2 India is a developing country with increasing infrastructural needs which are growing at an exponential rate. There is rampant construction to the point where every day one sees a construction project popping up. With such growing demand, there is a significant rise in commercial disputes arising out of the contracts that form the bedrock of these projects. Being cognizant of the fact that the number of such commercial disputes seems to be escalating, arbitration has become the preferred forum of choice for parties to seek resolution. Arbitration has been envisaged as a mechanism of dispute resolution which is free from the clutches of redundancy, inefficiency, and delay that plague our litigation system. Having said that, presently, it seems that arbitration process in India itself is finding it hard to bear the weight of the increasing judicial interference at every stage of the process. This not only impacts the viability of arbitration as a dispute resolution mechanism, but further demotes India's standing as a business-friendly destination in a globalised world. Such demotion can be

seen in the World Bank's Ease of Doing Business Report, published in 2020 where India was ranked 163rd vis-a-vis Enforcement of Contracts. To amend such a standing, there is dire need of arbitration reform in India. This reform must not only reflect in the legislation itself, but also in the mindset of all the stakeholders.

34.3 Courts are an important stakeholder in the arbitration process, however they must be weary of unnecessary judicial interference at every stage of the arbitral process. For instance, in this Section 34 application before me, the petitioner attempted to evade the arbitral award dated December 21, 2019, on each possible avenue. While a party cannot be barred from raising any particular ground, I feel there needs to be shift in the tendency of parties challenging an arbitral award to treat courts under Section 34 as an appellate forum. As expanded upon in this judgement, the arbitral tribunal is the sole competent judge of questions of facts and law between the parties. It is axiomatic that how a particular dispute has to be dealt with and adjudicated falls squarely within the arbitral tribunal's domain. The above is particularly significant in disputes arising out of large construction contracts, where facts are often convoluted, issues involved are too complex, and amounts claimed are colossal. Whatever is the arbitral tribunal's approach to reach a particular conclusion on the issues raised, or the final award

itself, the same cannot be and should never be interfered with by the courts under Section 34 of the Act unless there is severe infirmity or patent illegality involved. Such infirmity or patent illegality must be visible on the face of award, and courts cannot embark upon a deep journey in search of such infirmity or patent illegality.

34.4 While the petitioner before me raised a challenge to the entitlement of the respondent to the claim for damages itself, it more specifically challenged the method of quantification adopted by the arbitral tribunal. However, the arguments adopted by the petitioner failed to find favour before me. One needs to remember, that in absence of any specific contractual bar, a party cannot be estopped from availing the statutory right to damages available under Section 73 of the Indian Contract Act, 1872. Every contractual dispute is distinct and therefore, the Legislature has not penned any specific method of quantifying the loss/damages suffered by a party at the receiving end of a contractual breach as each dispute involves its own complexities and intricacies. Keeping in mind the cardinal principle of party autonomy, parties entering a contract have been left at liberty to opt for any particular process/formula for arriving at the quantification of damages/loss in the event of breach. Such formula can either be fixed or dynamic. In the instant case, the contract between

the parties envisaged 5% of liquidated damages payable by the respondent to the petitioner in case of any breach on the former's part.

34.5 However, no provision/stipulation of damages in event of breach on petitioner's part were provided for by the contract. In such a case, if the employer itself breaches its contractual obligations, the contractor cannot be left hanging. The arbitral tribunal, although under a mandate to follow the specifics contained in the contract between the parties by virtue of the mandate contained under Section 28(3) of the Act, is also competent to chart its own course in absence of any specific contractual stipulation. If a party has been held entitled to claim for damages, and no specific provision for arriving at the quantum of such damages is contained within the contractual provisions, arbitral tribunal is competent to adopt any legally sound formula/procedure to arrive at such quantification of damages. So long as there is no infirmity or patent illegality in the arbitral tribunal's decision, it is beyond the scope of challenge as envisaged under Section 34 of the Act.

34.6 I also feel compelled to put forth a pertinent concern that I faced while adjudicating the instant Section 34 application. While a party at the suffering end of a contractual breach can claim damages, there is a need to keep certain principles in mind

while claiming such damages. As penned by Sanjiv Khanna, J. in ***Batliboi Environmental Engineers (supra)***, in no circumstance, a party can be allowed to **'thicken'** its claim for damages by raising irrelevant and nonessential claims. What a party did not lose, it cannot be allowed to recover. The same was the case with the claim for overheads involved in Issue No. 27 in the arbitral award dated December 21, 2019. It would be apt to point out that while the suffering party must be made whole by the party responsible for the contractual breach, it cannot be unjustly enriched. Penalty accorded for a particular contravention can never exceed the contravention itself and what was never spent cannot be claimed back. Claims such as overheads, workforce expenses, etc. which can be too difficult to affix to a particular project/breach, need to be backed by compelling evidence and cannot be claimed on the back of vague certifications that are not buttressed by hard corroboration.

35. Conclusion and Directions

35.1 In view of the aforesaid discussion and findings, the arbitral award dated December 21, 2019 partially succeeds and is accordingly upheld.

35.2 However, with respect to the arbitral tribunal's findings under Issues 17, 18, 21, and 27, this Court has come to a conclusion

that the award suffers from patent illegality appearing on the face of the award with respect to these issues only. The said issues in no manner effect or are related to other issues in the arbitral award dated December 21, 2019, and need to be severed accordingly. As a result, by virtue of this Court's power under Section 34(2A) of the Act, this Court sets aside the findings of the arbitral tribunal only with respect to Issues No. 17, 18, 21, and 27.

35.3 Accordingly, AP 40 of 2020 is disposed of. There shall be no order as to the costs.

35.4 This Court would like to put on record its deep word of appreciation for Mr. Ratnanko Banerjee, Senior Advocate, Ms. Vineeta Meharia and Ms. Urmila Chakraborty for their assiduous and painstaking efforts in assisting this Court in presenting the case of the petitioner which was indeed an uphill task keeping in mind the limited scope of interference available under Section 34 of the Act as elucidated by the Hon'ble Supreme Court. Mr. Harish Salve and Mr. Tilak Bose, Senior Advocates assisted by Mr. Anuj Singh were gracious in being prepared with all the queries that fell from my end and answered the same with alacrity and brilliance. Though with deep respect to both of them, this Court was not convinced

enough to support the entire award as would appear from the conclusions reached.

35.5 This Court further acknowledges the valuable insights and dexterous research rendered by judicial clerks cum research assistants Mr. Anirudh Goyal and Mr. Labeeb Faaeq. This Court would also like to put on record its deep appreciation for the consummate efforts of the new judicial clerks cum research assistants Ms. Aarya Srivastava and Ms. Millia Dasgupta in proof-reading and formatting of this voluminous judgment. A special word of appreciation for judicial intern Mr. Jaspreet Singh who has laboured for days, given valuable insights and brought to my notice several important judgments on the various issues raised.

35.6 Urgent photostat certified copy of this order, if applied for, should be readily made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)

September 29, 2023