

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

% *Judgment Pronounced on: November 29, 2013*

+ **O.M.P. No.358/2007**

DELHI JAL BOARD Petitioner
Through Mr.Suresh Tripathy, Adv.

Versus

M/S KAVERI INFRASTRUCTURE PVT. LTD. & ANR
..... Respondents
Through Mr.R.K.Handoo, Adv. with
Mr.Sunil Goel, Mr.Inderbir Singh,
Mr.Susheel Bhartiya, Mr.Pranav
Sapra & Mr.Tanvir Nayyar, Advs. for
R-1.

AND

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CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this judgment, I propose to decide the abovementioned two petitions filed by the Delhi Jal Board, the petitioner, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called the “Act”) challenging the arbitral awards dated 7th April, 2007 passed by the sole Arbitrator, Sh.Mitter Singh. Legal points and most of the facts are common in both the matters and hence are decided together. Parties are the same so as issues involved in the matters.
2. Both awards are made and published on 7th April, 2007 by the respondent No.2 i.e. Mitter Singh on references made.
3. Under the work of rehabilitation/renovation of 1600-1900mm dia brick barrel trunk sewer from Delhi Gate to College Lane (MCD) limit & 950X1425mm egg shaped Bazaar Sitaram brick sewer from Turkman Gate to Ajmeri Gate Master Chamber (via Hauz Quazi) of contract agreement 21(2002-2003) dated 26th November, 2002 executed between petitioner and respondent No.1 which is the subject matter of OMP No.358/2007.
4. The relevant details of claims and the amount awarded in the second award which is subject matter of OMP No.359/2007 would be discussed in later part of my judgment.
5. On 1st September, 2011 when the matters were listed for further arguments, following order was passed by the earlier Bench:

“I have heard these cases at considerable length. While the arguments of the respondent were being heard, I put it to learned senior counsel for the respondent that the awards may not be sustainable and they may require to be set aside on the ground of being patently illegal and opposed to public policy.

Mr. Ravi Gupta, learned senior counsel for the respondent took time to take instructions. He has taken instructions from Mr. Vijay Kataria, the Chairman-cum-Director of respondent no.1, who is present in Court today.

Mr. Gupta submits that the awards, which adjudicate the claims of the respondent even if set aside, the respondent will still be entitled to seek adjudication of its claims. He submits that the respondent does not oppose the present petitions, and concedes that the awards in question are illegal and liable to be set aside. However, he submits that as the claims of the respondent need adjudication, in case the court records any findings or reasons, they may prejudice the rights of the parties in any future proceedings. He, therefore, submits that the Court may not record any reasons for the finding that the awards are patently illegal and opposed to public policy of India, as the respondent admits this finding.

Considering the fact that the prayer made in the two petitions is to seek the setting aside of the two awards, to which the respondent has conceded, in my view, there is no impediment in allowing these petitions.

Accordingly, the two awards, both dated 7th April, 2007 are set aside on the grounds of being patently illegal and opposed to public policy. I am not recording the reasons for my finding since, the respondent has not pressed its opposition to the present petitions by inviting detailed judgment of this Court and wishes to have its claims re-adjudicated by an independent Sole Arbitrator appointed by this Court.

The claims of the respondent are remanded for re-adjudication through arbitration. Hon'ble Mr. Justice M. Jagannadha Rao, retired Judge, Supreme Court of India, Mobile Nos. 09810972203/09848045472, is appointed as the Sole Arbitrator in both the cases. The learned arbitrator shall proceed on the basis of the existing record. However, considering the nature of the claims, in case, it is considered necessary the learned Arbitrator may call for expert evidence and learned tribunal may exercise power under Section 26 of the Act, or call for such evidence as he may feel necessary for appropriate adjudication.

Mr. Mishra prays for costs of these proceedings. However, I am not inclined to pass any order at this stage. Since, the matter is remanded back for adjudication, it shall be open to the parties to press their claims for costs before Arbitral Tribunal which shall be considered by the Tribunal.

The fees of the Tribunal shall be paid in accordance with the schedule of fees prescribed under the Delhi High Court Arbitration Centre Rules, which shall include his expenses for travel and stay in Delhi.

Learned Tribunal is requested to conclude the hearing and render the award at the earliest, and preferably within the next six months.

The petitions stand disposed of.”

6. On being aggrieved, the petitioner filed an appeal before the Supreme Court and on 14th September, 2012, the Supreme Court passed the following order:

“Civil Appeal No.6544 of 2012

By consent of Mr. Suresh Chandra Tripathy, learned counsel for the appellant and Mr. P.S. Patwalia, learned senior counsel for the respondent, the impugned order dated September, 1, 2011 passed by the High Court is set-aside. The petition being OMP No.359 of 2007 – Delhi Jal Board Vs. M/s. Kaveri Infrastructure Pvt. Ltd. and another is restored to the file of the Delhi High Court for fresh hearing and disposal in accordance with law.

Civil Appeal stands disposed of. No order as to costs.”

Civil Appeal No.6545 of 2012:

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“By consent of Mr. Suresh Chandra Tripathy, learned counsel for the appellant and Mr. P.S. Patwalia, learned senior counsel for the respondent, the impugned order dated September, 1, 2011 passed by the High Court is set-aside. The petition being OMP No.358 of 2007 – Delhi Jal Board Vs. M/s. Kaveri Infrastructure Pvt. Ltd. and another

is restored to the file of the Delhi High Court for fresh hearing and disposal in accordance with law.

Civil Appeal stands disposed of. No order as to costs.

We request the High Court to decide the above petitions as expeditiously as may be possible and preferably within four months from the date of receipt of this order.”

7. In view of order passed, the above mentioned matter along with connected OMP No.359/2007 was listed before this Court. Both parties made their respective submissions and also filed the written submissions.

8. The brief facts of the case i.e. OMP No.358/2007 as averred by the petitioner are given as under:

- a) That Trunk Sewerage System in Delhi was suffering from several deficiencies and was in urgent need of desilting and repair. Owing to severe constraints of space and the risk involved in installation of new sewer in densely populated and congested area, the Delhi Jal Board decided to do the rehabilitation of sewer using no dig technology. The petitioner/Board had identified some of such trunk sewers, which were baldly silted, and were in immediate requirement of rehabilitation an desilting. Keeping in view the specialized nature of work, the petitioner/Board had invited global pre-qualification applications, before allocation of execution of work to the either agency. After examination of the applications, received in this regard with the technical specifications regarding the technology intended to be used by such agencies, in case the work was awarded to them, the petitioner had short listed four firms, which were permitted to participate in the tender in respect of “Rehabilitation/Renovation of 1600-1900 mm, dia. Brick barrel trunk sewer from Delhi Gate to

College Lane (MCD) limit and Bazar Sitaram Brick sewer from Turkman Gate to Ajmeri Gate master chamber (via Hauz Quazi)".

The said firms were:

- i. M/s. Per Aar Sleff Denmark.
 - ii. M/s. Envirotech Overseas Ltd. U.K. in collaboration with M/s. Premier Pipe Services (Internationals) Ltd. U.K.
 - iii. M/s. Kaveri Infrastructure (P) Ltd. in collaboration with M/s. Waterflow Services, UK.
 - iv. M/s. Shriram Engineering Constn. Co. Ltd. in collaboration with M/s. Chevalier PRS (ASIA) Holdings Ltd. of Hong Kong.
- b) That of the aforesaid four firms, after examining the technical and financial bid for execution of the aforesaid work, the respondent No.1 was the successful bidder and as such, the work had been allocated to the respondent No.1 on item rate turnkey basis for at a total cost of ₹33,63,10,000/-. It is submitted that the aforesaid cost of the work comprised ₹23,64,69,000/- for civil works and ₹9,98,41,000/- for maintenance of sewer line for 10 years after completion of civil work.
- c) That as per agreement between the parties the work had to be executed by the respondent No.1 under the supervision of its foreign collaborator which had been an experienced firm in undertaking the work like the instant one, offered for execution to the respondent contractor. Significantly, the contractor vide letter dated 5th November, 2002 specifically informed the petitioner and undertook thereunder that Mr. Vernon Downes, Senior Director of M/s. Onsite (collaborator company) and Mr. Mark Lusher, General Manager of

M/s. Onsite would be associated with the work in question on behalf of the contractor at site. It is pertinent to mention that the said letters did not indicate the respondent having made any request of any additional amount, if any, to be paid by the petitioner by way of emoluments etc. to the said persons over and above the agreed price. The aforesaid undertakings given by the contractor/respondent No.1 as well as the work order issued by the petitioner were integral part of the contract executed between the parties. The copy of letter dated 5th November, 2002 and the work order issued by the department/petitioner form part of the contract filed along with this petition.

d) The salient features of the work contract awarded to the Contractor are given hereunder:

- | | | |
|-------------------------------------|---|--|
| 1. Name of work | : | “Rehabilitation/renovation of 1600-1900 mm. dia. Brick barrel trunk sewer from Delhi Gate to College Lane (MCD) limit and Bazar Sitaram Brick Sewer from Turkman Gate to Ajmeri Gate master chamber (via Hauzi Quazi)” |
| 2. Contract No. | : | 21 (2002-2003) |
| 3. Date of Start of Work | : | 26.12.2002 |
| 4. Stipulated period of completion: | | 18 months |
| 5. Stipulated date of completion: | | 25.06.2004 |
| 6. Actual date of completion | : | 22.06.2005 |

e) In the contract executed between the parties, it had been made clear by the petitioners that the work would be executed by the agency on item rate turnkey basis in which the contractor was under obligation

to design and execute the work as per the requirement of the petitioner, which had been set out in the agreement executed between the parties. The contract in question is a turnkey contract.

- f) In special condition No.8 of the contract that the department would make the payment to the agency on executing a complete item given in the Bill of Quantities (BoQ). As such, the petitioners were under no obligation to pay any amount till completion of the items elaborated in the bill of quantities. The contract special condition No.8 of the agreement is reproduced hereunder for the kind reference of the Court :-

“8. PAYMENTS

All payments will be made in Indian Rs. & offer should include all taxes and duties including customs duties of any payable on imported components of the project, nothing extra will be paid/released for successful completion of project.

Payment schedule shall be as under:

- i) Mobilisation advance after award of work against Bank Guarantee for equivalent amount 10% of cost (excluding maintenance cost).
- ii) Payment of each item as per bill of quantity shall be made on per metre/number basis after completion of the each item fully.
- iii) Payment for maintenance of trunk sewer shall be made on bi-annually basis.”

The details of the items had been spelt out in the BoQ, is part of the contract filed with this petition.

9. While the work was in progress, the respondent/Contractor requested the petitioner to amend the payment schedule. The payment schedule originally contemplated payment being made to the respondent/contractor only on completion of the entire item of work. That is to say, the Contractor would be entitled for payment only after completion of CCTV survey, desilting and laying of liner of a particular reach. During the course of the work, the Contractor requested the petitioner that the said payment schedule was creating financial difficulties for the Contractor and requested the petitioner to modify the payment schedule so that payments are made to the Contractor on completion of each stage of work. In the letter dated 1st July, 2003 written by respondent No.1 it was indicated that the project was turnkey reads as under :

“We would further submit that such an amendment would also be clearly supported by the fact that the project had been conceived on Trunkey project basis as mentioned in the letter (included in the contract agreement) issued by the Board inviting bids from the pre-qualified contractors in January 2002. This further appeared to be manifest in the fact that a specific request for a payment schedule made during the pre-bid conference received the response that payment would normally be released within one month of submission of bills. The fact that a specific order of activities was obtained from us through the Board’s letter of intent and that the total responsibility of work including methodology, design and materials was placed on the contractor, who would also be responsible for ten years of maintenance are all hallmarks of Trunkey project execution.”

10. Accordingly, after considering the request of the Contractor, the petitioner vide resolution No.539/DJB dated 4th July, 2003 which had been confirmed and approved on 31st July, 2003 modified the payment schedule and put in place the new payment mechanism, the Contractor/respondent would be entitled to be paid on completion of each stage of work. That is to

say, he would be entitled to payment on completion of desilting of a particular reach, laying of liner of a particular reach and on completion of CCTV survey of a particular reach. The said amendment was made on the specific request of the respondent/Contractor and the contract continues to be a turnkey contract irrespective of the amendment to the payment schedule. The amendment to the payment schedule is only with respect to the payment mechanism and there is absolutely no change on the contract price and other terms and conditions of the contract that has been agreed upon between the parties. The department had been making the payments to the agency as per new schedule of payment adopted by them.

The resolution was also made in terms of the request of the respondent No.1 with regard to the payment schedule and nothing else. In terms of special condition 8, it was envisaged that petitioner would make the payment to the contractor on executing a complete item given in the BoQ. As per the amendment, contractor would be entitled to be paid on completion of each stage of work.

11. As the respondent No.1 demanded extra expenses claiming incurred losses and damages suffered due to much in excess of what was mentioned in the tender specifications and in view of length of the service, the respondent found solidified rocks instead of silt and because of increased work and which was declined by the petitioner to make such payment to respondent. The respondent invoked arbitration clause contained in the agreement between the parties. The competent authority appointed respondent No.2 as sole arbitrator who was retired Chief Engineer to decide the disputes and claims in the above matter as well as the connected matter.

12. The contract value was little more than ₹23 crores, the awarded amount together with interest came to around ₹25 crores which was received for completing the project. The learned Arbitrator has awarded almost the same amount as it was in the arbitration.

13. In his letter dated 5th November, 2002 before the work order was issued, confirmed that “we confirm that we are fully prepared for the job and will ensure the necessary deployment of manpower and equipment to meet the terms of your NIT and the Bid Documents for the project.”

14. The main contention of the petitioner is that admittedly the work in question is a turnkey contract. The learned Arbitrator, however has totally ignored the same and renders the impugned award in favour of respondent No.1 without application of his mind even though it was not envisaged in the contract in question. The impugned award negates the contract in question and, therefore, is patently illegal and is liable to be set aside. He argues that it is an item rate turnkey contract, it is of vital importance to the owner that the contractor must know in advance what it will cost to him in getting the work done on turnkey basis. It is not a conventional contract where the price remains uncertain till the work is completed.

15. It is submitted by the counsel for petitioner that the expression ‘turnkey contract’ would be defeated if the price remains uncertain. In fact, it is inherent in such a contract that the economy of the turnkey contract should not exceed the rates fixed.

16. Counsel has also referred few quotations from the articles published including the quotation of Lord Denning who had the occasion of describing the expression ‘turnkey contract’ as package deal contract. The expression ‘turnkey contract’ leaves no ambiguity with regard to its intent and object.

There is no room either for any manoeuvring or for any price adjustments. The turnkey contract envisages therein the certainty for the employer at whose instance the work is being executed regarding the cost of the work. At the same time, it gives an assurance to the Contractor who is executing the work what ultimately he will be receiving on completing the work. In the present case, the objection with regard to turnkey contract was never given by the petitioner, however, respondent No.2 in order to favour respondent No.1 has recorded such fact.

17. It is stated by the counsel for the petitioner that the 'Turnkey' is used to describe a contract where the essential design, suitability and performance are all or each supplied by the Contractor and not the owner so that the legal responsibility for its design, suitability and performance of the work after completion rests solely with the Contractor. The awarded price denotes the contract price not subject to recalculation to take account of losses or damages on account of any implied terms.

18. It is also argued by him that the learned Arbitrator (respondent No.2) has passed the award which is perverse, ignores mandate of law and is completely in derogation of the mandates of the contract and has taken into consideration the point which were not even urged before him. Thus, the award is bad in law and against the public policy.

19. The award is not sustainable in the eyes of law if it is examined from any angle. Counsel has referred various letters issued by respondent No.1 who literally admitted and reiterated time and again even till almost at the time of completion of work, that being a turnkey contract, the respondent No.1/Contractor would not charge more than quoted price despite of loss suffered by him on account of alleged excessive work.

20. Lastly, the learned counsel also submitted the details of brief description of the contractor and alleges that the contractor has since been blacklisted from Delhi Jal Board. The said blacklisting decision though challenged by contractor, remained unsuccessful. The allegations are quite serious. Former Chief Executive Officer of Delhi Jal Board and contractor are accused of offences of criminal conspiracy, cheating, obtaining illegal gratification etc. and after inquiry, CBI had filed a chargesheet against both and trial is in progress. (copy of the said FIR was handed over to this Court). This is in respect of another contract executed by the parties hereto. It is also submitted by him that it is the same CEO who was instrumental in issuing the appointment letter in favour of the Arbitrator. Evidently, looking at the conduct of the Arbitrator and the contractor, it would be safe to assume that a larger conspiracy was hatched to derive illegal advantage thereby causing loss to the public exchequer. He states that it is now revealed, solvency certificate, a condition pre-requisite for participating in the bid, was submitted by contractor that is now found to be fake as per the enquiry conducted by economic offence wing of Delhi Police.

21. Mr.R.K.Handoo, learned counsel appearing on behalf of respondent No.1 on the other hand refuted all the submissions of the petitioner and argued that the objections are not maintainable in law. He also disputed the averment of the petitioner with regard to the conduct of the sole Arbitrator which was displayed by the counsel for the petitioner by stating that the same has nothing to do with the dispute in hand. According to him, all these averments are made in order to prejudice the mind of the Court and to try to avoid making the amount which is due towards the excessive work done by his client. He also made other submissions which are discussed herein below:-

(i) His first submission is that an arbitral award can be challenged only on the limited grounds available under Section 34 of Arbitration and Conciliation Act, 1996, but none of the grounds raised by the petitioner are covered within the ambit of said provisions.

It is settled law that the scope for interference by the court with an award passed by the arbitrator is very limited. The court, while hearing objections against the arbitral award, is not sitting as a court of appeal and cannot re-appreciate the evidence.

(ii) The general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts.

(iii) The objections filed by petitioner are matters of merit they are seeking re-appreciation of order. In the objections, the objector is pointing out alleged deficiencies during execution of work which are matters of merit. The matters of merit cannot be gone into in a proceeding involving challenge to the award as that would be akin to deciding an appeal. (see *Puri Construction Pvt. Ltd. Vs. Union of India*, AIR 1989 SC 777, *M/s. Arosan Enterprises Ltd. Vs. UOI*, AIR 1999 SC 3804). The Arbitrator is the best judge of quality and quantity of evidence before him. The objector has not pointed out anything in the award which falls within the statutory grounds of challenge. The ingredients of Section 34 have not even been demonstrated to exist in this case, in the objections. In view thereof, the objections are liable to be dismissed with costs. Large numbers of decisions on this issue were referred by the counsel.

22. It is also argued by the counsel for the respondent No.1 that in the present case an Arbitrator was an expert in the field being an engineer and a

technical person. He retired as Chief Engineer of Municipal Corporation of Delhi and had the expertise and the nature of disputes between the parties and to comprehend the situation existing during the execution of the work and to adjudicate accordingly. The arbitrator while in service of the Govt., had participated and supervised various works and was familiar with the peculiar problems associated with the works of similar nature and was thus the best person to evaluate and appreciate the evidence and was in fact appointed as Arbitrator by the CEO of the objector of the petitioner itself. It is argued that an award of an expert is not to be lightly interfered with. In ***Uttam Singh Duggal & Co. Vs. UOI***, (1998) 72 DLT 798, it was held by this Court that where an Award was made by an expert well versed in civil engineering, it should not be lightly interfered with. It was held in ***DDA Vs. Bhagat Construction Co. Pvt. Ltd.***, 2004(3) Arb.LR 481 that where an expert arbitrator appointed on the basis of his work experience is awarded certain amounts, he is not required to give detailed reasons for making and publishing the award. It is sufficient if he indicates his trends and outlines the basis on which he has arrived at the figure. He referred another judgment ***Delhi Development Authority Vs. Bhagat Construction Co. (P) Ltd. and Anr.***, 2004 (3) Arb.LR 548, it was held that when a technical person goes into the matter in disputes, the court should not substitute its own view with that of an arbitrator even if the court comes to a different conclusion until and unless the decision of the arbitrator is manifestly perverse or has been arrived at on the basis of wrong application of law.

23. It is argued that the Apex Court has also repeatedly cautioned that it is not ordinarily for the court to re-appreciate the evidence and in the absence of the award being absurd, reasonableness is not a matter to be considered.

These were relied upon by this court in *Ravindra Brothers Vs. Una Cooperative Group Housing Society MANU/DE/9810/2007* decided on 13th December, 2007 (kindly also see *Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd.*, AIR 1989 SC 973, *Food Corporation of India Vs. Joginderpal Mohinderpal*, (1989) 2 SCC 347).

24. With regard to the objection filed by the petitioner pertaining to turnkey contracts or Item Rate Contract that in a turnkey contract, the liability of the employer is limited to the payment of amount mentioned in the contract and that he is not at all liable for any other amount or expenses or losses/damages which may arise to the contractor owing to certain defaults on the part of the employer. The petitioner itself had abandoned his submissions before the learned Arbitrator who has rightly rejected the argument by holding that the petitioner had in fact abandoned this submission, hence petitioner is precluded from raising this issue in objections before this court.

25. Counsel for respondent No.1 submits that even if this argument is accepted, then very employer will start writing in the contract as ‘turnkey contract’ and wash off his hands from any kind of liability howsoever serious its default is. The extra cost is warranted due to abnormal variations encountered during actual execution at site as compared to the conditions intimated in the tender documents. The learned Arbitrator has appreciated this point and has granted the award accordingly.

26. It is argued by the counsel that most of the claims of the respondent No.1 are arising out of extra/excessive works which claimant had to carry out, under supervision of petitioners filed staff without any objection from them, due to adverse site/geological conditions which could not be

visualized at the time of estimation of work and which were beyond specifications beyond respondent No.1's control.

The excess/additional work done by his client is not denied by the petitioner. The 'additional work' done was neither specified by petitioners nor contemplated nor could be contemplated by respondent No.1 hence could not have been estimated at the time of execution of contract.

27. It is argued by the counsel that the contract was not a fixed price contract. There is no stipulation anywhere in the whole contract that this contract is a firm price contract. The price could be changed. It has in fact been changed. The total price mentioned in WO/contract was ₹23 crores, the petitioners gave more than that as during execution, some more length/stretch was asked by petitioner to be cleaned. The fact that in the contract in question, the work was awarded for ₹23 crores but the DJB gave more, showing that contract was not turnkey project. Though it may be shown as turnkey contract, but in spirit, it was not a turnkey contract and parties never treated it as a turnkey contract. There is no rule that in a turnkey contract, no payment over and above the price fixed can be given even if there are extra works done due to circumstances which could not be contemplated by either of the parties. It is stated that just by writing the word 'turnkey' in the contract, the petitioner can not wash his hands off and refuse to compensate the respondent No.1 if the contractor suffers extra expenses and losses during execution of work owing to situations not made known by the owner or due to faulty specifications. Counsel has referred to the decision of Supreme Court, where it was held in ***Tarapore & Company vs. Cochin Shipyard Ltd., Cochin & Anr.***, (1984) 2 SCC 680 that once rates quoted became irrelevant on account of the circumstances beyond the

control of the contractor, it would be open to the contractor to make a claim for compensation.

28. Counsel for respondent No.1 has also referred to few foreign judgments in order to counter the argument of petitioner that contract was a fixed price/turnkey contract and thus nothing extra is payable to claimant in spite of expenses incurred by claimant due to unforeseen situations which were not indicated in the tender specifications, the famous *spearin doctrine* may be referred. The said doctrine arose out of the famous case of *Spearin vs. United States*, 248 US 132 (1918) and is widely recognized worldwide. The said doctrine says that a contractor will not be liable to the owner for loss or damage which results from the insufficiencies or defects in the information, plans and specifications provided by the owner. It lays that in such situation, there is implied warranty on the part of the owner and the general terms requiring the contractor to examine the site and check up plans and to assume responsibility for the work until completion do not overcome the implied warranty and the contractor is entitled to be compensated by the owner. The other two US judgments squarely covering the case of respondent contractor are *United States vs. Utah Nevada & California Stage Company*, 199 US 251 (1905); *Archibald Hollerbach vs. United States*, 233 US 898 (1914).

The respondent No.1 has relied on Section 67, 70 and 2nd part of Section 73 of Indian Contract Act. Section 67 provides for an obligation on the part of the owner to facilitate the contractor and afford all reasonable facilities for the performance of work. This is reciprocal obligation of the owner in any contract. If such obligation is breached by the owner and the contractor suffers some losses/extra expenses as a result thereby, then the 2nd

part of Section 73 comes to the rescue of the contractor and he is entitled to be compensated by the owner. In a case, where the owner takes a plea that there was no contract to do what the contractor has done (extra work), then Section 70 comes to the rescue of the contractor. The learned Arbitrator has rightly referred and relied on said statutory provisions which cannot be overridden by any term/condition to the contrary in the agreement.

29. In reply to other contention of the petitioner that the learned Arbitrator has travelled beyond the terms of the contract and has misinterpreted it and has ignored relevant conditions and rather re-written the contract, counsel argued that the petitioner has failed to point out the specific clause or condition of the contract which has been flouted by the learned Arbitrator. Even otherwise, it is settled law that the interpretation of the contract is within the scope and ambit of the arbitrator. The Supreme Court in *Associated Engineering Co. Vs. Govt. of Andhra Pradesh*, AIR, 1992 SC 232 held that even if the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction and the same requires no interference.

30. Various other contentions are raised by the respondent No.1's counsel who has referred to large number of decisions. However, this Court felt that most of the decisions are on the same issue with regard to the scope by the courts when the objections are filed under Section 34 of the Act. Thus, it is not necessary to discuss all the decisions. Only relevant decisions are referred which would go into the route of the matter.

31. Before the Arbitral Tribunal, total sixteen claims are filed by the petitioner in its statement of claim. The petitioner filed its counter statement. Both the parties led evidence. The respondent produced Shri Vijay Kataria,

Shri Dhirender Kumar and Shri Pankaj Rao as it witnesses. The petitioner produced its EE Shri Pankaj Gupta as its witness. All witnesses were cross examined. The parties filed certain additional documents with the progress of the case. Both the parties also filed their respective written submissions before the learned Arbitrator. By two separate awards both dated 7th April, 2007, the learned Arbitrator allowed certain claims and rejected certain claims.

32. The petitioner has also challenged the award passed in the connected similar disputes by filing of OMP No.359/2007 petition under Section 34 of Arbitration and Conciliation Act, 1996 for setting aside of the award made and published on 7th April, 2007 by the respondent No.2, on a reference made under the work of rehabilitation of 1650 mm dia old brick barrel sewer from Q point Lodi Road to Kilokri SPS (DJB Reach) and 1200mm dia cross connection No.IV Sewer from 66” dia Brick barrel to Railway Nizamuddin Bridge awarded vide contract agreement (2002-2003) executed between petitioner and respondent No.1.

33. The award dated 7th April, 2007 passed in ‘Bazar Sitaram work’ has been challenged by DJB by filing OMP No.358/2007. The award dated 7th April, 2007 passed in ‘Kilokri work’ has been challenged by DJB by filing OMP No.359/2007.

34. It was submitted by respondent No.1 that in a normal contract the work to be done by the contractor is open and bare. The work to be undertaken is open to the eyes of the contractor who can make diligent and intelligent offer after assessing all the pros and cons of the work, the adequacy of the equipments, expenses, the labour, time involved, etc. Thus, where the assessment of the work is open, as aforesaid, all work to be done

is contemplated, it is assumed that the contractor has made diligent bid assessing all his costs on all aspects and later on, he cannot be seen to be saying that even though everything was open to his eyes. The turnkey project undertaken by such contractor, would not entitle him for any extra work and/or extra expenses incurred by him.

35. Counsel for the respondent No.1 states about the nature of blind contracts where the employer itself is not aware about the exact specifications of the work, or the specifications are wrong and the contractor is not able to make diligent and intelligent inquiries before making the offer the contractor cannot comprehend the obstacles. Such contracts inherently cannot be on 'turnkey' (even if the expression 'turnkey' is used in the contract) and the contractor would be entitled to claim extra money on extra effort/additional work. In such contracts there is an implied warranty to compensate the contractor for the unknown work and such terms are deemed to be the terms of the contract for which the employer is considered to have given his deemed consent and the law presumes that such was the intention of the parties for the purposes of discharge of such contract. In such cases, the duty to check the site is attended with inadequacy of the specifications and the extra effort and expense being not contemplated as payable by the employer.

In blind contracts or contract under the earth where specifications are not available, the obstacles are unknown, technology to be employed is not certain, the type of equipment to be used is not certain; the expenses cannot be worked out except for specific terms, the same cannot be termed as turnkey as is propounded by the objector.

36. It is submitted by the respondent No.1 that as per agreement between the parties, the work had to be executed by the respondent No.1 under the supervision of its foreign collaborator which had been an experienced firm, in undertaking the work like the instant one, offered for execution to the respondent Contractor. Significantly, the contractor by various letters informed the petitioner and undertook thereunder that Mr. Vernon Downes, Senior Director of M/s. Onsite and Mr. Mark Lusher, General Manager of M/s Onsite would be associated with the work in question on behalf of the contractor at site. The said letters do not indicate the respondent having made any request of any additional amount, if any, to be paid by the petitioner by way of emoluments etc. to the said persons over and above the agreed price. The aforesaid undertakings given by the contractor/respondent No.1 as well as the work order issued by the petitioner were integral part of the contract agreement executed between the parties.

37. The submission of the petitioner's counsel is that it was made clear by the petitioner that the work would be executed by the agency on item rate turnkey basis, in which the contractor was under obligation to design and execute the work as per the requirement of the petitioner, which had been set out in the agreement executed between the parties though, admittedly, the contract in question is a turnkey contract.

38. Time being the essence of the contract. The request of the respondent seeking extension of time was acceded to in the form of granting an extension. The respondent at no stage or prior to that had raised any such amount as was being claimed in the arbitration on any account whatsoever including alleged payments to the foreign collaborator. The petitioner submits that the respondent though had completed the work beyond the

actual stipulated period but the work was accepted by the petitioner, without levy of liquidated damages in terms of the contract. All the payments due and payable to the respondent under the contract had been made and nothing was due and payable when the respondent invoked the arbitration clause. On such invocation, the persona designate in the contract referred the dispute/claims between the parties for adjudication to the sole arbitrator Mr. Mitter Singh, respondent No.2 herein. The respondent No.1 filed 13 claims before the learned Arbitrator alleging inter alia breaches attributable to the petitioner department by coining flimsy pleas, on the facts and allegations concocted by the respondent.

39. There is no dispute and it is settled law that if the award is passed against the public policy, the same is liable to be set-aside under the provisions of Section 34 of the Act. (***See Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.***, (2003) 5 Supreme Court Cases 705). Para 31 of the said judgment reads as under:-

“31. Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in *Renusagar case* (supra), it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:-

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.”

40. Let me now discuss the claims of the respondent No.1, reply by the petitioner as well as finding arrived by the learned Arbitrator in view of submission made by the parties in court and written submissions filed by them after the judgments are reserved in both matters.

41. **Claim No.1:** Extra cost due to additional work for desilting of sewer lines due to excessive levels of silt and nature of deposits as compared to that indicated in contract documents.

- Claimed: ₹315.80 lakhs
- Award: ₹3,15,79,136/-

It was stated by the respondent No.1 that it was mentioned in its technical bid that “*We have based our bid on the information provided in the tender document together with our representatives’ visit to the site.*” The information provided and specifications given in the tender documents are as under:-

- “7. Existing condition of Sewer Line: (a)
- (b) Silted up approx.
30% to 50%
- (c)
- (v) The existing Trunk Sewer is 30% - 50%

silted up.”

The respondent No.1 worked out his rates and quoted the same based on the assumption that the silt level in the sewer to be cleaned/rehabilitated was 30% to 70%, that is, an average to 50%. But during actual execution, when the respondent contractor's labour got on to the job in the embedded sewers several feet down the earth, it was found that the silt level was almost 100% at various stretches in the sewer line. As a result, the respondent No.1 had to incur additional expenses in removing such type of silt (including hard rock like deposits, boulders, animal bodies etc.) and much higher quantum of silt, which was entirely unanticipated. This was a major deviation from the specifications which were given by the petitioner in the tender documents. The respondent No.1 had indicated in its technical bid that *“If jetting action is deemed inappropriate for cleaning any of the sewer lengths, the additional cost of removing silt by hand or other means will not be considered to be included in our tender sum.”*

The respondent contractor duly intimated to the petitioner the type of silt and the quantum of silt encountered during execution and the difficulties faced and steps taken by contractor to deal with the same, through various letters. The photographs also show these difficulties. A CD was also submitted which showed these bad conditions existing in the sewers concealed beneath the ground which could not be seen with naked eyes. In letter dated 19th March, 2004, the respondent demanded payment for the extra work involved in desilting/cleaning of the sewer line. The basis and calculation of demand was also given. The difficulties encountered and additional expenses incurred were duly proved by the witnesses of the respondent. The execution of additional work is not disputed. Despite

receipt of these letters, the petitioner kept silent. The principle of 'Duty to Speak' has been referred and relied upon by the Supreme Court in *M/s Arosan Enterprises vs. Union of India*, AIR 1999 SC 3804. In para 17 of the said judgment, the Court held that when the seller write several letters but there was silence on the part of the buyer in replying to those letters, there was duty to speak and failure to speak will forfeit all rights of the buyer.

42. There were three dimensions of sewers involved in this case:

- One was 1600 mm dia trunk sewer (length: 1232.25 mtr.),
- Second was 1900 mm dia trunk sewer (length: 552.79 mtr.),
and
- Third was egg shaped sewer (length: 878.67 mtr.)

For silt level of 50-50% i.e. average 45%, the desilting rate was taken by the petitioner as ₹9000/- per mtr. in the identical work at Harsh Vihar (which was relatively a new sewer and hence work there was easier) which was part of the same scheme/tender and which was relied by the petitioner itself in amending the instant contract. Accordingly, the contractor made calculations and laid the claim.

43. It appears from the submissions of respondent No.1 who claimed the alleged extra expenses incurred by it on account of excessive silt level and hard rocky nature of the silt as compared to the data and figures given in the contract in question.

The learned Arbitrator after recording the submission of the parties held the fact that the quantum of silt mentioned as 30-50% was indicative was not found anywhere in the contract, rather it was mentioned that the

word 'approximately' in sub-condition IV(7)(b) did not change the situation because once a range of 30-50% has been mentioned in the contract documents, there was no question of any approximation. The learned Arbitrator held that the contention of the petitioner was strange and the petitioner could carry out CCTV survey only in a limited length because of the impossibility of carrying out the survey for the whole stretch and on the other, it was expected that the contractor had to verify all the data at site which, allegedly, was impossible to do, by the respondent No.1. The learned Arbitrator held that the fortnightly/daily reports sent by the respondent No.1 was ignored by the petitioner, therefore, he is of the opinion that the site condition was difficult to determine. The learned Arbitrator before reaching his conclusion has relied on another project, namely, Harsh Vihar in order to import the said contract into the present contract. The argument of the petitioner is that the impugned award on the aforesaid score suffers from infirmities both on law and facts for the following reasons:-

- (i) The learned Arbitrator was incompetent to import another contract, namely, Harsh Vihar which had nothing to do with the mandate of the present contract. By placing reliance on another contract, the learned Arbitrator committed an error in reading the impugned award and as per the settled law, would have to be governed by the terms and conditions of the contract that he is supposed to interpret. The learned Arbitrator travelled beyond the terms of the contract in allowing the claim in question.
- (ii) The respondent No.1 had been duly paid all the amounts due and payable under the contract for carrying out the desilting, which had

been one of the composite items contained in BoQ. The work in question was accepted by the respondent No.1 on representation made by the department in the tender document that the subject sewer offered for rehabilitation was silted to the extent of 30% to 50% whereas, while execution of the work, the respondent No.1 was to confront with the level of silt ranging between 90% to 100%, which was allegedly comprising brick bats, boulders, concrete slabs, stones, dead animal bodies, filled up gunny bags, discarded tyres & bottles. The respondent No.1 has as such claimed an additional cost by importing the rates of desilting offered by the petitioner in the other work awarded to the other agency. In the instant work at the time of the agreement the first item contained in BoQ comprised topographical survey, conducting CCTV Survey desilting, designing and manufacturing of liners and their installation etc. for which, a composite cost had been settled, which had to be released to the contractor only on completion of the complete item. The figures given in tender document were only indicative and tentative which had been made clear by the department in the tender document itself that the information and data available with the department regarding the level of silt was not certain and had made incumbent upon the contractor to examine the same by acquainting with the site condition, i.e. the nature of work, the accessibility of the site and other details connected with the work. Though the payment schedule had been relaxed but, it had never been contemplated by the department nor the same boils out from the construction of the contract that the department ever contemplated that the cost indicated mentioned in the BoQ against item No.1, comprising desilting as one of the component

was only for the desilting in the subject sewer to the extent of 30% to 50%.

44. **Findings :**

- i) The contract conditions along with the BoQ would show that the contractor would be paid for the entire desilting, before designing and implanting the liner, for which the payments had been disbursed to the agency, which had been accepted without raising any protest thereto. Further, the claim in respect of the additional on account of excess level of silt, confronted by the contractor during the execution of the work was raised for the first time in the month of March, 2004 when the contractor had already completed the desilting of maximum portion of the subject sewer. After making the entire payment for desilting, under the contract, to the respondent No.1, there had been nothing due or payable by the department in the terms of the contract and any claim raised by the contractor on this count had been unfounded. The learned Arbitrator, ignoring the words and spirit of the contract reflecting from its terms negotiated and settled amongst the parties, had awarded the claim of the contractor by adopting the rates of desilting offered by the petitioner to some other agency, which had been assigned the other work at Harsh Vihar, Delhi, made a reference in the claim.
- ii) The mandate of the contract as envisaged in General Condition No.1 is as follows:-

“The agency before tendering should visit the site and acquaint himself with the nature of work, the accessibility of site and all other details connected with the work, the contract document consisting of

layout plan, schedule of various class of work to be done, can be seen and any other information required in this connection can be had from the office of Superintending Engineer (C), S-11, Delhi Jal Board, New Delhi whose address is given in the notice inviting tenders.”

- iii) The said condition was brushed aside by the learned Arbitrator. The said condition shows that the responsibility was on the respondent No.1 to visit the site and acquaint himself with all the details connected with the work. Further, in the tender document it was clearly stated that the details are as per visual survey/observation at site and exact position would need to be confirmed after desilting/CCTV survey etc. Therefore, it is clear that the respondent was all along aware that the silt level of 30-50% indicated by the petitioner was only tentative. The respondent also admitted vide his letter dated 6th May, 2002 that since there is very little information about the sewer, the entire risk as to the work will be theirs. It is clear from this letter that the risk factors were of the respondent No.1 while calculating and quoting his rates for the turnkey project.
- iv) Section 70 has no application in the facts of this case when admittedly, there is a written contract entered into between the parties and as per the said contract, the contractor is under an obligation to undertake desilting and there is no condition anywhere in the contract that if the silt level is more than the percentage indicated in the tender document, the contractor is entitled to additional payment. The learned Arbitrator evidently rendered the award contrary to both facts and law. The learned Arbitrator has not passed any speaking order on the issue as to how the distinction has been derived between the

operation of Sections 70 & 73 of the Indian Contract Act. If either of the parties is setting up claim on account of breach of other's obligations, in such circumstances the damages could be awarded only under Section 73.

v) In the present case, the respondent No.1 has been writing letters to the petitioner where certain admissions are made. The details of such letters are given as under:-

- (a) In his letter dated 6th May, 2002, the contractor clearly says that *“There is very little information about the sewer, with the result that all the risk is ours.”*
- (b) Letter dated 7th May, 2002 is, therefore, important. On his own contractor says that, *“High degree of difficulty of working in an almost defunct badly silted brick sewer about which there is very little real time information.”*
- (c) Letters dated 31st May, 2002, 20th June, 2002 and 5th November, 2002 are to the aforesaid effect where contractor reiterates the defunct/choked nature of the sewer. He indicates that *“Manual means may need to be employed”* to supplement the mechanical means.

In resolution dated 28th October, 2002, it was clearly spelt out the nature of difficulty and risks associated with the sewer level. There was no such indication therein that if the silt level is more than the percentage indicated in the tender, contractor would be entitled to addition sum. The learned Arbitrator, therefore, committed an illegality in placing reliance on the aforesaid section. Thus, the claim

of respondent No.1 is not sustainable in view of the settled law. The same is accordingly rejected.

- vi) Work assigned to the respondent No.1 is “rehabilitation/renovation of sewer”. Cleaning of sewer is, therefore, a part of the said assignment. At Serial No.7 therein, it was clearly indicated that sewer is “running fully surcharged”.
- vii) It is well settled that the Arbitrator has committed a patent absurdity in law in importing a contract that is otherwise impermissible to be brought in. The relationship between the petitioner and the contractor is determined by the present contract and not Harsh Vihar contract. Even otherwise, the respondent No.1 himself was opposed to a comparison with any other work as would be evident from his letter dated 31st May, 2002.
- viii) The learned Arbitrator failed to understand that the instant work had been awarded to the agency on item based turnkey basis, where no such additional claim could have been entertained, for the items, which the contractor was under obligation to execute in terms of the agreement. The aforesaid plea had been raised by the petitioner at the time of making oral submissions and had also emphasized the same in the brief synopsis filed by the petitioner before the learned Arbitrator. Instead of appreciating the aforesaid submissions made by the petitioner, the learned Arbitrator had erroneously concluded that the petitioner Board had given up the aforesaid argument that the work was awarded on turnkey basis.

The learned Arbitrator erred in observing that by relaxing the payment schedule, the petitioner had given up its right to claim that

the instant work had been awarded on turnkey basis, as such had rejected the defence raised by the department to counter the claim No.1 raised by the contractor. The relaxation of payment schedule had been adopted just to facilitate the respondent No.1 to avoid any eventuality of financial difficulties which could have hampered the progress of the work but had not altered the rest of the terms and conditions agreed between the parties, nor had interfered with the arrangement and the spirit of the contract.

The conclusion drawn by the learned Arbitrator while awarding the claims of the contractor as to giving up the plea of award of contract on turnkey basis is perverse which goes to the root of the contract. The award is made by the learned Arbitrator ignoring the spirit of the contract. (***See Food Corporation of India vs. Chandu Construction and Another***, (2007) 4 Supreme Court Cases 697). Para 19 of the said judgment reads as under:-

“19. From the above extracted terms of the agreement between the FCI and the claimants, it is manifest that the contract was to be executed in accordance with the CPWD specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project. It is to be borne in mind that filling up of the plinth with sand under the floors for completion of the project was contemplated under the agreement but there was neither any stipulation in the tender document for splitting of the quotation for labour and material nor was it done by the claimants in their bid. The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the

case here. Having accepted the terms of the agreement dated 19-9-1984, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. The claimants' claim had to be adjudicated by the specific terms of their agreement with the FCI and no other.”

In view of abovesaid reasons and settled law the findings of the learned Arbitrator are not sustainable and are set-aside. The respondent No.1 is entitled to claim any amount on this head.

45. **Claim No.2:**

Charges paid to Foreign expert employed for this work during the period of execution of this work i.e. 32 months @ ₹10 lac per month i.e. from October, 2002 to June, 2005.

- Claimed: ₹320 lac
- Award: ₹3,20,00,000/-

It is submitted by the respondent No.1 that there was no requirement in the contract for keeping a foreign expert. It is provided in condition No.30 that on failure of contractor to employ a graduate engineer, a penalty of ₹3500/- per month would be levied upon the contractor. However, petitioner insisted for keeping a foreign expert on regular basis at site, as this was the first work of its kind and required specialized expertise. At

petitioners request, respondent No.1 engaged a foreign expert Mr. Vernon Downes from UK on regular basis who was stationed at Delhi. The petitioner was apprised by the same. In letters dated 12th January, 2004 and 19th March, 2004 the respondent No.1 wrote that the foreign expert is available at site on continuous basis 'as per the directions of the department' and the respondent No.1 is incurring ₹10 lac on his emoluments and other benefits and asked the petitioner to compensate the same. As usual, there was no reply to these letters by the petitioner.

The respondent No.1's witness Mr. Dhirender Kuamr in his deposition confirmed that services of said expert were availed on day to day basis. The respondent No.1's witness Mr. Vijay Kataria in his deposition has deposed that petitioner asked him to engage the services of a foreign expert which he did and that he made it clear to the petitioner that the cost incurred on this account would be to petitioner's account which was never disputed by them. Even the Board's witness RW-1 admitted in his cross examination that the services of the foreign expert were not free of cost and that the contractor had demanded ₹10 lac per month for the same. Therefore, the learned Arbitrator passed a reasonable award based on actual expenses incurred on foreign expert for 32 months upto June, 2005 as the work was completed on 22nd June, 2005.

46. Submission of the petitioner :

- a) There is no condition in the contract providing for petitioner making payment to the contractor on his engaging foreign consultant.

- b) Respondent No.1 himself offered the services of the foreign consultant vide letter dated 5th November, 2002 in the following words:

“We are further happy to confirm that in addition to the above, not only would the expertise of the experienced and Senior Director of the company Mr. Vernon Downes, would be available for the project but also that he and other technical/operational expert would also be available in Delhi for the project, as per project requirement and site situations alongwith required supporting manpower and equipment to ensure its successful completion.”

- c) The letter written by the said foreign consultant to the respondent No.1 expressing his desire to get associated with the project. The letter written by foreign consultant to petitioner confirming its continued association with the ‘satisfactory completion of the project’.
- d) Minutes of Technical Committee to the effect ‘the firm has submitted confirmation dated 27th December, 2001 from M/s. Onsite along with this bid re-confirming the MoU made earlier with M/s. Water Flow services that M/s. Onsite will provide the necessary technical support.’
- e) The respondent No.1 writes confirming ‘continuous presence’ of one of the Directors of our technical assistance providing company in Delhi’ and then reiterating that ‘even this condition has been duly complied by us at substantial cost.’ He stationed in Delhi as per the condition that had been indicated at the time of signing the contract.’ Engagement of a foreign consultant was necessitated as contractor

himself admitted that he did not have the adequate experience in carrying out the work.

47. **Findings:**

The respondent No.1 had claimed ₹10 lac per month from November, 2002 to June, 2005 towards charges paid to Mr. Vernon Downes, Senior Director of the collaborator. The contention is that there was no such requirement in the contract and, therefore, expenses incurred on the foreign expert has to be reimbursed by the petitioner. The findings of the learned Arbitrator are erroneous due to following reasons:

- i) The contract in question does not envisage payment of remuneration/salary to a foreign expert even if the said foreign expert was engaged by the respondent No.1.
- ii) The respondent No.1 himself vide letter dated 5th November, 2002 had given an unqualified undertaking to the presence of the foreign expert during the period when the work was in progress. The engagement of the said foreign consultant was the idea of respondent No.1 as it appeared from the aforesaid letter. Fastening any liability on the petitioner on the said count is impermissible. The learned Arbitrator exceeded beyond the terms of reference while awarding the aforesaid claim to the contractor. The work had been awarded to the contractor on lump sum turnkey basis, in which the petitioner was concerned with the final product of the contract, for which a composite cost has been fixed in the beginning, by giving total description of the work to be executed by the agency. In such contacts, the contractor could be made additional payment over and

above the cost of the work only if there had been extra item executed by the contractor which had not been in the scope of work.

iii) The respondent No.1 while bidding will take into account all the cost components, while tendering the price bid. In the present case, at the time of participating in tender, the respondent No.1 itself had no experience of undertaking such specialized job of rehabilitating the sewers by adopting 'No Dig' technology as such and participated in the tender with its collaborator M/s. Onsite, who participated in the meeting convened by the technical committee and had assured all support to the contractor for execution of work vide letter dated 5th November, 2002 which is forming part of the contract. On 5th November, 2002, the respondent had also undertaken to ensure the presence of the representative of its foreign collaborator, including its Director Mr.Vernon Downes, throughout during the execution of the work. As such, the cost component for execution of work, bid by the respondent No.1 was comprising the expenditure incurred in making payment to the aforesaid collaborator as such, there had been nothing extra executed by the contractor, for which, the claim could have been preferred. On payment of the final bill for the civil work of the contract nothing extra was due and payable to the agency, for the items executed by it, which had been otherwise in the scope of the work offered for execution to the contract.

48. This claim in any case was not made either at the time of signing the agreement or prior thereto but in the year 2004. Finding of the Arbitrator that in none of the correspondences contractor had ever written not to charge for such engagement is completely incorrect as the project was on item

based turnkey project meaning thereby for each item specific amount has been fixed. The learned arbitrator passed an award on this claim on assumption that though the respondent No.1 had not stated to claim anything extra for ensuring presence of Mr.Vernon Downes, the Director of the Foreign Collaborator during the execution of the contract but, the claim had been awarded by the learned Arbitrator on the presumption that the respondent had not even stated in either of his correspondence that he shall not be claiming anything extra to ensure the presence of the aforesaid foreign collaborator.

It is correct that the terms and conditions of the contract was requiring the presence of a graduate engineer on the site but, owing to inexperience of the agency, the respondent No.1 had given an unqualified undertaking to the petitioner that they shall get the work executed in the presence of Mr. Vernon Downes. Furthermore, since the aforesaid undertaking was given by the contractor prior to award of work, without raising any additional claim, this indicates that the contractor had agreed to get the work executed, in the presence of the aforesaid collaborator on the rates agreed between the parties, which had been indicated in the contract. For discharge of the aforesaid obligation, the contractor cannot claim any additional cost as claimed.

49. Statement/evidence cannot be a substitute for what the contract envisages. If the contract does not envisage for making payment over and above the contractual arrangement, a statement of a witness on the alleged expenses having been incurred on the engagement of a foreign consultant is wholly inadmissible besides being misconceived. Even otherwise, the said statements support the case of the respondent No.1. The learned Arbitrator

gave an incorrect finding when he says that, ‘There is ample material on record to suggest that the claimant hired the services of Mr. Vernon Downes for ₹10 lac per month for 32 months (as the work was started on 26th December, 2002 and completed on 22nd June, 2005) for this work and that it was not part of the scope of the work. Since the claimant lawfully incurred these expenses in relation to the respondent’s work and he never afforded to do it gratuitously and the respondent availed the benefit of the service of Mr. Vernon Downes, the respondent is liable to compensate the claimant on the principle of Section 70 of the Contract Act.’ It has come on record during cross examination that the said foreign consultant was availed of by the respondent No.1 because of the reason that the said respondent did not have the adequate expertise in executing the project in question without a collaborator. The foreign collaborator was therefore, considered imperative by the respondent No.1 himself.

50. The project is an item based turnkey project and the payment of any extra money on account of the alleged engagement of a foreign consultant which is not contemplated under the contract is untenable. The learned Arbitrator committed an error in observing that since the contract envisaged employment of a graduate engineer and the said graduate engineer was admittedly employed and thus, employment of additional foreign consultant was therefore, required to be reimbursed.

51. Even otherwise, as per the contract, the work had to be concluded originally in a period of 18 months, at no point of time till expiry of about 15 months from the start of work, the contractor ever raised a plea for claiming anything additional on account of engagement of the aforesaid foreign collaborator. This indicates that the claims had been after thought when the

substantial portion of the work had already been executed. Thus, the same was liable to be rejected by the learned sole Arbitrator. The claim of respondent No.1 are thus rejected. The findings are set-aside.

Claim No.3

52. The claim No.3 for the loss suffered on account of claimant altering its position and suffering expenses on the basis of representation of DJB in pre-qualification documents/discussions for giving requirement of desilting works of about 91 km but then inviting tenders for only about 8-9 km sewer length. The said claim was rejected by the learned Arbitrator. The respondent No.1 has not challenged the said findings.

Claim No.4 :

Loss on account of delayed and short payments of monthly running bills due to respondent not releasing regular monthly payments and not releasing the payments on 'Method Statement' basis.

- Claimed: ₹56.38 lac
- Award: ₹1,87,317/-

53. It is the case of the respondent No.1 that as per Clauses 7 & 8 of the Contract clauses, the contractor was to submit monthly bills and on his failure, such monthly bills were to be prepared by the objector. It was clarified and confirmed in the pre-bid meeting that monthly payments will normally be made within 15 days time to make payment of the bills. It is submitted that his 1st bill amounting to ₹1.19 crore on 17th April, 2003. The receipt of said bill was confirmed by the objector vide letter dated 2nd June, 2003. This bill was submitted on basis of percentage progress achieved for various activities involved in the project till that time such as visual/ primary survey, topographical survey, site office construction, flow diversion/

stanking, section isolation, desilting/clearing, pre-lining CCTV survey, design of liner felt, and other operations, thereafter, upto final CCTV survey and commissioning of sewer, etc. This bill was neither paid nor responded to within 15 days, as required under the contract, and ultimately, after number of reminders, the petitioner objected to this method of billing for the percentage basis adopted in preparing the bill in accordance with 'Method Statement' which was suggested in the Tender documents.

It is also submitted that respondents' bills for both the projects on 31st March, 2003 and 17th April, 2003 on the basis of percentage progress of various activities but the same were rejected after passage of nearly 2 months by the petitioner's executive engineer on 2nd June, 2003 on the grounds that the method was not in accordance with provisions of Agreement. This was objected to by respondent No.1 vide letter dated 18th June, 2003 bringing out the position of the respondent's side which amounted to 'Non-Payment' of any work till final completion of work which as per contract was 18 months and as per actual position, it turned out to 30 months. The monthly payments, as per Standard Clause 8 of the contract, had been reconfirmed by the Board during the Pre-Bid conference and this obviously superseded the Special condition 8 mentioned in their letter of 2nd June, 2003.

This position was realized by the respondent Board after a series of letters to the Board Members who found it necessary to bring about an amendment in the contract payment terms vis-a-vis BoQ vide their Resolution dated 3rd July, 2003. The Board worked out the amendment for separate rate of desilting after taking into consideration the BoQ of Harsh Vihar project which was also awarded by the Board in the same period but with a different type of BoQ. Therefore, the Board ultimately realized its

mistakes of having adopted a defective BoQ vis-à-vis, the actual site situations and operations and resorted to monthly payment subsequently and the claimant suffered financial losses on account of the respondent's defaults and delay in rectifying action early.

54. The delay in releasing the bills and the financial impact thereof was placed on record by the contractor. The contractor's witnesses also supported the claim in their deposition. The witness admitted in cross examination that 1st bill was raised in May, 2003 for the work done till end of April, 2003 and the Board did not take urgent steps to verify the quantities with the bills. Since the petitioner by way of amendment dated 3rd July, 2003 had agreed to pay separate notes for only 3 items i.e. CCTV survey, desilting and lining, the contractor revised calculations sheets and claim was reduced from ₹56.38 lac to ₹12.54 lac. The petitioner filed its counter tabular statement. The arbitrator, as a finding of fact, found the delay to be in only 5 bills and calculated interest for delay as ₹1,87,317/- only as per Annexure 'A' attached with Award. The petitioner has not seriously challenged the claim. Claim No.4A for refund of works Contract Tax wrongly deducted from bills for imported materials and on PM Relief Fund Claim: ₹33.73 lac was rejected by the arbitrator.

55. Submissions of the petitioner

The Award made by the Learned Arbitrator of ₹1,87,317 on the aforesaid count is erroneous and patently illegal for the following reasons:-

i) Till the payment schedule was amended by the Petitioner Board vide resolution No.539 dated 4th July, 2003 and confirmed on 31st July, 2003, the obligation to pay the contractor had not arisen since as per the unamended pay schedule the obligation to pay would arise only after the completion of each item of work i.e. after completion of desilting, laying of liner and

CCTV Survey of each reach as stated earlier. Therefore, the contention of the petitioner that there was a delay in payment of running bills, as asserted by the learned Arbitrator, is erroneous. After the amendment of the payment schedule on 31st July, 2003, the payments were to be made by the Petitioner on completion of each stage of work i.e. after completion of desilting, laying of liner and CCTV Survey. Every single bill raised by the respondent No.1 has been paid within the time stipulated in the contract by the petitioner. Therefore, the claim with respect to delay raised by the petitioner which has been accepted by the respondent, is not correct and ought to be rejected.

56. **Findings:**

A detailed chart of the bills raised by the respondent and the date on which the petitioner has made the said payment is extracted below:

Bill No.	Submission date	C.V. No.	Date	Processing time in making payment
1.	14.07.03	3	15.07.03	1 day
2.	16.09.03	7	22.09.03	6 days
3.	20.10.03	3	10.12.03	51 days
4.	26.03.04	21	29.03.04	3 days
5.	28.04.04	22	05.05.04	7 days
6.	23.06.04	9	04.08.04	42 days
7.	20.10.04	21	21.04.10	1 day
8.	05.11.04	-	09.11.04	4 days
9.	03.02.05	-	04.02.05	1 days
10.	07.02.05	4	07.02.05	0
11.	17.02.05	23	28.02.05	11 days

12.	21.02.05	2	02.03.05	9 days
13.	28.02.05	10	15.03.05	15 days
14.	18.03.05	13	21.03.05	3 days
15.	23.03.05	20	28.03.05	5 days
16.	28.03.05	-	31.03.05	3 days
17.	31.03.05	44	31.03.05	0
18.	31.05.05	7	16.06.05	16 days
19.	30.01.06	-	28.02.06	29 days

57. The chart depicted no delay. The learned Arbitrator concluded as if there was a delay and thereafter was pleased to record the finding with respect to the delay and was pleased to render the impugned award. The findings of the learned Arbitrator thus, are erroneous that the original BoQ provided in the contract was faulty and misleading owing to the relaxation given by the petitioner by passing and adopting a subsequent resolution whereby the payment schedule was relaxed to facilitate the respondent No.1 to avoid financial difficulties. As a matter of fact, a contract agreement executed between the parties comprises mutual claims and bargains made by the parties prior to execution of the contract, which spells out the reciprocal obligation to be discharged by the parties. As observed by this Court in ***Forbes Gokak Ltd. Vs. Central Warehousing Corporation***, 2003 (1) RAJ 200 that it is not open for the arbitrator to foist or lift the terms and conditions raised before him by either of the party. The terms and conditions of the contract are devised and designed on the commercial wisdom of the parties and in such circumstances, it is not open for the Ld. Arbitrator to hold that the BoQ in the instant work was imperfect or

defective, by construing the same on the parameters of the contract of the other work awarded to the other agency, as such, the conclusion drawn by the Ld. Arbitrator and an award founded thereon is perverse and the same is as such, is liable to be set aside in terms of Section 34(2) of Arbitration and Conciliation Act, 1996.

Claim No.5:

58. Extra expenditure suffered by claimant due to interference of the respondent's consultant.

- Claimed: ₹236.47 Lac
- Award: ₹75,00,000/-.

The respondent No.1 has relied upon the clause 15 of the contract permitted engineer-in-charge or his subordinates to inspect and supervise the work. There was no provision in the contract permitting the Board to impose a third party consultant upon the contractor and to allow him to operate on behalf of the engineer-in-charge of the Board and to give directions to the contractor without any accountability. The Board vide letter dated 8th April, 2003 appointed one M/s. TTI Consulting Engineers to deal with all matters related to technical, contractual & construction management and to “*operate on behalf of Engineer-in-Charge*”. On objection having raised by respondent No.1, the board deleted the said words.

It is stated by the respondent No.1 that the said consultant started interfering in the smooth execution of the work by giving unwarranted directions and demanding unwarranted documents, which wasted the crucial time and money of the respondent No.1 in complying with the same. The said consultant vide letter dated 18th July, 2003 directed contractor to submit

different forms and returns. It forced the respondent to go through necessary documentation on a regular basis for which there was no provision in the contract. The respondent No.1 protested to the Board on 31st July, 2003 and on 13th August, 2003, the Board withdrew the consultant's letter of 18th July, 2003 and stated that henceforth all correspondence be made by petitioners/Engineer-in-Charge.

As the consultant continued with his interference, forcing the contractor to write letters dated 20th August, 2003, 2nd June, 2004, 3rd August, 2004, 22nd September, 2004, 23rd September, 2004.

59. In view of such situation, the delay in approval of liner designs by consultant on various occasions and delay caused due to 3rd party inspection. The said delay caused a lot of time loss and financial loss too. Respondent No.1 pointed out that the consultant showed that he had no idea of collecting, validating and interpreting testing results for CIPP lining. The consultant's incompetence was highlighted. The claimant highlighted the multitude of problems, unnecessary frustration created by the consultant due to their downright incompetence. The respondent also pointed out the delay in approval of liner designs for different stretches of sewer line submitted from time to time. Under wrong advice of consultant, the Board forced the contractor to increase the thickness of the liners over and above what was originally indicated by the Respondent in the bid and agreed by the Board. This caused the cost to increase due to more lining material. These averments were proved by the contractor by leading evidence of his witnesses. The Board's witness admitted in his cross examination that the contract does not provide for third party consultant.

The respondent contractor claimed 10% of the contract value under this claim. But, the Ld. Arbitrator found the same to be on higher side and

reduced the same and granted a lump sum amount of ₹75 lac as against ₹236.47 lac.

60. **Submissions of the petitioner**

It is the case of the petitioner that there has been no interference by M/s TTI who was the representative of the petitioner and in fact the contract permits the petitioner to appoint a third party as a consultant since the work to be executed under the contract is of a peculiar nature and the technology used in the execution of the work was being used for the first time in India on such a large dia sewer line and at such a large scale. In fact, condition No.34 of the General Conditions categorically states that the petitioner or his representative shall be given full opportunity to examine and measure any work under the contract. Therefore, examination of such work by M/s TTI cannot by any stretch of imagination be termed as an interference. In any event, in the Technical Committee meetings dated 19th June, 2002, 20th June, 2002 and 10th July, 2002.

61. It is argued by the petitioner that it was merely stating through letters that M/s TTI is interfering with the functioning of the claimant / contractor, no specific instance of any such interference has been pointed out by the respondent.

62. **Findings:**

Contract itself envisaged that considering the peculiar nature of work executed for the first time, the same shall be subject to third party inspection. Condition No.34 may be seen:

“34. No work will be covered or put out of view without approval of the Engineer in charge or his representative and the agency shall afford full opportunity for the Engineer in charge or his representative to examine and measure any work which is about to be covered up or put out of view.”

It confirms that contractor did not have adequate experience and stipulated as follows:

“To this end, it was also decided to recommend that the work should also be subject to 3rd party inspection by established experts in sewer rehabilitation so that the quality of workmanship and materials, specially the ingredients of the liners and suitability thereof, compliance to design, technical and safety standards could be ensured in the implementation of the contract”.

63. The only letter written by consultant TTI which is complained of by the contractor is dated 18th July, 2003, the said letter would establish that what was sought for in the said letter was routine compliance such as bills to be printed form, weekly programme, malba removal, normal working hours etc. and thus, it cannot be termed as interference.

In the letter dated 29th August, 2003 by the respondent no.1, it was mentioned there was a suggestion with interference. In the said letter, respondent mentioned that because of the so-called interference it is the petitioner who shall suffer financially and there was no demand by him to be compensated. The issue of interference, assuming there was any, was resolved mutually as stated by the petitioner.

64. In any event, to claim damages on account of interference, it is imperative that the respondent must prove the damages, if any, caused to them on account of the alleged interference. Having failed to do so, it is not open for the respondent to claim any amount as damages just by stating in the claim petition that there was interference by M/s TTI. The quantum of loss sustained by the Contractor/Respondent No.1 for the alleged interference by M/s TTI. The Contractor has claimed 10% of the contract price as the claim amount for the alleged interference by M/s TTI without

leading any evidence as to the actual damages is unheard of in law. The Learned Arbitrator committed an error by awarding an amount of ₹75 lac by simply stating that *“However 10% seems to me to be on a higher side, but there is no doubt that the claimant has suffered some tangible losses in the form of increase in liner thickness etc. According to me, fair and reasonable compensation would be ₹.75 lac as against ₹236.46 lac, as claimed by the claimant.”*

65. The learned Arbitrator has failed to appreciate the principles governing in grant of damages. It is well settled that a party claiming damages must establish the loss that has occurred. In the present case, in the absence of such proof of loss, the respondent was not entitled to damages. Thereby, the provisions of learned Arbitrator are set aside. The claim of the respondent No.1 is also rejected.

Claim No.6:

66. Extra cost suffered due to repetition of desilting work on account flooring/back flow of drain due to poor pumping arrangements, rains and non-locking arrangement of manholes, etc.

- Claimed: ₹202.23 Lac
- Award : ₹1,82,29,120/-

It is submitted by respondent No.1 that under Section 51 and Section 67 of the Indian Contract Act, 1872, it cast an obligation and duty upon the owner of the work to facilitate the contractor to perform the work and afford reasonable facilities to enable the contractor for the said purpose. The 2nd part of Section 73 stipulates that where contractual obligations are not 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 party has broken the contract. These are reciprocal obligations of the owner which are

inherent in any contract. However, in the present case, the petitioner has failed to live up to legitimate expectations and to adhere to its reciprocal obligations. As an owner of the work, it was the Board's duty to see that the pumps which were in exclusive control of the Board were functioning efficiently in such a way that pumps remain empty and no back-flooding occur. But the Board failed in its duty.

The Board failed to provide details about the topography of the network of sewers, pumping stations and storm water drains despite repeated requests. Due to gradient of sewer line, which was not informed by the Board, the sewage and removed silt accumulated in the pumps but due to inefficient pumping arrangements, which were in exclusive control of the Board, the pumps got completely filled up. Due to this, the back flow occurred after carrying out desilting, resulting in inflow of sewage carrying with it heavy amount of silt once again.

Moreover, the storm water drains and laterals, which are in exclusive control of the Board, were found to be directly connected with the sewers, contrary to settled engineering norms. Not only this, the manholes were found to be defective and many were without covers, which caused rain water to enter the sewer lines, thereby carrying fresh silt alongwith it. The Board failed to take necessary precautions during execution of work. The Board's breach, lack of precaution and careless conduct initiated the process resulting in rain water acting as catalyst for back-flooding and increasing the work.

67. The respondent No.1 duly apprised the Board vide letter dated 1st April, 2003 about this problem and sought necessary help. However, the Board kept silent and did not take any remedial steps to prevent back-flooding.

The Board relied upon special condition No.10 and special condition No.47. The Arbitrator dealt with the said clauses and His interpretation cannot be faulted. It was the duty of Board as the owner of work to make the work atmosphere congenial to the contract.

In view of carelessness of the petitioner, the respondent was forced to do the desilting twice whereas the contract was to do desilting once and prices were accordingly quoted. The contractor is entitled to be compensated for this additional work. For calculation purpose, the respondent took the same rates which were approved by the Board by way of amendment of the BoQ of this work on 3rd July, 2003. After correcting an error in the calculation, the Arbitrator allowed reduced sum of ₹1,82,29,120/- which is justified.

68. The submission of the petitioner is that the contract did not have any special condition. The contract is turnkey contract where each and every item to be executed was spelt out with the price determined. There cannot be any further liability on the petitioner for a work executed by the respondent No.1 under the contract.

69. This obligation to carry out the job is coupled with a prohibition in the contract that no additional amount be admissible on account of damage caused by rain etc. including natural cause whatsoever. Learned Counsel has referred general condition No. 47 in support of his submission.

70. The learned Arbitrator failed to appreciate that desilting was one of the items for which the payment due under the contract had been made in due course, as such, nothing further could have been claimed, which could be awarded by the learned Arbitrator. The award made in this regard is thus contrary to the terms of the agreement and the same is liable to be set aside. As the instant work had been awarded on item based turnkey basis, where

the cost of each and every item to be executed under the contract had been well spelt out. There could have been no further liability to pay anything extra on the claim of additional cost for either of the item, which the contractor was otherwise under an obligation to execute. Desilting was one of the items to be executed by the Contractor for which due payment was made in terms of the contract. As such, any additional claim set up in this regard by the respondent No.1 was not reasonable. The perusal of the contract indicates that the parties were aware of the fact that it was imperative on the Contractor to take all requisite precautions to control the sewer flow under the contract. In case there had been any failure in discharge of the aforesaid obligation, the liability cannot be fastened on the employer for such failures which had been squarely attributable to the Contractor.

71. **Findings :**

Condition No.10 of the Special Conditions of the contract makes it imperative on the respondent to plug the upstreams, before carrying out desilting in any portion of the subject sewer, but in case the respondent failed to do so, it does not justify the claimant/contractor to claim additional on this court.

The Special Condition No.10 of the contract is reproduced hereunder for the ready reference of the Court:

“10. Sewer Flow Control

The sewer line plug shall be inserted into the line upstream of the section being worked. The plug shall be so designed that all or any portion of the sewage can be released. After the work has been completed, flow shall be restored to normal. When pumping and by passing is required, the Contractor shall provide the pumps, conduits, piping

network and other equipment to divert the flow of sewage around the manhole section in which work is to be performed.”

Even the witness Dhirendra Kumar, examined by the respondent in support of claims, is a qualified engineer supervising the work, had admitted the aforesaid obligation of the respondent while executing the work, but, has tendered further explanation to justify the claim that plugging the mainstream in the aforesaid condition was meant for subject sewer only.

The going through the aforesaid condition in the contract does not indicate anything to that effect. The conclusions drawn by the respondent No.1 was not correct and unfounded.

72. The learned Arbitrator failed to withstand that there had been a specific prohibition in the contract regarding any claim made by the contract on account of rain, snow fall, flood, etc. on account of which the contractor was made to desilt the sewer again. The General Condition No.47 is reproduced hereunder for the kind reference of the Court:

*“47. No payment shall be made to the agency for any damage caused by rain, snow-fall, floods or any other natural cause whatsoever during the execution of work. The damage to work will be made good by the agency at his own cost and **no claim on this account shall be entertained**”.*

73. It is settled law that where the contract contains a specific prohibition, nothing additional can be paid by overlooking the aforesaid prohibition provided in the contract and the award made to the contrary suffers from illegality and contrary to the terms of the agreement. In the present contract awarded to the contractor had not identified desilting as an item as such, there had been no payment schedule payable for the work of desilting. The payment for desilting of sewers had been identified only at the resolution

adopted in the month of July, 2003, which was payable once for entire desilting, as the work in question was a lump sum contract being executed by the contractor. It was a duty of the Contractor to take adequate precautions in execution of work to avoid any such recurrence.

In view of the above, the claim of the respondent No.1 is rejected and the findings of the Arbitrator are set aside.

Claim No.7:

Payment on account of rehabilitation of sewer work having been done under actual site conditions of ‘confined space’ instead of normal conditions indicated in the tender documents

- Claimed: ₹819.78 lac
- Award: ₹1,63,95,368

The submission of respondent No.1 is that as per contract the work was required to be done by ‘confined space excavation’ but its length was not known. There was an error in the BoQ of this work as no separate rate for confined space excavation was mentioned in the BoQ whereas in the identical works of Kilokari and Harsh Vihar the length which was to be rehabilitated by confined space excavation and its rate were mentioned, apart from the length which was to be rehabilitated by ‘No Dig’ technology and rate for the same.

When the respondent started the work, he found adverse geological conditions due to which it was not possible to rehabilitate any portion of sewer line by ‘No Dig’ technology and entire length of sewers was thus rehabilitated by confined space excavation. This was not visualized at the time of estimation of the work or tendering of work and was completely

unexpected. In this method of rehabilitation, the respondent has to make centring and shuttering inside the sewer and then repair the sewer line from inside after cleaning prior to installation of liner. The respondent was compelled to do this repair work due to peculiar situation which was not envisaged and which was thus not included in his quoted price. In letter dated 19th March, 2004 the respondent wrote that he has suffered additional expenses on account of extra work involved in confined space excavation and asked compensation for the same.

As oral evidence led in the matter and after viewing the CD showing this work being done, the learned Arbitrator being an expert engineer himself came to the conclusion that rehabilitation by confined space excavation cannot be taken as done in the entire stretch. Going by his experience and analysis of evidence, he came to a finding that at least 20% length has been rehabilitated by confined space excavation. He applied the rates of confined space excavation given in the connected/identical work of Kilokari and arrived at the value of the work done by confined space excavation method as ₹1,63,95,368/-. No fault has been pointed out by the petitioner in these calculations. The petitioner's arguments have no force that while this claim has been allowed in the present case (Bazaar Sitaram) but the same was rejected by the learned Arbitrator in the Kilokari case. The petitioner is trying to confuse. The claim was not for excavation but for confined space excavation. The petitioner is not asking for any money for excavation.

74. The submissions of the petitioner is that the learned Arbitrator erred in awarding the claim under this head by foisting the price, which had been agreed upon between the parties in the other work assigned to the contractor,

which was governed by the different terms and conditions negotiated between the parties in a different arrangement. The same could not be taken as a parameter of awarding the claim made under this head. In fact, in the BoQ of the Kilokari work, it had been indicated that there can be certain reaches where the contractor may have to execute excavation in confined space , as such, the distinction was made in the rates offered for confined space excavation as well as that in excavation with ‘no dig’ technology.

As far as the present work is concerned, the contract executed between the parties does not recognize any such distinction in excavation, therefore, the award made by the learned Arbitrator was beyond the mandate of the contract. The respondent has raised the claim on the same ground in the Kilokri work which had been declined by the learned Arbitrator by assigning reason thereto, where there had been adequate provisions provided in the contract to pay such amount. However, in the present case, where there had been no provision for making such provision, the award had been made by the learned Arbitrator by adopting and implanting the rates provided in the other work.

Finding :

75. The learned Arbitrator observed that in BoQ no such distinction was carved out by the parties offering different rates for carrying out the excavation in confined space, as allegedly executed by the respondent. It is worth pointing out here that in none of the correspondence prior to April, 2004 there had been ever a reference made in this regard by the respondent. By April, 2004 the maximum work of CCTV and desilting had already been executed. In the award 20% of the total sewer length under the contract granted by the learned Arbitrator without any basis though nothing had been

borne out of the record. The witness Dhirender, Engineer, supervising the work on behalf of this effect whether any such hindrance was recorded at any point of time by the agency in the hindrance register during the currency of the work, to which the answer was in negative endorses the fact that the respondent had never been made to execute the work with confined space excavation, as claimed under this head.

76. The claim relates to confined space evacuation instead of normal condition mentioned in the tender document where award is to the tune of ₹1,63,95,368/-. The findings of the Arbitrator is recorded that 'however, i feel that there is no material on record to indicate that claimant did any excavation'.

77. It is apparent that learned Arbitrator committed a serious error in law in importing another contract where there was a specific stipulation that there could be a situation where excavation in confined space might have to be resorted to and therefore, rates were accordingly fixed. In the present case, there was no such stipulation. In Kilokri, as mentioned earlier there was a provision to pay such amount in the event there was any such contingency. In the present case the respondent from the very beginning acknowledged that respondent might have to work in confined space.

Letter dated 31st May, 2002 and 17th June, 2002 written by its partner and letter dated 5th November, 2002 speak for themselves. Even otherwise, there was no protest to the price fixed inspite of knowing that there might be a situation where he had to work in the confined space.

It was in the April, 2004 the respondent after completing the desilting work woken up to demand this amount, it appears to be an afterthought. The very claim made in OMP No.359/2007 was rejected by the Arbitrator.

Thus, in the present case, for the reasons stated as above, the claim is rejected.

Claim No.8

78. The claim No.8 for compensation for additional financial burden due to heavy increase in foreign exchange rates after date of NIT. The same was rejected by the learned Arbitrator. The findings are not challenged by the respondent No.1. Hence, it attains finality.

Claim No.9:

79. Compensation on account of escalation in prices of labour, material etc. due to prolongation of contract from stipulated 18 months to 30 months due to delays and defaults on part of DJB.

- Claimed: ₹338.31 lac
- Award: ₹2,92,89,105/-

The learned Arbitrator arrived at a finding of fact that the delay was attributable to the petitioner in support of this finding, the learned Arbitrator relied upon various letters written during execution of work to the petitioner but the petitioner just kept silent and did not take any precautionary and remedial steps for smooth execution of work. The arbitrator also relied upon the hindrance register maintained by the Board as well as the testimony of the contractor's witnesses in support of this finding. The petitioner's witness in cross examination admitted that the petitioner never wrote any letter to the contractor regarding delay in execution of work.

80. It was held by the learned Arbitrator that the execution of work was granted by the petitioner till the completion date of 22nd June, 2005 without levying any penalty on 12th September, 2005. The work was scheduled to be

completed in 18 months but it actually took 12 months extra to complete it. The stipulated date of start was 26th December, 2012 and the work was scheduled to be completed in 18 months by 25th June, 2004. But it was completed on 22nd June, 2005. During the prolonged period of 12 months from 25th June, 2004 to 22nd June, 2005, the respondent No.1 was made to suffer and incur additional expenses on account of increase in labour wages and prices of materials, the respondent No.1 produced calculations of claims based on the wholesale price indices issued by government of India. The respondent relied upon the 10CC formula which is contained in standard clause 10CC of CPWD contracts which are applicable to and followed by petitioner which was adopted by him as he deemed fit, particularly when the petitioner failed to suggest any alternative formula.

81. Reliance was placed on *Mcdermott International Inc. vs. Burn Standard Co. Ltd. & Ors.*, (2006) 11 SCC 181, wherein it was held by the Supreme Court: “It is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.... As computation depends on circumstances and methods to compute damages, how the quantum should be determined is a matter which would fall for the decision of the arbitrator.”

82. The award under the aforesaid head is correct as the learned Arbitrator awarded escalation to the contractor under claim No.9, which had been specifically prohibited under the contract. The department had raised objection on this claim on two parameters. Firstly, that the work was

awarded to the agency on item rate turnkey basis where the cost of the end product had been fixed without incorporating any variable therein and secondly, there had been specific prohibition as to payment of escalation charges in special condition No.6 of the contract which states that “No escalation whatsoever will be paid on the quoted rates during and after completion of work. This supersedes all other conditions relating to the escalation clause”. It had been pointed out that the respondent had never recorded any hindrance at any point of time, which had been attributable to the department which could have justified the claim raised by the respondent for such lapses and in such circumstances, if there had been delay in completion of work that could have been either attributable to the respondent or to some extraneous agency and cannot be attributed to the petitioner.

The contract executed between the parties does not provide any formula for calculating the escalation, as claimed by the respondent.

83. This finding relates to prolongation of contract from 18 months to 30 months that led to increase in prices of material as alleged by respondent No.1. Admittedly in none of the letters written by respondent seeking grant of extension of time nor even mentioned about any extra payment on account of increase in prices.

There was not a whisper making any complaint against the petitioner. The respondent asked for extension that was readily agreed that too without any levy of compensation. Therefore, the respondent is estopped to ask for escalation.

84. In letters dated 26th April, 2004, 2nd June, 2004 and 29th March, 2005 the respondent sought extension of time. Corresponding letter dated 26th

April, 2005 and 12th September, 2005 written by petitioner acceding to the request of the respondent. These letters were ignored by arbitrator and instead, awarded the amount in question.

85. Contract condition No.6 specifically prohibits admissibility of any claim on account of escalation. Clause 6 is reproduced:

“6. No escalation whatsoever will be paid on the quoted rates during and after completion of work. This supersedes all other conditions relating to escalation clause.”

86. Even when the work was complete, it was impermissible to ask for escalation, a condition to which the respondent was a party. The learned arbitrator has completely ignored all these.

87. As regards working in night with restricted hours it is the case of respondent right from the beginning that he had to work in night hours. The letter dated 20th June, 2002 is very clear in this regard where it is mentioned: “Our working hours would be severely restricted due to the site conditions. Moreover we would have to work at night hours specially for the maintenance period.....” Similarly, the price component fixed by petitioner after detailed negotiation too recognized this problem where it records:

“They further stated regarding constraints of working timings throughout the rehabilitation as well as maintenance period with extra risks and costs of working at night.”

88. The learned Arbitrator had not only ignored the specific prohibition incorporated in the contract as to payment of escalation under the contract but have also concluded that the delay is attributable to the petitioner without any cogent and clinching evidence. The learned Arbitrator adopted its own formula for payment of escalation to the agency, which is meant to rewriting of the contract. The same is beyond the terms of reference, which

vitiates the award passed by the learned arbitrators. Thus, the claim is rejected. The findings of the learned Arbitrator are set aside.

Claim No.10:

89. Compensation due to prolongation of contract by 12 months on account of reasons not attributable to the claimant resulting in

- (i) Loss of overheads due to salaries and wages of establishment in the prolonged period.
- (ii) Loss of overheads due to machinery and T &P in the prolonged period.
- (iii) Loss of profitability due to prolongation of contract

Claimed: ₹349.04 lac

Award: ₹3,49,04,000/-

90. It is argued by the respondent No.1 that the delay was found by the arbitrator to be on the part of the petitioner. The extension of work was granted by the petitioner till the actual completion date of 22nd June, 2005 without levying any penalty on 12th September, 2005. The work was scheduled to be completed in 18 months but it actually took 12 months extra to complete it. The stipulated date of start was 26th December, 2012 and the work was scheduled to be completed in 18 months by 25th June, 2004. But it was completed on 22nd June, 2005. During the prolonged period of 12 months from 25th June, 2004 to 22nd June, 2005, the contractor's overheads and establishment cost kept running, putting additional financial burden upon the contractor. In this claim, the salaries of staff/officers is included and not of labour. The respondent also suffered loss in the form of depreciation of the machinery, tools and plants. The respondent was also

deprived of earning profits which the respondent would have got by deploying his establishment, staff, T&P elsewhere.

91. The respondent filed statements giving details of the amounts suffered by respondent. Applying the famous Hudson's formula, the contractor calculated the amount. The calculations are given in the statement of facts and claims. The respondent relied upon the following judgments:

1. ***PC Sharma vs. Delhi Development Authority***, 2006(1) Arb. LR 403 Del.
2. ***Delhi Development Authority vs. SS Jetly***, 88 (2000) DLT 653 DB
3. ***Prem Chand Sharma & Co. vs. DDA***, 2005 (3) Arb. LR 472 Del
4. ***Walchand Nagar Industries Ltd. vs. Cement Corporation of India Ltd.***, 99 (2002) DLT 316

The condition no.18 was not referred and relied by the petitioner in its pleadings before the arbitrator. It is being raised now beyond pleadings, as an after-thought. The said clause, even otherwise, does not take any arbitrator's power to grant compensation under Indian Contract Act in case there are breaches on the part of petitioner leading to damages/extra expenses to the contractor.

The arbitrator accordingly awarded a total sum of ₹349.04 lac against this claim. The petitioner could not give any plausible argument against this claim. It is alleged by the respondent that there is no overlapping between claim No.9 and claim No.10, therefore, this claim is also pressed by the respondent.

92. The petitioner alleged that the amount awarded is erroneous on more than one count. The reasons are :

- i) The learned arbitrator committed an error in awarding the said sum without identifying the delay, if any. In a turnkey project, like the present one, it is the respondent who was to do everything.
- ii) The reliance on Exhibits C-72 and C-72A by the learned Arbitrator and recording a finding thereon that, “No convincing evidence has been laid by the respondents in rebuttal to this claim” is misplaced. It is the respondent who has to prove his case. Assuming that the exhibits question had any relevance, the fact remains that the contract being a item base turnkey contract, no extra amount was admissible on any score whatsoever. In any case the cross-examination of the petitioner clearly establishes that the respondent whose foundation is based upon the exhibits in question was confronted with and it was specifically put to the witness of the respondent with regard to authenticity of the said documents. It is absurd for the learned Arbitrator to reach the conclusion that the petitioner did not deny or dispute the admissibility of the claim based upon the exhibits in question.

Conclusion

93. As per condition No.18 of the Special Conditions of the contract, the work had to be adhered to while executing the work in the event there was a delay on account of certain unforeseen situations. It was made clear in the said condition that the petitioner would have no liability to pay any extra amount in the event time was extended for the reasons stated in the said condition.

94. The learned Arbitrator has not considered the said contractual condition and has incorrectly come to the conclusion that the respondent was

liable to be paid with respect to the claim in question. The award hence is contrary to the terms of the contract and is set aside by rejecting the claim of the respondent No.1.

Claim No.11 :

95. Claim No.11: Extra cost incurred due to:

- (i) Underground work having to be done in restricted hours in night due to heavy congested lanes
- (ii) Additional inversions due to non-uniformity of the cross-section of the sewer line
- (iii) Extra desilting to be done continuously on account of silt from parallel line at higher level which was not indicated in tender documents

Claimed: ₹223 lac

Award: ₹2,13,00,000/-

It is submitted by the respondent No.1 that the petitioner during arguments could not point out any flaw in the said award. The arbitrator dealt with all the submissions and clauses referred and relied by the parties in their pleadings. The petitioner referred to condition requiring respondent to take traffic police permission. This was not pleaded by the petitioner before the arbitrator. The contractor drew attention to condition which cast a reciprocal obligation upon the petitioner to assist in getting permission as the petitioner as well as traffic police are government departments and contractor has no control on them. The petitioner failed to act promptly in discharge of this reciprocal obligation and failed to facilitate the work of the

respondent, which was expected of objector under Section 51 and 67 of the Contract Act.

The respondent claimed ₹25 lac against 1st sub-head of this claim. The learned Arbitrator granted ₹15 lac. No fault can be found with this approach of the learned Arbitrator. The Division Bench of Delhi High Court in *Airport Authority of India vs. ICM Airport Technics*, 2006(3) Arb. LR 380 (Del) held that some guess work has to be made in the matter of assessing damages and compensation.

The petitioner did not controvert or give its reply to letters written by the respondent and remained silent. Therefore, the facts stated in these are to be taken as true.

96. The petitioner in its written statement is trying to improve upon its stand in the objection that the reply filed before the arbitrator is introducing new pleadings which were not made by them before the arbitrator. Thus, the objections filed by the petitioner are beyond its pleadings.

The respondent's relevant letters are dated 19th March, 2004, 26th April, 2004, 2nd June, 2004, 19th August, 2004, 9th September, 2004, 29th March, 2005. The resolution dated 3rd July, 2003 is Exh.C-73 detailing the cost of inversions.

97. It is submitted by the petitioner that the learned Arbitrator has awarded the aforesaid sum on the basis of purported absence of cross-examination. The petitioner submits that the said finding and the award is liable to be set-aside with the following reasons:-

- (i) The figure of ₹15 lac is based upon no reasoning. The learned Arbitrator has awarded the said amount merely because he

holds that the amount claimed by the respondent (₹25 lac) was on a higher side. The petitioner submits that it was incumbent upon the learned Arbitrator to have asked for an independent evidence to sustain the plea of the respondent with regard to the claim in question.

- (ii) The learned Arbitrator has employed yet another reasoning saying that because the respondent was working in a difficult condition and for that purpose, the respondent spent higher amount, therefore, the respondent was to be compensated for the said purpose. The petitioner submits that the said reasoning are without any substance and against the written contract which being an item rate turnkey contract. It is argued that assuming but not admitting that the respondent has had to spend extra amount, but the nature of the contract is an item rate turnkey contract, regardless of the amount that was spent. Thus, the respondent is not entitled to the amount claimed.

FINDINGS:

98. The learned Arbitrator records that traffic permission for facilitating the work inspite of an assurance by the petitioner was not obtained and, therefore, the respondent was entitled to the claimed amount. The BoQ enjoins the petitioner to only assist in getting the traffic permission. There was, therefore, no assurance from the petitioner that the traffic permission had to be arranged by the petitioner. Absence of cross-examination does not improve the case of the respondent on the teeth of a document which provides to the contrary. The learned Arbitrator has committed illegality in relying upon a statement and the purported absence of the cross-

examinations while awarding the claim in question. The condition 19(xv) of Special Conditions that was pointed out during the course of hearing with regard to the respondent's responsibility for obtaining the permission was completely ignored. The awarded amount is based on a statement of the respondent. The exhibit that was relied upon was not an independent evidence. Thus, the findings are contrary to the conditions of the contract.

Award on Sub Claim 2 for an amount of ₹183 lac on account of execution of work at Sitaram Bazaar

99. The following are the reasons to set-aside the award:-

In the award of this claim, it was not discussed that it was a turnkey contract. The resolution dated 4th July, 2003 and the reliance placed thereon does not mitigate the case of the respondent as well. The said resolution had a specific agenda i.e. facilitating mode of payment. The resolution in question does not either alter or damage or modify the character of the original contract. The learned Arbitrator has completely ignored the condition of the contract and committed a legal misconduct in relying upon a resolution whose effect is somewhere else.

The learned Arbitrator like the sub-claim 1 has again based the reasoning on the purported absence of the cross-examination of the witness of the respondent. During the course of the arbitral proceedings, an application dated 1st March, 2007 accompanied by a letter dated 1st February, 2005 written by the respondent to the petitioner was filed. A request thereon was made to permit the petitioner herein to place on record the said letter. The said application though was taken on record, yet the learned Arbitrator as is evident from the perusal of the award has failed to either take cognizance or give any reasons as to why the said application

was not considered by the learned Arbitrator. It is argued by the petitioner's counsel that the refusal to take an application and record reasons thereon, hit the mandate of Section 34 of the Arbitration and Conciliation Act, 1996. On this ground alone, the impugned award is liable to be set-aside.

In the letter in question, i.e. the letter dated 1st February, 2005 has a specific purpose to achieve. In the said letter, the respondent informed the petitioner that in the event, there was any difficulty that was to be faced by him while executing the work in Sitaram Bazar, there would not be any extra claim on the respondent's behalf. Had this letter been taken into consideration, the learned Arbitrator would have rejected the contention of the respondent with regard to the admissibility of any amount on the aforesaid score. Though the said letter was produced at the time of evidence by the petitioner, but the strong reliance was placed by the petitioner during the course of arguments. The respondent's counsel has admitted having sent the letter by his client. Just for the purpose of reference, its contents are reproduced here as below:-

“Ref. No.:KAVDEL/DJB/2005/1572

Dated: February 1, 2005

To

The Member (Drainage)
Delhi Jal Board
Govt. of NCT of Delhi
Jhandewalan, Karol Bagh,
New Delhi-110 005

Sub: Rehabilitation/Renovation of 1600-1900 mm dia Indian Express Sewer from Samta Sthal to Tilak Bridge Railway Station and 950x1425mm Egg shaped bazaar Sita Ram Sewer from Turkman Gate to Ajmeri Gate (via Hauz Quazi)

Dear Sir,

We have been called to attend the Technical Committee meeting in

your chamber regarding the reduction in the rates for 950x1425 mm egg shaped sewer due to variation in the size of the sewer. We would like to bring to your kind notice the details as below:

1. Technical:

There have been lots of variations in the subject sewer which were not mentioned in the contract agreement at all, which are:

- a) Change in the direction/alignment of the sewer which caused lot of problems and time loss during the execution of the project.
- b) A parallel sewer is running along the subject sewer at higher invert from which silt always keep flowing in to our sewer causing increase in the cost of desilting and time to complete the work substantially. Even we proposed to desilt this parallel sewer but the department took no interest to do the same.
- c) Bends of 90 degree were found in the alignment of the sewer which is not at all mentioned in the contract document.
- d) The silt level found during de-silting of the sewer was much higher than that of mentioned in the contract agreement.
- e) Before bidding for the work we calculated the cost of the lining of the sewer considering on 4 inversions. But due to the variation in the size of sewer, now we have to do 14 inversions for lining of the sewer by CIPP which in terms has again increased the cost of work.

2. Contractual:

During the execution of the project we had suffered with lot of variations in the work than those mentioned in the contract agreement which is already mentioned above. All these variations have been brought into the notice of the department time to time during the execution of the project. Still we have never been compensated by the department for all these problems we have faced during the execution of the work, being the turnkey project. Therefore, we argue not to reduce the rates. We although feel that the rates should increased keeping in mind all the points elaborated above.

3. Financial:

As mentioned above we had to do only 4 inversions if the site conditions were the same as those of the contract agreement but due to variation in size of the sewer we have to carry 14 inversions as per actual condition of site.

Cost of the Felt: There is no saving in the cost of felt as we have to do 10 more inversions increasing the length of felt by 70 metres.

Resin: Cost of the resin is very small which in terms does not make any big difference.

Extra Set Up: We have to incur huge expenses on account of extra set up because of increase in inversions like machinery and its maintenance, manpower and curing of the lining etc.

We would also like to mention the hike in the exchange rate of the currency which has increased the cost of the project enormously and we would appreciate the department if we are compensated on this account as we have successfully implemented the technology first time in India and have given the new direction to sewer rehabilitation in India. Infact it is a matter of pride for all of us. Hope that we shall get full cooperation from the department. We are of the opinion that these projects must be successful by all means.

Keeping all above mentioned points, we can not reduce the rates of the lining work at any cost. However, we shall not charge more than our quoted price. We will appreciate your cooperation in the matter and will be highly thankful to you.

Thanking you,

Sincerely yours,

For Kaveri Infrastructure Pvt. Ltd.

(Authorised Signatory)”

100. The respondent knew the topography of the area including Sitaram Bazar, as it is evident from the letter dated 20th June, 2002 addressed by the respondent to the petitioner’s Technical Committee. In the said letter, the respondent has recognized that Sitaram Bazar has extreme restrictions of space and has also noted other constraints in the said area. Having recognized the constraints, the respondent offered even a discount of ₹2,20,00,000/-. Evidently, despite of that the respondent sensing the constraints in Sitaram Bazar, the respondent willingly made such an offer. It appears from the said letter that the respondent after having been informed of the constraints was ready to take up the Sitaram Bazar challenge with the

amount so indicated. Therefore, it was not open to the respondent to ask for any extra money. The amount awarded of ₹183 lac is based upon no evidence and contrary to the condition of contract.

Award on Sub Claim 3 for an amount of ₹15 lac on account of laying of a parallel sewer line

101. The award of said amount under this sub-claim is erroneous for the following reasons:-

- (i) The award is again based on a statement of the witness of the respondent. No independent evidence was led by the respondent in support of the claim. The finding does not take into account the plea of the petitioner that the respondent was expected to know the topography of the area well in advance as envisaged in the contract.
- (ii) In a contract that is turnkey the entire responsibility is that of the respondent or else, the nature of contract loses its meaning.
- (iii) There is no condition, as incorrectly recorded, casting a responsibility on the petitioner to obtain various permissions. Rather, there is an express condition that reads, *“Department will assist in getting permission etc. Nothing extra shall be paid being a Turnkey job.....”* coupled with another condition, namely, Condition No.XV which reads as under:-

“Work is to be carried across outer ring road/along busy roads of City Zone areas, inside developed parks of DDA/MCD. Agency shall obtain the traffic department permission and other permission from various departments if required on his own.....”

- (iv) There is not a single letter where the respondent had pointed out that the petitioner failed to assist him in obtaining the requisite permission.

102. The learned Arbitrator commits an error in holding that the amendment on payment is same as that of nature of contract because in letter dated 1st February, 2005 written by the respondent clearly said that if any difficulty arose in executing work at Sitaram Bazar, nothing extra shall be claimed. Despite of this document is on record, the learned Arbitrator refused to consider. The respondent in his letter dated 20th June, 2002 was well aware of the condition at Sitaram Bazar. Even, he went on to offer rebate, as already submitted above. Thus, the entire claim of the respondent is rejected and the findings thereon are set-aside.

Claim No.12:

Extra cost on account of extra cleaning & grouting work having to be done in the portion of Indian Express sewer under the Foreign Post Office Building.

Claimed: ₹50 lakhs

Award : ₹50 lakhs

103. The written statement to the statement on Claim No.12 before the learned Arbitrator was filed by the petitioner but the objections filed by the petitioner are beyond their pleadings, as conditions No.19(xvi) and 22 were not referred and relied by the petitioner in its pleadings before the learned Arbitrator. It is being raised now in arguments beyond pleadings as an after-thought. The said clause, even otherwise, does not affect the grant of award.

104. Learned counsel for the petitioner has argued that Condition No.19(xvi) of special condition providing for prior knowledge and condition

No.22 of General Guidelines are ignored. In any event, the respondent was paid for the sewer line that was desilted. Loop line emanates from the main sewer line. Locating the loop line was his responsibility and there cannot be any liability on the petitioner on this count.

105. It is submitted by the petitioner that the learned Arbitrator awards the aforesaid sum by placing reliance on a statement of the witness of the respondent whereby the said witness placed upon his technical and actual experience and has given the figure of ₹50 lac having been spent on this head. It is wrongly recorded by the learned Arbitrator that the petitioner has failed to produce any material or evidence to demolish the plea of the respondent. This finding is legally incorrect, as the petitioner was not under an obligation to produce documents, as is being erroneously held by the learned Arbitrator in support of the plea raised by the respondent, however, it was submitted that the desilting done for 50 mtrs by the respondent stands duly paid.

Finding :

106. The conditions No.19(xvi) of the Special Conditions and 22 of the General Conditions clearly provide with regard to the requisite knowledge of the contractor of the alignment and locations etc. of the sewer line. It was provided in the said condition that alignment of trunk sewer was proximate to private and government buildings/properties. No damage on this account was permissible and in case such a damage was done then the responsibility was completely that of the respondent. Nothing extra was to be admissible on this account as mandated in the said condition. Likewise, condition No.22 of General Conditions specifies that in the event of any damage to properties/buildings/sewer lines as a result of the work/repair undertaken by

the contractor, the contractor shall be under an obligation to reconstruct and repair such damage caused at his own costs.

In view of abovesaid clause, it is not open for the respondent to claim any extra amount under this head. Even otherwise, condition No.14 of Special Conditions that talk about the safety code, binds the contractor to spend his own money and take all such precautions as are deemed necessary and avoid any accident and protect and support the structures in such manner as the safety measures demanded. It was mentioned therein that the expenses, if any, on the said score would be entirely at the behest of the contractor. Such being the stipulation, the learned Arbitrator, it is apparent, failed to take into account the said conditions in the contract.

107. Payment was released for the main sewer line which the contractor desilted under FPO. The loop line emanates from the very same sewer line. Therefore, during desilting of the main sewer line, the contractor necessarily would have identified the loop line and it is absurd to suggest that substantial expenditure has been incurred by the contractor to locate the said loop line. There is no basis whatsoever for the award of ₹50 lac. In short, the learned Arbitrator completely refused to accept that for awarding a claim it was imperative to assess the evidence. In absence of the evidence to reach a conclusion for the sum in question, the unwarranted figure awarded by the respondent No.2 is not acceptable. Therefore, the claim is liable to be rejected. The finding of the learned Arbitrator is set aside.

Claim No.13

108. The written submission to the claim No.13 filed by the petitioner before the arbitrator and the objections now filed by the petitioner are

beyond their pleadings as alleged by the respondent No.1 who also argued that no fault can be found with this approach of the learned arbitrator to grant ₹60 lakh, given his experience as an engineer. The Division Bench of this Court in *Airport Authority of India vs. I.C.M. Airport Technics*, 2006 (3) Arb. LR 380 (Delhi), held that some guess work has to be made in the matter of assessing damages and compensation.

109. It is argued by the petitioner that the award under the aforesaid head is illegal because of the reasons that the learned arbitrator has given no cogent reasons in awarding the aforesaid sum. Similarly, the respondent had given reasons which were flimsy in character. There was no document on record to suggest that the respondent was directed to airlift the liners. The whole basis of the award is to issue direction to the petitioner. Since the foundation of the award lies on the said alleged direction, the attempt of the learned Arbitrator proceeding to award the amount in question based upon no evidence, was erroneous.

Findings

110. There is a force in submission of the petitioner that it was the responsibility of the respondent to arrange for the materials. In what manner the materials were to be arranged was not the concern of the petitioner. The learned Arbitrator ought to have refused the mischievous claim of the respondent. Even otherwise, the awarded sum has no foundation. There is no evidence. It was illegally allowed in the absence of evidence. Thus, the finding is set aside and claim of respondent No.1 is rejected.

Claim No.14:

111. The claim No.14 was withdrawn before the arbitrator.

Claim No.15 :

112. **Claim No.15: Interest @ 18% per annum on awarded claims amounts.**

Award : ₹5,49,93,013.

113. It is stated by the respondent that the interest cannot be really interfered with in view of the judgment of this Court in *M/s Anurodh Constructions vs. Delhi Development Authority and Anr.*, 2005 ((84) DRJ 314 which followed the Division Bench judgment of this Court in *EM and EM Associates vs. Delhi Development Authority and Anr.*, 2002 (2) Arb. LR 222 (Delhi) (DB) where it was held by the Division Bench that it was not proper for the Court to modify the rate of interest which the arbitrator has granted in exercise of discretion vested in him. In that case, interest had been granted at the rate of 18% per annum. This judgment was followed in the judgment delivered by this Court on 13th December, 2007 in Suit No.147/2000 in *Ravindra Brothers vs. Una Cooperative Group Housing Society*, (supra). Since the objector has deprived the contractor the use of the money, interest is liable to be paid by the objector. The calculation of interest has been done by the contractor at page 1361. The contractor is entitled to further interest @18% per annum on the awarded amount till payment.

114. The learned Arbitrator has granted 18% per annum simple interest i.e. claim No.15 on the awarded claims with effect from 26th September, 2005 to 30th March, 2007. The petitioner submits that such an award on interest is completely erroneous for the reasons that the claim amount and the award thereon are completely without basis. To repeat what has already been submitted, not a single claim awarded by the learned arbitrator is sustainable

in law. The learned arbitrator in fact has rendered the impugned award based upon fanciful claims and no evidence whatsoever. The reasons given by the learned Arbitrator are simply erroneous and do not stand either the scrutiny of law or the mandate of Section 34. The impugned award is perverse and patently illegal. The Contractor/respondent No.1 is not entitled to a single claim.

Claim No.16 :

115. Claim No.16: Arbitration cost

Award: ₹14,77,500/-

116. The case of the respondent is that the arbitrator has dealt with and interpreted all the clauses referred and relied upon by the petitioner. As already stated, it is within jurisdiction of the arbitrator to interpret the terms of the contract. He has not ignored any term or condition of the contract, as alleged that the Arbitrator being a man of experience and expertise, wherever he found that claim is not sustainable, he rejected the same and where he found that claim is excessive, he reduced the amount.

117. The petitioner submits that even the cost as awarded by the learned Arbitrator suffers from infirmities, as the cost allegedly incurred by the respondent was not the making of the petitioner. The arbitration was foisted upon by the petitioner without any justifications. As stated supra, the respondent is not liable to get any amount on any of the claims preferred. Therefore, the cost allegedly incurred by the respondent towards the cost of arbitration was necessarily to be borne by him alone.

FINDING:

118. In view of the rejection of all claims, i.e. claims No.1 to 13 of respondent No.1 who is not entitled to claim raised as claims No.15 & 16, the same are rejected. The findings are set-aside in view thereof.

OMP No.359/2007

119. The second work which is subject to OMP No.359/2007 in respect of rehabilitation of sewer was to complete in 18 months. The period was from 26th December, 2002 to 25th June, 2004 and the total cost was ₹26,37,05,000/- which was extended to ₹42,95,90,000/- with cost of maintenance at ₹8,20,80,000/- thus total cost being ₹34,57,85,000/-. Work was actually completed on 10th February, 2006.

120. Following total 13 claims were taken by respondent No.1:-

(i) Claim No.1:

This claim for ₹484,00,610/- was awarded on account of additional desilting though claim made by the respondent was for ₹484 lac. Since findings are same in both the awards, findings arrived in OMP No.358/07 are equally applicable here.

(ii) Claim No.2:

On account of foreign consultant amount claimed was ₹380 lac while amount awarded was ₹380 lac. This claim is for a period of 38 months, i.e. from December, 2002 to January, 2006 at the rate of ₹10 lac per month. In the other tender which is subject matter of OMP No.358/2007, the period overlapped namely from 26th December, 2002 to 23rd June, 2005 for 32 months. Hence, as opposed to the claim of ₹10 lac month by the respondent, what is awarded for 32

months is ₹20 lacs per month on this head. Findings arrived on merits in OMP No.358/2007 are applicable here also.

(iii) **Claim No.3:**

Rejected, as the same was not challenged by respondent No.1.

(iv) **Claim No.4: (Interest due to delayed payments)**

Claim is ₹115.43 lac while award is ₹34.55 lac. The findings arrived in connected petition are applicable in this case also of this claim.

(v) **Claim No.5: (Interference by Consultant resulting in project delay)**

Claim was for ₹263.70 lac while award was ₹100 lac. The findings made in OMP No.358/2007 are same.

(vi) **Claim No.6: (Repetition of desilting due to flooding of back flow of drains)**

Claim was ₹380 lac and awarded ₹2,68,34,837/-. Findings arrived in OMP No.358/2007 are same.

(vii) **Claim No.7: ₹1,25,1.56 lacs**

This relates to so called confined space evacuation of normal condition etc. Though this claim is rejected curiously for the very same claim on the same ground, amount of ₹1,63,95,368/- in OMP No.358/2007.

(viii) **Claim No.9: (Delay etc.)**

Claim was ₹510.70 lac while award was ₹297.13 lac. (For findings, see the findings arrived in OMP No.358/2007)

(ix) **Claim No.10: (Prolongation of 19.5 months on overhead salaries, loss of profit etc.)**

Claim was ₹597.42 lac while the award was ₹367.64 lac. (See findings arrived in OMP No.358/2007)

(x) **Claim No.12:**

Interest on awarded amount ₹5,24,88,900/- @ 18%. (Findings arrived in OMP No.358/2007 be read in the present also)

(xi) **Claim No.13: (Cost of Arbitration ₹14,77,500/-)**

Final amount: ₹19,31,68,471/-

Interest: ₹5,24,88,900/-

Total: ₹24,56,57,371/-

Same result as arrived in OMP No.358/2007.

121. It is true and is settled law that the scope for interference by the Court with an award passed by the learned Arbitrator is very limited. The Court, while hearing objections against the arbitral award, is not sitting as a Court of Appeal and cannot re-appreciate the evidence. The Court while examining the objections taken to an award is not required to examine the correctness of the claim on merits and the scope is very limited and the Courts have no right or authority to interdict an award on a factual issue. Even if the Arbitrator committed an error in the construction of the contract, that is, an error within his jurisdiction and the same requires no interference. If the Arbitrator considered the entire evidence produced by the parties and that the Arbitrator had not acted beyond jurisdiction and there was no misconduct and that the Court cannot sit in appeal and give opinion different from the Arbitrator. In *ONGC Vs. Dowell Schlumberger (Western) SA*, (1997) 1 Cal LT 486, it was held that even if the Arbitrator has misinterpreted the relevant clauses of the contract in making his award on the impugned terms and even if the interpretation is erroneous, the Court

cannot touch the award as it is within the jurisdiction of the Arbitrator to interpret the contract.

122. It is not denied by Mr.Handoo that the respondent No.1 has done any work of rehabilitation in extra area other than provided in the contract. He has not denied the fact that it was a turnkey contract executed between the parties. He has also admitted that before execution of agreements there were various meetings and inspection were carried out at the site. His main submission is that his client has done excessive and additional work for desilting of sewer for which there were unseen circumstances which were not aware by either party. Therefore, the amount spent by his client is liable to be paid by the petitioner. Though he has denied the fact that the petitioner did not ask his client to do any additional work in the area other than the area allotted as per contract. During the course of hearing no doubt, the respondents were trying to protect the personal conduct of the respondent No.2/Arbitrator but at the same time, it is not denied by the counsel about the pendency of various criminal cases of serious nature about his corruption. Whether the said charges are true or false, the same yet to be decided. But at the same time, while considering the merit of the cases in hand are concerned, it has to kept in mind about the prima facie conduct of the Arbitrator and the courts can close their eyes or inquire the factual position. In case the said practice is allowed, the very purpose of arbitration would be defeated.

123. It is settled law that an award could be set aside if it shocks the conscience of the Court.

(i) In ***Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises and Another***, (1999) 9 SCC 283, it is held that:-

“The Arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.....”

(ii) In ***Food Corporation of India vs. Chandu Construction and Anr.***, (2007) 4 SCC 697, it is held that:-

“From the above extracted terms of the agreement between the FCI and the claimants, it is manifest that the contract was to be executed in accordance with the C.P.W.D. specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project.....

.....The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19th September, 1989, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material.”

(iii) In ***Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd.***, (2007) 8 SCC 466, it has been held that:-

“.....but in the present case we find that when NRL through the communication dated 4.11.1996 have accepted the total value to the extent of Rs.14.19 crores, then there is no reason why this should not have been accepted as they have examined all the items in their letter....”

124. It is not denied by the respondent that it is a turnkey contract and that, price is fixed, to which the respondent himself had agreed. It is not the case of the respondent that it is not a turnkey contract. It is now impermissible to question the character of contract having been a party to the same.

125. It is not disputed by the respondent No.1 that the contract was signed with the clear understanding that rate under the contract was firm and final and that no exaltation in rates being turnkey contract. Despite the admission of the respondent No.1, the learned Arbitrator has totally ignored the stipulations in the contract. In the award, he has forgotten the basic and fundamental terms of the contract. It is evident that he has exceeded his jurisdiction. By ignoring the terms, the learned Arbitrator has travelled beyond his jurisdiction.

126. It is also settled law that jurisdictional error can be corrected by the Court while considering the objections under Section 34 of the Act. It is true that in deciding whether the Arbitrator has exceeded his jurisdiction, the Court has to refer the terms of the contract. In the present case, if one reads the findings arrived at by the learned Arbitrator while allowing the claims of respondent No.1, it is apparent that the learned Arbitrator has exceeded his jurisdiction by ignoring the terms of contract which specifically prohibits the claims raised by respondent No.1 but yet the claims were allowed which are contrary to the terms of the contract.

127. In case, the letters issued by respondent No.1 from time to time, particularly, when the works in question were under progress, the respondent No.1 again and again mentioned in the correspondence not to make any claim of any amount from the petitioner despite of difficult works assigned to them, rather the respondent No.1 offered discount of huge amount to the petitioner in those letters. Even after completion of more than 90% of work, the respondent No.1 issued a letter dated 1st February, 2005 to the petitioner (though it was not taken on record as it was not produced at the time of trial) wherein it was mentioned that the respondent No.1 shall not charge more than quoted price and appreciated the cooperation of the petitioner in the matter and thanked to them.

128. Despite of issuance of large number of letters in the same nature and after receiving the entire amount in terms of the contract, the claims were raised contrary to their admission after invoking the arbitration in the matters.

129. In the case of ***Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises and Another*** (supra), it has also been held that:

“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 & 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 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 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.”

130. Considering all the above facts and circumstances, this Court is of the considered view that the conduct of respondent No.1 who did not raise his voice or demand even up to the completion of work more than 80% rather till almost end, it was again and again communicated to the petitioner not to charge any extra amount, the demand of excessive and additional work even if it is done is unreasonable and after-thought. It is settled law that terms and conditions of the contract between the parties have to be strictly adhered to. Being a turnkey contract, the respondent No.1 is not entitled for any claim raised by the learned Arbitrator whose conduct otherwise appears to be doubtful. Thus, both the awards dated 7th April, 2007 rendered by him are set-aside.

131. No costs.

(MANMOHAN SINGH)
JUDGE

NOVEMBER 29, 2013