

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

+ **O.M.P. 472/2013**

Judgement reserved on: 24.09.2014

% Judgment pronounced on: 17.12.2014.

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Advocate
with Ms. Tanu Priya Gupta and
Mr.Mukesh Verma, Advocates.

versus

M/S BSCPL

..... Respondent

Through: Mr.Amit George and Mr.Ajay Kumar
Jha , Advocates.

And

+ **O.M.P. 305/2013**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA.. Petitioner

Through: Mr Sudhir Nandrajog, Senior Adv with
Ms Tanu Priya Gupta and Mr Mukesh Verma,
Advs.

versus

M/S NCC-VEE (JV)

..... Respondent

Through: Mr Krishna Vijay Singh, Advocate

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. This order shall dispose of the above said two OMPs. Both the cases are taken up together as in both of them, the challenge relates to the interpretation of sub-clause 70.3 (xi) of COPA although in both the cases parties had entered into independent agreements, but the sub-clause 70.3 and other relevant clauses relating to Price Adjustment Formula are identical.

O.M.P. 472/2013

2. The present petition has been filed against the award dated 5th January, 2013.

3. In this case, the respondent, who was the claimant/Contractor before the Arbitral Tribunal, had entered into an agreement with the petitioner for the construction of 4 lane from Km. 208.00 to Km. 251.70 of Ayodhya-Gorakhpur Section of National Highway-28 in Uttar Pradesh, contract Pkg No. LMNHP-EW-II (WB)-package-6.

4. The last date of submission of the bid was 15th July, 2005 and the contract was signed on 19th October, 2005. The total sum of contract was Rs.262,60,20,168/- and the stipulated period of completion was 36 months ending on 23rd October, 2008 but the extension of time was granted by NHAI up to 15th December, 2010. Under the agreement, the contractor was entitled as per the terms of the contract for price adjustment in bills. The

price adjustment was to be done as per the formula agreed upon by parties and incorporated in sub-clause 70.3 of COPA. The contractor had submitted its Interim Payment Certificates (hereinafter referred to as 'IPCs') and claimed price adjustment in these IPCs and the petitioner had released 19 IPCs in terms of the contract. However, thereafter at the stage of 20th IPC and onward, the petitioner introduced a different interpretation to the calculation of the percentages of bitumen, cement and steel (X,Y,Z) factors in the formula of price adjustment and also attempted recovery of the money paid against the 19 IPCs on the ground that over payment had been made.

5. The dispute, therefore, relates to the calculation of percentage of bitumen, cement and steel (X,Y,Z) factor in the price adjustment formula. The petitioner had unilaterally changed the method of calculating the percentage of these factors in price adjustment formula, after clearing 19 IPCs while till that time the petitioner was calculating the percentage of these factors in price adjustment formula, on taking the cost of these factors that is, bitumen, cement and steel used in execution of the work in that month as per the IPC.

6. It is clear from the facts of the case that under the contract, the Engineer was the authority to determine and interpret the terms of the

contract. Uptil 19 IPCs, the Engineer had interpreted the relevant clause pertaining to the price adjustment in one particular manner, i.e., by taking the cost price of bitumen, cement used in execution of the work in the month of IPC. It is also clear from the undisputed facts of this case that the requirement to change the method of calculation of percentage of these factors arose when during the internal audit by the auditors of the petitioner, the auditors had pointed out that the value of X,Y,Z was to be calculated by taking into account the cost of cement, steel and bitumen as it stood 28 days prior to the date of submission of the bids. This audit report was for the period from October, 2007 to March, 2008 and was communicated to the Engineer on 28th March, 2009 i.e. after 5 months after the original date of completion of the contract i.e. 23rd October, 2008 and 40 months after signing the contract.

7. On 25th October, 2008, during the site visit by the General Manager of the petitioner, the Project Director (PD) advised the Team Leader to revise the calculation of price adjustment with an altered interpretation of sub clause 70.3 (xi).

8. Aggrieved by the said unilateral order of the PD, the contractor took up the matter with the PD on 26th October, 2008 and PD sought the

Engineer's opinion. Even, the Engineer vide its letter dated 21st November, 2008 wrote back to the Project Director that in his view the footnote of clause 70.3 (xi), percentage of factors bitumen, cement and steel (X,Y,Z) was the actual percentage of cost of procurement of these articles in the said month, and that they would continue to use the said method till instructed to change it. The petitioners, thereafter, referred the dispute to the Dispute Resolution Board (DRB) consisting of three experts into the field. The DRB had also given its finding in favour of the contractor and against the petitioner and opined that the interpretation given till 19 IPCs by the Engineer, was the correct one. It has held that the value of X,Y,Z as per clause 70.3 (xi) is to be calculated on the basis of procurement cost of the month relating to IPC and not on the basis of the cost of these articles, as it stood 28 days prior to the date of submission of the bids. The petitioner, however, did not accept these findings.

9. The arbitration clause was invoked and the Arbitral Tribunal was appointed. The Arbitral Tribunal has dealt with this dispute between parties as claim No.2

10. The claim No. 2 reads as under:-

*“Claim No.2:- Application of sub clause 70.3 (xi)-
Calculation of Price Adjustment factors X,Y,Z-*

(Unilateral Change of Contract provision after 19IPCs and unjustified recovery of certified payments.”

11. Dealing with this dispute regarding calculation of the price adjustment factors X,Y,Z, the learned Arbitral Tribunal has reproduced the clause 70.3 (xi) (page 17) as under.

“xi. The following percentages will govern the price adjustment of the contract:

<i>1.Labour-Pl</i>	<i>20%</i>
<i>2.Plant and Machinery and Spares-Pp</i>	<i>20%</i>
<i>3.POL-Pf</i>	<i>10%</i>
<i>4.Bitumen- Pb</i>	<i>x %</i>
<i>5. Cement- Pc</i>	<i>y %</i>
<i>6.Steel-Ps</i>	<i>z %</i>
<i>7.Other materials-Pm</i>	<i>50% -(x+y+z)%</i>
<i>Total</i>	<i>100%</i>

(Note: x,y,z are the actual percentage of cost of materials of bitumen, cement and steel respectively used for execution of work as per the Interim Payment Certificate for the month.)

12. Thereafter, after discussing elaborately all the other relevant factors, Arbitral Tribunal gave its findings as under:-

“We observe that the “note” below Sub-Clause 70.3 (xi) explicitly refers to “cost of materials of bitumen, cement and steel respectively used for execution of work as per interim Payment Certificate for a month”. 75% of the cost of procurement of these specified materials, by way of secured advance, has gone into the value ‘R’ the total value of work done during the month. There is no doubt that the quantity is a variable in every IPC. The dispute only is regarding the rate to be taken into account in working out the cost; whether the rate too is to be a variable (current invoice) rate from time to time, or a fixed rate. Had the contract intended only the quantity to be the variable and a fixed predefined rate, the ‘note’ could have been worded as “cost of the quantity of bitumen, cement and

steel respectively used for execution of work as per the Interim Payment Certificate for the month, at rates prevailing on a date 28 days prior to the last date for submission of bids”.

But the note has not been so worded. The interpretation advocated by the Respondent shall clearly amount to rewriting the contract and therefore illegal.”

13. The Arbitral Award shows that the petitioner had also raised the following contentions:-

“5.2.1 That the payment of escalation made in IPC-1 to IPC-19 was made by wrongly calculating the factors x,y,z based on the procurement costs of the specified materials, whereas it should have been calculated on the basis of base rates of these materials as these stood 28 days prior to the last date for submission of the bids. That accordingly, the Engineer was asked to correct this mistake and recover the excess payment so made.

5.2.2 That the Engineer could make such a correction in the payment made in the IPCs under the power vested in him sub clause 60.9 of contract agreement and even when the Engineer had allowed payment 19 IPC based on a certain interpretation of the contract, it did not take away the Engineer’s right to correct the payment with retrospective effects. That Interim Payment Certificate (IPCs) issued to the Claimant are interim payments and open to corrections if any, pursuant to Sub Clause 60.9 of COPA.

5.2.3 That there was no explicit opinion of the Engineer to adopt the method used for calculating factors x,y,z the way he did in IPC-1 to IPC-19, but he had stated that he will follow this very method till such time he was otherwise directed.

5.2.4 That the audit report had observed that “since the cost of IPC for the month are based at BoQ, and the cost of consumption of various components is based on current market price, basis of numerator and denominators is not the same and therefore, the percentage calculation is not correct.”

5.2.5 That the audit report had further stated, “since the cost is not being defined in the contract agreement, whether it is to be determined on base rate and current rate, hence different PIUs are using different basis. The same situation exists here.”

5.2.6 That the IPC value for a particular month is based on value of works executed as per BoQ rates in the contract. That for arriving at a fair calculation of percentage, the numerator and denominator should be comparable. Thus if the values of x, y, z are based on current prices prevailing during the IPC of the month as per the Claimant's stand, then it would make it incomparable to the denominator, i.e., the value of work done in the IPC at the BoQ rates.

5.2.7. That the value of 'R' defined in formulae includes secured advance based on the current procurement cost of materials but the value of denominator should be only the BoQ value of the work executed during the month without adding the amount of secured advance and not the value of 'R'.

5.2.8 That the contract does not say that the factors x, y, z are to be derived based on the procurement cost of these materials.

5.2.9 That the bituminous materials like emulsion should not be included in the specified material 'bitumen', as these could be covered under "other materials".

5.2.10 That the illegal conduct of the parties cannot be legalised or enforced.

5.2.11 And that the incorrect original method of calculating the factors x, y, z was adopted even after the IPC-19 because of the stay granted by the District Court of Basti, that the resulted in an excess payment of Rs. 38,39,52,711/- up to IPC-40 which needs to be recovered."

14. Arbitral Tribunal has elaborately discussed and dealt with the contentions of the petitioner. The Arbitral Tribunal observed as under:-

"6.2.7 we note that the value of the materials is obtained on the basis of actual cost incurred in the procurement of materials as duly evidenced by documents verified by the Engineer in accordance with COPA Sub Clause 60.3 As per COPA Sub Clause 703 the total value of the monthly work is the sum of the BoQ valuation and secured advance for input materials valued at current prices, thereby making it clear that the contract does not equate the BoQ valuation with the so called base price valuation as it existed 28 days prior to the last date for submission

of the bids. Thus the fact that a certain percentage of the current invoice cost goes into the valuation of IPC as secured material advance, cannot be lost sight of.

6.2.8 The price adjustment is taken care of the factors Ci-Co/Co, Si-So/So, Bi-Bo/Bo. These factors continue to remain the same irrespective amount-component of an IPC for any particular material. The 'cost' of materials as defined in the 'note' below Sub-clause 70.3 (xi), is merely used for working out a percentage factor to apportion a part of the IPC valuation for a particular material. Just as these factors are empirically specified to be 20%, 20% and 10% for labour, plant and machinery & POL respectively, the percentage ratios for rest of the material components are stipulated to be worked out on the basis of the cost of these materials that could be varying from IPC to IPC. The cost taken into account in working out the percentage factors x, y & z would affect only the weightage given to a particular material in apportioning a percentage of the IPC cost to that material (parties could have agreed to any mode for working out such apportioning of IPC), but this is not to be mixed up with the price adjustment as such. The note below Sub-Clause 70.3 (xi) does not by any means indicate or imply that cost mentioned therein pertains to a date 28 days prior to the last date for submission of the bids or that it is intended to be taken into account for calculating the x, y & z percentages.

6.2.9. The BoQ rates are quoted by the Claimant to perform the contract with a reasonable expectation of profit. These include all sort of indirect costs, cost of temporary and incidental works, provision for uncertainties and allowance for deficient compensation for escalation in conformity with the stipulation in Sub-clause 70.2 of COPA. Therefore the Respondent's stand that the rates of materials like cement, steel, bitumen 28 days prior to the submission of the bids and that too without adding the cost of transportation to site, of wastage and shortage/handling cost) would be comparable to the BoQ rates is unjust and erroneous.

6.2.10 It may sometimes happen that when the sum of 'x' and 'y' and 'z' is greater than 50%, the percentage factor for 'other materials' might become negative. But since parties have agreed to a certain formula and if at a later stage such an unexpected outcome crops up, a party cannot unilaterally resort to a different interpretation to its advantage in violation of the contract and to the detriment of the other party. In any case, even in such a contingency, the formulae do not become inoperable, since it shall only result in reducing the overall amount of price adjustment by a negative figure for 'other materials'."

15. A question for consideration had come up before Arbitrator. The question was whether a party to a contract, after giving a particular interpretation to the terms of contract for considerable period, can unilaterally change it to the disadvantage of other party.

16. The findings of Arbitral Tribunal is as under:-

“6.2.11 It is an established position that “it parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation of the contract and cannot be allowed to go back on it” (Amalgamated Investment & Property Co.Ltd. vs. Texas Commerce International Bank Ltd. (1981) 3 ALL ER 577). The Hon’ble Apex Court had held in AIR 1950 SC 15 (Abdulla Ahmed vs. Animendra Kissen Mitter) that “*the evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties.....Evidence of acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument*”. The parties had, from the very beginning for more than two years in IPC-1 to IPC-19, acted on a certain understanding of the contract. Additionally, we have already discussed supra that the initial interpretation of the parties was correct and in accordance with the stipulations in the contract.”

It is this award which has been assailed by petitioner.

OMP No. 305/2014

17. In this case, the majority award has been assailed by the petitioner.

The petitioner had invited a tender from pre-qualified contractors for the work of “4 Laning from Km 279.80 to 319.80 of Gorakhpur-Gopalganj Section of NH-28 in Uttar Pradesh. The bid submitted by the respondent was accepted by the petitioner and a letter of acceptance was issued on 09.09.2005. The contract price was Rs.253,11,78,955/-. A formal agreement was drawn between the parties on 25.11.2005. Notice for commencement of the work was issued on 14.12.2005 and work was to be completed within 36 calendar months. The work was already completed in February, 2011 and was taken over on 18.02.2011 and Defect Liability Certificate was issued on 23.02.2012. Under this agreement, the respondent was entitled to the price adjustment of various items while submitting his bills. This price adjustment was agreed upon due to rise or fall in the cost of labour, equipment, plant, materials and other inputs to the work. The price adjustment was to be done in accordance with the formula prescribed therein. As per sub-clause 70.3(xi), the calculation of percentage of X, Y and Z which relates to materials bitumen, cement and steel was to be done. The note underneath provided that X,Y and Z are actual percentage of cost of material of bitumen, cement and steel respectively used for execution of work as per the interim payment certificate for the month. There is no dispute to the fact that

till the 18 IPCs submitted by the respondent, the petitioner had calculated the value of X, Y and Z in this formula as per the actual cost of these articles in the relevant IPCs. However, subsequently, the petitioner changed the method of calculation and started calculating it on the basis of base price of these articles prevalent 28 days prior to the submission of the bids and also wrote a letter dated 28.07.2009 to PIU directing it to take necessary action to recover the excess payments made to the contractor and to apply the new interpretation in future. Thereafter, a letter dated 24.07.2009 was sent by the Project Director of the petitioner to the engineer, thereby requesting the engineer to review all the IPCs immediately. The engineer wrote a letter dated 01.09.2009 to the respondent that an excess payment of Rs.12,81,946.46/- has been made and asked the respondent to repay the excess payment or it would be recovered from the money due. The respondent thereafter filed the OMP No. 484/2009 under Section 9 of Arbitration and Conciliation Act, 1996 seeking stay on the operation of the changed price adjustment mechanism sought to be introduced by the petitioner and this Court stayed the operation of the changed position subject to respondent furnishing bank guarantee to recover the differential amount. This order was upheld by the Division Bench of this Court in appeal vide

order and judgment dated 14.01.2011. Respondent thereafter raised the claim before the Arbitral Tribunal. It is also apparent that the petitioner changed the interpretation of this clause pursuant to an internal audit. Before invoking the arbitration clause, the matter was also referred to DRB. The DRB by a majority decision upheld the interpretation given by the petitioner and rejected the contentions of the respondent. It has been contended before the Arbitral Tribunal by respondent that there was no provision in the contract giving power to the petitioner to direct the engineer to change its opinion. It is further submitted that the change in interpretation of the clause is based on the internal audit report which is not specific to this particular contract. It is further submitted that auditor in his report has referred to 'base rate' by reproducing clause 70.1 from a different contract, whereas no such 'base rates' were stipulated or defined in clause 70.1 of this contract. It is further submitted that the contract specifically provides that the value of the R which is total value of the work done during the month. The secured advance is the value of the materials included in the work. The value of R including the value of materials accounted for in the secured advance is the basis for determining the price adjustment and there is no dispute between the parties in this respect.

18. Before the Arbitral Tribunal, contention of the petitioner was that while calculating the component X,Y,Z, the base rate prevailing 28 days prior to the closing dates of the bids have to be used. It was argued that the words used is actual percentage of cost and not actual cost in the “note” underneath sub-clause 70.3 (xi) and this actual percentage has to be calculated of these three factors bitumen, cement and steel while the notional percentage has been provided in the contract for Labour, Plant and Machinery and Spares, and POL. The spirit behind price adjustment clause was that nobody should suffer and nobody should gain from the same. It is further contended before the Arbitral Tribunal that the term of the contract have to be understood and interpreted in the manner, i.e., “business commonsense”. It has further been contended that engineer was not forced to change his decision. It has also further been contended that the provisions of sub-clause 70.3 are clear and unambiguous and the conduct or understanding of the parties for a long period is not material in the case of an unambiguous and clear stipulation in the contract.

19. The contention of the respondent before the Arbitrator was that the “note” underneath sub-clause 70.3 (xi) clearly stipulates that the cost price of these material used for the work done during the IPC month is to be

considered while putting the value of these components in the price adjustment formula and the petitioner was adopting the same interpretation till payment of 18 IPCs and it changed it in view of the directions of its Auditors during internal audit.

20. The Arbitral Tribunal had crystallized the dispute between the parties as under:-

“57. The sub-clause 70.3 (xi) is the clause which is being interpreted by both the parties differently. Claimant’s contention is that the actual/current cost of bitumen, cement and steel should be used for calculating X,Y,Z and the Employer’s contention is that the cost/rate prevailing 28 days prior to the closing date of submission of bids should be used in the said calculation. This is the dispute between the parties.”

Similar is the dispute raised by the parties before this Court, i.e., relating to the interpretation of clause 70.3 (xi) with which Arbitral Tribunal had already dealt with.

The Arbitral Tribunal has reproduced various relevant clauses of agreement in its award and gave its findings that note below sub-clause 70.3 (xi) does not suggest that cost of bitumen, cement and steel mentioned therein has to be considered as cost of these materials prevailing “as on the date 28 days prior to the last date for submission of bids”. The Arbitral

Tribunal has further observed in para 59,60 and 61 as under:-

“59. We have given a serious consideration to the argument of the Respondent that the use of actual/current cost of cement, steel and bitumen for calculating the values of X,Y and Z is not in keeping with the spirit of the Contract, it contradicts various provisions in the other contract clauses and that such use of these values provides double benefit of escalation etc. We have also considered the argument that logically it would not be proper to use the current cost of these materials in the respective formulae. But if that was so, no one prevented the Respondent from drafting the Sub-Clause 70.3(xi) by making it clear that while calculating the values of X, Y and Z; prices of these materials prevailing as on the day 28 days prior to the date of opening of the bids would be considered. If the sub-clause would have been drafted properly in keeping with the argued intentions of the respondent, the respondent would have felt the need of making clear cut provision in the contract itself to define as to how these prices of the materials prevailing as on the day 28 days prior to the bid opening date are to be arrived at. The contract, as it was executed and entered into does not say so.”

60. On a conjoint reading of these clauses and sub-clauses, it is abundantly clear that what the respondent wants us to read, we are afraid cannot be done. We are duty bound to read and interpret the Contract the way it is made and signed by the parties.

61. When we consider definition of word ‘cost’ as given in sub-clause 1.1(g)(i) of GCC of the contract it all the more implies that the cost of

bitumen, cement and steel to be considered in the note below sub-clause 70.3(xi) has to be considered as actual/current cost. No where the contract mentions that the definition of cost for this particular Sub-Clause has to be understood differently.”

21. The Arbitral Tribunal has dealt with all the contentions of the parties quite elaborately and in its majority Award of two members has given its findings, wherein it has held that the expression ‘cost’ used in sub-clause 70.3(xi) has clearly been defined in clause 1.1 g(i) of General Conditions of Contract. After reproducing all the clauses of the agreement binding the parties the Arbitral Tribunal had rejected the contentions of the petitioner and has concluded that since the cost has been expressly defined in the contract and since there is no mention that the prices of these materials are to be calculated on the basis of base rate prevalent 28 days prior to the date of the bid, the contract had to be interpreted as it had been interpreted by the petitioner till the clearance of 18 IPCs.

22. The Arbitral Tribunal has also dealt with the contention of the petitioner that where the terms of the contract are unambiguous, it has to be read as such and the understanding of the parties for a long time is immaterial. The Arbitral Tribunal has held that the terms of contract has to be read as “it is” and not as “it should be” and while doing so has relied on

the findings of Supreme Court in the case of **Godhra Electricity Co. Ltd. vs. The State of Gujarat**, in Civil Appeal No. 2016 of 1973 and has reproduced the findings as under:-

“In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties- themselves or from their conduct in rendering or in receiving performance under it. (paragraph 14)

In Abdulla Ahmed v. Animendra Kissen Mitter (1960) S.C.R. 30, this Court said that where there remains a doubt as to its true meaning and that evidence of the acts, done under it is a guide to the intention of the parties, particularly, when acts are done shortly after the date- of the instrument.”

23. The learned Arbitrator has also relied on the finding of the Supreme Court in **Central Bank of India Limited vs. Hartford Fire Insurance Col. Ltd.** AIR 1965 SC 1288 and in the award has reproduced the findings as under:-

“Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words, however it may dislike the result.”

The learned Arbitrator after relying on the aforesaid judgments has

held that the ‘*Note*’ provided under sub-clause 70.3 (xi) of COPA read with other relevant clauses of the Contract leaves no scope for us to interfere with the clear meaning it conveys and the same has to be given effect to without regard to any other consideration.

24. The award also shows that the Arbitral Tribunal has discussed each and every contention of the parties and has also even dealt with the examples quoted by the petitioner before it. The Arbitrator has also clearly given due consideration to the argument of the petitioner that current/invoice cost and the BOQ cost are different and that the cost prevailing 28 days prior to the submission of bids was, for a rational ratio, comparable with the BOQ cost and had given its finding and rejected the contention that BOQ rates prevailing 28 days prior to the submission of the bids is to be taken into consideration. In para 75, the learned Arbitrator has made the following observations:

“75. The rethinking by the respondent appears to have started 4 years after the commencement of the work, i.e., 1 year after the completion of the original contract period of 36 months. At the relevant time, the price of bitumen increased abnormally, and as a consequence, in the case of a few IPCs, the sum of X, Y & Z became more than 50 and a negative percentage factor was the result for ‘other local materials’. This obviously and admittedly was an unexpected outcome of the formulae. We find that it is not that the formulae in such situations cannot be implemented.

*When the sum of 'X' 'Y' and 'Z' is greater than 50%, the percentage factor for 'other local materials' becomes negative which acts in reducing and to an extent balancing the higher escalation payable for bitumen, cement or steel. It is not a case where the formulae become absolutely impossible of being implemented. In any case, these are mathematical/empirical formulae where the results could be positive or negative. Parties have agreed to a certain formulae, and if the formulae are not such that they cannot be implemented, a party cannot negate it unilaterally just because the results are not favourable to it. A party cannot unilaterally act on a different interpretation to its advantage. In this regard the Claimant has referred to the decision of Hon'ble Supreme Court of India in **Delhi Development Authority vs. Joint Action Committee Allottee of SFS Flats** (2008) 2 SCC 672 where the Hon'ble Supreme Court has laid down in paragraph 61 as under:-*

“.....Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract making process. The parties thereto must be ad idem so far as the terms and conditions are concerned. If DDA, a contracting party, intended to alter or modify the terms of contract, it was obligatory on its part to bring the same to the notice of the allottee. Having not done so, it, relying on or on the basis of the purported office orders which is not backed by any statute, new terms of contract could (sic not be) thrust upon the other party to the contract.”

It was further held by the Hon'ble Supreme Court in paragraph 80 of the said case as under:-

“A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No

mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot thrust upon a contracting party.”

We observe that very similar situation has arisen in the present case. The Respondent felt the need to alter the ordinary meaning of the sub-clause 70.3 (xi). It has been brought on record that it indeed did so in its similar future contracts. It also wanted to implement the same changes in the Contract, which had already been signed and was in force. To this extent there was nothing wrong. However, thereafter the Employer implemented these changes unilaterally without holding any deliberations with the Claimant, who is also a party to the Contract. We cannot support this action of the Respondent as we do not have the liberty to traverse outside the four corners of the Contract.”

The Arbitral Tribunal has also clearly held that the contract cannot be unilaterally altered. The argument of the petitioner before the Arbitral Tribunal that the interpretation given by the engineer regarding 18 IPCs was a mistake and that under the contract, the engineer was authorized to correct his mistake at any stage has also been dealt with and the Tribunal has based its findings on the findings of the Supreme Court in **Bharat Sanchar Nigam Limited Vs. BPL Mobile Cellular** 2008 (8) SCALE 106.

The Supreme Court in the said case has held as under:

“26. If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded

contract. Such an exercise having not been resorted to, we are of the opinion that no interference with the impugned judgment is called for.

32. Indisputably, mistakes can be rectified. Mistake may occur in entering into a contract. In the latter case, the mistake must be made known. If by reason of a rectification of mistake, except in some exceptional cases, as for example, where it is apparent on the face of the record, mistake cannot be rectified unilaterally. The parties who that would suffer civil consequences by reason of such act of rectification of mistake must be given due notice. Principles of natural justice are required to be complied with. The fact that there was no mistake apparent on the face of the records is borne out by the fact that even the officers wanted clarification from higher officers. The mistake, if any, was sought to be rectified after a long period; at least after a period of three years. When a mistake is not rectified for a long period, the same, in law, may not be treated to be one.”

Relying on that, the Arbitrator has rejected the contention of the petitioner that it was not such a mistake which could be unilaterally rectified. While holding so, the Arbitral Tribunal had also relied on the findings of Lord Denning in **Amalgamated Investment & Property Co. Ltd. vs. Texas Commerce International Bank Ltd.** cited as (1981) 3 ALL ER 557 (Volume C-3 Page 175-183). The relevant paragraph is reproduced in Award:-

“If the parties to a contract, by their course of dealing, put a particular interpretation o the terms of it, on the

faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it, that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.”

The Arbitral Tribunal has also relied on the following findings in the case of **Godhra Electricity Co. Ltd.** (*supra*):-

“Parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actions as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. it is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when knows that the first party is acting on reliance upon the interpretation.”

Therefore, it is clear that the findings of the Arbitral Tribunal are based on the settled principle of law. The Arbitral Tribunal has also relied on the rule of contra proferentem which means that an ambiguity, if found in a contract, has to be interpreted against the author of the contract. Undoubtedly, the petitioner is the author of the contract.

25. The petitioner in both the OMP's aggrieved by finding of the Arbitral Tribunals on the issue of interpretation of sub-clause 70.3(xi) has approached this Court by way of present petitions under Section 34 of the Act.

26. Mr. Sudhir Nandrajog, learned senior counsel for the petitioner has contended that the Arbitral Tribunals has erred in holding that the value of X,Y,Z is to be calculated on the basis of actual cost of procurement and not on the basis of base rate, i.e. rate prevailing 28 days prior to the closing date of submission of the bid. It is also argued that Arbitral Tribunals have ignored the fact that cumulative weightage of bitumen, steel and cement should not exceed 50% as the same renders the value of other materials as negative. The incorrect application of Sub-clause 70.3 has resulted in the cumulative weightage of the said materials exceeding 50% resulting in negative value of other materials. The interpretation given by the Arbitral

Tribunals to clauses 60 and 70 of COPA is also incorrect and contrary to the meaning of the aforesaid provisions in the contract.

27. It is also argued that if the said formula is adopted then for a particular IPC, the total value of the work done could be more than what was included in that IPC. Also, by applying the relevant whole sale price index, the element of inflation affecting the price of a particular material during a given period of time would be adequately compensated and that it was the intent of clause 70 of the COPA. It is also contended that the interpretation given is going to enrich respondent. It is further stated that Arbitrator has allowed untenable and unsustainable claims of the respondents.

28. It is also contended that as per sub-clause 60.9, the Engineer is empowered to make any correction or modification in any previous IPCs as the payments released under the IPCs are on-account payments, subject to final calculations in terms of contract, and that the interpretation now given by the Engineer to these clauses is the correct interpretation. It is further contended that the Arbitral Tribunal has erred by taking the value of R in the denominator.

29. It is further contended that the Arbitral Tribunal cannot go beyond explicit terms of contract. (Reliance is placed on findings of Supreme Court

in *Oil and Natural Gas Corporation Ltd vs. Saw Pipes Ltd.*, 2003(2)

Arb.LR(5) SC para 40) and has reproduced the same in petition as under:-

“in constructing a contract, the Court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it.”

30. In OMP No. 305/2014, it is contended that rejection of claim of the petitioner by Arbitral Tribunal for recovery of sum of Rs.12,81,946.46/- which had been paid in excess from IPC No. 1 to 18 is in violation of the contractual provisions and against the public policy and hence patently illegal.

It is submitted that the findings of Arbitral Tribunals on the issue of interpretation of sub-clause 70.3 (xi) are erroneous, and contrary to terms of agreement and liable to be set aside. It is further contended that the interpretation which has been given by the Arbitral Tribunals to this clause leads to payment of excess money to the respondent and this causes loss to the public exchequer and hence award is against the public policy and so liable to be set aside.

31. Both the petitions are contested by the respondents. The contention in both cases in relation to legal proposition is that the Arbitral Tribunal has

given the correct interpretation to the Clause 70.3 (xi), and the findings of the Arbitral Tribunals regarding interpretation of the terms of the contract are final as the same are within the exclusive domain of the Arbitral Tribunals and the courts cannot interfere with said findings simply on the ground that another interpretation is possible. The courts also cannot re-appreciate the evidence. Reliance has been placed on the findings in the cases –(a) 2010 (1) ArbLR 589 (Del) NHAI Vs. UNITECH-NCC JOINT VENTURE (Para-9), and 178 (2011) DLT 496 (DB) NHAI Vs. UNITECH-NCC-JV, (b) 2009 (SUPPLE 2) ArbLR 107 (Del) (DB) NHAI Vs. AFCONS INFRASTRUCTURE LTD. Para 10 & (c) 2009(3) ArbLR 268 (Del) NHAI Vs M/S ITD CEMENTATION INDIA LTD.

32. Both the OMPs have been defended on the same grounds. Plea taken is that once a contract is understood and acted upon in a particular way, the interpretation of its terms cannot be changed unilaterally. It is also contended that under the contract, petitioner has no power to direct the engineer to interpret the contract in a particular manner. It is submitted that parties are bound by written agreement between them. It is further contended that nowhere in the contract, it is mentioned that the expression “cost” used in the sub-clause 70.3(xi) for the material bitumen, steel and

cement, used in the work done during the month of IPC, has to be the cost of these materials prevalent 28 days prior to the submission of the bid. It is contended that the Arbitral Tribunals have not gone beyond the terms of the contract and have correctly interpreted the contract giving the plain meaning to the words used in the contract. It is further argued that since it is a settled law that when a plausible interpretation to any clause of the agreement is possible and the Arbitrator has given the award based on that plausible interpretation of the terms of the contract then the Court cannot set aside the award solely on the basis that another interpretation is possible. It is further contended that awards do not suffer with any infirmity or illegality and simply because the findings of the Arbitral Tribunals do not suit the petitioner, the award cannot be set aside.

33. In OMP No. 472/2014, it is further submitted that the petitioner had paid only the interim payment of Rs.5,87,00,361/- against which the respondent had furnished bank guarantee, which was subsequently released, therefore, the interest has been rightly awarded by the Arbitrator. The respondent has also incurred the expenses of Rs.19,54,781/- charges for renewing the bank guarantee which do not form the part of the award. It is argued that in the present case, the Arbitrator has upheld the interpretation of

clause 70.3 which had been adopted by the petitioner himself till 19 IPCs and thereafter had unilaterally changed it, which act was contrary to the terms of the contract. Hence, the petition is liable to be dismissed.

34. I have given due consideration to the rival contentions of the learned counsels of the parties in both the cases and have perused the record.

35. There is no dispute to the fact that in terms of sub-clause 70.1 of the contract, the respondents were entitled to price adjustment and the formula for calculation of the price adjustment is noted in sub-clause 70.3. The dispute between the parties simply relates to the interpretation of clause 70.3 (xi) of the contract. This clause deals with the calculation of percentage of three components steel, bitumen and cement which governs the price adjustment of the contract. Sub-clause 70.1 of COPA states that the contractor is entitled for the price adjustment and this price adjustment is necessitated due to rise or fall in the cost of labour, etc. The said clause is reproduced as under:-

“Sub-Clause 70.1: Price Adjustment:

The amount payable to the Claimant, in various currencies pursuant to sub-clause 60.1, shall be adjusted in respect of the rise or fall in the cost of labour, contractor’s equipment plant, materials and other inputs to the works, by applying to such amounts the formulae prescribed in this

Clause.

*Sub-Clause 70.3 **Adjustment Formulae***

Contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures as per formulae given below. The amount certified in each payment certificate is adjusted by applying respective price adjustment factor to the payment amounts due in each currency.

- a.*
- b.*
- c. Following expressions and meanings are assigned to the work done during each month:*

R = Total value of work done during the month. It would include the value of materials on which secured advance has been granted, if any, during the month, less the value of materials in respect of which the secured advance has been recovered, if any, during the month. This excludes the cost of work on items for which rates were fixed under variations clause (51 and 52) for which the escalation will be regulated as mutually agreed at the time of fixation of rate.

*(ii) **Adjustment for Cement Component***

Price adjustment for increase or decrease in the cost of cement procured by the Contractor shall be paid in accordance with the following formula:

$$V_c = 0.85 \times P_o / 100 \times R_i \times (c_i - c_o) / c_o$$

P_c = Percentage of Cement component of work.

*(iii) **Adjustment for Steel Component***

Price adjustment for increase or decrease in the cost of steel procured by the Contractor shall be paid in accordance with the following formula:

$$V_s = 0.85 \times P_s / 100 \times R_i \times (s_i - s_o) / s_o$$

Ps= Percentage of steel component of the work.

v. **Adjustment for Bitumen Component**

Price adjustment for increase or decrease in the cost of bitumen procured by the Contractor shall be paid in accordance with the following formula:

$$Vb = 0.85x Pb/100 x Ri \quad x (Bi-Bo)/Bo$$

Pb= Percentage of bitumen component of work.

xi. *The following percentages will govern the price adjustment of the contract:*

1.	Labour-Pl	20%
2.	Plant and Machinery and Spares-Pp	20%
3.	POL-Pf	10%
4.	Bitumen- Pb	x %
5.	Cement- Pc	y %
6.	Steel-Ps	z %
7.	Other materials-Pm	50% -(x+y+z)%
	Total	100%

(Note: x,y,z are the actual percentage of cost of materials of bitumen, cement and steel respectively used for execution of work as per the Interim Payment Certificate for the month.).”

36. In formulae given for price adjustment of cement, steel and bitumen in the above sub-clause 70.3 (ii) (iii) and (v), Pc, Ps and Pb is the percentage of cement, steel and bitumen.

37. Clause 70.3 (xi) provides the method of calculation of the percentage of these components that is Bitumen, steel and cement which will govern the price adjustment. While the percentage of the components relating to

labour, plant and machinery and spares, and POL has been fixed as 20%, 20%, 10% respectively, the percentage of components bitumen (Pb), Cement (Pc) and steel (Ps) is X, Y and Z percentage respectively. The percentage of other materials PM 50% $-(X+Y+Z)\%$ and thus the formula requires that it should total as 100%.

38. The note below this clause provides the method of calculation of the factors X,Y and Z. The note clearly stipulates that X,Y,Z are the actual percentage of cost of material used for execution of work as per the Interim Payment Certificate for the month. This clause has no reference to the base price but relates to the procurement price of these materials, i.e., the cost incurred by the contractor towards these materials which he has used for execution of the work done by him as per his Interim Payment Certificate of that month. This simple interpretation has been adopted by the petitioner's Engineer till the 18 and 19 IPCs. Even when the opinion of the Engineer was sought by the PD, he had reiterated that procurement price of these articles used as per that month's IPC would determine its percentage in the price adjustment formula.

39. It is abundantly clear that the Engineer changed the interpretation of this clause only when the petitioner had insisted upon him to do so.

Thereafter, instead of calculating the percentage of Pb, Ps and Pc on the basis of procurement price of these components as per the relevant IPC, the calculation was done by using the base price prevalent 28 days prior to the last day of submission of the bid. The petitioner changed its interpretation from cost price to base price only when the auditor, in the audit report for the audit conducted for the period October, 2007 to March, 2008 had observed that the percentage calculation is not correct since the cost has not been defined in the contract agreement.

40. The Arbitral Tribunals have dealt with the report of the auditors and in OMP 472/2013, the Arbitral Tribunal has clearly held “*the audit report was generic in nature covering 23 contract agreements*”. The arbitral tribunal also observed that “*since the audit report is not specific to this particular contract and since the wording of several clauses are not identical in other contract but vary from contract to contract, it cannot be made applicable to this particular contract specially when there are various inconsistencies and factual errors in this report relating to the contract before us. For example the report observes that different PIUs (Project Implementation Units) are using different basis since ‘cost’ is not defined in the contract, but contrary to this assertion cost has been explicitly defined*

in the contract before us.”

In OMP No. 305/2014, the Arbitral Tribunal has observed that there is no dispute to the fact that in the contract under challenge, the cost has been defined as under:-

41. Clause 1.1(g) (i) of Contract reads as under:-

“(g) (i) “cost” means all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.”

42. The Arbitral Tribunals have concluded that the audit report, pursuant to which the petitioner had asked its Engineer to change the interpretation of sub-clause 70.3 (xi) was not specific to this contract and the auditors while giving its report have not considered the various terms and conditions of these contracts. On the other hand, Engineer has been interpreting the each contracts in the light of its terms and conditions. In OMP No. 472/2014, the opinion of Engineer, DRB and Arbitral Tribunals have been unanimous. They all had found that the value of X,Y and Z is to be calculated on the basis of cost price and not on base price.

43. The present petition is under Section 34 of the Arbitration and Conciliation Act and the scope of powers of this court to interfere with the

award has been reduced considerably in the new amended Arbitration and Conciliation Act, 1996. An arbitral award can be assailed under Section 34 of the Act only on the ground enumerated therein, i.e., when the applicant furnishes the proof that he was under some incapacity, or that the arbitration agreement was not valid under the law, or that he did not have any proper notice of the appointment of the arbitrator or of the arbitral proceedings or otherwise unable to present his case, or that arbitral award deals with the dispute not contemplated by or not falling within the terms of the submission of the arbitration, or where the composition of the arbitral tribunal or arbitral proceedings was not in accordance with the agreement of the parties or unless such agreement was not in accordance with the provision of the Arbitration Act where the dispute was not capable of settlement, or where the arbitral record is in conflict with the public policy of India.

44. The petitioner has challenged the awards on the grounds that the findings of the Arbitral Tribunals are not correct, the same are erroneous and that the interpretation given by the Tribunals to the several clauses of the contract is not only wrong but would also lead to heavy loss to public exchequer and hence against the public policy. It is submitted that the

petitioner is doing the work entrusted to it by the Central Government.

45. The sole question therefore is whether the findings of the Arbitral Tribunal are against the public policy. The public policy has been defined by the Hon'ble Supreme Court in Oil and Natural Gas Corporation Ltd vs.

Saw Pipes Ltd., AIR 2003 SC 2629: 2003(2) R.A.J. 1

"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 1994 Supp (1) SCC 644 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."

The legal position was crystallized in the later decision in *Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited*, (2009)

10 SCC 63 thus (SCC, p. 78):

"18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings."

The challenge to awards before me is on the ground that the

interpretation given by Arbitral Tribunal to the sub-clause 70.3(xi) is erroneous and thus against the public policy.

46. A similar question had come up before the Court in **National Highways Authority of India Vs. ITD Cementation India Ltd.** reported in 2007 (5) RAJ 642 (Delhi). The petitioner in that case had also challenged the findings in the arbitral award on the ground that the interpretation given by the arbitrator to the term of the contract was against the public policy.

The Court has given the findings as under:-

“ Suffice it to say that the arbitrators not only looked into the provisions of the contract but also examined the issues like whether minor minerals used for construction of highways were or were not included in the basket of materials whose cost variation is taken into consideration as an input in the assumption of the wholesale price index (WPI). Such being the position, simply because the interpretation placed by the arbitrators has not favoured one or the other party can be no reason for the Court to interfere under Section 34 of the Act with the award made on any such interpretation. It is fairly well settled by a long line of decisions rendered by the Supreme Court that a Court dealing with a petition under Section 34 of the Arbitration and Conciliation Act, 1996 does not sit in an appeal over the arbitral award. That was the position even under the Arbitration Act of 1940. As a matter of fact, the scope of interference with an arbitral award has been substantially reduced under the new legislation and would be confined to the grounds set out under Section 34 of the Act as interpreted by the Supreme Court in Oil and Natural Gas Corporation Ltd vs. Saw Pipes Ltd., AIR 2003 SC 2629: 2003(2) R.A.J. 1. We, therefore, see no reason to take a view different from the one taken by the learned Single Judge that the award made by the arbitrators cannot be interfered with simply on the ground that another interpretation of the terms of the contract, no matter equally plausible, was possible.”

In both the cases before me, the Arbitral Tribunal while giving its findings regarding interpretation of sub-clause 70.3(xi) have referred to all the relevant clauses relating to price adjustment formula and then reached to a conclusion. It is also clear that the Arbitral Tribunals have in fact upheld the interpretation adopted by the petitioner till its internal Auditors report. It has, in fact, accepted the interpretation of sub-clause 70.3 (xi) given by the engineers approached by the petitioner and found that that was the only possible interpretation that could be given to unambiguous sub-clause and any other interpretation would amount to re-writing the contract.

47. The Supreme Court in **National Highways Authority of India Vs. Unitech-NCC Joint Venture** reported in 2011 (Suppl.1) Arb.LR.94 (Delhi) (DB), while dealing with the scope of interference by Courts where arbitrator has given its findings on the interpretation of the terms of contract after relying on various case laws, has observed as under:-

“para 7. It is obvious that the interpretation of the contract forms the fulcrum of the dispute between the two adversaries before us. As already mentioned, the power to interpret the contract was reposed in the ‘Engineers’ as per Clause 5.2.1 of the contract. The Engineers, on a thorough and lucid examination of the contract, have concluded that escalation was contractually payable on the contract itself as well as on any variation thereto. Even under the regime of the repealed Arbitration Act, 1940, Their Lordships have opined in the celebrated judgment of **Sudarsan Trading Company vs. Government of Kerala**, (1989) 2SCC 38= 1989(2) Arb.LR 6 (SC)

inasmuch the court reiterated the position that –“*Once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the arbitrator on which the court cannot substitute its decision.*”

The continuity of this opinion is manifest from a reading of **H.P. State Electricity Board vs. R.J. Shah & Co., (1999) 4SCC 214= 1999(2) Arb.LR 316 (SC)** inasmuch the court reiterated the position that –“*when the arbitrator is required to construe a contract then merely because another view may be possible the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award.*” **Numaligarh Refinery Limited vs. Daelim Industrial Company Limited, (2007) 8 SCC 466=2007 SCACTC471 (SC)=2007(3) Arb.LR 378 (SC)** records that *with regard to the interpretation of a contract, the decision of the arbitrator should not be interfered with by the court.* After advertng to **Tarapore & Company Vs. Cochin Shipyard Limited, 1984 2 SCC 680= 1985 Arb. LR2 (SC)**, Their Lordships recorded that “*there can be no quarrel with the proposition that –if a question of law is specifically referred to by the parties to the arbitrator for decision, award of the arbitrator would be binding on the parties and court will have no jurisdiction to interfere with the award even on ground of error of law apparent on the face of award.*”

Very recently, in **McDermott International Inc.vs.Burn Standard Co.Ltd., (2006) 11 SCC 181=2006 SCACTC 283 (SC)=2006 (2) Arb.LR 498 (SC)**, after perusal of a plethora of precedents, Their Lordships have enunciated this aspect of the law in the following manner:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by

taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. ONGC: AIR 2003 SC 4519=2003(3) Arb. LR 409 (SC) and D.D. Sharma v. Union of India, (2004) 5 SCC 325=2004(2) Arb. LR 119 (SC)].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

114. The above principles have been reiterated in Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders and Contractors: AIR 2004 SC 1330=2004(1) Arb. LR 156 (SC), Union of India v. Banwari Lal and Sons (P) Ltd. AIR 2004 SC 1983=2004(2) Arb. LR 81 (SC), Continental Construction Ltd. v. State of UP. : (2003) 8 SCC 4 and State of UP. v. Allied Constructions: (2003) 7 SCC 396 Arb. LR 106 (SC).

8. In the case before us, the Arbitral Tribunal has unequivocally upheld the interpretation of the contract expressed by the 'Engineers' who have been contractually empowered by the parties to impart meaning to the sundry clauses of the subject Agreement.

9. It would be perilous and constitutionally unjustifiable to ignore and lose sight of Parliament's endeavour to curtail curial interference in arbitration awards. Section 34 of A and C Act does not contemplate the existence of errors on the face of the Award, which the Supreme Court has clarified to be beyond judicial interference. The learned Single Judge has, in the impugned Order, rendered a threadbare consideration of the terms of the Contract and his conscience has not been provoked in the least bit. The learned Single Judge has failed to find any infraction of the public policy of India. However much we stretch our

thinking, we cannot conceive of a construction of the contract contrary to that carried out by the Competent Authority and more particularly by the learned Single Judge. Interference by us will be justified if the views of the learned Single Judge can be perceived as a perversity.”

48. From the above findings of the Supreme Court, it is emphatically clear that the award can only be set aside in terms of Section 34(2). The courts have no jurisdiction to set aside the award on any ground other than those specified in the Section. The courts are not supposed to sit in appeal, re-appreciate the evidence as an appellate court. This observation has been made by the Supreme Court in Judgment **P.R. Shah, Shares and Stock Brokers Private Limited Vs B.H.H. Securities Private Limited and other,** (2012) 1 SCC 594.

49. Relevant para 21 of the said judgment is reproduced as under:-

“21. A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act...Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

50. Also in the case of **Numaligarh Refinery Ltd. Vs Daelim Industrial Co.Ltd.** (2007) 8 SCC 466 = 2007 SCACTC 471 (SC) = 2007(3) Arb.LR 378 (SC); the court has clearly held that where the interpretation given by the arbitral tribunal to the contract is a plausible interpretation, the court should not interfere even if a different interpretation is plausible.

51. The Supreme Court has consistently been of the opinion that the court should refrain itself from interfering with an award if the award is well reasoned, based on the substantive law and within the four corners of the terms of the contract and where there is no patent illegality on the face of it.

52. It is also settled law that an award cannot be set aside simply because a party feels that the award is unfair or unreasonable, unless the unfairness and the unreasonableness shock the conscience of the court. (Reliance is placed on **J.G. Engineers Private Limited vs. Union of India and another, (2011) 5 SCC 758**).

53. In the present case, the petitioner has failed to show any illegality in the awards. There is nothing in the Awards which shocks the conscience of this Court. No error that can be said to be apparent on the face of the award has also been pointed out. From the contentions of the petitioner, it is apparent that it has challenged the award only on the ground that the interpretation given by the arbitrator to the term of contract is erroneous.

54. In **McDermott International Inc (supra)**, it has been held that unless the illegality is of such a nature that it is not only patent but goes to the very root of the matter, it can be said that the award is against the public policy. If the illegality is not patent or does not go to the very root of the matter but

a frivolous or trivial illegality, such an award is not against the public policy.

55. In the present case, petitioner has failed to point out any illegality in awards. In these cases, even two interpretation of the terms of the contract is not possible. There is only one interpretation that can be given to the terms of the contract which is what has been given by Engineers of the petitioner, and upheld by the Arbitral Tribunals after elaborate discussion in the Awards.

56. The Supreme Court in the case of **Bharat Coking Coal Ltd. vs. L.K. Ahuja** (2004) 5 SCC 109 has clearly held that even if two views are possible, the view taken by the Arbitrator would prevail and the Courts have no jurisdiction to interfere with such an award. The Court has observed as under:-

“There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for.”

57. In a recent judgment of **M/s Navodaya Mass Entertainment Ltd. vs. M/s J.M. Combines**, Civil Appeal Nos. 7128-7129 of 2011, decided on

26.08.2014, the Supreme Court again has reiterated the same principle and relying upon the **Bharat Coking Coal Ltd.** (*supra*) and other decisions held that “*once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail.*”

58. In the present case, the Arbitral Tribunals have discussed all the contentions raised before it by the petitioner and the evidence produced and the case laws relied upon and then have given its well-reasoned findings.

59. For the foregoing reasons, there exists no ground to interfere with the findings of the Arbitral Tribunals. Both the petitions are hereby dismissed with no order as to costs.

DEEPA SHARMA, J.

DECEMBER 17, 2014

Sapna/BG