

HIGH COURT OF MEGHALAYA
AT SHILLONG

Arb.A. No. 1/2023 with
MC(Arb.A.) No. 1/2023
MC(Arb.A.) No. 7/2023
Arb.A. No. 2/2023 with
MC(Arb.A.) No. 2/2023
MC(Arb.A.) No. 12/2023
Arb.A. No. 3/2023 with
MC (Arb.A.) No. 3/2023
MC(Arb.A.) No. 13/2023
Arb.A. No. 4/2023 with
MC (Arb.A.) No. 4/2023
MC(Arb.A.) No. 14/2023
Arb.A. No. 5/2023 with
MC (Arb.A.) No. 5/2023
MC(Arb.A.) No. 15/2023

Heard on: 22.05.2023, 23.05.2023,
24.05.2023 and 25.05.2023
Date of Judgment: 30.05.2023

The North Eastern Electric Power Corporation Limited Vs. M/s Patel Engineering Limited

The North Eastern Electric Power Corporation Limited Vs. M/s Advance Construction Pvt. Ltd.

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. H. A. Ahmadi, Sr Adv. with
Mr. V.K. Jindal, Sr Adv.
Mr. K. Lahiri, Adv.
Mr. R. Sharma, Adv.
Mr. A. Atreya, Adv.
Mr. V. Kumar, Adv.

For the Respondents : Mr. A. Dholakia, Sr Adv. with
Mr. A. Bhan, Adv.
Mr. K. Gaur, Adv

Mr. R. Dangwal, Adv
Mr. R. Chawla, Adv
Ms. A. Kulshrestha, Adv

i)	Whether approved for reporting in Law journals etc.:	Yes
ii)	Whether approved for publication in press:	Yes/No

JUDGMENT

Hon'ble, the Chief Justice:

The challenge here is to five arbitral awards – three of them made on August 21, 2016 and the other two on October 14, 2016 – pertaining to three lots of work in respect of the Turial Hydro Electric Power Project on the Turial river system in the Aizawl district of Mizoram and two connected road construction contracts. The ultimate work involved the setting-up of a power station with two 30 MW hydro-turbines.

2. The appeals are directed against a common judgment and order of September 12, 2022 as corrected by a further order of October 26, 2022. The parties agree that since the disputes pertaining to the several lots of work and the two connected road construction projects were dealt with together by taking up the five references analogously, the appeals arising out of the distinct awards may be dealt with by a common order.

3. Two fundamental grounds of challenge are fashioned by the North-Eastern Electric Power Corporation Limited which had engaged respondent Patel Engineering Limited for setting up the power project. According to the appellant, two sets of references arose pertaining to different periods of time and covering the same project. The order for references passed by the Gauhati High Court, for all intents and purposes, required both sets of references pertaining to different periods of time to be taken up and adjudicated simultaneously. The appellant asserts that since the second set of references can no longer be taken up by the arbitral tribunal which rendered the awards impugned herein, these awards must go and the entirety of the matter referred to the tribunal considering the references pertaining to a later period as such references are at an advanced stage of hearing. The second fundamental objection taken to the awards is that the arbitral tribunal was biased as it had obtained hospitality from the respondent and had put up at the respondent's guesthouse in New Delhi. On such count, the appellant maintains that before the second set of references got underway in right earnest, it came to the knowledge of the appellant that the arbitrators had accepted the hospitality of the respondent herein and, possibly, shared meals with officers of the respondent, whereupon the appellant

applied for the mandate of the arbitral tribunal to be terminated. Following such application by the appellant, the arbitral tribunal voluntarily declined to take up the second set of references.

4. According to the appellant, since the arbitral tribunal voluntarily surrendered its mandate following the application alleging bias filed by the appellant, the impugned awards should not be allowed to stand particularly as there is a possibility of conflict of orders in the interpretation of the clauses of the common contracts in the two sets of references.

5. The appellant explains that it was necessary to make five references culminating in a common hearing of the references since there were five different contracts; the first of them pertaining to civil works for the diversion and tunnel, for the dam and for the power house; the second for supply and installation of the hydro-mechanical equipment for the project; the third for the supply and installation of the electrical and mechanical equipment for the generating units; and the two others for constructing a 17-km stretch and another 13-km stretch of road. In terms of the impugned awards, the respondent is to get in excess of Rs.56 crore in principal together with pre-reference and pendente lite interest at the rate of 18 per cent per annum simple from

December 18, 2005 till August 21, 2016 and post-award interest from October 22, 2016 at 12 per cent per annum simple.

6. On merits, the appellant has challenged the awards on the claims made and the sums awarded in respect of interest; delay in supply of explosives; delay and short supply of cement and steel; damages on account of collapse of tunnel; damages on account of deviation in the rock strata in the tunnel; additional costs incurred for extraction of boulders; additional costs for preparing the access road; and, damages for delay in issuing the construction drawings.

7. The appellant complains that in respect of the several impugned heads of claim, as in the claims of interest, delay in supply of explosives and delay or short supply of cement and steel, the arbitrators have acted in excess of their authority and have ignored express provisions of the contracts prohibiting any award on such heads. In respect of the challenges to the other heads of the award, the appellant claims that on a meaningful reading of the relevant provisions of the overarching matrix contract, it will be evident that there were express provisions prohibiting any claim to be made in respect of such matters or, at least, the prohibition ought to have been reasonably implied from the terms of the individual contracts. The further ground of challenge is that in awarding

sums under several heads, there is patent illegality writ large in the arbitral tribunal's conduct as it noticed the appellant's objections in such regard but neither dealt with such objections nor did it assign any reasons for awarding huge sums in favour of the contractor.

8. Before launching the challenge in respect of the several identified heads of claim allowed by the impugned arbitral award, the appellant submits that notwithstanding the commencement of the arbitral references in these cases being prior to the 2015 amendment to the Arbitration and Conciliation Act, 1996, the amended provisions would apply. For such purpose, the judgments of the Supreme Court reported at (2018) 6 SCC 287 (*Board of Control for Cricket in India v. Kochi Cricket Private Ltd*); (2020) 7 SCC 167 (*Patel Engineering Ltd v. North Eastern Electric Power Corporation Ltd*); and, (2020) 17 SCC 324 (*Hindustan Construction Company Ltd v. Union of India*) have been relied upon. Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 and Section 87 of the Act of 1996 as brought in by a 2019 amendment have been struck down and such judgments have extended the amended provisions to the pre-amendment references.

9. The appellant asserts that by virtue of such judgments, even though the references in these cases commenced prior to the 2015 amendment coming into effect, the appellant is entitled to rely on amended Section 34 of the 1996 Act to assail the arbitral awards. Indeed, there is little doubt that in *Kochi Cricket* it was expressly held that the 2015 amendment would be available to all Section 34 petitions filed after October 23, 2015 notwithstanding Section 26 of the amending Act providing otherwise and the relevant arbitral proceedings having commenced prior to the amendment coming into effect.

10. Indeed, at paragraph 78 of the judgment in *Kochi Cricket*, it was observed that the then proposed amendment by which Section 87 of the Act was to be introduced did not appear to be legally sound. Quite expectedly, upon Section 87 being incorporated in the 1996 statute, in the judgment of *Hindustan Construction Company* it was struck down.

11. In the other judgment of *Patel Engineering Ltd*, a matter between the same parties as in the present case, not only was the applicability of the 2015 amendment found to be in order in respect of subsequent challenges to arbitral awards rendered in references that had commenced prior to the amendment, but the aspect of what would amount to patent illegality in terms of Section 34(2A) of the 1996 Act,

that was introduced by the 2015 amendment, was also discussed at length. In short, such judgment concluded, by referring to, inter alia, the judgments in *Associate Builders* [(2015) 3 SCC 49] and *Ssangyong Engg* [(2019) 15 SCC 131] that when an arbitrator construes a contract in a manner that no fair-minded or reasonable person would, such that the arbitrator's view is not even a possible view to take in the circumstances, or if the arbitrator wanders outside the contract and deals with matters not allotted to him or beyond his purview, he would commit an error of jurisdiction which is capable of being challenged under new Section 34(2A) of the Act.

12. On the challenges to the various heads awarded, the appellant first questions the propriety of interest being awarded. The relevant clause (from Book II, conditions of contract) may first be noticed:

“55. Time for payment and interest

No claims for interest or damages will be entertained by the Corporation with respect to any money or balance which may be lying with the Corporation owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other or with respect to any delay on the part of the Engineer-in-Charge making periodical or final payments or in any other respect whatsoever.”

13. The contention of the appellant qua the above provision of the contract is that not only does it prohibit the payment of interest or

damages in respect of the matters specifically referred to therein, but the prohibition applies also “in any other respect whatsoever.” The appellant refers to Section 31(7) of the said Act and submits that the authority conferred on the arbitral tribunal to provide for pre-award interest is subject to the agreement between the parties. The appellant suggests that unlike under the 1940 Act where the authority of a party and the authority of an arbitrator could be distinctly seen, in view of the party autonomy having been given primacy under the 1996 Act, when a certain thing is prohibited qua the parties, such thing is also prohibited for the arbitrator.

14. In such context, the appellant relies on a judgment reported at (2019) 17 SCC 786 (*Jaiprakash Associates Ltd v. Tehri Hydro Development Corporation (India) Ltd*). In that case, clause 51.0 read substantially similar to clause 55 quoted above in this case as such provision dealt with certain specific situations and contained the very same seemingly omnibus expression “or in any other respect whatsoever” at its end.

15. Upon referring to several judgments, both under the 1940 Act and under the 1996 Act, the Supreme Court concluded in *Jaiprakash Associates* that the relevant provisions in the contract prohibited the

arbitral tribunal from awarding any interest. However, the prohibition was confined only to pre-award period since, for the post-award period, Section 31(7)(b) of the Act mandates that the arbitral award shall carry interest as specified in the provision unless the award directs otherwise. In such a scenario, the parties cannot contract out of post-award interest.

16. Apropos the sum awarded on account of delay in supply of explosives, the appellant first refers to a clause from the general conditions in the supplementary agreement executed by the parties and a similar clause from the general conditions in Book II, Appendix VI of the main contract. The relevant provisions are identical:

“However, if any item of materials as mentioned above cannot be provided by the Corporation in any time, that cannot be claimed as cause of delay by the contractor and compensation or extra benefit whatsoever except granting of time extension will (*not*) be entertained by the Corporation.”

17. At the outset, the appellant suggests that the word “not” indicated in italics above should be read into the provision as it would not make any sense otherwise. The appellant submits that the identical clause in the general conditions appended to the supplementary agreement and also forming a part of the general conditions in the main agreement implies that the delay on the part of the employer to supply any material that it is obliged to make available to the contractor may

result only in the time for completion of the contract being extended but such delay would not entitle the contractor to any compensation or other extra benefit apart from the extension of time.

18. The appellant cites the aforesaid clause to question the propriety of the findings rendered in the award under several heads of delay attributed to the appellant in the supply of the material or drawings. In respect of the finding pertaining to delay in the supply of explosives, the appellant refers to the recording at page 70 of the impugned award of the contentions raised by the appellant in course of the reference to resist the relevant head of claim. The appellant demonstrates that the appellant had also asserted that supplies of explosives made were not used by the contractor and there were letters in such regard that had been issued by the appellant. The appellant, then, refers to the findings on such aspect of delay recorded at pages 95 to 97 of the impugned award and suggests that the argument put forth on behalf of the appellant was not even dealt with.

19. The appellant attacks the breach attributed to the appellant on account of perceived delay and short supply of cement and steel on identical lines. It refers to the contentions on the appellant's behalf recorded at pages 70-71 of the impugned award and the findings

rendered at pages 97 to 99 thereof to demonstrate that the grounds of objection were not dealt with and no reasons were proffered by the arbitral tribunal to justify any finding on such aspect of delay claimed by the contractor or to discredit the objections raised by the appellant.

20. A further ground is asserted by the appellant in respect of the finding on the delay and short supply of explosives and of cement and steel. The appellant maintains that the mandate of Section 31 of the Act is for reasons to be furnished by an arbitrator in making an award. The appellant insists that there cannot be a general set of reasons indicated for different heads of claim, particularly when the different heads of claim are taken up for adjudication separately.

21. What the appellant seeks to suggest is that in view of Section 31 of the Act requiring every arbitral award to be reasoned, the several heads of claim allowed by an arbitrator should also be supported by reasons unless it is obvious that a general set of reasons would cover the entire gamut of claims. The appellant goes so far as to suggest that the lack of reasons in support of any head of claim would amount to patent illegality within the meaning of that expression in Section 34(2A) of the Act since an award without reasons would be, in the absence of any agreement to such effect between the parties, contrary to Section 31 (3)

of the Act; and, equally, every head of claim allowed upon noticing an objection but not dealing with the objection or furnishing any reason in awarding any part of the claim under such head would be contrary to the express provision of the statute.

22. In respect of the arbitral tribunal finding the appellant herein liable for the collapse of the support structure during tunnelling, the appellant contends that there is no basis to such finding. In dealing with the delay due to the collapse of tunnel support on different occasions, the tribunal disregarded the submission of the appellant herein that such part of the claim had not been pressed.

23. Indeed, the tribunal noticed the contractor's assertion that the tunnelling was held up due to collapse of steel rib supports as a result of the faulty design thereof. The tribunal did not miss the fact that the design for the steel rib supports was subsequently modified. The tribunal found, as a matter of fact, that the collapses occurred repeatedly and found that the oral evidence of a witness called by the appellant herein to be contrary to the admitted records. The tribunal reasoned that since the design for the structural support in the tunnels had been prepared by the appellant herein and such support failed and gave in on

numerous occasions, the consequent delay was attributable to the employer.

24. On the aspect of rock strata deviation, the appellant refers to pages 72-73 of the volume containing the principal impugned award pertaining to Lot 1 and points out that clause 6.6 of Book II of the tender papers that formed a part of the contract, clearly required the bidders to acquaint themselves with the geological conditions along the diversion channels and also indicated that the rock strata described in the relevant clause was based on field-mapping carried out by the Geological Survey of India on the evaluation of drill-hole data. The appellant submits that the weak rock conditions and the frequent shear zones were clearly indicated and the underlying caveat in the clause was that the rough description of the rock strata was not based on any comprehensive study.

25. What the appellant seeks to suggest is that in terms of the agreement between the parties, it was for the contractor to ascertain the nature of the rock strata and plan its course of action accordingly.

26. The appellant also relies on clause 7 from Book II of the tender documents. The appellant submits that though clause 6.6 of the instructions to bidders (ITB) was noticed by the arbitral tribunal, clause

7 of the same document had been clearly adverted to in the written submissions filed by the appellant at the end of the reference. Such clause advised bidders to inspect and examine the site and its surroundings and satisfy themselves before submitting their bids. In particular, the clause categorically instructed the bidders to acquaint themselves with the geological, meteorological, topographical and other general features of the site and its surroundings, obtain information as to the risks and contingencies which could affect the work or the cost thereof and not merely rely on the information in such regard furnished by the appellant since such information “has been given merely to assist the bidders and is not warranted to be complete.” The appellant refers to the disclaimer contained in clause 7(ii) of the same document to the effect that the employer would bear no responsibility for the lack of acquaintance with the site and no charges or claims whatsoever consequent upon the lack of information, knowledge or understanding would be entertained or payable by the employer.

27. The appellant seeks to interpret the relevant clause to imply that it was for the bidders and, ultimately, for the contractor, to ascertain the rock strata and prepare accordingly. The appellant maintains that it had no obligation to give any information at all regarding the conditions

prevailing at the site and if the contractor suffered because it submitted its bid or went into the execution of the contract without taking due care or caution, the employer could not be held liable therefor.

28. The arbitral tribunal noticed the contractor's contention that the construction programmes submitted by the contractor, both at the inception and later, during the execution, were accepted by the employer without any reservation. The arbitrators held that once the detailed information as to the rock strata had been supplied by the employer on the basis of field-mapping by the Geological Survey of India, a prospective bidder, which had to submit its bid within a finite time, could not be faulted for not carrying out extensive tests to ascertain the nature of the rock structure.

29. The next ground urged by the appellant pertains to the finding of the tribunal that the delay in obtaining boulders for the project site was attributable to the appellant. In such regard, the appellant refers to its contentions recorded at page 72 of the separate volume containing the principal award and the findings rendered by the tribunal at pages 101-103 thereof.

30. The appellant places clause 13 from Book IA containing the detailed work order. The relevant clause provided that the appellant

herein would “assist the contractor” for obtaining permission to operate quarries for stone and sand. The appellant says that it took necessary steps in such regard and it is evident that the Chief Minister of Mizoram held a meeting with the Chief Minister of Assam, whereupon, the Chief Minister of Assam instructed officials in that State to facilitate the extraction of boulders by the contractor. The appellant says that once the appellant had rendered assistance as aforesaid and continued to aid the contractor in obtaining fresh licenses or permission to extract boulders and sand, whenever necessary, the contractor’s allegation that adequate supply of boulders or sand may not have been available could never have been counted against the employer.

31. The arbitral tribunal has dealt with such aspect of the matter at length. It noticed that pursuant to the instructions of the Chief Minister of Assam, the contractor was allowed to extract 12,000 cu m of boulders on ad hoc basis and this was a rather meagre amount compared to the total requirement. The tribunal noticed that the contractor had requested the employer to obtain requisite permission for 1,36,000 cu m of boulders in financial year 2003-04, against which permits were obtained for 10,000 cu m of boulders and 3000 cu m of sand on March 17, 2004.

32. The arbitrators also referred to a revised construction programme submitted on August 16, 2002 where the contractor had raised the issue pertaining to shortage of boulders and the timelines indicated were subject to the resolution of the impediments to obtaining adequate quantities of boulders and sand.

33. In such circumstances, the arbitrators found that the assistance rendered by the employer to the contractor in such regard was wholly inadequate as the commensurate amounts of boulders and sand could not be obtained by the contractor. Accordingly, the tribunal was of the opinion that there was considerable delay in adhering to the planned programme due to the employer for non-receipt by the contractor of administrative permissions for obtaining boulders and sand.

34. In respect of the breach attributed by the arbitral tribunal to the appellant herein on account of access roads being inadequate or unavailable, the appellant refers to its contentions recorded at pages 67 to 69 of the volume containing the principal award and the findings rendered thereon at pages 90 to 93 of the same volume.

35. As to the guiding provisions in respect of access roads, the appellant relies on clauses 1.3, 3.2.2 and 3.2.4 of Book II containing the instructions to bidders. Further, the appellant places reliance on clause

15 from Book IA containing the detailed work order. Clause 1.3 of Book II informed the bidders that the principal access road to the project site was a State highway upto a village by the name of Bilkhawthlir which was on the main road connecting Silchar with Aizawl. From Bilkhawthlir, the access road crossed the villages of Saiphai and Saiphum, the latter being about 13 km from the work site. The information furnished by the employer referred to an access road being improved by the employer in conjunction with the Border Roads Organisation. The clause further indicated that all local access roads “are to be constructed and maintained by the contractor to facilitate execution of the Project.”

36. Clause 3.2.2 of Book II stipulated that the existing access roads in the project area had to be accepted by the contractor on “as is where is” basis. Clause 3.2.4 of the same document advised bidders to inspect the entire access roads and apprise themselves of their status and the need to upgrade the roads and bridges. Finally, clause 15 of Book IA indicated that an alternate road from Sherkhan on NH-54 to Saiphum could be used for the initial mobilisation without any extra claim to the employer.

37. In dealing with the delay due to non-availability of access road and its bad conditions, the arbitral tribunal drew a rough sketch of the roads leading up to the project site. The arbitral tribunal noticed that the construction programmes submitted by the contractor indicated three salient conditions: that an all-weather access road capable of use by vehicles bearing load of 20 mt should be ready by October, 2001; that such access road should be constructed and maintained by the employer throughout the year such that heavy vehicles could ply at a speed of 25 to 30 kmph; and, that all roads should have a gradient less than 10 degrees.

38. The tribunal found that the pitiable condition of the principal access road was repeatedly brought to the notice of the employer by the contractor, including the fact that the alternate route on NH-54 was not available. Indeed, the arbitrators came to a finding that since the employer could not provide the access road as per the agreed terms of reference contained in the construction programme, the contractor “could complete only 21.40% of the total contract work within the original stipulated period of 24 months ...”

39. The tribunal also found that the access roads were incapable of bearing the load of heavy machinery and though the contract

commenced on September 28, 2001, no access road had been made available even till the expiry of the extended period of the contract of April 30, 2005. The arbitrators found that due to the bad condition of the principal access road “prevailing over the entire contract period up to 27.09.2003 and continuing beyond till as late as June, 2005, the claimant could complete only 21.4% of the value of the contract.”

40. The final ground of challenge pertains to the delay attributed by arbitrators to the appellant for its failure to issue construction drawings in a phased and timely manner. No specific clause of the agreement between the parties is placed in such context, but the appellant asserts that adequate reasons were not assigned by the arbitrators for finding the appellant at fault on such count.

41. The tribunal noticed that though the contract commenced with effect from September 28, 2001, construction drawings had not been furnished by the employer to the contractor and the contractor complained accordingly in its letters of November 6 and November 15, 2001. The tribunal found that the first set of construction drawings arrived only on November 21, 2001 but there was delay in finalising the tunnel alignment and other structures which resulted in reliable construction drawings not being available till even in March, 2002. The

arbitrators also found that there was no response in such regard from the employer despite the contractor's repeated demands for the complete construction drawings.

42. There are several other counts on which the arbitral tribunal found the appellant herein to be in breach. It is fairly submitted on behalf of the appellant that given the limited scope of Section 34 of the Act, a meaningful challenge on such counts may not be possible. However, the appellant says that it invoked the *force majeure* principle to justify why work was suspended from June 9, 2004 to January 13, 2011, but the arbitral tribunal did not accept such justification. The project was finally completed in 2017.

43. The one general ground that is emphatically canvassed by the appellant is that even if it were to be accepted that the fault on several counts lay with the appellant, the arbitral tribunal was obliged to quantify the damages. The appellant alleges that though the arbitrators did not allow the entirety of the claims made by the contractor in respect of several heads, the awards do not indicate any general basis for quantification and, certainly, do not go into the quantification for the individual heads of claim. The appellant asserts that apart from the quantum awarded on account of interest, it is difficult to assess from the

awards as to what amount has been awarded for alleged delay in furnishing construction drawings or what other amount for collapse of the rib structure in the tunnel or the quantum of compensation for the delay in obtaining boulders and sand or even for the access roads not being in place.

44. The appellant submits that since it is evident on a plain reading of the awards that several of the appellant's objections with regard to the various heads of claim were not considered and several other heads of claim were dealt with without assigning any or adequate reasons, if this Court were to set aside the awards and the findings in respect of such individual heads – or even require a fresh reference on such limited aspects to be taken up – this Court will not be able to extricate the quantum in terms of money awarded that ought be set aside or considered afresh. The appellant exhorts that for such reason, and the opacity of the awards in such regard, the entirety of the awards should be set aside particularly as the identical issues are being considered in the second set of references by another arbitral tribunal and it may be convenient for the matters in issue covered by the first set of references to be referred to such other panel.

45. The respondent explains that there is a firm basis spelt out in the awards to allow a percentage of what had been claimed by the contractor and, in the absence of the respondent having challenged the awards, such reduced amounts ought not to be interfered with by the Court in exercise of the limited authority available in this jurisdiction. The respondent submits that apart from the claims made under various heads and sub-heads in the elaborate statements of claims and the voluminous calculations running into thousands of pages filed in support thereof, the contractor had indicated eight specific areas of hindrances as a result whereof the work could not progress as contemplated and the contractor attributed breach in each of the eight cases to the employer. The contractor seeks to deconstruct the awards by asserting that eight heads of hindrances were also cited by the employer to suggest that it was the contractor which was to blame for the inordinate delay in the execution of the work.

46. The contractor says that claims were not made on account of the grounds of hindrance cited and claims were made under specific monetised heads and sub-heads which have all been duly dealt with by the arbitrators. The contractor points out that a substantial counter-claim was made by the employer, but that is of no relevance in the present

context since the entirety thereof has been disallowed and the challenge in the present proceedings does not extend to the rejection of the counter-claim.

47. According to the respondent, even though the arbitral tribunal found that out of the eight aspects of hindrance that the contractor had highlighted in course of the references, seven of them were justified and were attributable to the employer, no monetisation of damages as a consequence of such hindrances was attempted by the tribunal as that would have been an exercise in futility.

48. The contractor exhorts that the several hindrances in the execution of the work that were of the employer's doing operated simultaneously and had a cumulative effect. The contractor points out that since the five references in this case were in respect of finite periods covering till a part of the time when the work remained suspended, there were similar claims in respect of Lot 1, Lot 2 and Lot 3 just as there were similar claims in respect of the two other references pertaining to the construction of a 17-km road and another 13-km road.

49. The contractor places several passages from the awards to demonstrate that the arbitral tribunal reckoned that the primary delay or principal hindrance in the progress of the work was the failure on the

part of the employer to provide access roads which had a cascading effect and which resulted in not only the delay on the part of the contractor to bring its heavy-duty machinery to the project site but also in the employer bringing the supplies that the employer was obliged to make over to the contractor. The contractor seeks to demonstrate from the award that such cascading effect led to even boulders and sand not arriving in time, quite apart from the fact that the requisite quantities of boulders and sand had not even been arranged for within reasonable time.

50. In such regard, the contractor places several passages from the award pertaining to the first lot and submits that the findings and observations of the arbitral tribunal on such aspect cover the entire gamut of the five references and must be seen in such light:

(i) At page 93 of the volume containing the main award, the arbitrators observed as follows:

“AT states that the Respondent was obliged to provide access roads as required under the construction programme and non-fulfilment of this fundamental and essential requirement – which are in the nature of contractual stipulations – will result in fundamental breach of Contract.

(ii) At page 97 of the award volume, the arbitrators recorded as follows:

“The three issues – Delay due to non-availability of the Principal Access Road being constructed and maintained by the Respondent. Delay in issue of Construction drawings and the

Non-supply/Short supply of explosives have a cascading effect on the progress of construction, i.e. planned use of cement being not possible.

(iii) At page 106 of the award volume the arbitrators recorded the following upon appreciating the entire perspective of the matter:

“The bad road conditions existing right from the contract was awarded and delay in providing the Principal Access Road and other Access Road as per the contract conditions, of which the Construction Programme is an integral part has a major contribution in the delaying the project beyond the original time limit of 24 months. This situation has a cascading effect on further activities in mobilization of machinery & manpower. The Claimant has also pleaded that it was compelled to revise the Construction Programme on 4 (four) occasions.”

(iv) Similarly, at page 110 of the award volume the arbitrators laid great emphasis on the bad or unready access roads to the project site being the overarching reason for the delay in the execution of the work. The following passages bring out such sentiment:

“The AT also notes the Claimant’s reference to letter dated 07.06.2004 wherein the access roads issue has been raised and said to be affecting the transport of construction materials.”

“The AT finds that once again it is the bad road conditions causing problems of mobilisation/transportation not only for the Claimant but also for the Respondent, who had the contractual obligation to supply construction materials like cement and steel to the works as per the construction programme. The administrative requirements to get the permission from the Forest Department of neighbouring State of Assam delayed the extraction and transportation of boulders/stone/sand. In view of these interdependent conditions the delay is primarily on account of reasons attributable to the Respondent.”

(v) Finally, while dealing with the legal submission and referring to the precedent cited, the arbitrators observed as follows at page 240 of the award volume:

“The Tribunal finds that the Claimant has not pleaded *frustration* of a contract, but has stated that the Respondent has failed to keep

up its promise to provide the Principal Access Road and the Access Road to the standard stipulated in the Construction Programme forming part of the Contract resulting into delay in performance for which the Respondent alone is responsible. Needless to say that without approach road in place Machinery/Materials cannot be brought to the site by the Claimant to perform as per the Construction Programme, and for the consequential delays in performance of the Contract the Respondent alone is responsible.”

51. The contractor suggests that in the case of a works contract as the present one and in assessing the disputes that are raised, the commercial terms of a contract cannot be divorced from the reality for a dispassionate adjudication merely on the basis of the cold print. The contractor cites the example of tunnelling work being undertaken with sufficient explosives being available and men and machinery ready to complete the work within the envisaged schedule. According to the contractor, tunnelling work would involve the initial act of blasting the rock and then insert supports to prop of the roof and stop it from caving in before cement plastering is undertaken to keep the roof in place. The contractor laments that in the present case upon the initial blasting being conducted and before the roof could be cement-plastered, it had to be supported by steel rib structures. However, upon the steel rib structures, which were designed and supplied by the employer, not being able to bear the load, the availability of adequate men, machinery and

explosives became meaningless since the work of plastering the ceiling could not be undertaken without the support structure holding up the roof.

52. As to the quantification of the several heads of claim by the arbitrators, the contractor refers to the first of the tables in the award appearing in the main award volume at page 129 thereof. In the relevant table, the two major amounts awarded are Rs.4,77,35,052/- on account of rental charges on idle and under-utilised plant and equipment during the contract period and a further sum of Rs.8,55,53,933/- on account of payment made to manpower deployed through sub-contractors who were rendered idle or under-utilised during the contract period.

53. The relevant table indicates the claim on account of such idle machinery to be in excess of Rs.14.06 crore and the claim on account of idle manpower to be in excess of Rs.11.81 crore for the stipulated period of the contract. The arbitrators dealt with the two claims as per the calculations and basis therefor indicated in Appendix-I which contains two tables running into several pages and detailing various items of machinery and manpower in respect of different parts of the work.

54. The contractor next refers to page 161 of the main award volume which is the last page of the table pertaining to divers items of machinery. In the note at the foot of the table at page 161 of the main award volume, the arbitrators indicate that the basis for assessing amounts under the individual sub-heads for machinery was the “Central Water Commission Guidelines for Preparation of Project Estimates for River Valley Projects, March, 1997 (Second Revised Edition) & Central Water Commission Guide Book on Use Rate Hire Charges and Transfer Value of Equipment and Spare Parts, December, 1988 (Third Edition).” The contractor asserts that depreciation, interest, multiplier factors and other parameters indicated in the relevant tables pertaining to idle machinery are on the basis of the Central Water Commission guidelines and the same is evident from the relevant appendix.

55. Similarly, the contractor refers to page 163 of the main award volume where the arbitrators clearly indicate the contractual terms on the basis of which payment required to be made for the labour component is ascribed 25 per cent of the value of the work achieved during the stipulated contract period. The contractor next places from the body of the award that it was the admitted position in course of the references that during the 24-month period from the date of issuance of

the letter of intent on September 28, 2001 till September 27, 2003 only 21.4 per cent of the value of the work had been executed. The total value of the work was slightly in excess of Rs.67.52 crore and there can be no dispute that the total work done during the original period of two years was of value of Rs.14.42 crore. Thus, the contractor points out, that the shortfall in the execution of work was to the extent of 78.6 per cent and it is the quantum of shortfall that was taken as the guiding factor by the arbitrators for assessing the quantum of loss occasioned to the contractor during the stipulated period of the contract and the consequent damages that the contractor was entitled to. The respondent is quick to demonstrate the copious references in the award to the “Hindrance Register” that was maintained by the parties and had been produced in course of the references.

56. As to the perceived failure on the part of the arbitral tribunal to deal with some specific objections raised by the employer or furnish adequate reasons for rendering a finding that the employer was in breach, the respondent places copiously from the award to maintain that basic reasons were furnished while dealing with every instance of hindrance cited by the contractor and accepted by the arbitrators. The contractor also submits that in the limited exercise that the Court is

required to perform at this stage, the adequacy of reasons cannot be gone into once it is noticed that there are some reasons which have been furnished.

57. On the issue of interest and the meaning and purport of clause 55 of Book II, the respondent claims that such clause was not cited in the statement of defence as a bar; nor was the relevant clause pressed into service at the hearing stage of the references. Upon the appellant revealing that the relevant clause was quoted in its voluminous written submission filed before the arbitrators, the respondent suggests that if a point of prohibition is not indicated at the outset or urged at the hearing but it is surreptitiously included in the written notes submitted at the conclusion of the hearing, such ground taken for the first time after the conclusion of the hearing has to be discarded.

58. For such purpose, the respondent first relies on a judgment reported at (2018) 2 SCC 182 (*Union of India v. Susaka Private Ltd*). At paragraph 17 of the report, the submission on behalf of the award-holder claimant before the Supreme Court is recorded to the effect that the ground of prohibition in the contract to entertain a particular head of claim was neither urged before the arbitral tribunal nor before the Single Bench or the Division Bench of the High Court and, as such, such

ground could not be permitted to be raised for the first time in proceedings arising under Article 136 of the Constitution. As to the *ratio decidendi* of the judgment, the respondent refers to paragraphs 20 to 22 of the report:

“20. On the other hand, we find that in Section 11(5) proceedings, the appellant did not raise this objection in their reply and instead gave their express consent to refer the issue of award of interest payable on various claims (1 to 17) to the Arbitral Tribunal considering the said claim to be arbitrable under the contract.

“21. In our opinion, the appellant could have registered their objection before the Single Judge at the time of making a reference to the Arbitral Tribunal by pointing out Clause 13(3) of GCC or could have reserved their right to raise such objection before the Arbitral Tribunal. It was, however, not done.

“22. Not only that, we further find that the appellant, in their reply, filed before the Arbitral Tribunal also did not raise this plea and allowed the Arbitral Tribunal to adjudicate the said issue on merits.”

59. With respect, paragraph 20 of the judgment is an observation that may not be seen to be a part of the *ratio decidendi* rendered in the judgment. In course of paragraphs 20 and 21 of the judgment, the Supreme Court merely noticed that at a stage when a request was before the Chief Justice of the relevant High Court or his designate to order a reference, no objection on the ground that interest was not payable in terms of the contract had been taken. However, the observation in such regard cannot be read to imply that simply because a claim included an

interest component and at the pre-reference stage the respondent had not asserted the clause in the contract prohibiting payment of interest, it was precluded from urging the ground in course of the reference.

60. What the respondent seeks to assert by referring to paragraphs 20 and 21 of the judgment defies logic. For a start, requests under Section 11 of the Act do not require the entire claim to be elaborately indicated. Further, the right to object to a request under Section 11 of the Act has more to do with the existence of the arbitration agreement or the entitlement to seek a reference than the merits of the claim that may be carried to the reference. As a matter of fact, a fair-minded opponent may concede to a request made under Section 11 of the Act, but that would not imply an admission of the claim as a consequence of the fair concession to go to a reference.

61. The ratio in *Susaka* must be confined to paragraphs 22 and 24 of the report where the Supreme Court declined the ground to be urged in course of an appeal with special leave since such ground had not been canvassed before the arbitral tribunal or in course of the two stages before the High Court.

62. The respondent has next carried a judgment reported at (1985) 2 SCC 670 (*Daman Singh v. State of Punjab*) for the observation at paragraph 13 of the judgment by a Constitution Bench:

“13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitions and memoranda of appeal etc., but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not?”

63. The principle enunciated in the passage quoted above would not apply in the present case because, in the scheme of arbitration law, an application in the nature of review or clarification cannot be carried back to an arbitral tribunal which has rendered an award and has become *functus officio*. It is true that in accordance with Section 33 of the Act, an award may be corrected after it is pronounced, but there is no provision for seeking a review or a clarification from the arbitral tribunal in respect of the contents of an award. Such limitation arises out

of the very nature of the arbitral tribunal which is a consensual forum and has only so much authority as is conferred by contract or statute unlike the overwhelming sovereign authority exercised by a regular court which has the power to review, correct, clarify and modify its orders unless its authority to do complete justice in such regard is curbed or curtailed by any express provision or by unavoidable necessary implication.

64. It would be dishonest to suggest that every footy-little ground urged in course of a matter is invariably recorded in the judgment and dealt with. Though the larger grounds canvassed ought to be recorded and dealt with, some insignificant grounds are ignored by judges in the usual course and some others may be, accidentally or otherwise, missed out. But merely because a ground that was urged, or is claimed to have been urged, is not reflected in the judgment, it should not be a stumbling block for a deserving litigant; particularly, when the judgment in question is an arbitral award.

65. In the present case, the arbitral tribunal referred to the objection taken by the appellant herein on the ground of interest but observed that there was no specific provision in the matrix contract that the arbitrators discovered which took away their authority to grant pre-reference or

pendente lite interest. However, whether or not clause 55 from Book II was specifically raised in course of the hearing in the references, it is evident that the arbitral tribunal invited written submissions to be filed and accepted such documents. Once the arbitral tribunal agreed to accept written submissions and the prohibitory clause was specifically referred to therein, since the ground went to the very authority of the arbitral tribunal to grant pre-award interest, due cognizance thereof ought to have been taken. Indeed, a copy of the appellant's written submission must have been forwarded to the respondent herein and there is no denial by the respondent of the receipt thereof. It was then incumbent on the respondent upon noticing the ground taken in the written submission that had not been urged in course of the hearing to request the arbitrators to allow the respondent to deal with such ground since the award was not pronounced immediately upon receipt of the written submissions. In the respondent failing to adopt such course of action despite the ground of prohibition of pre-award interest being squarely taken in the appellant's written submission, the respondent's present submission that the ground was not canvassed at the hearing cannot be countenanced. The essence of the matter is whether the prohibitory clause was brought to the notice of the arbitrators and the

respondent prior to the award being passed. And the answer is squarely in favour of the appellant. As such, it is exceptionable that the appellant would now be estopped from relying on the relevant provision on the ground that the point was not expressly taken in course of the hearing in the references.

66. The alternative argument of the respondent on interest is that the relevant provision did not prohibit interest being awarded at all for the pre-award period. In furtherance of such contention, the respondent first relies on a judgment reported at (1999) 1 SCC 63 (*State of UP v. Harish Chandra and Co*). The relevant clause is found at paragraph 9 of the report and requires to be set out:

“1.9 *No claim for delayed payment due to dispute etc.*— No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in marking periodical or final payments or in any other respect whatsoever.”

67. Such clause was interpreted at paragraph 10 of the report on the following lines:

“10. A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in marking

periodical or final payments or in any other respect whatsoever. The words “or in any other respect whatsoever” also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express language of this clause, there is no prohibition which could be culled out against the respondent-contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication...”

68. Though the judgment in *Harish Chandra* was rendered in the context of the Arbitration Act, 1940, the respondent submits that it relies on such judgment for the interpretation of a provision that is similar to clause 55 of Book II on which the appellant relies in the present case. The respondent suggests that since the Supreme Court interpreted the similar provision with the identical words in the end of “or in any other respect whatsoever” to imply that such words of restriction had to be confined to the words preceding them in the provision and not read as a universal bar on account of interest, it matters little that the arbitral tribunal in the present case did not refer to clause 55 of Book II or discuss the matter since the law established in such regard would go to demonstrate that such a provision cannot be inferred to be a provision prohibiting interest being awarded at all.

69. The respondent has also carried a judgment rendered under the 1996 Act and reported at (2009) 12 SCC 26 (*Sayeed Ahmed and Company v. State of UP*) to demonstrate how the interpretation of another similar provision in such case was a complete departure from the decision in *Harish Chandra* by virtue of a few additional words being present in the relevant clause. The provision from the contract that was cited as prohibiting any interest till the date of the award is found at paragraph 7 of the report:

“7. G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or any other respect whatsoever.”

70. In *Sayeed Ahmed*, the Court noticed that the words “or any become due owing” did not appear in the relevant clause in *Harish Chandra* and the Court held as follows at paragraph 19 of the report:

“19. But in the present case, Clause G1.09 is significantly different. It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge and contractor *or* with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever. The bar under Clause G1.09 in this case being absolute, the decision in *Harish Chandra* will not assist the appellant in any manner.”

71. The respondent has brought a judgment reported at (2012) 12 SCC 10 (*Tehri Hydro Development Corporation Ltd v. Jaiprakash Associates Ltd*) which was a case between the same parties as in the later *Jaiprakash Associates* judgement of 2019 cited by the appellant. In both cases of *Jaiprakash Associates* of 2012 and 2019, the judgments relied on not one, but two clauses from the contract to maintain that the combined effect of the two clauses was that pre-award interest could not be granted.

72. In the 2019 case of *Jaiprakash Associates*, the Supreme Court recorded the appellant's submission, at paragraph 8 of the report, to the effect that the words "or any other respect whatsoever" occurring in the second of the two clauses ought to be read *ejusdem generis* and should take their colour from the earlier part of the clause. The same paragraph also recorded the appellant's contention that the second of the two clauses was similar to the relevant clause in *Harish Chandra* where it was interpreted to not preclude the arbitrators from granting pre-award interest. At paragraph 9 of the report in the 2019 *Jaiprakash Associates* case, the alternate submission on behalf of the appellant is noticed: that since almost identical clauses had been differently interpreted in the

2012 case of *Jaiprakash Associates* and in *Harish Chandra*, there was a conflict which required resolution.

73. It may do well at this stage to see the two relevant clauses from *Jaiprakash Associates* which were numbered differently in 2012 and in 2019. The numbers indicated below are from the 2019 judgment:

“Clause 50.0 Interest on money due to the contractor

No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.”

“Clause 51.0 No claim for delayed payment due to dispute, etc.

No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to any dispute, difference or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer in charge in making intermediate or final payments or in any other respect whatsoever.”

74. The respondent submits that since both *Sayeed Ahmed* and the 2019 case of *Jaiprakash Associates* noticed *Harish Chandra* and did not detract therefrom but distinguished it on the relevant clause in *Harish Chandra* being somewhat different, the present scenario should be governed by the dictum in *Harish Chandra* which is closer to clause 55 of Book II than the two clauses conjointly read as a bar in *Jaiprakash Associates*. The respondent also suggests that the additional words

found in the middle of the *Sayeed Ahmed* clause is absent in the present case.

75. On the other hand, the appellant refers to paragraph 22 from the 2019 case of *Jaiprakash Associates* to indicate why the principle of *ejusdem generis* was inapplicable in that case and the same reasoning should hold good in the present case:

“22. Insofar as argument based on the principle of *ejusdem generis* is concerned, the Division Bench has held that is not applicable in the present case. We find that it is rightly so held. *Ejusdem generis* is the rule of construction. The High Court has negated this argument in the following manner: (*Jaiprakash Associate case*, SCC OnLine Del para 18)

“18. The rule of *ejusdem generis* guides us that where two or more words or phrases which are susceptible of analogous meaning are coupled together, a noscitur a sociis, they are to be understood to mean in their cognate sense and take colour from each other but only if there is a distinct genus or a category. Where this is lacking i.e. unless there is a category, the rule cannot apply.”

As rightly held, the rule of *ejusdem generis* would be applied only if there is distinct genus or a category, which is lacking in the instant case. This rule is applicable when particular words pertaining to a clause, category or genus are followed by general words. In such a situation, the general words are construed as limited to things of same kind as those specified. In that sense, this rule reflects an attempt “to reconcile incompatibility between the specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute were presumed to be superfluous. [See *Lokmat Newspapers (P) Ltd. v. Shankarprasad.*]”

76. It must be clarified at this stage that the work pertaining to the three lots – Lot 1, Lot 2 and Lot 3 – was allotted to Patel Engineering Ltd and the two road construction contracts – for 17 km and 13 km – were awarded to a joint venture by the name of Advance Construction Private Ltd which was formed by Patel Engineering Ltd along with another entity. There is no conflict of interest between Patel Engineering Ltd and Advance Construction Private Ltd.

77. The claims carried by the relevant contractor in respect of the three lots – Lot 1, Lot 2 and Lot 3 – and in respect of the two road construction contracts – one for 17 km and the other for 13 km – pertained to the similar matters and heads over different periods of time for the most part. Thus, in respect of Lot 1 a similar claim was made for the contractual period of September 28, 2001 to September 27, 2003 as was made for the extended period from October 1, 2003 to May 31, 2004. Then came the period of suspension but the entirety of the period of suspension is not covered in the first set of five references made and the claims pertaining to the remainder of the period of suspension of work up to the completion of the project are the subject-matter of other pending or proposed references.

78. In respect of Lot 1, Lot 2 and Lot 3, compensation for loss or extra expenses incurred due to suspension of works had been claimed, first for the period of June 9, 2004 till March 31, 2005, next from April 1, 2005 to June 20, 2005 and, finally, from July 1, 2005 to September 30, 2005. In addition, two further similar claims were carried for reimbursement of extra cost on account of transportation and reimbursement of cost of excess cement. In the two roads construction contracts, the three periods of claim were from June 9, 2004, when the suspension of work commenced, till March 31, 2005; from April 1, 2005 to June 30, 2005 and from July 1, 2005 to September 30, 2005. For the first period in either case of road construction, the claim was on account of additional expenses for suspension of work. The added claims for the two other periods were on account of additional rental charges for machinery, interest on mobilisation, additional expenses for keeping bank guarantees alive, overhead expenses and loss of profit and the like. In the five awards covering Lots 1, 2 and 3, the 17-km road and the 13-km road, the principal sums awarded in the independent awards rendered upon all the references being heard analogously were approximately Rs.31.06 crore, Rs.19 crore, Rs.3.62 crore, Rs.1.90 crore and Rs.1.32 crore, respectively. In each case, pre-reference and

pendente lite interest at the rate of 18 per cent per annum has been awarded and in each of the first four references, the amount of interest for such period has been quantified. Further, the entire principal and interest as the adjudged sum awarded carries interest in each case at 12 per cent per annum post-award after affording some time for payment.

79. The parties submit that in accordance with a policy now in vogue, 75 per cent of the awarded amounts, inclusive of interest till the date of payment, has been paid by the appellant to the relevant contractor against bank guarantees for the amounts that have been released.

80. On the issue of bias, the appellant claims that it was unaware in course of the references and the several hearings held in New Delhi, that some or all the arbitrators had accepted the hospitality of the contractor and had been accommodated in the contractor's guesthouse in the capital. The underlying suggestion is that the arbitrators may have dined and more with officials of the contractor and, thus, were more favourably disposed towards the contractor while making the adjudication.

81. The appellant extols the virtues of independence and impartiality in adjudication and lectures that justice must not only be done but must also be seen to be done. The appellant claims that it had

no inkling of the arbitrators putting up at the contractor's guesthouse in New Delhi and the matter accidentally came to the knowledge of the appellant in course of a hearing in the second set of references on or about November 26-27, 2016. By such time, the individual awards had already been rendered following the common hearings. The awards pertaining to the work covered by Lots 1, 2 and 3 were rendered on August 21, 2016 and the two awards in respect of the road constructions were made on October 14, 2016.

82. At this stage a point of principle may be made: that allegations of bias or prejudice ought not to be allowed to be made casually or, upon being made, ought not to be overlooked or disregarded. The robust charge made by the appellant in this case is that since the arbitrators stayed at the contractor's guesthouse in New Delhi and rubbed shoulders with the contractor's officials, the arbitrators may have been influenced thereby or felt obliged to favour the contractor. It is a frontal charge on the conduct of the arbitrators and a finger raised against their integrity. When a charge of such kind is made with the insinuation that extraneous considerations led to the making of an award or influenced the considerations that went into the process of adjudication, the court must sit up and take notice.

83. In such a scenario it is the duty of the court to ensure that the charges are made with a degree of responsibility since reputations of the arbitrators are at stake. Every person, whatever may be his status or position in society or financial ability, is entitled to his reputation and a blot on a person's integrity would be a serious matter and an affront to the ordinary dignity that he is entitled to.

84. Upon the appellant being queried by the Court as to whether the appellant picked up the bills for the arbitrators' travel and accommodation, it is submitted by the appellant that no break-up for travel or accommodation was available with the appellant since the contractor as the claimant would pay the entire fees of the arbitrators and reimburse their costs and forward bills indicating the appellant's share therein. The appellant also informs the Court that the bills on such account have not yet been paid by the appellant.

85. It appears that the petitions challenging the five independent awards in respect of the three lots of work were filed on or about October 26, 2016 in respect of Lot 1; November 28, 2016 in respect of Lot 2 and December 2, 2016 in respect of Lot 3. In respect of the road construction orders, the petitions challenging the two awards were filed on December 9, 2016 and December 20, 2016.

86. Despite the appellant's assertion that the appellant came to be aware of the arbitrators having accepted the hospitality of the contractor on or about November 26-27, 2016, none of even the later petitions challenging the awards contains a ground of bias on such account. Since the relevant discovery is alleged to have been made after the petition challenging the award in respect of Lot 1 was filed on October 26, 2016 and a day or two shy of the award in respect of Lot 2 being challenged on November 28, 2016, it is understandable that such petitions did not contain the ground of bias that is fashioned here. However, the three other petitions challenging the awards were filed in early, mid and end-December, 2016. The ground of bias upon the arbitrators enjoying the hospitality of the contractor is not expressly taken in any of such petitions. Indeed, such ground of bias was sought to be incorporated only by way of an amendment to each of the petitions filed under Section 34 of the Act only in June, 2019. It is clear that such ground was taken as an afterthought and amounted to a drowning man clutching at straws.

87. In support of the appellant's contention that bias need not be proved to the hilt and a party may only indicate the likelihood of bias for the Court to accept the same, a decision reported at AIR 1962 Bom

274 (*Air Corporations Employees' Union v. DV Vyas*) has been carried by the appellant. In that case certain disputes were referred for adjudication pursuant to an agreement under Section 10A of the Industrial Disputes Act, 1947. The respondent before the Bombay High Court, a retired Judge of that Court, was nominated as the independent chairman of the committee of arbitration. The matter pertained to Air India International Corporation and the chairman of the arbitral committee and his wife took the inaugural Boeing flight from the then Bombay to the United States of America at the invitation of Air India. An award came to be made which was challenged before the Bombay High Court. One of the grounds canvassed was that since the chairman of the arbitral committee and his wife availed free air passage from Bombay to New York and back and even hospitality during their seven-day stay in the US, the award should be annulled. The Court held that courts have always zealously upheld the principle that is not merely sufficient that justice is done but that justice must be seen to be done. The Division Bench of the Bombay High Court expressed its opinion that by accepting hospitality from one of the parties to the dispute before him, the chairman of the arbitration committee “rendered himself incompetent to be a Judge of the cause before him.”

88. The dictum may not be applicable in the present context. The appellant and its officials were aware that the arbitrators may not have been from Delhi and were required to obtain accommodation in Delhi to conduct the hearings in the references. It is the duty of a party to an arbitral reference to not only pay the fees of the arbitrators but to also reimburse the expenses incurred by the arbitrators on account of travel and accommodation. With reasonable diligence, the appellant and its officials could have discovered where the arbitrators had been accommodated and it appears to be somewhat difficult to believe that it was only after the protracted hearings in the first set of references were over and the second set of references had commenced that the appellant or its officials came to know of the arbitrators being put up at the contractor's guesthouse in New Delhi during some of the hearings. This was not a situation where an adjudicator had accepted a freebie from one of the parties and then sat to adjudicate a dispute between such party and another.

89. An incidental ground of prejudice is also introduced, the insinuation again being that the arbitrators were too mixed up with the contractor in this case for the awards rendered by them to be accepted. The allegation in such regard is that upon some unpleasant exchange

taking place in course of an initial hearing in the second set of references, the arbitrators applied to the court for punitive measures to be taken against the officials of the appellant herein for such officials having attributed motives to the arbitrators. The more important point made in such regard is that the relevant application was filed through Advocate-on-Record representing the contractor in the arbitral references or the subsequent proceedings in court.

90. The arbitrators in this case were engineers or technocrats and may not have been lawyers or retired Judges. But just as the Court would throw an award procured by corrupt means into the nearest dustbin, it must not allow its platform to be abused by the derelict and the recalcitrant to launch an unsubstantiated tirade against the reputation of any person. Just as the reputation of a Judge ought, presumably, to be the highest badge that he wears, the court must also guard against the reputation of any other being sullied by desperate litigants.

91. In the light of the cumulative effect of the point of bias and the attendant prejudice sought to be canvassed, this Court deemed it appropriate to indicate it to the appellant that the appellant was well within its right to pursue the grounds, but it had to be done responsibly

since it involved the reputations of arbitrators, including the one possibly nominated by the appellant.

92. At such stage, Counsel appearing for the appellant takes responsibility and, without obtaining instructions from client, submits that the ground of bias is not pressed by the appellant. Since senior Counsel representing a client has a degree of implicit authority, when a considered submission is made to abandon a ground, the court may accept the ground to have been abandoned by the client itself.

93. Accordingly, no finding of this Court need be rendered on the ground of bias but it must be observed that courts should be wary in allowing such grounds to be taken recklessly. A ground of bias of the present kind pertains to a matter of moral turpitude and the courts have to guard against its open forum being used for irresponsible mudslinging.

94. This may also be the appropriate place to deal with the other overarching submission of the appellant that the Gauhati High Court order of April 30, 2010 intended both set of references to be taken up by a common arbitral tribunal. There is no doubt that paragraph 14 of the relevant order recorded that the parties had agreed that in case of other

disputes which may arise in future in respect of the same contracts, they would be jointly referred for arbitration to the same panel of arbitrators.

95. It must not be lost sight of that the recusal by the panel of arbitrators which rendered the awards impugned herein was as a consequence of an allegation of bias being brought against them by the appellant herein and some rude words used against them in course of a hearing in the second set of references. Indeed, if the arbitrators had some ill-motive, they would have stuck to their ground, contested the flimsy charge of bias levelled and waited for the order of Court in such regard. But these arbitrators may not have been thick-skinned judges or career lawyers and deemed it fit to give up their mandate since their integrity had been called into question.

96. In the light of the ground of bias having been consciously abandoned after it was belatedly taken by way of an afterthought and the second set of references going to a completely new arbitral tribunal, there does not appear to be any good reason to undo the impugned awards on the specious pretext that all the disputes were required to be taken up by one panel of arbitrators in the order of reference. Indeed, it is the appellant which has brought about this unusual situation and the appellant cannot be permitted to take advantage thereof. At any rate,

there is no ground of such kind under Section 34 of the 1996 Act, to which all source of authority in this jurisdiction must be traced, to annul the impugned awards and require the elaborate exercise to be undertaken afresh.

97. Apart from the ground of bias that was initially argued and, later, given up and the appellant's suggestion that since all the references could not be dealt with by the same panel of arbitrators, the impugned awards should be set aside and all disputes referred to a panel already in seisen of similar references, which ground has been repelled as indicated earlier in this judgment, the remainder of the challenge is founded on the arbitrators having exceeded their authority in overlooking express or implied provisions in the contract to allow certain heads of claim and the ground of patent illegality for there being no basis, justification or reasons being furnished for quantification of the sums allowed under divers heads and sub-heads of claim.

98. At the initial stage, the heads of challenge fashioned by the appellant coupled with the submission that there was no quantification of the sums awarded on the basis of the several heads of breach perceived to have been committed by the appellant, appeared to be attractive. After all, even though it is accepted that while assessing

damages a certain degree of guesswork based on rough estimations would occur, it was difficult to comprehend as to how the delay attributed to the appellant on account of supply of materials or faulty design of tunnel support or deviation in rock strata or the lack of a proper access road and the like could be quantified in money terms.

99. However, as it turns out, there were eight aspects that were highlighted by the contractor as being the main grounds for the very limited extent of work being completed during the 24-month contemplated period of the contract. At the same time, the appellant herein also carried eight grounds of perceived delay on the part of the contractor that resulted in only a little over a fifth of the value of the work to be completed within the original contractual period till September 27, 2003.

100. It is evident on a plain reading of the award and the discussion on such aspects, that the arbitral tribunal was satisfied that on seven of the eight counts of delay cited by the contractor, there was breach on the part of the employer and the delays on such accounts were attributable to the employer. Likewise, the eight counts of delay attributed by the employer to the contractor were found not to hold any water and were rejected. No specific challenge has been canvassed on the rejection of

the several counts of breach on the part of the contractor as alleged by the employer.

101. In respect of each of the heads of challenge on merits asserted by the appellant, pertaining to delay in supply of explosives, delay and short supply of cement and steel, tunnel collapse, rock strata deviation, extraction of boulders and sand, access roads and delay in issuing construction drawings, despite certain clauses of the contract being placed by the employer, there does not appear to be any specific clause of prohibition for the breach alleged under the several heads to be disregarded.

102. For instance, on account of tunnel collapse, rock strata and access roads, the contracts specifically required the bidders to acquaint themselves with the existing conditions and to factor in the time for executing the work and the expenses therefor, accordingly. At the same time, the description of the access road and the nature of the rock composition were also furnished albeit with the relevant disclaimers. In a commercial contract, the disclaimers must not be read to a point of absurdity. The nature of the composition of the rock was indicated and the data supplied was said to be on the basis of information furnished by the Geological Survey of India by drilling holes into the rock and

assessing its structure and composition. If every bidder were to carry out comprehensive examinations of the rock strata before furnishing their bids, which had to be done within a finite period of time, it would have been an impossible exercise. Again, even though the poor condition of the access roads could be seen by the bidder, yet there was a promise of one road being constructed by the employer along with the Border Roads Organisation. Further, the plans submitted by the contractor in this case for moving its men and machinery clearly stipulated the minimum standards for the access roads so that heavy vehicles could ply at a regular, if somewhat reduced, speed and did not have too much of an incline to negotiate. As the arbitrators found, the access road never adhered to the required standards nor was the other road constructed even by the end of the initial extended period of contract or even the date of suspension of the work.

103. As the arbitrators rightly observed, the overarching problem for the work being undertaken at the project site was the absence of an access road that prevented, impeded and grossly delayed the reaching of material and machinery at the project site, not only by the contractor, but also by the employer in respect of the material that the employer was obliged to supply to the contractor.

104. In case of none of the seven grounds – delay in supply of explosives; delay and short supply of cement and steel; tunnel collapse; rock strata deviation; extraction of boulders; access roads; and, delay in issuing construction drawings – has the appellant been able to show any clause in the contract that absolved the appellant of the consequences of its breach in such regard. In any event, the claims carried by the contractor were only indirectly based on such grounds which were cited as hindrances or impediments to the work being carried out and not as heads of claim. Ordinarily, a prohibitory clause in a contract would preclude a particular claim being made in monetary terms and not a charge being brought as a ground for the delay in the execution of the work.

105. Even if it is accepted that a contract may contain a clause that prohibits a contractor from claiming any damages on account of any loss in respect of a particular matter, the same has to be spelt out clearly. In the present case the endeavour on the part of the appellant has been to rely on contractual provisions that implied that necessary care and caution ought to have been taken by the bidders for assessing various aspects before making a bid or drawing up their estimates of expenses therefor. There is no doubt that the relevant provisions cast a

responsibility on the bidders and, ultimately, the contractor; but a prohibition has to be clear, categorical and unambiguous since a prohibition on such account would be contrary to the natural right of a contractor to claim damages for breach upon putting the employer on notice and proceeding with the work notwithstanding the breach. Further, the arbitral tribunal reckoned that the poor access road was such an overwhelming impediment to the work being taken up or executed in a timely manner, that it based its finding of delay primarily on such account despite finding delay attributable to the employer on six other aspects of hindrance that the contractor had cited.

106. In commercial contracts, particularly in respect of power projects and the like where a private contractor is dependent on the public employer for licenses, permissions, concessional supplies and the like, it must be recognised that there are reciprocal obligations to be discharged as in a well-oiled machine for such machine to function smoothly and produce optimal results. As rightly noticed by the arbitrators, when the project site could not be approached because of the lack of a proper access road, all other grounds paled into insignificance.

107. Nonetheless, adequate reasons have been furnished by the arbitrators in finding the appellant in breach on the seven counts of

hindrances pertaining to delay in supply of explosives, delay and short supply of cement and steel, tunnel collapse, rock strata deviation, extraction of boulders, access road and delay in issuing construction drawings. In respect of tunnel collapse, the arbitrators found that the steel ribs structure designed by the employer was faulty and required several modifications. The obvious did not require to be stated thereafter. If the structure could not support the ceiling or the roof to afford the contractor sufficient time to apply cement plaster for the roof to be firmed up, the delay on such count was attributable solely to the appellant upon noticing that the support structure caved in.

108. Similarly, the arbitrators acknowledged that the contractor could not have had access to boulders and sand without being given the requisite assistance in such regard. As much as the appellant flaunts the assistance rendered through the Chief Minister of Mizoram, it cannot be missed that only a small percentage of extraction was allowed. Even in the later periods, meagre amounts of boulders and sand could be obtained. Given the reality of the situation, it would not do for the appellant to wash its hands off in such regard and claim that it had rendered assistance but it was not its obligation to extract the boulders

and sand necessary for the project. What cries out loud is that the assistance rendered fell woefully short of what was necessary.

109. As to the delay in handing over construction drawings, it appears to be the fairly admitted position that the appellant failed miserably in such regard and the ground has been urged more in hope than with any expectation.

110. That leaves only the ground of interest.

111. Apart from the rival submissions of the parties on the matter pertaining to interest recorded earlier in this judgment, the legal issue that the respondent has raised pertains to the amendment in Section 28(3) of the 1996 Act. The respondent submits that the original Section 28(3) has been turned on its head by the amendment as would be evident from how it read before the amendment and how it now reads as indicated hereinbelow:

Before amendment

“28(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

After amendment

“28(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.”

112. There is no denying that the provision has undergone a sea change and, as a consequence, the extent of intervention that the court

can make in respect of an arbitral award is narrowed down from what was possible when the seminal judgment in *ONGC Ltd v. Saw Pipes Ltd* reported at (2003) 5 SCC 705 was delivered.

113. However, it still begs the question despite the qualitative transformation of what an arbitral tribunal is required to do under Section 28(3) of the Act, whether the arbitral tribunal in this case referred to the possible prohibition in clause 55 of Book II of interest being awarded in respect of any claim under the contract.

114. It is elementary on a plain reading of Section 31 of the Act that the statute recognises party autonomy in the matter of interest, but only till the pre-award stage. For the post-award period, the arbitral tribunal has full authority, subject to an outer limit that has been prescribed in Section 31(7) of the Act. Thus, it is possible for a contract to contain a clause that would prohibit any interest to be awarded for the pre-reference and pendente lite periods. Further, the distinction that courts made under the 1940 Act of the authority of an arbitrator to award interest despite a prohibitory clause precluding the parties to the matrix contract from claiming or granting interest, is no longer relevant under the present statute. It is clear that in terms of the 1996 Act, if interest is

prohibited or restricted in the agreement between the parties the prohibition or restriction will apply equally to the arbitrators.

115. Clause 55 of Book II is not referred to at all in the impugned awards. It, thus, appears that arbitrators had no occasion to interpret or comprehend the effect of such provision on the permissibility or the arbitrator's authority to grant any pre-reference or pendente lite interest.

116. This is a case of not only the arbitrators not deciding the issue in accordance with the terms of the contract but where the arbitral tribunal failed to take into account a relevant term crucial in the matter of adjudication and award of pre-award interest.

117. Though the parties have laboured on the issue by referring to similar clauses in *Harish Chandra*, *Sayeed Ahmed* and the 2012 and the 2019 cases of *Jaiprakash Associates*, it is evident that the impugned award has been made without reference to a crucial term in the contract that was pointed out in the written submission filed on behalf of the appellant herein. It is one thing for the court, in seisin of a petition challenging an award, to conclusively decide on the interpretation of a provision upon a view in such regard being expressed by the arbitral tribunal and quite another for the court to embark on such exercise when no opinion on such aspect is expressed in the arbitral award itself.

The matter is of greater significance in the present context particularly since any conclusive finding on the interpretation of the relevant clause as to whether it prohibits or permits pre-award interest would operate as issue estoppel and would have an overarching impact in the other pending and proposed references.

118. It is only for such reason that in the light of the arbitrators in the present case not having decided the issue with reference to the relevant provision that was cited in such regard by the appellant, that the court desists from undertaking such exercise in the limited scope available under Section 34 of the Act and the rarified atmosphere of an appeal under Section 37 of the Act against the dismissal of a challenge to an award.

119. Accordingly, the grant of pre-reference and pendente lite interest made in each of the five impugned arbitral awards is set aside without expressing any opinion as to the efficacy of clause 55 of Book II and by leaving it open to the contractor in each case to carry the claim further in accordance with law. The challenges brought on all other heads stand repelled. There is sufficient justification for the grant of the limited amounts under the several heads and sub-heads of claim and the impugned awards indicate basis for the quantification in the several

appendices. The arbitrators have referred to the applicable Central Water Commission guidelines, the terms of the contract and the formulae and principles in Hudson's venerable treatise on *Building and Engineering Contracts* in arriving at the quantification.

120. As to the adequacy or sufficiency of reasons, the matter falls entirely within the exclusive domain of the arbitrators. It may do well to remember that the degree of superintendence that a court exercises in matters pertaining to arbitral awards has more to do with correcting errors of jurisdiction, where the arbitrators stray beyond the authority they derive from the contract, and does not extend to errors within jurisdiction, unless such errors lead to an absurd conclusion or result in manifest miscarriage of justice.

121. It is often said that a court does not sit with a fine tooth-comb to look for the i's that have not been dotted or the t's that have not been crossed in an arbitral award. When it comes to sufficiency of reasons, as long as the discussion reveals the application of the mind to the matter in issue and the finding has reasonable nexus therewith, the court will not interfere. Indeed, embarking on an exercise to ascertain whether adequate reasons have been furnished may result in a re-appreciation of the evidence, which the court is neither required nor authorised to do in

this jurisdiction. As long as the reasons furnished are not outlandish or patently absurd, even the subjective satisfaction based on some discernible objective criteria would pass muster. The underlying basis for the limited jurisdiction granted to court in arbitration law is that since the parties had chosen a consensual forum, they must abide by the result obtained in such private forum, unless there is egregious injustice caused by the impugned award of the kind that would shock the conscience of the court.

122. After all, the arbitrators were engineers and not trained lawyers or judges. Judges often use legal jargon and Latin expressions to convey certain reasons without elaborating thereon. And that it is not to speak of the modern trend of churning out judgments that are heavier by weight than in content, what with page after inane page of intellectual rubbish sought to be embellished with bombastic words – oftentimes reeking of malapropism – and littered with obscure Latin expressions to camouflage the complete lack of substance therein. Engineers may find certain observations made to be wholesome enough not to require any further explanation.

123. Since 75 per cent of the amount awarded in each reference, inclusive of interest, has been received by the relevant award-holder

respondent, the appellant will not be entitled to claim immediate refund of any amount notwithstanding this order, if appropriate steps in pursuance of the claim for pre-award interest are taken by the contractors in accordance with law within the period of limitation.

124. Since the appellant has succeeded in part as indicated above and the issue as to entitlement to pre-award interest remains wide open, the parties will pay and bear their own costs.

125. Arb.A. No. 1/2023 with MC (Arb.A.) No. 1/2023 and MC (Arb.A.) No. 7/2023; Arb.A. No. 2/2023 with MC (Arb.A.) No. 2/2023 and MC (Arb.A.) No. 12/2023; Arb.A. No. 3/2023 with MC (Arb.A.) No. 3/2023 and MC (Arb.A.) No. 13/2023; Arb.A. No. 4/2023 with MC (Arb.A.) No. 4/2023 and MC (Arb.A.) No. 14/2023; and, Arb.A. No. 5/2023 with MC (Arb.A.) No. 5/2023 and MC (Arb.A.) No. 15/2023 are disposed of accordingly.

(Sanjib Banerjee)
Chief Justice

I agree.

(W. Diengdoh)
Judge

Meghalaya
30.05.2023

"lam DR-PS"