***IN THE HIGH COURT OF JUDICATURE AT BOMBAY***
***ORDINARY ORIGINAL CIVIL JURISDICTION***

***ARBITRATION PETITION NO.436 OF 2010***

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| Union Bank of India (UBI) through | ) | | |
| Assistant General Manager, | ) | | |
| Architect Division, Support Service | ) | | |
| Department, Central Office, | ) | | |
| Union Bank Bhavan Marg, | ) | | |
| Mumbai 400 021 | ) | .. | Petitioner |
| Versus | | | |
| Thakkar and Associate, through | ) | | |
| Mr. Mehul S. Thakkar, Partner, | ) | | |
| Above IDBI Bank, 1st Floor, | ) | | |
| Near Union Bank of India, | ) | | |
| Bokde Building Compound, N.S. Road, | ) | | |
| Mulund (W), Mumbai 400 080 | ) | .. | Respondent |

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Mr.R.S. Apte, Senior Advocate a/w Ms.Kavita Brid-Chavan a/w Mr.Rishabh Jaisani i/by M/s. Singhania & Partners for the Petitioner.
Mr.P.K. Dhakephalkar, Senior Advocate a/w Mr.Sachin Dhakephalkar a/w Ms.Gawri Raghuvanshi for the Respondent.

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***CORAM : R.D. DHANUKA, J.***
***RESERVED ON : 24th APRIL, 2015***
***PRONOUNCED ON : 10th JUNE, 2015***

***<u>JUDGMENT</u> :-***

. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the said Arbitration Act"), the petitioner has impugned the arbitral award dated 15th October 2009 made by the arbitral tribunal thereby allowing most of the claims made by the respondent and rejecting all the counter claims made by the petitioner. The petitioner was the original respondent whereas, the respondent was the original claimant in the arbitral proceedings. The petitioner had also made counter-claims against the respondent. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner had developed a property at Powai comprising of two buildings namely administrative building which comprises of basement, ground plus eight storied and a hostel comprising of ground plus two floors totally admeasuring 70,000 sq.ft. The petitioner had appointed M/s. Gherzi Eastern Limited as an Engineer/ Project Architect and Project Management Agency for implementing the subject work. The said project engineer had drawn the plans, designs and tenders for implementing the said project. The petitioner had awarded civil construction work to M/s.Engineering Project (India) Limited, a Government of India enterprise. The said M/s.Engineering Project (India) Limited, however, did not complete the part of the work and more particularly the external development work. The petitioner accordingly decided to call for tenders so as to complete the balance work on urgent basis.

3. On 26th January 2007, the petitioner issued an advertisement and invited tenders for completing external development work. The tenders were opened on 13th February 2007. The respondent submitted their bid for Rs.71,13,095.71. The respondent vide their letter dated 23rd February 2007 offered a discount and undertook to complete the work

as per schedule by working late hours/holidays and agreed not to sublet the said work on back to back basis system. On 28th February 2007, the petitioner placed the work order upon the respondent stipulating completion period as 3 months with recovery of liquidated damages @ 1% of the contract amount per week of delay for the period the work would remain incomplete, subject to maximum deduction of 10% of the contract amount.

4. The respondent vide their letter dated 10th March 2007 submitted acceptance letter. It was the case of the petitioner that the respondent did not initiate any steps for commencing the work on the ground that the entire work available for execution was of the value of just Rs.25 lacs as against Rs.71.13 lacs quoted by them and they wanted full scope of work to be finalised and/or revision before commencing the said work. The petitioner was sending reminders to the respondent to commence the work. The respondent sent a letter on 4th April 2007 stating that they were commencing the work only on the assurance that the value of work would be around Rs.60-65 lacs.

5. On 27th April 2007, the respondent submitted a bar chart program for completing the work without confining to the program of schedule for commencement and completion dates. The petitioner advised the respondent to amend the bar chart showing commencement date as 12th March 2007 instead of 19th April 2007.

6. Various correspondence were exchanged between the parties during the course of the execution of the work and several meetings were held which were also attended by the Project Consultant. It was the case

of the petitioner that there was a slow and unsatisfactory progress on the part of the respondent in proceeding with the work. The respondent was failing to arrange manpower and machinery required for completing the work. It was also the case of the petitioner that during the site inspection, the petitioner observed various defects in stone masonry retaining wall and advised the respondent to get the same rectified in line and levels to avoid its damage/collapse and also to submit structural engineer certificate about its satisfactory completion.

7. On 1st July 2008, a portion of retaining wall constructed by the respondent collapsed. It was the case of the petitioner that the wall constructed was not only of a poor quality but without bond stone and against the specification tender clause 4.3.8 and tender item 3.4.

8. It was the case of the petitioner that the respondent vide their letter dated 27th August 2007 themselves declared that the work stood completed on 27th August 2007 ignoring various pending matters. The petitioner reminded the respondent that if the work was completed, they had to obtain the certificate from the project engineer. The respondent, however, once again vide their letter dated 12th December 2007 stated that the work was completed without approaching the project engineer for completion certificate. It was the case of the petitioner that without obtaining completion certificate from the project engineer, the respondent was illegally insisting for payment.

9. Vide their letter dated 26th December 2007, the project engineer issued a virtual completion certificate declaring that the work was completed on 9th October 2007. The said project engineer vide their

letter dated 26th December 2007 addressed to the petitioner recommended for granting extension of time to the respondent upto 9th October 2007. It was the case of the petitioner that the petitioner was not convinced with the reasons submitted by the respondent and recommendations of the project engineer for granting extension of time and, therefore, did not grant extension of time and did not regularise the delay beyond scheduled completion date of 11th June 2007. According to the petitioner, there was thus delay of 118 days attributable on the part of the respondent.

10. The petitioner vide their letter dated 28th December 2007 requested the respondent to fulfill the contractual formalities required for settlement of final bill and not to raise unrelated issues. The respondent vide their letter dated 13th June 2008 only submitted required details in respect of extra items to enable the petitioner to settle the final bill. The petitioner vide their letter dated 7th February 2008 refused to pay the claim submitted by the respondent vide their letter dated 17th December 2007 received by the petitioner in respect of cost difference in cement purchase and difference in items no. 4.13 of security cabin on the ground that the claims submitted by the respondent were unjustified and there was no provision in the tender to make such payment.

11. Vide their letter dated 25th February 2008, the project engineer issued final bill certificate valuing the work at Rs.1,05,75,220.55. The respondent submitted 'No Claim Certificate' vide their letter dated 26th February 2008. The petitioner vide their letter dated 22nd April 2008 informed the respondent about alleged

discrepancies in the bills submitted by the respondent. It was the case of the petitioner that the final bill submitted by the respondent was verified at site in the presence of Mr.Keni, authorised representative of the respondent on various dates and it was observed that there were various discrepancies in the measurements of various items.

12. On 28th March 2008 the petitioner released ad hoc payment of Rs.8 lacs against final bill settlement. It was the case of the petitioner that at the level of 4th RA bill (pre-final bill), the petitioner had already released payment of Rs.88,07,324/-. The total payment released to the respondent came to Rs.96,07,324/-.

13. It was the case of the petitioner that the authorised representative of the respondent was shown final measurement by the petitioner after joint inspection with Shri Haidery and the amount of work was around Rs.87,94,155.70. Copy of the abstract of the final bill was also handed over to the authorised representative of the respondent with a request for his consent for acceptance of measurements so as to enable the petitioner to release the payment, if any. The petitioner on several occasions requested the respondent to submit a consent for settlement of the bill but the respondent did not agree to it. The respondent protested against the petitioner for rechecking of the bill and insisted that the petitioner would settle the bills as per the bills settled by the project engineer.

14. The petitioner vide their letter dated 28th July 2008 informed the respondent that the defect pointed out had not been rectified by the respondent and the work would be attended by other agency at the risk

and cost of the respondent. In the month of October 2008, the rechecking of the final bill measurement was completed and copy of the abstract was handed over to the respondent on 17th October 2008 for their confirmation. It was the case of the petitioner that though the respondent acknowledged the receipt of revised measurement and also the revised bill amount of Rs.95,84,347.33, the respondent insisted for release of payment without confirming their acceptance of measurement.

15. It was the case of the petitioner that after addressing several letters by the petitioner to the respondent, the respondent vide their letters dated 18th December 2008 and 22nd December 2008 gave confirmation to the revised measurements. The petitioner accordingly processed the final bill and was ready for making payment. It was observed by the petitioner that the petitioner had already released payment of Rs.96,07,324/- as against final bill of Rs.95,84,347/- and thus the excess amount of Rs.22,977/- was to be recovered by the petitioner from retention money of the respondent. The respondent, however, issued a notice for arbitration.

16. The petitioner as well as the respondent nominated their respective arbitrator who appointed a presiding arbitrator and constituted the arbitral tribunal. Pursuant to the directions issued by the arbitral tribunal, the respondent herein filed their statement of claim before the arbitral tribunal and made 11 claims inclusive of interest and cost of arbitration. The said claims were resisted by the petitioner by filing written statement. The petitioner also made counter claims against the respondent and made 9 claims including cost of arbitration and interest. None of the parties led any oral evidence before the arbitral tribunal.

17. On 15th October 2009, the arbitral tribunal made unanimous award and allowed 10 claims either fully or partly out of 11 claims made by the respondent and rejected all the counter claims made by the petitioner. The respondent did not challenge any part of the award made by the arbitral tribunal. The petitioner has impugned the entire award allowing 10 claims out of 11 claims made by the respondent and rejecting all the counter claims made by the petitioner on various grounds.

18. Mr.R.S. Apte, learned senior counsel along with Ms.Kavita Brid-Chavan, learned counsel for the petitioner submitted that as per 'the instructions to tenderers,' the tenderers were required to obtain all information that they might require to enable them to submit the tender including necessary visits to the site regarding procurement of materials, labour, etc. It was clearly provided that the schedule of quantities as contained in the tender document was liable to alteration by omission, deduction, substitution or addition at the discretion of the engineer/ employer without affecting the terms of the contract. The petitioner was not liable to entertain any claims for want of information at any particular point or any change in rate or conditions after opening of the tender. He submits that the petitioner had already issued two sets of tender drawings along with tender document.

19. Learned senior counsel invited my attention to various provisions of the contract in support of his submission that the arbitral tribunal has awarded several claims contrary to the terms of the contract. I shall refer to and deal with those provisions of the contract while discussing the claims awarded by the arbitral tribunal in the impugned

award. He invited my attention to correspondence exchanged between the parties and submits that the delay in execution of the work was solely attributable to the respondent on various grounds and the respondent had committed breach of the contract.

20. Learned senior counsel submits that the work carried out by the respondent was defective which caused damage and resultantly, the retaining wall was collapsed. The respondent could not have declared the work as completed unilaterally without obtaining completion certificate from the project engineer. He submits that there was a delay of 118 days on the part of the respondent in completing the work and thus the petitioner was entitled to recover the liquidated damages from the respondent as per the terms of the contract. He submits that the letter addressed by the respondent for extension of time was not in accordance with clause 44 of the General Condition of the Contract. He submits that the letter addressed by the project engineer to the petitioner for recommending the extension to the respondent was not binding on the petitioner and was not approved by the petitioner.

21. The petitioner did not grant any extension of contract to the respondent beyond the original stipulated date of completion. He submits that since the petitioner had not granted any extension to the respondent, the arbitral tribunal could not have considered the recommendation letter of the project engineer as letter granting extension of time and the said finding of the arbitral tribunal is totally perverse and contrary to the terms of the contract. He submits that various claims for compensation thus awarded by the arbitral tribunal for the work

during the alleged extended period were contrary to the terms of the contract and without jurisdiction.

22. Learned senior counsel for the petitioner submits that the respondent had not mobilized men and machinery and had wasted around 31 days after the receipt of the work order from the petitioner. The respondent had not procured cement, steel, sand, aggregate, paver blocks etc. in time and in adequate quantity. There was stoppage of work frequently by the respondent for various reasons not attributable to the petitioner. He submits that though various breaches of the terms of the contract were committed by the respondent, the arbitral tribunal awarded various claims by overlooking documentary evidence produced by the petitioner and contrary to the terms of the contract. No notice under clause 6(3) and clause 44 of the General Conditions of Contract in respect of the alleged delay or disruption of the works was issued by the respondent. The arbitral tribunal awarded various claims contrary to clause 6(3) and clause 44 of the General Conditions of Contract.

23. It is submitted by the learned senior counsel that as against the contract price of Rs.70,46,618.18, the petitioner had already paid an amount of Rs.96,07,324/- to the respondent and inspite thereof, the arbitral tribunal awarded amount of Rs.86,00,091/- in favour of the respondent which claim was not only frivolous but without any basis. He submits that the arbitral tribunal has completely disregarded the ‘No Claim Certificate’ dated 26th February 2008 which was signed, stamped and submitted by the respondent towards full and final settlement with an undertaking that upon receipt of final bill payment, the respondent

would not have any claim of whatsoever nature against the petitioner.

24. Learned senior counsel submits that in terms of clauses 4, 8 and 12(i) of the article of agreement dated 25th July 2007, the respondent was under an obligation to complete the work within the stipulated time and was not entitled to anything over and above on account of the alleged varied, extra work done by it. He submits that in any event, there was no request for extension of time within the prescribed period as per clause 44 of the General Conditions of the Contract. It is submitted by the learned senior counsel that since the petitioner had found various discrepancies and irregularities in the final bill submitted by the respondent, the petitioner had decided to re-measure the work executed by the respondent which was permissible under the provisions of the contract.

25. It is submitted that at the stage of re-measurement, the representative of the respondent was already present. Based on such re-measurement done by the petitioner, the final bill was approved and the respondent was requested to accept the payment on the basis of re-measurement. He submits that the finding of the arbitral tribunal that the petitioner could not have re-measured the work and was bound to honour the first certificate issued by the project engineer is contrary to the terms of the contract.

***<u>Claim No.1 (a)</u>***

26. In so far as the claim no.1(a) i.e. “for payment towards work done at Rs.9,64,266.45 excluding interest” awarded by the arbitral tribunal is concerned, it is submitted by the learned senior counsel that

the arbitral tribunal has allowed the said claim under the final bill solely on the ground that the engineer had issued a certificate dated 25th February 2008 as per clause 17.1 of the General Conditions of the Contract and the said certificate was final, binding and conclusive and that being excepted matter, the said final bill certified by the engineer had to be honoured and paid to the respondent by the petitioner. It is submitted that the said certificate dated 25th February 2008 was issued on Interim Payment Bill No.05 as per clause 17.1 of the General Conditions of the Contract and the final certificate could be issued by the engineer only after completion of the Defect Liability Period i.e. only after August 2008. He submits that in any event, the petitioner being an employer had right to take re-measurement of the work certified by the said engineer, for the purpose of making payment under the final bill to the respondent. The said certificate was not final, binding and conclusive and the dispute having arisen under the said certificate was to be adjudicated on merits by the arbitral tribunal. The said dispute was thus not covered by any excepted matter but was arbitrable. He submits that the award shows non-application of mind on the part of the arbitral tribunal.

27. Mr.P.K.Dhakephalkar, learned senior counsel for the respondent, on the other hand, supported the findings rendered by the arbitral tribunal and submits that the arbitral tribunal has appreciated the evidence produced by both the parties and has considered the pleadings and documents and thus, this Court cannot re-appreciate the evidence under Section 34 of the Arbitration Act. It is submitted that since the findings rendered by the arbitral tribunal are not perverse, this Court cannot interfere with such findings of facts. He submits that as

per the work order issued by the petitioner, the work was to be completed within three months, however, due to various delays attributable on the part of the petitioner, the work could be completed only after more than seven months i.e. on 9th October 2007.

28. Learned senior counsel for the respondent invited my attention to the definition of the 'Engineer' under clause 2 of the Special Conditions of the Contract and also the condition no.3 which specifies the powers and duties of the Engineer. He submits that under the said provision, M/s. Gherzi Eastern Limited was appointed as Engineer for day to day site supervision and management with several powers prescribed under the said provision.

29. Reliance is also placed on condition no.17.1 of the Special Conditions of the Contract which provides for submission of monthly running bills by the respondent and the procedure prescribed for checking, verifying and certifying the bills submitted by the Contractor for interim payment. Reliance is also placed on condition no.17.2 of the Special Conditions of the Contract which provides for terms of payment.

30. It is submitted by the learned senior counsel for the respondent that under clause 18 of instructions to the tenderers, in the event of any discrepancy between the details and/or description given in the BOQ, the drawings and the technical specifications, then the item shall be deemed to have been priced in accordance with the details and/or description confirming to the most superior provisions contained in the Bill of Quantities, drawings and technical specifications. Any further interpretation of the said clause shall be at the discretion of

engineer, whose decision shall be final and binding on the parties to the contract. He submits that in this case, the said engineer had certified various payments from time to time and had rendered various decisions which were binding on both the parties including the petitioner.

31. Learned senior counsel for the respondent placed reliance on clause 52 of the General Conditions of the Contract which provides for valuation of variations. Reliance is also placed on clause 67 of the General Conditions of the Contract which provides for settlement of dispute by arbitration. It is submitted that some of the decisions of the engineer provided in the contract fell under excepted matter and such decisions were not open for challenge or adjudication in the arbitration proceedings under clause 67 of the General Conditions of the Contract.

32. Learned senior counsel for the respondent submits that in view of aforesaid provisions of the contract and several other provisions, the finding rendered by the arbitral tribunal that certificate issued by the said engineer certifying that the final bill certificate was binding on both the parties and such decision fell under excepted matter was not open for adjudication before the arbitral tribunal is finding of fact. He submits that in any event, the interpretation of clause 67 of General Conditions of the Contract rendered by the arbitral tribunal while holding that the certificate of the engineer is final, binding and conclusive on the parties is a possible interpretation and thus cannot be substituted by another interpretation by this Court under Section 34 of the Arbitration Act.

33. A perusal of the award indicates that the arbitral tribunal has allowed this claim in the sum of Rs.9,64,266/- towards principal sum

and interest @15% p.a. with effect from 30th April 2008 to 15th October 2009. The arbitral tribunal placed reliance on the alleged joint measurement recorded by the respondent and the project engineer while allowing the said claim and has rejected the submission made by the petitioner that the petitioner had equal right to have a technical check for the final bill measurement and held that whatever exercise was done by the petitioner for re-measurement was futile and beyond the provisions of the contract terms. It is held by the arbitral tribunal that the power was vested with the project engineer and thus the action of the petitioner for re-measurement was beyond the provisions of the contract terms. In so far as the interest @15% p.a. from 30th April 2008 to 15th October 2009 is concerned, the arbitral tribunal held that the certified amount was required to be paid within 6 weeks time under clause 32.1 of the General Conditions of the Contract which was to be reckoned from the date of certification of the project engineer i.e. on or before 11th April 2008.

34. It was the case of the respondent that the respondent had submitted a final bill for the completed works on 3rd December 2007 and the scrutiny of the bill was made and measurement was finalized and processed for payment vide Project Architect certificate dated 25th February 2008 which certificate was to be honoured by the petitioner within 6 weeks time as per the terms of the contract. It is held by the arbitral tribunal that the Project Architect certificate dated 25th February 2008 was binding on the parties and was an excepted matter. It was the case of the petitioner that there was a gross delay on the part of the respondent solely on account of the non-cooperation of the respondent. The petitioner after preliminary scrutiny of the alleged

final bill had found that it contained certain discrepancies and irregularities. Thus it was decided to re-measure the works executed by the respondent.

35. It was the case of the petitioner that based on such re-measurement done by the petitioner, the final bill was approved and a request was made to the respondent to accept payment on the basis of re-measurement. It was the case of the petitioner that the respondent vide their letter dated 22nd December 2008 had signed the copy of the abstract of quantities and gave their consent in respect of the quantities by making an endorsement thereon. Though the said document was forming part of the record before the arbitral tribunal at exhibit 'R-46,' the arbitral tribunal ignored the said endorsement made by the respondent themselves having agreed to re-measure the quantities and allowed the entire claim by overlooking the said document and by treating the certificate dated 25th February 2008 issued by the project engineer as final certificate. According to the petitioner, the said certificate was issued on Interim Payment Bill No.05 (Pre-Final Bill) as per clause SP 17.1 of the Special Conditions of the Contract.

36. Under clause 48.1 of the General Conditions of the Contract, it was provided that when the whole of the works had been substantially completed and had satisfactorily passed any final test, the contractor was entitled to issue a notice to that effect to the engineer for issuance of a certificate of completion in respect of the works carried out. The project engineer was empowered to issue a notice to the contractor within 21 days from the date of delivery of such notice with a copy thereof to the employer as regards the certificate of

completion stating that the date on which, in his opinion, the works were substantially completed in accordance with the contract. It was further provided under the said clause that the contractor was entitled to receive such certificate of completion within 21 days of completion to the satisfaction of the engineer of the works so specified and making good of any defects so notified.

37. Under clause 49.1 of the General Conditions of the Contract, the Defects Liability Period was prescribed which was the period of 365 days calculated from the date of completion of the works certified by the engineer. Under clause 61 of the General Conditions of the Contract, it was provided that no certificate other than the certificate of final completion referred to in clause 62 of the General Conditions of the Contract shall be deemed to constitute approval of the works. Under clause 62, it was clearly provided that the contract shall not be considered as completed until a certificate of final completion had been signed by the engineer and delivered to the employer stating that the works had been completed and maintained to his satisfactions. The certificate for final completion shall be given by the engineer within 28 days after expiry of the Defects Liability Period. Under clause 17.1 of the Special Conditions of the Contract, monthly running bills were to be submitted by the contractor which were required to be checked/ verified and certified by the engineer for interim payments. It was provided that all interim payments made to the contractor during the progress of the works and thereafter against various running bills shall deem to be on account payments to be adjusted in the Pre-Final Payment Certificate issued after the issue of completion certificate and handing

over of the works to the employer and further adjusted, if necessary in the final payments certified at the final account stage after the completion of Defects Liability Period and issue of certificate of final completion by the engineer.

38. A perusal of the record indicates that the final certificate could be issued by the engineer only after completion of Defects Liability Period i.e. August 2007 + 365 days which would have been completed in the month of August 2008. The arbitral tribunal, in my view, could not have treated the so called certificate dated 25th February 2008 which was issued on Interim Payment Bill No.05 (pre-final bill) as final certificate which in any event was much prior to the completion of Defects Liability Period prescribed under clause 49 of General Conditions of the Contract read with clause SP 14 of the Special Conditions of the Contract.

39. A perusal of clause 17.1 of the Special Conditions of the Contract makes it clear that interim payment was to be made to the contractor during the progress of the works and thereafter various running bills were deemed to be 'on account payments' which were liable to be adjusted in the pre-final payment certificate issued after the issue of completion certificate and handing over of the works to the employer. In my view, Mr.Apte, learned senior counsel for the petitioner is right in his submission that the project engineer had not issued any final certificate as contemplated under the provisions of the agreement entered into between the parties and in any event could not have issued such certificate before expiry of 365 days of the Defects Liability Period. It was a matter of record before the arbitral tribunal that in view of various

discrepancies, the parties had followed the procedure of re-measurement of quantities. The respondent had made an endorsement to such re-measured quantities in their letter addressed to the petitioner which was a part of the arbitral record and was numbered as exhibit 'R-46.'

40. In my view, the finding of the arbitral tribunal that such pre-final certificate certifying the quantities by the project engineer was a final certificate and no re-measurement could be done by the petitioner is totally perverse and contrary to the provisions of the agreement. The said so called certificate dated 25th February 2008, in my view, could not have been considered as final certificate as contemplated under the provisions of the agreement. Be that as it may, the said certificate was not issued after expiry of the Defects Liability Period which was over some time in the month of August 2008. Be that as it may, there was no provision in the agreement that once such certificate was issued by the project engineer, it was final, conclusive and binding on the petitioner and it could not be opened or reviewed in the arbitral proceedings being in the nature of an excepted matter.

41. A perusal of the record also indicates that it was not the case of the respondent that such certificate dated 25th February 2008 was not amenable to review or adjudication by the arbitral tribunal and was an excepted matter. In my view, the arbitral tribunal could not have rejected the objection of the petitioner challenging the certificate issued by the project engineer on the ground that such decision was an excepted matter without there being a provision in the agreement to that effect and in any event without there being any issue raised by the respondent before the arbitral tribunal.

42. Under clause 67(1) of the General Conditions of the Contract, it is specifically provided that wherever in any of the documents forming part of the contract, the engineer has been vested with the final powers, his decision, opinion or certificate shall be final conclusive and binding on the parties and shall be without appeal. All other matters shall be subject to the rights of arbitration. A perusal of the award indicates that neither the respondent could point out any such powers of the project engineer which provided that the decision, opinion, certificate or any other decision was final, conclusive and binding on the parties and was covered by an excepted matter. Even the arbitral tribunal did not refer to any such provision providing that the final certificate or certificate of measurement issued by the project engineer was an excepted matter.

43. A perusal of the record indicates that the petitioner has placed on record various documents in support of their plea that the final bill measurement was verified by the authorized representative of the respondent when it was observed that the few measurements of excavation were not available at the site and found to be repeated and level of which recorded by the excavation board was not tallying with the record etc. A perusal of the award indicates that though the arbitral tribunal has referred to these documents and submissions advanced by the petitioner, it has not dealt with the material piece of the evidence merely on the ground that the certificate issued by the project engineer was final, conclusive and binding on the parties and was an excepted matter.

44. In so far as the reliance placed on clause 18 of the instructions to the tenderers' by the learned senior counsel for the respondent in support of their submission that interpretation of the clauses of the contract shall be solely at the discretion of the engineer whose decision was final and binding on the parties to the contract is concerned, in my view, there is no substance in this submission of the learned senior counsel for the respondent. The said provision does not provide that the so called certificate issued by the project engineer was by way of interpretation of any of the provisions of the agreement or was given in view of the alleged discrepancies in the details and/or description given in the Bill of Quantities, the Drawings and the Technical Specifications etc. In my view, the said provision would not apply in case of alleged final certificate issued by the project engineer purporting to certify the measurement and rates under the provision of the contract payable to the respondent by the petitioner.

45. In my view, the arbitral tribunal ought to have exercised their wide powers under the arbitration clause and ought to have decided the issue raised by the petitioner whether such so called measurement certificate issued by the project engineer could be disputed by the petitioner and there could be re-measurement. The arbitral tribunal, in my view, could not have ignored the admitted fact that the process of re-measurement of the quantities to ascertain the final quantities was carried out by the parties and such final quantities were endorsed by the respondent themselves. In my view, the award is contrary to the terms of the agreement. The arbitral tribunal had wide powers under clause 67(2) of the General Conditions of the Contract. The dispute raised

under claim no.1(a) arising out of the contract was arbitrable. The impugned award in so far as the claim no.1(a) is accordingly set aside.

***Claim No.1 (b)(i)***

46. In so far as the claim no.1(b)(i) i.e. "Additional and varied work with regard to tender schedule item" is concerned, it is submitted by the learned counsel for the petitioner that as per clause 1 of the instructions to the tenderers and clause 11 of the General Conditions of the Contract, the respondent was under an obligation to have a site visit in advance and to examine and ascertain the nature of the work executed at site. Any extra cost on account of the non-inspection and change in methodology of work due to site condition was inadmissible under the said clause. He submits that description of the BOQ item no.1 clearly provided for excavation by mechanical means for foundation in all types of soil including hard rock. He submits that the work carried out by the respondent clearly fell under the said description and the respondent was thus not entitled for any additional cost. He placed reliance on clause 9(vii) of the article of agreement dated 25th July 2007 and would submit that even under the said clause, the said claim no.1(b)(i) was not admissible and was prohibited.

47. Mr. Dhakephalkar, learned senior counsel for the respondent, on the other hand, submits that there was a change in the specification as per description of the BOQ items and specification for hard rock. The respondent was thus required to adopt heavy hydraulic machineries, drill and splitters etc. to tackle the area of excavation for road and drain. The respondent was required to take tremendous efforts in view of change in the specification and specification of hard rock. He submits

that the arbitral tribunal has interpreted clause 18 of instructions to the tenderers and clause 56 of General Conditions of the Contract while allowing the said claim made by the respondent. The respondent in their letter dated 27th April 2007 addressed to the petitioner had demanded the rate of Rs.5,500/- per cubic meter for the said work.

48. It is submitted that during the site meeting held on 15th May 2007, it was decided that additional compressor will have to be used. Level of the road had been increased. He submits that though the specification of the BOQ as well as of the hard rock had been changed, the petitioner had paid to the respondent only at the BOQ rate whereas the arbitral tribunal has rightly considered the claim of the respondent and has allowed the difference of Rs.6,42,657/- in the impugned award. He submits that no interference is permissible with such finding of fact rendered by the arbitral tribunal.

49. A perusal of the record indicates that it was the case of the respondent that there was a change in the specification as per description of the BOQ items and specification for hard rock. Resultantly, the respondent was required to adopt heavy hydraulic machineries, drill and splitters etc to tackle the area of excavation for road and drain. It was contended by the respondent that considering the actual site condition, the project engineer had directed the respondent to deploy different techniques and methodology without resorting to blasting. During execution of the work, the respondent vide letter dated 27th April 2007 had made it clear that adoption of blasting or loosening rock by pre-splitting and that too without using dynamite/detonators would call for tremendous efforts and expected rates per cubic meter

would be around Rs.5,500/- per cubic meter. It was the case of the respondent that the respondent had carried out the work by using hydraulic air compressor having capacity of 40 H.P. under the supervision of the project engineer. It was the case of the respondent that the actual cost worked out was Rs.6,340/- per cubic meter. The petitioner had, however, only paid as per BOQ rate of Rs.1468.10 per cubic meter.

50. It was, however, the case of the petitioner that under the provisions of the agreement, the contractor was required to visit the site before quoting a tender. Since the entire site was part of hillock comprising of black basalt stone, blasting was remote due to proximity of high rise buildings. The BOQ clearly provided that mechanical includes hard rock.

51. A perusal of the award in respect of this claim indicates that the arbitral tribunal has considered all these submissions made by the parties and placed reliance on clause 18 of the instructions to the tenderers and has rendered finding that it was practically impossible to identify the said quality of rock as mentioned in the specification. It is held that if there was any difference in the items in specification, the said item was required to be substituted and new rate was required to be worked out based on rate analysis. It is held by the arbitral tribunal that though the respondent has revised their rate based on the rate analysis at Rs.6,340/- per cubic meter, the respondent had indicated the approximate rate of Rs.5,500/- per cubic meter at the time of carrying out the work. The arbitral tribunal after rendering the finding that the activity of excavation was prime important to take

other sequential items awarded to the respondent, allowed the said claim at the rate of Rs.5,500/- per cubic meter.

52. The arbitral tribunal also took cognizance of the fact that in the particular hard rock excavation the quantity executed was almost 300% of the quantity mentioned in the BOQ. The respondent also placed reliance on the decision arrived at the site meeting held on 15th May 2007 when it was decided that additional compressor will have to be used and level of the road had been increased. In my view, the arbitral tribunal had interpreted the terms of the agreement and has appreciated the evidence produced by both the parties. The findings rendered by the arbitral tribunal are not perverse and thus cannot be interfered with under Section 34 of the Arbitration Act. The interpretation of the arbitral tribunal of the terms of the contract, in my view, is a possible interpretation and cannot be substituted by another interpretation by this Court. In my view, there is thus no merit in the submission of the learned senior counsel for the petitioner that the award in respect of this claim is contrary to the terms of the contract or such claim was prohibited.

***Claim No.1 (b)(ii)***

53. In so far as the claim no.1(b)(ii) i.e. “Raised Pointing” is concerned, it is submitted by the learned senior counsel for the petitioner that the respondent had voluntarily agreed to the rate of Rs.134/- per sq.meter for execution of the said work. He submits that since the respondent had agreed to the said rate, it had waived its right to claim anything over and above the said agreed rate. He submits that though the certificate issued by the project engineer was defective and was

subject to further scrutiny and satisfaction of the petitioner, the arbitral tribunal has ignored the mutually agreed rate and based on defective certificate, has allowed additional amount in favour of the respondent. In support of his submission, the learned senior counsel invited my attention to the documents showing agreed rate duly signed by both the parties annexed at Exhibit 'H' to the petition.

54. Learned senior counsel for the respondent supported the finding rendered by the arbitral tribunal in which it is held that there was no dispute for the quantity recorded in the measurement books by the engineer. The work carried out by the respondent was not at all connected to the description of the BOQ item. He submits that the arbitral tribunal has rightly accepted the rate arrived at Rs.149/- per sq. meter by the project engineer. He submits that it was not the case of the petitioner that there was any collusion between the respondent and the said engineer. This Court cannot re-appreciate the finding of fact rendered by the arbitral tribunal.

55. A perusal of the record indicates that it was the case of the petitioner that both the parties had agreed to the rate of Rs.134/- per sq. meter for execution of the work i.e. "Raised Pointing." Learned senior counsel for the petitioner placed reliance on the documents showing agreed rate signed by both the parties which was forming part of the arbitral proceedings and is annexed at exhibit 'H' to the arbitration petition. A perusal of the award indicates that the arbitral tribunal has rejected the agreed rate @ Rs.134/- on the ground that the project engineer had arrived at a reasonable rate of Rs.149/- per sq. meter by exercising the powers vested in them to decide approved rate

as per the provisions of the contract. It is held by the arbitral tribunal that the petitioner herein had gone beyond the provisions of the contract and a futile exercise was made to arrive at the rate of Rs.134/- by taking acceptance of the respondent herein.

56. Mr. Dhakephalkar, learned senior counsel for the respondent could not dispute that the parties had agreed the rate in respect of the said work @ Rs.134/- per sq. meter.

57. Under clause 52.2 of the General Conditions of the Contract which provides for power of engineer to fix rates in respect of all extra or additional work done or work omitted by the order of the engineer. It is provided that if all extra or additional work done or work omitted by the order of the engineer shall be priced at the rates and prices set out in Part II of the Special Conditions of the Contract provided that if the nature or amount of omission or addition relating to the nature or amount of the whole of the works or to any part thereof shall be such that, in the opinion of the engineer, the rate or price contained in the contract for any item of the works is, by reason of such omission or addition, rendered unreasonable or inapplicable, then engineer shall recommend the case to the employer and the employer shall have right to decide such rates. It is thus clear that the final decision to decide the rate in respect of all extra or additional work was with the petitioner being the employer. The project engineer could only recommend the case of the employer, however, a final decision was to be taken by the employer. The finding of the arbitral tribunal holding that the project engineer was vested with the powers to decide the

approved rate and thus the petitioner could not have gone beyond the provisions of the contract and thus arrived at Rs.134/- per sq. meter by taking acceptance of the respondent, is contrary to the terms of the agreement and more particularly clauses 52.1 and 52.2 of the General Conditions of the Contract. In my view, the arbitral tribunal has also overlooked the agreement arrived at between the parties. The award shows patent illegality and is accordingly set aside.

***Claim No.1 (b)(iii)***

58. In so far as the claim no.1(b)(iii) i.e. “Construction of security cabin” is concerned, learned senior counsel for the petitioner submits that execution of the said work i.e. construction of security cabin was covered under item 4.13 of the BOQ which provided for lump sum rate and no additional payment whatsoever was payable by the petitioner to the respondent. He submits that the respondent was fully aware that the existing building contained ACP cladding of reynobond and the respondent was thus under an obligation to furnish similar material for security cabin. The petitioner had informed the respondent for providing reynobond material for the security cabin. He submits that the additional rate awarded by the arbitral tribunal is contrary to the terms of the contract and no amount was permissible over and above the lump sum rate agreed under the contract.

59. Learned senior counsel for the respondent on the other hand submits that there was a change in the dimension due to change in elevation and the petitioner had insisted to have material like aluminum composite panel of 'Raynobond make' imported by M/s.Shapoorji

Pallonji & Co. which was almost double the price of any ISO standard material. Since the elevation treatment was changed, the respondent was required to spend additional amount and thus, the petitioner could not have insisted the respondent to accept payment at the lump sum rate. He submits that the arbitral tribunal has rightly rendered a finding of fact that the work provided in the BOQ was substituted in respect of which the petitioner as well as the engineer had not worked out the revised rate. He submits that this Court cannot interfere with such finding of fact.

60. A perusal of the award in respect of this claim indicates that the arbitral tribunal has rendered a finding that “List of approved manufacturers/agencies” for various materials was to be incorporated in the work on page 89 of the contract agreement. The said material brand 'Reynobond make' (imported) was not indicated. It is held that elevational treatment to the security cabin was having changes in its over all dimensions mentioned in the BOQ item No.4.13 and thus the rate mentioned under the BOQ item could not have applied to the work actually carried out. The Petitioner or the said engineer had not worked out the revised price of the lumpsum item for the work done on the basis of substituted item. The arbitral tribunal accordingly considered to award an additional payment of Rs.1,17,479/- extra over the lumpsum amount of Rs.1,90,000/- which was payable as per the BOQ Item No.4.13. The arbitral tribunal has considered the rates offered by the Respondent in the said substituted item vide exhibit 'R-26' dated 17th December 2007.

61. Mr. Apte, the learned senior counsel for the Petitioner did not dispute that the material like aluminum composite panel of

'Reynobond make' imported by M/s. Shapoorji Pallonji & Co. was not mentioned in the list of approved manufacturers/agencies for various materials to be incorporated in the work. In my view, the arbitral tribunal has rightly rendered the finding of fact that since the Petitioner had insisted for the use of material like Aluminum composite panel of 'Reynobond make' which was imported by M/s. Shapoorji Pallonji & Co. and which was of the price higher than the price of any ISO standard material, the Petitioner could not have paid to the Respondent the price for the said substituted item at the lumpsum rate.

62. In so far as the rate awarded by the arbitral tribunal is concerned, the arbitral tribunal has considered the lumpsum cost over and above BOQ amount of Rs.97,081.50 vide exhibit 'R-26' dated 17th December 2007. However, while deriving the additional amount of Rs.1,17,479/-, the arbitral tribunal has added 10% overheads and reimbursement cost of Rs.97,081.50 and thereafter, has further added 10% profit in the sum of Rs.1,06,700.50 which was comprising of reimbursement cost and 10% overheads. Under clause 32 of the Special Conditions of the Contract, it is provided that for settlement of rates of extra or additional items of work, the rate analysis was to be prepared as per CPWD norms and overheads and contractor's profit was to be taken as 10%. A perusal of the award, however, indicates that the arbitral tribunal has considered 10% towards overheads after working out the amount of reimbursement cost and thereafter, further added 10% profit on the composite amount of Rs.1,06,700.50. Under the said clause 32 of the Special Conditions of the Contract, in my view, the arbitral tribunal could not have considered overheads and profit

separately @ 10%. The amount of Rs.10,679.90, thus considered as 10% profit though 10% was already added to the reimbursement cost, is accordingly set aside being contrary to clause 32 of the Special Conditions of the Contract. Part of the award in respect of this claim is modified to that extent.

***Claim No.1 (b)(iv)***

63. In so far as claim no.1(b)(iv) i.e. “Dismantling interlocked paver blocks BOQ Item 4.22” is concerned, learned senior counsel submits that the item of just removal of paver block did not fit into the description of BOQ item no.4.22 and thus the said activity was treated as an extra item and was considered @Rs.365/- per sq. meter. The respondent had agreed to and accepted the said rate. In support of this submission, learned senior counsel invited my attention to the document annexed at Exhibit 'R-81' in the arbitral proceedings showing the agreed rate derived @ Rs.365/- per sq. meter. The said payment was also reflected in the final bill. The arbitral tribunal thus could not have overlooked the said agreed rate and could not have awarded any other amount to the respondent.

64. Learned senior counsel for the respondent on the other hand submits that since the work carried out by the respondent was as per BOQ item no.4.22, the payment in respect thereof was accordingly made earlier under the said item upto 4th RA Bill. The petitioner, however, in the final bill unanimously deleted the said payment and claimed that the same was payable as an extra item and at the rate of Rs.365/- per sq.meter. In so far as the agreed rate analysis showing rate of Rs.365/- per sq. meter relied upon by the petitioner is concerned, the

learned senior counsel for the respondent could not dispute the said document.

65. It was the case of the Petitioner that since the activity of removal of paver blocks carried out by the Respondent did not fit in the BOQ Item No.4.22, the said activity was treated as an extra item and was considered @Rs.365/- per sq. meter. The Respondent had agreed to and accepted the said rate. The Petitioner placed reliance on the document annexed at Exhibit 'R-81' forming part of the record of the arbitral proceedings. It was contended by the Petitioner that in view of the agreed rate @365/- per sq. meter, the arbitral tribunal could not have overlooked the said agreed rate and could not have awarded any other rate over and above the agreed rate. A perusal of the award, in so far as this claim is concerned, indicates that the arbitral tribunal has completely overlooked the agreed rate derived by the parties at Exhibit R-81 while allowing this claim made by the Respondent. It is held by the arbitral tribunal that the action of the Petitioner in correction of the final bill is beyond the terms of the contract and is uncalled for. The arbitral tribunal has not rendered any reason as to why such an agreed rate which was duly accepted by the respondent and the payment made to the Respondent by the Petitioner at such an agreed rate, could be overlooked and different rate as claimed by the Respondent could be awarded. In the impugned award, the arbitral tribunal has not recorded any reason as to how the arbitral tribunal has allowed the said claim made by the Respondent of Rs.4,17,928/-.

66. In my view, the arbitral tribunal has awarded the said claim contrary to the agreement arrived at between the parties. The award

shows total non-application of mind on the part of the arbitral tribunal, shows perversity and patent illegality on the face of the award. Mr. Dhakephalkar, learned senior counsel for the Respondent could not demonstrate as to how the arbitral tribunal could award any amount over and above the agreed rate which was derived by the parties as agreed at Exhibit 'R-81' which was forming part of the record of the arbitration proceedings. In my view, the arbitral tribunal could not have overlooked the agreed rate derived by the parties. This part of the award is accordingly set aside.

***Claim No.1 (c)(i)***

67. In so far as the claim no.1(c)(i) i.e. “Applying 50 mm thick plaster to the drain side” is concerned, it is submitted by the learned senior counsel for the petitioner that on 8th February 2008, the respondent after mutual discussion had agreed to accept the payment @Rs.375/- per sq.meter for execution of the said work. He submits that the claim made by the respondent @ Rs.756/- per sq.meter for execution of the said work was after thought and contrary to the agreed rate. The arbitral tribunal has thus traveled beyond the scope of the contract and overlooked the agreed rate during the execution of the work.

68. Learned senior counsel for the respondent on the other hand submits that though the respondent, at one point of time, had agreed to accept lower rate as suggested by the petitioner and had agreed to give concessional rate for the said work done by the petitioner, since the petitioner did not make the said payment immediately, the respondent had withdrawn the said concession. Reliance is placed on the letter dated

5th February 2009 (at page 644 of the compilation) addressed by the respondent to the petitioner in support of the submission that all the earlier concessions granted by the respondent to the petitioner were withdrawn. He submits that this Court cannot interfere with the finding of fact rendered by the arbitral tribunal.

69. It was the case of the Petitioner that on 8th February 2008, the parties after mutual discussion had derived at the rate in respect of this item @ Rs.375/- per sq. meter for execution of the said work. The Respondent had agreed to accept the said rate @Rs.375/- per sq. meter. However, it was the case of the Respondent that though the respondent had agreed to accept the concessional rate on various conditions, had withdrawn the said concessions vide letter dated 5th February 2009 addressed by the Respondent to the Petitioner. A perusal of the award, in so far as this claim is concerned, indicates that the arbitral tribunal has held that on give and take policy, the Respondent herein made certain concessions to settle the account and since the same was not done, the Respondent had withdrawn the earlier concessions and thus was not bound by the said rate of Rs.375/- per sq. meter. It was also held by the arbitral tribunal that negotiating the rates with reference to the rate analysis given for the item rests with the project architect/engineer and not with the Petitioner. The Petitioner, therefore, could not have revised the rate. It is held that the engineer never finalizes the rate.

70. A perusal of the record does not indicate that after the Respondent agreed to accept the rate of Rs.375/- per sq. meter, the Respondent had demanded any other rate or was offered payment of any other rate by the petitioner. The finding of the arbitral tribunal that the

power to decide the rates vests only with the Engineer and the Petitioner had no role to play is contrary to the Clause 52.2 of the General Conditions of the Contract. In my view, in view of the Respondent having agreed to accept the rate of Rs.375/- per sq. meter for execution of the said work under claim no.1(c)(i), the arbitral tribunal could not have awarded any other rate contrary to the agreed rate. In my view, the arbitral tribunal has travelled beyond the scope of the agreement and overlooked the agreed rate derived by the parties themselves. The award shows patent illegality and perversity insofar as this part of the award is concerned. This portion of the award is accordingly set aside.

***Claim No.1 (c)(iii)***

71. In so far as the claim no.1(c) (iii) i.e. "Structural work of providing and fixing M.S. Grill to be provided over R.R. masonry wall including amendment of the post" is concerned, it is submitted by the leaned senior counsel for the petitioner that on 8th February 2008, the respondent had agreed to the rate of Rs.72/- per kg. for execution of the said work and thus, the claim of Rs.2,25,751/- made by the respondent before the arbitral tribunal was as and by way of after thought and against the agreed rate.

72. Learned senior counsel for the respondent, on the other hand, submits that there was no dispute regarding measurement recorded in the measurement books by the project engineer in respect of this claim. The arbitral tribunal has considered the rate of Rs.88/- per kg. which was recommended by the said engineer and the the same was binding on both the parties. He submits that thus, no such interference is permissible by this Court under Section 34 of the Arbitration Act.

73. In so far as this claim is concerned, it was the case of the Petitioner that on 8th February 2008, the Respondent had agreed to accept the rate @ Rs.72/- per kg. for execution of the said work and thus the Respondent could not have made any claim over and above the said amount. The learned senior counsel for the Respondent on the other hand could not justify as to how the arbitral tribunal could have considered the rate @ Rs.88/- per kg. which was recommended by the engineer since both the parties had agreed to a particular rate for the said extra item. In my view, the arbitral tribunal could not have awarded a different rate in favour of the Respondent based on the premise that the engineer had recommended a different rate contrary to what was agreed by and between the parties. In my view, the arbitral tribunal has allowed this claim contrary to the terms of the agreement and has overlooked the agreement arrived at between the parties. The arbitral tribunal has exceeded its jurisdiction by allowing the claim over and above the agreed rate and thus, this part of the award is accordingly set aside.

### ***Claim No.1 (c)(v)***

74. In so far as the claim no.1(c)(v) i.e. " Laying and fixing paver blocks as directed" is concerned, the learned senior counsel for the petitioner could not point out any ground raised in the arbitration petition for impugning the said part of the award and has not advanced any submission on the said claim at the time of hearing of this petition. Thus, this Court need not go into the merits of this claim and the award in respect of this claim is accordingly upheld.

### ***Claim No.2 (a)***

75. In so far as the claim no.2(a) i.e. "Price variation on cement

during contract period" and claim no.2(b) i.e. "Price variation for labour materials (excluding cement) in extended period" are concerned, the learned senior counsel for the petitioner submits that under clause 9(iii) of the article of agreement dated 25th July 2007, the respondent was prohibited from making any claim on the basis of insufficiency of rates and prices stated in BOQ. He submits that the said prices as quoted by the respondent were to cover all their obligations under the contract or matter concerning the execution of the project. He submits that under clause 12(iii) of the contract, the claim for price variation was not payable to the respondent. The rate quoted by the respondent in BOQ was to be treated as firm and could not be adjusted or altered for any reasons.

76. Learned senior counsel submits that the alteration or adjustment could be done only on account of statutory rise or fall in the cost of labour and/or material or any other matter affecting the cause of execution of wok. The claim of the respondent, however, did not fall under the said category and was thus prohibited. The arbitral tribunal has awarded the said two claims for price variation contrary to the terms of the contract and exceeded their jurisdiction. He submits that in any event, the delay in execution of the work was not attributable to the petitioner but was solely attributable to the respondent. No extension of time was granted by the petitioner to the respondent and thus, the said claim for price variation was not maintainable. Learned senior counsel for the petitioner submits that in any event, the arbitral tribunal did not take into consideration books of account, document, vouchers receipts for verifying the increase in the rates and has awarded the said claim without any evidence and without any basis.

77. Learned senior counsel for the respondent, on the other hand, submits that the arbitral tribunal has rightly considered the extended date of completion of contract as 9th October 2007 as certified by the project engineer. He submits that since the cement was procured during the extended period, the arbitral tribunal has rightly awarded the price variation of cement at a reasonable rate which cannot be interfered with by this Court. Similarly, in so far as the price variation in respect of the other material is concerned, it is submitted that since the arbitral tribunal has rendered a finding that the delay was not attributable to the respondent and the contract period was required to be extended upto 9th October 2007, the respondent was entitled to price variation on those items @ Rs.1,50,119/-. He submits that the claim awarded by the arbitral tribunal is fair and reasonable and thus, no interference with that part of the award is permissible under Section 34 of the Arbitration Act.

78. In so far as the award in respect of claim no.2(a) i.e.'Price variation of cement during the contract period' is concerned, the arbitral tribunal has considered the date of extension of contract upto 9th October 2007 based on the recommendation for extension made by the project engineer to the petitioner. The arbitral tribunal has considered that though the extension of time period upto 9th October 2007 was granted by the project engineer on 26th December 2007, there was no further communication from the petitioner whether the said extension granted by the project engineer was approved or not. The arbitral tribunal in the earlier part of the award has rendered a finding of fact that there was a gross delay on the part of the petitioner due to various

obligations not having been complied with by the petitioner. It is held that the delay was attributable on the part of the petitioner which necessitated grant of extension by the project engineer.

79. After rendering such finding of fact by the arbitral tribunal in the earlier paragraphs of the impugned award, the arbitral tribunal while dealing with the claim no.2(a) considered that the rate of cement of Rs.4,700/- per ton was available in the contract which was prevailing rate for cement at the material time. It is considered by the arbitral tribunal that there was no dispute regarding procurement of cement in the extended period of the contract upto and including the period upto 9th October 2007. The arbitral tribunal accordingly worked out the claim of price variation for procurement of cement after excluding the procurement of 100 bags on 4th June 2007 and found that the sum of Rs.45,332.80 was payable as and by way of price variations of cement towards principal amount. The arbitral tribunal also interpreted the provisions of clause 70 (1) (iii) (a) of the General Conditions of the Contract and has held that since the delay was not attributable to the respondent herein, the contract period was extended and thus the respondent was entitled to claim price variation.

80. In so far as claim no. 2(b) is concerned, the arbitral tribunal after interpreting the terms of the contract has held that the respondent had carried out the work of Rs.57,71,829/- during the extended period and accordingly worked out escalation for labour and other material excluding the cement during the extended period at Rs.1,50,119/-. It is found by the arbitral tribunal that since the petitioner was responsible for delay which resulted in extension of contract, the respondent was

entitled to price variation for the labour and other material.

81. In so far as the finding of the arbitral tribunal that the delay was attributable on the part of the petitioner which resulted in grant of extension of contract which was, as a matter of fact, granted and/or recommended by the project engineer is concerned, in my view, such finding of fact rendered by the arbitral tribunal is based on the appreciation of evidence produced by both the parties which finding is not perverse. This Court thus cannot interfere with such finding of fact under Section 34 of the Arbitration Act.

82. In so far as the relief granted for price variation is concerned, the arbitral tribunal has appreciated the evidence and found that the delay was not attributable on the part of the contractor and since the extension was granted by the project engineer though not confirmed by the petitioner, the respondent was entitled to claim a reasonable amount of price variation. A provision of the contract pointed out by Mr.Apte, learned senior counsel for the petitioner does not indicate that there was a complete prohibition on the payment of price variation irrespective of the fact that the delay was attributable on the part of the petitioner and the extension was granted. In any event, the work carried out by the respondent during the prolonged period was accepted by the petitioner without any objection and thus it cannot be urged by the petitioner that there was no extension granted by the petitioner or that the respondent could not claim any additional amount for the work done during prolonged period though the petitioner was responsible for such delay. In my view, the award rendered by the arbitral tribunal in so far as this claim is concerned, is based on the interpretation of the

terms of the contract and is also based on the appreciation of the evidence produced by both the parties and is reasonable and does not require any interference by this Court. In my view, there is thus no merit in the submission of the learned senior counsel for the petitioner in so far as this claim is concerned.

***Claim No.3***

83. In so far as the claim no.3 i.e. "Extraneous overheads and time related costs incurred during the prolongations of works" is concerned, the learned senior counsel for the petitioner submits that the delay in execution of the work was solely due to reasons attributable to the respondent and thus the said claim was not maintainable. He submits that the said claim for extraneous overheads was also overlapping with the claim for price adjustment and additional rate for extra items. There is no provision in the contract for making such claim for overheads during the prolonged period. He submits that in any event, the claim allowed @15% of the work done in the extended period is without any evidence, justification and any basis.

84. Learned senior counsel for the respondent, on the other hand, submits that due to vast variation of BOQ items and the delay attributable on the part of the petitioner, the work could not be completed in three months and was extended by four months. He submits that within the stipulated period of time for completion of the work, the respondent had carried out the work of Rs.31 lacs and had done the work of Rs.72 lacs during the prolonged period. He submits that the arbitral tribunal having found that the petitioner was responsible for

delay has awarded overheads @15% of the work carried out during the extended period which is a reasonable amount and this Court cannot interfere with that part of the award. Leaned senior counsel, however, fairly admitted that the respondent did not lead any evidence before the arbitral tribunal in support of the claim of overheads which has been awarded by the arbitral tribunal @15%.

85. In so far this claim is concerned, a perusal of the arbitral award indicates that the arbitral tribunal has rendered a finding that the respondent had carried out a bulk of the work of BOQ and the extra items during the monsoon period. The petitioner was found responsible for the delay of 4 months beyond the stipulated date of completion. The project engineer had granted extension to the respondent having found that the delay was not attributable to the respondent. The arbitral tribunal has allowed the claim for overheads and time related cost @15% of the work done during the extended period.

86. It is not in dispute that the respondent had carried out various additional work during the prolonged period. It was the case of the petitioner that the petitioner was not responsible for any delay and in any event had not approved recommendation made by the project engineer for grant of extension. It was also urged by the petitioner that in any event, the claim for overheads in respect of the work carried out during the prolonged period was over lapping with the claim for price variation and in any event, the same was without any evidence.

87. Mr. Dhakephalkar, learned senior counsel for the respondent could not point out any evidence on record before the arbitral tribunal

produced by the respondent in support of the claim for overheads during the extended period. The arbitral tribunal has granted this claim at flat 15% of the work done during the extended period without any evidence and any basis. The award, in my view, in respect of this claim is based on no evidence. Even if the respondent had proved that the delay was not attributable on the part of the respondent and the extension was granted by the project engineer, unless the respondent would have proved the claim for compensation, the arbitral tribunal could not have awarded the claim for compensation. In my view, Mr.Apte, learned senior counsel for the petitioner is right in his submission that the claim for overheads was without any evidence and was over lapping with the claim for price variation which was made for the work done during the extended period and which also included the components of the overheads. In my view for claiming compensation, the respondent was required to prove not only breaches on the part of the petitioner but was also required to prove that they had suffered damages and had proved the quantification thereof. The respondent has failed to prove the damages. This part of the award is accordingly set aside.

## ***Claim No.4 (A)***

88. In so far as the claim no.4(A) i.e. “Delayed payments of certified running account bill nos.3 and 4” is concerned, learned senior counsel submits that since the respondent did not complete the running bill measurement, the respondent was solely responsible for the delay, if any, in processing the RA bills. He submits that the respondent had also failed to submit necessary statement of consumption for cement, steel and test report of ingredient materials used by it during the

execution of the work. The arbitral tribunal, however, overlooked this crucial aspect and the evidence produced by the petitioner and could not have allowed any such claim for such delay.

89. Learned senior counsel for the respondent submits that since there was delay in making the payment of the running account bill nos.3 & 4 by the petitioner and the said amount was unreasonably withheld, the arbitral tribunal has rightly awarded interest to the respondent @ 15% p.a. though the respondent had claimed the interest @24% p.a. This Court cannot interfere with this part of the award.

90. A perusal of the award indicates that the arbitral tribunal has awarded interest on alleged delay in payments of certified running account bill nos.3 and 4. The petitioner contended that the 3rd RA bill dated 31th July 2007 was processed by the project engineer on 28th August 2007 and the payment was released on 4th October 2007. In so far as the 4th RA bill dated 30th August 2007 is concerned, the said bill was processed by the project engineer on 22nd November 2007 and the payment was made in two installments on 8th November 2007 for Rs.10 lacs and on 4th December 2007 for Rs.7,72,550/-. It was the case of the petitioner that the delay was on account of non attendance of rectifications by the respondent and some purchase vouchers for material and test reports for various ingredients were not submitted by the respondent immediately. The arbitral tribunal has rejected the submission made by the petitioner and has rendered a finding of fact that at no point of time bills were sent back for correction and accordingly the reasons for delay in making payments need not be condoned. In my view, the arbitral tribunal has rendered a finding of

fact while allowing the claim which finding is not perverse and thus no interference is permissible with such finding of fact under Section 34 of the Arbitration Act. In my view, there is thus no merit in the submission made by the learned senior counsel for the petitioner in so far as this claim is concerned.

***Claim No.4(c)***

91. In so far as the claim no.4(c) i.e. "Delayed release of retention money" is concerned, learned senior counsel for the petitioner has not raised any ground in the arbitration petition for impugning the said part of the award and has not advanced any submission on the said claim at the time of hearing of this petition. This Court need not go into the merits of this claim and the award thus in respect of this claim is accordingly upheld.

***Claim No.5***

92. In so far as the claim no.5 i.e. "Reimbursement of cost of arbitration" is concerned, learned senior counsel for the petitioner submits that since the claims made by the respondent were frivolous and untenable and the petitioner was unnecessarily dragged to litigation, the arbitral tribunal cold not have awarded the arbitration cost in favour of the respondent and ought to have allowed the claim for payment of arbitration cost in favour of the petitioner.

93. Learned senior counsel for the respondent submits that since the petitioner did not pay the legitimate dues of the respondent, the respondent was compelled to adopt arbitral proceedings and thus, the arbitral tribunal having allowed almost all the claims except one having

found the same due has rightly awarded the arbitration cost in favour of the respondent and thus, this Court cannot interfere with that part of the award.

94. The arbitral tribunal has in the impugned award allowed several claims made by the respondent and has rejected the counter claims made by the petitioner. It is held by the arbitral tribunal that in view of the fact that the respondent had partially succeeded, the respondent was entitled to costs amount to Rs.10,30,500/- which was incurred by the respondent. In my view, since the respondent had succeeded in the arbitral proceedings in respect of the several claims made by the respondent, the arbitral tribunal has allowed the claim for recovery of costs quantified at Rs.10,30,500/- based on the particulars of the claim of costs against the respondent vide their letter dated 8th October 2009. Though some of the claims are set aside by this order and judgment, I do not propose to modify this part of the award since the respondent had succeeded substantially in the arbitral proceedings. This part of the award is accordingly upheld.

***Interest***

95. In so far as the claim for interest awarded by the arbitral tribunal is concerned, it is submitted by the learned senior counsel that the arbitral tribunal has awarded interest on interest in favour of the respondent i.e. firstly has provided interest while considering each claim separately and has again awarded interest on interest in the operative part of the award.

96. Learned senior counsel for the respondent submits that

though the respondent claimed interest @18% p.a., the arbitral tribunal awarded interest @15%p.a. for the past period. He submits that it is permissible to grant interest on interest. He submits that there is no prohibition under the terms of the contract from awarding interest on interest and thus, this Court cannot interfere with that part of the award.

97. In so far as the interest awarded by the arbitral tribunal is concerned, the arbitral tribunal has awarded interest @15% p.a. on some of the claims for the period prior to the date of declaration of the impugned award and has awarded interest @18% p.a. on the claims awarded including on the interest from the date of award till payment. It is not in dispute that there is no provision in the agreement entered into between the parties prohibiting the payment of interest by the arbitral tribunal in favour of any of the parties to the agreement. Under Section 31(7) of the Arbitration Act, the arbitral tribunal has power to award reasonable rate of interest for such period as the arbitral tribunal may deem fit. In this case, the arbitral tribunal has awarded interest @15% p.a. for the period prior to the date of declaration of award and the interest @18% p.a. from the date of award till payment. The arbitral tribunal has exercised its discretion by awarding interest @15% p.a. for the past period and the interest @18% p.a. towards future interest. For the aforesaid reasons, I do not propose to modify the rate of interest on those claims which are upheld by this order and judgment. It is however made clear that those claims which are set aside by this order and judgment, the petitioner would not liable to pay any interest to the respondent on those claims.

## ***Counter Claims***

98. Learned senior counsel also invited my attention to the portion of the award dealing with counter-claims made by the petitioner and rejection thereof by the arbitral tribunal. Learned senior counsel submits that the arbitral tribunal has summarily rejected the counter-claims made by the petitioner without appreciating the genuineness of the counter-claims and without giving any cogent and justifiable reasons. He submits that the petitioner had proved each and every such counter claim and thus the arbitral tribunal ought to have allowed such counter-claims made by the petitioner. He submits that the respondent was solely responsible for collapse of the retaining wall due to inferior quality of the work carried out by the respondent and thus, the arbitral tribunal ought to have allowed all such counter-claims even relating to the said collapse of the retaining wall with costs and interest.

99. Learned senior counsel for the respondent submits that the arbitral tribunal has rightly rendered finding of delay and breaches against the petitioner in the impugned award and has accordingly rightly rejected the counter-claim for compensation made by the petitioner after giving detailed reason.

100. In so far as the claim arising out of collapse of the retaining wall is concerned, the learned counsel for the respondent submits that the respondent was asked to complete construction of portion of wall which was left incomplete by the earlier contractor. The respondent was not responsible for collapse of the wall. He submits that the arbitral tribunal has rightly rejected each and every counter-claim made by the petitioner and has rendered finding of fact which cannot be interfered with by this Court under Section 34 of the Arbitration Act.

101. In the rejoinder, Mr.Apte, learned senior counsel for the petitioner submits that though various claims were prohibited under the terms of the contract, the arbitral tribunal has allowed the claim contrary to the terms of the contract and has awarded the claim dehors the terms of the contract. He submits that the Contractor ought to have taken site inspection of site before submission of their bid and could not have made any claim based on any misunderstanding or alleged vague provision of the tender. He submits that the claim for price variation awarded is contrary to the terms of the contract and without any basis. In so far as the claim due to alleged change in specification of hard rock is concerned, the learned senior counsel for the petitioner invited my attention to clause 2.2.1 of the contract which provides for specifications and conditions regarding various scope of work including excavation and submits that under the said provision, it was clearly provided that all excavation and hard rock cutting work was to be carried out by mechanical equipment unless, in the opinion of engineer, the work involved required it to be carried out by manual methods. He submits that there was no change in the specification of the hard rock and the said work could not have been considered as extra item. In support of the submission that the arbitral tribunal could not have awarded any claim contrary to the terms of the contract, the learned senior counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of ***Rashtriya Chemicals and Fertilizers Ltd. Vs. Chowgule Brothers and Ors.,*** reported in ***AIR 2010 SC 3543*** and in particular paragraph 16 which reads thus :-

> *"16. That brings us to the question whether an Arbitrator can make an award contrary to the terms of the contract executed between the parties. That question is no longer res integra having been settled by a long line of*

*decisions of this Court. While it is true that the Courts show deference to the findings of fact recorded by the Arbitrators and even opinions, if any, expressed on questions of law referred to them for determination, yet it is equally true that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties. Reference may be made, in this regard, to the decision of this Court in* Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor, *(1999) 8 SCC 122 where this Court observed :*

> *" ........ that it is settled law that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one; that this deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action......"*
>
> *...... It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error....”*

102. In so far as the counter claims made by the arbitral tribunal is concerned, a perusal of the record indicates that the petitioner had made 9 counter claims inclusive of interest before the arbitral tribunal under various heads. Counter claims nos.1 to 7 were towards compensation based on alleged breaches on the part of the respondent. Counter claim no.8 was towards costs of arbitration. Counter claim no.9 was towards interest. A perusal of the arbitral award clearly indicates that the arbitral tribunal has given detailed reasons while rejecting each of the counter claims made by the petitioner.

103. A perusal of the arbitration petition indicates that in so far

as challenge to the award rejecting the counter claims is concerned, the only ground is raised in paragraph HH of the petition is that the arbitral tribunal failed to appreciate the genuineness of the counter claims put forth by the petitioner and summarily rejected the same without giving any cogent and justified reason. Learned senior counsel for the petitioner could not point out any other ground raised in the petition in so far as rejection of the counter claims is concerned. I am not inclined to accept the submission made by the learned senior counsel for the petitioner that the arbitral tribunal has summarily rejected the counter claims without giving any cogent and justified reason. Learned senior counsel, in my view, could not justify any ground for setting aside this part of the award. In my view, the award, in so far as rejection of counter claims is concerned, is a reasoned award and thus findings of facts rendered by the arbitral tribunal are not perverse. No interference with this part of the award rejecting the counter claims made by the petitioner is warranted.

104. In so far as the judgment of the Supreme Court in the case of *Rashtriya Chemicals and Fertilizers Ltd. (supra)* relied upon by the learned senior counsel for the petitioner is concerned, there is no dispute in the propositions laid down by the Supreme Court in this judgment. This Court has applied the said principles while deciding this matter and has set aside part of the award by which the arbitral tribunal had travelled beyond its jurisdiction and had acted beyond the terms of the agreement.

105. I, therefore, pass the following order :-

a) The arbitration petition is partly allowed in aforesaid terms.

b) It is made clear that the petitioner would be liable to pay interest to the respondent only in respect of the claims which are upheld by this order and judgment and not which are set aside.

c) There shall be no order as to costs.

***R.D. DHANUKA, J.***