

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 648 OF 2009**

Board of Trustees of Jawaharlal Nehru)
Port Trust,)
a Statutory Body, acting through its)
Board of Trustees, Administrative Building)
Nhava Sheva, Taluka Uran,)
Navi Mumbai – 400 707) **Petitioner**

Versus

Three Circles Contractors,)
35, Kanta Niwas, D.J.Road, Vile Parle)
(West), Mumbai – 400 056) **Respondent**

Mr.Milan Bhise, a/w. Mr.Amit Bhawe, Mr.Vinod Sakpal, i/b. Milan Bhise & Co. for the Petitioner.

Mr.E.P.Bharucha, Senior Advocate, a/w. Mr.Atul Damle, Senior Advocate, Mr.A.R.Balsara, i/b. Mr.Rupesh Lanjekar for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 3rd FEBRUARY, 2015

PRONOUNCED ON : 1st APRIL, 2015

JUDGMENT :

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 25th April, 2009 passed by the arbitral tribunal allowing some of the claims made by the respondent. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original respondent to statement of claim and was the claimant to the counter claim before the learned arbitrator. The respondent herein was the original claimant to the statement of claim and was the respondent to the counter claim.

3. On or about 21st March, 1996, the petitioner invited tenders for reclamation behind service berth in the quadrangle between the container berth approach and service berth approach. The petitioner issued amendment to the tender documents on 3rd April, 1996 which was to be treated as part of the said contract. Some of the terms and conditions of the original contract were modified and incorporated as a part of the contract. On 11th April, 1996 the respondent submitted its bid. On 27th May, 1996 the respondent was awarded the contract by the petitioner. The date of commencement of work was 1st June, 1996 and the stipulated date of completion was 28th February, 1997.

4. On 18th May, 1996 the respondent by its letter confirmed that it would provide the stone material as per provisions of tender and it would be entitled to payment for the work done between initial bed level and final level of work done. The respondent also informed the petitioner that the respondent had appointed Dr.R.K.Katti as its consultant.

5. On 27th February, 1997, the respondent was issued work completion certificate by the petitioner with a snag list. It would be the case of the petitioner that there were several incomplete items which the respondent had to comply with after issuing the said work completion certificate which the respondent failed and neglected to comply with by complying incomplete items as mentioned in the said snag list.

6. It is the case of the petitioner that after completion of the work, the respondent submitted its 5th, 6th and 7th running account bill to the petitioner. By letter date 29th January, 1998 the petitioner asked the respondent to submit its final bill but the respondent failed and neglected to submit the final bill.

7. On 2nd February, 1998 the respondent made various claims before the Senior Manager (PPD) of the petitioner. By letter dated 23rd February, 1998, the Senior Manager (PPD) of the petitioner refused to entertain the claims of the respondent. On 5th March, 1998 the respondent filed an appeal before the Chief Manager (PPD) of the petitioner against the decision of the Senior Manager (PPD) of the petitioner.

8. On 8th April, 1999 the respondent quantified its claim and called upon the petitioner to settle the same making it clear that in case of failure to settle the claim, it would be considered that the disputes and differences had arisen and the respondent would proceed as per the provisions of contract. In the said claim, the respondent claimed the amount of Rs.3,64,51,616.60. On 28th April, 1999, the respondent recorded the alleged failure on the part of the petitioner to pay its dues and therefore invoked the provisions of clause 65 of the contract and called upon the petitioner to appoint arbitrator.

9. The Manager (PPD) of the petitioner by its letter dated 20th October, 1999 to the respondent recorded that no proposal was submitted by the respondent for settling the disputes and the final bill was proceeded as per the contract provisions and retention money would be released after submission of documents as mentioned and amount of Rs. 8 lacs was withheld. The respondent by its letter dated 12th December, 1999 placed on record that it had no claims other than the list of dues submitted by its letter dated 8th April, 1999.

10. On 20th April, 2000 Mr.R.K.Bhansali was appointed as a sole arbitrator. On 19th June, 2000, the respondent filed its statement of claim before the learned arbitrator Mr.R.K.Bhansali. The respondent made six claims including interest totalling to Rs.4,31,72,103.15. No pleadings were filed by the respondent alongwith the said statement. The petitioner filed its written statement and counter claim on 27th September, 2000. The arbitration proceedings were held before said Mr.R.K.Bhansali on 26th May,2000, 12th December, 2000, 13th December, 2000, 20th January, 2001 and 25th August, 2001. Both parties agreed before the learned arbitrator that they would not lead oral evidence. The learned arbitrator recorded the said statement in the minutes of the meeting held on 20th January, 2001. It is the case of the petitioner that the respondent tried every attempt to delay the arbitration proceedings before the said Mr.R.K.Bhansali on one or the other ground though the arguments by both parties were over. On 19th April, 2002 the learned arbitrator Mr.R.K.Bhansali resigned. After resignation of Mr.R.K.Bhansali as a sole arbitrator, the retired judge of this court was appointed as a sole arbitrator.

11. It is the case of the petitioner that the arbitration meetings were held on 30th October, 2002, 17th February, 2003, 21st April, 2003, 16th May, 2003, 28th August, 2003 and 16th October, 2003. The respondent submitted an additional statement of claim on 14th June, 2003 without making any application for amendment of the statement of claim. The petitioner objected to the filing of this additional statement of claim without making any application for amendment. The respondent thereafter filed an application for amendment of the statement of claim on 18th December, 2003. By an order dated 18th December, 2003, amendment application filed by the respondent came to be rejected by the learned arbitrator. However, the additional statement of claim dated 14th June, 2003 remained on record. In the said amendment, the respondent enhanced the claim amount insofar as claim nos. 2

and 3 are concerned. The respondent did not make any amendment in the claim amount insofar as claim nos. 1 and 4 are concerned. The respondent reduced the claim amount insofar as claim no.5 i.e. idle charges of the man and machinery are concerned. It is the case of the petitioner that as and by way of abundant caution, the petitioner filed additional written statement dated 1st March, 2004 to the additional statement of claim dated 14th June, 2003 and denied the claims filed by the respondent.

12. On 19th January, 2004, the respondent filed an application for seeking permission to allow the oral evidence of Dr.R.K.Katti which application was opposed by the petitioner. On 23rd January, 2004 the respondent made an application before the learned arbitrator stating that it had reconsidered its stand and decided not to insist on leading oral evidence of Dr.R.K.Katti. By an order dated 24th January, 2004 the learned arbitrator however permitted the respondent to examine Dr.R.K.Katti as its witness and directed the respondent to file his affidavit of evidence.

13. On 16th June, 2004 the respondent filed an affidavit of one Mr.Prakash Falari as their expert witness. The learned arbitrator permitted the respondent to lead oral evidence of the said Mr.Prakash Falari. The said Mr.Prakash Falari however during the pendency of his cross examination informed the learned arbitrator that he would not be available for evidence. The respondent thereafter sought permission to examine Mr.V.T.Ganpule. The learned arbitrator permitted the respondent to file affidavit of evidence of Mr.V.T.Ganpule. The respondent filed fresh affidavit of Mr.V.T.Ganpule on 6th January, 2005 who was cross examined by the petitioner.

14. It is the case of the petitioner that after completion of the cross examination of Mr.V.T.Ganpule, the respondent commenced its oral argument. The petitioner thereafter commenced its argument and pointed out that the learned arbitrator could not look into the additional statement of claim dated 14th June, 2003 as application for amendment of the respondent was already rejected by the learned arbitrator. On 11th April, 2008, the learned arbitrator suo moto reviewed his earlier order dated 18th December, 2003 on the ground that there was a clerical or typographical mistake in the order dated 18th December, 2003. The learned arbitrator however did not direct that the additional statement of claim was to be taken on record.

15. On 14th August, 2008, the petitioner completed its arguments before the learned arbitrator. The respondent commenced its arguments in rejoinder on 10th September, 2008. On 10th September, 2008 the respondent filed an application dated 1st September, 2008 for amendment of the claims. The said application was served upon the petitioner's advocate on 10th September, 2008. The petitioner objected to the amendment application being taken on record and insisted for filing reply to the same. The learned arbitrator however allowed the amendment application and directed the petitioner to file reply to the amendment application after allowing the said amendment. The respondent was directed to carry out the amendment within one week. It is the case of the petitioner that though the petitioner pointed out to the learned arbitrator that the question of filing reply became redundant in view of the order of the learned arbitrator allowing amendment, the learned arbitrator however did not vacate and/or modify its order allowing the amendment application.

16. On 23rd September, 2008 the respondent filed another application inter alia

praying that the written arguments dated 9th September, 2008 of the respondent be treated as affidavit of evidence of Mr.Vijay Jaiswal, proprietor of the respondent and offered himself for cross examination by the petitioner. The petitioner by its reply dated 20th October, 2008 opposed the application on various grounds. By an order dated 20th October, 2008, the learned arbitrator rejected the said application dated 23rd September, 2008 to examine Mr.Vijay Jaiswal as its witness. The learned arbitrator thereafter closed the proceedings for declaring an award on 27th November, 2008 at 2.30 p.m.

17. The arbitral tribunal by his letter dated 8th December, 2008 informed the parties that the award would be declared on 16th December, 2008, however the award was not pronounced on that day. On 12th January, 2009 a meeting was fixed by the learned arbitrator. It is the case of petitioner till 12th January, 2009 the respondent had not carried out amendment to the statement of claim which was allowed by the learned arbitrator on 12th September, 2008. By an order dated 12th January, 2009 the learned arbitrator directed the respondent to carry out the amendment as specified in the amendment application dated 1st September, 2008 on or before 19th January, 2009. It is the case of the petitioner that though the argument was over and the matter was closed for award, the respondent was permitted to further amend the statement of claim.

18. By the said amendment allowed on 12th September, 2008, the respondent inflated the claim amount insofar as claim nos. 1, 2 and 3 are concerned substantially than that what was already amended pursuant to the earlier amendment allowed by the learned arbitrator. The respondent served upon the petitioner the said amended statement of claim. On 4th March, 2009, the petitioner filed its additional written statement to the amended statement of claim dated 19th

January, 2009.

19. On 16th March, 2009 the respondent filed its rejoinder to the additional written statement before the learned arbitrator. On 24th March, 2009 and 1st April, 2009 the learned arbitrator framed additional issues and closed the matter for passing of the award. It is the case of the petitioner that no hearing was granted or conducted on the new claims/inflated claims introduced by the amendments allowed on 12th January, 2009 by the learned arbitrator.

20. On 25th April, 2009 the learned arbitrator made an award directing the petitioner to pay a sum of Rs.8,00,06,872.26 against the claim nos. 1, 2 and 3 and allowed the interest at the rate of 14% per annum on the said amount from 28th February, 1997 till realization and further awarded Rs.14,00,000/- by way of cost. The learned arbitrator rejected the counter claims made by the petitioner. The petitioner has impugned the arbitral award insofar as claim nos. 1, 2 and 3 including the claim for interest and arbitration cost and insofar as counter claims of the petitioner are rejected by the learned arbitrator.

21. Mr.Milan Bhise, learned counsel for the petitioner submitted a chart for consideration of this court to demonstrate the amount and quantity claimed by the respondent on different dates before the chairman of the petitioner, before the learned arbitrator from time to time in various amendment application.

22. Learned counsel appearing for the petitioner submits that the arbitration proceedings had already commenced when the respondent had invoked arbitration agreement and had issued a notice dated 28th April, 1998 to the chairman of the petitioner for appointment of an arbitrator. The arbitration proceedings had

commenced in respect of such disputes which were made in the said notice and the limitation had stopped in respect of such claims on the date of receipt of the said notice for appointment of arbitrator in view of section 21 of the said Arbitration Act. Learned counsel submits that by the amendment dated 18th December, 2003 filed by the respondent before the learned arbitrator, the respondent had not only increased the quantity but also increased the amount substantially. Learned counsel submits that on the date of making such application for amendment of the claim, the claim arising out of the additional quantity and the additional amount were already barred by law of limitation. Though the learned arbitrator was empowered to allow the amendment to the statement of claim, the learned arbitrator could not have allowed the amendment in respect of the additional claims which were already barred by limitation.

23. Mr.Bhise, learned counsel for the petitioner submits that the learned arbitrator has allowed the claims which were beyond the scope of reference and also contract awarded to the respondent. He submits that the learned arbitrator has framed issues which even did not arise under the contract awarded to the respondent and has rendered an award on such issues. Learned counsel invited my attention to the chart submitted by the petitioner to show as to how all the three claims were amended from time to time by the respondent before the learned arbitrator illegally and awarded by the learned arbitrator contrary to law and without application of mind. He submits that the respondent had not only amended the quantity of the claims originally made in the notice invoking the arbitration agreement but also enhanced the claim amount in the amendment. He submits that the respondent has inflated claims from time to time without any justification.

24. Learned counsel submits that though the petitioner had raised a specific plea

in the written statement that the claims made by the respondent were beyond the scope of contract, learned arbitrator has allowed most of the claims made by the respondent without considering the plea of the petitioner on the issue of jurisdiction and has travelled beyond the scope of reference and contract. He submits that the findings rendered by the learned arbitrator that the amendments did not change the quantity of the work but the changes were made only in the rate of material is totally perverse and shows an error apparent on the face of the award. Learned counsel invited my attention to the various amendment applications filed by the respondent and would submit that the respondent had not only changed the quantities of the work but had also changed the basis of the claim. The learned arbitrator has overlooked the nature of the amendment sought by the respondent and allowed by the learned arbitrator while deciding this issue and has committed an error which is patently illegal on the face of the award.

25. He submits that the impugned amendments allowed by the learned arbitrator are contrary to section 23 of the Arbitration and Conciliation Act, 1996. He submits that since the respondent had invoked arbitration agreement in respect of the particular disputes quantified by the respondent in their notice dated 8th April, 1999 by annexing the index and events and had claimed specific amount, the arbitration proceedings had commenced in respect of such claims/disputes under section 21 of the Arbitration and Conciliation Act, 1996 and thus the respondent could not have amended the nature of dispute and the claims subsequently in future. He submits that the limitation in respect of the new claims made by the respondent and/or new quantities and new rates claimed by the respondent thereby enhancing the monetary claims could not have been permitted by the learned arbitrator. All such new claims and the claims arising out of the new quantity and new rates were beyond the scope of reference and thus beyond the jurisdiction of

the learned arbitrator to entertain such claims and were not arbitrable.

26. Learned counsel for the petitioner submits that the respondent had not explained for cause of delay in making amendment application dated 18th December, 2003. By the said application, the respondent had applied for amendment in respect of the claim no.2 and claim no.3. The contents of the said application for amendment were inconsistent in the final amendment sought by the respondent. The petitioner had pointed out before the learned arbitrator that the respondent had not filed any statement of claim in accordance with law before the erstwhile arbitrator and there was no justification in making the application for amendment without explaining the gross delay. The learned arbitrator however has just taken casual approach in the matter by ignoring the objection raised by the petitioner opposing the amendment application filed by the respondent.

27. Learned counsel submits that though the petitioner had pointed out that the additional statement of claim was rejected by the learned arbitrator by order dated 18th December, 2003 and the first amendment could not be considered by the learned arbitrator, the learned arbitrator without any application being made by the respondent by its order dated 11th April, 2009 suo motu reviewed its own order dated 18th December, 2003 and recalled the said order. The learned arbitrator erroneously held that there was a clerical and typographical mistake in the order dated 18th December, 2003. The learned arbitrator however did not issue any direction stating that the said order dated 18th December, 2003 shall stand corrected.

CLAIM NO. 1

28. Insofar as the claim no.1 i.e. “Illegally withheld balance payment and other amounts” is concerned, the learned counsel for the petitioner submits that in the claim made before the Chairman of the petitioner in the notice dated 8th April 1999 by which the respondent had invoked arbitration agreement, the respondent had made a claim for 59943.586 cubic meters @ Rs.90/- per cubic meter i.e. the claim for the sum of Rs.53,94,922/-. On 9th June 2000, in the claim filed before the learned arbitrator Shri.R.K. Bhansali, the respondent claimed an amount of Rs.44,22,903.59 comprising of three parts i.e. (i) claim for Rs.33,22,903.59 for 36921.151 cubic meters @ Rs.90/- per cubic meter for quarry run material; (ii) claim for Rs.8,00,000/- which was alleged to have been withheld for removal of heaved up portion; and (iii) a claim for Rs.3,00,000/- which was alleged to have been withheld for royalty.

29. On 27th September 2000, the petitioner herein filed a written statement denying the said claims. Learned counsel for the petitioner submits that before the learned arbitrator, a former Judge of this Court, the respondent made an amended claim dated 16th April 2003 for Rs.44,22,903.59/-. There was no change in so far as the quantity and the amounts claimed in the said amended claim than what was claimed before the earlier learned arbitrator Shri R.K. Bhansali on 9th June 2000. The said amendment was opposed by the petitioner by filing written statement before the learned arbitrator. On 19th January 2009, the respondent filed amended statement of claim. Insofar as claim no.1 is concerned, the respondent made a claim of Rs.63,41,314.87/- comprising of three parts i.e. (i) Claim for Rs.52,41,314.87/- for 36933.59 cubic meter @ Rs.138/- per cubic meter; (ii) claim for Rs.8,00,000/- towards the amount alleged to have been withheld for removal of heaved up portion; and (iii) claim for Rs.3,00,000/-

towards the amount alleged to have been withheld for royalty. The petitioner filed an additional written statement denying the said amended claim.

30. Learned counsel submits that the learned arbitrator has dealt with the claim no.1 in issue nos.22, 38, 13 and 23, 17 and 24, 36 and 37.

31. Learned counsel submits that in second amendment application, when the respondent amended the claim no.1, the amount of Rs.8,00,000/- and Rs.3,00,000/- remained the same. In so far as the quantity for first part of claim no.1 is concerned, the respondent claimed the quantity of 399943.59 as per bill no.7. The estimated quantity in the bill of quantity (BOQ) was provided at Rs.3,00,000/- and deviation in excess of 20% provided under the contract came to be 360000 cubic meters. The respondent made a claim for Rs.3,00,000/- cubic meters @Rs.90/- per cubic meter. The respondent made a claim for quantity i.e. 399943.59 cubic meters @ Rs.138/- per cubic meter. The respondent accordingly increased the claim in respect of the claim no.1 from Rs.33,22,903.59/- to Rs.52,41,314.87/-. Learned counsel for the petitioner submits that though the learned arbitrator at page 215 of the impugned award while dealing with the reconciliation statement dated 9th March 2001 has recorded that “this statement therefore is binding on both the parties as far as quantities executed by the respondent into the reclamation and bund works, except that, in the last column as regards quantity of 705.107 cubic meters of fill material is concerned, it is mentioned that the petitioner herein may consider the said quantity.” Learned counsel submits that once it is held that the quantities mentioned in the reconciliation statement were correct, the learned arbitrator could not have allowed any claim for inflated quantities. The award shows perversity on the face of the award.

32. Learned counsel for the petitioner submits that the learned arbitrator could not have considered 9000 cubic meters of heaved portion as reclaimed area under the contract. He submits that the claim no.1 was beyond the scope of reference. Learned counsel submits that though the petitioner in its written statement has specifically denied the amended claim nos.1, 2 and 3 and had disputed the correctness of modified claim no.1, the learned arbitrator has rendered a perverse finding that the corrected statement is not refuted by the petitioner.

33. Insofar as the amended application dated 1st September 2008 made by the respondent is concerned, learned counsel for the petitioner submits that the said amendment had not been served upon the petitioner. Learned arbitrator, however, allowed the said application for amendment on 12th September 2008. The petitioner had requested for time to file its reply for opposing the said amendment application. No application for condonation of delay in filing the said application for amendment was made by the respondent. Though the petitioner objected to the said amendment on the ground of gross delay, the application was allowed without giving any opportunity to the petitioner of being heard, by the learned arbitrator permitting the respondent to carry out such amendment. The petitioner had already completed its arguments. Learned arbitrator did not record these objections raised by the petitioner. He submits that the amendment carried out by the respondent was not served upon the petitioner. On 20th October 2008, the learned arbitrator had declared that the award would be declared on 27th November 2008 and for that purpose, the meeting would be held on 27th November 2008. On 20th October 2008, both the parties closed their case. No meeting was called on 27th November 2008. Learned counsel submits that by letter dated 8th December 2008, the learned arbitrator had informed the parties that the award would be declared on 16th December 2008.

34. He submits that on 24th December 2008, the petitioner requested the learned arbitrator for liberty to file its reply to the amendment allowed by the learned arbitrator. Learned arbitrator thereafter fixed the hearing for filing of the reply by the petitioner to the application for amendment on 9th January 2009. Learned counsel submits that since the learned arbitrator had already allowed the amendment on 12th September 2008 itself, the question of keeping any hearing on 9th January 2009 did not arise. Learned counsel submits that on 6th January 2009, the petitioner was compelled to place its objections on record in the form of reply to the amendment application. The petitioner also recorded that the arguments were completed and award was to be declared on 27th November 2008. Learned arbitrator postponed the pronouncement of the award to 16th December 2008. He submits that the application for amendment was deemed to have been abandoned and therefore there was no question of having any fresh hearing. Till 6th January 2009, the respondent had not carried out any amendment though permitted by the learned arbitrator.

35. Learned counsel submits that the learned arbitrator by an order dated 12th January 2009 confirmed that the amendment application had been decided by his order dated 10th September 2008. However, on 12th January 2009, the learned arbitrator permitted the respondent to carry out amendment by 19th January 2009 and directed the petitioner to file reply to it by 22nd January 2009. The petitioner accordingly filed its written statement under protest on 4th March 2009. Thereafter, no hearing was granted. He submits that the learned arbitrator did not frame any issue of jurisdiction though pleaded in its written statement filed on 4th March 2009. The petitioner was thus deprived of an opportunity to present its case after filing the written statement to the second amendment. He submits that the award is in violation of the principles of natural justice. All the

claims have been awarded by the learned arbitrator on the basis of the second amendment and not on the basis of the original claim or the additional statement of claim dated 14th June 2003.

36. Insofar as the issue no.38 framed and discussed by the learned arbitrator is concerned, the learned counsel for the petitioner submits that the claim as amended by the second amendment was barred by law of limitation. The finding of the learned arbitrator that the demand for correct rates in the second amendment would not mean that the claims were barred by law of limitation is totally perverse and shows non-application of mind. The finding on limitation is also contrary to the law.

37. In so far as the claim for recovery of Rs.8,00,000/- made by the respondent towards removal of heaved up portion is concerned, the learned arbitrator had decided the said claim while discussing the claim under issue nos.23 and 13. Learned counsel submits that the area of 9000 cubic meters could not have been considered to be reclaimed as a part of the contractual work done under the contract. The said portion was required to be removed by the respondent at its own cost. Since the respondent did not remove the heaved portion, the petitioner was entitled to withheld an amount of Rs.8,00,000/- for removal of the said heaved up portion. The finding of the learned arbitrator in the award allowing the said claim is totally perverse and contrary to the contract. He submits that the learned arbitrator has placed reliance on the affidavit of Mr.V.T. Ganpule whose evidence was restricted to the contractual mode of measurement to be made to the respondent. He invited my attention to the letter dated 29th March 1997 which was addressed by the petitioner to the respondent in which it was specifically recorded by the petitioner that the heaved up area where filling was not

done and it was not permissible to take into consideration. He submits that the heaving was expected and was to be controlled or rectified by the respondent exclusively at its own cost. The impugned award allowing the said claim is contrary to the provisions of the contract.

38. Insofar as the claim for Rs.3,00,000/- which was withheld for royalty is concerned, learned counsel submits that the said claim is discussed in issue nos.17 and 24 of the impugned award. He submits that though there was no pleading in support of the said claim for Rs.3,00,000/- regarding payment of royalty charges, the learned arbitrator had allowed the said claim illegally. He submits that under clause 47 of the General Conditions of Contract, it provided for royalty charges will have to be paid in connection with obtaining the filling material. The respondent did not produce any evidence in support of its claim that the respondent was not liable to pay royalty on filling material. The respondent itself had filed a Writ Petition in this Court. He submits that the learned arbitrator did not have jurisdiction to direct the petitioner to pay royalty charges to the respondent.

39. Learned counsel submits that since the learned arbitrator has allowed the claims as made in the second amendment which were barred by law of limitation and since it is not possible to sever the good portion of award, if any, from the bad portion of the award, the entire award is liable to be set aside on that ground. He submits that limitation would not relate back to the date of receipt of notice invoking arbitration agreement in this case. The finding of the learned arbitrator that the claims were not barred by law of limitation is contrary to the judgments laid down by the Supreme Court and this Court.

40. Learned counsel for the petitioner invited my attention to clauses 43, 44 and 45 of the contract which provides for rates due to additions and alterations, for variation exceeding 20% etc. He submits that the rates provided in the BOQ were inclusive of the loss of material due to sinking etc. Learned counsel submits that though the 7th RA bill was submitted by the respondent which was last bill on 15th April 1997, the respondent did not make any such claim in the said bill. A completion certificate was already issued on 26th February 1997. The respondent, however, made this claim for the first time only on 8th April 1999. The RA bill 5 to 7 was submitted by the respondent only after submission of the completion certificate.

41. Learned counsel submits that the petitioner had not issued any variation order as contemplated under clause 43 of the contract. Even if any additional rates are required to be fixed under clause 43, learned arbitrator has decided contrary to the said clause of the contract and accepted the rates as demanded by the respondent without following the mandatory procedure under the said clause. Though the learned arbitrator has recorded the said clause in the award, the learned arbitrator had allowed the amount as claimed by the respondent only after deducting Rs.8,00,000/-. Learned arbitrator has considered the rate of Rs.138/- per cubic meter which was offered by the petitioner to some other contractor, which rate was not applicable to the work in question. Though the petitioner had raised all these objections about non-compliance of mandatory procedure under clauses 43 and 44 of the contract, the learned arbitrator did not consider the submission made by the petitioner in the impugned award and has allowed the prohibited claim. The award is thus in conflict with the public policy.

42. Learned counsel for the petitioner submits that clause 3 of the contract

provides for scope of work. Simpson Rule was to be applied for the purpose of measurement. No allowance for extra quantity for sinking could have been considered. Clause 8.2 of the said contract provides for mode of measurement. Reliance is also placed on preamble of the contract. He submits that reconciliation carried out by the parties pursuant to the directions given by the learned arbitrator without prejudice to the rights and contentions, was not binding on the petitioner. He submits that even in the first amendment applied by the respondent, the respondent had made a claim at the rate of Rs.90/- per cubic meter. Only in the second amendment, the respondent made a claim at the rate of Rs.138/- per cubic meter that is after closure of the argument.

CLAIM NO. 2

43. In so far as claim no.2 i.e. claim for additional quantity of angular rock boulders to construct larger cross section of the rock bund than shown in the tender drawing is concerned, learned counsel for the petitioner submits that in the notice dated 8th April 1999 issued to the Chairman of the petitioner invoking arbitration agreement, the respondent had made this claim for Rs.17,11,000/- comprising of 11800 cubic meters @ Rs.145/- per cubic meter. In its claim filed before the learned arbitrator Shri Bhansali on 9th June 2000, the respondent, however, made a claim of Rs.11,60,046.11 for 8003.18 cubic meters @ Rs.145/- per cubic meter. The said claim was opposed by the petitioner by filing written statement on 27th September 2000. In its amended claim dated 16th April 2003, the respondent made a claim for Rs.28,89,536.14 comprising of 2200.32 cubic meters @ Rs.145/- per cubic meter and 10281.96 cubic meters @Rs.250/- per cubic meter claimed as market price. The petitioner filed an additional written statement opposing the said amended claim of Rs.64,38,716.84/-.

44. On 19th January 2009, the respondent made further amendment to claim no.2 for Rs.72,72,207.30/-. The said amount was claimed comprising of 34800 cubic meters @ Rs.145/- per cubic meter and 11204.90 MT @Rs.545.49 per MT as per DSR rate. The respondent deducted the sum of Rs.38,85,953.60/- which was paid by the petitioner to the respondent out of the claim amount of Rs.1,11,58,160/- and made a claim of Rs.72,72,207.30/-. The petitioner opposed the said claim by filing additional written statement. Learned arbitrator framed various issues. The learned arbitrator has discussed the said claim under issue nos.18, 25, 39, 36 and 37 and has allowed the said claim.

45. He submits that the original claim no.2 made by the respondent was only for Rs.11,60,046.11/- for providing rock angular boulder of 10 kgs. to 200 kgs. for bund wall as per specific scope of work and drawings. The respondent had claimed 8003.18 cubic meters in respect of claim no.2. The rate originally claimed by the respondent under claim no.2 was at Rs.145/- per cubic meter. In the first amendment, the claim no.2 was calculated on the basis of Rs.145/- per cubic meter as well as Rs.250/- per cubic meter. In the second amendment, the claim no.2 was calculated on the basis of Rs.145/- per cubic meter and Rs.545.49 per cubic meter.

46. Learned counsel submits that the respondent had failed to establish before the learned arbitrator the basis on which it had arrived at the quantity of 10281.96 cubic meters as additional quantity of rock bund over and above the estimated quantity mentioned in the tender. Similarly, there was no evidence produced by the respondent for proving the correctness of the rate of Rs.250/- per cubic meter claimed by the respondent in respect of additional quantity of rock bund of 10281.96 cubic meters. The respondent also did not prove that the respondent

had completed the work of 39281 cubic meters in respect of the said claim no.2.

47. Learned counsel for the petitioner submits that the measurements in the contract were to be taken from initial ground level and not below the ground level. The respondent had made the original claim for the construction of bund wall only on the basis of stones of 10 kgs. to 200 kgs. It was not the case of the respondent in the original claim that they were entitled to payment of 1 to 1.5 ton boulders as an extra item. He submits that the claim nos. 2 and 3 were overlapping and were duplicated claims. Learned arbitrator has awarded both the claims which shows perversity and patent illegality on the face of the award.

48. Learned counsel submits that though the respondent had not followed the prescribed procedure under clause 43 of the contract and had failed to produce any material to claim the quantity of the alleged extra work in respect of the claims filed before the learned arbitrator, the learned arbitrator has allowed the claim contrary to the terms of the contract. Learned counsel submits that though the petitioner had specifically denied and disputed the amended claim no.2, the learned arbitrator has rendered perverse finding that the petitioner had not refuted the amended claim no.2.

49. On the issue of limitation, it is submitted by the learned counsel for the petitioner that the finding of the learned arbitrator that the respondent had not changed the quantity is totally perverse and contrary to the amendment application made and allowed by the learned arbitrator. The award discloses patent illegality on the face of the award.

50. Learned counsel submits that before making the claim no.2, the respondent

did not follow the procedure provided for claiming any variations. The respondent had not submitted any rate analysis. The claim made by the respondent for bund wall was not based on the tender drawings. Mr. Ganpule who was examined as a witness by the respondent had admitted that as per drawings, the side slope was 1:1. The petitioner had not issued any variation order. In the 5th RA bill, no such claim was made which was submitted on 10th March 1997. The said bill was returned to the petitioner by the respondent with a direction to resubmit the same. On 21st March 1997, the respondent had submitted 6th RA bill. In the said 6th RA bill, the respondent had admitted the rate @ Rs.250/-. He submits that on 29th March 1997, the petitioner had disputed the quantity as per slope 1:1. All the joint measurements recorded 1:1 slope.

51. Learned counsel for the petitioner submits that though the District Schedule Rates of Ratnagiri and Sindhudurg were not applicable to this contract, learned arbitrator has applied the said schedule rates. Learned arbitrator has acted contrary to the terms of the contract. Learned counsel invited my attention to the Minutes of Meeting held between the parties in which the respondent agreed not to charge any extra amount for heavy boulders and submits that the learned arbitrator has decided contrary to the said agreement arrived at in the Minutes of Meeting which was an admitted document.

CLAIM NO.3

52. The learned counsel for the petitioner submits that the learned arbitrator totally overlooked the provisions of the contract provided for mode of measurement by Simpsons formula. The respondent themselves had accepted reconciliation quantity made on 9th March, 2001. The petitioner had determined the agreed quantities based on the contractual provisions. As regards reclamation work, the petitioner had not agreed to quantity of Rs.49,849.90 cubic meters.

Similarly as regards bund wall, the petitioner had not agreed to the quantity of 12,482.57 cubic meters for the bund wall above ground level and the quantity 57,600 cubic meters in the bund wall below ground level of the sea bed as the quantities were not based on joint measurements and joint records mentioned by the parties. He submits that though the respondent did not produce any evidence to prove the disputed quantities in terms of cubic meters which were originally claimed and altered by the amendments, the learned arbitrator has allowed the entire quantities as claimed by the respondent without evidence.

53. Learned counsel submits that under the terms of the contract, the petitioner was liable to make payment to the respondent in respect of slope of 1:1. The respondent achieved bund slope at 1:2 and not 1:1 as required by the contract. The respondent themselves had accepted and agreed that the bund slope required was 1:1 and not 1:2. The respondent themselves in the 5th RA Bill had claimed side slope of 1:1 for bund wall which bill was submitted by the respondent on 10th March, 1997 which was after completion of the work. The award of the learned arbitrator allowing the claim of the respondent based on slope 1:2 is thus contrary to the provisions of the contract and is in conflict with public policy. He submits that the learned arbitrator ignored the provisions of the contract. The General Specifications clauses 6, 7 and 9 did not make any reference whatsoever to materials brought to side by trucks and dumpers. The said provisions stipulates the measurement for the purpose of payment would be from the ground level. The joint survey report was contemplated by clauses 8 and 9 of General Specifications. The 7th RA Bill was submitted on 15th April, 1997. The joint survey record was completed on 10th March, 1997. The said joint survey report was conclusive evidence of the fact that the total reclamation work was 3,63,027.435 cubic meters and for bund wall the quantity was 26.799.682 cubic meters. The learned arbitrator

ignored the joint survey record maintained by the parties under the provisions of the contract and awarded exorbitant quantity based on no evidence and contrary to the joint survey record.

54. Learned counsel submits that the respondent had been already paid a sum of Rs.3,65,56,887.16 on the basis of 7 RA Bills submitted by them. The petitioner had already made payment on the basis of levels taken from time to time in accordance with the contract. The learned arbitrator could not have considered the truck loads while allowing the said claims in favour of the respondent. The respondent had never called upon the engineer of the petitioner to make calculations as per truck loads. The learned arbitrator overlooked the register of the trips made by dumpers and trucks. The respondent did not submit a final bill. The 7th RA Bill submitted by the respondent was the last bill submitted by them. It was only the final bill which determines the quantum on the basis of the Simpson formula. No reasons are rendered by the learned arbitrator as to how the quantum in respect of the reclamation, bund wall, bund slope of 1:2 was derived from truck loads. Learned counsel submits that the learned arbitrator totally overlooked the provisions of the contract which did not stipulate any payment for any material below ground level.

55. Insofar as rates awarded by the learned arbitrator in respect of claim no.3 is concerned, learned counsel submits that the respondent did not produce any evidence in support of their claims for higher rates before the learned arbitrator. DSR rates of Harbour Division were not provided for in the contract and could not have been applied for calculating rates by the respondent or by the learned arbitrator while allowing the said claim. The respondent had not even discussed the basis on which the rates were sought to be proved by the respondent in respect

of claim no.3. The rates awarded by the learned arbitrator is not in accordance with the contract but beyond the terms of the contract.

56. Learned counsel submits that the petitioner had already paid to the respondent for 26,799.68 cubic meters at the contractual rate of Rs.145 per cubic meter which rate had been accepted by the respondent. He submits that the respondent was not entitled to 20% variation as claimed by them in the second amendment. Learned counsel submits that the quantity of 34,800 cubic meters and quantity in excess of 20% of variation limit was not mentioned by the respondent in the first amendment to the statement of claim. Only in the second amendment, the respondent had claimed the said quantity without producing any material on record in support of the said claim. Though the petitioner had challenged the rate analysis given by the respondent in the amended statement of claim, the learned arbitrator rendered a perverse finding that there was no such challenge by the petitioner.

57. Learned counsel for the petitioner submits that the respondent had visited the site before submission of tender. The rates provided in the contract covered the additional quantity of material, if any, sunk. The respondent had made a claim only after submission of the completion certificate. He submits that there was no provision in the BOQ insofar as the claim no.3 as made by the respondent is concerned. The respondent has connected the claim no.3 with claim no.2 which is contrary to the terms of the contract. Since there was no provision made in the BOQ in respect of the claim made under claim no.3, no measurement was carried out by the parties at all as contemplated under the terms of the contract. The respondent did not submit any rate analysis. The petitioner had not ordered any variation.

58. Learned counsel submits that claim no.3 was specifically prohibited under clause 3 of the general specifications. Learned arbitrator by allowing the prohibited claim has exceeded his jurisdiction. The award thus is contrary to the terms of the contract and is in conflict with the public policy. Learned counsel for the petitioner submits that loss of material, if any, in water was not payable separately under the terms of the contract.

59. He submits that under the Simpson Rule applicable under the contract, it was not possible to measure the quantity drown in water. The entire claim was disputed by the petitioner in toto. Learned counsel placed reliance on clauses 2, 3 and 9 of the General Specifications which provided for prohibition for making any such payment. He submits that the claims were contrary to clauses 43, 44 and 45 of the contract. The rates demanded by the respondent were not in accordance with the said provision. The award is contrary to and overlooking the provision of the contract. Learned arbitrator overlooked the discussions arrived at in the Minutes of Meeting on some frivolous grounds.

60. Mr. Bhise, learned counsel appearing for the petitioner placed reliance on the judgment of the Supreme Court in the case of ***Associated Engineering Co. Vs. Government of Andhra Pradesh and Anr.***, reported in ***AIR 1992 SC 232*** and in particular paragraphs 26 to 31 and would submit that the learned arbitrator could not decide contrary to the terms of the contract and could not act arbitrarily.

61. Per contra, Mr. Bharucha, learned senior counsel appearing for the respondent submits that the learned arbitrator has rendered various findings of fact which are not perverse and thus no interference is warranted with such findings

of fact. In so far as the claim no.1 is concerned, he submits that statement of the reconcile quantity filed by the parties before the learned arbitrator was binding on both the parties. It was not the case of the petitioner that the petitioner would not consider the jointly recorded quantity at all. The learned arbitrator had recorded the finding that the said statement was binding on both the parties. This Court cannot interfere with such finding of fact.

62. Learned senior counsel submits that insofar as the rate of Rs.138/- per cubic meter allowed by the learned arbitrator is concerned, the said rate has been awarded by the learned arbitrator based on the rate claimed by the petitioner itself in the counter claim against the respondent after reducing the amount against the dredging. Learned arbitrator had rightly considered the said rate and cannot be challenged by the petitioner. He submits that under clause 3.3 of the contract, additional dumping material was anticipated. The petitioner had asked the respondent for fast dumping of the material and as a result thereof, the additional quantity was required to be used. The respondent was not responsible for the same. The claim thus made by the respondent for additional quantity or for bigger size of the boulders was justified. He submits that the learned arbitrator had rightly considered the joint quantity arrived at between the parties. The petitioner cannot thus challenge the said finding before the learned arbitrator.

63. Insofar as the claim no.2 is concerned, the learned senior counsel invited my attention to page 304 of the contract which provides for work sketch showing slope as 1:1. He submits that the sketch drawn in the contract was not drawn seriously. The rock bund was not designed on sound principle of Engineering. The learned arbitrator, after considering the oral evidence of Mr.Ganpule who was an expert, has rightly allowed the claim and has rendered a finding that the slope

1:1 was not possible. This Court cannot re-appreciate the evidence considered by the learned arbitrator under Section 34 of the Arbitration Act. He submits that there was no dispute about the actual quantity. The petitioner wanted to pay for 1:1 slope. The respondent had demanded the additional quantity in view of 1:2 slope. The finding rendered by the learned arbitrator was based on pure question of fact. The learned arbitrator has already rejected the claim for extra lead and escalation. This Court cannot interfere with such finding of fact rendered by the learned arbitrator.

64. Insofar as the claim no.3 is concerned, learned senior counsel submits that though the respondent had used big boulders for the work carried out under claim no.2, the respondent had claimed for the quantity provided in the BOQ rate plus 20% excess at the rate provided in the BOQ. He submits that insofar as the claim no.3 is concerned, the respondent had used the big size boulders for under ground works. The Minutes of meeting relied upon by the petitioner were not applicable since the same could not be considered as a binding contract between the parties. The interpretation of the contract rendered by the learned arbitrator is a possible interpretation and cannot be interfered with by this Court under Section 34 of the Arbitration Act.

65. Learned senior counsel submits that the petitioner had only denied the quantity on the ground that the quantity claimed by the respondent was for the work below the ground level. The petitioner had not disputed the measurement of quantity as claimed by the respondent. Learned arbitrator has rightly rendered a finding to that effect which cannot be interfered with. Learned arbitrator has also considered the progress report in the impugned award which was jointly signed by both the parties.

66. Insofar as the rates applied by the learned arbitrator is concerned, learned senior counsel submits that the District Schedule Rate relied upon by the respondent and followed by the learned arbitrator was also the government approved rate. Learned arbitrator had applied the District Schedule Rates of Ratnagiri, Harbour Division. This Court cannot re-appreciate the evidence considered by the learned arbitrator under Section 34 of the Arbitration Act.

67. Insofar as the submission of the learned counsel for the petitioner that the learned arbitrator could not have allowed the amendment to the statement of claim in the manner permitted by the learned arbitrator is concerned, he invited my attention to the statement of claim and also to the amendment application and would submit that the respondent had reserved the right to amend its claim. Once such liberty was reserved by the respondent, the learned arbitrator was justified in allowing the application for amendment. He submits that such amendment even otherwise was permissible under Section 23 of the Arbitration Act. The petitioner thus cannot challenge such amendment which was rightly allowed by the learned arbitrator.

68. Learned senior counsel in support of aforesaid submission placed reliance on the judgment of the Supreme Court in the case of ***Rashtriya Ispat Nigam Limited Vs. Dewan Chand Ram Saran***, reported in (2012) 5 SCC 306 and in particular paragraphs 43 to 45 and submits that since the interpretation of the contract rendered by the learned arbitrator was a possible interpretation if not a plausible one, the Court cannot substitute such interpretation by another interpretation. Paragraphs 43 to 45 of the said judgment in the case of ***Rashtriya Ispat Nigam Limited (supra)*** read thus :

“43. In any case, assuming that clause 9.3 was capable of two

interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. *The legal position in this behalf has been summarized in paragraph 18 of the judgment of this court in SAIL vs. Gupta Brother Steel Tubes Ltd. (supra) and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. reported in [2010 (11) SCC 296] to which one of us (Gokhale J.) was a party. The observations in paragraph 43 thereof are instructive in this behalf.*

45. *This paragraph 43 reads as follows: (Sumitomo Heavy case, SCC p.313)*

“43.The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwalitiy Mfg. Corpn. v. Central Warehousing Corpn., the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

69. Learned senior counsel also placed reliance on the judgment of the Supreme Court in the case of **Associate Builders Vs. Delhi Development Authority**, reported in **2014 SCC OnLine SC 937** and submits that construction of the terms of a contract is primarily for an arbitrator to decide and if the arbitrator construes

the terms of a contract in a reasonable manner, the Court cannot interfere with such award. He submits that interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. The relevant portion of the said judgment of the Supreme Court in the case of **Associate Builders (supra)** is extracted as under :-

*“This, in turn, led to the famous principle laid down in **Champsey Bhara Co. v. The Jivraj Balloo Spinning and Weaving Co. Ltd.**, AIR 1923 PC 66, where the Privy Council referred to **Hodgkinson** and then laid down:*

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

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

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

*“Now the regret expressed by Williams, J. in **Hodgkinson v. Fernie** has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if*

that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Clause 52." But they were entitled to give their own interpretation to Clause 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous."

This judgment has been consistently followed in India to test awards Under Section 30 of the Arbitration Act, 1940.

In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads-

- (a) a contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:*

"28. Rules applicable to substance of dispute.--

(1) Where the place of arbitration is situated in India,-

- (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;*
- (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality-for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*
- (c) Equally, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

“28. Rules applicable to substance of dispute.--(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.”

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

*In **McDermott International Inc. v. Burn Standard Co. Ltd.** (2006) 11 SCC 181, this Court held as under:*

*“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See **Pure Helium India (P) Ltd. v. ONGC** [(2003) 8 SCC 593] and **D.D. Sharma v. Union of India** [(2004) 5 SCC 325]).*

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

70. Learned senior counsel also placed reliance on the judgment of the this Court in the case of **Rolta India Ltd. Vs. Maharashtra Industrial Development Corporation** delivered on 27th August 2014 in Arbitration Petition No.103 of

2011 and in particular paragraphs 44 and 45 thereof in support of the submission that scope of Section 34 of the Arbitration Act is very limited.

71. Learned senior counsel also placed reliance on the judgment of the Supreme Court in the case of ***Steel Authority of India Limited Vs. Gupta Brother Steel Tubes Limited***, reported in (2009) 10 SCC 63 and submits that since the respondent had reserved liberty to amend the claim, the learned arbitrator is justified in allowing the application for amendment under Section 34 of the Arbitration Act. Paragraphs 32 and 33 of the said judgment read thus :

“32. We are not persuaded by the aforementioned submission of the learned senior counsel for the appellant for more than one reason. For one, the aforesaid argument was not at all canvassed before the High Court. A perusal of the judgment of the High Court would show that only two contentions were raised there, namely; (i) that arbitrator committed error of jurisdiction when he entered a time barred claim and (ii) that the arbitrator awarded damages to the claimant under category A, AA and C by exercising his power beyond Clause 7.2 of the agreement. We are afraid the appellant cannot be permitted to raise a contention before this Court in an appeal by special leave which was not raised before the High Court. This contention is not even indirectly or remotely connected with the plea of limitation that was canvassed before the High Court.

33. For another, even otherwise, we find no merit in the submission of the learned senior counsel that fresh claim was made by the respondent on September 12, 1991. In the claim petition filed by the respondent, in paragraph 18, it has been stated that in view of non availability of certain details which are in possession of the respondent and otherwise, the claimant reserves its right to add, amend and/or modify the statement of claims. Consequent upon the right already reserved in paragraph 18 of the claim petition, the respondent quantified the claims, namely, A, AA, AAA vide application dated September 12, 1991. We find no merit that by consideration of the claims as quantified vide application dated September 12, 1991, the arbitrator exceeded his jurisdiction.”

72. In the rejoinder, learned counsel for the petitioner submits that there was a joint measurement quantity in respect of bund above the ground level. There was no jointly recorded measurement in respect of the work carried out below the ground level. The said joint measurement was carried out, without prejudice to the rights and contentions of the parties, pursuant to the directions issued by the learned arbitrator. Such measurement could not have been considered by the learned arbitrator.

73. In so far as the amendment permitted by the learned arbitrator is concerned, it is submitted that merely because the respondent had reserved the liberty to carry out amendment, such amendment could not have been permitted contrary to Section 23 of the Arbitration Act which was on the face of it barred by law of limitation and beyond the scope of reference and contract. Learned counsel distinguished the judgments relied upon by the learned senior counsel for the respondent.

REASONS AND CONCLUSIONS

Arbitrability/ Natural justice

74. A perusal of the award indicates that the learned arbitrator had dealt with the issue of arbitrability in respect of this claim under issue no.36, issue of limitation under issue no.37 and the merits of the claim under issue nos.22,38,13, 23, 17 and 24. The claim no.1 had been divided by the respondent in three parts. First part of claim no.1 was for recovery of the sum arising out of the alleged unpaid amount for quarry run material. The second part of claim no.1 was for recovery of Rs.8,00,000/- towards the withheld amount by the petitioner for removal of heaved up portion and the third part of claim no.1 was for recovery of Rs.3,00,000/- towards the withheld amount by the petitioner for payment of

royalty.

75. I shall first deal with the issue of arbitrability of claim no.1 raised by the petitioner. A perusal of the award indicates that the learned arbitrator had dealt with this objection while dealing with issue no.36. In so far as the claim no.1 is concerned, the learned arbitrator has held that the claims made by the respondent in the notice dated 8th April 1999 invoking dispute settlement clause of tender and the claims made in the statement of claim dated 19th June 2000 before the erstwhile learned arbitrator Mr.Bhansali and also before the learned arbitrator who has rendered this award in the amended statement of claim filed on 14th June 2003 as well as in the second amended statement of claim dated 1st September 2008 were without the change of quantities of work executed by the respondent. It is held that there were changes made as regards rates of materials used in the items of work as per clause nos.43 and 44 of the General Conditions of Contract which dealt with extra item of works not covered by the contract. Learned arbitrator held that in regard to claim no.1, the respondent herein had corrected the rate of excess quantity beyond 20% of estimated quantity mentioned in bill of quantity which had been permitted as per the provisions of clause no.44 of the General Conditions of Contract. It is held that in the amended statement of claim dated 14th June 2003, the rate demanded by the claimant had been the rate offered by the respondent to other contractor engaged to execute extension of the same contract and that admission had been made by the petitioner herein in its counter claim raised against the respondent herein. Based on the above referred reasons, the learned arbitrator rejected the plea of the petitioner that the amended claims were not arbitrable and no cause of action had been arisen. Learned arbitrator rejected the plea of the petitioner that amendments carried out by the respondent herein were newly added claims and

could not be granted.

76. In so far as the claim nos.2 and 3 are concerned, on the issue of arbitrability raised by the petitioner, learned arbitrator has held that the respondent herein had claimed excess quantity beyond stipulated variation of 20% of BOQ mentioned in the tender at the rate mentioned therein at the stage of amended statement of claim dated 14th June 2003 which was on cubic meter basis for the boulders of size 1 to 1.5 tonne. It is held that as per the contract, the measurement of boulders 10 to 200 kg were on cubic meter basis, but the mode of measurement for 1 to 1.5 tonne boulders were on weight basis as per the District Schedule Rates of Ratnagiri, Harbour Division of PWD of the Government of Maharashtra. Learned arbitrator accordingly held that there was no new claim in so far as the claim nos. 2 and 3 are concerned. It is held that as the cause of action remained the same and the quantity claimed by the respondent herein all along remained constant.

77. A perusal of the record indicates that the petitioner had issued a work completion certificate on 27th February, 1997. The respondent did not submit any final bill though the petitioner had asked the respondent to submit their final bill. On 2nd February, 1998 the respondent filed several claims before the Senior Manager (PPD) of the petitioner. The said Senior Manager (PPD) refused to entertain the claim of the respondent on 23rd February, 1998. On 5th March, 1998 the respondent filed an appeal before the Chief Manager (PPD) of the petitioner against the decision of the Senior Manager (PPD) of the petitioner. On 8th April, 1999 the respondent filed claims before the Chairman of the petitioner and claimed an amount of Rs.3,64,51,616.60. On 28th April, 1998 the respondent invoked arbitration agreement and requested the chairman of the petitioner to appoint an

arbitrator. On 20th April, 2000 the petitioner appointed Mr.R.K.Bhansali as a sole arbitrator.

78. On 19th June, 2000 the respondent filed their statement of claim demanding an amount of Rs.4,31,72,103.15. The said claim was resisted by the petitioner by filing written statement and counter claim. The petitioner claimed an amount of Rs.5,80,60,080/- in the counter claim. In the meeting held on 20th January, 2001 the parties agreed that they would not lead any oral evidence which was recorded by the learned arbitrator in the minutes of the meeting. The argument had already commenced thereafter. The learned arbitrator Mr.R.K.Bhansali resigned on 19th April, 2002. On 26th October, 2002, former judge of this court was appointed as a sole arbitrator.

79. On 14th June, 2003, the respondent filed additional statement of claim which was opposed by the petitioner. On 18th December, 2003 the respondent filed an application for amending statement of claim dated 19th June, 2000. By an order dated 18th December, 2003, the learned arbitrator rejected the said amendment application. By the said additional/amended statement of claim dated 14th June, 2003, the respondent inflated their claim from Rs.4,31,72,103.15 to Rs.6,97,80,236.99. The petitioner filed their amended written statement.

80. On 24th January, 2004, the learned arbitrator allowed the respondent to lead oral evidence of Dr.R.K.Katti. The respondent filed affidavit of Mr.V.T.Ganpule on 22nd November, 2004. The said Mr.V.T.Ganpule was cross examined by the petitioner. On 26th March, 2007 the respondent commenced his argument. On 23rd January, 2008 after conclusion of the argument of the respondent, the petitioner commenced their argument.

81. On 11th April, 2008, the learned arbitrator suo-moto reviewed its earlier order dated 18th December, 2003 on the ground that there was a clerical or typographical mistake in the order dated 18th December, 2003. It is recorded that the learned arbitrator had not rejected the amendment application. The learned arbitrator however did not direct the additional statement of claim to be taken on record. On 1st September, 2008 at the stage of the mere conclusion of the oral argument of the petitioner, respondent filed an application for further amendment of the statement of claim. The petitioner objected to the said application at such a belated stage by filing reply dated 10th September, 2008. The learned arbitrator however before any reply could be filed by the petitioner allowed the said amendment application and directed the petitioner to file their reply to the amendment application.

82. On 23rd September, 2008, the respondent filed an application praying that the written argument dated 9th September, 2008 of the respondent be treated as affidavit of evidence of the proprietor of the respondent. The said application was opposed by the petitioner. On 20th October, 2008 the learned arbitrator rejected the said application dated 23rd September, 2008 and closed the proceedings for declaring the award on 27th November, 2008.

83. On 8th December, 2008 the learned arbitrator informed the parties that the award would be declared on 16th December, 2008. On 16th December, 2008 the learned arbitrator however did not declare any award. On 12th January, 2009 the learned arbitrator directed the respondent to carry out the amendment as prayed in the amendment application dated 1st September, 2008 on or before 19th January, 2009. On 19th January, 2009, the respondent amended the statement of claim and inflated the claims from Rs.6,97,80,236.99 to Rs.9,93,22,755.66. On 4th March, 2009 the petitioner filed additional written statement to the amended statement of

claim and denied the claims. On 1st April, 2009 the learned arbitrator framed additional issues and closed the matter for passing of the award. On 25th April, 2009 the learned arbitrator rendered an award rejecting the counter claim of the petitioner and allowed some of the claims made by the respondent.

84. On perusal of the arbitration clause provided under clause 65 of the contract it is clear that the said clause does not provide that only such claims which were made before the chairman of the petitioner could be referred to arbitration. The respondent however amended the claims by filing application for amendment and had inflated the claim amount and changed the nature of claims as would be dealt with in the later part of this order. The learned arbitrator was thus empowered to adjudicate upon the claims which were made in the amendment application also however on merits. In view of there being no restriction provided under the arbitration agreement upon the learned arbitrator to entertain only those claims which were made before the chairman or before the authorised person of the petitioner, the learned arbitrator in my view had jurisdiction to arbitrate upon all the claims subject to the parameter of the contract and law. I am thus not inclined to accept the submission of the petitioner that any of the claims made in the amended statement of claim were not arbitrable or that the learned arbitrator exceeded his jurisdiction to adjudicate upon such claims which were not made before the chairman and were not subject matter of the notice issued by the respondent invoking arbitration agreement. Whether such claims were contrary to the terms of the contract or not that is a different issue raised by the petitioner which will be dealt with in the later part of this order.

85. A perusal of the facts narrated aforesaid clearly indicates that though the arguments had already commenced and concluded as far back as in the year 2001

by the parties before the learned arbitrator, the respondent was allowed to file amendment application repeatedly for carrying out amendment to the statement of claim. In spite of strong objections raised by the petitioner for opposing such amendment application, the learned arbitrator allowed such application on the erroneous grounds. A perusal of the record shows that the respondent had already filed amended statement of claim even without making any application for carrying out amendment on 14th June, 2003. When the petitioner raised an objection about filing of such amended additional statement of claim, respondent filed an application for carrying out amendment to the statement of claim dated 19th June, 2000 on 18th December, 2003. Though the learned arbitrator had rejected the said application by order dated 18th December, 2003, the learned arbitrator by his order dated 11th April, 2008 suo-moto reviewed its earlier order dated 18th December, 2003 on the ground that there was a clerical or typographical mistake. The learned arbitrator however did not direct that the additional statement of claim be taken on record.

86. A perusal of the record also indicates that though the parties had made statement before the learned arbitrator as far back as on 20th January, 2001 that they would not lead any oral evidence and the same was recorded in the minutes of the meeting, the learned arbitrator entertained the application of the respondent for examining Dr.R.K.Katti on 24th January, 2004. The learned arbitrator also allowed the respondent to examine one Mr.Prakash Falari.

87. A perusal of the record further indicates that though arguments of the respondent were over and the petitioner had commenced their arguments on 23rd January, 2008, the learned arbitrator allowed the respondent to make further application for amendment for the statement of claim. When the respondent made

such application on 1st September, 2008 for further amendment of statement of claim, the arguments of the petitioner were coming to an end. In spite of strong objection raised by the petitioner, the learned arbitrator by an order dated 10th September, 2008 allowed said amendment application and directed the petitioner to file their reply to the said amended application.

88. A perusal of the record further indicates that on 20th October, 2008, the learned arbitrator had closed the proceedings for declaring an award on 27th November, 2008. After closing the proceedings, the learned arbitrator directed the respondent to carry out the amendment by an order dated 12th January, 2009 on or before 19th January, 2009. The learned arbitrator therefore allowed the respondent to inflate the claims in the said amended statement of claim filed on 19th January, 2009. The petitioner as and by way of abundant caution filed additional written statement to the amended statement of claim dated 19th January, 2009 denying and disputing the claims. It is surprising that on 1st April, 2009 the learned arbitrator framed additional issues and closed the matter for passing of the award without any further hearing on the additional issues framed by the learned arbitrator.

89. A perusal of the entire record clearly indicates that the procedure in this matter followed by the learned arbitrator as set out aforesaid is a procedure unknown to law. The entire procedure followed by the learned arbitrator is in breach of principles of natural justice and shows total non-application of mind and patent illegality on the face of the award. Amendments are allowed after closure of the arguments. Additional issues are framed after declaring the proceedings as closed for declaring the award. No hearing is rendered to any party on the additional issues framed by the learned arbitrator after the proceedings were closed for declaring the award. In my view by adopting such procedure by the learned

arbitrator in this manner, the interest of both the parties and in particular of the petitioner was seriously prejudiced. The entire award is thus in breach of principles of natural justice and shocks the judicial conscience.

Limitation :-

90. Insofar issue of limitation raised by the petitioner is concerned, the learned arbitrator dealt with the said issue in respect of all the claims while dealing with issue no.37 in the impugned award. Learned arbitrator has held that under Section 43 of the Arbitration and Conciliation Act 1996, the Limitation Act 1963 shall apply to arbitration as it applies to proceedings in Court and for the purpose of that section and the Limitation Act 1963, arbitration should be deemed to have been commenced on the date referred to in Section 21. It is held that however, in the facts of the present case, the respondent herein had since the beginning asked for payment for the same quantity. The quantity for which amount is claimed by the claimant is the same, though the correct rates had been applied in the light of District Schedule of Rates published by the PWD of Government of Maharashtra. It is held that cause of action remained the same because the quantities claimed were the same throughout and the rates were allowed to be modified by amendments which were applied for on the legible copy of the District Schedule Rates from PWD of Ratnagiri Harbour Division.

91. It is held by the learned arbitrator that in the facts of this case mere asking for amounts according to correct rates as provided under District Schedule Rates could not mean that the claims as per the second amendment were barred by limitation, particularly because the quantities were the same from the beginning i.e. in the notice of arbitration, in the original statement of claim, amended statement of claim and the second amendment of the statement of claim. It is

held that while granting the amendments, the question of delay was borne in mind and amendments were allowed after hearing the parties and thus the claims made by the respondent herein as amended by the second amendment could not be barred by limitation.

92. While dealing with the said plea of limitation, the learned arbitrator, however, rejected the claim of Rs. 10,00,000/- made by the respondent herein in the Second Amendment dated 1st September 2008 for the item of providing outfall drain covered under item no.3 of BOQ on the ground that the said claim did not find place in the notice issued to the petitioner herein dated 8th April 1999 nor was there a mention in the amended statement of claim dated 14th June 2003, hence the same was barred by limitation and was not maintainable.

93. A perusal of the award indicates that the learned arbitrator has rejected the issue of limitation only on the ground that there was no change in the quantities claimed by the respondent from the beginning i.e. in the notice of arbitration, in the original statement of claim, amended statement of claim and the second amendment of the statement of claim. It is held by the learned arbitrator that merely because the respondent had asked the correct rates as provided under District Schedule Rates DSR, it could not mean that the claims as per second amendment were barred by law of limitation.

94. For the purpose of appreciating findings of the learned arbitrator whether there was any change in the quantity or rate or both in respect of the claims made in the two amended applications which would have bearing on the issue of limitation, it would be appropriate to refer to the notice of demand, statement filed before erstwhile arbitrator by the respondent, first application for amendment,

order passed thereon, second application for amendment and the order passed thereon.

95. A perusal of the record indicates that the respondent had only claimed Rs.53,94,922/- insofar as claim No.I is concerned, in the notice invoking arbitration dated 8th April, 1999, the quantity claimed under claim No.I was for 59943.586 cubic meter at the rate of Rs.90/-. However, in the claim filed before the learned arbitrator, the respondent made a claim of Rs.33,22,903.59 for 36921.151 cubic meter at the rate of Rs.90/- per cubic meter. In addition to the said sum of Rs.33,22,903.59, the respondent also made a claim in the statement of claim of Rs.8.00 lakhs for removal to heaved up portion and Rs.3.00 lakhs which was withheld amount for royalty. By the first application for amendment dated 16th April, 2003, the respondent made a claim of Rs.33,22,903.59. There was no change in the quantity or rate in the first amendment insofar as claim No.I is concerned.

96. However, in the second application for amendment dated 19th January, 2009, the respondent made a claim in the sum of Rs.52,41,314.87. The respondent enhanced the quantity from 36921.151 cubic meter to 399943.59 cubic meter. The respondent also enhanced the rate to Rs.138/- per cubic meter. However, there was no change insofar as claim of Rs.8.00 lakhs and Rs.3.00 lakhs which were made in the statement of claim dated 9th June, 2000 are concerned.

97. Similarly insofar as claim No.II is concerned, the respondent in the notice invoking arbitration had made a claim of Rs.17,11,000/- in respect of 11800 cubic meter at the rate of Rs.145/- per cubic meter. However, in the statement of claim filed on 9th June, 2000, the respondent made a claim of Rs.11,60,046.11 i.e. for 8003.98 cubic meters. There was no change insofar as rate is concerned. In the first

application for amendment dated 16th April, 2003, the respondent claimed a sum of Rs.28,89,536.14 for quantity of 2200.32 cubic meter at the same rate and for quantity of 10281.96 cubic meter at the rate of Rs.250/- per cubic meter. The respondent thus not only changed the quantity but also rate in respect of the quantity. In the second application dated 19th January, 2009, the respondent claimed a sum of Rs.72,72,207.30. The respondent made the claim for 34800 cubic meter at the rate of Rs.145/- per cubic meter and claim for 11204.90 metric tonne at the rate of Rs.545.49 per metric tonne. It is thus clear that the respondent not only claimed for additional quantity but also demanded new rate on the basis of the alleged District Schedule rates which was much higher than what was claimed earlier.

98. Insofar as claim No.III is concerned, the respondent had made a claim of Rs.1,55,60,490/- in the notice invoking arbitration comprising of 62241.96 cubic meter at the rate of Rs.250/- per cubic meter. However, in the statement of claim filed before the learned arbitrator on 9th June, 2000, the respondent claimed for the quantify of 97041.96 cubic meter. In the first amendment application dated 16th April, 2003, the respondent revised the said claim to Rs.5,71,82,400/- comprising of 86640 metric tonnes at the rate of Rs.560/- per metric tonne on the basis of the District Schedule rates and for 34656 cubic meter at the rate of Rs.250/- per cubic meter. The respondent bifurcated the quantity of 97041 cubic meter by claiming 39281 cubic meter under claim No.II. The respondent alleged that about 57760 cubic meter sunk below ground level and converted the quantity of 57,760 cubic meter into 86,640 metric tonne. In the second amendment application dated 19th January, 2009, the respondent made a claim of Rs.7,87,68,576/- and demanded the quantity of 1444000 metric tonne at the rate of Rs.545.49 metric tonne based on the alleged District Schedule rates. It is thus clear that the respondent not only

enhanced the quantity but also demanded higher rate. It is not in dispute that the respondent had made all these claims much after the petitioner having issued completion certificate.

99. A perusal of the notice invoking arbitration, the statement of claim and two applications for amendment clearly indicate that the respondent had amended the quantity as well as the rate. The respondent had demanded the additional quantity and additional rate. In the amendment application dated 18th December, 2003, the respondent has clearly stated that the original statement of claim consisting of seven claims. By the said amendments, four of the claims remained unaltered. Out of the remaining three claims, two claims consisting of Rs.16,72,038.11 were revised due to various reasons. It is stated that the full quantity of bund above the ground level was not taken earlier which was now taken. The new rate and the quantity not existing in the tender was claimed. The respondent also revised claim No.III on the basis of the rate for heavy boulder as per District Schedule rates.

100. A perusal of the second amendment application filed by the respondent also indicates that it was the case of the respondent that the respondent had noticed certain discrepancy in the amended statement of claim submitted before the learned arbitrator. The quantity, rates and amount required correction. It is also stated that claim No.III was required to be corrected in terms of the quantity and rate since the copy of complete District Schedule of rates from Harbour Division was now available.

101. A perusal of the order passed by the learned arbitrator on these two amendment applications and more particularly the order dated 18th December, 2003, which was passed on the first amendment application indicates that initially

the said amendment application was rejected by the learned arbitrator which order was *suo-moto* recalled by the learned arbitrator. A perusal of the order dated 10th September, 2008 passed by the learned arbitrator insofar as the second amendment application is concerned, clearly indicates that the learned arbitrator has recorded that the claimant had alleged that they have noticed discrepancy in the amended statement of claim and as such the quantity raised and the amount required correction. The respondent had also protested for bill including item 3 of the bill of quantity annexed to the amended statement of claim which was to be included in the statement of claim. The learned arbitrator referred to the averments made in the second amendment application and recorded that according to the claims, claim No.III was also required to be corrected in terms of the quantity and rate. By the said order, the learned arbitrator thus allowed the respondent to amend the statement of claim by enhancing the quantity and also rate.

102. A perusal of the impugned award however, indicates that the learned arbitrator has proceeded on the premise that there was no change in the quantity in respect of any of the aforesaid claims i.e. claim Nos.I to III and there was only a change insofar as the rate is concerned. In my view the learned arbitrator has completely ignored the averments made by the respondents themselves in their applications for amendment and the orders passed by the learned arbitrator himself on this applications allowing amendment to the claim on number of occasions thereby increasing the quantity there as well as rate. The award is totally perverse and shows patent illegality on the face of award.

103. In my view the arbitration proceeding commences in respect of the disputes which are referred in the notice invoking arbitration agreement on the date on which such notice is received by the respondent in respect of such disputes. The

respondent in this case had made a claim of specific amount for specific quantity at particular rate in the notice invoking arbitration agreement. In my view the arbitration proceedings thus commenced in respect of those specific disputes which were raised in the said notice invoking arbitration agreement. The limitation stopped only in respect of such disputes which were referred to in the said notice invoking arbitration agreement. In my view, though the learned arbitrator is empowered to allow the amendment claimed under section 23 of the Arbitration Act, 1996, it is subject to limitation. Merely because the amendment is allowed by the learned arbitrator, it cannot be said that the additional claims / disputes raised by the respondent on the date of such application for amendment are deemed to have been within time. The limitation in respect of the additional claims / disputes would stop only on the date of application for such amendment and will not relate back. The work was completed much prior to three years of respondent no.1 making application for amendment of the statement of claim. The learned arbitrator however, has rejected the plea of limitation casually and on the premise that there was no change in the quantity at all in respect of any of the claims. In my view the learned arbitrator has allowed the time barred claims and the award is thus liable to be set aside on that ground alone except the claims for Rs.8.00 lakhs and Rs.3.00 lakhs in respect of which there was no change effected by the respondent either in the first amendment application or in the second amendment application.

104. Merely because the respondent had reserved their right to amend the statement of claim in future such plea would not extend the period of limitation till the date of filing the amendment application whenever they apply in future. The claims which were already barred by law of limitation on the date of such amendment application could not have been allowed by the learned arbitrator. A perusal of the entire award indicates that the learned arbitrator has awarded claim

Nos.I to III based on the claims made in the first and second amendments. Since it is not possible to sever the part of the claim which was formed part of the notice invoking arbitration agreement and the original statement of claim from the entire award, the entire award excluding the claims of Rs.8.00 lakhs and Rs.3.00 lakhs deserves to be set aside on the ground of limitation. The judgment of the Supreme Court in the case of *Steel Authority of India Limited (supra)* relied upon by Mr.Bharucha, learned senior counsel for the respondent, is clearly distinguishable with the facts of this case and does not assist the respondent.

105. A perusal of the record indicates that however the learned arbitrator has rejected the claims of Rs.10 lacs as barred by law of limitation as not maintainable since the said claim was not made in the notice issued to the petitioner by the respondent on 8th April, 1999 nor the same was mentioned in the statement of claim or amended statement of claim dated 14th June, 2003. Though the learned arbitrator rejected one claim on such ground, the learned arbitrator did not reject the other claims which were inflated by the respondent in the first as well as second amended statement of claims dated 14th June, 2003 and 1st September, 2008. The award shows patent illegality, inconsistency and non-application of mind on the part of the learned arbitrator.

Claim no.1 –

106. Learned arbitrator has dealt with the first part of the claim no.1 i.e. alleged unpaid amount for quarry run material while dealing with the issue no. 23. A perusal of the award insofar as first part of the claim no.1 is concerned indicates that the learned arbitrator has held that the respondent herein completed the work satisfactorily as per the instructions of the petitioner and to its satisfaction and was granted completion certificate dated 27th February 1997 by the petitioner. It

was held that there was no restriction of any kind in the contract on recording of final levels on the heaved up portion and it is simply provided that final levels should be recorded and those should be co-related with the initial levels. The contract also did not specify whether levels should be taken only on murum and not on heaved up clay. It is held that the very fact that the Engineer accepted the reclamation work as it was, a part was occupied by the heaved up clay and issued completion certificate without saying that the heaved up portion was not a reclaimed portion. He held that it clearly indicated that Engineer accepted that portion as a reclaimed portion. If it is not reclaimed portion, the said Engineer would have terminated the contract stating that the contractor had not satisfactorily completed the work. Learned arbitrator held that there was no reason whatsoever to deny the payment to the respondent herein for the same.

107. Insofar as the quantity allowed by the learned arbitrator is concerned, it is held that as per the statement of quantity reconciliation of the petitioner dated 9th March 2001 which was signed by the Superintendent on behalf of the petitioner with a remark at the end of the said quantity reconciliation statement that during the said reconciliation, various persons were present including the officer of the petitioner, learned advocate of the petitioner and the proprietor of the respondent, the said statement, therefore, was binding on both the parties. As far as quantities executed by the respondent into the reclamation and bund works except in the last column as regards the quantity of 705.107 cubic meters of fill material was concerned, it was mentioned that the petitioner may consider the said quantity. The petitioner, however, did not take a stand thereafter that the said quantity of 705.107 cubic meters would not be considered. Learned arbitrator has held that as per the said statement, the respondent herein had executed

quantity of filling material of 399943.59 cubic meters. However, the petitioner had considered the quantity of 363416.21 cubic meter. Learned arbitrator accordingly held that the corrected quantity was $399943.59 - 362710.96 = 37232.63$ cubic meters excluding 705.11 cubic meters.

108. Learned arbitrator held that the respondent would be thus entitled to recover payment for the quantity of 399943.59 cubic meters of fill material in the reclamation work. Estimated quantity in the BOQ was 300000 cubic meters. By addition of 20% variation, the quantity became 360000 cubic meters to be paid at Rs.90 per cubic meter i.e. rate provided in BOQ which was worked out to Rs.3,24,00,000/-. Learned arbitrator held that the balance of quantity of 39943.59 cubic meters was required to be paid at revised fair market rate as per clause no.44 of the General Conditions of Contract. The respondent had claimed for the said balance quantity of 39943.59 cubic meters at the rate of Rs.138 per cubic meter which was worked out to Rs.55,12,214.87/-.

109. Learned arbitrator had held that the respondent had been paid by the petitioner for 363010 cubic meters at the rate of Rs.90/- per cubic meter i.e. 32670900 and from the said amount, the petitioner had withheld Rs.8,00,000/- against dredging of heave and Rs.3,00,000/- against royalty clearance from revenue authorities. The petitioner had thus effectively paid to the respondent Rs.3,15,70,900/- and thus had deprived the respondent from payment of Rs.63,41,315.42/-.

110. Learned arbitrator thereafter held that the rate of Rs.138/- for the additional quantity of fill material without considering cost effect of removal of heaved material cannot be accepted in toto without giving effect to the element

of dredging. It is held that the petitioner itself has evaluated the said element and had withheld Rs.8,00,000/- for removal of heaved material. The said amount of Rs.8,00,000/- is accordingly reduced from the amount of Rs.63,41,315.42 as demanded by the respondent herein. Learned arbitrator accordingly held that the respondent was entitled to an amount of Rs.55,41,315.42/- in so far as first part of claim no.1 is concerned.

111. In the second amendment dated 19th June 2009, the respondent had claimed a sum of Rs.52,41,314.87 insofar as the first part of claim no.1 i.e. towards unpaid amount for quarry run material is concerned. Learned arbitrator, however, had allowed the said amount of Rs.55,41,315.42/- which is more than the amount claimed by the respondent in the second amendment.

112. A perusal of the record indicates that the rates provided in the bill of quantities under claim No.I was inclusive of loss of material due to sinking. The learned arbitrator completely overlooked the admitted fact that though the respondents themselves had submitted 7th running account bill on 15th April, 1997 which was after issuance of the completion certificate on 26th February, 1997, the respondent did not make any such claim even in the last bill. Under clause 51 of the general conditions of contract, the contractor was under an obligation to submit to the petitioner each month on or before 10th day of each month a statement in a standard format duly approved showing the estimated contract value of the permanent works executed upto the end of the month, the amount due to him on account of estimated contract value of the permanent works executed upto the end of the previous month. A perusal of the record indicates that though the respondent submitted 7th running account bills, at no point of time the respondent made this

claim which was subject matter of claim No.I in those bills. It is thus clear that the said claim was made by way of after-thought and after issuance of completion certificate.

113. Under clause 43 read with 44 of the general conditions of contract, if any variation order was issued by the petitioner, the rates in respect of such extra work was required to be decided in accordance with the mandatory procedure under clause 44. The respondent could not have carried out any additional work without any such variation order under clause 43 of the general conditions of contract. If the rates in respect of such additional work was not specified, suitable rate backed up by rate analysis was required to be submitted by the contractor and agreed upon between the contractor and the petitioner. Under the said clause, in the event of any disagreement, the petitioner was required to fix such rates or prices as shall be in its opinion was reasonable and proper having regard to the circumstances.

114. The said clause also provides that the contractor is required to give to the petitioner before 10th day of every month, a statement in writing of any extra work which he may have performed during the preceding month, failing which any claim for which he may afterwards make for payment on account of any such extra work will not be allowed. It is thus clear that any claim for extra work which was not claimed by the contractor in the statement in writing of such extra work required to be given on or before 10th day of every month, such claim is prohibited. The learned arbitrator has thus allowed claim No.I in breach of and contrary to condition Nos.43 and 51 of the general conditions of contract. No such claim for extra work could have been allowed by the learned arbitrator. The learned arbitrator in my view has exceeded his jurisdiction by allowing the prohibited claim and the impugned award is thus being contrary to and *de-hors* the terms of

the contract and is thus in conflict with the public policy.

115. The learned arbitrator in my view has not applied Simpson rule which was admittedly applicable to the parties for the purpose of measurement. The learned arbitrator relied upon reconciliation carried out by the parties during the pendency of the arbitration proceedings without prejudice to the rights and conditions. Such reconciliation statement which was prepared without prejudice to the rights and contentions could not be relied upon on the ground that the respondent had failed to prove their entitlement to claim any extra amount and secondly since the said statement was prepared pursuant to the directions issued by the learned arbitrator during the pendency of the arbitration proceedings and was without prejudice to the rights and contentions of both the parties. The learned arbitrator has thus relied upon the document which was disputed document and has thus violated the principles of natural justice.

116. Insofar as the rate of Rs.138/- per cubic meter applied by the learned arbitrator is concerned, the said rate was not derived in accordance with the mandatory procedure prescribed under clause 43 of the general conditions of contract. The respondent had not submitted any rate analysis in accordance with such provision. Under the provision of the contract, the rate could be determined by the petitioner after such rate analysis was submitted by the respondent at the appropriate time with supporting document. The respondent did not comply with the said provision. The learned arbitrator allowed the said claim at the rate of Rs.138/- per cubic meter which was contrary to the terms of the contract and overlooking the mandatory procedure required to be followed for claiming extra amount and the rate over and above the rate provided in the bill of quantity. The award deserves to be set aside on this ground also.

117. Clause 3 of the general specifications (scope) provides that initial levels shall be taken at 5M grids in the marine situation with the help of small boats etc., or at low tide situation which shall form the basis of initial datum levels. The filling shall be continued to the requisite finished levels. The finished levels at the same grids shall be taken and the quantum of fill shall be computed based on Simpson rule. No allowance or extra quantities for sinking, replenishing, shifting etc., shall be considered. It further provides that the rate quoted by the contractor shall include for the likely consumption of extra quantities in quantum heaving shifting etc., during entire construction period. In my view, the impugned award is thus contrary to clause 3 which prohibits any allowance or any extra quantities for sink. The learned arbitrator has thus exceeded his jurisdiction by allowing the prohibited claim. The award is thus in conflict with the public policy.

118. Insofar as the claim amount of Rs.8.00 lakhs withheld by the petitioner herein towards removal of heave is concerned, the learned arbitrator has placed reliance on the affidavit of evidence filed by Mr.Ganpule. The learned arbitrator has rendered a finding that if the respondent herein was asked by the petitioner for removal of heave, they would have removed the same and would have claimed the amount of expenditure for removal of heave as an extra item under clause No.43 of General Conditions of Contract. The petitioner has not pointed out any correspondence or other documentary evidence to show that they had instructed the respondent to remove heave from the reclamation area. The petitioner has also not produced any documentary evidence in respect of their spending of Rs.8.00 lakhs for removal of heave. The learned arbitrator accordingly held that the petitioner was not justified in withholding the payment of Rs.8.00 lakhs for removal of heave in the reclamation work done by the respondent in 9000 sq. mtr. area from the bill of the respondent.

119. Insofar as the claim for Rs.8.00 lakhs under claim No.I is concerned, a perusal of the record indicates that there was no change in the said amount claimed by the respondent in the statement of claim and in the two amendment applications before the learned arbitrator. The learned arbitrator has considered the affidavit of evidence filed by Mr.Ganpule and has rendered a finding that the petitioner had not pointed out any correspondence or other documentary evidence so that it instructed the respondent to remove the heave from the reclamation area. The petitioner also could not produce any evidence in support of their plea that the petitioner had spent the said amount of Rs.8.00 lakhs for removal of heave. The learned arbitrator has, in my view, rightly held that the petitioner was thus not justified in withholding the said payment of Rs.8.00 lakhs for removing to heave any reclamation work done by the respondent from the bill of the respondent. The finding rendered by the learned arbitrator in my view is not perverse and thus no interference with such finding of fact is warranted under section 34 of the Arbitration & Conciliation Act, 1996.

120. Insofar as the claim for refund of Rs.3.00 lakhs which was deducted by the petitioner is concerned, the respondent had deposited the first installment of royalty for Rs.1,40,000/- with the Collector, Alibag. The respondent had also filed the writ petition in this Court directing the State Government not to charge any royalty from the ordinary earth used for filling. It was the case of the respondent that the respondent was forced for payment of royalty. The respondent also placed reliance on the judgment of the Supreme Court in Special Leave petition No.13092 of 1989 from the order dated 19th July, 1989 passed by this Court which took a view that ordinary earth used as filling is a mineral, it does not fall within the first part of the definition of “minor mineral” and thus no royalty could be charged thereon. The learned arbitrator accordingly rendered a finding that it was not

necessary for the respondent herein to pay royalty charges. The respondent had indemnified the petitioner in the event of any claim from any revenue department on their behalf.

121. The learned arbitrator held that inspite of indemnifying the petitioner by the respondent, the petitioner has illegally withheld a sum of Rs.3.00 lakhs from the dues of the respondent towards royalty charges which action of the petitioner was contrary to the decision of the Supreme Court and thus the respondent was entitled to be refunded of Rs.3.00 lakhs. The learned arbitrator also held that the petitioner had not produced any evidence to show that the said amount of Rs.3.00 lakhs had been paid by them to the Collector, Alibag towards royalty charges and thus the petitioner was not entitled to deduct the said sum of Rs.3.00 lakhs by way of royalty charges from the respondent. The learned arbitrator accordingly held that the respondent was entitled to refund of Rs.3.00 lakhs towards royalty charges deducted by the petitioner from the dues of the respondent.

122. Insofar as the claim for refund of Rs.3.00 lakhs which was deducted by the petitioner for not depositing the royalty amount by the respondent is concerned, a perusal of the award indicates that the learned arbitrator has considered the terms of the contract and also order passed by the Supreme Court in Special Leave Petition No.13092 of 1989 and has held that it was not necessary for the respondent to pay any royalty charges. The respondent had indemnified the petitioner in the event of any claim from any revenue department on their behalf. It is held by the learned arbitrator that the petitioner did not produce any evidence to show that the said amount of Rs.3.00 lakhs had been paid by the petitioner to the Collector, Alibag, towards royalty charges on behalf of the respondent and accordingly held that the said deduction of Rs.3.00 lakhs from the bills of the

respondent for the payment of royalty was not proper.

123. The learned arbitrator has rightly directed the petitioner to refund the said amount to the respondent. In my view, the learned arbitrator has considered the evidence on record and has interpreted the terms of the contract which interpretation is possible interpretation. The learned arbitrator rendered the finding of fact which is not perverse and thus no interference is warranted for. That part of the award is thus upheld.

CLAIM NO.II

124. Insofar is claim No.II i.e. for “additional quantity of angular to construct a larger cross section of the rock bund than shown in the tender drawing for Rs.72,72,207.30” is concerned, the learned arbitrator has awarded a sum of Rs.64,38,716.84 in favour of the respondent. In the impugned award, the learned arbitrator has considered the affidavit of Mr.Ganpule, who deposed that drawing which was formed part of the contract was not seriously drawn. Heave was constructed to the side slope of 1:2 and not 1:1 as shown in the tender drawing. The learned arbitrator has held that the petitioner had not produced any evidence documentary or otherwise to show that in the facts and circumstances of this case the bund could be constructed with material of 10 to 200 Kg stones as specified in bill of quantities. The learned arbitrator came to the conclusion that the rock bund could not have been constructed with side slope of 1:1 as shown in the contract drawing. The learned arbitrator also placed reliance on the joint reconciliation statement made by the parties on 11th March, 2001 showing total quantities of boulders at 39,2865.96.

125. Insofar as the rate of Rs.250/- per cubic meter by the respondent is concerned, it is held by the learned arbitrator that as the respondent was not bound to execute the extra quantity beyond variation limit of 20% as specified in the contract clause No.44 of General Conditions of Contract beyond bill of quantity, the contractor had a right to work out their own rate for excess quantity. The learned arbitrator referred to a rate analysis submitted by the respondent in their amended statement of claim dated 14th June, 2003 for extra item of usage of 1 to 1.5 tonnes of boulders in the construction of bund wall. The learned arbitrator has held that the rate analysis given by the respondent in the amended statement of claim had not been denied by the petitioner.

126. The learned arbitrator rejected part of claim i.e. additional net of 5 km at the rate of Rs.62.00 per cubic meter on the ground that there was no evidence on record to show that the quarries from where boulders were brought to site of work were situate at a distance of more than 10 km. The learned arbitrator also rejected the claim for 10% extra over rate mentioned in the District Schedule of rates on the ground that the said provision was applicable only to the works in Ratnagiri and Sindhudurg districts and therefore, was not applicable in the present work which was in Raigad district. The learned arbitrator also rejected the claim for escalation at the rate of Rs.85.60 per tonne on the ground that there was no evidence on record about escalation of 9% per annum as claimed by the respondent.

127. The learned arbitrator however, has allowed the claim of Rs.64,38,716.84 as against the claim of the respondent made in the second amendment in the sum of Rs.72,72,207.30 for the consideration of bund wall above ground level. The learned arbitrator allowed the said claim for 34,800 cubic meter at the rate of Rs.145.- per cubic meter amounting to Rs.50,46,000/- and for the quantity of

11204.9 tonne at the rate of Rs.471.10 per tonne i.e. Rs.52,78,628.39 totaling to Rs.103,24,628.39. After deriving the said sum, the learned arbitrator deducted the amount paid by the petitioner of Rs.38,85,911.55 for the quantity of 26799 per cubic meter and at the rate of Rs.145/- per cubic meter.

128. Insofar as claim No.II is concerned, a perusal of the record indicates that the respondent had failed to prove the basis on which it had arrived at the quantity of 10281.96 cubic meter as additional quantify of rock bund over and above the estimated quantity mentioned in the tender. The respondent did not prove that they had completed the work of 39281 cubic meters which was claimed under claim No.II. The respondent had made original claim for consideration of bund wall only on the basis of the stones of 10 to 200 kg. It was not the case of the respondent in their original claim that they were entitled to payment of size of 1 to 1.5 tonne boulder as an extra item. A perusal of claim Nos.II and III clearly indicates that both the claims were overlapping. The respondent did not follow any mandatory procedure under clause 43 of the contract and failed to produce any material for any quantities of the alleged extra work. The respondent did not make any such claim in any of the running account bills. All joint measures recorded by the parties recorded 1 : 1 slope in terms of the contract.

129. The learned arbitrator overlooked the effect of the letter dated 18th May, 1996, which was addressed by the respondent to the petitioner and was forming part of the document. The respondent had confirmed under the said contract that they would provide specification of the stone material as per the provisions of the tender and had considered that the tender provided for payment to the work done between the initial bed level and final level of work done. The respondent had also in their letter of 20th May, 1996 which was also forming part of the contract,

confirmed that in case the petitioner was desirous to increase the quantity of reclamation, the respondent was prepared to execute the work under the same terms and conditions provided suitable time extension was granted for the same. The learned arbitrator totally overlooked and decided contrary to the said provision of the contract and provided the exorbitant rate in the impugned award. The award of additional and exorbitant rate is also contrary to clause 43 of the general conditions of contract and also contrary to clause 3 of the general specification which provides for scope of work.

130. The learned arbitrator also totally overlooked and decided contrary to clause 3 of the “Instructions to Tenderers” which provided that the tenderer was advised to acquaint himself with the job involved at the site, examine soil conditions, hydrological conditions and shall collect all information that may be necessary for preparing and submitting the Tender and entering into the contract. Clause 7 of the said instructions to tenderers provides that the tenderer has to examine carefully all instructions, general conditions of contract, specification, bill of quantities, scope of work, drawings etc., nature of the ground and substrata, quantity and nature of work etc. and shall be deemed to have been examined and obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect his tender. Failing to comply with the requirement of the tender document will be at the risks of the tenderers himself. Clause 11 provides that the tenderer shall quote realistic rates in respect of works to be executed by him. The rates should be firm and no increase or decrease in prices will be allowed except as mentioned in the General Conditions/Particular Applications. The award is thus contrary to the terms and conditions of the contract and deserves to be set aside on this ground also.

131. In any event the finding of the learned arbitrator that the petitioner had not produced any evidence to show that the bund could be constructed with material of 10 to 200 kg stones as specified in the bill of quantities is totally perverse and contrary to the terms of the contract. The respondent had confirmed that the respondent had studied the drawing and other related documents and also had considered the site conditions in the bid. The respondent themselves had submitted their claim on the basis of the material of 10 to 200 kg stones initially. The learned arbitrator has overlooked all these crucial facts and has rendered a perverse finding.

132. Insofar as the District Schedule rates considered by the learned arbitrator is concerned, the said District Schedule rates were not at all applicable to the contract awarded to the respondent. In any event the respondent could not have placed reliance on the said District Schedule rates for the first time in the arbitration proceedings. The rate awarded by the learned arbitrator is thus contrary to the mandatory procedure and under clause 43 of the general conditions of contract. The learned arbitrator has exceeded his jurisdiction by relying upon the District Schedule rates which were not forming part of the contract, nor was submitted to the petitioner by the respondent in compliance of clause 43 of the General Conditions of Contract at the relevant time. The impugned award is thus liable to be set aside on this ground also.

133. Insofar as claim No.III, i.e. “for the payment towards the price of heavy boulders of 1 to 1.5 tonne size used by them in the construction of the rock bund” is concerned, the respondent had claimed a sum of Rs.7,87,68,576/-, whereas the learned arbitrator has allowed the said claim of Rs.6,80,26,840/-. The learned

arbitrator held that the provision of clause 3 of the scope of work also became redundant because the use of 10 to 200 Kg stones made the contract totally unworkable. It is held that the respondent would be entitled to payment for using boulders of size 1 to 1.5 tonne in the lower portion of the top level of the marine clay bed as it would constitute an extra item under clause No.43 of General Conditions of Contract. The respondent had demanded the rate of Rs.545.95 per tonne in accordance with the rate analysis based on the District Schedule of rates from Ratnagiri Harbour Division, submitted by them by their second amendment to the statement of claim.

134. The learned arbitrator held that if the respondent was to continue use of stone of 10 to 200 kg size as per item no.2 of bill of quantity of contract, the work could never be completed nor would the respondent be paid for such unmeasurable work with the result that the respondent would continue to suffer huge financial losses because of unlimited continuous dumping of stones 10 to 200 kg. size.

135. The learned arbitrator held that in these circumstances, the respondent's representative had no right to offer user of 1 to 1.5 tonne boulders at no extra cost in the said project co-ordination meeting held on 22th November, 1996 stating that they would use 1 to 1.5 tonne boulders at no extra cost in place of 10 to 200 kg. stones as advised by the project co-ordination consultant. The learned arbitrator rejected the submission of the petitioner based on the agreement arrived at in the project co-ordination meeting on the ground that the contractor could not have been required to go on dumping small size stone of 10 to 200 kg indefinitely without achieving any progress on the work, because such stones were getting washed away into the near by sea and the respondent would not get reimbursement of the same since the payment could be made only for the measurable work

produced.

136. The learned arbitrator held that mere statement being recorded in the minutes of the meeting could not substitute or alter the terms of the contract for being paid excess amount of cost involved. It is held that after such minutes of the project co-ordination meeting held on 22nd November, 1996 was prepared, there was no written agreement between the parties to the effect that the provisions of clauses 43 and 44 of the General Conditions of Contract stood deleted. The learned arbitrator also held that the offer made by the representative of the respondent in the said meeting was under compulsive circumstances and not voluntarily.

137. Insofar as the quantities claimed by the respondent is concerned, the learned arbitrator placed reliance on the joint records alleged to have been maintained at site in respect of the quantities of boulders brought to site. The respondent placed reliance on the rate analysis based on PWD Harbour Division of Ratnagiri. The petitioner had denied the total quantities of rock bund. The learned arbitrator referred to the second amendment dated 1st September, 2008 in which the respondent had modified their claim for usages of boulders of 1 to 1.5 tonne below ground level and had claimed a sum of Rs.7,87,68,576/- instead of Rs.5,42,94,400/- which was claimed in the earlier amended statement of claim.

138. The learned arbitrator placed reliance on the District Schedule of rates of Ratnagiri Harbour Division of PWD for 1993-1994 and worked out an average rate of 545.49 per tonne. The learned arbitrator held that the respondent was entitled to be paid for the quantity of bund wall work below the ground level by using 1 to 1.5 tonne boulders as an extra item. The learned arbitrator accordingly allowed the claim of Rs.6,80,26,840/- being the alleged quantity of 1,44,444 tonne at the rate

of Rs.471.10 per tonne.

139. Insofar as claim No.III is concerned, clause 3 of the General Specifications specifically prohibited such claim. The rates provided in the contract covered the quantity of the material, if any, sunk. In my view, claim No.III was overlapping with claim No.II. There was no provision made in the bill of quantity in respect of the claim made under clause 3. No measurement was carried out by the parties at all as contemplated under the terms of the contract. Admittedly, the respondent did not submit any rate analysis or raised any demand in respect of the said alleged extra work in accordance with the provisions of the contract. The said claim thus awarded by the learned arbitrator is contrary to the terms of the contract. By awarding the prohibited claim the learned arbitrator has exceeded his jurisdiction and the award is thus in conflict with the public policy.

140. In my view, the loss of material, if any, in water was not separately payable under the terms of the contract. Clause Nos.2, 3 and 9 of the General Specifications also provided for prohibition from making any payment for additional quantity by the petitioner to the respondent. The respondent had not demanded the rate in accordance with clauses 43, 44 and 45 of the contract. The learned arbitrator totally overlooked these provisions of the contract and has decided *de-hors* those provisions of contract.

141. The learned arbitrator has also ignored the decision arrived at in the minutes of the meeting held by the parties in which the respondent themselves had made a statement not to make any additional claim. The learned arbitrator has erroneously rejected the submission of the petitioner on the ground that the decision arrived at in the minutes of the meeting was not forming part of the contract and also on the

ground that the contractor could not have carried out the said work unconditionally at the rate provided in the bill of quantity.

142. Insofar as the rate considered by the learned arbitrator based on the District Schedule rates of Ratnagiri and Sindudurg is concerned, admittedly the same were not applicable to the present contract. The learned arbitrator has considered the enhanced rate by applying the rates of the District Schedule rates of Ratnagiri and Sindudurg contrary to the terms of the contract. The contractor was required to submit the rate analysis in accordance with clause 43 of the general conditions of contract and not across the bar before the learned arbitrator. The said District Schedule rates for Ratnagiri and Sindudurg could not have been applied to the work in question which was even otherwise on different site. The learned arbitrator, in my view, has exceeded his jurisdiction and applied the disputed document while considering the rate and also which was not applicable to the contract in hand at all.

143. Insofar as the judgment of the Supreme Court in the case of ***Rastriya Ispat Nigam Limited (supra)*** relied upon by Mr. Bharucha, learned senior counsel for the respondent is concerned, there is no dispute about the proposition in law laid down by the Supreme Court in the said judgment. In this case the petitioner does not seek any substitution of the interpretation of the learned arbitrator by another interpretation. In my view, the interpretation of the contract by the learned arbitrator is neither possible nor plausible interpretation but is an impossible interpretation. The findings rendered by the learned arbitrator are totally perverse and *de-hors* the term of the contract. The judgment relied upon by learned counsel for the respondent in the case of ***Rastriya Ispat Nigam Limited (supra)*** thus does not assist the respondent.

144. Insofar the judgment of the Supreme Court in the case of ***Steel Authority of India Limited (supra)***, relied upon by learned senior counsel for the respondent is concerned, in my view the said judgment does not assist the respondent. The Supreme Court has not decided the issue of limitation in the said judgment. However, in this case, the learned arbitrator has allowed the amendment of claim twice which was not only in respect of the additional quantities but also in respect of the additional amount. The respondent had changed the basis of the entire claim in the amendment applications.

145. In my view, there is no merit in the submission of learned senior counsel for the respondent that the findings rendered by the learned arbitrator are not perverse or that the same are based on the documents and evidence produced by both the parties.

146. Insofar the judgment of the Supreme Court in the case of ***Associate Builders vs. Delhi Development Authority (supra)*** relied upon by learned senior counsel for the respondent is concerned, in my view even the said judgment does not assist the respondent since the learned arbitrator has rendered perverse findings and the award rendered by the learned arbitrator is contrary to and *de-hors* the terms of the contract. The learned arbitrator has allowed the time barred claims. The procedure followed by the learned arbitrator in this matter is unknown to law and is in violation of the principles of natural justice. The award shows patent illegality and shocks judicial conscience of the Court.

147. I am therefore, of the view that this is a fit case in which the award rendered by the learned arbitrator requires interference under section 34 of the Arbitration & Conciliation Act, 1996 except to the limited extent that the learned arbitrator has

allowed the claim for Rs.8.00 lakhs and Rs.3.00 lakhs forming part of claim No.I.

148. Insofar as award of cost is concerned, in my view since claims except claim of Rs.11.00 lakhs is wrongly allowed by the learned arbitrator, award of cost deserves to be set aside on that ground.

149. Learned counsel for the petitioner did not pursue the submissions regarding rejection of counter claim, hence that part of the award is upheld.

150. I therefore, pass the following order :-

(a) Arbitration Petition is partly allowed. Award in respect of Rs.8.00 lakhs for removal of heaved portion, Rs.3.00 lakhs for refund of amount withheld for payment of royalty and interest awarded on two claims, and award rejecting counter claim is upheld. Rest of the award is set aside.

(b) There shall be no order as to costs.

(R.D. DHANUKA, J.)