

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

*Judgment reserved on February 5, 2015*  
*Judgment delivered on September 21, 2015*

+ **O.M.P.No. 161/2003**

UNION OF INDIA

..... Petitioner

Through: Mr.Darpan Wadhwa, Senior CGSC  
with Mr.Arn timer Kumar, Govt.  
Pleader, Ms.Roshini Namboodiry,  
Advocate

versus

SAB INDUSTRIES LTD.

..... Respondent

Through: Mr.Nidhesh Gupta, Sr. Advocate  
with Mr.Tarun Gupta, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE V.KAMESWAR RAO**  
**V.KAMESWAR RAO, J.**

1. The challenge in this petition by the Union of India under Sections 28, 31, 34 of the Arbitration & Conciliation Act is to the award dated December 31, 2002 passed by the learned Sole Arbitrator, whereby the learned Arbitrator has allowed certain claims of the respondent and rejected/not granted certain counterclaims of the petitioner, whereby he has awarded a sum of Rs.6,79,52,084.13 with interest @ 12% p.a with effect from September 1, 1997 to December 31, 2002 amounting to

Rs.4,00,49,812.99 i.e a total sum of Rs.10,80,01,897.12 along with interest @10% p.a with effect from April 1, 2003.

**The facts:**

2. The facts in brief are, the petitioner had floated a tender for construction of accommodation for Army Hospital (R&R) in the Delhi Cantonment Area. The bids were opened and the respondent was declared successful. The respondent thereafter accepted the terms of the contract on June 29, 1991. The total contract was for Rs.25,00,44,768.40/- less 12% debate amounting to Rs.22,00,39,396.19/-.

3. As per the contract, the construction work of the project was to begin on July 17, 1991 and was supposed to be completed within 27 months of commencement i.e. October 16, 1993. The respondent completed the construction work on March 25, 1997. The final bill dated March 29, 1997 was considered by the petitioner who found that no amount was due and in fact Rs.1,15,47,711.93/- was to be recovered from the respondent. The respondent initiated arbitration proceedings against the petitioner claiming Rs.46,91,71,288.69/- along with interest @ 24% raising in total 41 claims. The petitioner herein had also raised counterclaims of Rs.1,88,00,000/- along with 24% interest and the recovery of negative amount arrived in the final bill. The Arbitrator awarded Rs.10,80,01,897.12/- along with 10% future interest with effect

from April 01, 2003 to the respondent and Rs.7,50,000/- along with interest towards the counterclaim to the petitioner.

4. The challenge in the petition is to the award of 21 claims of the respondent i.e. claim Nos. 1, 2, 3, 7, 8, 9, 11, 12, 14, 18, 20, 21, 23, 29, 33, 34, 35, 36, 37, 40 & 41 and rejection/partially allowing counterclaims No. 1, 2 & 5. The following is the conclusion arrived at by the learned Arbitrator, while awarding the aforesaid claims/counter claims.

5. **Claim No.1:-**

Insofar as the claim No. 1 is concerned, the same relates to final bill dated March 29, 1997 as certified by the Assistant Garrison Engineer and forwarded to Garrison Engineer. The claim No. 1 consists of five sub-claims, apart from claim 1(B). They are as under:-

(i) **Schedule 'A' items:-**

The respondent had in the final bill, against Schedule 'A' items claimed an amount of Rs. 23,66,29,678.87/-. The petitioner had checked and verified the bill with regard to Schedule 'A' items to be Rs. 23,65,11,558.50/-. It was the case of the petitioner that the respondent had not pointed out its disagreement with the changes carried out in the final bill with regard to Schedule A items. The learned Arbitrator has held that the amount of Rs. 23,65,11,558.50/- as checked and verified by the petitioner for Schedule A items, is correct;

(ii) **Deviation Orders:-**

This is a claim wherein, the respondent has claimed certain amounts under various deviation orders issued by the respondent. The learned Arbitrator has awarded the amount against four deviation orders namely, DO No. 59(P); DO No. 30(P), DO No. 70(P), DO No. 6(P-1).

(iii) **Recovery for Schedule 'B' items:-**

It was the case of the respondent that while calculating the theoretical consumption, the petitioner has not considered the wastage for cement and free issue materials and has only considered an arbitrary percentage of other material. It was the case of the petitioner that recovery against Schedule 'B' material has been worked out correctly as per condition 10(B) of IAFW-2249 forming part of the CA. Wastage of steel has been considered and no wastage of cement has been allowed as wastage of 2.5% is already included in the constants applied for calculation of theoretical consumption. It was the case of the respondent that the petitioner has not considered the consumption of cement in preparatory works of office, cement, godowns, stores, curing water tanks, repairs of demolitions done by other agencies etc. In the case of reinforcement steel, actual wastage with respect to reinforcement steel issue and recorded by the board and allowed in RAR bills has not been taken by the petitioners. It was the case of the respondent wastage of reinforcement

steel etc as per CPWD contracts and all government contracts is allowed at 5%. It was also argued that wastage of free issue material have also to be accounted for. According to the respondent, the total schedule B material issued to it was for Rs. 5,94,66,320.03, which the petitioner confirmed as Rs. 5,94,55,861.25/- as mentioned in the final bill corrected by the petitioner.

6. The learned Arbitrator was of the view that the condition 10(B) of the contract agreement (IAFW-2249) stipulate the use of material in all preparatory works, of whatever description, as may be required and due allowance for actual consumption for reasonable wear and tear and/or waste. Further, it stipulated that on completion of works, if the contractor fails to return surplus material out of those supplied by the Govt., then, in addition to any other liability which the contractor would incur, the Engineer-in-Charge, may, by a written notice to the contractor, require him to pay within a fortnight of receipt of the notice for such unreturned and surplus material at double the prevailing market rate as decided by the Garrison Engineer. The learned Arbitrator noted that the petitioner had admitted that the consumption of cement has not been recorded by it for preparatory and temporary works and the wastage of reinforcement and structural steel have not been worked out with respect to the length issued vis-a-vis bar bending schedule and only 2.5% wastage was allowed by the

petitioner. It is also noted by the learned Arbitrator that no wastage as been allowed for free issue material. The learned Arbitrator also observed that the petitioner has already done the recovery for total material issued under Schedule B at issue rates in the final bill. For these reasons, he was of the view that the penal rate recovery is not justified which has been done by the petitioner in the final bill. He also noted that no notice was issued by the petitioner to the respondent as per the provisions of the contract agreement. He has also held that, recovery for material issued under Schedule B has been effected in the final bill. The reasoning given by the learned Arbitrator for not agreeing with the penal rate of recovery was that the petitioner has not proved any misuse on the part of the respondent. He allowed the market rate recovery of over issue of Schedule B material excluding cement taking 5% wastage on steel items being a normal practice including free issue materials issued free of cost. He allowed a recovery of Rs. 3,20,277/- in lieu of Rs. 39,11,873.56/-;

**(iv) Recovery due to site examination:-**

The respondent had submitted that the petitioner has shown a recovery of Rs. 5 lakhs towards site examination, which according to the respondent has no basis and was an afterthought. The case of the petitioner was that certain defects have been noticed by the petitioner during contract and maintenance period which have not been rectified by the claimant and

these defects have not been finalized so far and therefore, an amount of Rs. 5 lakhs has been withheld in the final bill. It was admitted by the petitioner that an amount of Rs. 56,717/- against finalized recoveries has been effected from various RARs. The learned Arbitrator was of the view that since the work was completed in March 1997, the recovery, if any has not finalized by the petitioner and withholding of amount for over five years is uncalled for cannot be done and concluded that the recovery of Rs. 5 lakhs from the final bill is wrong. He in para 126 has held as under:-

*“126. The gross value (work done including DOs) of the final bill as per UOI is Rs.27,08,33,062.44. In view of the findings and payments allowed by me on the above claim, the gross value of the final bill works out to Rs.27,24,80,770.90”.*

**(v) Escalation Bill:-**

The claim of the petitioner was for escalation against material. It was the case of the respondent that the escalation bill has been wrongly prepared by the petitioner. The petitioner justified the bill, by taking a stand, that reimbursement of prices has been corrected during Technical Check and Audit Check. It is noted, during the arbitration proceedings, the Arbitrator had called upon the respondent to comment on the discrepancies of the escalation bill prepared by the petitioner. According

to the petitioner (i) the escalation amount payable in the last four quarters ending March, 24, 1996, June 24, 1996, December 24, 1996 and March 24, 1997 has been shown as 'Zero'; (ii) the escalation in last four quarters, the escalation was the highest; (iii) the appendix G is showing the payment of star rates from 8<sup>th</sup> RAR to 105<sup>th</sup> RAR, is at variance with the stand of the petitioner, that escalation is 'Zero'. The objection of the petitioner before the learned Arbitrator was that the amendment No. 1 to the contract dated January 6, 1994 had prohibited any escalation on material after April 30, 1994 which includes the star rate items in the last four quarters ending March 24, 1996, June 24, 1996 and March 24, 1997. The escalation amount payable for these quarters has been shown by them as zero. According to the learned Arbitrator, in view of Appendix G, wherein, the petitioner has shown the payment of star rates from 8<sup>th</sup> RAR dated June 24, 1992 upto 105<sup>th</sup> RAR dated March 24, 1997, the learned Arbitrator held that the stand of the petitioner is contrary to the Appendix G. The learned Arbitrator also held that the work done against star rate items carried out in various quarters have been wrongly taken by the petitioner in the last four quarters only. According to the learned Arbitrator, in the last four quarters escalation on the work done was the highest which has been shown by the petitioner as zero. The learned Arbitrator was also of the view that during the original completion period

of work and thereafter, the indices which were being applied were for the month of June, 1994 for material only as contended by the respondent. According to the learned Arbitrator, now in the final bill, as prepared, these indices were sought to be reworked on the basis of month of March, 1994. According to the learned Arbitrator, there was no basis for doing so. The learned Arbitrator agreed to the submissions of the respondent that no freeze whatsoever could have been applied since the wordings of the amendment do not permit a freeze to be applied as done by the petitioner.

7. On the aspect of amendment No. 1, it was the case of the respondent that they were forced to sign the amendment under coercion. It was also contended by the respondent that the amendment No. 1 does not restrict the payment of escalation as per its wordings and its contents. The learned Arbitrator has also held that a perusal of the amendment makes it clear that it has been stated that no reimbursement due to the variation in prices of material is to be admissible except as permitted in the subsequent paras. The subsequent para starting with the word 'secondly' clearly shows that the reimbursement due to the variation in the prices for "any new material ordered now onwards and luxalon and door shutters shall remain admissible provided further that contractor places firm orders for procurement of luxalon and door shutters by April

13, 1994, failing which no reimbursement due to variation in prices for luxalon and door shutter shall be admissible beyond April 30, 1994". According to the learned Arbitrator, a plain reading of the aforesaid makes it clear, there is no bar on account of variation in prices for any new material which may be ordered henceforth.

8. The learned Arbitrator has also observed that the petitioner has freezed the indices and has considered the whole sale price index of 252.1 applicable for the quarter ended in March 24, 1994, which is nowhere mentioned in the amendment and as such, the stand of the petitioner cannot be sustained. The learned Arbitrator was of the view that it does appear that the respondent was made to sign the amendment No. 1 under the threat of petitioner that it would not grant extension of time. The respondent continued to object both prior to and subsequent to its signing the amendment. The learned Arbitrator held, from a reading of the amendment, same is in accordance with the contention put forth by the counsel for the respondent. He has held that a plain reading of its words does not permit any freeze to be applied and the escalation claimed in the final bill is based on the June 1994 indices as per the department's interpretation.

9. The learned Arbitrator allowed the claim of the respondent. He has also held that the petitioner has not incorporated the value of the star rate

items in the respective quarters in terms of Appendix G. It is also his finding that the petitioner has not interpreted the Amendment No. 1 correctly. He relied upon the contention of the respondent in its letter dated December 5, 2002, as correct. He worked out the total amount payable under claim No.1 as Rs. 38,74,466.85/-.

**Claim No. 1(B) Security Deposit along with interest @ 24% p.a.:-**

10. According to the respondent, as per condition 68 of IAFW-2249, the security deposit of Rs. 1.50 lakhs should have been released after a Defect Liability Period of one year. The respondent had claimed the refund of FDR No. 519401 of Rs. 1.50 lakhs with interest @ 24% p.a. for 42 months of the extended contract period and have claimed an amount of Rs. 3,39,136/-. The case of the petitioner was, the final bill could not be finalized for want of vouchers and also the respondent has not given a No-Claim Certificate. The petitioner, on interest, had stated that the FDR deposited by the respondent bears interest which the bank must have been accruing to their Account. The learned Arbitrator, on the basis of the finding that as per the contract provisions, the payment of the final bill was to be made within 6 months from the date of submission by the respondent, which in this case has been delayed by more than 4 years, has directed the release of FDR amount of Rs. 1.50 lakhs, but, denied the interest on the ground that the FDR interest has already been credited to

the Account holder.

**Claim No. 2-Cost due to time over run:-**

11. It was the case of the respondent that the date of start of work was March 17, 1991 and stipulated date of completion was October 16, 1993. The time period of completion of work was 27 months. The work was actually completed in March 25, 1997, with a total delay of 42 months. It was the case of the respondent that the delay was attributable to the petitioner because of late handing over of the sites, delay in approval of mix-design, delay in nomination of E/M agencies, delay in approval of Luxalon, delay in issues of drawings, delay in issue of Schedule B material. Learned Arbitrator has observed the filing of Ex.CC-2 to CC-716 by the respondent in support of its claim. The respondent had claimed an amount of Rs. 6,79,79,232/- which was later amended to Rs. 8,44,55,527.52/- before the earlier Arbitrator. The case of the petitioner was that the extension was granted under clause 11(A) and according to clause 11(C) of IAFW-2249, this claim cannot be granted. The respondent relied upon the decision of this Court in Arbitration Application No. 417/1998, wherein, in this Court, in its order dated March 28, 2001 had noted that the argument of the petitioner that clause 11(A) and 11(C) of IAFW-2249 applies, as per which, the decision is final and binding. According to the respondent the clauses pertain to extension of

time, whereas, the claim which has been made is on account of damages, non availability of sites, designs etc. The learned Arbitrator had observed that this Court had referred to the decision of ***M/s. Simplex Concrete Piles India Ltd. Vs. Engineer-in-Chief, Army Headquarters (Suit No. 2543/1995)***, where the same clauses have been interpreted by holding that the disputes raised are not covered under clauses 11(A) and 11(C) of the contract and the petitioner cannot raise the plea in the present proceedings as the aforesaid decisions are binding. The learned Arbitrator was of the view that in view of the decision of this Court, the contention of the petitioner that the respondent is estopped from raising its claim in view of its acceptance in the letter granting extension of time that the final effect shall be NIL is incorrect and cannot be sustained. He agreed with the stand of the respondent that clause 11(A), makes it absolutely clear that the reason for costs over run are different and are not covered under the reasons provided in clause 11(A). He was of the view that the various items falling under heads (i) to (vii) as set out in clause 11(A) makes it clear that the reasons mentioned therein pertain to force majeure, bad weather, fire etc. Insofar as sub-clause (vii) providing for any other reason, has to be read in consonance with the earlier sub-clauses (i) to (vi), which are in the nature of matters which are out of control of the petitioner. He was of the view that the various reasons for delay, clearly

establishes that the delay was on account of reasons which do not fall under clause 11(A). According to him, the petitioner should have acted more efficiently in order to avoid delay. On the plea of the petitioner that the respondent had not raised these claims during the currency of the work, the learned Arbitrator was of the view that correspondence has been placed by the respondent with regard to late handing over of site, drawings etc. He was also of the view that the letters of the respondent indicates that it had made it clear in its communication to the petitioner that it shall be seeking damages from the petitioner and also interest. It was also contended on behalf of the petitioner that this claim is covered in the payment which has been made on account of escalation. The reference has been made to clauses 24 & 25 of the Special Conditions of Contract. This stand was controverted by the respondent by stating that clauses 24 & 25 deal with material, labour and petrol oil and lubricant only. The claim which has been made is not related to the said items, therefore, clauses 24 & 25 have no applicability. It was also contended by the petitioner that the claim is an 'excepted matter'. This contention of the petitioner was also with regard to claim No. 17, 18 and 27. The learned Arbitrator held that such an objection was rejected by this Court, which order has become final and has been accepted by the petitioner. The learned Arbitrator has also observed that the petitioner has admitted the

reasons for extension as has been mentioned by the respondent in its letters inasmuch as the delay in completion of work was attributable to the petitioner. On acceptance of the extension of time, it was the case of the respondent that the letters regarding extension of time were on a printed performa and the respondent had no option but to sign the letters at the time of extension of time, and the same would not affect the claim as the respondent had written many letters indicating its intention to claim damages, interest on account of cost over run for the reasons mentioned therein. The learned Arbitrator ultimately was of the view that the petitioner was solely responsible for the delay in completion of works. He has also concluded that the respondent has conclusively established the expenses that were incurred by it on account of various overheads, administrative expenses, payments being made to various Provident Funds of the employees, charges on account of insurance, conveyance, labour welfare and a large number of various heads which have been set out in detail. The expenses incurred from month to month during the extended period have been shown and examined in detail. The figures of the respondent have been substantiated from the audited accounts and various other documents, which have been produced by the respondent. He has sustained the amount of Rs. 2,40,54,080/- which has been claimed by the respondent and as certified by the statutory auditors on account of

administrative and over heads during the extended period. The respondent has also shown an amount of Rs. 19,68,945/- on account of hire charges for plant and machinery were paid during the extended period as hiring charges. The learned Arbitrator had allowed an amount of Rs. 1 lakh per month on the loss suffered by the respondent because of the plant and machinery remained underutilized for a period of 42 months and amount of Rs. 1 lakh per month, which according to the learned Arbitrator is reasonable. He has also held that 32 months in total, delay has occurred on account of reasons not covered under clause 11(A) and 11(B), and as such, the respondent has suffered loss. He has awarded compensation to the respondent for actual loss suffered for 32 months period on account of site/office overheads, tools and plants, underutilization/depreciation etc. an amount of Rs. 2,30,00,000/-.

**Claim No. 3-Payment due to increase in DO limit upto 30%:-**

12. It was the case of the respondent that as per the conditions of the contract agreement and condition 7 of IAFW-2249, they were bound to execute the work upto a deviation limit of 10% over the contract sum of Rs. 22,00,39,396.19. But due to increase in the scope of work, they had to execute the work beyond the scope of 10% deviation limit. It was the case that they had asked revision of rates for the work beyond 10% deviation limit. They had informed the petitioner on August 1, 1995 as

regards exceeding of the deviation limit. They had submitted the revised rates on October 4, 1995 for the all the items of the work. They had relied upon certain documents in support of their claim. It was the case of the respondent as noted by the learned Arbitrator that the petitioner had been promising them for early settlement of these rates but ultimately did not settle anything, rather, accounted for the quantities beyond the deviation limit on the same contract rates. It was the case of the respondent that the only relief given by the petitioner was way of not deducting the rebate offered by them for the work done beyond 92<sup>nd</sup> RAR when the deviation limit had reached the 10% limit. But the relief of non application of rebate for the work done beyond deviation limit had been withdrawn by the petitioner in 105<sup>th</sup> RAR dated March 24, 1997. They have claimed final amended amount of Rs. 4,97,27,082.65 including escalation on the amended claim amount of Rs. 2,82,30,391.61. It was the case of the petitioner before the learned Arbitrator that in terms of clause 7 of IAFW-2249, it is clear that the claimant was not to make any deviation unless asked by written orders. They had not given any written orders for the execution of the quantities/items for which the claim has been made. According to the petitioner, this would not entitle the respondent the claim it had raised before the learned Arbitrator. The petitioner had stated that the respondent has not submitted the rates/analysis or any other evidence

at any time during the progress of the work. It had contested the entitlement of the respondent to escalation on this amount and the respondent has considered the WO, LO, FO as that of last date of receipt of tender and W1, L1 and F1 as that on the date of completion which is not admissible. The respondent in its rejoinder before the learned Arbitrator had submitted that the petitioner's contention that it was not supposed to make any deviations unless ordered in writing, is incorrect. The issuance of construction drawing is itself an instruction. The respondent referred to CD-25 to highlight that information was given to the petitioner that work is exceeding the deviation limit. It is also noted, the respondent had also relied upon the reply of the petitioner dated September 27, 1995 vide enclosure CD-27 to highlight that it was the stand of the petitioner that the additional work is closely connected to the original work and the petitioner had advised the respondent to do the work beyond the deviation limit and asked the respondent to intimate and submit their revised dates trade-wise. In fact, the respondent also relied upon a letter dated September 30, 1995 enclosed as CD-26 whereby the petitioner asked the respondent to submit revised rates in the given performa. It was the case of the respondent that vide an enclosure CD-17 dated October 4, 1995, it submitted the revised rates for items, trade wise as sought by the petitioner. It was also pointed out by the respondent that

increase in DO limits was duly approved by Chief Engineer and Command Chief Engineer and the respondent was partly compensated, temporarily, by way of non-reduction of rebate beyond the deviation limit. This payment had however later been recovered by the petitioner in the 105<sup>th</sup> RAR.

13. The petitioner raised an issue that the respondent has not given proper break up details, locations and vouchers etc. in support of its claim. It was the case of the respondent that the work being item rate, they had quoted their revised rates based on market rates at that point of time. According to the respondent, detailed analysis of rates and supporting vouchers are not required as while quoting for Schedule-A item, originally, also they have not supplied the same. It is for the petitioner to ascertain the fair market rates which they have failed to do so. On the basis of the stand taken by the parties, the learned Arbitrator was of the conclusion that as per clause 7 of IAFW, the deviation limit of 10% is provided in the contract and the respondent is entitled to the revision of the rates beyond a deviation limit of 10%. He relied upon documents filed by the respondent to conclude that the same proves the respondent's stand. He was of the view that the petitioner was aware of exceeding of deviation limits. He also concluded that a Board of Officers was constituted for assessing the market rates of items of contract agreement

and Board's proceedings were concluded by May 15, 1996, which was not done. The learned Arbitrator relied upon the document No. CAA-1 dated February 26, 1996 to the statement of claim that settlement of revision of rates submitted by the respondent vide letter dated October 4, 1995 was under finalization. The learned Arbitrator was also of the view that the respondent has been paid escalation on the contract rates for the work done beyond the deviation limit. It is also noted in the award that petitioner in terms of the letter dated January 31, 2002 pursuant to the directions of the Arbitrator has paid an amount of Rs.92,82,000/- as escalation beyond 10% of DO limit.. The amount which was claimed by the respondent against this claim was Rs. 4,84,99,130.32. The learned Arbitrator noted that Board of Officers was constituted for fixing the rates to be applied beyond deviation limit of 10%, however, same was not prepared by the Board of Officers. Despite promises made by the petitioner that the rates were under finalization, the petitioner did not finalize the rates. The learned Arbitrator held that the respondent is due for extra negotiated rates beyond 10% DO limits. He also concluded that the work done beyond 10% deviation limit at contract agreement rate is Rs. 356 lakhs appox. The learned Arbitrator assessed the extra amount payable beyond 10% DO limit (market increase w.e.f. June 1990 when the rates were quoted) which is 60% over contract rates (including rebate).

The learned Arbitrator noting that the petitioner has paid escalation which has to be deducted from total extra amount, granted an amount of Rs. 1,21,00,000/- to the respondent against this claim.

**Claim No. 7—Payment due to double recovery of rock:-**

14. It was the case of the respondent that as per clause 2.1.3 the excavated hard rock was the property of the contractor i.e. the respondent. The petitioner was to recover Rs. 70.5 per cubic meter towards cost of material from the RAR and final bill. The respondent protested the recovery effected by the petitioner. It was stated that in the RARs and final bill, recovery of double of the quantity paid for hard rock was made. The case of the petitioner was that mode of measurement for these two items are different and relied on clause 3.1.4. It was stated that mode of measurement of quantity payable is as per solid contents of hard rock or 50% of that measured in stack which has been followed in this work. The learned Arbitrator came to the conclusion that the quantity of hard rock excavated and recovered shall remain the same. The stack measurements have to be reduced to 50% on account for the voids or in case solid measurements are to be taken as per drawings/trench dimensions. The quantities of hard rock in both the cases shall remain the same. The learned Arbitrator granted an amount of Rs. 1,42,280/- to the respondent holding that it is the excess amount recovered by the

petitioner.

**Claim No. 8-Balance payment in excavation in hard rock and soft rock:-**

15. The respondent had made a claim for Rs. 1,04,41,618/- as they had to do the excavation in soft rock and hard rock of depth of 3 to 9 meters for sewerage lines and sewage sump, foundation work etc. in different blocks. As the blasting was not permitted, they had to go for chisel excavation. On account of rocky terrain, the excavation was not possible as per drawing dimensions. According to the respondent, the actual width of excavation was more than what has been considered for payment by the petitioner. The respondent had also stated that the contract is silent regarding width of hard rocks and provides for extra depth only. The respondent had claimed 75% of the quantities considered for payment by the petitioner as extra quantity payable to it.

16. The case of the petitioner was that the method of measurement to be adopted in this contract shall be as laid down in MES Standard Schedule of Rate 1988. According to the petitioner, only authorized width is payable irrespective of actual width excavated by the claimant. The extra width should have been considered in the unit rates quoted by them. It was also stated that the respondent was required to examine the site before tendering. The extra width stated by the respondent is totally

arbitrary and without any basis and rate was also high.

17. The learned Arbitrator was of the view that quantities of soft rock and hard rock should have been arrived by measurement of stack and reducing the quantities for voids as per clause 3.1.4 on serial page 12 of SSR 1988 Part II of MES. According to the learned Arbitrator, the petitioner had taken the drawing dimensions with authorized width, wherein, the actual quantities of excavation done in soft rock and hard rock do not get accounted for. He was of the view that from sound engineering practice, the quantity of 70 % extra and uniform rate of Rs. 300/m<sup>3</sup> claimed by the respondent, is on higher side. He was also of the view that the average rates of Rs. 56/m<sup>3</sup> and Rs. 145/M<sup>3</sup> was worked out by him with respect to item No. 9, 10 and 11 of Schedule A for soft disintegrated rock and item No. 22, 23, 24 & 25 for hard rock respectively. According to him, out of 19759 m<sup>3</sup>, the quantity of hard rock is 2018 m<sup>3</sup>, therefore, the quantity of soft rock so arrived is 17741 m<sup>3</sup>. Considering a reasonable extra quantity of 50% for extra width over and above the authorized width, the extra quantity of soft rock and hard rock, worked out to 8870 m<sup>3</sup> and 1009 m<sup>3</sup> respectively. He worked out extra amounts of Rs. 4,96,720/- and Rs. 1,46,305/- considering the average quoted rates for these items of soft rock and hard rock respectively. He was of the view, an amount of Rs. 6,43,025/- is payable.

He has also held, as per clause 2: 1: 3 of agreement, an amount of Rs. 71,135/- is to be recovered towards cost of hard rocks by the petitioner for the extra quantity. He had also found that the escalation on the above amounts is payable to the respondent on account of application of average contract rates of soft rocks and hard rocks items of Schedule A. He had calculated the escalation amount of Rs. 1,71,000/- on the above net payable amount of Rs. 5,71,890/- as against Rs.45,13,842/- claimed by the respondent and accordingly granted an amount of Rs. 7,42,890 to the respondent.

**Claim No. 9 – Payment due to circuit wiring:-**

18. The respondent had claimed an amount of Rs. 3,08,24,783.72 under this claim and relied upon items No. 482 and 568(K), which are items for point wiring and circuit wiring respectively. It was the respondent's case that the petitioner had not made the payment of circuit wiring and paid only for point wiring. It was the case of the respondent that the description of point wiring is amply explained from light point to switch point only. According to the respondent, item 482 is clear and does not tally with the description of items of SSR and therefore preamble to SSR is not applicable to this item. There are changes in the materials and activity of making good of chases being included in the description and circuit wiring have been excluded from the description of items. According to the

respondent, the description of item as per clause 6A of IAFW-2249 is prime and takes precedence over particular specifications, drawings and general specifications. The respondent worked out the details of circuit wiring from the drawings. It had claimed an amount of Rs. 1,75,00,000/- for the circuit wiring and Rs. 1,33,25,783.72 towards escalation on the above amount.

19. The stand of the petitioner was that the payment had been made to the respondent as per contract provision and SSR forms part of the contract agreement. Schedule A is to be read in conjunction with preamble to SSR. According to the petitioner, as per the preamble the rates for point wiring includes supplying and fixing/drawing cables for carrying out wiring of a circuit of any length. From the distribution board or iron clad switch upto ceiling rose or connector, socket outlet, lamp holder, switch or fan regulator including additional length from connector to lamp holder. The respondent refuted the stand of the petitioner and stated that Schedule A items are different from the SSR items. Therefore, the preamble is not applicable and referred to Condition 6A of IAFW-2249. It was argued by the petitioner that the quantities of cables cannot be checked from drawings and also on site as the work of wiring is concealed. The case of the respondent was the various drawings numbers mentioned have been issued by the petitioner itself for execution of work.

The learned Arbitrator was of the view that in terms of condition 6A of IAFW 2249 in case of discrepancies between Schedule A, the bills of quantities, the specifications and/or drawings the precedence shall be as under:

- A. *Description of Schedule A/Bill of quantities.*
- B. *Particular specifications.*
- C. *Drawings.*
- D. *General Specifications.*

20. The learned Arbitrator concluded that item 482 of Schedule A on page 142 (R) of the contract agreement does not have the same nomenclature as the SSR item. He on an interpretation of the definitions of 'point' and 'circuit', found that the stand of the respondent is correct. The learned Arbitrator had noted that the petitioner had agreed with the arithmetical calculations of the claim and had not denied the execution of the work by the respondent. According to him, the stand taken by the petitioner is contrary to the documents on record. He had also stated that the respondent had shown various drawing numbers issued by the petitioner itself pertaining to different rooms in different blocks in the building. The learned Arbitrator on the basis of the conclusion that the details have been submitted only with respect to 1,13,742.90 meters had allowed the claim on the basis of the contract rate of Rs. 140 per running meter which was calculated as Rs.1,59,24,006. The escalation payable on

the aforesaid amount, would also be in the same proportion as has been granted hereinabove. However, he found the rate of 140/rm is high. According to him, the rate based upon the contract item and worked out the total cost of circuit wiring of 1,13,743 RM, there will be no escalation payment since the rate assessed by him will be star rate and accordingly granted an amount of Rs. 1,18,30,000/- against this claim.

**Claim No. 11: Cost due to damage and demolitions done by E/M Agencies:-**

21. It was the case of the respondent that the petitioner had delayed the appointment of agencies related to Airconditioning, Fire Detection, External Electrification, MATV System and Acoustic Treatment. On account of delayed start of work by these agencies, they had dismantled and damaged the finished work of the respondent. The agencies were not equipped by adequate material and skilled manpower to make good the damages. Therefore, the respondent had to do the repairing and the replacement before handing over the building to the petitioner. The learned Arbitrator had observed that various documents have been filed by the respondent along with their claims showing that they had informed the petitioner of the damages and demolitions. They have given the details of the expenditure on different works done by them and claimed an amount of Rs.20 lacs and interest thereof.

22. On the other hand, it was the case of the petitioner that the respondent was required to work in close coordination with other agencies. They had relied upon various documents filed by it along with its reply. It was also stated by the petitioner that the respondent has not substantiated the damages suffered by it nor pointed out the location of damages.

23. The learned Arbitrator has noted that the respondent has pointed out to a document wherein the petitioner has admitted the damages caused by the E/M Agencies. The learned Arbitrator was of the view that there had been definite damages to the completed works. He referred to various letters brought on record by the respondent which clearly establishes that losses were being caused, more particularly the losses pertained to false-ceiling which had to be replaced. He found that an amount of Rs.12 lacs claimed on account of replacement of the damaged false-ceiling as valid, but on high side and assessed as Rs.10,75,000/-. He also noted an amount of Rs.12 lacs claimed on account of replacement of doors, windows, repair of flooring, brick work, plastering and painting continuously damaged by other agencies yet according to him instead of Rs.8 lacs a sum of Rs.3 lacs need to be awarded under the said head and in total allowed the claim of the respondent for an amount of Rs.13,75,000/-.

**Claim No. 12: Payment on account of deficient water supply and refund of water charges:-**

24. The respondent's case under this claim was that as per clause 22.1 the water was to be supplied for use in the works at the point shown in the site plan. A recovery of Rs.3.75 for every Rs.1000/- value of work was to be done by the petitioner for the same. It was their case that against the requirement of 80,000 gallons per day, the petitioner failed to supply them water. The respondent filed 22 documents in support of its claim. The respondent had demanded the refund of the amount of water charges recovered in the RAR. The respondent had claimed an amount of Rs.1,44,36,795/- under this claim along with interest, the total of which was Rs.2,03,54,073.91/-.

25. The case of the petitioner also relied on clause 22.1 of the contract agreement. According to the petitioner, the respondent was allowed to augment the departments water supply by boring wells at its own costs as per the said clause, which would have proved more economical to it. Therefore, the respondent was not entitled for the extra amount claimed by it. The respondent per contra refuted the aforesaid stand of the petitioner and stated that in terms of clause 22.1 it was the responsibility of the petitioner to supply water for the works. The respondent had also taken a stand that despite promises adequate quantity of water could not

be supplied. They had augmented the water supply through tankers.

26. The learned Arbitrator concluded that there was deficiency in supply of water. The respondent had to augment the water supply and bear additional expenditure for the same. He had referred to the letter of the respondent, by which it had brought to the notice of the petitioner that it had purchased huge quantity of water running into approximately 80,000 gallons per day, including the fact that the same was bought at a very huge cost. The learned Arbitrator concluded that since larger part of water was not supplied by the petitioner, it cannot recover money against the same. He held that the recovery of Rs.12,92,343/- which has been effected by the petitioner from the claimant's final bill is wrong since it includes escalation amount also. He was of the view that since some water has been supplied by the petitioner to the respondent, he allowed the petitioner to recover an amount of Rs.5,11,000/- and directed balance of Rs.7,81,343/- be refunded by it. He also observed that, as per contract, the primary responsibility for supply of water was upon the petitioner. The learned Arbitrator was also of the view that since the clause also provided that in the event of the petitioner failing to supply water the respondent would be required to augment the supply, the claim of the respondent for Rs.1,31,10,000/- on account of water which it had to purchase on its own costs was rejected. Suffice to state that the learned Arbitrator has awarded

an amount of Rs.7,81,343/- against this claim.

**Claim No. 14: Cost due to excessive water logging in basement constructed by other agency:-**

27. It was the case of the respondent that the work of the basement was in the scope of other agency. The scope of the work of the respondent was to do construction and finishing of the building above the basement. The respondent's case was that due to seepage and leakage in the basement constructed by the other agency, there used to be water logging in the basement. This resulted in spoiling/damaging the finished work. The construction activity also suffered on account of the water logging. The respondent had also stated that the petitioner had failed to provide a proper drainage which resulted into monsoon water coming into the basement and aggravating the problem of water logging of the basement. It had to do dewatering of the basement at all times during the monsoon. On account of the same they claimed an amount of Rs.57,37,200/- for the de-watering done by them and Rs.65,02,819.47/- towards interest on the above amount. A total of Rs.1,22,40,019.47/- has been claimed.

28. The petitioner denied the claim and had stated that the work of de-watering was done by the other agency-M/s Simplex Concrete Piles (I) Ltd., which was carrying out the repair work pertaining to leakage. The petitioner had argued, from the exhibit it is evident that there was

leakage/seepage in basement connecting portions G to X and A to Z which was constructed by the respondent. This stand of the petitioner was refuted by the respondent by relying on certain documents.

29. The learned Arbitrator had concluded that there was definitely a problem of water logging of the basement. The work of basement has been done by M/s Simplex Concrete Piles (I) Ltd., which entailed extra expenditure to the respondent on account of dewatering in order to complete its work. He referred to various letters, to conclude that the respondent has been informing the petitioner that labour and machinery is being deployed for dewatering. This has to be compensated by the petitioner. The learned Arbitrator was of the view that the claim as made by the respondent was on the higher side and had awarded an amount of Rs.3 lacs to the respondent.

**Claim No. 18: Balance payment due to escalation embargo imposed by CEDZ:-**

30. It was the case of the respondent that the start of work was March 17, 1991 and the stipulation date of completion was October 16, 1993. The time period for completion of work was 27 months. The work was actually completed on March 25, 1997. There was a total delay of 42 months. The respondent has given various reasons for delay, which included late handing over of the sites, delay in approval of mixed design,

delay in nomination of E/M agency, delay in approval of luxalon, delay in issue of drawings, delay in issue of Schedule B material.

31. The petitioner relied upon the amended agreement, which according to the petitioner had a clause of escalation embargo. It was also the case of the petitioner that in view of the embargo under the contract no escalation could be given.

32. The learned Arbitrator after examining the documents found that the petitioner had not incorporated the value of the star rate items in the respective quarters as submitted by it in the Appendix G and had not interpreted amendment No.1 correctly. The learned Arbitrator had applied the reasoning with relation to claim No.1 dealing with escalation under this claim also. The respondent had made a claim for Rs.77,25,119.07/- under this claim. According to the respondent the calculation is on the basis of indices as were applicable at the relevant time without applying any freeze. The learned Arbitrator was of the view that without application of freeze an amount of Rs.55,26,544.77/- is payable on this count. According to the learned Arbitrator, the detailed calculation have been done by taking the value of work done relevant indices and value of star rate items from the documents submitted by the petitioner and the final value of star rate items arrived under claim Nos.34, 35 and 36. He awarded an amount of Rs.56,26,544.77/- against this claim.

**Claim No.20: Payment of item No.238 of Schedule A and other items:-**

33. The case of the respondent was that the various items executed by them have not been considered by the petitioner for payment. An amount of Rs.28,88,306.80/- was claimed.

34. The stand of the petitioner was that the inclusion of item in BOQ does not necessarily imply that one party to the contract is under contractual obligation to pay to the other party to contract on the ground that those items are the part of the contract. It was the stand of the petitioner that the claim for item No.238 was not payable since it has not been recorded in the measurement book therefore, it is conclusive that the said item was not executed at all. The respondent relied upon document CU1 & CU2 filed along with the claim.

35. According to the learned Arbitrator, in those documents the respondent had refuted the contention of the petitioner. It was the case of the respondent that no floors or wall cladding can be done within 24 hours of flooring of sub-base or RCC slabs as per the specification. It was their case that the matter was discussed in the presence of Chief Engineer. The learned Arbitrator noted that the petitioner had agreed that work had been executed but denied the payment as per the instruction of the E-in-C Branch. He was of the view that 3 kg of cement slurry has been used over concrete/brick surfaces for flooring/dado but payment has not been made.

Rate of flooring/dado do not include cost of 3 kg cement slurry and this is payable under item 238 of Schedule A. He also found that item 238 of Schedule A qualifies for payment of escalation as per contract agreement. The respondent set out the quantity of 179695 sq. meters but quantities for flooring and dado works 156857/- sq. meters as checked by the Arbitrator from the final bill which is covered under this item 238 of Schedule A. The contract rate as stipulated in the contract was Rs.5 per sq. meter. Accordingly, an amount of Rs.7,84,285/- was made payable and escalation was also granted on the said amount. In total the learned Arbitrator granted an amount of Rs.10,37,217/- against this claim.

**Claim No. 21: Payment on account of defective pipes of fire fighting:-**

36. It was the case of the respondent that the CI pipes for fire fighting works were supplied by the petitioner under Schedule B of the contract agreement. The fire fighting lines were tested by them but due to poor quality these pipes could not withhold the required pressure when put to testing and had to replace the defective pipes including transportation from stores, excavation in rocks, laying of pipes, gaskets, nut and bolts, welding of joints, backfilling etc. The respondent had claimed for replacement of 54 numbers of pipes at Rs.5,000/- per pipe.

37. It was the case of the petitioner that the respondent after having signed the indent, USRs, gate passes have taken the pipes and transported

them to site including loading and unloading. These pipes must have got damaged after taking the possession of the pipes. It relied upon documents filed by it, numbered as R622 to R626 in support of its stand. Based on the condition No.46 of the general conditions of contract forming part of the contract agreement it was the respondent who is liable to rectify all defects noticed and are not entitled to extra payments.

38. On the other hand, the respondent in its rejoinder had stated that these pipes got burst while testing and read out the documents wherein they had informed the petitioner about the defective pipes having been issued.

39. The learned Arbitrator has accepted the stand of the respondent that the pipes were defective. He also noted that the respondent had brought to the notice of the petitioner that money would be charged for the replacement of the defective pipes. He referred to letter dated March 23, 1998 and also found that the rate of Rs.5000/- as high and assessed the same as Rs.700/- per pipe as a reasonable rate and granted an amount of Rs.40,600/- against this claim.

**Claim No.23: Refund of Rebate applied beyond the quoted sum of Rs.22 Crores:-**

40. The respondent has claimed a sum of Rs.39,85,001.12/- against this claim. It was the case of the respondent that it had offered a rebate of 12%

on the total contract sum of Rs.25,00,44,768/-. The learned Arbitrator referred to letters of the petitioner wherein it was clarified that the respondent's rebate had been considered offered on contract sum and not on quoted rates but the petitioner had deducted the rebate on the total value of work done and they are entitled for the refund of rebate recovered by the petitioner over and above their quoted sum. The respondent claimed escalation over this amount of work done which has been recovered as a rebate by the petitioner.

41. The petitioner in its reply has quoted clause 1(n) of general conditions of contract based on this the rebate shall be applicable on total costs of work arrived at after including increased quantities shown in Schedule A. Further they have stated that as per Note 3 and Note 6 on serial page 14(R) of contract agreement the quantities shown in column 5 are approximate and total amount of column 7 is not firm but will be treated as contract sum respectively.

42. The respondent in its rejoinder had reiterated that the contract sum is clearly mentioned on page 199(R) of the contract agreement and rebate has been offered on the quoted contract sum.

43. The learned Arbitrator was of the view that from the documents produced the petitioner in its letter dated October 23, 1990 has clarified that the rebate of 12% is on the quoted sum and not on quoted rates. It was

also his conclusion that on page 199(R) of the contract agreement, the total contract sum has been mentioned as stated above and rebate of 12% has been offered on this amount. The contract sum as per IAFW 2249 is the total cost of work arrived at after including increased quantities shown in Schedule A. He was of the view that the rebate of 12% is applicable on the quoted sum as clarified by the petitioner itself. According to him, the respondent had offered a total rebate of Rs.3,00,05,372.16/- on the contract sum but the petitioner recovered a total rebate of Rs.3,22,51,596.13/-, which included extra work beyond the contact sum. As such the petitioner is bound to return extra rebate recovered from the contractor. Therefore, he granted an amount of Rs.22,46,224/- against this claim.

**Claim No. 29: Extra payment due to late taking over of building causing thefts and more watch and ward:-**

44. A claim of Rs.42,32,000/- has been made by the respondent. It was the case of the respondent that they had requested the petitioner for taking over of the completed work from June, 1995 onwards. It was their case that due to non-completion of work of service contractors, the user was not in a position to take over the building, the respondent was forced to make good the thefts, keep extra watch and ward, maintain the building for handing over. This resulted in extra expenditure. They further stated

that the petitioner delayed in taking over the buildings because they wanted to hand over the same directly to the user in order to avoid the responsibility of the wages, watch and ward and maintenance of the building.

45. The case of the petitioner was, they could only take over the building when it is actually certified as completed. They relied upon clause 16,36,48 & 49 of general conditions of contract agreement.

46. The learned Arbitrator was of the view that there was delay on the part of the petitioner to take over the blocks which have been completed. He also noted that the respondent has also placed on record the letters which established various items that have been mentioned therein have been stolen. He referred to various letters. He ultimately taking into account the entire matter in totality awarded a sum of Rs.25,000/- to the respondent.

**Claim No. 33: Payment of pattern flooring instead of normal flooring in marble floors and odd sized marble:-**

47. It was the case of the claimant that in the drawings issued on April 28, 1993 it was shown that tiles to be of size 300mm X 375mm which was a non-standard size and not available in the market. It was also the stand of the claimant that it had informed the petitioner regarding the deviation and the extra cost arising out of the same. The agreement provided tiles to

be square in size from 200mm X 200mm to 400mm X 400mm. In pattern flooring as indicated in the drawings, the tiles had to be cut and this resulted in extra cost of tiles and labour due to the cutting of tiles and placing them in patterns which the claimant had claimed at Rs.250 per sq. meter. The total size of pattern flooring executed by the respondent as per final bill was 5595.832 sq. meter. The claimant had made a claim for Rs.13,99,000/- and escalation amount of Rs.10,65,301.23/-.

48. The stand of the petitioner before the learned Arbitrator was that Note 13 on serial page No.17(R) of Schedule A only a reasonable extension of time was to be considered under condition 11(A) and no extra payment is admissible due to change. The respondent disputed the relevance of note 13 at page 17(R) in this case.

49. It was the respondent's case that it had to buy a bigger size of tiles to cut them to suit the drawing dimensions and they justified the claim.

50. The learned Arbitrator agreeing with the stand of the respondent and noting that the amount sought @Rs.250/- per sq. meter is on the higher side, awarded an amount of Rs.160/- per sq. meter and quantified the pattern flooring which has been executed by the respondent as per the drawings as 3705.044 sq. meters and granted an amount of Rs.5,92,807/- to the claimant.

**Claim No. 34: Balance payment due to non adoption of labour rates as per Minimum Wages Act in formation of Star Rates**

**Claim No. 35: Balance Payment Due to Non Inclusion of T&P, Electricity Charges, Sundries Etc. in Star Rates**

**Claim No. 36: Balance Payment Due Arbitrary Deductions in Rates of Material Incorporated in Star Rates:-**

51. It was the case of the respondent that the petitioner while preparing the Star Rates did not consider the Minimum Wages prevalent at the time of execution of work which is mandatory requirement for payment of labour wages as per the Minimum Wages Act, which are decided by the Government and cost of T&P, electrical charges and sundries in the Star Rates which are part of the basic parameters in rate analysis of an item. It was also submitted that the petitioner has not paid any attention to the rates of materials as per vouchers given by it and also paid in various secured advance bills. According to the respondent, the petitioner has arbitrarily considered the material rates of year 2001 and reduced them with indices. Most of the rates have been prepared by the petitioner in the year 2001, although the work was completed on March 25, 1997. They claimed an amount of Rs.36,14,812/-, Rs.36,14,812/- and Rs.84,34,561/- for claim Nos.34, 35 and 36 respectively. Interest has been included in the said amount. The respondent sought to revise the amount to Rs.22,18,121.92/-, Rs.10,42,325.51/- and Rs.95,06,525.80/- respectively.

52. It was the stand of the petitioner that the claim Nos.34 to 36 have been claimed twice by the respondent and are the same as claim No.17 for the payment of escalation on star rates. It was also the stand that the star rates were prepared confirming to condition 62(G) of general conditions of contract agreement. It was also the stand that it is incorrect that fair rates of material and cost of T&P, electricity charges and sundries have not been included by them in preparation of star rates. The petitioner had taken a stand that star rates could not be finalised due to non-production of original vouchers and non- signing of the star rates, by the respondent.

53. The respondent had taken a stand in the rejoinder that claim Nos.17 and 34 are completely different. Further it was stated that the wages of the skilled workers are higher than the prescribed minimum wages due to shortage of this category of workers. However, the unskilled labours are paid minimum wages prescribed by the Government.

54. According to the learned Arbitrator, he has found discrepancies in the rates of the material, wages of labour, tools and plants in the star rates prepared by the petitioner. According to him, the petitioner had derived the rates of material in a particular year on the basis of back calculation with All India Wholesale Price Indices from the rates of material in the year 2001, which was not agreed to by the learned Arbitrator. According to him, the petitioner should have enquired the market rates when the

work was being executed. He had also found that there has been mistake in the wages of labour adopted by the petitioner. He agreed with the respondent that a component of tools and plants have to be considered in the analysis of an item. He referred to documents at pages 2587 to 2672 and at page 2691 filed by the claimant, which had the analysis of star rate items 1 to 68 claimed by the respondent and considered by the petitioner respectively. He had also found that there is a difference in the rate of material, labour, tools and plants. The respondent had relied upon the copies of the voucher. He would state that the rates of skilled labour have been reflected on the lower side. The learned Arbitrator after incorporating the correct rates of material, labour, component of tools and plants had assessed the rate of all star rate items and tabulated them under Annexure F and in terms of which he granted an amount of Rs.41,93,711.51/- to the respondent herein.

**Claim No. 37: Extra cost due to maintenance of sewerage line after handing over due to non-maintenance contractor appointed by Union of India:-**

55. The respondent claimed an amount of Rs.4 lacs under this claim. It was the case of the respondent that the petitioner failed to appoint an agency for maintenance work after completion and handing/taking over of the work. They relied upon certain documents. The respondents case was that the petitioner had forced them to attend the maintenance problem

projecting as defects. It was mainly leakage/seepage in CI Soil Pipes occurred due to blockage caused by flushing/draining hospital waste which included cotton bandages, napkins rubber globes, plastic wrappers, food waste, peeling of food and vegetables. This resulted in extra expenditure.

56. The case of the petitioner by relying upon document R-75 was that it was a case of removal of defects.

57. The learned Arbitrator was of the view that non-production of proof by the Union of India for appointment of maintenance agency in Defect Liability Period the work of maintenance was to be carried out by the respondent. He accordingly awarded an amount of Rs.12,000/- per month during period of defect liability as a reasonable amount for the work and accordingly granted an amount of Rs.1,44,000/- under the said.

**Claim No. 40: Compensation of the Block Payments from claim No.1 to claim No.39 as mentioned above:-**

58. It was the case of the respondent that it had suffered heavy financial losses on account of the amounts from claim Nos.1 to 39 in terms of interest which was rightly due to it. The respondent claimed an amount of interest @ 24% per annum compounded quarterly on the above claims from the date of completion i.e. March 25, 1997 to June 30, 2001 and claimed an amount of Rs.8,52,869,841.92/-.

59. The learned Arbitrator granted simple interest @ 12% on the awarded claims (except claim No.2) from October 01, 1997 till the date of award and against claim No.2 also awarded interest @ 12% but with effect from October 01, 1998 till the date of award.

**Claim No. 41: Future interest @ 24% per annum compounded quarterly on the above award amounts of claim No.1 to 40 upto the date of actual payment:-**

60. The learned Arbitrator has awarded interest @ 10% per annum on all the awarded claims including claim No.40 from April 01, 2003 onwards after allowing a reasonable time for the petitioner for making payment in terms of the award till the date of actual payment.

**Counterclaim No.1: Rectification of defects at contractor's risk and cost:-**

61. The case of the petitioner under this claim was that when the work of the respondent was inspected by the Garrison Engineer on various occasions, defects were found and notified to the respondent and relied on Exh.6 of their statement of claim. According to the petitioner, the defects were not rectified. The petitioner relied upon condition 46 of IAFW 2249. According to the petitioner, it had constituted the Board of Officers and the respondent was informed vide letter dated July 07, 1998. The respondent did not attend the proceedings.

62. The case of the respondent was, in terms of condition 46 the

liability was during the Defect Liability Period. It was also averred by the respondent that the claim for risk and cost could only be claimed, if the same had actually been carried out by the petitioner. It was also stated by the respondent, no defects pointed out had remain unattended. The Defect Liability Period expired on March 24, 1998. The respondent refuted the letter dated July 07, 1998 and relied upon the documents annexed along with claim, stated that no representative of the petitioner was ever present on the assigned date of July 11 1998 for ascertaining any pending defects. The date of letter under –Annexure K of Exh.GS8 stated to be a fabricated one.

63. The petitioner has also produced documents relating to risk and cost which was refuted by the respondent. According to the respondent, they have been attending to the defects which were pointed out.

64. The learned Arbitrator has examined the documents on record and the submissions made by both the parties. A glaring error which has been rightly pointed by the counsel appearing for the contractor that the measurement of various items which had to be tendered was admittedly to be carried out by the Board of Officers which was appointed by UOI for this purpose. The respondent was informed vide letter dated July 07, 1998 to assemble for carrying out of physical check of the rectification work which was pending. The counsel for contractor stated that although the

letter dated July 07, 1998 point out that the physical check is to be carried out on July 11, 1998, yet the proceedings of the Board of Officers clearly proved that the Board of Officers had already met on July 05, 1998. The case of the contractor was in fact there was no person on the site on July 11, 1998. The contention of the petitioner that the Board of Officers had also met “on subsequent days” as stated in its proceedings does not in any way assist the petitioner since the respondent has rightly pointed out that no such days or any details with regard to such days has been provided. When admittedly, the Board of Officers had already met on July 05, 1998 and had by itself made a list of various items, which were to be rectified, it is proved that no adequate notice was given to the Claimant to participate in the said proceedings. This non-issuance of a proper opportunity to contractor is completely proved in the present matter. This is so since the very claim of petitioner is based on the notings of the Board of Officers. Moreover, the claimant has also been able to prove that the tender amount was arbitrarily changed by petitioner from Rs.18 lacs to Rs.80 lacs and then again to Rs.49.9 lacs. On examination of the tender items, the learned Arbitrator found that a large number of items were not attributable to the contractor at all. Contractor demonstrated that various items which had been tendered were not in the list which was given to it for rectification at the time of the issuance of the Completion Certificate.

This fact also goes to establish that various items which have been tendered are items which were never pointed out to contractor for rectification at the time of completion. Moreover there is also substance in their contention that the work which is now being tendered in the year 2002 is on account of the various defects, damage, which may have been caused over the last several years. This fact was not denied by petitioner during the course of hearing. There is also valid basis that the petitioner has not been able to show details pertaining to any item which has been tendered and to demonstrate that the said item which has been tendered was also defective at the time of completion of the building and/or that the said defect was brought to the notice of the claimant company. Moreover, he found that the requirements of the clause 46 of the Contract Agreement had also not been complied with by the petitioner. The claimant has also shown that there are various tender items which were not part of its work at all.

65. The learned Arbitrator found that the petitioner has not been able to establish its claim fully. The petitioner should have gone for defects rectification during 1998 itself and not during 2001-2002. The petitioner partly able to establish that the defects that are sought to be tendered during 2001-2002 were arising out of the work which had been executed by the claimant or that the said defects were pending at the time of completion of

the work which had been executed by the respondent. He concluded that the respondent rectified the said defects during Defect Liability Period. The procedure required under Clause-46 has also not been fully complied with. Notice given to the respondent should have been given within the Defect Liability Period whereas the Board itself met after this period. Certain defects being got rectified now are part of normal maintenance (not recoverable from contractor) and part are not covered in Board of Officers. Details of Board of Officers are also not full proof and mention of all details. The proceedings of the Board of Officers goes to show that there was a manipulation of various works which were sought to be carried out by the petitioner. The learned Arbitrator assessed the loss which the contractor would have incurred to defect rectification (mentioned in Completion Certificate or defect likely in liability period) if done in 1998 itself and partly sustained the claim and awarded Rs.4,35,000/-.

**Counterclaim No.2: Devaluation of work due to bad workmanship and adoption of inferior quality of material by the contractor:-**

66. The petitioner claimed an amount of Rs.8 lacs under this claim. The case of the petitioner was that certain defects were observed by them and the rectification would have caused inconvenience to the user of the hospital. The rectification of these defects of improper slopes, splitting of

floors, grinding marks etc. involved demolition of the areas which would have led to closure of hospital activity. The petitioner had taken a stand that rectification/replacement of certain defects were considered to cost higher to the respondent. Therefore, the petitioner proposed to get it devalued and claimed the amount which the respondent might have saved on this account and brought out that a Board of Officers was ordered which have assessed such items of work to cost Rs.8 lacs.

67. It was the case of the respondent that they have rectified all the defects pointed to them and the question of devaluation for any alleged defects does not arise. The respondent had also taken a stand that no such information or notice had been given to them by the petitioner for the constitution of Board of Officers and their assembling for assessment for any such devaluation. It was also the case of the respondent that the entire work was executed under strict quality control and supervision of the petitioner and there was no departure from drawings and specifications. Further the users are using facilities comfortably.

68. The learned Arbitrator agreed with the stand of the respondent. According to him, the only notice for the assembling of the Board on July 11, 1998 was given by the petitioner vide letter dated July 07, 1998 and none of the petitioner's representative had come on the scheduled date as informed by the respondent.

69. It was the case of the respondent that the board proceedings were fabricated. The respondent also pointed out, the defects like edges chipped of, grinding marks on edges, crack tiles, crack slaps as pointed out were caused due to heavy traffic and other equipments in the hospital. They are simply maintenance defects and rectification of these defects does not called for closure of the hospital activities as stated by the petitioner and any defects arising out of the misuse/use of the hospital building cannot be considered to be rectified by the respondent. The learned Arbitrator finding that certain portion of work was slightly defective and Union of India made devaluation and partly sustained the claim by awarding an amount of Rs.3,15,000/-.

**Counterclaim No.5: Interest @ 24% past pendent lite and future on awarded amount:-**

70. The learned Arbitrator has not granted the interest during pre-reference and reference period but has awarded only future interest for counterclaim Nos.1 and 2 at the same rate as awarded to the respondent.

**Submissions:**

71. Mr. Darpan Wadhwa, learned counsel appearing for the petitioner would submit, that the scope of objections under Section 34 of the Act is well settled. It is his submission that the objections filed by the petitioner are squarely covered within the parameters of the law laid down by the

Supreme Court in the case reported as **2008 (13) SCC 80 DDA Vs. R.S. Sharma**; **2014 9 SCC 260 Oil & Natural Gas Corporation Ltd. vs. Western Geco International Ltd.** He would also state, that the Award based on no evidence is an error on the face of the record and liable to be set aside by placing reliance on the judgment of the Supreme Court reported as **2009 (10) SCC 259 State of Rajasthan and anr. Vs. Fero Concrete Construction Pvt. Ltd.** He would also state, that, it was obligatory on the part of the Arbitrator to record reasons in support of the Award, which according to him has not been given by the learned Arbitrator and would rely upon the following judgments:-

- (i) Som Datt Builders Ltd. vs. State of Kerala (2009 )10SCC 259;**
- (ii) Jajodia (Overseas) Pvt. Ltd. vs. Industrial Development Corporation of Orissa Ltd. (1993 )2SCC 106;**
- (iii) Ajay Construction Co. vs. Delhi Development Authority 64(1996)DLT 590;**
- (iv) M/s. Ansal Properties and Industries Ltd. V. Himachal Pradesh State Electricity Board 1997(3) ShimLC 176;**

72. Mr. Darpan Wadhwa would also submit, that the claims beyond what was sought in final bill i.e claim Nos.2 to 39 were not maintainable in view of clause 65 of the General Conditions of Contract. He would state, that after the submission of final bill on March 29, 1997, the respondent sought to raise additional claims i.e claim Nos. 2 to 39 for the first time vide notice dated September 29, 1998 as an afterthought.

According to him the respondent had waived or extinguished its right to additional claims after the submission of final bill as per Contract and additional claims beyond what has been sought in the final bill are expressly barred by the Contract in view of Clause 65 of GCC. He would rely upon the judgment of this Court reported as **2004 (3) Arb.Lr 225 Delhi Vaish Brothers vs. Union of India**. He would state, even if clause 65 was not pleaded before the learned Arbitrator, the learned Arbitrator being a creature of the Contract is bound to act within the four corners of the Contract as held by the Supreme Court in the case reported as **1999 (9) SCC 283 Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises; 2007 (4) SCC 697, FCI vs. Chandu Constructoin**. He would state, section 28 (3) of the Act casts a statutory duty upon the Arbitrator to observe all the terms of the Contract while adjudicating the disputes between the parties, irrespective of pleadings. The Arbitrator has no jurisdiction to grant any claim which is barred by the Contract itself and in cases of arbitration, question, whether a particular claim is barred or against an express term of the Contract is a question of law and can be raised at any stage. An Arbitral Award contrary to the terms of the Contract or statutory enactment is patently illegal and is against the public policy of India in terms of judgment of the Supreme Court reported as **2003 (5) SCC 705 ONGC Vs. Saw Pipes;**

**2011 (5) SCC 758 J.G Engineers Pvt. Ltd Vs Union of India.**

Alternatively, he would state, that as Section 34 (2) (b) begins with if “*the Court find that*” the Arbitral Award is in conflict with public policy, implying that a duty is cast on the Court to find out if the Award is in conflict with public policy i.e contrary to express terms of the Contract. Even in the absence of specific pleadings, Court while exercising power under Section 34 (2) of the Act can consider whether claim Nos.2 to 39 are barred by clause 65 of GCC. He would rely upon the judgment of the Supreme Court in the case reported as **2009 (17) SCC 796 Fiza Developers & Inter Trade (P) Ltd; AIR 2003 Kerala 61 Government of Kerala Vs. Som Datt Builders.** He would make the submission in view of huge claims of Rs.122 Crores approximately made by the respondent after submission of the final bill, which is precisely, the Contract seeks to stop and this ought to be applied in full force to prevent raising of barred claims. In the end, it is his submission that reading of clause 65 and 66 makes it amply clear that final bill submitted by the respondent is in respect of both undisputed as well as disputed items. Submission of final bill is a bar from raising claims not included in the final bill and for the purpose of clause 65, not signing No Claim Certificate is of no purpose.

73. On the other hand, Mr. Nidhesh Gupta, as a preliminary submission would state, that it is a settled law that in an arbitration proceedings if two

views are possible either on interpretation of contract or application of provisions thereof on the given set of facts and Arbitrator has taken one of the possible view, the Court would not interfere in exercise of jurisdiction under Section 34 of the Act. He would rely upon the following judgments:-

- (i) ***Associated Constructions v. Pawanhans helicopters ltd. (2008)16 SCC128;***
- (ii) ***G. Ramchandra Reddy v. Union of India (2009)6 SCC 414;***
- (iii) ***Numaligarh Refinery Ltd. V. Daelim Industrial Co. Ltd (2007)8 SCC 466;***
- (iv) ***Housing and Urban Development Corporation Ltd. V. Leela Hotels Ltd. FAO (OS) 59/2003***

74. He would also rely upon the judgment of the Bombay High Court in ***Municipal Corporation of Greater Bombay v. Press Tress Product India 2003 (2) ArbLR Bombay*** that specially in cases where the Arbitrator is a technical person, the interference should be minimal and it is not expected of such a person like Engineer to record detailed reasoning of its finding and no interference is warranted by the Courts if the basis of the finding is indicated in the Award. He also relied upon the judgment of the Supreme Court in ***2006 (11) SCC 181 Mcdermott International Inc vs. Burn Standard Co. Ltd*** to contend that if the Award is as per Contract between the parties and a detailed and speaking one having no perversity whatsoever, no interference is called for as there is no re-appreciation of the evidence. It is also the submission of Mr. Nidhesh Gupta, learned

Senior Counsel for the respondent that the argument of petitioner that clause 65 of the General Conditions of Contract (GCC) prohibits any claim after/beyond final bill is inter-alia, not sustainable. The arguments now being taken by the petitioner in its written submissions were never raised in its pleadings or argument before the learned Arbitrator or even in the pleadings before this Court. It is a trite law that one cannot argue beyond their pleadings and such argument cannot even be entertained. He has relied upon the following judgments in support of his contention:-

- (i) ***Siddu Venkappa Devadiga v. Smt. Rangu S. Devadiga (1977)3 SCC 532;***
- (ii) ***Samir Chandra Das v. Bibhas Chandra Das (2010)6 SCC 432;***
- (iii) ***State of Maharashtra v. Hindustan Construction Co. Ltd. (2010) 4 SCC 518;***
- (iv) ***Transmission Corp. of A.P. Ltd. V. P. Surya Bhagavan (2003)6 SCC 353;***
- (v) ***Vimal Chandra Grover v. Bank of India (2000)5SCC 122;***
- (vi) ***MSK projects India (JV) Ltd. V. State of Rajasthan (2011)10 SCC 573;***
- (vii) ***Union of India v. Dinesh Prasad (2012)12 SCC 63;***
- (viii) ***Ranbir Singh v. executive engineer (2011)15 SCC 453;***

75. He would state, if it had been raised on an earlier occasion, the respondent would have produced the correspondence between the parties showing that final bill was only qua undisputed items of bill and other claims were raised separately even before invoking arbitration vide letter dated September 29, 1998 and also with the notice invoking arbitration dated October 24, 1998 which is a question of fact and cannot be gone

into by this Court for the first time at the stage of Section 34. It is submitted that there may be other letters/correspondence of the parties on this issue. However, since the said argument has been raised for the first time before this Court during argument, the other letters/correspondence are not on record and could not be relied upon. It is for this reason that no new argument can be raised for the first time in a petition under Section 34 of the Act. The argument of petitioner that the respondent had to show whether it had submitted the final bill in a manner to get out of rigors of prohibitory language of Clause 65 of GCC itself indicates that it is a mixed question of law and fact, if not a pure disputed question of fact. Even in such a case, the Supreme Court has categorically held that such issue cannot be gone into if not raised before the forum below. [Reference: *Mohd. Shahabuddin v. State of Bihbar* (2010) 4 SCC 653; and *Vishwasrao Madhavrao Chiplunkar v. Kamlabai Vishwasrao Chiplunkar* (2004) 18 AIC 768 of Bombay High Court that even a question of law not pleaded cannot be argued.]

76. It is his submission that the petitioner was well aware of this factual position even before commencement of arbitration proceedings as the respondent has placed above referred letters dated September 29, 1998 and October 24, 1998 with its Arbitration Application No.417/1998 and it was because of this reason they have not raised any plea of clause 65 of

GCC before the Arbitrator and/or before this court. Thus, the argument of the petitioner that claims have been added as an afterthought during arbitration has no basis since the said claims have been raised even prior to invoking the arbitration. It is submitted that the respondent had submitted the bill of undisputed items in March 1997 which was finalized by petitioner only in April, 1998 and respondent has signed the final bill 'under protest' back in April 1998 itself as soon as it is received by respondent. The letter of respondent followed on September 29, 1998 raising all its disputed claims. It is further his submission that while submitting its bill in March 1997, the respondent had never presumed that illegal deductions and recoveries would be made from its earlier unpaid bill i.e 105<sup>th</sup> RAR. The respondent thus could not have raised claims relating to recoveries made in 105<sup>th</sup> RAR, payment of which was not released when it submitted the bill in March, 1997.

77. It is further submitted that respondent has submitted its bill only on undisputed amounts and also not signed the column-4 of the bill which pertains to Clause 65 of GCC to undertake that there is no further claim (i.e disputed amount) beyond the bill. The respondent has also thereafter received the final bill certified by Assistant Garrison Engineer (AGE) of petitioner of about Rs.93 Lakh under protest in April 1998. Even the "No-Claim Certificate" was signed 'under protest'. It is evident from the

correspondence between the parties that the respondent has consistently raised its claims throughout the currency of contract, after conclusion of contract, before invoking arbitration and during the arbitration. It is trite law that documents signed under compulsion do not bind a party. He has relied upon the following judgments in support of its case:-

- (i) ***Chairman and M.D., N.T.P.C. Ltd. V. Reshmi Constructions, Builders and Contractors (2004) 2SCC 663;***
- (ii) ***National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd. (2009) 1SCC 267;***
- (iii) ***Ambica Construction vs. Union of India (UOI) (2006) 13SCC 475;***
- (iv) ***Associated Constructions v. pawanhans helicopters ltd. (2008) 16 SCC 128;***
- (v) ***General Manager Northern Railways and Anr. vs. Sarvesh Chopra (2002) 4SCC 45***

78. It is further his submission that the petitioner had even continuously paid the respondent in respect of several of its claims in the RAR running bills before 105<sup>th</sup> RAR, but with dishonest intention has illegally deducted earlier payments made in 93<sup>rd</sup> – 104<sup>th</sup> RAR in the 105<sup>th</sup> RAR Bill. The 105<sup>th</sup> RAR bill was submitted a day prior to completion of work. It is his submission that a positive bill of about 93 lakh certified by their own AGE, the petitioner dishonestly modified it into a negative bill of about Rs.1.15 Crore during pendency of arbitration proceedings and that too after 5 years of submission of final bill. The said action of the petitioner is nothing but an afterthought to negate genuine claims of respondent.

79. It is further his submission that even 'submission, acceptance or payment of final bill' does not bar a contractor from raising other genuine claims subsequently, unless he has issued No Claim Certificate willingly which the respondent has signed 'under protest'; thus, even clause 65 of GCC shall have no application on claims of petitioner. He has relied upon following judgments in support of his contention:-

- (i) ***Durga Charan Rautray vs. State of Orissa and Anr. (2012 )12SCC 513;***
- (ii) ***R.L. Kalathia and Co. vs. State of Gujarat (2011 )2SCC 400;***
- (iii) ***Bharat Coking Coal Ltd. vs. Annapurna Construction (2003 )8SCC 154.***

#### **Claim No.1**

80. As stated above, the claim No. 1 has five parts. On schedule A items, wherein the respondent claimed an amount of Rs, 23,66,296,78.87, the same was checked and verified by the respondent to be 2,36,51,15,588.50/-. It was the case of the petitioner that the respondent has not pointed out any disagreement with the changes carried out in the schedule A of the final bill. The learned Arbitrator has accepted the amount as verified by the petitioner. Even the learned counsel for the petitioner has accepted the aforesaid position as noted by the Arbitrator.

81. On deviation orders, as noted above, the learned Arbitrator has awarded amount against four deviation orders in para 59, 67-68, 74 and

108. Insofar as the award against the deviation orders are concerned, the learned counsel for the petitioner would accept the same. Similarly, recovery for schedule B items and recovery due to site examination are concerned, the same were not pressed by learned counsel for the petitioner. I note, from the petition, as well as the written submission filed by the petitioner, the primary challenge to the claim No.1 was the award of Rs.38,74,466.85/- to the respondent on the ground (a) amendment to Contract carried out between the parties (b) escalation formula has been applied incorrectly and minus amount, wherever marked out has not been deducted. According to Mr. Wadhwa, the Arbitrator's calculation of escalation on material works out to Rs.3,60,26,192.05/-. As per petitioner's calculation, escalation on material works out to Rs.3,31,83,229.88/-. There is a difference of 28,42,962.17/- on account of Arbitrator incorrectly applying escalation formulae as provided for in clause 24 of the Special Conditions of Contract. According to him, the error is;

(i) in freezing W1 rates for the quarter 25.03.94 to 25.6.94. As per the formulae, W1 is the whole sale price index prevailing on the date of commencement of the period of reckoning i.e beginning of the quarter. In determining W1, Arbitrator has incorrectly applied June indices i.e 258.3 instead of March indices i.e 252.10;

(ii) Arbitrator instead of deducting the minus amount in S.No.3, 17, 18 and 19 has considered it as “*nil*”. The difference in the calculation on this account would be Rs.14,06,124.79/-.

82. On the other hand, Mr. Nidhesh Gupta, learned senior counsel appearing for the respondent, would submit, that the petitioner deliberately tried to intermingle the escalation payable before the amendment came into force (Claim-1) and that for period after amendment (Claim 18). He would state, that escalation under claim No.1 was for undisputed items payable in terms of the final bill before the amendment came into effect and in fact some of it had been paid but recovered later by the petitioner on the ground of application of incorrect index. He would state, even assuming, without admitting, that the amendment freezed all indices, the escalation under claim No.1 was not affected inasmuch as the freeze on escalation on material is to be applied on April 30, 1994, yet the amount of Award given under head of escalation in claim No.1 is correct. According to him, this is so because the relevant index for the period March 25, 1994 to June 24, 1994 was 258.30, whereas it was 252.10 only for December 25, 1993 to March 24, 1994. Therefore, the index of 258.30 is applied correctly because, even as per the case of the petitioner, the amendment bars payment of escalation only after April 30, 1994. He would refer to appendix H at page 27 of

letter dated June 10, 2002 of the petitioner, wherein, according to him, the petitioner itself had mentioned that for quarter beginning March 25, 1994 to June 24, 1994, the index was 258.30. Arbitrator has applied the index of 258.30 for calculating escalation, which is the only correct method. The learned Arbitrator has worked out as per annexure C of the Award Rs.3,60,26,192.05 for material, Rs.23,67,247.08/- for POL work, Rs.3,72,71,735.63 for labour. He states, that after deducting payments already made, the final payable amount under this head to Rs.7,56,65,174.76. After deducting the amount paid by the petitioner in the final bill, the Arbitrator concluded that only Rs.38,74,466.85/- is payable under claim No.1, which he would justify. He had also stated that for quarters mentioned at Sl. Nos. 3 and 17-19 of appendix H, given the escalation as 'zero', which is not correct as it is clearly seen from indices for those respective quarters that they were consistently on increase and higher than the base index, therefore, there cannot be any de-escalation as contended by the petitioner or nil escalation as awarded by the Arbitrator.

**Claim No.1B Security Deposit along with interest @ 24% p.a.:-**

83. Insofar as the award to claim 1B is concerned, which relates to security deposit, it is the submission of Mr. Darpan Wadhwa that as per clause 68 of the Contract, the security deposit can only be refunded when the respondent issues a No-Demand Certificate. Whereas, Mr. Nidhesh

Gupta, learned senior counsel would submit, that security deposit of respondent was forfeited by the petitioner on the ground that the final bill is of negative amount and security is adjusted against the same. He would state, that on the basis of the contentions made above, the final bill has to be positive as awarded by the learned Arbitrator, hence security deposit has to be refunded by the petitioner/Union of India.

**Claim No. 2-Costs due to time over run:-**

84. Insofar as the award of claim No.2 i.e costs due to time overrun, it is the submission of Mr. Darpan Wadhwa that such a claim was not made in the final bill dated March 29, 1997 and extension of time under clause 11(A) and 11(B) of the GCC and the extension letters jointly signed by the petitioner and the respondent categorically stating that the financial effect would be nil. He would also state that such a claim is barred by clause 11(C) of the GCC. He would rely upon the judgment of the Supreme Court reported as **2007 (2) SCC 453 Ramnath International Construction (P) Ltd Vs Union of India**, wherein the Supreme Court dealt with clauses 11(A), 11(B) and 11(C) on which reliance has been placed by the parties herein. According to him in the said judgment the Supreme Court has held that clause 11(A) and clause 11(C) are attracted even if delay is on the part of the employer. He states that the finding of the Learned Arbitration at para 154 is erroneous. He states the judgment

in ***Ramnath International*** (supra) has been followed by this Court, which also dealt with the effect of signing of the letters stating “Nil” financial liability by referring to the judgment reported as ***2008 ILR Supp. Delhi 128 Union of India Vs. Bahl Builders*** and ***Public Works Department Vs. Navayuga Engineering Co. Ltd and Anr.*** decided on March 31, 2014 in O.M.P No. 420 of 2012. He states, that the arbitrator in addition to overhead costs has awarded Rs.32,00,000/- as compensation towards under-utilization of plants and machinery due to its deployment at the site in the extended period. He would state, that it is a settled law that loss of earning capacity is an indirect or remote loss and cannot be granted in the light of Section 73 of the Indian Contract Act. Mr. Nidhesh Gupta, learned senior counsel for the respondent would submit, that it was never the case of Union of India either before the learned Arbitrator or before this Court, that the delay was not attributable to them. He states, that the escalation is only payable in respect of material, labour and POL (Power, Oil and Lubricants) in terms of the Special conditions of Contract. The claim of the respondent under the said head does not include escalation paid by Union of India but for the administrative overhead, hire charges for plant and machinery and for its own plant and machinery. This was the clear observation of learned Arbitrator also that clause 24-25 of SCC covers only Material, Labour and POL. He would state, that the

applicability of clause 11(A) and 11(C) of General Conditions of Contract has already been decided in favour of the respondents by this Court in Arbitration Application No. 417 of 1998 dated March 28, 2001 between the parties herein, categorically holding that the present case is not governed by clauses 11(A) read with 11(C) which deals with extension, whereas, present case is for damages for late providing of site, designs and non-utilization of machinery employed. The said order has now attained finality as it was never been challenged by the petitioner and as such operates as res-judicata between the parties. He would state, assuming there was an error in the said judgment, for the sake of argument, it is trite law that even an incorrect/ erroneous decision binds the parties to it once it had attained finality. He relied upon the following judgments in this regard:-

- (i) ***Mohanlal Goenka Benoy Kishna Mukherjee AIR 1953 SC 65;***
- (ii) ***Satyadhyan Ghsal v. Deorajin Debi AIR 1960 SC 941;***
- (iii) ***Swamy Atmananda v. Sri Ramakrishna Tapovanam (2005) 10 SCC 51;***
- (iv) ***State of Karnataka v. All India Manufacturers Organisation (2006) 4 SCC 683;***
- (v) ***Supreme Court Employee's Welfare Association v. Union of India (1989) 4 SCC 187;***
- (vi) ***B.L. Sreedhar V. K.M. Munireddy (2003) 2 SCC 355;***
- (vii) ***Jaswanti Singh Mathurasingh vs. Ahmedabad Municipal Corpn. 1992 Supp (1) SCC 5***

85. He would state that the above contentions were also raised before the learned Arbitrator who had clearly observed that the above judgment dated March 28, 2001 of this Court between the present parties, relied on an earlier judgment of this Court in ***Simplex Concrete Piles India Ltd Vs. Engineer-In-Chief, Army Headquarters*** and applicability of that judgment was admitted by the petitioner by submitting that it is binding on them and as such, the claim of the petitioner that the respondent herein is bound by its acceptance of extension letters issued on condition that financial affect shall be nil cannot be sustained. He would also state, that the faults of the petitioner are not covered under clause 11(B), was never pleaded by the petitioner. He stated, that in terms of appendix A of the letter dated June 10, 2002 submitted by the petitioner before the Arbitrator contains the reason for various extensions and the Arbitrator has perused all the reasons given by the petitioner itself to arrive at such a conclusion that period of 32 months is not covered under any of pre-conditions for invoking 11(A) and 11(C) of Contract. In some cases, the respondent has finished its work within time and on instructions of proposed users of the respective blocks, the petitioner has directed the respondent to bring down the whole construction and re-construct it as per the wish of the proposed user and had issued fresh instructions and drawings even in the extended period while in other cases, despite several requests of the respondent, the

petitioner failed to appoint E/M Agencies within the Contract period to allow the respondent to complete its work in time. For this conduct of the petitioner, the respondent cannot be penalised. He would also, on the basis of an appendix B and appendix C of letter dated June 10, 2002 of the petitioner, contend that along with tender, only 154 drawings were issued and approximately 1100 drawings were issued thereafter. That apart, till the original period of Contract, only 177 instructions were issued and 162 decisions/instructions were issued thereafter for fresh and extra work, most of the time, on the instructions of the users after completion of the original work. Insofar as the submission made on behalf of the petitioner that the rates of plants, tools and machinery by the respondent for completing the work is not payable is concerned, it is his submission that the expenses for such items are calculated limited for the contract period in an item rate Contract. However, the charges/expenses for these items for any extended period cannot be presumed and calculated in advance while quoting rates even for an item rate Contract. Therefore, damages suffered by the respondent in respect of extra hiring charges of machinery, tools and plants are liable to be awarded if the delay is attributable to the employer i.e the petitioner herein. He would state, that the extension letters were on fixed printed format, which the respondent was forced to sign. According to him, it is a settled law, merely signing on a dotted line

under compulsion does not bind the party. He would rely upon the following judgments in this regard:-

- (i) ***Chairman & MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663;***
- (ii) ***National Insurance Co. Ltd. v Boghara Polyfab (2009) SCC 267;***
- (iii) ***Ambica Construction v. Union of India (2006) 13 SCC 475;***
- (iv) ***Associated Constructoin v. Pawanhans Helicopters Ltd. (2008) 16 SCC 128***

86. It is also his submission, that the respondent has been continuously writing letters to the petitioner intimating them that they shall be claiming damages on all heads of cost overrun and the petitioner, has, in spite of such letters, allowed the respondent to carry on the work, therefore the petitioner could not have turned around and say that they are not liable to pay anything for cost overrun suffered by the respondent. Non denial of claims of respondent is deemed acceptance of the same in view of (i) the respondents' letters asserting claim for cost overrun during currency of work (ii) in view of the judgment of the Supreme Court in the case reported as ***2002 (4) SCC 45 General Manager Northern Railway Vs. Sarvesh Chopra, 2008 (16) SCC 128 Associates Construction vs. Pawanhans Helicopters Ltd.*** He would justify the total sum of Rs.2,30,00,000/- awarded by the learned Arbitrator. He would submit, the reliance placed by the petitioner on ***Ramnath International*** case (supra) is misplaced in view of the admitted binding nature of the judgment of

this Court between the parties regarding clauses 11(A) and 11(C). The above case is distinguishable in facts as the delay in the above case was contributory by both the parties, whereas, in the present case, the delay is attributable to the petitioner and not covered under clause 11(A). He would also state, that in a subsequent judgment in the case of ***Asia Tech Ltd.*** (supra) the Supreme Court has rendered interpretation of clauses 7, 11(C) and 62(G) of IAFW 2249 which is the same as the present case, wherein the Supreme Court referred to the various letters from the contractor to the Union of India regarding reasons of delay and all of which showed that the delay was solely caused by the Union of India which is identical to the facts of the present case and with a clear finding of the learned Arbitrator to that effect. He would also submit, that, in the case in hand, there was an assurance by the petitioner, that the rates would be revived and for that reason, the work was not stopped by the respondent. In any case, it is his submission, that clause 11 only prohibits the department from entertaining the claim but it did not prohibit the Arbitrator from entertaining it. He, in the last, states, if the Arbitrator had favoured one of the interpretation to clause 11(A) and 11(C) of the Contract, it is a settled law that where two views are possible and Arbitrator has taken one view, the Court shall not interfere.

**Claim No.3 Payment due to increase in DO limit upto 30%:-**

87. With regard to claim No.3, it is the submission of Mr. Darpan Wadhwa, that under this claim the respondent had claimed market rate in respect of schedule A items for work done beyond 10% deviation limit. He states, that such a claim was not submitted in the final bill dated March 29, 1997. The respondent has been paid as per condition 62 for deviation beyond 10%. Clauses 62(E) and 62(G) provides for valuation of deviation. In absence of any specific agreement to the contrary, respondent is not entitled to revision of "Schedule A" rates. He would further states, no evidence was led in support of market rate. Learned Arbitrator in para 172 of the Award notes that no analysis of market rates and supporting vouchers have been supplied by the respondent. According to him, the award is perverse and liable to be set aside. That apart, the Arbitrator could not have awarded a hypothetical amount of blanket rise of 60% over the Contract rate in respect of all schedule A items. Mr. Nidhesh Gupta, learned senior counsel would submit, that the only objection of the petitioner is, that the calculation of the amount awarded was arbitrary and having no reason. Before the learned Arbitrator, the petitioner had argued, no written instructions have been submitted for deviation and therefore, no amount was payable. He states,

that the instructions were submitted by the petitioner in the form of modified construction drawings from time to time which amounted to instructions under clause 6-A of General Conditions of Contract and that excess work was admittedly carried out by the respondent. Since the respondent was obliged under the contract only to fulfil upto 10% of the deviation as per condition 7 of IAFW 2249, any work beyond that was chargeable as per revised rates. He states, that the respondent, in fact had written a letter dated August 1, 1995 intimating the petitioner that the permissible DO limit has reached and it will not carry on further work. The petitioner replied requesting the respondent to carry out excess work stating it to be closely connected with main work vide letters dated September 21, 1995 and September 27, 1995. He states, the petitioner had even asked the respondent to submit its revised rates vide its letter dated September 27, 1995 and September 30, 1995 for this work which the respondent submitted vide its letter dated October 4, 1995 and October 26, 1995. The petitioner had not objected to the revised rates submitted by the respondent and had allowed them to carry out the work. Therefore, they are deemed to have admitted the revised rates submitted by the respondent in respect of extra work beyond 10% permissible DO limit. According to him, the respondent was partly compensated by the petitioner in that respect by non-deduction of rebate beyond 10% DO limit

in subsequent RAR bills, but eventually with mala fide intention, the same has been recovered by the petitioner in 105<sup>th</sup> RAR. According to him, even a Board of Officers was constituted for finalizing rate of work beyond 10% DO limit and as such, the petitioner was well aware of excess work beyond DO limit but the Board never finalized it and eventually the Arbitrator had to adjudicate on the same. He refers to the observation of learned Arbitrator that the petitioner had instructed the respondent to carry out work without which, the facility could not function and stated that the rates have been paid without deducting rebate of 12% and escalation was paid without freezing indices. The petitioner has claimed the payment of amount of Rs.92,82,800/- as escalation paid beyond the 10% DO limit. He justifies the amount payable under the said claim, by stating that the learned Arbitrator had perused the work done from appendix H submitted by the petitioner itself and observed that in March 1996, the limit of executing 10% DO was reached which the respondent was obliged to perform under the Contract and till then the value of the work done was found to be Rs.24.11 Crore. Thereafter, the value of the work done till completion of work in March 1997 was found to be Rs.27.67 Crores and as such it was held that work done beyond 10% DO limit was approximately Rs.356 lakhs. He then adopted a formula of 10% inflation per year for six years on the said Rs.356 lakhs and

calculated the payable amount as  $356 \times 60 / 100 = 214$  lakhs and deducted therefrom an amount of 93 lakhs, already paid by the petitioner to arrive at a final figure of Rs. 1.21 Crore for this claim, which according to him is not unreasonable. He would also state, that the learned Arbitrator ought to have granted escalation for 6.5 years and not 6 years. He would state, that the whole price indices issued by Government of India was 77%, hence the inflation of 60% granted by the learned Arbitrator cannot be termed as arbitrary. According to him, rather the respondent is aggrieved by the Award of the learned Arbitrator.

**Claim No.7 Claim due to double recovery of rock:-**

88. Against claim No.7, which relates to claim due to double recovery of rock, against which an amount 1,42,280/- was awarded by the learned Arbitrator, it is the submission of Mr. Darpan Wadhwa that such a claim was not submitted in the final bill dated March 29, 1997. The Arbitrator has also ignored clause 4 of GCC, clause 3.1.4 of SCC and preamble on page 352 of SSR Part II.

89. On the other hand, Mr. Nidhesh Gupta, would state that the petitioner did not press its objection to the award during the arguments. He would also state, that the learned Arbitrator clearly held that as per clause 3.1.4 of the Contract Agreement, the mode of measurement for payment of quantity of hard rock excavated is by reducing 50% of stack

measurement for voids. He further held that modes of measurement cannot be different for that of recovery than that for payment and shall remain the same. Therefore, the award is justified.

**Claim No.8 Balance payment in excavation of hard rock and soft rock:-**

90. According to Mr. Darpan Wadhwa, the nature of claim was due to rocky terrain, excavation was not carried out as per drawings. Contractor seeking payment for 'actual width' instead of 'authorized width'. It is his submission that this claim was not part of the final bill dated March 29, 1997. He states, that in terms of clause 4 of GCC, the respondent is deemed to have satisfied himself "*as to the nature of site, local facilities of access and all matters affecting the execution and completion of works*". According to him, the clause provides that contractor would not be entitled to any extra charges consequent on misunderstanding or otherwise. He states, Arbitrator ignored clauses 3.2.1 and 3.2.3 of the SSR which provide that the contractor would be entitled for payment for 'authorized width' only and not 'actual width'. Arbitrator has erroneously relied on clause 3.1.4 of SCC which has no relevance to the present claim as it deals with the depth of excavation and not width. On the other hand, Mr. Nidhesh Gupta, states that the only contention raised by the petitioner in the present petition, is that the learned Arbitrator has awarded claim

No.8 ignoring preamble of SSR without mentioning the relevant provisions and it was also not raised before the learned Arbitrator. However, according to him, clause 3.2.3 of SSR is a general clause for authorized width for the purpose of excavation and the presence of the words “*unless otherwise provided for*” which means any specific clause/condition of Contract, GCC etc exist that would prevail. According to him, clause 3.1 of SSR is the specific clause for measurement of excavation and clause 3.1.4 thereof is a particular clause for excavation in hard rock and soft rock which was the claim in issue. He states, that the learned Arbitrator has given his reasoning in para 209 of the Award and based on clause 3.1.4 of SSR 1988 Part II of MES, by holding that in present case, clause 3.1.4 is applicable where hard and soft rock has been excavated and the petitioner has not made full payment for that quantity. He would also state, that while calculating the amount payable, the learned Arbitrator has taken the rates prescribed for hard rock and soft rock under schedule A to the Contract on which rates the petitioner had itself paid to the respondent under head of Claim No.7. Therefore, the amount of Rs.5,71,890/- on the basis of clause 3.1.4 of SSR is justified and the escalation granted as the same pertains to schedule A items of Rs.1,71,000/- totalling to 7,42,890/- is also justified. Mr. Darpan Wadhwa in his rejoinder would state, that the submission made by Mr.

Nidhesh Gupta is without any merit. According to him, clause 3.1.4 has no connection with the width of the excavation. Even the learned Arbitrator has not dealt with the argument. Such a submission of Mr. Gupta is contrary to the submission made before learned Arbitrator as noted in para 204 of the Award, where it was argued that the Contract is silent regarding width of hard rock and provides for extra depth only whereas, the claim of the respondent before the learned Arbitrator was for actual width of excavation done over authorized width. Dispute is not with respect to measurement of authorized width. He states, that the learned Arbitrator has not given any reasoning in this regard.

**Claim No.9– Payment due to circuit wiring:-**

91. In so far as claim No.9, with regard to payment of circuit wiring for which an amount of Rs.1,18,30,000/- was awarded, is concerned, it is the submission of Mr. Darpan Wadhwa, that under this claim, the respondent had claimed amount for wiring done from distribution board to switch board under item no. “568K” instead of item no. “482”. It is his submission that such a claim was not made in the final bill. The item 482 provides for point wiring. Point wiring is specifically defined in Section 19-Internal Work, SSR. As per the definition, rates for point wiring includes “*circuit of any length from the distribution board or iron clad*

*switch upto ceiling...*”, therefore, rightly included in item No.482. He states, that learned Arbitrator came to a wrong conclusion that description of point wiring in item No. 482 does not tally with the description of point wiring in SSR. Description of point wiring in item 482 nowhere mentions that it is from light point to switch point only. It reads “....*including necessary cutting, chases and making good for one light point or one fan point controlled by one switch...*”. He would state, that the respondent’s attempt is to read this part to confine item no. 482 to only light point to switch point. In any case the definition is inclusive and not exhaustive. Further, the Arbitrator completely ignored note 4 and note 9 of schedule A items, which expressly provide the description of schedule A items has to be read in conjunction with MES SSR. It also states, that in case of deficiency in the description of items in schedule A, it shall be supplemented by the description contained in SSR. According to him, the learned Arbitrator failed to appreciate that under the tender approximate requirement of 568k item was only of 500 meters. Arbitrator awarded payment under the head for 1,13,742.90 meters. If the intention was to pay under item 568k then the said figure would be exponentially high. He would state, if the quantity under item 568k had to increase from 500 meter to 1,13,742.90 meters, deviation order had to be issued under clause 7 of GCC. No such deviation order was issued. The claim was an

afterthought and it precisely what the barring in clause 65 of the Contract seeks to avoid as a matter of contractual policy. The claim made was of 3 Crores approximately, which is more than 12% of overall contract value itself for just point wiring/circuit wiring which is untenable.

92. On the other hand, Mr. Nidhesh Gupta states, that point wiring charges have been paid by the petitioner but circuit wiring charges from switch board to main distribution board were not paid. He states, that the case of the petitioner that point wiring includes circuit wiring as per preamble to SSR and further contention was that drawings and vouchers of the claimed length of circuit wiring was not produced. He would state, that in terms of description given in schedule A, clauses 482 and 568k reads as under and the preamble for point wiring also reads as under:-

**“482:** Point wiring with stranded copper conductor 2.5 sq. mm (Nominal area) PVC insulated unsheathed cable in and including concealed stove enamelled rigid steel conduit **for one light point or one fan point controlled by one switch** including 16 gauge copper continuous earth wire (switch measured separately) including necessary cutting chases and making good”.

**“568-K:** Wiring with 2-2.5 mm 2 stranded copper conductors PVC insulated with unsheathed cable laid in MS Conduit system (Surface/concealed)”

Preamble to SSR (General Specification) for point wiring

“(1) The rates for point wiring include

- (a) Supplying and fixing/drawing of cables for **carrying out wiring of a circuit of any length from the distribution board or iron clad switch up to ceiling rose or connector, socket, outlet, lamp holder, switch or fan regular**

**including additional length from connector to lamp holder** (in case of stiff pendants points and water tight bracket points) and back-plate to lamp holder (in case of plain bracket points).”

93. It is his submission, that the perusal of the above provisions indicate that the term circuit and distribution board are conspicuous by their absence from description to schedule A item No. 482 which is the description of point wiring agreed upon by the parties. Further it is provided, for one light/fan, point with one switch, cannot by stretch of imagination include circuit wiring. He states, that the learned Arbitrator has observed the discrepancy and has held that as per the condition 6A of GCC, in case of discrepancies in the description of an item, the description of the same under schedule A shall prevail. He relied upon clause 6A of GCC, which reads as under:-

***“6A. Discrepancies and Adjustment of Errors (Applicable generally to Measurement and Lump Sum Contracts)-***

*The several documents forming the contract are to be taken as mutually explanatory of one another, detailed drawings being followed in preference to small scale drawings and figured dimensions in preference to scale.*

*In the case of discrepancy between Schedule “A”, the Bills of Quantities, the Specifications and/or the Drawings, the following order of precedence shall be observed:-*

- (a) Description of Schedule “A” / Bills of Quantities.*
- (b) Particular Specification.*
- (c) Drawings.*
- (d) General Specification.*

94. It is his submission that learned Arbitrator has clearly observed that

under schedule A point wiring was specified as item 482 and another item of circuit wiring was separately specified as item 568k. As per the above description and as per the definitions of point and circuit given in IS 732 of 1989 and similar other government specifications, the learned Arbitrator observed that under schedule A of the Contract between the parties, point wiring and circuit wiring are separate items. Therefore, as per clause 6A of the GCC, the specification under schedule A will take precedence over any general specification under the SSR. It was also observed that if point wiring was to include everything then there was no occasion to provide another item 568k in schedule A. He also relied upon the observation of learned Arbitrator that if the petitioner had understood point wiring to include whole circuit wiring the rate quoted by respondent at Rs.103/- per point would have to be categorized as an item having freakishly low rate, which was not the case. He would state, that even as per the petitioner, in terms of their letter dated June 10, 2002 and appendix D to the said letter, the item 482 was not included in the list having freakishly low or freakishly high rate, thereby signifying that the petitioner had understood, from the very beginning that separate payments are to be made for circuit wiring. He also submit, that as soon as the wiring work first stated in 1992, the respondent wrote a letter dated January 10, 1992 that as per the contract condition, item 482 is of point

wiring and item 568k is of circuit wiring and respondent is going ahead with the work with this understanding. He states similar letter was written on October 28, 1993 before starting wiring work in the basement. On June 28, 1994, when the petitioner raised dispute for the first time, the respondent wrote letter dated June 28, 1994 clearly mentioning that wiring work has been done throughout on understanding that circuit wiring will be paid as per 568k and its increase in quantity has also been intimated to concerned Engineer. He highlights, that the respondent had taken the ground of clause 6A in the said letter. He would justify the total length of wire used in circuit based on the detailed drawings provided by the petitioner. He states, that the learned Arbitrator has only accepted the total length of the cable with respect to drawings which were supplied by the petitioner and not the additional drawings provided by the respondent before the Arbitrator. He also states, that the learned Arbitrator has not accepted the rate at Rs.140/- per meter but had granted at Rs.104/- per meter. Mr. Wadhwa, learned counsel for the petitioner, in rejoinder would submit, that there is no definition of circuit wiring, therefore clause 6A is not applicable. There is no concept of freakishly low items in the tender. He states, the Award on this claim need to be set aside.

**Claim No.11 Cost due to damage and demolitions done by E/M Agency:-**

95. Insofar as claim No.11 relating to cost due to damage and demolition done by E/M Agencies are concerned, Mr. Wadhwa would submit, that such a claim was not submitted in final bill dated March 29, 1997. According to him, the claim is contrary to plain reading of clause 18 and clause 16 of SCC. Clause 18 of GCC provides that outside agencies appointed for executing work mentioned in item No.618-“prime cost sum” like fire detection, external electrification, MATV system and Acoustic treatment etc act as a sub-contractor. The role of the employer is limited to nominating/selecting them. Thereafter, the contractor enters into a separate Contract with them and as per clause 5 GCC payment to them is also made directly by the contractor. Further under clause 18 of GCC, respondent is responsible for the work carrying out by the sub-contractor and is liable to make good the loss or damage caused on this account and condition 16 of SCC requires the contractor to work in close co-ordination with the outside agencies/sub-contractors for completing the works. He states, that the Award suffers from non application of mind nor any reason has been given by the learned Arbitrator.

96. On the other hand, Mr. Nidhesh Gupta would submit that the delayed employment of E/M agencies by the petitioner and extra cost

incurred by respondent because of same is not denied by Union of India. Only argument raised, was that since, clause 16 of SCC prescribes that respondent is required to work in close co-ordination with other agencies, respondent cannot claim for the damages suffered. He states, the new plea raised before this Court, by the petitioner without any pleadings that as per clause 18 of GCC, the petitioner is not liable for payment of any damage. The argument is of no consequence as clause 18 deals with sub-contractors appointed by the contractor, whereas, in the present case, the agencies for electrical/mechanical work such as air-conditioning, gas pipes etc have been appointed by the petitioner without any say of the respondent and each one of them were having independent Contract with the petitioner. According to him, the respondent had written several letters to the petitioner complaining damages being done by E/M agencies to its already constructed work and the fact that these agencies are not rectifying the damages caused by them. He states, even the petitioner had written to these agencies confirming this fact that damage is being caused by agencies appointed by the petitioner to already constructed work of respondent and requesting them to rectify the same which has never been done and ultimately the respondent had to rectify all the damages. He would refer to appendix A to letter dated June 10, 2002 submitted by the petitioner before learned Arbitrator wherein the petitioner admitted the

damages, caused by E/M agencies appointed by it to already constructed work of respondent and respondent had to rectify it, causing delay in completion of work of respondent. It was held, that this expenditure was incurred by the respondent only because of delayed appointment of such agencies by the petitioner. Eventually, the learned Arbitrator has granted an amount of Rs.10,75,000/- and Rs.3,00,000/- for damage to the false ceiling and damages to doors, floorings etc.

97. Mr. Darpan Wadhwa, would state, that there is no letter to suggest that the petitioner had admitted responsibility. The responsibility under the Contract to make good the loss or damage caused by the outside agencies was upon the respondent alone.

**Claim No.12 Payment on account of deficient water supply and refund of water charges:-**

98. Insofar as claim No.12 with regard to payment on account of deficient water supply and refund of water charges are concerned, the learned Arbitrator has awarded an amount of Rs.7,81,343/- here again the submission of Mr. Darpan Wadhwa was that it was not the part of the final bill dated March 29 1997. He states, that the claim and finding of learned Arbitrator is contrary to clause 31 of GCC and clause 22 of SCC. He states, that the learned Arbitrator has wrongly held in para 242 of the Award, that the primary responsibility for supply of the water was on the

petitioner. Mr. Nidhesh Gupta, on the other hand, would state, that in the light of clause 22.1 of the Contract, the primary responsibility of water supply under the Contract was on the petitioner. But on failure to do so, the Contractor will augment its own supply. The deficiency in water supply admitted by the petitioner in their letters dated August 16, 1994 and April 19, 1995. He states, the learned Arbitrator had only allowed the refund of excess water charged collected by the petitioner for water which it had not supplied and not for tankers bought by respondent. He states, that the learned Arbitrator had observed that petitioner has recovered an amount of Rs.12,92,343/- from respondent as water charges, whereas, it had actually supplied water only worth 5,11,000/- as such a refund of Rs.7,81,343/- collected in excess by the petitioner directed to be refunded.

**Claim No.14 Cost of damage due to excessive water logging in basement:-**

99. Insofar as claim No.14 is concerned, the learned Arbitrator has awarded an amount of Rs.3,00,000/- under this claim. Mr. Wadhwa would submit, that this was not submitted in the final bill dated March 29, 1997. If the water logging was due to excessive rain/monsoon, then the petitioner can't be liable for it. Under clause 36 and 48 of GCC, it is the sole responsibility of contractor to take all precautionary steps to ensure no damage or loss is caused to the works/building. Further, the contractor

is liable to make good the loss caused at its own cost. He states that the learned Arbitrator has failed to deal with clause 36 and 48 of GCC and the petitioner has never ordered or gave direction to respondent to carry out such purported work. There was no evidence to substantiate that (i) the water logging in the basement has affected the work of the respondent; (ii) work of water logging was actually carried out by respondent and (iii) actual cost incurred in carrying out such work. Mr. Nidhesh Gupta, on the other hand would submit, that the contention of the petitioner that water logging was because of respondent and dewatering was done by third party employed by the petitioner was rejected the learned Arbitrator in toto being contrary to evidence on record and finding that case is converse. He states, the plea of lack of evidence is also liable to be rejected on the ground that the learned Arbitrator has given a clear finding that letters of party on record show that labour and machinery was employed by respondent for long period of time for dewatering. However, against a claim of Rs.1.22 Crores, the learned Arbitrator has given a meagre amount of Rs.3,00,000/- for which the aggrieved person is the respondent herein.

**Claim 18 Balance payment due to escalation embargo imposed by CEDZ:-**

100. Mr. Darpan Wadhwa states, that the nature of claim of the

respondent under this head was escalation of material without the amendment dated January 6, 1994. He would state, that this claim was not part of the final bill dated March 29, 1997. Amendment dated Jan. 6, 1994 was signed by both the parties expressly prohibiting reimbursement due to variation in prices of material beyond April 30, 1994. The wholesale price index was agreed to be frozen as of April 30, 1994 prices. He states, that learned Arbitrator has erred in concluding that there is no bar whatsoever under the amendment and the respondent is entitled to reimbursement in respect of all material. The interpretation at para 134 of the Award in interpreting the amendment dated January 6, 1994 is implausible, perverse, unreasonable and illegal for the reasons (i) if the reimbursement due to variation in prices for all materials was permissible, even after the amendment then there is no need for the party to execute a separate amendment as the original tender already provided for escalation; (ii) it completely renders the first para of the amendment otiose and nugatory, this is against the principle construction of the terms of the Contract; (iii) Arbitrator completely overlooked the correspondence exchanged between the parties prior to and subsequent to the amendment which clearly evidence that both the parties understood the amendment to mean freezing of rates. He placed reliance on letters dated March 25, 1993, March 22, 1995 and May 15, 1996.

101. He also states, that the learned Arbitrator failed to appreciate that the second para of the amendment is limited only to door, shutter and luxalon that can be the only plausible interpretation. No reason has been given by the learned Arbitrator who simply quotes the amendment and concludes that there is no freezing of rates by saying the amendment is clear.

102. On the other hand, Mr. Nidhesh Gupta, learned counsel for the respondent, would state that plain language of the amendment shows, that there was no freeze on escalation on new materials ordered after the amendment. He relied upon amendment No.1 which reads as under:

*“Reimbursement due to variation in prices for any new materials ordered now onwards and luxalon and door shutter shall remain admissible provided further that contractor places firm orders for procurement of luxalon and door shutters by 10/01/1994 failing which, no reimbursement due to variation in prices of material for luxalon and door shutters shall be admissible beyond April 30, 1994.”*

103. He states, a plain reading of above clause gives only one meaning that reimbursement due to variation in prices for any new materials ordered now onwards shall remain admissible. According to him, the Supreme Court has time and again reiterated that while interpreting a Contract, its plain and simple meaning is to be taken into consideration to arrive at the intention of the parties and Courts cannot supplement or

supplant words to it. According to him, it has also been held that, howsoever, the Court might dislike the result it is the plain and simple meaning which is to be given effect to. He relied upon the following judgments:-

- (i) ***Central Bank of India Ltd. Amritsar v. Hartford Fire Insurance Co, Ltd. AIR 1965 SC 1288***
- (ii) ***Delhi Development Authority v. Jitender Pal Bhardwaj (2010) 1 SCC 146***
- (iii) ***Mysore State Road Transport Corporation, Bangalore v. S.K. Athani (1973) 2 SCC 540***
- (iv) ***H.M. Kamaluddin Ansari v. Union of India (1983) 4 SCC 417***

104. According to him, it is also a settled law that a possible interpretation given by an Arbitrator should not be interfered with by a Court while exercising jurisdiction under Section 34 of the Act. He states, that if amendment No.1 is interpreted in a manner as argued by the petitioner that if a material is not ordered by January 10, 1994, no escalation would be payable on the same, will result in absurd consequences and impossibility of performance. According to him, no order for materials can be placed by the contractor till the work order/decision is placed by the petitioner. Thus, it is the interpretation placed by the petitioner which is leading to absurd consequences. He relied on the appendix B and appendix C to letter dated June 10, 2002 from where it can be seen clearly that 154 drawings were issued by

petitioner with tender document whereas more than 1100 drawings were issued thereafter. The petitioner had issued only 177 decisions by the original stipulated date of completion and 162 decisions after the said date. Some of the deviation order even include dismantling and bringing down already completed/constructed portion and reconstructing the same as per demands made by the users. It is impossible for the respondent to order in advance the material for decisions communicated to the respondent after amendment. To say, that in terms of amendment No.1, all the materials be ordered by January 10, 1994 otherwise escalation will not be paid, is absurd. He states that doctrine of impossibility is a valid excuse to legal obligation. In this regard he relied on the following judgments:-

- (i) ***State of M.P. v. Narmada Bachao Andolan (2011) 7 SCC 639;***
- (ii) ***State of Rajasthan v. Shamsher Singh 1985 (supp.) SCC 416;***
- (iii) ***Standard Chartered Bank v. Directorate of Enforcement (2005) 4 SCC 530;***
- (iv) ***Industrial Finance Corpn. Of India Ltd v. Cannanore Spg. And Wvg. Mills Ltd. (2202) 5 SCC 54;***
- (v) ***Hira Tikkoo v. Union Territory, Chandigarh (2004) 6 SCC 765***
- (vi) ***Special Reference No.1 of 2002, in re (Gujarat Assembly Election matter), (2002) 8 SCC 237***

105. He states because of this reason, the amendment has permitted payment of escalation on 'any new material ordered now onwards' after stating that the variation of price on 'material' will not be admissible after

April 30, 1994. It has been clearly indicated that there will not be any freeze on escalation on new material even after April 30, 1994. Even otherwise, the amendment is not binding on the respondent as it has been signed under coercion, duress and undue influence and therefore, voidable at the option of respondent as there was no free consent. He relied upon following judgments in this regard:-

- (i) ***Chairman & MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors (2004) 2 SCC 663;***
- (ii) ***National Insurance Co. Ltd. v Boghara Polyfab (2009) SCC 267;***
- (iii) ***Ambica Construction v. Union of India (2006) 13 SCC 475;***
- (iv) ***Associated Constructoin v. Pawanhans Helicopters Ltd. (2008) 16 SCC 128;***

106. He takes support from the conclusion of the learned Arbitrator that amendment has been signed by the respondent under coercion and threat of non-grant of extension by the petitioner. The petitioner had written a letter dated November 25, 1993 to the respondent asking the latter to give an undertaking inter-alia stating that the respondent shall not be claiming any escalation in future and accordingly there shall be an amendment to the Contract and then only the final extension will be granted. The respondent had immediately responded to the said letter vide its reply dated November 29, 1993 stating that it will not give an undertaking. This clearly shows that the amendment dated January 6, 1994 has coincided with the grant of extension. Thus, the letter of the petitioner

itself shows the lack of free consent. No oral evidence is required in a case where the petitioner's own documents show the lack of free consent. It is his submission that even thereafter, the respondent had written several letters to the petitioner stating that it has signed the amendment under threat and coercion and therefore it is not applicable and binding on it and demanded payment of escalation exercising its option to avoid the amendment signed without free consent. He justified the calculation of payable escalation from appendix H of letter of the petitioner dated June 10, 2002. He has also stated, the Arbitrator has, for quarters mentioned at Sl. No. 3 & 17-19 of appendix H given the escalation as 'zero' which is not correct as it is clearly seen from indices for those respective quarters that they were consistently on increase and higher than the base index, therefore, there cannot be any de-escalation or nil escalation. He states, that the learned Arbitrator has also found that even in calculation of escalation in appendix H, the petitioner deliberately made another mischief and deducted payments of star rate items by showing all star rate items in only last four quarters when the indices were highest and respondent was entitled for maximum escalation. The learned Arbitrator also found that the petitioner, contrary to their calculation in appendix H of letter dated June 10, 2002, has mentioned in appendix G that payment of star rate items have also been made in several previous RAR bills

before last four quarters. Learned Arbitrator has found such mischief in calculation by the petitioner unacceptable and contrary to their own document, and as such allowed deduction star rate items only as they have actually been paid for in previous relevant quarters as per appendix G submitted by the petitioner itself. The learned Arbitrator has clarified that calculation is made by him on basis of value of work done provided by petitioner applying the index of 258.30 as per appendix H submitted by the petitioner and deducting the value of work done under star items taken from appendix G submitted by the petitioner. He thus, calculated the escalation permissible in claim no. 18 in annexure E to the award as 55,26,544.77/- which according to him is justified. Mr. Darpan Wadhwa, on the other hand, would submit that interpretation adopted by the Arbitrator is implausible and can be interfered with under Section 34 in view of the judgment of the Supreme Court in the case reported as **(2007) 13 SCC 236 Security Printing and Mining Corporation of India Ltd and anr. v. Gandhi International Corporation**. He would state, if the literal interpretation of second para as suggested by the respondent remains then the same would render the first para otiose and defeats the purpose of amendment. According to him, in case, the meaning of the term of the Contract is ambiguous, Court can look into the subsequent conduct of the parties to gather the true intention of the parties, in view of the judgment

of the Supreme Court reported as ***AIR 1975 SC 31 The Godhra Electricity Co. Ltd v. State of Gujarat and anr.*** In the present case, correspondences clearly reflect that respondent also understood the amendment to mean “freezing of rates”. The final bill submitted by the respondent as well as RAR bills were prepared after freezing the rates at April 1994 indices. The argument of coercion cuts through the respondent’s argument of literal interpretation of the amendment. These two arguments are contradictory. He would state that the respondent completely misunderstood the interpretation suggested by the petitioner. According to him, the petitioner never suggested that order for all materials need to be placed before January 10, 1994. According to him, the only plausible interpretation of the amendment would be to confine second para to door shutters and luxalon. He would also state, particulars of coercion were not pleaded. No oral evidence led. The respondent failed to substantiate the allegation of coercion as defined under Section 15 of the India Contract Act keeping in view of the ratio of the judgment of the SC reported as ***AIR (38) 1951 SC 280 Bishundeo Narain & Anr. v. Seogenui Rai & Ors.*** At the most, the respondent has argued that it was coerced to sign the amendment on threat of petitioner not granting extension under the Contract. According to him, in a commercial Contract, commercial Pressure put by one party on the other cannot be

categorized as “coercion”. Respondent always had the option to opt out. He further states, that without prejudice to the above, even on the basis of documentary evidence no case is made out and it is clear that allegation of coercion is an afterthought because of following reasons:-

(i) Amendment was executed on January 6, 1994. The first letter produced by the respondent alleging coercion after execution of amendment is dated December 11, 1995. No letter of protest sent immediately post execution of amendment.

(ii) In the letter dated March 22, 1995, the respondent had stated “*we request you to kindly lift the embargo of no escalation on materials beyond April 30, 1994*”. Therefore even the respondent, considered the amendment to be valid.

(iii) In the letter dated May 25, 1993, petitioner had requested the respondent to give an undertaking that respondent would claim no amount towards escalation in prices of materials, fuel and labour. However, eventually amendment was restricted to only materials. This clearly shows that the terms of the amendment were equally negotiated and that respondent was not arm twisted much less coerced to enter into the same. In any case, in the last it is his submission that the learned Arbitrator has given no reasons for arriving at the finding of coercion.

**Claim No.20 Payment of item no. 238 of Schedule A and other items:-**

107. According to Mr. Darpan Wadhwa, the claim relates to payment of 3kg cement slurry used for flooring not made as per rates mentioned in item no. 238 of Schedule A, was not part of the final bill dated March 29, 1997. The learned Arbitrator also failed to appreciate that as per section 13 of SSR, rates for marble flooring is inclusive of cement slurry used for joining and setting the tiles. Hence, claiming it again under item No.238 amounts to double payment. In any case, escalation could not have been granted as cement is procured from the Government at a fixed rate as per schedule B. Mr. Nidhesh Gupta, learned senior counsel for the respondent would submit that the objection against award to this claim was not pressed by the petitioner during arguments. He states, in their reply to claim, the petitioner had admitted that work pertaining to schedule A item no. 238 had actually been executed but payment has not been made on instructions of Engineer-in-chief. He refers to the conclusion of the learned Arbitrator that admittedly item 238 of schedule A has been used on site but not paid for as agreed by the petitioner and therefore, it has to be paid. He also states, that the learned Arbitrator has also held that since said item is of schedule A, it also qualifies for escalation and has awarded a sum of Rs.10,37,217/- which included the escalation.

**Claim No.21 Payment on account of defective CI Pipes for fire fighting system:-**

108. This claim relates to extra cost incurred by the respondent in replacing the defective pipes supplied by the petitioner under “schedule B item”. Mr. Darpan Wadhwa, would make the common submission, as was made with regard to other claims, that it was not part of the final bill dated March 29, 1997. According to him, the petitioner was to supply these pipes under Sl. No. 7 and 8 under “schedule B items”. Note “r” of schedule B provides that respondent is solely liable in case the pipes are damaged or lost while in his custody. Under clause 10(B) of GCC, the respondent was liable to bear the cost of transportation, loading, unloading, storing etc of schedule B items. Similarly, under clause 46 of GCC, the respondent was liable to cure, repair any defect till the expiry of the Defect Liability Period. If the pipes supplied by the petitioner were defective, the respondent would ask the petitioner to replace them. The fact that respondent got them repaired at its own cost shows the pipes were damaged during transportation. He states, no evidence whatsoever was placed to substantiate that (i) the pipes were defective when supplied by the petitioner; (ii) the pipes were not damaged while in custody of the contractor, including during transportation; (iii) replacement order/voucher in support of actual cost incurred in replacing the pipe. He

states, the award suffers from non-application of mind as the Arbitrator has not dealt with the submission of the parties nor the award is a reasoned one. On the other hand, Mr. Nidhesh Gupta learned senior counsel would submit, that supply of defective pipes and difference in issue and actual measurement established by respondent by documentary evidence including the reconciliation statement prepared by the petitioner admitting difference in issue and measured quantities of CI pipes. The contention of the petitioner that the pipes must have got damaged during transportation was found to be false on the above referred evidence by the Arbitrator. It was found that total 58 extra pipes have been issued and used. He referred to letters dated August 26, 1997 and March 23, 1998 of the petitioners. However, actual rate mentioned by respondent @ Rs.5000/- per pipe was not accepted by Arbitrator who awarded @ Rs.700/- per pipe, which was too low and it is the respondent who is aggrieved and not the petitioner. In rebuttal, Mr. Wadhwa would submit, that there was no admission on behalf of the petitioner and there is no document to suggest so. In the last, it is his submission that the learned Arbitrator has not dealt with the plea of the petitioner that it was damaged while in custody of respondent.

**Claim No.23 Refund of rebate over and above quoted sum:-**

109. This claim relates to refund of rebate applied beyond quoted sum.

Mr. Wadhwa would state that this is not part of the final bill dated March 29, 1997. He states, that the learned Arbitrator has failed to observe that the respondent had offered 12% rebate on the quoted rates to be calculated on the basis of final bill. Arbitrator completely overlooked the letter dated September 28, 1990 sent by the respondent forming part of the Contract agreement. In the said letter, the respondent had stated that rebate is only on the quoted rates. Mr. Nidhesh Gupta, on the other hand, would submit that the petitioner has not referred to any provision of the agreement which has been violated. It has been established by documentary evidence before the learned Arbitrator, that rebate was offered by the respondent only on quoted sum and not on quoted rate. The Arbitrator has categorically held that the petitioner itself clarified vide its letter dated October 23, 1990 that rebate of 12% is on the quoted sum and not on the quoted rates and that letter has become part of the agreement. Moreover, at page 199-R of the Contract, the total contract sum has been mentioned as Rs.25,00,44,768/- which is the sum on which rebate is applicable. Therefore, refund of excess rebate collected by the petitioner was ordered by the learned Arbitrator. He states, learned Arbitrator had calculated 12% of rebate on Contract sum of Rs.25,00,44,768/- comes to Rs.3,00,05,372.16/- but the petitioner had recovered an amount of Rs.3,22,51,596.13/-. Accordingly, the learned Arbitrator had refunded a

sum of Rs.22,46,224/- collected in excess by the petitioner.

**Claim No.29 Extra payment due to late taking over of building causing thefts and more watch and ward:-**

110. This claim relates to extra payment incurred as a result of damage, theft etc caused due to late handing over of the works. He states, that this claim was not part of the final bill dated March 29, 1997. Site was to be handed over only after it was certified to be completed. Completion Certificate was issued on March 31, 1997. The Arbitrator overlooked clause 36 and 48 of GCC under which, it is the respondent's liability to provide watchman necessary for the protection of the site. Further, the respondent was responsible for safekeeping of all the materials provided on the site and is liable to make good all damage/loss occasioned thereto at its own cost. No evidence whatsoever to substantiate the claim. The Arbitrator has relied upon inventory prepared in 1995 when the work was not even completed i.e during the execution of the Contract. On the other hand, Mr. Nidhesh Gupta learned senior counsel would submit, no ground raised by the petitioner for contesting the award under this claim except for saying that the award is erroneous and without any reason. He states, there was sufficient documentary evidence before the Arbitrator that possession of completed blocks were not timely taken by the petitioner, which were to be taken phase wise, causing extra expense to respondent

regarding theft, watch and guard. He states, that delay in issuance of Completion Certificate was because of the delay in completion of work by E/M Agencies employed by the petitioner and several thefts had occurred during that period. However, even after observing that several items were stolen and were to be replaced by the respondent, he had refused to actually consider the inventory of stolen items submitted by respondent and received by the petitioner and had awarded a paltry sum of Rs.25000/- for all expenses incurred in extra watch and ward and compensation for stolen items.

**Claim No. 33 Payment of Pattern Flooring instead of Normal Flooring in marble floors and odd sized marble:-**

111. The case of the respondent under this claim was that as per the drawings, the petitioner had sought tiles of 300 mm x 375 dimension. There being a purported deviation, the respondent was entitled to revised/extra rates. Mr. Darpan Wadhaw would submit that such a claim was not part of the final bill dated March 29, 1997. He states, that the conclusion of the learned Arbitrator that there is a deviation is contrary to express terms of the Contract. Inasmuch as;

(i) In the prescription of items in schedule A (item no. 243 to 247-floor tiles) only thickness of tiles mentioned, no mention of dimension or shape;

- (ii) Note 4 and 9 of the preamble to schedule A provides that description of items in the schedule must be read in conjunction with the particular specification;
- (iii) Clause 11.11.1 of particular specification provides that sizes of tiles shall not exceed 400 mm x 400 mm and not less than 200 mm x 200 mm as ordered. This obviously means that any tile within these dimensions can be ordered. The contractor cannot charge for cutting etc of the tiles ordered within these dimensions;
- (iv) There is no requirement of only square tiles being ordered by the petitioner.

112. It was also his submission, the learned Arbitrator has not given any reasons for arriving at the finding that there is a deviation. Without prejudice, he states there was no evidence for substantiating the rate. On the other hand, Mr. Nidhesh Gupta, learned counsel for the respondent would submit, that it was held by the learned Arbitrator that specification in the Agreement clause 11.11.1 of the Contract was of tiling of prescribed specification but the drawings provided by the petitioner were for pattern flooring and usage was of odd sized tiles not manufactured by any company. Therefore, the learned Arbitrator considered this as a deviation and awarded cost incurred for cutting of large sized marble tiles. He justifies the award inasmuch as the respondent in its final bill had

specified that 5595.832 sq. meter of pattern flooring has been done by it and claimed a rate of 250 per sq. meter amounting to Rs.13.99 Lakhs and then 10.65 Lakhs as escalation on the same as flooring is a schedule A item. However, the Arbitrator has held that as per drawings submitted with the final bill and accepted by the petitioner the pattern flooring was 3705.044 sq. meter and has awarded the rate at Rs.160 per sq. meter only without any escalation whatsoever. Therefore, the grant of only Rs.5,92,807/- against a claim of Rs.24,64,301/- is justified.

**Claim No. 34: Balance payment due to non adoption of labour rates as per Minimum Wages Act in formation of Star Rates**

**Claim No. 35: Balance Payment Due to Non Inclusion of T&P, Electricity Charges, Sundries Etc. in Star Rates**

**Claim No. 36: Balance Payment Due Arbitrary Deductions in Rates of Material Incorporated in Star Rates:-**

113. It is the submission of Mr. Darpan Wadhwa, that these claims were not part of the final bill dated March 29, 1997. The star rates were calculated by the petitioner as per clause 62(G) of GCC and being an excepted matter, the decision of CWE is final and binding. Arbitrator did not deal with the submission of the petitioner despite the fact that the same was raised before the learned Arbitrator by the petitioner in his statement of defence. He would also state, that the Arbitrator has not judicially determined the claim between the parties by weighing the

evidence on record and keeping in mind the contractual provisions. Rather, he acted as an expert himself, computing the star rate items. On the other hand, Mr. Nidhesh Gupta, would state, that the Arbitrator has found that there were discrepancies in labour wages in star rates prepared by the petitioner and though, the rates of unskilled labour have been found to be correctly adopted but rates of skilled labour were on lower side. He would also state, that the petitioner has taken the rate of a particular year 2001 and has reduced it by back calculation applying All India Whole Sale Price Index and not taking correctly the rates of the time when the work was done. The method of calculation was not accepted by the Arbitrator particularly when the actual market rates were available with the petitioner of relevant point of time during which the work was carried out. He relied upon the judgment of the Supreme Court in *Asian Tech (supra)*, wherein, the Supreme Court held that clause 62(G) read with clause 7 make it clear that the finality provided under clause 62(G) applies only to cases of deviation and not in a case when there is a material alteration and addition in the work done, which is the case here also and as such, the star rates finalized by the Arbitrator requires no interference. He also submit, that the learned Arbitrator has observed that both the parties considered same basis and components in analysis of items but there is a definite difference in rates of material, labour, tools and plants.

It has been held by the Arbitrator that vouchers and secured advance bills paid by none other than petitioner for same items was produced by the respondent for the relevant period. On the basis of the rates provided by the petitioner and the respondent for 68 star items covered under claims 34, 35 and 36, the learned Arbitrator has allowed increase only in respect of 33 star items and had not increased anything for 30 star items from the rate given by the petitioner. He would state, that insofar as three star items are concerned, the learned Arbitrator has decreased the rates granted by the petitioner without having jurisdiction to do so. He refers to annexure F to the award wherein the calculation has been made by the learned Arbitrator.

**Claim No. 37 Extra cost due to maintenance of sewerage line after handing over due to non-maintenance, contractor appointed by UOI:-**

114. The submission of Mr. Darpan Wadhwa, on this claim, was that this claim was not part of the final bill. Under clause 46 of GCC, contractor is solely liable to remedy any defect/damage caused during the Defect Liability Period of one year after handing over of the works. The employer i.e the petitioner is not bound under the Contract to appoint a maintenance agency. Arbitrator has erroneously shifted the burden of proof on the petitioner. The Award is perverse as there is no evidence at all to substantiate the claim. Hypothetical rates of Rs.12,000/- per month

had been awarded. No reasons have been given by the Arbitrator. On the other hand, Mr. Nidhesh Gupta would submit, that the responsibility of the respondent was limited to rectification of defects in construction within the contractual Defect Liability Period. Respondent, however, was forced to attempt regular maintenance activities in the name of defects such as maintenance of sewage lines and CI pipes, which the petitioner denied stating that it had not directed anything to be done beyond defects. He states, that the petitioner has failed to appoint maintenance agency in Defect Liability Period and maintenance work had to be attended by the respondent. Hence, Rs.12,000/- per month as maintenance charges awarded. He states, that the maintenance charges of Rs.12,000/- per month awarded by the Arbitrator is much less than what has been spent by the respondent on maintenance of sewerage lines, CI pipe and other miscellaneous items. Therefore, it is the respondent who is aggrieved by the award under this claim and not the petitioner.

**Claim No. 40: Compensation of the Block Payment from claim Nos.1 to 39 as mentioned above:-**

115. The submission of Mr. Darpan Wadhwa is, that the contractor does not provide for any rate of interest. It is settled law that in the absence of contractual rate of interest, interest to be awarded from the date of demand notice. The demand notice was sent by the respondent on September 29,

1998. The Arbitrator without giving any reason has awarded interest on all claims except claim No.2 from 1.10.1997 instead 1.10.1998. Award of the learned Arbitrator is against public policy. The reduction of past and pendentelite interest from 12% to 9% considering that after economic reforms interest rates had substantially reduced at the concerned time. He would rely upon the judgment of the Supreme Court reported as **2007 (2) SCC 720 Krishna Bhagya Jal Nigam Ltd. v. G. Harish Chandra Reddy and anr.** Mr. Nidhesh Gupta, would submit that the rate of interest as awarded by the learned Arbitrator is wholly reasonable. He would state, that the petitioner in this case has charged an interest of 17% p.a from the respondent on mobilization advance, released in favour of respondent as per 29 of the SCC. This shows, the rate of interest awarded is on the lower side.

**Claim No.41 Future interest @ 24% per annum compounded quarterly on the above award amounts of claim Nos.1 to 40 upto the date of actual payment:-**

116. Mr. Darpan Wadhwa would submit, reduction of future interest from 10% to 6% considering the fact that approximately 14 to 15 years have already elapsed from the date of the award, in view of the judgment of the Supreme Court in the case reported as **2006 (7) SCC 700 Rajasthan State Road Transport Corporation vs. Indag Rubber Ltd**, whereas, on the other hand, Mr. Nidhesh Gupta would submit, that the future interest has

been awarded at 10% with effect from April 1, 2003 till date of actual payment. It is a settled law, if pendente lite interest is claimed in the claim petition itself, future interest is to be awarded on whole claim including pre-reference and pendente lite interest by referring to the judgment of the Supreme Court in the case of ***Hithar Consulting (U.K) Ltd V. Governor, State of Orissa*** Civil Appeal No. 3147 of 2012 decided on November 25, 2014. Moreover, the rate of interest of 10% is less than awarded in arbitration proceeding involving commercial transaction and construction activities. Moreover, longer the delay, more should be the interest awarded at the rate of 12-18% by relying upon the following judgments:-

- (i) ***Sayeed Ahmed & Co. v. State of U.P (2009) 12 SCC 26;***
- (ii) ***Manalal Prabhudayal v. Oreintal Insurance Co. Ltd. (2009) 17 SCC 296;***
- (iii) ***Bhagwati Oxygen Ltd v. Hindusthan Copper Ltd. (2005) 6 SCC 462;***
- (iv) ***Central Bank of India v. Ravindra & Ors (2002) 1 SCC 367;***
- (v) ***M.D.J & K Handicrafts Jammu v. Good Luck Carpets (1990) 4 SCC 740;***
- (vi) ***Numaligarh Refinery Ltd v. Daelim Industrial Co. Ltd (2007) 8 SCC 466;***
- (vii) ***Housing and Urban Development Corporation Ltd. v. Leela Hotels Ltd [FAO (OS) 59/2013]***

117. In the last, it is his submission that the award under each and every claim granted by the learned Arbitrator is based on sound and plausible reasoning and the calculations are based on the figures provided by the petitioner itself and the material on record. It is the petitioner, which has

deliberately misled the learned Arbitrator whether in providing erroneous star rates, making deductions in the 105<sup>th</sup> RAR bill after having made the payments in the earlier bills, converting a positive balance in favour of Rs.93 lakh into a negative balance of Rs.1.15 Crore etc. He would submit, that against the total work of about Rs.35 Crores, an award of little over Rs.6.5 Crores has been made. He would submit that the objections filed by the petitioner deserve outright rejection and do not warrant any interference by this Court.

**Counterclaim No.1: Rectification of defects at contractor's risk and cost:-**

118. The nature of counter claim No.1 was with regard to rectification of defects at contractor's own cost. Mr. Darpan Wadhwa would state, that under clause 46 of GCC, in case the contractor fails to remedy or rectify the defects caused before the expiry of Defect Liability Period i.e 24.3.1998, the petitioner herein is entitled to get the same done by other means at the risk and cost of the contractor. According to him, the counter claim was raised on the basis of Board of Officer's meeting held on July 5, 1998 and subsequent days. The Completion Certificate was issued by the Garrison Engineer on March 31, 1997, which mentioned the list of defects. Due to failure on the part of the respondent to remedy the defects, petitioner was compelled to float various tenders for getting the

same repaired through outside agencies. Petitioner relied on these tenders to substantiate the quantification of claim. He would submit, that the learned Arbitrator's finding that Board of Officer's meeting dated July 5 1998 is fabricated is based on no evidence. He would also submit, that the learned Arbitrator had ignored the fact that Completion Certificate dated March 31, 1997 was issued subject to rectification of defects. Therefore, contractor was duly notified but surprisingly the learned Arbitrator failed to observe that the respondent had failed to rectify the defects during the Defect Liability Period.

119. Mr. Nidhesh Gupta, learned senior counsel would make the following submissions:-

- (i) Learned Arbitrator had observed that tender notice of alleged defect rectification issued 3 times. Initially for Rs.18 lakh, revised to Rs.80 lakh and lastly revised to Rs.49.9 lakh without any reason;
- (ii) It was also found that tender items showed that large number of works were not attributable to contractor at all. It was the categorical observation of the learned Arbitrator that the work which is being tendered now by the petitioner in 2002 is on account of damages by use for several years, i.e 5 years use of a big public hospital with large footfall and this fact was not denied by the petitioner. It was also recorded by the learned Arbitrator that no evidence was produced on

record by the petitioner to show that these defects are in works executed by the respondent.

(iii) It was observed by the learned Arbitrator that measurement of various items to be tendered and pointing out defects for rectification was to be considered by Board of Officers in accordance with Clause 46 of General Terms & Conditions, i.e after inspection and after giving opportunity to contractor to explain which was not done. Moreover, Board of Officers already met and decided on 05.07.98 and then informed contractor of an inspection on 11.7.1998 which was never done.

(iv) It was an observation of the learned Arbitrator that as per the contract, the petitioner should have gone for defect rectification in 1998 itself and not during 2001-02. It was observed by the learned Arbitrator that certain defects being got rectified are part of normal maintenance not recoverable from contractor.

(v) Therefore, it was held that regular maintenance work after contract liability period cannot be taken from respondent at latter's cost. Still, however, Rs.4.35 lakh awarded in favour of the petitioner.

**Counter Claim No.2 Devaluation of work done to bad workmanship and adoption of inferior quality of material by the Contractor:-**

120. It is the submission of Mr. Darpan Wadhwa, that the finding of the Arbitrator at para 414 of the Award that Board of Officer's meeting is

fabricated is perverse and based on no reasoning or evidence. At para 414 of the Award, Arbitrator relied on finding given in counter claim No.1. He would submit that Arbitrator failed to appreciate that the finding given in counter claim No.1 in respect of Board of Officer's meeting has no bearing as the petitioner is relying on some other Board of Officer's meeting in support of counter claim No.2. There were two separate Board of Officer's meeting which shows clear non-application of mind and mechanically accepting the submission of the respondent without giving any reasons. On the other hand, Mr. Nidhesh Gupta would submit that most of the defects are maintenance defects caused due to heavy traffic and equipments of hospital. Only some are due to defective work for which Rs.3,15,000/- was awarded in favour of the petitioner.

**Counterclaim No.5: Interest @ 24% passed pendent lite and future on awarded amount:-**

121. It is the submission of Mr. Darpan Wadhwa that the learned Arbitrator after recording the submission of the petitioner has given no reason or finding on past or pendentelite interest on the sum awarded in favour of the petitioner. On the other hand, Mr. Nidhesh Gupta, learned senior counsel would submit, that only future interest is payable on claim No. 1 & 2 @ 10% till actual payment.

## **CONCLUSION:**

122. Having heard the learned counsel for the parties, before I deal with the submissions made by the learned counsel for the parties on the claims, the scope of judicial review in a petition under Section 34 of the Act is well settled in terms of the judgment of the Supreme Court in the case reported as **ONGC Vs. Saw Pipes** (supra). Even though, both the learned counsel for the parties have relied upon the judgments of the Supreme Court in **DDA Vs. R.S. Sharma** (supra), **Associated Construction** (supra), **G. Ramchandra Reddy** (supra), **Numaligarh Refinery Ltd** (supra) and **Housing & Urban Development Corporation Ltd** (supra) on the scope of jurisdiction of a Court in a petition, in the nature of objection, under Section 34 of the Act, I note as recently as November 25, 2014, the Supreme Court in the case reported as **(2015) 3 SCC 49 Associate Builders vs. Delhi Development Authority** after referring to the various judgments of the Supreme Court including **Saw Pipes Ltd. (supra)** and a further recent judgment of the Supreme Court reported as **(2014) 9 SCC 263 ONGC Ltd. vs. Western Geco International Ltd**, has held as under:-

### ***Grounds on which arbitral award may be assailed***

Section 34 in conjunction with Section 5 of the Arbitration and Conciliation Act, 1996 (1996 Act) makes it clear that an arbitral award that is governed by Part I of the 1996 Act can be set aside only on the

grounds mentioned under Sections 34(2) and (3), and not otherwise. It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the Tribunal gives reasons for an arbitral award; to ensure that the Tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral process.

***Merits of arbitral award can be assailed only when it is in conflict with “public policy of India”***

None of the grounds contained in Section 34(2)(a) of the A&C Act, 1996 deal with the merits of the decision rendered by an arbitral award. It is only when the award is in conflict with the public policy of India as prescribed in Section 34(2)(b)(ii) of the A&C Act, 1996 that the merits of an arbitral award are to be looked into under certain specified circumstances.

## **Heads Of “PUBLIC POLICY OF INDIA”**

### **I. Fundamental Policy of Indian Law**

#### **(i) *Compliance with statutes and judicial precedents***

Violation of Indian statutes i.e the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the

administration of justice and would be regarded as being contrary to the fundamental policy of Indian law. Furthermore, the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

(ii) Need for judicial approach

In every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “*judicial approach*” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal, or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to

challenge.

The juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

(iii) *Natural justice compliance*

Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also

contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act.

*(iv) Wednesbury reasonableness*

No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

The juristic principle of Wednesbury reasonableness is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation.

It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision

would necessarily be perverse.

## ***II. Interest of India***

The next ground on which an award maybe set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign powers.

## ***III. Justice or Morality***

The third ground of public policy is, if an award is against justice or morality. These are two different concepts in-law.

### ***(i) Justice***

An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs. 45 laks without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to “justice”.

### ***(ii) Morality***

The other ground is of “morality”. Just as the expression “public policy” also occurs in Section 23 of the Contract Act, 1872 so does the expression “morality”. The Supreme Court has confined morality to

sexual morality so far as Section 23 of the Contract Act, 1872 is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. “Morality”, would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court’s conscience.

#### *IV. Patent Illegality*

The fourth head of public policy, namely, is patent illegality. It must be remembered that under the Explanation to Section 34(2)(ii) of the 1996 Act, an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground in which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator.

In the 1996 Act, the principle stands as the “Patent illegality” principle which, in turn, contains three sub-heads:-

##### *(i) Contravention of substantive law of India*

A contravention of the substantive law of India would result in the

death knell of an arbitral award. Violation of Indian statutes i.e the award which is, on the fact of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgement/decision is likely to adversely affect the administration of justice and would be regarded as being contrary to the fundamental policy of Indian law. Furthermore, the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law. This must be understood in the sense that such illegality must go to root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the 1996 Act.

(ii) *Contravention of A&C Act, 1996*

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 1996 Act, such award will be liable to be set aside.

(iii) *Contravention of the terms of the contract*

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. Thus, the third sub-head of patent illegality is really a contravention of Section 28(3) of the Arbitration Act. This contravention must be understood with a caveat. An Arbitral Tribunal

must decide in accordance with the terms of 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.

***Caution in applying all the above Heads/Sub-heads of Public Policy Test***

It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.

**Submission with regard to claim Nos. 2 to 39, in view of clause 65 of GCC:-**

123. The first and foremost question that needs to be decided is whether

the respondent could have at all raised claim Nos. 2 to 39 for the first time on September 29, 1998 in view of clause 65 of the GCC. There is no dispute that such a stand was taken by the petitioner for the first time during the argument before this Court. In the absence of any plea, there was no occasion for the learned Arbitrator to decide such an issue.

124. The point would be, whether the learned Arbitrator, even if such a submission/stand was not taken in the pleadings or argued, was required to look into the Contract himself in view of Section 28(3) of the Act. Section 28 (3) of the Act reads as under:-

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

125. There is also no dispute on the position of law that an Arbitrator being creature of a Contract, has to confine himself to the provisions of the Contract while deciding the dispute. First of all, I deal with the judgments relied upon by Mr. Nidhesh Gupta. In the case of **Siddu Venkappa Devadiga (supra)**, the Supreme Court while considering an appeal by certificate against the judgment of the High Court of Bombay, has held that the appellate court cannot go outside the pleadings and make out a new case, wherein, the High Court had reversed the trial court's judgment on a finding of benami which was never pleaded. In **Samir**

***Chandra Dass (supra)***, the Supreme Court held that issue, not pleaded in the written statement nor argued before trial court nor raised in the Memo of Appeal before the High Court, held, First Appeal was not maintainable. In ***State of Maharashtra Vs. Hindustan Construction Ltd***, wherein, the Supreme Court was concerned with facts, wherein, the respondent company and the appellant had entered into a Contract for some construction work. After completion of the work, dispute arose between them in relation to payment/rates of payment under five different heads. Those were referred to Arbitral Tribunal. The Arbitral Tribunal passed an Award for certain amount in favour of the respondent. The Appellant/State made an application for setting aside of the Award and relied upon section 28, 33 and 16 of the Act to assail the Award and set up the grounds of waiver, acquiescence, delay and laches and res-judicata. The court, at the first instance, rejected the first application. In an appeal under Section 36 (Sic.) of the Act about one year and four and a half months thereafter, the appellant made an application before the High Court seeking amendment to the memorandum of arbitration appeal by adding additional grounds that the Arbitral Tribunal has exceeded its jurisdiction in granting claim Nos. 1 and 3; that it had acted beyond the scope of arbitration with regard to claim No.2 and; that it had mis-conducted itself in granting the other two claims. Dismissing the said

application, the High Court held, that the grounds not initially raised in the petition for setting aside the Arbitral Award could not be permitted to be raised beyond the period of limitation prescribed in Section 34(3). It further observed that the proposed amendments that were sought to be effected were not even the grounds contained in the application under Section 34 of the Act. The question before the Supreme Court was whether in an appeal under Section 37 of the Act, from an order refusing to set aside the Award, a memorandum of appeal to raise additional/new grounds could be permitted. The Supreme Court held that the application for setting aside an Arbitral Award under Section 34 of the Act has to be made within time prescribed under Section 34 (3). If incorporation of additional grounds, by way of amendment in the application under Section 34 is treated to be tantamount to filing fresh application, in all situations and circumstances, it would follow that no amendment in the application for setting aside the Award, howsoever material or relevant it may be for consideration by the Court, can be added nor existing ground amended after the prescribed period of limitation has expired, although the application for setting aside the Arbitral Award has been made in time. That could not be the intention of the Legislature while enacting section 34 of the Act.

126. In ***Transmission Corporation of A.P Ltd case (supra)***, the

Supreme Court was of the view that a question as to whether the respondent was overage for entry into the service was neither raised in his written statement nor it was argued before the High Court. Under such circumstances, the Supreme Court held that the appellant cannot be permitted to raise the point for the first time in that Court. In ***Vimal Chandra Grover case (supra)***, the Supreme Court had not permitted the respondent to raise a plea, which had no foundation either in the pleadings or in the evidence before the National Commission i.e the Court below. Similarly, in ***MSK Projects India (JV) Ltd***, the Supreme Court was concerned with facts of a case wherein the respondent/Public Works Department of the State of Rajasthan decided in September 1997 to construct the Bharatpur Bypass for the road from Bharatpur to Mathura. For the aforesaid work, tenders were invited with the stipulation that the work would be executed on the basis of Build Operate and Transfer. The total extent of the road had been 10.850 km out of which 9.6 km was new construction and 1.25 km was improvement i.e widening and strengthening of the existing portion of Bharatpur Deeg road. The bypass project was completed on April 10, 2004 and it also started collecting toll fee as provided in the Agreement w.e.f April 28, 2001. There was some problem in collecting the toll because of agitation of local people. The State issued notification dated September 1, 2000 under the provisions of

the Tolls Act, 1851 and Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994, preventing the entry of vehicles into Bharatpur city stipulating its operation w.e.f October 1, 2000. The petitioner invoked arbitration clause raising the dispute. The learned Arbitrator made an Award in favour of the petitioner. The State of Rajasthan being aggrieved with the Award, filed objection under Section 34 of the Act and while deciding the same, District Judge vide order dated January 17, 2006 set aside the Arbitral Award on the ground, there was no clause in the agreement to issue notification barring the entry of vehicles in the city of Bharatpur. It held that the petitioner was not entitled to any compensation. The petitioner filed an appeal before the High Court, wherein the High Court, vide the impugned judgment dated April 24, 2007 held that Bharatpur Deeg Section was part of the project and the contractor could collect the toll fee from the users of this part of the road also. Clause 10 of the Concession Agreement was not attracted in the facts of the case. There was no agreement for the issuance of notification by the State barring the use of the old route and directing the vehicles to use the new route alone. The Supreme Court after noting that the State of Rajasthan had not taken the defence that it was not agreed between the parties to issue the notification barring the trafficking through the market of Bharatpur city, was of the view the only issue remained as to whether, there was a delay

in issuance of notification and implementation thereof. In such a fact situation and considering the settled legal proposition it was held that the District Judge and the High Court fell in error considering the issue which was not taken by the State before the Tribunal during the arbitration proceedings.

127. In ***Union of India Vs. Dinesh Prasad***, the Supreme Court noting that during the course of arguments before the learned Single Judge, a submission was made on behalf of the petitioner that the very Commandant of the Battalion who signed and issued the charge sheet to him convened and presided over the Summary Court Martial and then conclusion of which, the punishment of dismissal from service was imposed, which vitiated the court martial proceedings as he was denied the fair trial. The Supreme Court was of the view that the learned Single Judge had clearly erred in allowing such argument. Firstly, the argument was raised without any foundation in the writ petition. No plea of actual or likelihood of bias was raised in the writ petition. There was no plea taken in the writ petition that he was denied fair trial in the course of Summary Court Martial. Similarly, in ***Ranbir Singh Vs. Executive Engineer***, the Supreme Court while considering the case, where, the challenge in a writ petition was limited only to the back wages and not to the Award in toto. The High Court set aside the Award in toto. The

Supreme Court held that the High Court was well beyond the scope of the prayers in the writ petition. If the State was aggrieved by the Award in toto, there was no impediment in its way to challenge it in its entirety. The party must be bound by its pleadings. A prayer clause cannot be construed or dubbed as technicality.

128. On the other hand, the judgments relied upon by Mr. Darpan Wadhwa are concerned, in ***Vaish Brothers (supra)***, this Court was concerned with a petition under Section 20 of the old Arbitration Act, 1940, under which an application was filed by the plaintiff in that case for appointment of an Arbitrator on the failure of the respondent to refer the same. The plaintiff relied upon clause 70 of the General Conditions of Contract IAFW 2249. The said petition was resisted by the respondent by placing reliance on clause 65 of the GCC with which, we are also concerned here. This Court held, since the petition proceeded on an admission by the learned counsel for the petitioner that final bill was submitted and clause 65 providing for excepted matters and barring raising of any claim after submission of the final bills, clearly comes into play and held that the petitioner was not entitled to seek reference of the dispute and even the issue of existence of a dispute cannot be referred to. In ***Rajasthan State Mines & Minerals Ltd. (supra)***, the Supreme Court has held that the Arbitrator, being a creature of the Contract between the

parties and hence, if he ignores the specific terms of the Contract, it would be a question of jurisdictional error which could be corrected by the Court and for that limited purpose, the Agreement is required to be considered. An Arbitrator cannot Award an amount which is ruled out or not prescribed by the terms of the Agreement. Because of a specific bar stipulated in the Agreement, that claim could not be raised. Even, if it is raised, and referred to arbitration because of wider arbitration clause, such claim amount cannot be awarded as the agreement is binding between the parties and the Arbitrator has to adjudicate as per the Agreement.

129. In ***F.C.I Corporation vs. M/s Chandu Construction & Anr***, the Supreme Court held that an Arbitrator being a creature of the agreement between the parties has to operate within the four corners of the agreement and if he ignores the specific terms of the Contract, it would be a question of jurisdictional error on the face of the Award falling within the ambit of legal misconduct, which could be corrected by the Court. However, it must be clarified that if the Arbitrator commits an error in the construction of Contract, that is an error within his jurisdiction but if he wanders outside the Contract and deals with the matter not allotted to him, he commits a jurisdictional error. The Supreme Court also held that the Arbitrator derives his authority from the Contract and if he acts in disregard of the Contract, he acts without jurisdiction. A deliberate

departure from the Contract amounts to not only manifest disregard of his authority or a misconduct on his part but it may tantamount to mala fide action. Similarly, in **ONGC Vs. Saw Pipes Ltd** (supra), the Supreme Court held that an Arbitral Award contrary to the terms of Contract/statutory enactment is patently illegal and against the public policy of India. Similarly in **J.G Engineers Pvt. Ltd (supra)**, the Supreme Court held that where the Contract is clear and unambiguous terms, bars or prohibits a particular claim, any Award made in violation of the terms of the Contract would violate section 28 (3) of the Act and would be considered to be patently illegal and therefore, liable to be set aside under Section 34 (2) (b) of the Act. In **Fiza Developers & Inter Trade (P) Ltd**, the Supreme Court was considering a case wherein certain disputes between the respondent and the petitioner were referred to arbitration. An Award was made on September 14, 2005. The petitioner filed an application under Section 34 of the Act before the city Civil Court (Bangalore) for setting aside the Award. The petitioner made an application under Order 14 R 1 & 3 of the CPC r/w rule 4(b) of the High Court of Karnataka Arbitration (Proceedings before the Courts) Rules 2001, requesting the Court to frame issues in the matter. The said application was rejected vide order dated September 12, 2006. The writ petition challenging the said order was dismissed. The learned Single

Judge was of the view that application under Section 34 was not necessarily in the nature of adversarial proceedings where a dispute between the parties requires adjudication by the Court; that there is a legal presumption in favour of the Award being valid and that whether the opposite party joins issue or not, the person challenging the Award has to make out one of the grounds enumerated under Section 34(2) of the Act and there is no need for the Court to frame issues as is contained in a Civil Suit. The Supreme Court, rejecting the contention of the petitioner for framing of the issues in the given background. The Supreme Court, in para 28 of the judgment has held that in a regular Civil Suit, in the event of failure to file a defence, it will be lawful for the Court to pronounce the judgment on the basis of facts contained in the plaint but in an application under Section 34, even if there is no contest, the Court cannot, on the basis of the averments contained in the application, set aside the Award. Whether there is contest or not, the applicant has to prove one of the grounds set out in sections 34 (2) (a) and (b). Even if the applicant does not rely upon the grounds under clause (b), the Court on its own initiative may examine the Award to find out whether it is liable to be set aside on either of the two grounds mentioned in Section 34(2)(b).

130. Similarly, in the case of ***Government of Kerala Vs. Som Datt Builders (supra)***, the High Court, after noting the plea of the Government

pleader that though, such a contention was not raised before the Court below, the first appellate Court has a duty to examine whether Award is in any way tainted by fraud or corruption or making of the Award is induced by fact of fraud or corruption. The Government pleader laid stress on the words “*the Court finds that*” unlike section 34(2)(a) where the party has to furnish proof so as to establish the grounds under Section 34(2)(a) (i) (ii) (iv). The counsel submitted, as far as section 34(2)(b) r/w explanation is concerned, a duty is also cast on the Court to find out, on material available before it, whether the Award is in conflict with public policy or the making of the Award is induced or affected by fraud or corruption. The High Court held, even though, it had indicated, there was no such allegation or argument raised before the Arbitrator or before the Court below, the Award was induced or affected by fraud or corruption, all the same, in a given case, if the Court finds that the Award, is, in any way induced or affected by fraud or corruption, the Court has a duty to interfere.

131. No doubt, a reading of the judgment of the Division Bench of the High Court, it is seen that the Court was of the view that if the Court finds that the Award, is, in any way induced or affected by fraud or corruption, the Court has a duty to interfere. A duty is also cast on the Court to find out, on material available before it, whether the Award is in

conflict with public policy or the making of the Award is induced or affected by fraud or corruption. In the present case, at the highest, the case set up by the petitioner is that, in view of clause 65, which bars the additional claims and the Award being contrary to the terms of the Contract, the same is illegal and against public policy of India (not a case that the Award is affected by fraud or corruption). The reliance placed by learned counsel for the respondent in the case of **MSK Projects India (JV) Ltd. (supra)** would be relevant for the purpose of deciding this issue inasmuch as the Supreme Court, in the said case in para 23, was of the following view:-

*“23 The Tribunal considered the relevant agreement provisions as well as land lease deed, total packet documents, minutes of pre-bid meetings and the deed authorizing collection of toll fee etc and proceeded with the arbitration proceedings. The State of Rajasthan had not taken the defence that it was not agreed between the parties to issue the notification barring the traffic through the markets of Bharatpur city. The only issue remained, as to whether, there was delay in issuance of notification and implementation thereof. In such a fact situation and considering the settled legal proposition it was held that the District Judge and the High Court fell in error considering the issue which was not taken by the State before the Tribunal during the arbitration proceedings”.*

132. From the above, it is clear that the Supreme Court had reiterated the settled legal proposition that an issue, which was not taken by the party before the Arbitral Tribunal during the arbitration proceedings, the

authorities above i.e the District Judge or High Court in that case and this Court in the present case, cannot consider the issue and decide the same. The judgment of the Supreme Court in ***State of Maharashtra Vs. Hindustan Construction Company Ltd***, would also be relevant while deciding the issue under consideration inasmuch as the Supreme Court has upheld the decision of the High Court rejecting the State of Maharashtra's application for adding new grounds in the Memorandum of Arbitration Appeal on the ground that they were absolutely new grounds for which there is no foundation in the application for setting aside the Award. The Supreme Court was also of the view that no new grounds containing new material/facts could have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the Award. The Supreme Court had also observed that no prayer was made by the appellant i.e State of Maharashtra for amendment in the petition under Section 34, before the Court concerned or at the appellate stage. In the present case, the issue based on clause 65 was not raised nor pleaded before the learned Arbitrator. Even in the objections, no such ground has been taken. Such a submission was taken only at the time of the argument and the brief submissions filed by learned counsel for the petitioner after the culmination of the argument. Even, no application seeking amendment of

the objections has been filed. The submission of the learned counsel for the respondent, in the absence of any plea by the petitioner, there was no occasion for the respondent to justify the additional claims, is appealing. No doubt, this Court had held in the case of ***Vaish Brothers***, that in view of clause 65, additional claims would be barred. Regretably such a plea having not advanced at the relevant time, cannot be urged now. Some justification has been given by the respondent to show that such an issue is a mixed question of law and fact and those claims were raised separately before invoking arbitration vide letter dated September 29, 1998 and also the notice invoking arbitration dated October 24, 1998. The reliance placed by learned counsel for the respondent, in the case of ***Vishwas Rao Madhav Rao Chiplunkar vs. Kamla Bai Vishwas Rao Chiplunkar 2004 (18) AIC 768 (n) Bombay***, that even a question of law, not pleaded, cannot be argued would also be of some relevance. In any case on a reading of two judgments of the Supreme Court in ***MSK Projects India (JV) Ltd*** (supra) and ***State of Maharashtra vs. Hindustan Construction Company Ltd*** (supra), this issue needs to be decided in favour of the respondent and the plea now taken by learned counsel for the petitioner based on clause 65 of the GCC needs to be rejected having not taken before the learned Arbitrator and even in the objections. A plea has been advanced by Mr. Nidhesh Gupta that, documents signed under

compulsion do not bind a party. The said submission was in relation to signing of the final bill and the No Claim Certificate. A perusal of the document show the representative of the respondent did write on the said documents signed under protest letter follows; which is an enough indication, that, the contents of the said documents are not acceptable. Although, Mr. Gupta has referred to the judgment in the case of **Reshmi Construction** (supra), **National Insurance Co. Ltd Vs. Boghara Polyfab Pvt. Ltd.** (supra), **Ambica Construction** (supra), **Associated Construction** (supra) and **General Manager Northern Railways** (supra), **Durga Charan Routray** (supra), **R.L. Kalathia and Co.** (supra), **Bharat Coking Coal Ltd.** (supra), the same are not dealt with, as I have already rejected the objection taken by Mr. Wadhwa on the arbitrability of claim No.2 to 39 based on clause 65 of GCC. Similarly, the issue of applicability of clause 65 of the GCC cannot be gone into now in view of my conclusion above, the judgments referred to by Mr. Gupta are not dealt with.

**Conclusion on each of the claims:-**

**Claim 1**

133. Claim No. 1 has five parts.

**(i) Schedule 'A' items:-**

As noted above, the respondent had, in the final bill against schedule A items, claimed an amount of Rs.23,66,29,678.87/-. The petitioner verified

the bill with regard to schedule A items to be Rs.23,65,11,558.50/-. The respondent did not point out any disagreement with the changes carried out in the final bill relating to schedule A items. The learned Arbitrator, has noted that the respondent has not objected to the amount as granted by the petitioner. The amount checked and verified by the petitioner for schedule A items is correct, that apart, the objections in the present petition, against claim No.1 is with regard to escalation bill, so is the position at the time of the arguments. I note, in the absence of objection, the conclusion of the learned Arbitrator with respect to the final bill relating to schedule A items is justified.

**(ii) Deviation Orders:-**

The learned Arbitrator has awarded the amount against four deviation orders. There is no challenge to the conclusion of the learned Arbitrator with regard to the award against deviation orders i.e DO No.59(P) at para 59; DO No.30(P) at para 67-68; DO No.70(P) at para 74 and DO No.6(P-1) at para 108, as such the award is upheld.

**(iii) Recovery of Schedule 'B' items:-**

I note, that there is no objection to this head of claim No.1. Even during the course of the arguments, there was no challenge by learned counsel for the petitioner. The conclusion is upheld.

**(iv) Recovery due to Site examination:-**

Similar is the position of this head under claim No.1, there is no objection by the petitioner. Even during the course of the proceedings, there was no attempt to challenge the same. Hence, to that extent, the Award is upheld.

(v) **Escalation bill:-**

The claim of the respondent was for escalation against material. The final bill of the respondent was worked out to minus Rs.1,15,47,711.93 by the petitioner. As noted above, the twofold argument of the petitioner is that the Arbitrator's calculation of escalation on material works out to Rs.3,60,26,192.05/-. As per petitioner's calculation, escalation on material works out to Rs.3,31,83,229.88/-. There is a difference of 28,42,962.17/- on account of Arbitrator incorrectly applying escalation formulae as provided for in clause 24 of the Special Conditions of Contract. Clause 24 of the Special Conditions of Contract reads as under:-

*W1      Whole sale price index for all commodities (base 81-82 = 100) published by Economic Advisor to the Government of India as on the date of commencement of the period of reckoning.*

134. As noted above, the contention of learned counsel for the petitioner was, in freezing W1 rates for the quarter March 25, 1994 to June 25, 1994, as per the formula W1 is the whole sale price index prevailing on the date of commencement of the period of reckoning i.e beginning of the quarter,

which would be March 25, 1994 (as per petitioner) which means, the previous quarter ended on March 24, 1994. The contention of Mr. Nidhesh Gupta that on March 25, 1994, the indices was 258.3, has not been denied. So, till April 30, 1994, the indices of 258.3 would hold good which is also clear from appendix H to letter dated June 10, 2002, the W1 for the period March 25, 1994 to June 24, 1994 has been shown as 258.3. The grant of the claim on the basis of W1 as 258.3 is justified till April 30, 1994. [The applicability of escalation per se after April 30, 1994 i.e w.e.f May 1, 1994 shall be considered in claim 18]. Insofar as the objection that the learned Arbitrator instead of deducting the minus amount in S.No.3, 17, 18 and 19 has considered it as “*nil*”. Suffice to state, even, if the escalation of material is in minus, it only signified, there was no escalation during that period or for that matter, the prices have gone down. That would not mean that there is de-escalation and the petitioner is entitled to the benefit of such de-escalation. The Arbitrator has rightly treated the relevant quarters as ‘Zero’ to mean the benefit of escalation would not be given to the respondent. I do not see any reason to interfere.

**Claim 1B Security Deposit along with interest @ 24% p.a.:-**

135. Insofar as this claim is concerned, in terms of condition 68 of IAFW 2249, the security deposit of Rs.1,50,000/- should have been released after the period of defect liability of one year. The only plea of

the petitioner is that the same can only be refunded when the respondent issues a No Demand Certificate. The stand of the petitioner is that the final bill was in the negative amount, the security is adjusted against the same.

136. On the other hand, the case of the respondent being that the final bill has to be in positive, as awarded by the learned Arbitrator, the security amount has to be refunded by the petitioner/Union of India. Surely, going by the award of the learned Arbitrator, the final bill, being in the positive, he has directed the refund of the same. Ultimately, the refund of the same would depend upon the outcome of the objections filed by the petitioner, which are being considered by this order and as I have already upheld the award qua claim No.1, the release of the security deposit in terms of the award needs to be upheld.

**Claim No. 2-Cost due to time over run:-**

137. Insofar as claim No.2 is concerned, there is no dispute that it was not part of the final bill dated March 29, 1997. As I have already concluded that this submission of Mr. Wadhwa, based on clause 65 at this stage is not sustainable, the objection on the non-arbitrability of this claim needs to be rejected. Insofar as the submission of Mr. Wadhwa that the extension of time granted under clauses 11(A) and 11(B) of the GCC and claim for extra expenditure towards administrative expenses, hiring

charges of equipment, plant & machinery is barred by clause 11(C) of GCC is concerned, suffice to state, when this claim was initially not referred to arbitration by the petitioner on the ground that it was an excepted matter as it does not fall in arbitration clause, the issue was considered while adjudicating the Arbitration Application No.417/1998, wherein, the petitioner herein, in support of its stand that the claim is an excepted matter relied upon clause 11A and 11C of GCC, which stipulates as under:-

*“11. Time, Delay and Extension-*

*(A) Time is of the essence of the Contract and is specified in the contract documents or in each individual Works Order.*

*As soon as possible after the Contract is let or any substantial Works Order is placed and before Work under it is begun, the G.E. and the Contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between the G.E. and the Contractor within the limitation of time imposed in the contract documents or Works Order. If the Works be delayed:-*

- (i) By force majeure, or*
- (ii) By reason of abnormally bad weather, or*
- (iii) By reason of serious loss or damage by fire, or*
- (iv) By reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or*
- (v) By reason of delay on part of nominated sub-contractors, or nominated suppliers which the Contractor has, in the*

*opinion of G.E. taken all practicable steps to avoid, or reduce, or*

- (vi) By reason of delay on the part of Contractors or tradesmen engaged by Government in executing works not forming part of the contract, or*
- (vii) By reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control*

*then, in any such case the Officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of Work for which separate periods of completion are mentioned in the contract documents or Works Orders, as applicable.*

*Upon the happening of any such event causing delay, the Contractor shall immediately, but not later than 30 days of the happening of the event, give notice thereof in writing to the G.E. but shall nevertheless use constantly his best endeavour to prevent or make good the delay and shall do all that may reasonably be required to the satisfaction of the G.E. to proceed with the works. Extension of time shall be granted as under:-*

- (a) by G.E. for all Term Contracts;*
  - (b) by Accepting Officer of the contract for all other Contracts.*
- In case the Contractor fails to notify the G.E. of happening of an event(s) causing delay within the period of 30 days stipulated in sub-para 3 above, he shall forfeit his right to claim extension of time for the delay caused due to such event(s).*

*Extension of time, as granted above, shall be communicated to the Contractor by G.E. in writing and shall be final and binding. PROVIDED THAT in the case of contracts (other than Term Contracts) accepted by the G.E., in the even of the Contractor not agreeing to the extension granted by the G.E., the matter shall be referred to the C.W.E. whose decision shall be final and binding.*

**11(C)** *No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."*

138. This Court while deciding the issue on March 28, 2001, has held

the aforesaid clauses deal with extension of time, whereas the claim for damages i.e claim No.2 is on account of non availability of site and designs by referring to a judgment of this Court in the case of ***M/s. Simplex Concrete Piles India Ltd. Vs. Engineer-in-Chief, Army Headquarters (Suit No. 2543/1995)***, wherein the same clauses have been interpreted by holding that the dispute raised was not covered under clauses 11(A) and (C) of the Contract. So, the conclusion of this Court on the non applicability of clauses 11(A) and (C) is final between the parties. Nothing has been brought to my notice that the order dated March 28, 2001 has been varied or set aside. The reliance placed by Mr. Wadhwa on the judgment of the Supreme Court in the year 2007, in the case of ***Ramnath International Construction (P) Ltd (supra)***, wherein the Supreme Court held that clause 11(C) would be attracted even if the delay is attributable to the employer is misplaced in view of the finality of order dated March 28, 2001 of the Court in Arbitration Application No.417/1998.

139. In view of my aforesaid conclusion on clause 11(C) of GCC, the reliance placed by Mr. Nidhesh Gupta, learned Senior Counsel for the respondent on the case of ***Mohanlal Goenka vs. Benoy Krishna Mukherjee case (supra)***, ***Satyadhyan Ghosal case (supra)***, ***Swamy Atmananda case (supra)***, ***State of Karnataka and Anr. vs. All India***

*Manufacturers Organization case (supra), Supreme Court Employees' Welfare Association case (supra), B.L. Sreedhar case (supra) and Jaswantsingh Mathurasingh case (supra)*, may not be required to be gone into. But that would still, not, preclude the learned Arbitrator to consider the nature of extension letters, the conduct of the parties while deciding the claim on its merit without considering the effect of clauses 11(A) and 11(C) of the GCC. In the case in hand, the extension letters issued on June 1, 1994, August 16, 1995, October 23, 1996 did stipulate that the financial affect as 'Nil' and the said letters have been duly signed by the representative of the respondent without demur or protest. The implication thereof, was, the respondent had accepted the terms of extension not once but on three occasions, each in a gap of more than one year and could not have claimed any amount towards the cost overrun because of the extension of time. The learned Arbitrator had only referred to the factum of various letters written by the respondent detailing reasons for the delay. He also referred to the extension letters being on the printed format/proforma and the respondent had no option but to sign the letters is not tenable in the facts. No letters have been referred to by the learned Arbitrator to show that the respondent had protested for being coerced to sign the letters. The learned Arbitrator could not have allowed the claim contrary to the stipulation in the extension letters that the financial affect

shall be 'Nil'. I must note, that Mr. Gupta, has during the submission has relied upon certain communications dated November 29, 1992, January 22, 1992, May 19, 1992, December 9, 1992, December 3, 1992, February 26, 1996, March 27, 1996 and September 21, 1996 sent by the respondent to the petitioner, wherein they have highlighted the reasons for the delay. In two communications dated March 27, 1996 and September 21, 1996, the respondent has sought extension of time without prejudice to their rights. That would still not improve the case of the respondent, when in fact the extension letters were issued they were with 'Nil' financial liability. I note for benefit, the following observation of this Court in the case of ***Union of India Vs. Bahl Builders (P) Ltd (supra)***, as an alternate reasoning, to set aside the Award being without application of mind, wherein, a similar claim was made.

*“17. Even otherwise, the court is of the opinion that the award betrays non application of mind to the facts; the petitioner's letter of extension dated 12-8-1997 had clearly posited that it was subject to "Nil" financial implication. This meant that the contractor could not have claimed any amount, towards the head which was ultimately awarded. Nothing was shown from the correspondence or the record to support the contractor's disclaimer or protest against this conditional extension of time. In the circumstances, the arbitrator could not have awarded the sum that he did.”*

140. I agree with the submission of Mr. Wadhwa that the respondent had the option to terminate the Contract if the stipulation in the extension

letters did not suit it. The reliance placed by Mr. Nidhesh Gupta on the judgment of *Asian Tech (supra)*, is liable to be rejected in the facts of this case, inasmuch as the Supreme Court in the said case was dealing with the same stipulations with which this Court is concerned in the present case by noting a fact that when the petitioner in that case vide its letter dated November 24, 1988 made it clear that it was not ready to carry out the work beyond the contracted period, otherwise on a separate work order and the subsequent letter of the respondent in that case dated October 11, 1989, wherein, specific assurance was given by the respondent to the petitioner to continue the work and the rates would be decided across the table, the appellant went ahead with the work. The Supreme Court was of the view that when such an assurance was given, it was not open to the respondent to contend that no claim for further amount can be made due to clause 11(C) and the Arbitrator would have no jurisdiction to award the claim. Such is not the case here. The respondent has not placed any letter to show that an assurance was given by the petitioner to the respondent that rates pursuant to the extension of time shall be worked out. Insofar as the reliance placed by Mr. Gupta on para 21 of the judgment in *Asian Tech (supra)* that clause 11 only prohibits the department from entertaining the claim but it did not prohibit the Arbitrator from entertaining it is concerned, even if the Arbitrator was within its right to

consider the claim in the given facts, he could not have awarded the claim in view of the clear stipulation in the extension letter, which has been accepted by the respondent without any demur or protest except stating, as noted by the learned Arbitrator that it would claim damages including interest, which according to this Court is of no consequence, having accepted the extension of time with '*Nil*' financial effect.

141. Insofar as reference made to appendix A to the letter submitted by the petitioner dated June 10, 2002, which incorporates reasons for various extensions is concerned, the same would have no effect on the claim made by the respondent when for those very reasons extension was granted with '*NIL*' financial liability. The reliance placed by the respondent on the case of ***Chairman & MD, NTPC Ltd. v. Reshmi Constructions (supra)***, has no applicablity. In the said case, the Court was concerned with payment of final bill and not letter relating to extension of time. Be that as it may, in the said case, the Supreme Court noted a letter written by the contractor on December 20, 1990, detailing the circumstances under which they were compelled to sign the said printed letter. It was under those circumstances, the Supreme Court has said that the assertion of the contractor of undue influence or coercion cannot be said to be an afterthought. In the case in hand, no such letter written by the respondent asserting undue influence or coercion has been noted by the learned

Arbitrator. The only plea of the respondent, that it has been writing letters to the petitioner, claiming damages and interest, is not same as to contend undue influence or coercion.

142. Similarly, in the case of *National Insurance Company Ltd (supra)*, the Supreme Court was concerned with the settlement vouchers/full and final discharge obtained from the contractors by the Government Departments. The Court held that when a Contract is fully performed, there is a discharge of the Contract by performance and where both the parties to a Contract, confirmed in writing, that the Contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims of disputes, Courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the Contract issues full and final discharge after confirming that he has received the payment in full and final satisfaction of all claims and he has no outstanding claim, that amounts to discharge of the Contract by acceptance of performance and the party issuing the Discharge Voucher Certificate cannot, thereafter, make a fresh claim or revive any settled claim. The Supreme Court also held that the receipt that has been taken in that case by the appellant/insurer was undated and was in proforma furnished by the appellant containing irrelevant and inappropriate statement. There was no mention of assignment of certain rights in

respect of theft of property nor was the claim being settled in respect of a theft claim, the Court held, that shows how the claims were required to be signed on the dotted line and how such vouchers were insisted upon and taken mechanically without application of mind. The Court also noted, on the date when the above discharge voucher was signed and given by the respondent, the payment of about Rs.2.3 Crores made and it was made after receiving the voucher. In the case in hand, as noted from the extension letters, the same pertained to the Contract in question. All the details were duly typed and signed by the parties i.e the petitioner and the respondent herein. The extension letters also suggest and reveal minute details like date of completion; date of completion in previous order; extended date of completion, financial effect, reasons for extension. Hence, the plea that the respondent was made to sign on the dotted lines cannot be accepted. Similarly, in the case of ***Ambika Consutrction (supra)***, the said judgment would also not be applicable inasmuch as the Court, therein, had noted that clause 43(2) of the General Conditions of Contract indicates that a No Claim Certificate is required to be submitted by the Contractor, once the works are finally measured up. The Court also noted that the work was yet to be completed and there is nothing to indicate that the works as undertaken by the contractor has been finally measured and on the basis of the same, No Claim Certificate has been

issued by the appellant in that case. There was a finding by the first Arbitrator that the No Claim Certificate has been given under coercion and duress. The Court also found that unless a Discharge Certificate is given in advance, payment of bills are generally delayed. The Court also concluded that clause 43 (2) has been included in the General Conditions of Contract as a safeguard against claims after final measurement. The Court held that such a clause in the Contract would not be an absolute bar to a contractor raising claims which are genuine even after the submission of such a No Claim Certificate. The case in hand is not such a case, as noted above, on three consecutive occasions with a gap of one year each, the last one being in the month of October 1996, just six months before the completion of work, extension of time was sought and granted with a clear stipulation of 'NIL' financial affect. Hence, it can't be said that in the given facts, the respondent could have still raised the claim for cost overrun etc. In *Associated Construction (supra)*, the No Due Certificate issued under duress by the contractor, held not binding on him. In the present claim, this Court is not concerned with No Due Certificate but with the letters relating to extension of time with a clear stipulation of 'NIL' financial liability which was not objected to, even was not part of the final bill dated March 29, 1997 of the respondent. The judgments have no application in the facts of this case. Insofar, as the judgment of

the Supreme Court in the case of ***General Manager Northern Railway vs. Sarvesh Chopra*** (supra), on which reliance was placed by Mr. Gupta, more specifically, para 15, wherein the Supreme Court, referring to the position under the Indian Law, inspite of there being a Contract between the parties where under the Contractor has undertaken not to make any claim for delay in performance of the Contract occasioned by an act of the employer still claim would be entertainable in one of the following situations; (i) if the contractor repudiates the Contract exercising his right to do so under Section 55 of the Act; (ii) the employer gives an extension of time either by entering into supplementary agreement or by making it clear that escalation of rates or compensation for delay would be permissible; (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the Contractor inspite of delay and such notice by the contractor putting the employer on terms. None of the situations exist/applicable in this case. Situation No. 1 does not exist. Situation No.2 is not applicable as there is a clear stipulation in the extension letters, that the financial effect is '*NIL*'. Situation No.3 presupposes no extension letters with a stipulation of '*NIL*' financial effect. Rather it contemplates, a situation where the contractor seeking extension of time demands compensation, and the employer accepts the

delay and the terms. The award, to this claim needs to be set aside. I order so.

**Claim No.3 Payment due to increase in DO limit upto 30%:-**

143. Having heard the learned counsel for the parties, the plea of Mr. Wadhwa that the claim was not part of the final bill dated March 29, 1997 needs to be rejected in view of my conclusion on the plea with regard to clause 65 of the GCC. Insofar as the submission of Mr. Wadhwa that in the absence of any specific agreement to the contrary, the respondent was not entitled to revision of schedule A rates also needs to be rejected in view of the letters dated September 27, 1995 and September 30, 1995, which I reproduce as under:-

“27 Sep. 95  
M/s S.A Builders Ltd.  
610-612, Chiranjiv Tower,  
43-A, Nehru Place,  
New Delhi-110019

CAN NO : CEDZ 6/91-92 : PROVN OF ACCN FOR  
ARMY HOSPITAL (R&R) AT DELHI CANTT

Dear Sir (s),

1. Reference this office letter No.8406/CEDZ-6/6152/E8 dated 26 Sept 95.
2. As the Deviation limit of contract is likely to increase beyond 10% permissible limit of CA. It is well known to you that additional work is closely connected with the original work.
3. In view of reason explained above you are requested to do the work at the same rate in the interest of work as a

*good gesture for this prestigious work. Your agreement may please be forwarded at the earliest. Please intimate the items trade wise, for which the rates are to be revised with supporting details of revised rates and quantity (revised).*

*Yours faithfully,*

*(Anand Srivastava, IDSE)  
EE  
Garrison Engineer”*

“

*30 Sep 95*

*M/s S.A Builders Ltd.  
610-612, Chiranjiv Tower,  
43-A, Nehru Place,  
New Delhi-110019*

*CA NO : CEDZ 6/91-92 : PROVN OF ACCN FOR  
ARMY HOSPITAL (R&R) AT DELHI CANTT-110010*

*Dear Sir (s),*

- 1. Reference your letter No.MES/SAB/01/95/1106 dt. 09.08.95.*
- 2. Please submit your revised rates with supporting details in the performa attached.*

*Yours faithfully,*

*(Anand Srivastava, IDSE)  
EE  
Garrison Engineer*

**PERFORMA**

| Sr No | Description of item | CA Rate | Qty | Amount | Revised Rate | Final Qty | Amount Final |
|-------|---------------------|---------|-----|--------|--------------|-----------|--------------|
|-------|---------------------|---------|-----|--------|--------------|-----------|--------------|

144. In response to the above letters, the respondent had given the revised rates vide its letter dated October 4, 1995. When the petitioner

itself had sought the revised rates from the respondent, it cannot contend that the Contract bars the revision of schedule A rates. That apart, I note that the petitioner had constituted a Board of Officers for ascertaining the market rates for all schedule A items of the agreement and the Board proceedings were to be complete by May 15, 1996, which was not done and this aspect has been conceded by the petitioner before the learned Arbitrator. That apart, it is also noted that the respondent was partially compensated temporarily by way of non deduction of the rebate beyond the Deviation Limit, which was later recovered by the petitioner in the 105<sup>th</sup> RAR. The aforesaid also proves that the petitioner itself proceeded on a premise that the respondent is entitled to the revision of rates for the work beyond Deviation Limit of 10%.

145. Insofar as the submission of Mr. Wadhwa that there was no evidence led in support of the market rates nor any analysis of market rates produced nor supporting vouchers have been supplied by the respondent, the learned Arbitrator could not have awarded the claim as he has done against this claim is concerned; it is seen from the Award that the learned Arbitrator in the hearing dated July 24, 2001, had asked the petitioner to check the calculations of the claim. The petitioner was to inform the rates, if any, finalized by the Board of Officers appointed by them. The petitioner was to give details of the calculations considering

the rates as arrived at by the Board of Officers/Independent Assessment. Both the parties were to sit together and sort out the difference in quantities. The petitioner's stand, that the respondent had not submitted the details in support of the rates claimed by them with proof of cost of material. It is also petitioner's stand, that the respondent had not submitted the analysis in support of the rates claimed by them, therefore the claim may be rejected. The stand of the respondent was that the Contract being an Item Rate Contract, the petitioner should have ascertained the market rates. The petitioner having failed to do so, the rates asked by the respondent need to be granted. The learned Arbitrator was of the view that Board of Officers was constituted by the petitioner for fixing the rates to be applied beyond 10% Deviation Limit. No such rates were prepared by the petitioner as clarified by the petitioner in its letter dated January 31, 2002. The learned Arbitrator has observed, the petitioner ought to have finalized the rates but it failed to do so. I agree with the conclusion of the learned Arbitrator. The petitioner having failed to finalize the rates, is precluded to contend that the respondent has not supplied the market rates and supporting vouchers. In other words, the petitioner was within its right to independently ascertain the market rates and make an analysis thereof to come to a conclusion. The petitioner having lost the opportunity of determining the rates, the Arbitrator was within its right on

a reasonable basis to compute the rates, which he has done in the present case.

146. Insofar as the plea that the Arbitrator has arrived at a hypothetical amount while awarding an amount of Rs.121 Lacs is concerned, I note, on a reading of the award and perusing the submissions made by the parties, the learned Arbitrator has taken into consideration the work beyond 10% Deviation to be of Rs.356 Lacs approx on the rates quoted in the year 1990. This aspect has not been disputed by the petitioner in their objections or in the arguments. The learned Arbitrator adopted a formula of 10% inflation per year for six years to arrive at the figure of Rs.214 Lacs and further deducting the amount already paid to the respondent to arrive at a figure of Rs.121 Lacs. I note, the methodology adopted by the learned Arbitrator is a reasonable one. It is not the case of the petitioner that there was a better methodology in computing the revised rates. The only objection that it is a hypothetical figure need to be rejected. This Court is of the view that the award of the amount under this claim need not be interfered.

**Claim No.7 Claim due to double recovery of rock:-**

147. The submission of Mr. Darpan Wadhwa, that this claim was not part of the final bill dated March 29, 1997 needs to be rejected in view of

my conclusion above on clause 65 of GCC. The only ground of objection with regard to this claim is that the learned Arbitrator has ignored clause 4 of GCC, clause 3.1.4 of SCC and preamble of SSR Part II while granting this claim. The said clauses are reproduced as under:-

**GCC**

***“4. Works to be carried out (Applicable generally to Measurement and Lump Sum Contracts)-*** The Contract shall, except as provided under Schedules ‘B’, ‘C’ and/or ‘D’ include all labour, materials, tools, plant, equipment and transport which may be required in preparation for, and for and in the full and entire execution and completion of the Works. The descriptions given in Schedule ‘A’ and the Bills of Quantities shall, unless otherwise stated, be held to include waste on materials, carriage and cartage, carrying in, return of empties, hoisting, setting, fitting and fixing in position and all other labours necessary in and for the full and entire execution and completion aforesaid in accordance with good practice and recognised principles. The Contractor shall be deemed to have satisfied himself as to the nature of the Site, local facilities of access and all matters affecting the execution and completion of the Works. No extra charges consequent on misunderstanding or otherwise will be allowed.”

**SCC**

***“3.1.4 Where soft disintegrated rock and hard rock are mixed, the measurement for the total quantity shall be made by methods described in paras 3.1.2 and/or 3.1.3 above. The hard rock excavated shall be stacked and measured in stack. The quantity of hard rock excavated shall be reduced by 50% to allow for voids. From the total quantity of the mixture the quantity of hard rock excavated thus arrived at, shall be deducted to work out the quantity of the soft/disintegrated rock excavated.”***

148. On a perusal of the conclusion of the learned Arbitrator, it is

revealed that quantity of hard rock excavated and recovered shall remain the same. The stack measurements have to be reduced to 50% to account of the voids or solid measurements are to be taken as per the drawings/trench dimensions. The learned Arbitrator has directed the refund of excess amount recovered by the petitioner. During the course of arguments Mr. Wadhwa has not pressed the objections to this claim. In view of this, I uphold the Award to claim No.7.

**Claim No.8-Balance payment in excavation of hard rock and soft rock:-**

149. Insofar as the objection of Mr. Wadhwa, that this claim was not part of the final bill dated March 29, 1997 is rejected. The claim of the respondent was premised on the ground that that the actual width of the excavation was more than, what has been considered by the petitioner. The respondent's stand before the Arbitrator was also that the Contract is silent regarding the width of the hard rock and it provides for extra depth only. On the other hand, the petitioner relied upon clause 3.2.1 and clause 3.2.3 of the SSR, which provided that the contractor would be entitled to payment for authorized width only and not actual width. The said clauses are reproduced as under:-

*“3.2.1 Authorised quantities or those actually excavated, whichever are less shall be allowed.*

*3.2.3 Authorised widths - Unless otherwise provided*

*for, authorised widths shall be as under:-*

*(a) Upto 1 m depth, the width of the trench for the purpose of measurements of excavations, shall be arrived at by adding 40 cm to the external diameter of the pipe (not the sockets), cable, conduit, etc. Where a pie is laid on concrete bed/cushioning layer the authorised width shall be the external diameter of the pipe plus 40 cm or the width of concrete bed/cushioning layer, whichever is more.*

*(b) For depths exc. 1m an allowance of 5 cm per metre of depth for each side of the trench shall be added to the authorised width (i.e external dia of pie plus 40 cm) except where battering or benching has been ordered. This allowance shall apply to the entire depth of the trench. The authorised width in such case shall, therefore, be equal to depth of trench plus external dia of pipe plus 40 cm or the width of concrete bed/cushioning layer, whichever is more.*

*(c) Where more than one pipe, cable, conduit, etc. are laid, the diameter shall be reckoned as the horizontal distance from outside to outside of the outermost pipes, cable conduits, etc.*

150. The respondent had primarily placed reliance on the expression *‘unless otherwise provided for’* in clause 3.2.3 to mean, any specific clause agreed upon by the parties and clause 3.1.4 of SCC is the particular clause for excavation in hard rock and soft rock, which was the claim in issue. The conclusion of the learned Arbitrator in favour of the respondent is not tenable, which was primarily relying upon clause 3.1.4 which I reproduce below, overlooking the clause 3.2.3 contrary to the case set up by the respondent that the Contract is silent regarding the width of the hard rock and provided for extra depth only, and also clause 3.2.1, which is part of section 3 relating to earth work, stipulates authorized

quantities or those actually excavated, whichever are less shall be allowed.

### **SCC**

*“3.1.4 Where soft disintegrated rock and hard rock are mixed, the measurement for the total quantity shall be made by methods described in paras 3.1.2 and/or 3.1.3 above. The hard rock excavated shall be stacked and measured in stack. The quantity of hard rock excavated shall be reduced by 50% to allow for voids. From the total quantity of the mixture the quantity of hard rock excavated thus arrived at, shall be deducted to work out the quantity of the soft/disintegrated rock excavated.”*

The Arbitrator has erred in relying upon clause 3.1.4, which is not applicable and the claim with regard to this claim need to be set aside being contrary to the contractual provision.

### **Claim No.9– Payment due to circuit wiring:-**

151. The submission of Mr. Darpan Wadhwa, that this claim was not part of the final bill needs to be rejected in view of my conclusion above. The claim of the respondent was, that it has not been paid for circuit wiring done in the construction of the hospital. It was the case that besides the point wiring, they were supposed to be paid separately for the circuit wiring. The Arbitrator referred to item 482 and 568k of Schedule A. The same are reproduced as under:-

**“482:** *Point wiring with stranded copper conductor 2.5 sq. mm (Nominal area) PVC insulated unsheathed cable in and*

*including concealed stove enamelled rigid steel conduit for one light point or one fan point controlled by one switch including 16 gauge copper continuous earth wire (switch measured separately) including necessary cutting chases and making good”.*

*“568-K: Wiring with 2-2.5 mm 2 stranded copper conductors PVC insulated with unsheathed cable laid in MS Conduit system (Surface/concealed)”*

152. The case of the petitioner was, item 482 provided for point wiring and point wiring is specifically defined in section 19-Internal Work, SSR, which reads as under:-

*“Preamble to SSR (General Specification) for Point Wiring*

*(1) the rates of Point Wiring include supplying and fixing/drawing of cables for carrying out wiring of a circuit of any length from the distribution board or iron clad switch up to ceiling rose or connector, socket, outlet, lamp holder, switch or fan regular including additional length from connector to lamp holder (in case of stiff pendants points and water tight bracket points) and back-plate to lamp holder (in case of plain bracket points).”*

153. The petitioner also relied upon Note 4 and Note 9 of Schedule A items which are also reproduced as under:-

*“4. The description of items given in column 2 shall be read in conjunction with these General Notes, Preambles to MES Schedule 1988, Specifications, Drawings and conditions of contract and these documents are deemed to be jointly explanatory of the work included against individual item. In case of any discrepancy between the provisions of various documents of the Contract, the Order of Precedence shall be as laid down in Condition 6A of IAFW -2249.*

*9. For full description of material and workmanship, reference shall be made to the specifications contained in*

*MES Standard Schedule of rates- 1988 Part I, so far as applicable to each item of work and supplemented and amended by particular specifications and drawings. In case sufficient details for fixing arrangements, method of laying of any item included in schedule A is not given in specifications/drawings, the same shall be supplemented by the manufacturers' instructions and executed in accordance with good engineering practice and recognised principles and nothing extra over the tendered rates shall be paid to the contractor on this account."*

154. Reading of the provisions reproduced above would reveal that there is no dispute that the point wiring has to be done with stranded copper conductor 2.5 sq. mm (Nominal area) PVC insulated unsheathed cable and including concealed stove enamelled rigid steel conduit for one light point or one fan point controlled by one switch including 16 gauge copper continuous earth wire (switch measured separately) including necessary cutting chases. Item 568k also shows wiring with 2-2.5 mm 2 stranded copper conductors PVC insulated with unsheathed cable laid in MS Conduit system (Surface/concealed). The items 482 and 568k stipulate identical specification of the cable. The Note 4 of Schedule A, inter-alia stipulate that the description of items given in column 2 has to be read in conjunction with the Notes, Preamble to MES Schedule 1988, Specifications, Drawings and Conditions of Contract and these documents are deemed to be jointly explanatory of the work included against individual items. In case of discrepancy, the Order of Precedence shall be

as laid down in Condition 6A of IAFW 2249. Similarly, a reading of Note 9, also makes it clear that the full description of material and workmanship, reference shall be made to the specifications contained in MES Standard Schedule of rates- 1988 Part I, so far as applicable to each item of work and supplemented and amended by particular specifications and drawings. In case sufficient details for fixing arrangements, method of laying of any item included in schedule A is not given in specifications/drawings, the same shall be supplemented by the manufacturers' instructions and executed in accordance with good engineering practice. I may point out here, the case of the respondent was primarily based on clause 6A of GCC which reads as under:-

***“6A. Discrepancies and Adjustment of Errors (Applicable generally to Measurement and Lump Sum Contracts)-***

*The several documents forming the contract are to be taken as mutually explanatory of one another, detailed drawings being followed in preference to small scale drawings and figured dimensions in preference to scale.*

*In the case of discrepancy between Schedule “A”, the Bills of Quantities, the Specifications and/or the Drawings, the following order of precedence shall be observed:-*

- (a) Description of Schedule “A” / Bills of Quantities.*
- (b) Particular Specification.*
- (c) Drawings.*
- (d) General Specification.*

155. From the perusal of 6A, the Order of Precedence is what has been laid down therein. First, the question would arise, whether there was any

discrepancy in description of item. If, yes whether the Arbitrator was right in relying upon the Order of Precedence to hold that the Item No.482 shall prevail. It may be clarified here that the approximate requirement of 568k was 500 meters. The respondent was paid 213.20 meters for wiring under item 568k as the same was raised in the final bill. The Arbitrator had paid the respondent under this head for 1,13,742.90 meters. Sub clause (1) of Section 19, which relates to rates for point wiring states that it would include supplying and fixing/drawings of cables for carrying out wiring of a circuit of any length from the distribution board or iron clad switch upto ceiling rose or connector, socket outlet, lamp holder, switch or fan regulator including additional length from connector to lamp holder. In fact, the list runs from A to Q. The question also would be, whether section 19 would need to be relied upon in construing item No.482. There is no dispute that Section 19 relates to rates for point wiring and item 482 relates to point wiring and are similar. The conclusion of the learned Arbitrator, that item 482 of Schedule A, does not have the same nomenclature as SSR item is not correct. A perusal of both the provisions, shows item 482 specify the specification of cable with a point each, of light, fan controlled by one switch. Item no.482A to 482D specify the number of points and the manner of operation whereas section 19(1)(a) is an inclusive description of the rates of point wiring

which contemplates carrying of a circuit wiring of any length from distribution board till the end point like lamp holder, switch of fan regulator. To say they are different would make Section 19 more specifically Clause 1(a) meaningless. Moreover, the specification of cable in item 568k and 482 is also identical and under 568k, the total quantity of wiring is 500 running meter. If the intent of the contractor was to pay separately for circuit wiring then the figure would be more than 500 meters for which a deviation order need to be issued, which has not been done in this case. In other words, the total quantity of wiring with identical specification could not have exceeded 500 meters and the respondent was paid for 213.20 meters of wiring under 568k, the quantity as claimed in the final bill. So, the conclusion of the learned Arbitrator that the Preamble is not applicable is not correct and further reliance on instruction 6A of IAFW 2249 is also misplaced when section 19 (1) (a) of the SSR is applicable and further the reliance placed on the definition of 'Point' and 'Circuit' as given in IS 732 of 1989 and other Government specifications is not tenable being beyond the Contract-Agreement. The claim for 1,13,742.90 meters is clearly an afterthought and the Award to claim 9 needs to be set aside being contrary to contractual terms. I order accordingly.

**Claim No.11 Cost due to damage and demolition done by E/M Agency:-**

156. The plea of Mr. Wadhwa, that this claim was not part of the final bill needs to be rejected. The reliance has been placed by the petitioner primarily on clauses 5 and 8 of GCC and 16 of SCC. As per the said clauses, the payment of the Sub-Contractor for Fire Detection, Extra Electrification, MATV system and Acoustic treatment etc is to be made directly by the respondent who is responsible to the work carried out by the Sub-Contractor and is liable to make good the loss or damage caused on their account; the Contractor shall permit free access and reasonable facilities to other agencies or departmental workman, if any, engaged by Government to carry out their part of work in the area. No extra payment, shall, however be made to the contractor on this account whatsoever. In view of the aforesaid provisions, it is clear that the Sub-Contractors, who have been identified by the petitioner are engaged by the respondent, any act or omission of the Sub-Contractor resulting in loss has to be made good by the respondent. Per contra, any damage caused by the sub-contractor not engaged by the respondent would not be the liability of the respondent. For the work related to Fire Detection, Extra Electrification, MATV system and Acoustic treatment etc., the sub-contractors were engaged by the respondent. The case of the respondent was that the

agencies doing the work of air conditioning and gas pipes were appointed by the petitioner. The various correspondence filed by the respondent during the course of the submission, reveals the damage caused by the agencies carrying out the Acoustic Treatment, Air Conditioning work, Fire Fighting, Extra Electrification, Medical Gases etc. It is noted from the correspondence that the false-ceiling has been damaged by Fire Fighting Agency and Air Conditioning Contractor, Extra Electrification Contractor. The letters also reveal breaking of window panes etc by Acoustic Agency, the Lift Agency. In view of the contractual provision, the Agencies with which the petitioners had Contract, the damage caused by those sub-contractors i.e the Air Conditioning Agency and Medical Gases Agency needs to be borne by the petitioner. At the same time, the letters also reveal that the false-ceiling was not only damaged by the Air Conditioning Agency but by other Sub-Contractors of the respondent. The Arbitrator should have demarcated the proportion of damage to each of the agencies and fasten the liability accordingly. It is noted that the Arbitrator has awarded an amount of Rs.10,75,000/- on account of false-ceiling against a claim of Rs.12,00,000/-. The Arbitrator has not given any basis for awarding an amount of Rs.10,75,000/-. Awarding such an amount gives an impression, as if, the whole of the false-ceiling was damaged by the Air Conditioning/Medical Gas Agencies. That is not the

case, at least on the reading of the letters. The amount of Rs.10,75,000/- as compared to the total claimed, appears to be on higher side. I am of the view, that the agencies appointed by the petitioner, being also equally responsible to the damage caused to the false-ceiling, which had to be repaired by the respondent, an amount of 50% of the total claimed amount i.e Rs.6,00,000/- would suffice the claim. Insofar as the award of 3,00,000/- against replacement of door, windows, repair of flooring, brick work, the Arbitrator has not given any finding as to which sub-contractor was responsible for the damage. The letters reveal window shutters along with glass pane were broken by M/s Pan Enterprises, doing acoustic work. There is also correspondence to suggest that flooring was damaged because of dismantling of the partition walls by the Air Conditioning Agency appointed by the petitioner. As the amount awarded is Rs.3,00,000/-, in the given facts, I do not think, this part of the award needs to be interfered with. The objections to this extent are rejected.

**Claim No.12 Payment on account of deficient water supply and refund of water charges:-**

157. This claim relates to the payment on account of deficient water supply and refund of water charges. The plea of Mr. Wadhwa, that it was not part of the final bill needs to be rejected. The petitioner has placed reliance on clause 31 of GCC and 22 of SCC. The same are reproduced

as under:-

*“31 Water- The Contractor shall allow in his tender and provide at his cost all water required for the use of Works or his employees on the Works, together with all pipes and fittings or other means that may be necessary or required to ensure a proper and ample supply of water for all purposes for the Works.*

*In the event of a provision existing in the tender documents for M.E.S Supply of water on payment and the contractor desiring to buy it from M.E.S., he will be permitted to draw it from M.E.S. Water Supply System or other M.E.S. sources at such point or points as may be decided by the Garrison Engineer on his sole discretion and the contractor shall make necessary arrangements at his own cost for lifting, pumping, carrying or conveying water to the site of works as required.*

*Normally in all cases of water supplied from M.E. S. Piped system, the supply shall be metered and paid for by Contractor at the All India Flat Rate per 1,000 gallons which includes hire charges for meter to be provided by M.E.S. In exceptional cases where metering is not feasible, i.e water from M.E.S. wells or static tanks, or in the case of Term Contracts where the Contractor draws water not from any ONE source, the Contractor shall pay Rs.3.75 per every Rs.1,000 worth of work done priced at Contract rates. In the event of breakdown of M.E.S. Supply of water or in the event of the said supply of M.E.S. water becoming intermittent, the Contractor shall have no claim whatsoever on this account.*

*The water used for any or all requirements shall be subject to the prior written approval of the Engineer-in-Charge.”*

## **“22. Water**

*22.1 Water will be supplied to the contractor for the work and for use of his workmen at the points shown on site plant or as decided by the GE for which recovery will be effected @ Rs.3.75 for every Rs.1,000/- worth of work done priced at the contract rates.*

*22.2 In the event of break down of MES Supply of water or in the event of said supply of MES, water supply becoming intermittent, the contract may be required to make his own alternative arrangements. The contractor shall have no claim whatsoever from the Government on any such account.*

*22.3 The contractor shall make his own arrangements for the storage of water to ensure adequate supply at all times during execution of work.*

*22.4 The contractor if so desires, will be allowed to augment the department's water supply by boring wells at his own cost at site (s) approved by the GE. On completion of work, the contractor shall remove pipe etc installed and make good the site as directed by the Engineer-in-Charge with out any extra cost to Govt. No rebate shall be given for augmentation of water by the Contractor and charges for water shall be recovered at the rate mentioned here in before. The contractor shall, however, ensure that water drawn from such sources is clear and free from all impurities and as suitable for mixing concrete, mortar, washing aggregate and curing of concrete as specified in IS 456”.*

158. It is clear from the provisions of the Contract, the prime responsibility for providing water to the Contractor for the work as well as to its employees was that of the petitioner. The water which was to be supplied by the MES, the respondent was to pay Rs.3.75/- per rupees thousand worth of work done. There is a finding by the learned Arbitrator that the respondent was augmenting the supply. The petitioner supplied part of the water. The respondent also placed on record, the letter that shows, the water is being purchased by it from the tankers, which had to be brought at its own cost. The only ground for challenge is that the

Arbitrator in para 242 of the Award, wrongly holds that the primary responsibility for supply of water was of the petitioner. The said finding, even if not correct, may not have any bearing on the ultimate outcome of this claim. The Arbitrator has noted, recovery of Rs.12,92,343/- has been effected by the petitioner from the final bill. The Arbitrator, noting that the water was also supplied by the petitioner, allowed the petitioner to recover an amount of Rs.5,11,0000/- and directed refund of Rs.7,81,843/-. In the Award, the Arbitrator has given a finding that since large part of the water was not supplied by the petitioner itself, it cannot recover money against the same. In view of such a finding that the recovery in the final bill was wrong, he has granted the aforesaid amount with which no fault can be found. The award to this claim is upheld.

**Claim No.14 Cost of damage due to excessive water logging in basement:-**

159. Insofar as claim No.14, which relates to cost of damage due to excessive water logging in the basement against which the learned Arbitrator has granted an amount of Rs.3,00,000/- is concerned, the submission of Mr. Wadhwa that this claim was not part of the final bill is concerned, the same needs to be rejected in view of the conclusion already given above. The petitioner relied upon clauses 36 and 48 of GCC, which relates to precautions against risk to be taken by the contractor and

damage and loss. The same are reproduced as under:-

“36. **Precautions against Risks-** The Contractor shall be responsible at his own expense, for precautions to prevent loss or damage from any and all risks other than for Accepted Risks and to minimise the amount of any such loss or damage and for the provision of all protective works, casings, coverings, etc, required for the purpose, until the Works have been handed over complete to the Engineer-in-Charge.”

“48. **Damage and Loss-** (a) All plant, temporary building, equipment, and things on the Site provided by or on behalf of the Contractor for the construction of, but not for incorporation in the Works shall stand at the risk and be in the sole charge of the Contractor and the Contractor shall be responsible for, and with all possible speed make good, any loss or damage thereto arising from any cause whatsoever, including the accepted risk.

(c) Save as above, the Works and all materials and things whatsoever including such as may have been provided by Government on the Site in connection with and for the purpose of the Contract shall stand at the risk and be in the sole charge of the Contractor and the Contractor shall be responsible for, and with all possible speed make good, any loss or damage thereto arising from any cause whatsoever, other than the accepted risks and shall deliver up all the Works to the Engineer-in-Charge in a clean state, complete in every particular.

In the event of any loss or damage to Works and materials on the Site from any of the accepted risks, or loss or damage from accepted risk and fire to Government buildings handed over to contractor for execution of works referred to in Condition 47, the following provision shall have effect:-

(i) The Contractor shall, as may be directed in writing by the Engineer-in-Charge, remove from the Site any debris and so much of the Works as shall have been damaged, taking to the E.E's store such articles and/or materials as may be directed;

- (ii) *the Contractor shall, as may be directed in writing by the Engineer-in-Charge, proceed with the erection and completion of the Works under and in accordance with the provisions and conditions of the Contract; and*
- (iii) *There shall be added to the Contract Sum the net amount due, ascertained in the same manner as for deviations, or as prescribed for payment, in respect of the re-execution of the Work lost or damaged, the replacement of any materials and things lost or damaged but not incorporated in the Works at the date when the loss or damage occurred, and the removal by the Contractor as provided above the debris and damaged Work referred to therein. Provided always that the Contractor shall not be entitled to payment under this Condition in respect of so much loss or damage as has been occasioned by any failure on his part to perform his obligations under the Contract.*
  - (c) *Save as provided above, the Contractor shall at his own expense reinstate and make good to the satisfaction of the G.E. or make compensation for any injury, loss or damage occasioned to any property or right whatever including property and rights of Government (or agents, servants, or employees of Government) being injury, loss or damage arising out of or in any way in connection with the execution or purported execution of the Contract and further, the Contractor shall indemnify Government against all claims enforceable against Government (or any agent, servant or employee of Government) or which would be so enforceable against Government were Government, a private person, in respect of such injury (including injury resulting in death), loss or damage to any person whomsoever or property, including all claims which may arise under the Workmen's Compensation Act or otherwise.*

160. The stand of the respondent was, the water logging was due to bad workmanship of the third agency, whereas the petitioner's stand was that the respondent should have taken precautions and any loss suffered was

on account of the respondent. According to the petitioner, it had never ordered or gave direction to the respondent to carry out such work. The objection of the petitioner, primarily being; that there is no evidence to substantiate water logging in the basement had affected the work of the respondent; work of water logging was actually carried out by the respondent and the actual cost incurred in carrying out such work. It was the case of the petitioner that the dewatering was done by the other agency M/s Simplex Concrete Piles India Ltd., which was carrying out the work pertaining to leakage. This stand of the petitioner suggests that there was a leakage, which resulted in water logging of the basement. The respondent relied upon certain letters, a reference of which is made in the Award. I have seen some of the letters annexed along with short synopsis filed by the respondent. From the perusal of the same, it is noted that the respondent did refer to water logging of the basement, wherein, it is stated that basement at certain places is full of water and the same is being pumped out. They have also stated, that they would be claiming for the pumping out of the water separately. Clauses 36 and 48 of GCC does not suggest, that the contractor shall be liable for the damage caused due to the workmanship of the third party or for the damage caused for which he has no responsibility. Further, it is noted, the water logging was not for the reasons attributable to the respondent as no evidence has been placed

to prove the same. Since, the finding of the learned Arbitrator is based on the letters and the learned Arbitrator has granted an amount of Rs.3,00,000/- for the amount spent for engaging labour and deployment of machinery, no ground exists for interfering with the award.

**Claim No. 18: Balance payment due to escalation embargo imposed by CEDZ:-**

161. Having heard the learned counsel for the parties, insofar as the submission of Mr. Wadhwa that this claim was not part of the final bill dated March 29, 1997 needs to be rejected in view of my conclusion above. To appreciate the submissions made by learned counsel for the parties, it is necessary to reproduce the contents of the amendment dated January 6, 1994. The same is reproduced as under:-

*“AMENDMENT No.1 dated 6.1.1994*

*WHEREAS on the 29<sup>th</sup> day of June 1994, agreement was entered into between the resident of India represented by Chief Engineer, Delhi Zone, Delhi Cantt-10 (hereinafter referred to as Government and M/s S.A. Builders Ltd, Registered Office: 500, No.50, Section 26, Madhya Marg, Chandigarh-160019 (hereinafter referred to as the Contractor) under which the said contractor among other conditions contracted to provide provn of accn for army hospital (R&R) at Delhi Cantt.*

*AND WHEREAS the said parties are mutually desirous of amending the said agreement in certain respects.*

*It is therefore, hereby agreed by and between the parties thereto as follows:-*

*FIRST: That no reimbursement due to variation in prices of material shall be admissible beyond 30<sup>th</sup> April, 1994, except as described in subsequent paras.*

SECONDLY: That the reimbursement due to variation in prices for any new materials ordered now onwards and luxalon and door shutters shall remain admissible provided that contractor places firm orders for procurement of luxalon and door shutters by 10.1.1994 failing which the reimbursement due to variation in prices of materials for luxalon and door shutters shall be admissible beyond 30.4.1994.

THIRDLY: That this amendment shall be numbered as serial page 505 (sic.) of the contract that the total number of pages on the contents shall be amended to read as 559 in lieu of 558.

LASTLY: That all other terms of the contract shall hold good in all other respects and be in full force and effect.”

162. There is no dispute that the date of start of work was March 17, 1991. The stipulated date of completion was October 16, 1993. The period of completion of the work was 27 months. The work was actually completed on March 25, 1997. The work was extended/delayed by 42 months. It was the case of the petitioner that the escalation embargo was put with the consent of both the parties by making amendment of Contract. Reliance has been placed on letters dated May 25, 1993, March 22, 1995 and May 15, 1996 to contend that both the parties understood the amendment to mean freezing of rates. That apart, I note, that in letter dated November 25, 1993, the petitioner had, in its communication to the respondent, wherein, it was communicated to the respondent that to review grant of final extension, the respondent was requested to give an undertaking that it will not claim for price escalation towards material,

fuel and labour for variation in price indices and labour indices respectively as per provisions under conditions 24 and 25 of the Special Conditions. The amendment dated January 6, 1994 was duly signed by the respondent. Even communications, thereafter (which have been given to me during the course of the arguments), more specifically the letters dated July 26, 1996, June 15, 1996, May 15, 1996, February 26, 1996, November 18, 1995, March 22, 1995 also reveals that it was the understanding of the respondent as well that the amendment dated January 6, 1994 had put a freeze on escalation. In view of the above, Mr. Wadhwa is right in his submission, inasmuch as the amendment dated January 6, 1994 signed by both the parties expressly prohibits reimbursement due to variation in prices of material beyond April 30, 1994. The wholesale price index was agreed to be frozen as of April 30, 1994 prices. On the interpretation of second para of the amendment, it must be read to mean that the reimbursement due to variation in prices for new materials ordered now onwards to mean luxalon and door shutters, provided further, the respondent places firm orders for procurement of luxalon and door shutters by January 10, 1994. If the second para is read to mean that reimbursement due to variation in prices would be available for materials as well then the first paragraph would become redundant. I agree with the submission of Mr. Wadhwa in that regard. The presence of the word

‘AND’ is superfluous and if it is read so, it would nullify the very purpose of the amendment dated January 6, 1994 as the original tender already had a provision of escalation and the second para of the amendment is limited to door shutters and luxalon, if the orders for procurement are placed by January 10, 1994, failing which no reimbursement due to variation in prices of materials for luxalon and doors was admissible beyond April 30, 1994. The submission of Mr. Nidhesh Gupta that the plain language of amendment shows, there was no freeze on escalation on new materials orders after the amendment need to be rejected for the reasons already stated above.

163. Insofar as his submission that it is a settled law, while interpreting a Contract, its plain and simple meaning is to be taken into consideration to arrive at the intention of the parties and Courts cannot supplement or supplant words to it, howsoever the Court might dislike the result, by placing the reliance on the judgment of ***Central Bank of India, Amritsar*** (supra) is concerned, the Supreme Court was concerned with the interpretation of clause 10 of the policy, which I reproduce as under:-

*" 10. This insurance may be terminated at any time at the request of the insured, in which case the company will retain the customary short period rate for the time the policy has been in force. This insurance may also at any time be terminated at the option of the company, on notice to that effect being given to the insured, in which case the company shall be liable to repay on demand a*

*rateable proportion on the premium for the unexpired term from the date of the cancelment. "*

The Supreme Court held that the plain and categorical language cannot be radically changed by relying upon surrounding circumstances. Thus, right to terminate at will, cannot by reason of the circumstances be read as a right to terminate for a reasonable cause.

164. Insofar as the **Delhi Development Authority** (supra) is concerned, the Supreme Court in para 9 has stated as under:-

*"9. Though the intention of Development Authorities in general is to allot plots to the houseless, the policy and scheme has to be given effect with reference to the specific wording of the eligibility provision. If DDA wanted to bar everyone owning a plot/house/flat from securing an allotment, it could have made its intention clear by simply providing that "anyone owning or holding a long term lease, any plot/house/flat in Delhi/New Delhi/Delhi Cantonment area, will be ineligible for allotment under this scheme". But DDA chose to make the eligibility clause subject to an exemption. If it chose to exempt certain categories, such exemption has to be given effect. When the term of exemption is specific and unambiguous, it is not possible to restrict its applicability or read into it, a meaning other than the plain and normal meaning, on the assumption that the general object of the Scheme was different from what is spelt out in the term. Be that as it may."*

165. In **Mysore State Road Transport Corporation, Bangalore** (supra), the Supreme Court in para 10 has stated as under:-

*"10 The words "have been given" are significant. They would refer to the interim relief and dearness allowance*

already given to the Mysore employees and such Bombay and Hyderabad employees as had opted for the Mysore rates of dearness allowance as stated in various orders issued between 1960 and 1964. It is not possible to sell out from them an agreement that the respondents would get interim relief and also increased dearness allowance with retrospective effect from January 1, 1960. The next important word is "now" in the second part of Clause 16(1). The word "now" occurs in the sentence "the management now agree to set up a Joint Committee of representatives of management and labour". If the first part of Clause 16(1) had really incorporated an agreement as contended for by the respondent, the word "now" could not have been used in the second part. Instead of the word "now" the draftsman would have used the word "also" or "further", because the second part would incorporate another agreement. Again, the word "agree" is expressly used in the aforesaid sentence in the second part. Similarly the expression "it is agreed" is expressly used in Clause 16(11). If the first part of Clause 16(1) were intended to incorporate an independent agreement, the draftsman would have used the same language there. The omission of the word "agree" or "it is agreed" is therefore significant. It is plain that the first part of Clause 16(1) does not incorporate an independent agreement. The word 'employees' in the first part of Clause 16(1) cannot refer to all the employees belonging to Mysore employees because the increases in the dearness allowance made with effect from January 1, 1960, January 1, 1961, April 1, 1963 and April 1, 1964 were granted to the Mysore employees and to those Hyderabad and Bombay employees who made an option for the Mysore rates of dearness allowance. Admittedly, the Hyderabad and Bombay employees did not exercise the requisite option. The High Court says that it makes little sense if the first part of Clause 16(1) is construed as a mere recital of history. If the draftsman had not intended to grant increased dearness allowance to the respondents, he would have omitted the first part and then Clause 16(1) would have included only the second part thereof. With

*respect, this reasoning does not appear to us to be cogent, for even on this reasoning the opening phrase in Clause 16(1) “the pay-scales of the Corporation employees not having been revised since the first Trace Agreement of January 10, 1998”, remains a mere recital of history and should have been omitted. As the language of the first part is plain and unambiguous, it is not legitimate to speculate into the reasons which prompted the contracting parties to include it in clause 16(1).”*

The Supreme Court held, where a language of a part of a clause of a Contract is plain and unambiguous, it is not legitimate to speculate into the reasons which prompted the contracting parties to include in it that clause.

166. Similarly, in **H.M Kamaluddin Ansari and Co.** (supra), the Supreme Court in para 27 has held as under:-

*“The headings prefixed to a section or a group of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statutes but they may explain ambiguous words. The view is now well settled that the headings or titles prefixed to a section or a group of sections can be referred to in determining the meaning of doubtful expressions. It is true that the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words. The law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words. The golden rule is that when the words of a statute are clear, plain and unambiguous, that is, they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences. The duty of a Judge is to expound and not to legislate, is a fundamental rule. If we apply the*

*same principle to the interpretation of cl. 18 of the standard form of contract, it would be clear that the clause unequivocally contemplates a claim for the payment and it is open to the Union of India to appropriate any amount due to the contractor under other pending bills. It does not contemplate the amount due and, therefore, the heading of this clause which talks of only 'Recovery of sum due' will not control cl. 18. The clause in our opinion gives wide powers to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time thereafter may become due to the contractor under other contracts."*

167. From the perusal of the judgments referred to above, there is no dispute on the proposition of law laid down in those judgments. Surely, the judgments has to be read in the context where there is no ambiguity in the provisions of the Contract/Statutes, which have clear words then the plain and simple meaning need to be given. Insofar as the present case is concerned, the second para of the amendment dated January 6, 1994, more specifically the presence of the word 'AND' has created ambiguity. In fact if the word 'AND' is read then the para No.1 would become redundant, which would defeat the very purpose of the amendment dated January 6, 1994. To make the amendment dated January 6, 1994 more meaningful and to achieve the purpose for which it was entered and to ensure, every clause therein is made purposeful, then the only way, it has to be read in the manner specified above that no escalation on materials after April 30, 1994. Suffice to state, the judgments relied upon by Mr.

Gupta are not applicable to the facts of this case. In the case in hand, as noted above, it was the understanding of the respondent as well that the amendment puts an embargo on the admissibility of variation in rates of material. Even on that ground, the plea of the respondent that the contents of paragraph two are clear and unambiguous need to be rejected.

168. The plea of Mr. Gupta that if the amendment dated January 6, 1994 is interpreted in the manner suggested by Mr. Wadhwa would lead to absurd consequences and impossibility of performance is concerned, the same is liable to be rejected for the reason that the amendment was executed on January 6, 1994. The cut of date was January 10, 1994. As concluded above, the reimbursement due to variation in prices would be relevant only for luxalon and door shutters, provided, the orders for procurement of luxalon and door shutters is made before January 10, 1994, which was still four days away from January 6, 1994. Merely, because the date of January 10, 1994 has elapsed would not make the para redundant or would be a case of impossibility of performance. Moreso, the respondent could have sought the extension of time beyond January 10, 1994 so as to enable the respondent to place orders with regard to luxalon and door shutters. Nothing has been brought to my notice to show that the extension of time was sought for beyond January 10, 1994. Had they sought extension of time beyond January 10, 1994 and placed

the orders, the reimbursement for variation of prices would be admissible on luxalon and door shutters. The plea of the respondent is clearly an afterthought. The reliance placed by Mr. Nidhesh Gupta on the judgments in the case of **(i)Chairman and M.D., N.T.P.C. Ltd. V. Reshmi Constructions, Builders and Contractors (2004) 2SCC 663; (ii) National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd. (2009 )1SCC 267; (iii) Ambica Construction vs. Union of India (UOI) (2006 )13SCC 475; (iv) Associated Constructions v. pawanhans helicopters ltd. (2008)16 SCC128;** to contend that doctrine of impossibility is a valid excuse to legal obligation would not be applicable to the facts of this case. Insofar as the plea of coercion is concerned, the same is also liable to be rejected. It is noted that the amendment was signed without protest and demur on January 6, 1994. The first letter, wherein the plea of coercion was raised was on December 11, 1995 and also July 26, 1996 (as noted from the documents handed over during the submissions), wherein the respondent had stated that “the amendment to this was signed by the undersigned under coercion and the same was specifically asked by the department in writing. At that time, we were left with no alternative as the department was not giving the extension without this amendment”. A letter after almost more than 1 ½ years would not suggest/prove coercion. Coercion need to be specifically pleaded. In any case, the Arbitrator has

not granted the claim on the basis of coercion. Such a plea would not be available to the respondent to justify the grant of claim in its favour. Hence, the conclusion of the learned Arbitrator is implausible and perverse and need to be set aside.

**Claim No.20 Payment of item No.238 of Schedule A and other items:-**

169. The objection of Mr. Wadhwa, that this claim was not part of the final bill needs to be rejected. Insofar as the submission of Mr. Wadhwa that the learned Arbitrator has failed to appreciate, as per section 13 of SSR, rates for marble flooring is inclusive of cement slurry used for joining and setting the tiles, hence claiming it again under item 238 amounts to double payment is concerned, Section 13(a) of the SSR which relates to Floor, Finishes and Pavings stipulates that the rates are exclusive of bedding layer or screed but included for setting and jointing the tiles in cement paste or slurry.

170. At the same time, item 238 of schedule A reads as under:-

*“Brushing with cement slurry over concrete/brick surfaces, with 3 kg. Of cement per square metre including cleaning of surfaces.”*

171. There is no dispute that the claim relates to payment of 3 kg cement slurry used for flooring which was not made as per rates mentioned in item 238. There is no dispute that the work pertaining to item 238 of

Schedule A had actually been executed but payment has not been made on the instructions of Engineer-In-Chief (*para 294 of the Award*). Therefore, the amount needs to be paid. The Arbitrator has also held that since the said item is Schedule A item, it qualifies for escalation and had awarded a sum of Rs.7,84,285 by adding escalation on the same. In total, he granted an amount of Rs.10,37,217/-. During the course of submission, Mr. Wadhwa has conceded to the claim. Having seen the Award and the fact that the learned counsel for the petitioner had not contested the claim as awarded, the objection to claim 20 of the Award needs to be rejected.

**Claim No.21 Payment on account of defective CI Pipes for fire fighting system:-**

172. The submission of Mr. Wadhwa that this claim was not part of the final bill dated March 29, 1997 needs to be rejected for the reasons already stated above. There is no dispute that the petitioner was to supply the pipes to the respondent. There is also no dispute that under clause 10(b) of GCC, the respondent was liable to bear the cost of transportation, loading, unloading, storing etc and in terms of clause 46 of GCC, the respondent was liable to cure/repair any defect till the expiry of the Defect Liability Period. There is no doubt, in normal course, if any pipe was defective, the respondent could have asked the petitioner to replace it. There is no such evidence, placed on record nor brought to my notice that

the respondent has written such letters to the petitioner. Be that as it may, the primary objection to the Award against this claim is that there is no evidence that the pipes were defective when supplied by the petitioner; the pipes were not damaged while in the custody of the respondent including during transportation; no replacement order/voucher in support of actual cost incurred in replacing the pipes.

There is a finding by the learned Arbitrator that the defective pipes were issued by the petitioner. Even though, he had referred to the fact that the said aspect was brought to the notice of the petitioner by the respondent vide letter dated March 23, 1998, the said letter was after the final bill dated March 29, 1997 was submitted. During the course of submission, Mr. Nidhesh Gupta, learned Senior Counsel has placed before me a letter dated August 26, 1997 also which was written by the respondent to the petitioner during the Defect Liability Period, wherein, it was mentioned that the pipes supplied by the petitioner were not withstanding the pressure. The pipes burst and broke at many places at site. No communication has been shown, wherein, the petitioner had called upon the respondent to seek replacement of the defective pipes. In the given background, the Arbitrator had awarded an amount of Rs.40,600/- against this claim fixing the cost of each pipe at Rs.700/-. I do not see any perversity in the Award against this claim, which can be

interfered by this Court. The award to this claim is upheld.

**Claim No.23 Refund of rebate over and above quoted sum:-**

173. Insofar as claim No.23 is concerned, the objection of Mr. Wadhwa that it was not part of the final bill needs to be rejected. It is noted that this claim was primarily allowed by the learned Arbitrator relying upon the letter dated October 23, 1990 of the petitioner, wherein the petitioner has clarified that rebate of 12% is on the quoted sum and not on the quoted rates. No doubt, Mr. Wadhwa is right in his submission that the respondent had offered 12% rebate on the quoted rates, to be calculated on the basis of the final bill by referring to the letter of the respondent dated September 28, 1990 wherein the respondent has stated as under:-

*“We have quoted our rates under the provisions of the NIT and also offered a rebate of 12% on our quoted rates on the subject work. We have again reviewed our rates referred by you in the letter under reference and ofund that no revised rates can be offered by us for these items. Hence, we are returning herewith the letter in original and its enclosures duly signed for your records. We further request you to kindly expedite the acceptance of the tender as our offer is valid only upto 23<sup>rd</sup> November, 1990.”*

174. Such an offer of the respondent was not agreed to by the petitioner when the petitioner, in its letter dated October 23, 1990 has clarified that the rebate is on the quoted sum and not on the quoted rates. That being so, if the learned Arbitrator has awarded the refund of Rs.22,46,224/-

being 12% rebate on the Contract sum of Rs.25,00,44,768/-, I do not see any illegality in the same. The award is upheld.

**Claim No.29 Extra payment due to late taking over of building causing thefts and more watch and ward:-**

175. Insofar as this claim is concerned, the submission of Mr. Wadhwa that it was not part of the final bill needs to be rejected. There is no dispute, that the building was taken over when it is actually certified as complete and this is the position under clauses 16, 36, 48 and 49 of GCC. There is also no dispute that it was the respondents' responsibility to provide necessary security for the protection of the site and respondent was also responsible for safe keeping of all the materials provided on the site and is liable to make good all damage/loss occasioned thereto. I note, that the learned Arbitrator has given a finding that there was a delay on the part of the petitioner in taking over the blocks, which were completed. A perusal of Clause 49 of GGC, the relevant part which I reproduce as under, does indicate taking over by the petitioner such works, for which separate period of completion has been mentioned in the contract and which has been completed.

**GCC**

***"49. Completion-***  
**XXX                      XXX                      XXX**

***In the case of groups of items of Works for which***

*separate periods of completion are given in the Contract, the G.E. may take over from the Contractor such individual items as are completed to his satisfaction before the completion of the entire group, but for all purposes of the Contract except for compensation for delay, the completion of the entire group shall be taken into account.*

*The G.E. shall take over from the Contractor from time to time items or groups of items of Works for which separate periods of completion have been mentioned in the contract and which have been completed to the satisfaction of the G.E.*

*The G.E. shall certify to the Contractor the Date(s) on which the items or group of items of Works are completed and taken over and the state thereof.*

*The G.E. shall also certify to the Contractor the state of items or groups of items of the Works at the end of the defects liability period”.*

In other words, the contract does stipulate phase taking over of the work. A reference is given to letter dated August 26, 1995 when the work was in progress, wherein a mention was made to the items stolen/lost. The Arbitrator after considering the totality of facts has granted an amount of Rs.25,000/-, the award against this claim cannot be faulted. I reject the objection.

**Claim No.33 Payment of pattern flooring instead of normal flooring in marble floors and odd sized marble:-**

176. The submission of Mr. Wadhwa that this claim was not part of the final bill needs to be rejected. It was the case of the respondent that they were made to install non standard size tiles (300mm x 375 mm) which

were unavailable in the market which lead to cutting of the tiles purchased and thereby incurring excess labour cost. No doubt, it is the petitioner's contention that as per clause 11.1.1 of particular specification provides that size of tile shall not exceed 400mm x 400mm and not less than 200mm x 200mm as ordered, which means that any tile within these dimensions can be ordered and a contractor i.e the respondent cannot charge for cutting. What is important is the finding of the Arbitrator that the drawings which were issued by the petitioner were for pattern flooring and usage of tiles of non-standard size and which were also not square in shape. It was also noted that as per specification and schedule A item, the respondent was not to go in for pattern flooring. Meaningfully read, that because of pattern flooring the cutting was required to be done which resulted in extra labour cost. The reasoning of the learned Arbitrator to award an amount for Rs. 5,92,807/-, on the basis of the total area being 3705.044 sq. meters to be paid at Rs.160 per sq. meter is justifiable. No evidence has been placed by the petitioner to show that the cost of Rs.160 per sq. meter granted by the learned Arbitrator is on high side except stating that no evidence has been placed by the petitioner for substantiating the rate. The objection of the petitioner qua this claim needs to be rejected and the Award cannot be interfered.

**Claim No. 34: Balance payment due to non adoption of labour rates as per Minimum Wages Act in formation of Star Rates**

**Claim No. 35: Balance Payment Due to Non Inclusion of T&P, Electricity Charges, Sundries Etc. in Star Rates**

**Claim No. 36: Balance Payment Due Arbitrary Deductions in Rates of Material Incorporated in Star Rates:-**

177. The submission of Mr.Wadhwa that these claims were not part of the final bill dated March 29, 1997 and as such not arbitrable need to be rejected in view of my conclusion above on Clause 65 of the GCC. The plea that star rates were calculated by the petitioner as per Clause 62(G) of GCC and being an excepted matter the decision of CWE is final and binding is concerned, that the said submission proceeds on a premise that the rates with regard to material, labour, tools and plants were prepared by the petitioner, but I note in para 370 the learned Arbitrator noted the contention of the petitioner that the star rates to be prepared as per Clause 62(G) could not be finalized due to non-production of original vouchers and non-signing by the respondent is a stand which is at variance. Be that as it may, any decision of the CWE as per Clause 62(G) of GCC is final and binding and could not have been subject matter of a claim has to be looked from the perspective of the judgment as relied upon by Mr.Nidesh Gupta in the case of *Asian Techs Ltd.* (supra). In the said case, the Supreme Court was also concerned with a challenge to the judgment of

the High Court which had set aside the Arbitrator's award holding that under the finality clause under Clauses 11(C) and 62(G) that decision of the Commander Works Engineer is final and binding and has been exempted from the purview of the arbitration clause which is Clause 70 of the Contract. Clause 62(G) stipulates as under:-

*“(G) For all contracts-*

*If any work, the rate for which cannot be obtained by any of the methods referred to in Paras (A) to (E) above, has been ordered on the contractor, the rate shall be decided by the GE on the basis of the cost to the contractor at site of works plus 10% to cover all overheads and profit. Provided that if the contractor is not satisfied with the decision of the GE he shall be entitled to represent the matter to the CWE within seven days of the receipt of the GE's decision and the decision of the CWE thereon shall be final and binding.*

*If any alterations or additions (other than those authorised to be executed by day work or for an agreed sum) have been covered up by the contractor without his having given notice of his intention to do so, the Engineer-in-charge shall be entitled to appraise the value thereof and in the event of any dispute the decision of the GE thereon shall be final and binding”.*

The Supreme Court in para No.18 was of the view that Clause 62(G) read with Clause 7 makes it clear that the finality provided under Clause 62(G) applies only to cases of deviation and not in cases when there is material alteration and addition in the work done as is clear from the correspondence between the parties. The Supreme Court also in the

said case noted that the jurisdiction of the CWE was with regard to cases not exceeding Rs.20,000/- only. Be that as it may, what is relevant is, whether the claims made were against deviation or is a case of material alteration and addition in the work done. The contention of the respondent was that it is the case of alteration or addition in the work done, which aspect has not been disputed by the petitioner. Hence, the plea of Mr.Wadhwa that the claims are excepted matter needs to be rejected. It is also relevant, the Arbitrator while deciding the claims did not agree with the calculations so made by the petitioner on the ground that the market rates were available with the petitioner for the relevant point of time during which the work was carried out. The methodology adopted by the petitioner by taking into account the rate of a particular year 2001 and reduced it by back calculation applying the All India Wholesale Price Index and not taking correctly the rates of time at which the work was done. The Arbitrator also noted that there is a definite difference in rate of material, labour, tools and plants. The Arbitrator also held that the vouchers and secured advance bills paid by the petitioner for the same items were produced by the respondent for the relevant period for granting these claims. It is also noted, out of 68 star items covered under these three claims, the Arbitrator allowed increase only with respect to 33 star items leaving aside 30 star items and with regard to 3 items he had

reduced the rate granted by the petitioner. In the given facts, the award is liable to be upheld.

**Claim No. 37 Extra cost due to maintenance of sewerage line after handing over due to non-maintenance, contractor appointed by UOI:-**

178. As is noted from above, the claim is with regard to extra cost due to maintenance of sewerage lines after handing over the project as no maintenance contractor was appointed. The objection of Mr. Wadhwa that it was not part of the final bill needs to be rejected. No doubt under clause 46 of GCC contractor is solely liable to remedy any defect/damage caused during the Defect Liability Period. It was the case of the petitioner that the blockage of the sewerage lines was caused due to bad workmanship of the respondent. The claimant refuted the said contention and has stated that the same had occurred due to blockage caused by flushing/draining, hospital waste which included cotton bandages, napkins, rubber gloves etc. The petitioner has stated that it was not bound to appoint a maintenance agency under the Contract. No doubt, that there is no obligation on the part of the petitioner to appoint a maintenance agency but the conclusion of the learned Arbitrator was that the work of maintenance had to be attended by the respondent. In other words, the work which was asked to be done by the respondent was not removing the defects but maintenance of the sewerage lines. The learned Arbitrator has

granted an amount of Rs.12,000/- per month. No doubt there is no justification for arriving at that figure. But it appears, the intent of the learned Arbitrator was to award an amount, which the petitioner would have incurred had they given a contract for maintenance. Since the amount is only Rs.12,000/- per month and moreso, on a finding of the learned Arbitrator that it was not rectification of defects but maintenance of sewerage lines, I do not think that this Court exercising jurisdiction under Section 34 need to interfere with the same. The award to this claim is upheld.

**Claim No. 40: Compensation of the Block Payment from claim Nos.1 to 39 as mentioned above**

**Claim No.41: Future interest @ 24% per annum compounded quarterly on the above award amounts of claim Nos.1 to 40 upto the date of actual payment:-**

179. Having considered the submissions made by the counsel for the parties, and noting the judgments reported as *2006 (7) SCC 700 Rajasthan State Road Transport Corporation vs. Indag Rubber Ltd.*, wherein the Court had reduced the interest granted by the learned Arbitrator from 12% p.a to 6% p.a from the date of award till realization of the amount and *2007 (2) SCC 720 Krishna Bhagya Jalanigam Ltd. vs. G.Harish Chandra Reddy & Anr.*, wherein the Supreme Court reduced the interest of 18% p.a awarded by the learned Arbitrator for the pre-

arbitration period, for pendente lite and future interest to 9% p.a and also considering the judgments relied upon by the learned counsel for the respondent in the case of **Syed Ahmed** (supra), wherein the Supreme Court by noting Clause (B) of Sub Section 7 of Section 31 of the Act provides that if the award does not otherwise direct the amount awarded shall carry interest as directed by the award and in the absence of any provision of 18% p.a and holding that the award of 18% p.a granted by the learned Arbitrator in that case is not contrary to Section 31(7)(B) of the Act upheld the interest granted.

In the case of **Manna Lal Prabhu Dayal** (supra), the Supreme Court has set aside the direction of the High Court reducing the rate of interest from 12% p.a to 6% p.a. and retained the interest granted by the learned Arbitrator of 12% p.a. all throughout pre-reference period, pendente lite and post award period.

In **Bhagwati Oxygen Ltd.** (supra), the Supreme Court upheld the grant of interest of 18% p.a by the learned Arbitrator on the ground that was the rate at which the respondent had given an advance to the petitioner- Bhagwati Oxygen Ltd., which was reduced by the Single Judge and the Division Bench.

In **M.D. J& K Handicrafts Jammu** (supra), where the Court relying upon the agreement entered between the parties which

contemplated 18% interest in certain contingency has granted the said interest which can be taken as a reasonable basis for fixing the rate on which the interest is to be awarded for the reason that even the appellant therein considered that rate to be reasonable for recovery from the respondent.

In ***Numaligarh Refinery Ltd.*** (supra), the Supreme Court has granted rate of interest @ 12% p.a pendente lite from the date of the claim till realization. On failure to pay the said interest, the payment shall carry interest @ 15% p.a.

In ***Housing & Urban Development Corporation Ltd.*** (supra), this Court has upheld the grant of 20% interest being in accordance with the agreement.

The learned counsel for the respondent has relied upon the relevant extract from ***Mustill & Boyd Second Edition 1989 and 2001 Companion Volume to the Second Edition*** in support of his contention justifying the interest granted by the learned Arbitrator.

There is no dispute that the respondent has not filed objections to the award. The respondent despite a stipulation of 17% charged by the petitioner as interest on the mobilization advance released to the respondent, has accepted the grant of interest of 12% p.a and 10% p.a with effect from October 01, 1997 and October 01, 1998 till the date of

award and from the date of award till realization respectively but during the period in question, I note the banking interest rates varied between 9% to 6.25% (1997-2002) and between 6.25% to 8.25% (2002-2015). There are judgments, as noted above, wherein the Supreme Court has reduced the interest to interest @ 6% p.a {*Rajasthan State Road Transport Corporation (supra)*}, 9% p.a {*Krishna Bhagya Jala Nigam (supra)*}. No doubt the Supreme Court and this Court has upheld/granted interest @ 18% p.a. Keeping in view that the work was related to Army Hospital (R&R), I reduce the pendente lite interest w.e.f October 1, 1997 and October 1, 1998 till the date of the Award on claims No.1 to 39 at 9% p.a. and future interest from the date of award till realisation also at 9% p.a.

**Counterclaim No.1: Rectification of defects at contractor's risk and cost:-**

180. Having considered the findings of the learned Arbitrator and the arguments/submissions made and filed against this claim of the petitioner, the following position emerges:-

(i) The petitioner's case is that this claim is based on the Board of Officers' Meeting held on July 05, 1998 and on subsequent dates.

(ii) The respondent did not get the notice of the meeting dated July 05, 1998. No representative of the petitioner was present at site on July 11, 1998.

(iii) There are no details as to which “subsequent days” the meetings were held.

(iv) The defects pointed out during the Defect Liability Period has been attended to by the respondent.

(v) The tender items were for the work not attributable to the respondent.

(vi) The items for which tender was issued were for the works which were never pointed out to the respondent for rectification except few against which the learned Arbitrator had granted an amount of Rs.4,35,000/-.

(vii) The petitioner had not been able to comply with the requirements of Clause 46 of GGC.

(viii) The petitioner should have gone for the rectification of defects in the year 1998 and not during 2001-02.

181. Clause 46 of the GGC reads as under:-

*“Inspection of the Works- M.E.S. Officers concerned with the Contract shall have power at any time to inspect and examine any part of the Works and the Contractor shall give such facilities as may be required to be given for such inspection and examination.*

*Should the G.E. consider, at any time during the construction or reconstruction or prior to the expiration of period of a twelve calendar months after the works have been handed over to Government (hereinafter*

*referred to as the “defects liability period”) that any work has been executed with unsound, imperfect or unskilful workmanship or of a quality inferior to that contractor for or not otherwise in accordance with the Contract ( in respect whereof the decision of the G.E. shall be final and binding), the Contractor shall, on demand in writing from certified and paid for, forthwith rectify or remove and reconstruct the Work so specified, in whole or in part as the case may require, at his own expense; and in the event of his failing to do so within a period to be specified by the G.E. in his demand aforesaid, the G.E. may carry out the Work by other means at the risk and expense in all respects of the Contractor. Provided always that the liability of the Contractor under this Condition shall not extend beyond the defects liability period except as regards workmanship which the G.E. shall have previously given notice to the Contractor to rectify.”*

182. A perusal of Clause 46 of GCC reveals that G.E. must form an opinion about the work being defective before expiration of Defect Liability Period. The Defect Liability Period expired on March 24, 1998. The meeting alleged to have been held on July 05, 1998 was beyond the Defect Liability Period for which the respondent did not had any notice. The requirement of Clause 46 has not been met by the petitioner. The conclusion in this regard of the learned Arbitrator is justified. Even otherwise there is a finding that most of the defects were because of the usage during several years between 1997-2001/2002. In any case the learned Arbitrator on the basis of the defects mentioned in Completion Certificate dated March 31, 1997 and certain defects likely to be of the

defect liability period granted an amount of Rs.4,35,000/-. It is not the case of the petitioner that the findings are perverse. The learned Arbitrator has also given a finding that the respondent has rectified the defects during the Defect Liability Period. He is also the view that certain defects being got rectified now are part of normal maintenance and part are not covered in Board of Officers' Meeting. No attempt has been made to highlight that the defects referred to in the Completion Certificate and the work for which the tenders were issued were identical. I do not see any perversity in the conclusion of the learned Arbitrator. The award is upheld.

**Counterclaim No.2 Devaluation of work due to bad workmanship and adoption of inferior quality of material by the contractor:-**

183. Having considered the submissions made/advanced, the learned Arbitrator on the basis of details in Exh.GS-8, wherein the Board of Officers have assessed the work which were defective and devalued it to claim an amount of Rs.8 lacs against which the learned Arbitrator granted Rs.3,15,000/-, which on a finding that many defects shown were due to normal wear and tear can be a plausible finding, which is not perverse and need to be upheld.

**Counterclaim No.5: Interest @ 24% passed pendent lite and future on awarded amount:-**

184. The learned Arbitrator has not awarded interest to the petitioner

even though he had granted against counterclaim Nos.1 & 2 amount of Rs.4,35,000/- and Rs.3,15,000/- respectively. As I have limited the interest granted against claim Nos.40 & 41 to all the claims as granted to the respondent in this award to 9% p.a. pendente lite and future interest, the petitioner shall also be entitled to the same interest of 9% p.a. pendente lite and future interest on the amounts awarded to the petitioner against counterclaim Nos.1 & 2.

185. The petition is disposed of in terms of the above.

**(V.KAMESWAR RAO)**  
**JUDGE**

**SEPTEMBER 21, 2015**

ak/akb/km