

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 267 OF 2011

**M/s.Oil and Natural Gas Corporation Ltd.)
A company incorporated under the Companies)
Act, 1956 having its registered office at)
Jeevan Bharati Tower – II, Connaught Circus,)
New Delhi – 110 001 and one of the Regional)
Office at 11-High, ONGC Office Complex,)
Bandra-Sion Link Road, Mumbai – 400 017) Petitioner**

Versus

Essar Oil Limited)
A company incorporated under the Companies)
Act, 1956 having its Regional office at)
Essar House, 11 K.K.Marg, Mahalaxmi,)
Mumbai – 400034 and the Registered Office at)
Khambalaia Post, P.O.Box.24, Dist.Jamnagar,)
Gujarat – 261305) Respondent

**ALONGWITH
ARBITRATION PETITION NO. 630 OF 2011**

Essar Oil Limited	)	
A company registered under the Companies	)	
Act, 1956 and having its office at	)	
Essar House, 11, Keshavrao Khadye Marg,	)	
Mahalaxmi, Mumbai – 400034	)	 Petitioner

Versus

**Oil & Natural Gas Corporation Ltd.,)
Engineering Services, Offshore Works 501,)
11-High, Bandra Sion Link Road, Sion (West),)
Mumbai – 400 022) Respondent**

Mr.Pradeep Sancheti, Senior Advocate, a/w. Mr.Rohan Cama, Mr.Virendra Perira, Mr.Aziz Khan, Jahan Chokshi, Ms.Gautami Manjrekar, Mr.Pulkit Sharma, i/b. Divya Shah Associates for the Petitioner in Arbitration Petition No. 267 of 2011 and for the Respondent in Arbitration Petition No. 630 of 2011.

Mr.Rahul Narichania, Senior Advocate, a/w. Mr.Vishal Muglikar, Mr.Gandhar Raikar for the Respondent in Arbitration Petition No. 267 of 2011 and for the Petitioner in Arbitration Petition No. 630 of 2011.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 11th SEPTEMBER, 2015

PRONOUNCED ON : 14th JANUARY, 2016

JUDGMENT :

By these two petitions filed under section 34 of the Arbitration and Conciliation Act, 1996, (for short the said Arbitration Act), both the parties have impugned the arbitral award dated 30th September, 2010. M/s.Oil and Natural Gas Corporation Ltd. the petitioner in the Arbitration Petition NO.267 of 2011 was the original respondent in the arbitral proceedings and have impugned the arbitral award dated 30th September, 2010 in toto. M/s.Essar Oil Limited the petitioner in the Arbitration Petition No.630 of 2011 was the original claimant in the arbitral proceedings and have challenged the arbitral award dated 30th September, 2010 to the extent that the claims of the claimant having been rejected viz. Claim nos. 1(a), 2(2), 2(4), 2(5), 2(6), 2(7), 2(9), 2(10), claim no.5 and also thereby allowing part of the counter claims for liquidated damages in favour of M/s.Oil and Natural Gas Corporation Ltd. The parties to the present proceedings are referred in the later part of the judgment as they were referred in the arbitral proceedings as claimant and respondent for the sake of convenience. By consent of parties, both the petitions were heard together and are disposed of by a common judgment. Some of the relevant facts for the purpose of deciding these two petitions are as under :-

2. Sometime in the month of December 1991 the respondent invited tenders for the Bombay High Modification Project. Pursuant to the said invitation of bids, the claimant submitted their bid. The respondent vide Letter of Intent dated 16th November, 1992 considered the bid submitted by the claimant. On 27th November, 1992, the claimant and the respondent entered into a contract.
3. On 15th May, 1994, the claimant completed the work on 14 platforms and 5 pipelines by the scheduled completion date. On 8th February, 1995, the claimant completed 5 platforms and 6 pipelines. According to the respondent, on 9th April, 1996, the warranty period in view of condition 2.2.6 of the General Condition of Contract expired.
4. On 17th December, 1999, the dispute arose between the parties. The claimant invoked the arbitration agreement and nominated a former Chief Justice of India as their nominee arbitrator. The respondent also nominated a former Chief Justice of India as their arbitrator on 11th February, 2000. The arbitrator nominated by the parties thereafter nominated a former judge of this court as a presiding arbitrator.
5. Pursuant to the directions issued by the arbitral tribunal, on 27th October, 2000, the claimant filed their statement of claim containing about five claims and several sub-claims aggregating to approximately Rs.35,00,27,929.76 along with interest and cost. The respondent filed their written statement and statement of counter claims before the arbitral tribunal. The said claim was however subsequently revised to Rs.29,92,64,507.43 along with interest and cost.
6. Claim no.1 was divided in five sub-claims. Claim no.2 was divided in 10 sub-claims. The respondent had filed counter claim inter alia praying for (1)

reimbursement of payment in foreign exchange variation and (2) liquidated damages for delayed completion of work in respect of 4 platforms and 6 pipelines in the sum of Rs.24,46,37,396.75 i.e. at the rate of 3% of the contract value. Both the parties had also filed their written submissions before the arbitral tribunal. During the pendency of the arbitral proceedings, two of the arbitrators expired and the parties accordingly nominated two new arbitrators in place of those arbitrators. The claimant had examined a witness who was cross-examined by the learned counsel for the respondent.

7. The arbitral tribunal thereafter rendered an award on 30th September, 2010 allowing claim nos. 1, 2 and 5 partly. The arbitral tribunal rejected claim no.1(a) and allowed claim nos. 3 and 4 as claimed. The arbitral proceedings were concluded in approximately 9 years and 8 months. By the said impugned award, the arbitral tribunal allowed part of the counter claim made by the respondent to the extent of Rs.3,44,51,538/- towards liquidated damages. The arbitral tribunal directed the respondent to pay a sum of Rs.53,46,66,288/- in respect of various claims raised by the claimant and directed the claimant to pay to the respondent a sum of Rs.3,44,51,538/- in respect of the counter claim. The arbitral tribunal directed the respondent to pay the net amount of Rs.50,02,14,749/- within the period of 30 days from the date of the said award and in case of the failure on the part of the respondent to pay the said amount within the said period, directed the respondent to pay interest at the rate of 12% per annum for the period of delay.

8. The arbitral tribunal further directed the respondent to release bank guarantee of Rs.25 crores within a period of 15 days from the date of the said award and provided that in case of failure, the respondent shall pay to the claimant the bank guarantee commission from 1st October, 2010 onwards and 12% interest

on the said amount to the claimant till the release of the bank guarantee. The arbitral tribunal further directed the respondent to pay to the claimant the bank guarantee commission on proof being furnished by the claimant to the respondent from 1st July, 2010 to 30th September, 2010.

9. Both the parties have impugned the arbitral award as stated aforesaid on various grounds. Learned senior counsel appearing for both the parties have invited my attention to various documents, pleadings, provisions of the contract entered into between the parties, part of the oral evidence, various findings and observations made by the arbitral tribunal and also placed reliance on large number of judgments of the Supreme Court, this court and other High Courts in support of their rival submissions.

10. Both the parties have raised issue of limitation in respect of the claims or counter claims made by the parties as case may be before the arbitral tribunal. The arbitral tribunal in the impugned award has rejected the plea of limitation raised by both the parties and have held that the claims as well as the counter claims were made within the period of limitation.

Whether the respondent has raised any specific ground in the arbitration petition on the issue of limitation in respect of any of the claims or not and if not raised whether court has suo moto powers to set aside the award on the ground of limitation ?

11. Mr.Narichania, learned senior counsel for the claimant has vehemently raised an objection about the arguments sought to be advanced by the learned senior counsel for the respondent on the issue of limitation across the bar in respect

of each of the claims made by the claimant on the ground that except in respect of sub-claim no.1 and claim no.3, the respondent has not raised any ground on the issue of limitation in the arbitration petition. In support of this submission, learned senior counsel invited my attention to paragraph 20(z) and paragraph 21(pppp).

12. Mr.Sancheti, learned senior counsel appearing for the respondent on the other hand invited my attention to the aforesaid two paragraphs i.e. paragraph 20(z) and paragraph 21(pppp) and paragraph 14 of the arbitration petition and would submit that there is no dispute that the respondent had raised an issue of limitation before the arbitral tribunal not only in the written statement but also in the written submission filed by the respondent before the arbitral tribunal. He submits that in above paragraph (14) of the arbitration petition, the respondent had reiterated all its submissions and pleadings as stated in the written statement and written submissions filed before the arbitral tribunal by reference and has made it clear that the submissions made therein may be treated insofar as applicable as part of the ground of challenge to the award. He submits that the plea of the limitation thus raised by the respondent in the written statement and written submissions are incorporated and shall be read as part of the ground of challenge. Learned senior counsel accordingly addressed this court on the issue whether the respondent can be allowed to rely upon the submissions and pleadings on the issue of limitation raised in the written statement and in the written submissions as if part of the ground of challenge in this petition filed under section 34 of the Arbitration Act or not.

13. Learned senior counsel also made their rival submissions on the issue of limitation in respect of each claim independently and also on the merits of the claims awarded and/or rejected by the arbitral tribunal in favour of each of the

party to the proceedings. It would be therefore appropriate for this court to deal with the issue first as to whether the respondent has raised any specific ground on the issue of limitation in the arbitration petition or not or whether submissions and pleadings forming part of the written statement and written submissions before the arbitral tribunal can be considered as incorporated as part of the ground of challenge in this petition or not. This court also has to consider that if the respondent is not allowed to raise the plea that the submissions and pleadings stated in the written statement and in the written submissions as incorporated by the reference as part of the ground of challenge to the arbitral tribunal, in that event whether the respondent has raised any specific ground in respect of any of the claims awarded by the arbitral tribunal in favour of the claimant and if raised, whether those claims were barred by law of limitation or not.

14. Mr.Sancheti, learned senior counsel for the respondent in support of his aforesaid submission placed reliance on the judgment of Supreme Court in case of ***Mohan vs.Bhairon Singh Shekhawat, (1996) 7 SCC 679*** and more particularly paragraphs 2 and 5 thereof and would submit that the submissions made in the written statement/written submissions which are annexed to the arbitration petition have to be considered as part of the grounds raised in the arbitration petition while deciding a petition under section 34 of the Arbitration and Conciliation Act, 1996. Learned senior counsel placed reliance on the judgment of this court in case of ***Ballabhdas Eshwardas vs. The Union of India, 1956 Vol.LVIII Bom.L.R. Page 873*** and more particularly relevant portion on pages 877 and 878 in support of the aforesaid submissions. He also placed reliance on the judgment of this court in case of ***Oil and Natural Gas Commission vs. Punjsons Pvt. Ltd., 1999(2) ALL MR 162*** and in particular paragraph (5) of the said judgment and would submit that even the arguments advanced by the respondent herein would be made part of the

petition.

15. Learned senior counsel for the respondent also placed reliance on the judgment of Supreme Court in case of ***Ram Sarup Gupta (dead) by L.Rs., vs. Bishun Narain Inter College and others, AIR 1987 SC 1242*** and more particularly paragraph (6) and would submit that since the claimant was fully aware of the plea of limitation raised by the respondent in the written statement and in the written submissions and had urged such plea before the arbitral tribunal all throughout and the claimant had dealt with such plea of limitation before the arbitral tribunal, even if there was no specific ground raised in the arbitration petition on the issue of limitation as were raised in the written submissions and written statement, it would not be open to the claimant to raise the question of absence of specific ground at this stage in this petition filed under section 34 of the Arbitration Act. He submits that the court has to find out whether any such issue arises in this proceedings or not and no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***State of Maharashtra vs. M/s.Hindustan Construction Company Ltd., AIR 2010 SC 1299*** and in particular paragraphs 22 to 28 thereof in support of the aforesaid submissions.

16. Learned senior counsel for the respondent placed reliance on the judgment of Supreme Court in case of ***Bhagwati Prasad vs. Chandramaul, AIR 1966 SC 735 (V 53 C 139)*** and in particular paragraph (10) and would submit that since the parties knew the matter in question involved in the arbitration petition and have dealt with the issue of limitation on merits even before this court, the claimant cannot be allowed to raise the plea that no specific ground on the issue of limitation has been raised in the arbitration petition by the respondent.

17. Mr.Narichania, learned senior counsel on behalf of the claimant on the other hand on this issue would submit that the arbitral tribunal has rendered a finding of fact on the issue of limitation raised by the respondent in respect of each claim separately. He submits that it was for the respondent to plead specific ground on each of such findings rendered by the arbitral tribunal including on the issue of limitation of each of the claim to enable the claimant to meet such case of the respondent in the arbitration petition. He submits that the arbitration petition is not in the nature of an appeal and cannot be construed as original arbitration proceedings before the arbitral tribunal. He submits that the plea of limitation is a mixed question of facts and law. The unsuccessful party who is aggrieved by an arbitral award can challenge such award only on limitation grounds specified and available under section 34 of the Arbitration Act.

18. It is submitted that that except in respect of sub-claim no.1(1) and in respect of claim no.3, the respondent has not raised any specific ground of limitation in respect of the other claims awarded by the arbitral tribunal in favour of the claimant and has not challenged the specific findings of limitation rendered by the arbitral tribunal on the remaining claims. Those finding of fact rendered by the arbitral tribunal has thus attained finality and cannot be interfered with by this court on the basis of the plea of incorporation of the submissions made in the written statement and/or written submissions or on the basis of the arguments made across the bar for the first time.

19. It is submitted by the learned senior counsel for the claimant that if the respondent is allowed to raise such a plea and such ground across the bar, the claimant would have no opportunity to deal with it at this stage. It is submitted that the submissions made by the respondent on the merits of the claim and on the

plea of limitation before the arbitral tribunal cannot be considered as ground of challenging in this petition in absence of specific pleading. It is submitted that neither this court nor the claimant can find out from the plea raised in the written statement and also in the written submissions and to ascertain whether those submissions made on merits or on the issue of limitation at the stage of arbitral proceedings before the arbitral tribunal would hold good as grounds of challenge under section 34. He submits that those submissions were made by the respondent before an arbitral award was made by the arbitral tribunal and thus the question of incorporation of those submissions as part of the ground of challenge under section 34 did not arise.

20. Learned senior counsel for the claimant placed reliance on the judgment of Division Bench of this court in case of ***Patel Engineering Company Ltd. vs. Konkan Railway Corporation, 2009(5) Bom.C.R.256*** and in particular paragraphs 6, 7, 9 to 12, 14 and 17 and would submit that for challenging an arbitral award under section 34 of the Arbitration Act read with Bombay High Court (Original Side) Rules, 1980 and more particularly Rule 803-C (a), the petitioner has to raise specific ground of challenge in the manner provided therein in support of challenge to arbitral award. He submits that the court cannot allow the petitioner to urge any additional ground which is not raised in the arbitration petition filed under section 34 of the Arbitration Act.

21. Mr.Narichania, learned senior counsel for the claimant distinguished the judgment of Supreme Court in case of ***Mohan vs.Bhairon Singh Shekhawat***, (supra) relied upon by Mr.Sancheti, learned senior counsel for the respondent on the ground that such judgment was delivered considering the provisions of Order 7 Rule 11 in an election petition. The principles laid down by the Supreme Court in

the said proceedings cannot be extended to the arbitration petition filed under section 34 of the Arbitration Act. He submits that under section 34 of the Arbitration Act, the grounds of challenge have to be clear and specific.

22. Insofar as judgment of this court in case of ***Ballabhdas Eshwardas vs. The Union of India*** (supra) relied upon by Mr.Sancheti, learned senior counsel for the respondent is concerned, learned senior counsel for the claimant distinguished the said judgment on the ground that the reference to correspondence cannot be deemed to have been incorporated in a petition filed under section 34 of the Arbitration Act. He submits that the facts before this court in the said judgment were totally different than the facts of this case.

23. Learned senior counsel for the claimant also distinguished the judgment of this court in case of ***Oil and Natural Gas Commission vs. Punjsons Pvt. Ltd.*** (supra) on the ground that the said judgment was delivered by this court under the provisions of the Arbitration Act, 1940 and the facts before this court in the said judgment are totally different and the said judgment is not applicable to the facts of this case.

24. Learned senior counsel for the claimant distinguished the judgment of Supreme Court in case of ***Bhagwati Prasad vs. Chandramaul*** (supra) on the ground that in that matter though there was no pleading on a particular issue, evidence was led by that party, the other party had not raised any objection though had an opportunity to raise objection in respect of such evidence. The grievance was made for the first time before the Division Bench. In that context, the Division Bench held that the objections ought to have been raised when such evidence was led without any pleadings. He submits that the said judgment does

not apply to the facts of this case at all.

25. Insofar as judgment of Supreme court in case of ***Ram Sarup Gupta (dead) by L.Rs., vs. Bishun Narain Inter College and others*** (supra) is concerned, the said judgment is distinguished by the learned senior counsel for the claimant on the ground that the opposite party was fully aware of the case of the plaintiff and had proceeded to trial. In this case, the respondent had specifically raised plea of limitation only in respect of sub-claim no.(1) of claim no.1 and claim no.3 and thus the claimant had no opportunity to deal with the plea of limitation raised across the bar in other claims. He submits that the plea which is raised as and by way of after thought cannot be permitted by this court. He distinguished the judgment of Supreme Court in case of ***Bhagwati Prasad vs. Chandramaul*** (supra) on the identical issue.

26. Learned senior counsel for the claimant invited my attention to the averments made in the paragraph (14) of the arbitration petition in which the respondent has stated that all its submissions and pleadings stated in the written statement and written submissions filed before the arbitral tribunal are incorporated by reference and may be treated as submissions insofar as applicable as part of the ground of challenge of the award. He submits that it is not possible to probe into the mind of the respondent herein as to which submissions made in the written statement and written submissions would be urged as part of the ground of challenge to the arbitral tribunal at this stage.

27. Learned senior counsel for the claimant placed reliance on the judgment of Delhi High Court in case of ***Uppal Engineering Company Pvt. Ltd. vs. Abhinav Cooperative Group Housing Society Limited and Ors., 2008(3) Arb.L.R. 64*** and

in particular paragraph 17 and would submit that the respondent if wanted to raise any issue of limitation as a ground of challenge in petition filed under section 34 of the Arbitration Act, he was bound to raise specific plea of limitation and such issue cannot be decided on assumptions and on applying principles of proportionality.

28. Mr. Sancheti, learned senior counsel for the respondent in rejoinder on this plea submits that the limitation is a matter of public policy and if any claim is ex-facie barred by law of limitation, the court has to set aside such time barred claims. He submits that the respondent has also impugned the arbitral award on the ground that the same is contrary to law and public policy. He submits that all the facts which were pleaded and proved before the arbitral tribunal including the issue of limitation are also forming part of the record in the present proceedings. He submits that awarding the time barred claim would also fall under the ground of patent illegality, the award being contrary to the substantive law of India and in conflict with public policy. Reliance is also placed on the judgment of Supreme Court in case of **ONGC vs. Saw Pipes, AIR 2003 SC 2629**.

29. Learned senior counsel also placed reliance on the judgment of **Steel Authority of India Limited vs. Gupta Brother Steel Tubes Limited, (2009) 10 SCC 63** and in particular paragraph 18. Reliance is also placed on the judgment of Supreme Court in case of **Basawaraj & Anr. vs. The Spl. Land Acquisition Officer, AIR 2014 SC 746** and in particular paragraph 13 in support of the plea that the statute of limitation is founded on public policy and it seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale.

30. Mr.Sancheti, learned senior counsel for the respondent placed reliance on the judgment of Division Bench of this court in case of ***Hindustan Petroleum Corporation Limited vs. Batlibol Environmental Engineers Ltd. & Anr., 2008(1) Bom.C.R.89*** and more particular paragraph (9) and would submit that since the claims made by the claimant were barred by law of limitation, the award was against the provisions of law and such award cannot be sustained.

31. It is submitted by the learned senior counsel for the respondent that since the arbitral tribunal has allowed the time barred claims, such award can be also challenged under section 34(2) (b) (II) on the ground of public policy of India. He submits that the powers of court under section 34(2) (b) are distinct with its power provided under section 34 (2) (a) (I) to (V). It is submitted that the power of court under section 34(2) (b) are of higher pedestal and when the court is ceased of the matter, if the court comes to the conclusion that an award of any particular claim is patently illegal or is in conflict with public policy, the court cannot put its seal on such award. He submits that since the award shows patent illegality on the issue of limitation, it becomes duty of the court to set aside such arbitral award by exercising suo-moto power under section 34(2) (b) of the Arbitration Act. Mr.Sancheti, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***State of Maharashtra vs. M/s.Hindustan Construction Company Ltd.,*** (supra) also on this issue.

32. Learned senior counsel for the respondent placed reliance on the judgment of Supreme Court in case of ***Binod Bihari Singh vs. Union of India (1993) 1 SCC 572*** and in particular paragraph (10) and would submit that a bar of limitation may be considered even if such plea has not been specifically raised. Reliance is also placed on the judgment of this court in case of ***Sealand Shipping & Export Pvt.***

Ltd. vs. Kin-ship Services (India) Pvt. Ltd., 2011(5) Bom.C.R.572 and more particularly paragraphs 26 to 30 and it is submitted that even if plea of limitation is not specifically raised in the arbitration petition, the court is bound to consider such plea while considering a petition under section 34 of the Arbitration Act. He submits that there cannot be any waiver on the issue of limitation.

33. Learned senior counsel for the respondent also placed reliance on the judgment of Supreme Court in case of ***State of Orissa and Anr. vs. Mamata Mohanty, (2011) 3 SCC 436*** and in particular paragraph 36. It is submitted that if a court comes to the conclusion that a wrong order has been passed, it becomes solemn duty of the court to rectify the mistake rather than perpetuate the same.

34. Learned senior counsel for the claimant distinguished the additional judgments relied upon by Mr.Sancheti, learned senior counsel for the respondent in the rejoinder and submitted a written submissions on the issue of limitation and other issues. It is submitted that the respondent admittedly did not apply for amendment to the arbitration petition at any stage of the proceedings including at the stage of final hearing of the present petition.

35. There is no dispute even according to the claimant that the respondent had raised specific ground of limitation in paragraph 20(z) and paragraph 21(pppp) of the arbitration petition which were in respect of claim no.1(1) and claim no.3. The respondent in paragraph (14) of the arbitration petition had reiterated all its submissions and pleadings as stated in the written statement and written submissions filed before the arbitral tribunal as referred and had made it clear that the submissions made therein may be considered insofar as applicable as part of ground of challenge to the award.

36. There is no dispute that the respondent had raised specific plea of limitation before the arbitral tribunal by filing a detailed written statement and also in the written submissions. In the present proceedings though the claimant had raised an issue that there was no specific plea of limitation raised by the respondent in respect of other claims in the arbitration petition, both the parties have dealt with the issue of limitation and have relied upon several judgments of Supreme Court and this court on the issue of limitation. It was urged by the learned senior counsel for the respondent that the issue of limitation was raised by the respondent in respect of all the claims in view of paragraph 14 of the arbitration petition and also under other grounds of challenge such as public policy whereas it was urged vehemently by the learned senior counsel for the claimant that the written statement and written submissions filed by the respondent cannot be treated as part of the ground of challenge by reference or incorporation. It was also urged by the learned senior counsel for the claimant that the court has no suo-moto power under section 34 to consider any additional ground urged across the bar which was not raised specifically in the arbitration petition.

37. In view of the fact that both the parties have also addressed this court on the issue of limitation subject to the aforesaid issue of not raising a specific ground of limitation on merits, I have considered all these submissions on merits of the claim and counter claim as well as on the issue of limitation on each claim separately. In the backdrop on these facts, this court has to decide whether there was any specific ground of limitation raised by the respondent in the arbitration petition in respect of all the claims or not and whether in absence of such specific ground, the court cannot set aside any part of the award though the award shows total perversity and patent illegality.

38. A perusal of the arbitration petition indicates that the respondent had also challenged the entire award on the ground that the award as decided is arbitrary against the public policy of India and is also against the facts of the case and law.

39. Supreme Court in case of ***Mohan vs. Bhairon Singh Shekhawat***(supra) has held that the averments made in the election petition have to be read along with annexures to the election petition. This court in case of ***Oil and Natural Gas Commission vs. Punjsons Pvt. Ltd.***, (supra) has held that no specific ground as sought to be contended was raised. Nonetheless reference in the petition was placed on the arguments advanced as to what is wharfage. It is held that in paragraph 17 of the petition, the arguments were made part of the petition. In this background, it is held that it cannot be said that such a ground has not been raised. This court accordingly permitted the petitioner to raise the said contention in the said arbitration petition filed by the petitioner.

40. It would be appropriate to refer to the judgment of Supreme Court in case of ***Bhagwati Prasad vs. Chandramaul***(supra) and more particularly paragraph (10) of the said judgment which reads thus :-

10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in

the issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it ? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

41. It would be appropriate to refer to the judgment of Supreme Court in case of ***Ram Sarup Gupta (dead) by L.Rs., vs. Bishun Narain Inter College and others*** (supra) and in particular relevant portion of paragraph (6) which reads thus :-

6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by S. 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of

the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

42. Supreme Court in case of ***Basawaraj & Anr. vs. The Spl. Land Acquisition Officer***(supra) has held that the statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale.

43. Division Bench of this court in case of ***Hindustan Petroleum Corporation Limited vs. Batlibol Environmental Engineers Ltd. & Anr.***, (supra) has held that the arbitral tribunal shall decide the dispute in accordance with the substantive law for the time in force in India and if he ignores the substantive law in force in India and passes an award, it is bound to cause injustice and is liable to be set aside. It is held that if the award is passed on a claim, which is clearly barred by the limitation, that will be against the provisions of law and the award cannot be sustained.

44. Supreme Court in case of ***Steel Authority of India Limited vs. Gupta Brother Steel Tubes Limited*** (supra) has held that if an award is contrary to the

substantive provisions of law, against the terms of the contract, it would be patently illegal.

45. Supreme Court in case of ***State of Orissa and Anr. vs. Mamata Mohanty***, (supra) has held that once a court comes to the conclusion that a wrong order has been passed, it becomes solemn duty of the court to rectify the mistake rather than perpetuate the same. The Supreme Court has adverted to its earlier judgment reported in case of ***Hotel Balaji and Ors. vs. State of A.P. and Ors.***, AIR 1993 SC 1048 in which it was observed that to perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience.

46. Supreme Court in case of ***Binod Bihari Singh vs. Union of India*** (supra) has held that the bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy.

47. This court in case of ***Sealand Shipping & Export Pvt. Ltd. vs. Kin-ship Services (India) Pvt. Ltd.***, (supra) has held that if the court is under an obligation to consider the plea of limitation in view of section 3 of the Act read with decisions of the Supreme Court as well as various other High Courts and as, if the limitation issue goes to the root of the claim/matter, there is no reason that the court even in the petition under section 34, should not consider the same merely because the parties, for whatever may be the reason, had chosen not to press the point before the arbitrator, but now agitating the issue of section 34 by raising specific ground to that effect. It is held that there is no question of invoking doctrine of waiver

and/or no interference by the court as contemplated under sections 4 and/or 5 of the Arbitration Act, specifically at the time of awarding/granting/passing the final award.

48. Insofar as the judgment of this Court in case of ***Patel Engineering*** (supra) relied upon by learned senior counsel for the claimant is concerned, this Court has taken a view that it cannot be said that in the scheme of 1996 Act, there is *suo-moto* power in the Court to set aside the award. The said judgment was delivered by this Court before the delivery of the judgment of the Supreme Court in case of ***State of Maharashtra vs. Hindustan Construction Company Limited, AIR 2010 SC 1299***. In the said judgment this Court also did not consider the submission that if that if the award is *ex-facie* barred by law of limitation and shows patent illegality whether such award can be set aside by the Court or not or even if specific ground is not raised by the petitioner in the arbitration petition whether the Court has still to put its seal on such patently illegal award or not. In my view, since in this matter both the parties were fully aware of the pleadings and more particularly the case of the respondent on the issue of limitation, which was dealt with by the claimant even in these proceedings, in my view the said judgment of this Court will not assist the case of the claimant.

49. Insofar as the judgment of the Delhi High in case of ***Uppal Engineering Private Limited*** (supra) relied upon by learned senior counsel for the claimant is concerned, it is held by the Delhi High Court that specific pleas have to be taken and the issue of time barred case cannot be decided by assumption and on applying the principles of proportionality. On perusal of the grounds raised in the petition, I am of the view that it cannot be said that no ground for challenging the award on the ground of limitation has been raised by the respondent at all in the arbitration

petition. This Court has to consider over all grounds raised in the arbitration petition and if the award is patently illegal and ex-facie barred by law of limitation and more particularly when the claimant was fully aware of the case of the respondent, this Court has ample power to set aside such arbitral award. The judgment of the Delhi High Court thus in, my view would not assist the case of the claimant.

50. Insofar as the judgment of the Supreme Court in case of ***Swan Gold Mining*** (supra) relied upon by learned senior counsel for the claimant is concerned, it is held by the Supreme Court that the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the face of it erroneous or patently illegal or in contravention of the provisions of the Act. There is no dispute about the proposition laid down by the Supreme Court in the said judgment. In my view, since every finding of the arbitral tribunal on the issue of limitation is ex-facie perverse, patently illegal, contrary to the provisions of the Limitation Act and is contrary to the well settled principles of law laid down by the Supreme Court and this Court, this Court has power to set aside such erroneous and patently illegal award under section 34 of the Arbitration & Conciliation Act, 1996.

51. Insofar as the judgment of the Supreme Court in case of ***Indersingh Rekhi*** (supra) relied upon by learned senior counsel for the claimant is concerned, the Supreme Court in the said judgment held that when in a particular case the dispute has arisen or not has to be found out from the facts and circumstances of the case. It is a common ground that both the parties have raised the issue of limitation in respect of the claims made by each other on the ground that the limitation in

respect of the claims as well as counter claims had commenced at least on the date of completion of work and more particularly in case of payment for the work done when the amount was due. It was the case of both the parties that insofar as the claim for damages is concerned, the cause of action for claiming compensation would commence on the date of the other party committing breaches of their obligations. In view of the fact that both the parties were ad-idem as to when the dispute had arisen, in my view, the issue of limitation would not be a mixed question of fact and law. The arbitral tribunal however without considering the provisions of law and the law laid down by the Supreme Court and this Court, rejected the plea of limitation raised by both the parties.

52. Insofar as the judgment of the Supreme Court in case of ***Hari Shankar Singhania*** (supra) relied upon by the learned senior counsel for the claimant is concerned, the said matter was decided under section 20 of the Arbitration Act, 1940. In a family dispute, the parties were negotiating for settlement. In the facts of this case, the Supreme court has held that the application for filing a suit under section 20 of the Arbitration Act, 1940 was thus not barred by law of limitation. In the facts and circumstances of this case, the claimant failed to prove that any negotiation for settlement was pending before the arbitral tribunal. On the contrary, the claimant also raised their objection in respect of limitation about the counter claims made by the respondent on the same ground. This Court has accordingly accepted the plea of the claimant insofar as the issue of limitation raised by the claimant in respect of the award allowing part of the counter claim in favour of the respondent is concerned.

53. In my view, the status of limitation is founded on public policy. The arbitral tribunal cannot allow any the claim which is barred by law of limitation. Such

award allowing any claim which is barred by law of limitation is patently illegal and in conflict with the public policy. There is no dispute that the respondent has raised a specific ground of award being in conflict with the public policy. A perusal of the grounds raised in the arbitration petition does not indicate that the respondent has not raised any ground whatsoever on the plea of limitation.

54. Insofar as the submission of Mr.Narichania, learned senior counsel appearing for the claimant that the respondent cannot be allowed to read the submissions made in the written statement and the written submission as part of the grounds in the arbitration petition by doctrine of reference or incorporation is concerned, in my view since the claimant was fully aware of the claim of the respondent on the issue of limitation and has also addressed this Court also on the issue of limitation, even if this Court proceeds on the premise that there is no specific ground of limitation raised in respect of other claims except claim no.1(1) and claim no.3, on the plain reading of paragraph 14 of the arbitration petition, in my view, this Court has to read the entire petition as a whole to ascertain as to whether the ground of the respondent on the issue of limitation was raised or not and how such case was understood by the claimant. If the claimant has understood the case of the respondent and has dealt with such case across the bar, this Court cannot reject such plea of the respondent merely on hyper technical ground.

55. The Supreme Court in case of **Bhagwati Prasad** (supra) and **Ram Sarup Gupta** (supra) has dealt with the issue that even if there was no specific pleading, the opponent had knowledge of the case of the plaintiff and had dealt with such case on merits, the case of the plaintiff cannot be thrown out for want of specific pleading. The Supreme Court in case of **Binod Bihari Singh** (supra) has held that

bar of limitation may be considered even if such plea has not been specifically raised. Similar view has been taken by this Court in case of ***Sealand Shipping and Export Pvt. Ltd.*** (supra).

56. In my view, since both the parties had raised the issue of limitation in respect of the claim made by each other on common ground and facts, and since this Court has in the later part of this judgment has come to the conclusion that each and every finding of the arbitral tribunal on the issue of limitation is contrary to law and patently illegal, this Court has power to set aside such patently illegal award and the finding rendered by the arbitral tribunal. In my view powers of court under section 34(2) (b) are distinct with its power under section 34(2)(i) to (v) and are of higher pedestal.

Whether any part of the claim allowed by the arbitral tribunal is barred by law of limitation ?

57. In the alternate to the submissions urged by the learned senior counsel for both the parties on the issue whether the plea and/or submission made in the written statement and/or written submissions stand incorporated as grounds of challenge under section 34 of the Arbitration Act or not, the learned senior counsel have addressed this court on the issue of limitation in respect of each claim separately.

Issue of limitation on Claim no.1.

58. Mr.Sancheti, learned senior counsel for the respondent invited my attention to some of the correspondence and more particularly pages 26 to 40, 84 to 106, 162 to 168, 180 to 191 and pages 200 to 205 on the claims air drying, project management consultant, oil PPM monitors, caliper pigging and safety valves respectively. It is submitted by the learned senior counsel that the date of invoices in respect of each of this claim were during the period between 29th October, 1993

to 29th July, 1994. He submits that the work was completed on 8th February, 1995. It is submitted that the correspondence on record clearly indicates that the claims made by the claimant were rejected or the respondent had refused to pay the same prior to 17th December, 1996. He submits that the letter dated 27th March, 1997 addressed by the claimant at page 168 of the compilation would clearly indicate that even the claimant had referred to the deduction of Rs.2 crores and had alleged that the said issue was pending since more than one year on the date of the writing said letter. He submits that the notice invoking arbitration agreement was issued by the claimant only on 17th December, 1999. It is submitted that Article 18 to the schedule of Limitation Act would apply to all the sub-claims made under claim no.1.

59. Learned senior counsel invited my attention to Column No.6 of Ex.I-1 of the statement of claim and would submit that even according to the claimant, the due date for making a claim for interest was falling much prior to the three years of date of invocation of the arbitration agreement. He submit that there was no acknowledgment of liability or any part payment made by the respondent in respect of any of the sub-claims made under claim no.1. He submits that though the claim was rejected in early 1996, the claimant once again raised a demand. He submits that merely because the demand was once again raised by the claimant, it would not commence any fresh cause of limitation.

60. Learned senior counsel invited my attention to the findings/observations made by the arbitral tribunal on the issue of limitation insofar as claim no.1 is concerned. He submits that the findings of the arbitral tribunal that clause 3.2.3 of the General Condition of Contract which provided for time to make payment of undisputed amount of each invoice within 30 days from the date of receipt of the

invoice by the respondent to the petitioner would have no application to the present dispute is totally perverse and is contrary to the said provisions. He submits that the finding of the arbitral tribunal that there has to be specific rejection of a particular invoice in order to commence the limitation or that the question of deemed rejection of invoice did not arise is also contrary to law and shows patent illegality. The arbitral tribunal has held that it is difficult to determine when the amount became due when the actual rejection took place and consequently when the limitation had commenced. Even this finding of the arbitral tribunal is perverse and shows patent illegality.

61. Insofar as claim no.1 is concerned, learned senior counsel for the respondent submits that the limitation was not extended in view of the correspondence exchanged between the parties. Limitation would extend only if there would be acknowledgment of the liability before expiry of the period of limitation or if there was any part payment. He submits that the finding of the arbitral tribunal that letter dated 24th April, 1997 of the respondent, letters dated 27th March, 1997 and 9th May, 1997 of the claimant and that of 13th May, 1997 of M/s.Engineers India Limited were exchanged within three years preceding the date of the invocation of the arbitration proceedings on 17th December, 1999, the claims of the claimant were not barred by law of limitation is totally perverse and shows patent illegality. He submits that this finding is contrary to the law laid down by the Supreme Court and this court. The arbitral tribunal further held that further subsequent letters exchanged between the parties also lent support to the findings in favour of the claimant being within limitation is also perverse.

62. It is submitted that the findings of the arbitral tribunal that the limitation for invoking the arbitration would commence from 17th December, 1999 when the

notice for invocation of the arbitration was issued is totally perverse and contrary to section 21 of the Arbitration Act. He submits that when the notice invoking arbitration agreement is received, the arbitration proceedings commences on the date of receipt of such notice and the limitation stops on such date in view of section 21 of the Arbitration Act and not the limitation commences on the date when such notice is issued or received.

63. It is submitted by the learned senior counsel for the respondent that even if the claim was reduced by the claimant or any fresh notice was issued, it would not give any fresh cause of action for the purpose of making a claim. He submits that the arbitral tribunal has mixed up the issue of limitation for making a claim with commencement of cause of action for making an application for appointment of arbitrator.

64. In support of the aforesaid submissions, learned senior counsel for the respondent placed reliance on following judgments :-

- (i) ***State Bank of India vs. M/s.B.S.Agricultural Industries (I), AIR 2009 SC 2210*** (Paragraphs 11 to 14)
- (ii) ***J.C.Budhraja vs. Chairman, Orissa Mining Corporation Ltd. and Another, (2008) 2 SCC 444***
- (iii) ***CMC Ltd. Mumbai vs. Unit Trust of India, 2015 (2) ABR 472*** (Paragraphs 87, 88, 89 and 95)
- (iv) ***Avalon Investment Pvt. Ltd. vs. Mukesh Brokerage and Financial Ltd., 2012 Vol.114(5) Bom.L.R.2716*** (Paragraphs 15, 18 to 21)
- (v) ***State of Maharashtra vs. Hindustan Construction Company Ltd. And Anr., 2013(1) Arb.LR 443 (Bombay)***

- (Paragraphs 5, 17, 20, 21, 23, 27, 30 to 35, 38 to 40 and 45)
- (vi) Judgment of this court in case of ***Hindustan Construction Co. Ltd. vs. State of Maharashtra*** in ***Review Petition No. 2 of 2013*** delivered on 4th April, 2013
- (vii) Judgment of this court in case of ***Aditya Birla Chemicals (India) Ltd. vs. Tata Motors Ltd., 2013 (2) Bom.C.R.476*** (Paragraphs 12, 20 and 21)
- (viii) Judgment of Gujarat court in case of Gujarat ***State Construction Corporation Ltd. vs. Kamal Construction Company, 2002 (2) Vol.XLIII Gujarat Law Reporter 1520*** (Paragraphs 6.1 and 8.1)
- (ix) Judgment of this court in case of ***Atmaram Vinayak Kirtikar vs. Lalji Lakhamshi, AIR 1940 Bombay 158*** (pages 159 and 160)
- (x) Judgment of this court in case of ***Board of Trustees of Jawaharlal Nehru Port Trust vs. Three Circles Contractors*** in ***Arbitration Petition No.648 of 2009*** delivered on 1st April, 2015 (Paragraphs 90, 103 and 104)
- (xi) Judgment of this court in case of ***Gujarat State Fertilizers Co. Ltd. vs. Tata Motors Ltd. 2015(2) Bom.C.R.522*** (Paragraphs 52, 56 to 61 and 66)
- (xii) Judgment of this court in case of ***Jagmohan Singh Gujral vs. Satish Ashok Sabnis & Anr., 2004(1) Arb.LR 212 (Bombay)***
- (xiii) Judgment of Supreme Court in case of ***Sampuran Singh and others vs. Smt. Niranjan Kaur and others, AIR 1999 SC 1047*** (Paragraph 9)

65. Mr.Narichania, learned senior counsel for the claimant on the other hand submits that the arbitral tribunal has rendered findings of fact on the issue of limitation after considering the documents on record which findings are not perverse and thus this court cannot interfere with those findings of fact under section 34 of the Arbitration and Conciliation Act. He submits that the issue of limitation is mixed question of fact and law and this court cannot re-appreciate the evidence considered by the arbitral tribunal and cannot interfere with the finding of fact in support of this submission. Learned senior counsel placed reliance on the ***Patel Engineering Company Ltd. vs. Konkan Railway Corporation*** (supra), judgment of Supreme Court in case of ***Swan Gold Mining Ltd. vs. Hindustan Copper Ltd., 2014(4) Arb.LR 1(SC)***, ***Uppal Engineering Company Pvt. Ltd. vs. Abhinav Cooperative Group Housing Society Limited and Ors.***(supra), ***Major (Retd.) Inder Singh Rekhi vs. Delhi Development Authority, AIR 1988 SC 1007***, judgment of Supreme Court in case of ***Hari Shankar Singhania and ors. vs. Gaur Hari Singhania and ors. 2006(2) Arb.LR 1(SC)***.

66. It is submitted by the learned senior counsel for the claimant that the invoices raised by the claimant were pending for consideration quite sometime. The parties were discussing about the payment due to the claimant. The limitation for the purpose of arbitration thus had not commenced. The parties were also exchanging correspondences in that regard. The respondent had made various adjustment in the claims raised by the claimant. The claimant had raised various revised invoices. He submits that the arbitral tribunal has considered all these issues at length and have rightly rendered a finding of fact that the claims made by the claimant were not barred by law of limitation. The learned senior counsel for the claimant also distinguished the judgments relied upon by the learned senior

counsel for the respondent.

67. In rejoinder, Mr.Sancheti, learned senior counsel distinguished the judgments referred to and relied upon by the learned senior counsel for the claimant. It is submitted by the learned senior counsel that if this court comes to the conclusion that the respondent cannot be allowed to raise the plea of limitation in respect of the claims other than sub-claim no.1 of claim no.1 and claim no.3, sub-claim no.1 of claim no.1 and claim no.3 being ex-facie barred by law of limitation, award in respect thereof thus deserves to be set aside.

Submissions on merits of the claim no.1 awarded by the arbitral tribunal :-

68. Learned senior counsel for the parties have addressed this court on the merits of each claim awarded by the arbitral tribunal and/or those claims which are rejected by the arbitral tribunal and are impugned by the claimant herein without prejudice to their submissions made on the issue of limitation.

69. The claimant has made five sub-claims under claim no.1 totaling to Rs.2,27,04,044.45. Each of these sub-claims made under claim no.1 were relating to the recovery of various amounts made by the respondent from the claimant which amount were deducted by the respondent from over all contract.

70. Insofar as sub-claim no.1 is concerned, it is submitted by the learned senior counsel for the respondent that the findings of the arbitral tribunal that there was no cost benefit approved in favour of the claimant in view of the claimant having demobilized its personnel and equipment for carrying out the work of dewatering and air drying of the stated pipelines, which work the claimant was prevented from carrying out because of the instructions received by the respondent is totally

perverse. He submits that once the arbitral tribunal had come to the conclusion that the claimant had not executed the said work, the arbitral tribunal could not have accepted the calculation of the claimant of the cost benefit of Rs.2,13,840/-. It is submitted that the onus was on the claimant to prove the exact cost benefit that had accrued to the claimant and the arbitral tribunal thus could not have passed the burden of proving the deduction from the invoices upon the respondent. In respect of this claim admittedly the respondent has raised a specific plea of limitation.

Sub-claim no.(2)

71. Insofar as sub-claim no.2 is concerned, it is submitted by the learned senior counsel for the respondent that the arbitral tribunal has not properly construed the Condition No.5.2.2 of the General Condition of Contract which provided for an appointment of the project management consultant within one month from the date of modification of the award. He submits that the findings of the arbitral tribunal that there had been no cost benefit to the claimant in view of Mr.John Miles having been engaged by the claimant from 17th December, 1992 and that he was representing JBEC and that the respondent had never complained about the quality of the project is totally perverse and contrary to clause 5.2.2 of the General Condition of Contract. He submits that the arbitral tribunal has cast burden of proof in respect of this claim also upon the respondent wrongly and could not have allowed this claim made by the claimant.

Sub-claim no.3

72. It is submitted by the learned senior counsel that the claimant had supplied only offline PPM monitor. The arbitral tribunal while allowing the claim of the claimant had merely relied upon letter dated 2nd October, 1993 of M/s.Vortoil without examining the author of the said letter or any representative of the said

third party and without permitting the respondent to cross examine him. He submits that the arbitral tribunal has thus relied upon an irrelevant material without giving any reasons and has relied upon the documents which were not proved.

Sub-claim no.4

73. It is submitted by the learned senior counsel that the arbitral tribunal had wrongly cast burden on the respondent to prove that the amount deducted by the respondent in the sum of Rs.48,15,539/- was in fact cost benefit that accrued to the claimant. He submits that though the alleged cost calculations provided by the claimant were not proved, the arbitral tribunal has accepted such calculations as being their assessment of the cost benefit without concluding that the same were proved and accepted the same for arriving at the quantum of cost benefit that accrued to the claimant. He submits that this part of the claim is based on no evidence.

74. Mr.Narichania, learned senior counsel for the claimant on the other hand invited my attention to the relevant paragraphs of the award and more particularly paragraphs 11 to 78 of the impugned award and would submit that the arbitral tribunal has given detailed reasons in the impugned award while dealing with the five sub-claims made under claim no.1 and have rendered finding of fact after considering the provisions of the contract and the documents relied upon by both the parties and since those finding of facts are not perverse, this court cannot interfere with such finding of fact. In support of this submission, learned senior counsel for the claimant placed reliance on the judgment of Supreme Court in case of *Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49*. He submits that insofar as sub-claim (1) is concerned, the said claim is not barred by law of limitation and has been rightly allowed by the arbitral tribunal.

REASONS AND CONCLUSIONS ON CLAIM NO.1

75. I shall first deal with the issue as to whether claim no.1 which was made in five parts were barred by law of limitation. There is no dispute that the respondent has raised a specific ground of limitation as far as the claim no.1 (b) is concerned. Whether other sub-claims can be set aside on the ground of limitation or not has already been dealt with in the earlier paragraphs of the judgment. In view of the fact that this Court has already taken a view that if the claims are *ex-facie* barred by law of limitation and if both the parties addressed this Court on the issue of limitation, this Court can set aside *ex-facie* time barred claims.

76. Supreme Court in the case of ***State Bank of India vs. M/s.B.S.Agricultural Industries (I)*** (supra) has held that if there was no acknowledgement of liability, limitation is not extended. Supreme Court in the case of ***J.C.Budhraja vs. Chairman, Orissa Mining Corporation Ltd. and Another*** (supra) has held that even if the acknowledgement is made with reference to a liability, it cannot extend limitation for a time-barred liability or a claim that was not made at the time of acknowledgement or some other liability relating to other transactions. It is held that even if the party says without admitting liability that it would like to examine the claim or the accounts, it may not amount to acknowledgement. Supreme Court has held that what can be acknowledged is a present subsisting liability.

77. This Court in the case of ***CMC Ltd. Mumbai vs. Unit Trust of India (supra)*** has held that once the cause of action has commenced when the breaches were alleged to have been committed by the party, such cause of action would not stop in view of Section 9 of the Limitation Act unless there is any

part payment made by the other party or the liability is acknowledged. The Division Bench of this Court in the case of ***Avalon Investment Pvt. Ltd. vs. Mukesh Brokerage and Financial Ltd.(supra)*** after adverting to Section 9 of the Limitation Act has held that once the cause of action had arisen, it did not stop subsequently and once limitation has begun to run upon the accrual of the cause of action, it would run continuously and it ceases to run when the party commences legal proceedings in respect of the cause of action in question. It is further held that limitation stopped running in respect of the counter claim only when the party lodged the counter claim with the arbitral tribunal. It is held that exchange of correspondence does not extend the period of limitation and can be extended only if there is a part payment or acknowledgement of liability.

78. This Court in case of ***State of Maharashtra vs. Hindustan Construction Company Limited*** (Supra) has held that for invoking the arbitration clause, limitation provided under the Limitation Act, 1963 for making application will not apply but limitation provided by schedule for institution of a suit will apply. It is also held that the contractor was not bound to wait for completion of the entire work but could have invoked the arbitration promptly as soon as the dispute has arisen even in respect of items of works out of the entire scope of work were executed. It is held that the cause of action had arisen when the work had been done in respect of items of work done and the cause of action would not postpone till the date of completion of the entire scope of work awarded to the contractor.

79. This Court in case of ***Aditya Birla Chemicals (India) limited*** (supra) has held that once the right to sue had accrued, raising of demand subsequently by issuing a debit note and refusal to pay the said demand by other party would not commence fresh period of limitation. It is held that in view of section 9 of the

Limitation Act, 1963, once the time is begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Once time starts running, it does not stop. Limitation is not extended unless there is an acknowledgment of liability or part payment.

80. This court in case of ***Atmaram Vinayak Kirtikar vs. Lalji Lakhami*** (supra) has held that cause of action in respect of delivery of goods when delivered on various dates, although the cause of action is one for the price of all the goods delivered, the Court is bound to check the various items which go to constitute that cause of action and to apply Article 52 to deliveries which took place more than three years before the filing of the suit.

81. This court in case of ***Board of Trustees of Jawaharlal Nehru Port Trust*** (supra) has held that the arbitration proceedings commences in respect of the specific disputes which were raised in the said notice invoking arbitration agreement and the limitation stopped only in respect of such disputes which were referred to in the said notice invoking arbitration agreement.

82. This court in case of ***Gujarat State Fertilizers Co. Ltd.*** (supra) has held that the correspondence entered into between the parties would not extend the period of limitation. It is held that in view of section 9 of the Limitation Act, 1963 once time is begun to run, no subsequent disability or inability to institute a suit or make an application stops it. It is held that once the right to sue had already accrued, subsequent correspondence between the parties thereby party making a fresh demand in respect of the same cause of action and the letter of the other party denying such demand would not create any fresh right to sue or would not amount to a fresh cause of action.

83. This court in case of ***Jagmohan Singh Gujral vs. Satish Ashok Sabnis & Anr.***, (supra) has held that under section 43 of the Arbitration and Conciliation Act, 1996, Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in court. In other words, the claims which are barred by limitation before the courts cannot also be entertained by arbitral tribunal. It is held that the law of limitation is grounded on the plea of public policy, viz. the stale claim cannot be entertained. Once that be the case, a plea of limitation would be a ground based on the public policy and, consequently Sections 34(2)(b)(i) would be attracted. That issue cannot be said to be an issue merely within the jurisdiction. It is held that the issue is the basis of a Tribunal exercising or assuming jurisdiction.

84. This court in the said judgment has held that the cause of action arises when the amount became first due and payable. A mere demand does not extend the period of limitation. The period of limitation can only be extended when the parties against whom the cause of action has arisen admit the liability and seek time to make payment or makes part payment, thereby admitting liability. It is held that if the claim is barred by law of limitation, claim of the petitioner has to be rejected on that count alone and such award is liable to be quashed and set aside.

85. Supreme Court in case of ***Sampuran Singh and others vs. Smt. Niranjan Kaur and others*** (supra) has held that the acknowledgement of liability, if any, has to be prior to the expiration of the prescribed period for filing a suit, in other words, if the limitation has already expired, it would not revive under Section 18 of the Limitation Act. It is only during subsistence of a period of limitation, if any, such document is executed, the limitation would be revived afresh from the date of acknowledgement.

86. Insofar as submission of the learned senior counsel for the claimant that the limitation is a mixed question of fact and law and that the arbitral tribunal has rendered a finding of fact on the issue of limitation which finding of fact cannot be interfered with by this court is concerned, a perusal of the record indicates that the plea of limitation raised by both the parties in respect of the rival claims made by the other party is based on the common ground that the entire work was completed in the year 1995 whereas the notice invoking arbitration agreement was issued on 17th December, 1999. It is also common ground that the plea of limitation raised by both the parties insofar as claim for damages is concerned, is canvassed on the ground that limitation for making a claim for compensation/damages would commence on the date of other party committing breach of contract and/or their obligation under the contract. This court has accepted the plea of claimant in the later part of the judgment insofar as part of the counter claim allowed by the arbitral tribunal in respect of the liquidated damages is concerned.

87. A perusal of the arbitral award clearly indicates that the plea of limitation raised by both the parties before the arbitral tribunal was not a mixed question of fact and law. Both parties had relied upon the same ground and the same facts for contesting the claims and counter claims made by the claimant and the respondent respectfully on the ground of limitation. The finding rendered by the arbitral tribunal in respect of the claims and counter claims on the issue of limitation are totally perverse and contrary to law laid down by the Supreme Court and this court referred in the aforesaid judgment.

88. Be that as it may, since both parties have urged before this court on the plea of limitation in respect of the claims and counter claims respectfully, this court

shall now deal with the issue of limitation in respect of each claim and counter claim in the later part of the judgment.

89. There is no dispute that as far as the claim no.1 is concerned, the invoices issued by the claimant were during the period 29th October 1993 and 29th July 1994. The work was completed on 8th February 1995. Rejection of the claim, if any, was prior to 7th December 1996. A perusal of the letter dated 27th March 1997 addressed by the claimant indicates that even according to the claimant, the claims made by the claimant were pending for more than one year from the date of writing such letter. Admittedly, the claimant had issued a notice invoking the arbitration agreement on 17th December 2009. The claimant had claimed interest for the period prior to three years from the date of notice dated 17th December 2009. A perusal of the record indicates that there was no part payment made by the respondent to the claimant after completion of the work till the notice dated 17th December 2009 was issued by the claimant invoking the arbitration agreement or even thereafter. There was no acknowledgment of the liability on the part of the respondent in favour of the claimant.

90. In my view, no specific rejection was required of any claim for the purpose of commencement of cause of action. The arbitral tribunal has totally overlooked and have decided contrary to clause 3.2.3 of the General Conditions of Contract by holding that the said clause would not apply. Even if, the claimant had reduced part of the claims on the subsequent stage would not extend period of limitation and would not give any fresh cause of action. In my view, the award of claim no.1 in favour of the claimant made by the arbitral tribunal is thus *ex-facie* barred by law of limitation and deserves to be set aside on that ground alone.

91. In so far as the merit of claim no.1 which has been awarded by the arbitral tribunal is concerned, there is no dispute that each of these sub-claims made under claim no.1 were arising out of recovery of various amounts by the respondent which were deducted from overall contract.

92. In so far as the claim no.1(1) made by the arbitral tribunal is concerned, a perusal of the impugned award rendered by the arbitral tribunal indicates that the arbitral tribunal had rendered a finding of fact after considering the documents and the evidence produced by both the parties which findings are not perverse. However, since this Court is of the view that the said claim is barred by law of limitation, the said claim no.1(1) is set aside on that ground.

93. In so far as the claim no.1(2) made by the arbitral tribunal is concerned, a perusal of the award indicates that the arbitral tribunal has interpreted the clause 5.2.2 of the General Conditions of the Contract and has allowed the said claim. The arbitral tribunal has also rendered a finding of fact that there had been no cost benefit to the claimant in view of Mr. John Miles having been engaged by the claimant from 17th December, 1992 and that he was representing JBEC and that the respondent had never complained about the quality of the project. In my view, the finding of fact rendered by the arbitral tribunal on this claim is not perverse. However, since the claim awarded by the arbitral tribunal is barred by law of limitation, the said claim no.1(2) is also set aside on that ground.

94. In so far as the claim no.1(3) made by the arbitral tribunal is concerned, a perusal of the record indicates that the arbitral tribunal has allowed this claim merely on the basis of letter dated 2nd October 1993 of M/s. Vortoil which was

disputed by the respondent. The arbitral tribunal, in my view, thus could not have relied upon such disputed document which was not proved by the claimant before the arbitral tribunal. This part of the award is in violation of the principles of natural justice and deserves to be set aside on that ground. Be that as it may for the reasons recorded aforesaid, this claim is also barred by law of limitation and is accordingly set aside on that ground also.

95. In so far as the claim no.1(4) made by the arbitral tribunal is concerned, a perusal of the record indicates that though cost calculations submitted by the claimant before the arbitral tribunal were not proved by the claimant, the arbitral tribunal has accepted such calculations as being their assessment of the cost benefit without concluding that the same were proved and accepted the same for arriving at the quantum of cost benefit that accrued to the claimant. In my view, this part of the award is based on no evidence and is accordingly set aside. Be that as it may, this part of the claim is also barred by law of limitation for the reasons recorded aforesaid.

96. In so far as the judgment of the Supreme Court in the case of ***Associate Builders (supra)*** relied upon by Mr.Narichania, Senior counsel for the claimant is concerned, there is no dispute about the propositions laid down by the Supreme Court that this Court cannot re-appreciate the findings of facts or substitute the interpretation of the arbitral tribunal which interpretation is a possible interpretation by another interpretation. In my view, if the findings of the arbitral tribunal are perverse and it shows patent illegality and if the interpretation of the arbitral tribunal is an impossible interpretation, the Court has ample power to interfere with such award and to set aside the same.

Claim no.2 – Extra work invoices

97. There were 10 sub-claims made under claim no.2 by the claimant. The arbitral tribunal has partly or fully rejected the sub-claim no.2(2), 2(4), 2(5), 2(6), 2(7), 2(9) and 2(10) which are impugned by the claimant also in the Arbitration Petition No.630 of 2011. Insofar as respondent is concerned, the respondent has challenged the award of claim nos. 2(1), 2(2), sub-claim no.2(4b), 2(5), 2(6), 2(7) and 2(9) on various grounds.

98. **Insofar as sub-claim no.1 awarded by the arbitral tribunal is concerned,** learned senior counsel for the respondent submits that item Flare Pistol for initial ignition of pilot burners and flare gas and alternative scheme for ignition of pilot burners from the remote process platform were both mandatory requirements of the contract and thus the supply of the alternative ignition system was part of the scope of supply to be made by the claimant and the price of the same was part of the firm price fixed under the contract. He submits that though the witness examined by the claimant had admitted that the offer of 5th February, 1992 was an alternative ignition system, the arbitral tribunal has allowed the said claim though under the terms of the contract, the supply of the alternative ignition system was included. It is submitted that the arbitral tribunal has allowed the entire claim of the claimant though the claimant had not proved actual loss/expenses incurred by it for supply of the alternative ignition system.

99. **Insofar as sub-claim no.2 is concerned,** it is submitted by the learned senior counsel for the respondent that the claim awarded by the arbitral tribunal is contrary to clause 5.3.5 of the contract and is based on no evidence admissible in law. He submits that the arbitral tribunal could not have cast burden of proof upon the respondent. No notice under clause 2.2.2.1 and 5.15 of the contract was issued

by the claimant.

100. **Insofar as claim no.2(4) (b) is concerned**, it is submitted that the said claim is allowed on the basis of a letter/fax dated 3rd March, 1994 addressed by the master of the barge though the contents of the said document were not proved in accordance with law. He submits that the claimant had failed to demonstrate that the divers equipment on board the barge was satisfactorily working.

101. **Insofar as sub-claim no.5 is concerned**, it is submitted that the said claim has been allowed by the arbitral tribunal on account of carrying out extra work even without proving the said claim by the claimant. He submits that the arbitral tribunal has accepted the calculations of the claimant in respect of the alleged loss without any proof.

102. **Insofar as sub-claim no.6 is concerned**, it is submitted that the claimant had not issued any notice as required under clause 5.1(b) of the contract or setting down the platform and on this ground alone, the arbitral tribunal ought to have rejected this claim. He submits that various findings recorded by the arbitral tribunal in respect of this claim are perverse.

103. **Insofar as sub-claim no.7 is concerned**, it is submitted that this claim awarded by the arbitral tribunal is based on no evidence. The arbitral tribunal has accepted the rates claimed by the claimant as standby charges without any evidence or proof of the rates claimed by the claimant.

104. **Insofar as sub-claim no.9 is concerned**, it is submitted that the claim towards barge, manpower and equipment which were alleged to have remained idle

for the period 28th February, 1994 to 1st March, 1994 was part of and forming part of lumpsum/fixed price payable under the contract and was not separately payable. He submits that the award in respect of this claim is thus contrary to the terms of the contract.

105. Mr.Narichania, learned senior counsel for the claimant on the other hand supported the findings rendered by the arbitral tribunal in respect of various sub-claims made under claim no.2 and would submit that the claims which are allowed by the arbitral tribunal are based on the appreciation of the evidence and based on the interpretation of the contract and thus this court cannot interfere with such finding of fact and cannot substitute the interpretation of the arbitral tribunal which interpretation is possible interpretation with another interpretation.

106. It is submitted that though the claimant had proved the remaining claims fully, the arbitral tribunal either rejected the some of the claims fully or partly such as 2(2), 2(4), 2(5), 2(6), 2(7), 2(9) and 2(10) and award thus in respect thereof deserves to be set aside.

REASONS AND CONCLUSIONS ON CLAIM NO.2 :-

107. Out of 10 sub-claims made by the claimant under claim no.2, the arbitral tribunal has partly or fully rejected the sub-claim nos.2(2), 2(4), 2(5), 2(6), 2(7), 2(9) and 2(10) which are impugned by the claimant in Arbitration Petition No.630 of 2011. The respondent has, however, challenged the award of claim nos.2(1), 2(2), sub-claim no.2(4b), 2(5), 2(6), 2(7) and 2(9) on various grounds including on the ground of limitation.

108. A perusal of the award on claim no.2 by which some of the sub-claims are partly allowed or fully allowed or rejected by the arbitral tribunal indicates that the entire award in respect of such claims is based on the appreciation of the evidence led by both the parties and is based on interpretation of the terms of the contract. In my view, the findings of facts rendered by the arbitral tribunal in respect of these claims are not perverse. Interpretation of the arbitral tribunal in respect of various provisions of the contract while allowing, partly rejecting and partly allowing or fully rejecting the claims is a possible interpretation and thus such interpretation cannot be substituted by another interpretation by this Court under Section 34 of the Arbitration and Conciliation Act, 1996.

109. In my view, the challenge to some of the claims which are fully rejected or partly rejected made by the claimant in Arbitration Petition No.630 of 2011 cannot also be accepted for the similar reasons. Even in the said Arbitration Petition No.630 of 2011, the claimant seeks that this Court shall re-appreciate the evidence and/or substitute the possible interpretation of the arbitral tribunal by another interpretation which is not permissible in law. Be that as it may, since this Court is of the view that since this entire claim is *ex-facie* barred by law of limitation for the reasons recorded aforesaid, the claims which are partly or fully allowed by the arbitral tribunal under claim no.2 are accordingly set aside on the ground of limitation.

Claim No. 3 – Non payment of foreign exchange rate variation

110. Under the contract entered into between the parties, the component of the total contract was to be paid by the respondent to the claimant in foreign exchange currencies i.e. US Dollars, GBP, DM and IL which payments were counted towards

total contract price on the basis of the exchange rate accepted in the contract. Both the parties had made their rival claims against each other arising out of fluctuation in the exchange rate of the foreign exchange.

111. Mr.Sancheti, learned senior counsel for the respondent invited my attention to some of the paragraphs of the statement of claim filed by the claimant. There was no claim for fluctuation of foreign exchange during the course of execution of the contract made by the claimant. The date of the invoices in respect of this claim were issued on 24th July, 1997 and 13th January, 1998. The date of remittance admittedly by the respondent to the claimant was on 31st March, 1995.

112. Insofar as issue of limitation in respect of this claim is concerned, it is submitted by the learned senior counsel for the respondent that the date of remittance of the foreign exchange by the respondent to the claimant was 31st March, 1995 and was relevant date and not the date on which the invoices were issued by the claimant much later i.e. on 24th July, 1997 and 13th January, 1998. He submits that merely because the respondent had asked for certain details from the claimant that would not extend the period of limitation. The letter dated 22nd May, 2000 from the respondent to the claimant asking for such details did not admit alleged liability of the respondent to the claimant. He submits that in any event even on that date i.e. 22nd May, 2000, three years period from the due date had already expired and thus the said letter would not extend the period of limitation and would not give a fresh cause of action. It is submitted by the learned senior counsel that the arbitral tribunal has completely overlooked the provisions made in clauses 3.1 and 3.2 of the contract and the said claims ought to have been dismissed on the ground of limitation itself.

113. It is submitted by the learned senior counsel that the claimant had not even submitted any foreign exchange variation claim in respect of Deutsche Mark and Italian Lira inspite of raising various invoices according to milestone payment formula and received payment equivalent to Indian Rupees at foreign exchange rate prevailing on the date of Stage – II price rate opening i.e. 11th September, 1992. During the execution of the project the exchange rate of Deutsche Mark and Italian Lira had gone down considerably. The respondent was deprived of benefits to which they were entitled against those currencies inspite of raising the claim for the same in their counter claim. It is submitted that the claimant had been paid more than that they ought to have received in full payment of contract including foreign exchange component. The arbitral tribunal thus ought to have allowed counter claim made by the respondent and ought to have rejected the claim made by the claimant.

114. Mr.Narichania, learned senior counsel for the claimant on the other hand placed reliance on the findings rendered by the arbitral tribunal on this claim and more particularly in paragraphs 316 to 351 of the impugned award and would submit that the arbitral tribunal has considered the provisions of the contract and the evidence produced by both the parties and have interpreted the terms of the contract and have rendered various findings of fact which cannot be interfered with by this court under section 34 of the Arbitration Act.

REASONS AND CONCLUSIONS ON CLAIM NO.3

115. The claimant had initially made claim for Rs. 3,78,13,742.76 before the arbitral tribunal which was subsequently revised to Rs.3,28,05,777.86. The respondent had made a counter claim on account of alleged excess payment of foreign exchange variation to the claimant to the extent of Rs.79,01,516.60. Out of

the said amount, the respondent had already deducted a sum of Rs.33,52,519.00 from the invoices of the claimant and made the counter claim of Rs.45,48,997/- against the claimant.

116. Initially the total value of the entire work under the contract was Rs.313,26,96,645.97 which was divided in two components i.e. foreign currency component and the Indian Rupees component. Clause 3.1 of the contract provided for contract price payable by the respondent to the claimant. Clause 3.2 provided for payment procedure to be followed. The claimant had submitted the first invoice on 24th July, 1997 for Rs.3,02,19,199.50 and second invoice on 13th January, 1998 for Rs.75,94,543.24. It was the case of the respondent before the arbitral tribunal that the claimant had utilized more US Dollars than permitted by clause 3.2.1 and less UK Pounds. The claimant had not used Deutsche Marks and Italian Lira at all. It was the case of the respondent that since the claimant had spent currencies in excess of the contractual limit, viz. US Dollars, no payment had been made. In respect of the currencies mentioned in the contract but not utilized the actual exchange rate on the date of the mile stone payment had been calculated and paid.

117. According to the respondent they had over paid a sum of Rs.79,01,516.60 because milestone rate was higher than actual rate. It was also the case of the respondent that the claimant had not filed any evidence to establish the fact that the remittances made by the Essar World Trade Limited and Essar Project Limited which were not parties to the present contract related to this particular contract or were for the goods and material received for the present contract.

118. Insofar as remittance made by the claimant to their suppliers in Singapore Dollars and UAE Dirham is concerned, the claimant withdrew their claim for foreign exchange rate variation in respect of those two currencies. The claimant also excluded all the claims of foreign exchange rate variation in respect of the remittances made by their two sister organizations.

119. Insofar as currencies which were not used by the claimant is concerned, the arbitral tribunal has held that there was no need for the respondent to have payment of Indian equivalent of those currencies. The claim of the respondent was on the basis of notional remittances. It is held that since the claim of the respondent was based on notional remittances, and payment of Indian equivalent had been made on the basis of the then SBI existing rates, the claim of the respondent for foreign exchange variation in respect of these two countries did not survive.

120. It is held by the arbitral tribunal that according to the terms of the contract, the foreign exchange rate as existed on the date of making payment would prevail and once the payment was made by the claimant to its foreign supplier and the same was reimbursed by the respondent to the claimant, the exchange rate crystallizes at that point of time. It is held that the subsequent variation in the exchange rate became immaterial.

121. Insofar as claim of foreign exchange rate variation in respect of US Dollars and UK Pounds is concerned, it is held that there was no dispute between the parties about rate of foreign exchange variation. The claimant had limited their claims to the remittance of US Dollars 5,77,27,321.63 and UK Pounds 34,76,089 and the corresponding amount of foreign exchange variation payable in Indian Rupees as Rs.7,28,53,061.09 in respect of the US Dollars and Rs.4,00,47,283.23 in

respect of UK Pounds. The arbitral tribunal accordingly computed that the foreign exchange variation payable in respect of US Dollars 5,77,27,321.63 was Rs.7,28,53,061.09.

122. Insofar as UK Pounds are concerned, it is held by the arbitral tribunal that the claimant had not remitted the balance of UK Pounds 4,58,981.99 and thus could not be held entitled for the foreign exchange rate variation in respect thereof.

123. Insofar as counter claim made by the respondent is concerned, it is held by the arbitral tribunal that no evidence had been produced by the respondent before the arbitral tribunal to show how the said amount of Rs.4,53,35,111.53 had been arrived at or at what rate the lower exchange rate variation had been calculated and claimed. It is held that since the claimant had not disputed the same, it was accepted as correct. The arbitral tribunal accordingly held that the claimant was entitled to recover a sum of Rs.7,28,53,061.09 minus 4,00,47,283.23 = Rs.3,28,05,777.86 and held that the counter claim made by the respondent did not survive. It is held that since the respondent had already deducted a sum of Rs.33,52,519/- from the invoices of the claimant, the claim in respect thereof made in the claim no.1 is also allowed. The arbitral tribunal accordingly allowed claim of Rs.3,61,58,296.86 with interest thereof at Rs.82,38,148.85 computed at the rate of 12% from January 1998 to 7th December, 1999.

124. I shall first deal with the issue whether this claim for non payment of foreign exchange rate variation was barred by law of limitation or not. There is no dispute that the respondent had raised a specific ground in the arbitration petition in respect of this claim of limitation. The learned senior counsel for the respondent as well as the learned senior counsel for the claimant invited my attention to the part of the

record of the arbitral proceedings in support of their rival contention on the issue of limitation as well as on merits.

125. There is no dispute that the date of the remittance of foreign exchange by the respondent to the claim was 31st March, 1995. The claimant had invoked arbitration agreement on 17th December, 1999. The limitation stopped when the notice invoking arbitration agreement dated 17th December, 1999 was received by the respondent. In my view merely because the claimant had issued invoices on 24th July, 1997 and 13th January, 1998 for making such claim under claim no.3, the cause of action which had already commenced on the date of remittance of foreign exchange would not be extended from the date of invoices issued by the claim. There would be no fresh cause of action from the date of issuance of such invoices. The limitation which has already commenced earlier is not extended unless part payment is made by the respondent or the liability is acknowledged.

126. Similarly letter dated 22nd May, 2000 from the respondent to the claimant asking for any details would not amount to acknowledgment of liability or would not extend the period of limitation. In my view, the finding of the arbitral tribunal on the issue of limitation is totally perverse and contrary to the law laid down by the Supreme Court and this court. The arbitral tribunal has allowed the ex-facie time barred claim and thus the said claim is set aside on the ground of limitation itself.

127. Insofar as submission made by the learned senior counsel for the respondent on merits of this claim is concerned, in my view the arbitral tribunal has rendered various finding of fact and the arbitral tribunal has interpreted the terms of the contract which interpretation is a possible interpretation. However since this court

is of the view that the arbitral tribunal has allowed the time barred claim, this part of the award is set aside on the ground of limitation itself.

Claim No.4 – Additional mobilization and de-mobilization of marine spread on 15th May, 1994 to 16th September, 1994

128. It was the case of the claimant that under the contract as stipulated, amount has to be paid for mobilization and de-mobilization of the equipments including vessel and personnel etc. and due to delay in execution of the work attributable to the respondent, the completion of the work stretched in the monsoon season. It was the case of the claimant that during that period, the work under the contract could not be continued because of which the equipments and personnel had to be de-mobilized and then mobilized/re-mobilized after the monsoon season. The claimant accordingly made a claim of Rs.8,69,75,600/- towards this claim with interest. The arbitral tribunal has allowed the entire claim with interest at the rate of 12% from 7th December, 1999 till the date of invocation of the arbitration by the claimant.

129. On the issue of limitation insofar as this claim is concerned, Mr.Sancheti, learned senior counsel for the respondent submits that the marine spread demobilized by the claimant on 15th May, 1994 and was re-mobilized on 15th September, 1994. The arbitration agreement was invoked by the claimant on 7th December, 1999. the claim was thus ex-facie barred by law of limitation. The invoices were issued by the claimant on 15th February, 1995 and had claimed interest w.e.f. 1st April, 1995. He submits that cause of action in respect of this claim which was for damages arising out of all the alleged breaches commenced when such alleged breach ceased to exist or alternatively from the date of invoice. Learned senior counsel placed reliance on clauses 1.1.16, 1.1.23, 1.1.25, 1.1.27,

1.1.37, 2.2.2.1, 2.2.2.2, 2.3.2.1, 2.3.2.2, 3.2.3 and 3.2.4 and would submit that these provisions clearly defined the demobilization of marine spread and mobilization of marine spread monsoon area scheduled, complete date, knowledge about site condition of the claimant, weather condition, payment procedure etc. He submits that the findings of the arbitral tribunal that the issue as to when the amount became due was uncertain or that the limitation would commence when there was a rejection of a particular invoice is totally perverse and contrary to the provisions of the Limitation Act and also clause 3.2.3 of the contract.

130. It is submitted that merely because some invoices were subsequently resubmitted by the claimant that would not give any fresh cause of action. It is submitted that rejection of invoice specifically was not to be considered for the purpose of computing the period of limitation. He submits that the finding of the arbitral tribunal that the notice invoking the arbitration i.e. 17th December, 1999 would be a deemed date of rejection of invoice is also perverse and patently illegal. He submits that the contract work was already completed on 8th February, 1995. The invoices subsequently raised were as and by way of after-thought and contrary to the provisions of the contract.

131. It is submitted by the learned senior counsel for the respondent that though monsoon season provided in the clause 1.1.25 was 16th May to 15th September, there was no provision in the contract that during the monsoon period, no work could be done at all by the contractor. He submits that under clause 2.3 of the General Condition of Contract, the claimant had or deemed to have the knowledge of site condition, climate condition, hydrological condition. It is submitted by the learned senior counsel that the arbitral tribunal has allowed the entire claim without any evidence and based on conjectures. The specific provisions in the

contract have not been dealt with. There was neither any request made by the claimant for demobilization nor any directions were issued by the respondent for demobilization. The claimant had made a claim at day rate contrary to the said provisions which could be claimed only when the marine spread or personnel were deployed. There was no separate payment provided for demobilization or mobilization under the contract and the same was part of the contract price.

132. It is submitted that the claimant could claim for such mobilization/demobilization only if the claimant was directed by the respondent to do so and that also at the mutually agreed rate. The arbitral tribunal could not have allowed the day rate for such mobilization/demobilization which was payable for deployment of the marine spread. It is submitted that in any event, the claimant was bound to prove the actual expenditure even if they would have proved that the respondent had issued any directions for de-mobilization and mobilization. He submits that the rates which were applicable under clause 2.2.2.2 could be awarded only if the claimant was waiting on the site and was not allowed to work by the respondent. Stand by rate also could apply to the situation when the marine spread and personnel were idle. He submits that the arbitral tribunal has totally overlooked the provisions regarding mobilization and de-mobilization. The rates adopted by the arbitral tribunal while allowing the claims were made by the claimant were for different purposes and activities.

133. It is submitted that the findings of the arbitral tribunal that monsoon season was non-est is contrary to the express terms of the contract. He submits that in absence of any instructions of the respondent and of application for permission of the claimant for de-mobilization and re-mobilization, the arbitral tribunal could not have allowed any such claim for de-mobilization and mobilization. He submits

that the claimant had failed to prove that the respondent was responsible for delay for which the claimant was entitled to make such claim. The entire award is based on no evidence and is based on assumptions that during the monsoon season the work under the contract could not be carried out.

134. It is submitted by the learned senior counsel that the arbitral tribunal totally overlooked the effect of clause 2.3.2.2 of the General Condition of Contract which provided for the time and cost consequences of the work under the contract having to be done during any extended period which was affected due to adverse weather condition. It is submitted that the claimant could de-mobilize during the monsoon season only if the instructions were issued by the respondent for such de-mobilization. He submits that no evidence was led by the claimant in support of the alleged loss of Rs.8,69,75,600/- which has been allowed by the arbitral tribunal.

135. Mr.Narichania, learned senior counsel for the claimant on the other hand placed reliance on clauses 1.1.7, 1.1.25, 2.3.4.1, 2.2.4.2, 5.15, 5.17, 2.3.2.2 and submits that the arbitral tribunal has rightly rendered a finding that no work could be done by the claimant during monsoon. He submits that the arbitral tribunal has interpreted the provisions of the contract which interpretation is not an impossible interpretation. He submits that under clause 5.17 of the General Condition of Contract, in certain situation, the marine spread was required to be diverted which itself shows that no work was permissible during monsoon as the same would be a difficulty condition. He submits that offshore work was more difficult and unmanageable in monsoon. Reliance is placed on the project key dates mentioned in the contract and it is submitted that those dates itself would indicates that the entire offshore work had to be done before monsoon. Learned senior counsel also invited

attention of this court to the oral evidence of the witness examined by the claimant who deposed that no work was possible in monsoon. He submits that the project key dates are interpreted by the arbitral tribunal and the finding is rendered that the work was though not prohibited during the monsoon period but was not safe. He submits that the respondent on the other hand did not examine any witness to show that the offshore work was possible during the monsoon period.

REASONS AND CONCLUSIONS ON CLAIM NO.4 :

136. The arbitral tribunal has dealt with this claim in paragraphs 352 to 366 of the impugned award. The arbitral tribunal has held that through there is no doubt that work in monsoon season was not prohibited, it should safely be said that it was not intended as a matter of course. It is held that when the construction season ends, if the work of offshore site remains to be taken up, it would be expected that the contractor would demobilize his spread for the duration. It is held that the period from 16th May, 1994 to 15th September, 1994 had to be considered as non-est for the purposes of doing any work under the contract and thus the scheduled date of completion of the work actually got extended beyond 15th September, 1994. It is held that after monsoon season was over, the entire marine spread had to be mobilized once again on 15th or 16th September, 1994 and in the process of mobilization and demobilization, the claimant had suffered huge loss and are thus entitled to cost of mobilization and demobilization of marine spread. It is held that the claimant had provided detail calculation of the amount claimed by way of loss due to mobilization and demobilization based on the rates prescribed for different kinds of barges at page 166 of the contract.

137. It is held by the arbitral tribunal that most of the work under the contract was to be done in offshore platform located at various places on the high sea and the

work was of such a nature that it could be done only in the construction season. It is held that in the monsoon season, the work under the contract could not be done. The arbitral tribunal has held that though the definition of the 'monsoon season' does not strictly or specifically say so, nevertheless the intention of defining the 'monsoon season' appears to be the same. The arbitral tribunal accordingly held that for all practical purposes, period from 16th May to 15th September has to be treated as non-existent and non-working period for doing offshore work under the contract. The arbitral tribunal held that the claimant had demobilized the entire marine spread on or about 15th May, 1994 and after monsoon season was over on 15th September, 1994, the said marine spread had been remobilized to the respective work locations on or after that date.

138. As far as rates claimed by the claimant is concerned, the arbitral tribunal has held that the quantification of the claim was founded on the contract rates and the tribunal did not see any fault in the method adopted and accordingly allowed the entire claim for sum of Rs.8,69,75,600/- for demobilization of marine spread on 15th May and re-mobilization on 16th September, 1994. The arbitral tribunal also awarded the said claim with interest at the rate of 12% per annum from the date of invocation of arbitration agreement i.e. 7th December, 1999.

139. I will first deal with the issue whether claim no.4 as made before the arbitral tribunal by the claimant for recovery of additional mobilization and demobilization charges of marine spread was barred by law of limitation and then deal with the claim on merits.

140. It is not in dispute that it was the claim of the claimant that marine spread was demobilized on 15th May, 1994 and remobilized on 15th September, 1994,

whereas the arbitration agreement was invoked by the claimant on 17th December, 1999. It is also not in dispute that the invoices were issued by the claimant on 15th February, 1995 and had claimed interest in the arbitral proceedings with effect from 1st April, 1995. A perusal of the arbitral award however, indicates that the arbitral tribunal has rejected the plea of limitation insofar as this claim is concerned on the ground that the notice invoking arbitration i.e. 17th December, 1999 would be a deemed date of rejection of invoices. There is no dispute that this claim made by the claimant before the arbitral tribunal was in the nature of damages.

141. In my view the cause of action for making a claim for damages would commence when the alleged breaches were committed by the respondent and as a result thereof, the claimant was required to demobilize the marine spread and thereafter remobilize the same. Demobilization even according to the claimant was on 15th May, 1994, whereas remobilization was on 15th September, 1994. In my view, merely because the invoices were issued subsequently by the claimant, would not give a fresh cause of action for the purpose of making such claim for damages.

142. The cause of action, in my view, would have commenced when according to the claimant, the claimant was forced to demobilize marine spread on 15th May, 1994 and when remobilized on 15th September, 1994. The finding of the arbitral tribunal that the date of notice invoking arbitration agreement i.e. 17th December, 1999 would be the deemed date of rejection of invoice and the limitation would stop on such date is patently illegal and perverse.

143. The limitation does not commence when the notice invoking arbitration agreement is issued but it stops when such notice invoking arbitration agreement is received by other party. The impugned award allowing such time barred claim on the premise that the limitation would commence only on the date of invocation of the arbitration agreement is contrary to section 21 of the Arbitration & Conciliation Act, 1996 and also contrary to the law laid down by the Supreme Court and this Court. The finding on the issue of limitation is perverse and patently illegal and deserves to be set aside. The claim awarded by the arbitral tribunal was *ex-facie* barred by law of limitation and thus deserves to be set aside.

144. A perusal of the record further indicates that the claimant themselves had made the claim for interest on this claim with effect from 1st April, 1995 on the premise that the work was completed in 1995 and that would itself indicate that the cause of action for principal amount also had arisen prior to 1st April, 1995 and thus on the date of receipt of notice invoking arbitration agreement i.e. on 17th December, 1999, the claim was *ex-facie* barred by law of limitation.

145. Be that as it may, the award on this claim has been also challenged by the respondent on the ground that the amount spent, if any, on demobilization and remobilization was part of the contract price agreed upon by the parties and was not separately payable. The award is also challenged on the ground of payability, quantification and rate. Insofar as payability of this claim of concerned, it is not in dispute that the respondent had never issued any direction to the claimant to demobilize and/or remobilize marine spread on 15th May, 1994 or on 16th September, 1994 respectively or on any other date. The claimant also had never applied for permission to demobilize or remobilize the marine vessel from the respondent. It was not the case of the claimant that during the entire monsoon

period, no work of offshore would have been carried out by the claimant at all. Admittedly, there was no provision under the contract for not carrying out any offshore work during the monsoon period. There was also no provision in the contract for demobilization or remobilization of marine vessel during the monsoon period compulsorily.

146. In my view the finding of the arbitral tribunal that there is no doubt that the work in monsoon season was not prohibited, it should be safely be said that it would not be intended as a matter of course that the said monsoon has to be considered as non-est for the purposes of doing any work under the contract is contrary to the provisions of the contract. Under clause 2.3 of the General Condition of Contract, the claimant had or deemed to have knowledge of the site condition, climate condition and hydrological condition. A perusal of the award indicates that the arbitral tribunal has allowed this claim based on no evidence and the award is based only on conjectures. The arbitral tribunal has not dealt with the provisions of the contract though specifically referred by the respondent. The arbitral tribunal also decided contrary to clause 2.3.2.2 of the General Condition of Contract which provided for the time and consequences of the work under the contract having to be done during the extended period which was affected due to adverse weather condition.

147. In my view even if the part of the offshore work could not be carried out by the claimant during the monsoon period because of any alleged delay on the part of the respondent, the claimant could have been awarded such claim for compensation only if the claimant would have proved the breaches on the part of the respondent and also the actual loss suffered due to such alleged delay and/or breaches on the part of the respondent. The claimant did not lead any oral

evidence on the quantification of the claim made by the claimant but claimed the amount at the day rate which could be claimed under the contract only when the marine spread or personnel were deployed. The claimant even could not have claimed the standby rates which were applicable only when the marine spread and personnel were idle. This entire claim awarded by the arbitral tribunal as claimed by the claimant in my view is thus based on no evidence and contrary to the provisions of the contract and deserves to be set aside on that ground also.

148. Insofar as submission of the learned senior counsel for the claimant that the arbitral tribunal has interpreted the provisions of the contract while holding that no work could be done by the claimant during monsoon is concerned, the claimant did not lead any evidence to show before the arbitral tribunal that no offshore work at all could be done during the entire monsoon period. The arbitral tribunal though itself has held that there was no prohibition under the contract for not carrying out the work during the monsoon period, at the same time has rendered a perverse and contradictory finding that no work could be done by the claimant during the monsoon and the said monsoon period was non-est. In my view the interpretation of the arbitral tribunal is not a possible interpretation and is contrary to the provisions of the contract. This court thus has power to interfere with such impossible interpretation or interpretation which is contrary to the contract.

149. In my view even if part of the offshore work could not be carried out by the claimant and was incomplete on the date of commencement of monsoon period, the claimant in that event could have applied for extension of the contractual period and could have carried out the said work during the extended period and thus could not have made any claim for demobilization and re-mobilization of the marine spread.

150. Insofar as submission of the learned senior counsel for the respondent that the arbitral tribunal has interpreted the project key dates mentioned in the contract while rendering a finding that no work was possible in monsoon and reliance placed on the oral evidence is concerned, in my view, the claimant even in that circumstances could not have made any claim for demobilization and re-mobilization of marine spread in absence of any directions issued by the respondent and in view of the claimant not having obtained any permission from the respondent or without intimating the respondent before such demobilization and re-mobilization. In my view the impugned award on this claim shows total perversity and patent illegality and is thus set aside on that ground also.

Claim No.5 – Bank guarantee commission and loss of interest on margin money :-

151. The claimant claimed a sum of Rs.2,27,19,501/- as bank guarantee commission for the period from 9th April, 1996 to 31st March, 2000 for keeping the bank guarantee alive during the said period. The claimant also claimed interest on the bank guarantee commission, at Rs.4,04,76,854/- for the period of 1st April, 2000 to 30th June, 2009. The aggregate sum claimed under the said head was Rs.6,31,96,355/-. The arbitral tribunal has awarded the entire amount as claimed and further a sum of Rs.32,81,250/- also towards the bank guarantee commission for the period of 1st July, 2009 to 30th June, 2010 i.e. aggregate sum of Rs.6,64,77,605/- with interest at the rate of 12% per annum till 30th September, 2010 on the said amount which was calculated at Rs.6,75,53,842/-. The arbitral tribunal rejected the claim for loss of interest on margin money.

152. Some of the relevant facts for the purpose of deciding this claim as highlighted by the learned senior counsel appearing for both the parties are as

under :-

(a) The performance guarantee of Rs.31,32,70,000/- submitted by the claimant was valid upto 30th January, 1993. The scheduled date of completion of the contract was 15th May, 1994. The actual date of completion of the contract was 8th February, 1995. On 5th January, 1996, the respondent addressed a letter to the claimant stating that the project was delayed and completed on 8th February, 1995 and accordingly the performance guarantee should be valid upto 7th February, 1996 plus 60 days claim period. On 2nd March, 1996, the respondent addressed a letter to the claimant for extension of the said bank guarantee upto 31st May, 1996. It was stated that the claimant had delayed the completion of the project beyond scheduled date which attracted levy of liquidated damages. On 26th April, 1996, the respondent addressed a letter to the State Bank of India thereby invoking the said bank guarantee in case the same was not extended by the claimant.

(b) The claimant addressed a letter on 2nd May, 1996 to the respondent inter alia stating that they had renewed the guarantee pending application for extension of time made by the claimant. On 28th May, 1996, the claimant addressed a letter to the respondent requesting to intimate to them the value of the guarantee so that the same could be extended for the reduced amount. On 30th May, 1996, the respondent requested the claimant to extend the bank guarantee. On 6th July, 1996, the claimant addressed a letter to the respondent

reducing the bank guarantee amount of Rs.25 crores and stating that they had further extended the guarantee.

(c) On 10th July, 1996, the respondent requested the claimant for extending the validity of the bank guarantee upto 31st December, 1996 plus 60 days claim period. On 16th October, 1996, the respondent addressed a letter to the claimant requesting for extension of bank guarantee upto 31st December, 1996 plus 60 days claim period. On 18th December, 1996 the respondent addressed a letter to the claimant requesting for extension of bank guarantee upto 30th June, 1997 plus 60 days claim period. On 19th June, 1997 and 30th June, 1997, the respondent addressed a letter to the claimant requesting for extension of bank guarantee upto 31st December, 1997 plus 60 days claim period. On 13th July, 1998 the respondent requested the claimant to extend the bank guarantee upto 30th September, 1998 plus 60 days claim period.

(d) On 3rd June, 2002 the claimant made an application before the arbitral tribunal for discharging the security of Rs.25 crores. The said application was opposed by the respondent. The arbitral tribunal passed an order on the said application on 17th June, 2002 rejecting the said application made by the claimant. The arbitral tribunal directed the claimant to keep the bank guarantee alive till the date of the award.

(e) The claimant through their advocate addressed a letter to the arbitral tribunal on 3rd August, 2010 annexing the proof of payment of bank commission for amendment for keeping the bank guarantee alive for Rs.25 crores and stated that in case the request of the claimant for reduction in the bank guarantee charges was granted by the State Bank of India, the claimant shall pass all such benefit and inform the arbitral tribunal and respondent accordingly. The claimant requested the arbitral tribunal to take on record those documents. The arbitral tribunal allowed the entire claim made by the claimant under this claim.

153. Mr.Sancheti, learned senior counsel for the respondent placed reliance on clauses 3.3, 3.3.3 and 3.3.6. He submits that under these provisions, the respondent was permitted to retain the performance bank guarantee for the purpose of recovery of the liquidated damages. If such performance bank guarantee was required to be retained by the respondent, the respondent was not liable to return such bank guarantee immediately. Learned senior counsel invited my attention to some of these correspondence referred to aforesaid and would submit that the respondent had given an option to the claimant to renew the bank guarantee or if the same was not renewed, the respondent would encash the said bank guarantee. He submits that since the claimant had exercised the option of renewal of the bank guarantee to avoid encashment of the bank guarantee by the respondent, the claimant was liable to pay all such commissions charges and could not have made such claims against the respondent.

154. It is submitted by the learned senior counsel that in any event part of the claim i.e. alleged expenses on bank guarantee commission having been incurred

three years prior to the date of receipt of notice dated 17th December, 1999 i.e. prior to 17th December, 1996 was though ex-facie barred by law of limitation. The arbitral tribunal has allowed the entire claim including such time barred claim.

155. It is submitted by the learned senior counsel that the extension of the bank guarantee was only at the instance of the claimant and their specific request not to enforce the bank guarantee. On one hand the arbitral tribunal has ordered unconditional extension of the bank guarantee and on the other hand had restrained the respondent from encashing such bank guarantee. He submits that the award shows patent illegality and inconsistency. It is submitted that the arbitral tribunal ought to have rendered a finding before awarding such claim for payment of bank guarantee commission and interest as to whether the respondent was at fault in the claimant extending such bank guarantee or not.

156. It is submitted that though there was no amendment to the statement of claim, the arbitral tribunal awarded the claim for the period 1st April, 2000 to 31st March, 2009 and also interest thereon. It is submitted that the said part of the claim was beyond the scope of reference and had been allowed on the basis of such statement tendered across the bar during the course of the hearing. He submits that the claim for interest on liquidated damages claimed by the respondent was rejected through the same was claimed on the basis of similar statement filed by the respondent.

157. It is submitted by the learned senior counsel that the finding of the arbitral tribunal that the respondent ought to have encashed the bank guarantee immediately and since the same was not encashed, the respondent is liable to pay the bank guarantee commission charges and interest thereon is totally perverse and

patently illegal. He submits that the option of extending the bank guarantee was exercised by the claimant and thus no such charges could be claimed against the respondent. The respondent did not compel the claimant to renew the said bank guarantee for 14 years. It is submitted that the arbitral tribunal has totally overlooked the provisions of clause 3.3.3 of the General Condition of Contract. The respondent had a right to ask the claimant to keep the bank guarantee alive in view of the claim of liquidated damages made by the respondent against the claimant. It is submitted that the basis of the entire findings rendered by the arbitral tribunal is contrary to the evidence on record and also contrary to the provisions of the contract. It is submitted that though the arbitral tribunal has allowed part of the counter claim towards liquidated damages made by the respondent, the arbitral tribunal has allowed the entire claim made by the claimant towards the bank guarantee commission charges and interest for the entire period and for the entire amount which shows patent illegality. The arbitral tribunal on one hand rejected the claim for liquidated damages in the monsoon period and on the other hand allowed the claim for bank guarantee commission charges and interest thereon for the entire period.

158. It is submitted by the learned senior counsel that if the arbitration proceedings were pending for about 10 years, it was not due to any fault on the part of the respondent and thus no interest for the entire period could be awarded against the respondent.

159. Mr.Narichania, learned senior counsel for the claimant on the other hand submits that under clause 3.3.1 of the General Condition of Contract, the performance bank guarantee could be kept alive only for a period equitable to cover the schedule completion date for the work plus the warranty period of 12

months plus 60 days i.e. only upto 8th April, 1996. He submits that since the completion of the work under the contract was delayed by the respondent, the claimant was required to extend the performance bank guarantee accordingly. It is submitted that the respondent had opposed the application filed by the claimant under section 17 of the Arbitration Act before the arbitral tribunal for return of the bank guarantee. The arbitral tribunal accordingly rejected the said application under section 17 made by the claimant. It is submitted that though the respondent had made a counter claim for Rs.24,46,37,396.75 towards liquidated damages, the arbitral tribunal granted the said claim only for Rs.3,44,51,538/- which clearly indicates that the claim made by the respondent was highly exaggerated. He submits that the respondent thus on the face of it could not have retained the bank guarantee for Rs.25 crores alive all these years.

160. It is submitted by the learned senior counsel that after the impugned award is rendered by the arbitral tribunal directing the respondent to return the performance bank guarantee, the respondent has already returned the said bank guarantee to the claimant which itself would indicate that the respondent has accepted the entire award and thus could not have challenged any part of the claim. He submits that the arbitral tribunal has wrongly rejected the claim for interest on the margin money though the arbitral tribunal had found the breaches on the part of the respondent. It is submitted that even if the arbitral tribunal had not considered clause 3.3.3 of the General Condition of Contract, it would not affect the merits of the claim.

161. Insofar as submission of the learned senior counsel for the respondent that the arbitral tribunal could not have awarded any part of the claim made for the period which were not made in the statement of claim is concerned, it is submitted

that those claims had arisen in view of the directions issued by the arbitral tribunal for keeping the bank guarantee alive during the pendency of the proceedings till the arbitral award was rendered by the arbitral tribunal and thus the same was within the jurisdiction of the arbitral tribunal.

REASONS AND CONCLUSIONS ON CLAIM NO.5

162. The arbitral tribunal in the impugned award has held that under the provisions of the contract, undisputedly the performance bank guarantee had to remain valid upto 8th April, 1996. The respondent had not granted any extension for the schedule date for the completion of the work under the contract. It is held that if according to the respondent, the respondent was entitled to recover any amount towards liquidated damages, the respondent ought to have encashed the bank guarantee and would have saved the claimant from paying heavy bank commission charges and deposit of margin money.

163. It is held by the arbitral tribunal that since the respondent had failed to encash the bank guarantee within the reasonable time after actual completion of work under the contract, it was clear that the respondent was not sure of their right to levy or recover liquidated damages from the claimant. The respondent compelled the claimant to keep the bank guarantee of Rs.25 crores alive for about 14 years without any justifiable reasons and are thus liable to reimburse the claim for the bank guarantee commission charges paid by the claimant to the bank.

164. Insofar as quantification of the claim is concerned, it is held by the arbitral tribunal that the claimant had submitted a detailed evidence from the State Bank of India for the amount claimed by them which were not contested by the respondent. The arbitral tribunal accordingly allowed the claim for the bank

guarantee commission till 30th June, 2009 for a sum of Rs.6,31,96,355/- and further sum of Rs.32,81,250/- for the period from 1st July, 2009 to 30th June, 2010. The arbitral tribunal further directed that the claimant was entitled to the bank guarantee commission for the period from 1st July, 2010 till the release of the said bank guarantee. The arbitral tribunal awarded interest at the rate of 12% interest for the period upto 30th September, 2010 which came to Rs.6,75,53,842/- on the principal amount of Rs.6,64,77,605 aggregating to Rs.13,40,31,447/-.

165. Insofar as claim for interest on the deposit of the margin money is concerned, the arbitral tribunal rejected the said claim.

166. A perusal of the record indicates that though the scheduled date of the completion of the contract was 15th February, 1994 and actual date of the completion of the contract was 8th February, 1995, the respondent had addressed various letters to the claimant for extension of the bank guarantee from time to time. By letter dated 2nd March, 1996, the respondent had alleged that the claimant had delayed the completion of the project beyond the scheduled date which attracted the levy of liquidated damages at that stage, the respondent had threatened to encash the bank guarantee. The claimant agreed to renew the bank guarantee. It was however decided that the bank guarantee amount shall be reduced to Rs.25 crores. There is no dispute that the claimant had made an application before the arbitral tribunal on 3rd June, 2002 for discharging the guarantee of Rs.25 crores. The said application was opposed by the respondent. The arbitral tribunal passed an order on the said application on 17th June, 2002 filed by the claimant rejecting the said application. The arbitral tribunal directed the claimant to keep the bank guarantee alive till the date of the award.

167. Insofar as submission of Mr.Sancheti, learned senior counsel for the respondent on the issue of limitation is concerned, a perusal of the arbitral award indicates that the arbitral tribunal has rejected the plea of limitation on erroneous ground. The bank guarantee was periodically extended by the claimant. There is no dispute that the respondent had threatened to make a claim for liquidated damages against the claimant. Under the provisions of the contract entered into between the parties the respondent could ask the claimant to extend the bank guarantee.

168. There is no dispute that the claimant had invoked the arbitration agreement only on 17th December, 1999. The submission of the respondent on the issue of limitation was that the arbitral tribunal could not have awarded claim for reimbursement of the bank guarantee commission prior to 17th December, 1996 on the ground that the claim prior to the said date was ex-facie barred by law of limitation.

169. In my view the cause of action in respect of the claim for reimbursement of the bank guarantee commission arose in favour of the claimant when the respondent had called upon the claimant to renew the bank guarantee which according to the claimant was in breach of the provisions of the contract. The arbitration proceedings commenced when the notice issued by claimant invoking arbitration agreement on 17th December, 1999 was received by the respondent. The limitation in respect of such claim thus stopped when such notice invoking the arbitration agreement was received by the respondent. In my view the claim for reimbursement of the bank guarantee commission for the period prior to 17th December, 1996 was thus ex-facie barred by law of limitation. A perusal of the record indicates that the arbitral tribunal in any event has awarded claim for bank

guarantee commission for the entire period. In my view the submission of the learned senior counsel for the respondent that the claim for reimbursement for bank guarantee commission charges for the period prior to i.e. 7th December, 1996 was barred by law of limitation deserves acceptance. This part of the award directing the respondent to pay the bank guarantee commission charges to the claimant prior to 17th December, 1996 is accordingly set aside.

170. Insofar as submission of the learned senior counsel for the respondent that in view of the option given by the respondent to the claimant either to extend the bank guarantee or to allow the respondent to encash the bank guarantee and in view of the claimant exercising the option of extension of performance bank guarantee, the claimant could not make any claim for reimbursement of the bank guarantee commission is concerned, in my view there is no substance in this submission of the learned senior counsel. If the respondent was entitled to encash the performance bank guarantee in law and in accordance with the contract entered into between the parties, the respondent ought to have encashed such performance bank guarantee. The fact remains that the respondent allowed the claimant to extend the bank guarantee from time to time. The respondent had as a matter of record had opposed the application made by the claimant for discharge of the performance bank guarantee before the arbitral tribunal. The arbitral tribunal accepted the plea of the respondent and rejected the said application filed by the claimant under section 17 of the Arbitration Act. In my view the arbitral tribunal is thus right in holding that the respondent could have encashed the bank guarantee and having allowed the claimant to extend the bank guarantee, could not refuse to pay bank guarantee commission charges thereon.

171. A perusal of the record also indicates that the claim made by the respondent for recovery of liquidated damages from the claimant itself was barred by law of limitation. The respondent had not demanded any payment of liquidated damages during the course of execution of the work till the respondent filed their written statement and counter claim before the arbitral tribunal on 27th October, 2000, though in their letter dated 2nd March, 1996, had alleged that alleged delay on the part of the claimant had attracted liquidated damages. This court has already dealt with the issue of limitation in respect of the said counter claim separately in the later part of the judgment. In my view since the counter claim made by the respondent for recovery of liquidated damages itself was barred by law of limitation, the respondent could not have compelled the claimant to extend the performance bank guarantee from time to time. The respondent was thus liable to pay the bank guarantee commission charges to the claimant however subject to part of claim being barred by law of limitation.

172. Insofar as quantification and proof in respect of the claim is concerned, a perusal of the record indicates that the claimant had produced the proof of payment made to the bank and had filed their statement of quantification/calculation which was not disputed by the respondent. The arbitral tribunal has thus allowed the entire claim as claimed by the claimant. This court thus cannot re-appreciate the evidence produced by the parties before the arbitral tribunal and take a different view in the matter.

173. Insofar as submission of the learned senior counsel that the arbitral tribunal could not have awarded any claim for reimbursement of the bank guarantee commission charges from the date of claim till such bank guarantees were returned by the respondent is concerned, it is not in dispute that the subsequent claim arising

out of extension of such bank guarantee during the pendency of the arbitration proceedings were not referred to the arbitral tribunal. The claimant did not make any application for amendment of their claim before the arbitral tribunal. The claimant had only produced a statement before the arbitral tribunal. The respondent had opposed the grant of any relief based on such statement. The arbitral tribunal had rejected the claims made by the respondent based on similar statement while rejecting their part of the claim for liquidated damages. In my view, the arbitral tribunal thus did not have any jurisdiction to entertain the claims having arisen during the pendency of the arbitration proceedings without those claims being referred to the arbitral tribunal and/or without amending the statement of claim. The directions issued by the arbitral tribunal for payment of the bank guarantee charges for the period 1st April, 2000 till 31st March, 1999 and interest thereon was without jurisdiction and is accordingly set aside.

174. In my view there is no merit in the submission of Mr.Narichania, learned senior counsel for the claimant that since the matter was pending before the arbitral tribunal and the arbitral tribunal had directed the claimant to extend the performance bank guarantee during the pendency of the arbitration proceedings, the claimant was entitled to make such claim in the ongoing arbitration proceedings though those claims were not referred to the arbitral tribunal and without making any application for amendment of the statement of claim. The claim for bank guarantee commission and interest thereon prior to 7th December, 1996 is set aside. The award of the arbitral tribunal directing the payment of bank guarantee for the period 1st April, 2000 to 31st March, 2009 and interest thereon is set aside on the ground of jurisdiction. Rest of the award in respect of the said claim is upheld.

Claim for interest :-

175. The arbitral tribunal has awarded interest at the rate of 12% per annum for the entire period when the arbitration proceedings were pending i.e. from 17th December, 1989 to 30th September, 2010 in the amount of Rs.22,63,17,040/- on the principal amount awarded under various claims at Rs.17,43,17,801/-.

176. It is submitted by the learned senior counsel for the respondent that the arbitral tribunal could not have awarded any interest in favour of the claimant since no amount was liable to be paid by the respondent to the claimant. He submits that in any event the arbitral tribunal could not have awarded interest for the entire period during which the arbitral proceedings were pending for no fault of the respondent. He submits that the arbitral tribunal did not render any finding that the arbitral proceedings were delayed by the respondent. It is submitted that in any event, the arbitral tribunal could not have awarded interest at the rate of 12% per annum which is exorbitant. He lastly submits that the amount of interest awarded by the arbitral tribunal is much more than the principal amount awarded.

177. Mr.Narichania, learned senior counsel for the claimant on the other hand submits that the arbitral tribunal had power to award interest for all the three period i.e. from the due date till the date of payment at reasonable rate. He submits that the rate of 12% awarded by the arbitral tribunal is not exorbitant but is a reasonable rate. He submits that the arbitral tribunal has rightly allowed the claim for the period during which the proceedings were pending for no fault of the claimant.

REASONS AND CONCLUSIONS ON CLAIM FOR INTEREST

178. A perusal of the award indicates that the arbitral tribunal has awarded interest in favour of the claimant at the rate of 12% per annum for the entire period i.e. from 17th December, 1989 to 30th September, 2000 and further interest thereon. The submission of the learned senior counsel for the respondent on the claim of interest is that the respondent was not responsible for pendency of the arbitral proceedings for about 10 years and in absence of any finding against the respondent, that the respondent was responsible for delay in outcome of the arbitral proceedings, the arbitral tribunal could not have awarded interest for the entire period against the respondent. Similarly the submission of the learned senior counsel for the claimant is that the claimant was also not responsible for prolongation of the arbitral proceedings for about 10 years.

179. In my view since the claims made by the claimant (except part of claim no.5) were ex-facie barred by law of limitation, the question of payment of any interest thereon did not arise. Those part of the claims which are set aside on the ground of limitation or on merits, the interest awarded by the arbitral tribunal on those claims is set aside.

180. Insofar as period of interest is concerned, a perusal of the award indicates that there is no finding rendered by the arbitral tribunal that either the claimant or the respondent were responsible for disposal of the arbitral proceedings which took around 10 years. In my view the claimant who has partly succeeded insofar as claim no.5 is concerned cannot be deprived of interest pendente lite and till payment for no fault of the claimant.

Counter claims :-

181. The respondent had made two counter claims i.e. (1) for reimbursement of payment in foreign exchange variation and (2) liquidated damages for the delayed completion of work in respect of 4 platforms and 6 pipelines for the sum of Rs.24,46,37,396.75 i.e. 3% of the contract value. The arbitral tribunal however rejected the counter claim of the respondent for reimbursement of the payment in foreign exchange variation.

182. Insofar as counter claim for the liquidated damages is concerned, the arbitral tribunal allowed the said counter claim for Rs.3,32,07,429/-. The respondent has impugned the rejection of the balance amount of the counter claim towards the liquidated damages and also rejection of the counter claim for reimbursement of payment in foreign exchange variation. The claimant on the other hand has impugned the award allowing the liquidated damages in the sum of RS.3,32,07,429/- by the arbitral tribunal in favour of the respondent.

183. Mr.Sancheti, learned senior counsel for the respondent submits that insofar as rejection of the counter claim arising out of reimbursement of payment in foreign exchange variation is concerned, the respondent adopts the submission already made while dealing with the claims made by the claimant and submits that the said counter claim could not have been rejected by the arbitral tribunal.

184. Insofar as rejection of substantial part of the counter claim in respect of the liquidated damages is concerned, it is submitted by the learned senior counsel for the respondent that the arbitral tribunal has failed to give proper reasons as to why the entire claim for liquidated damages could not have been allowed by the arbitral tribunal. The arbitral tribunal did not consider the submissions made by the

respondent for delay attributable on the part of the claimant in respect of the performance of the contract by the claimant. He submits that the arbitral tribunal has mis-interpreted clauses 6.2.2 and 6.2.3 of the contract, has acted arbitrarily and against the established principles of law. He submits that though the arbitral tribunal has accepted the principles laid down by the Supreme Court in case of **ONGC vs. Saw Pipes, AIR 2003 SC 2629**, the arbitral tribunal failed to implement those principles while rejecting the substantial part of the counter claim. He submits that though the respondent had proved that the delay was solely attributable on the part of the claimant, the arbitral tribunal rejected substantial part of the counter claim.

185. It is submitted that though the actual stand by time of the barges was 262.42 hours, the arbitral tribunal has considered the counter claim only for 12 days. He submits that the arbitral tribunal has failed to consider clause 5.2.4.3 or clause 2.3 of the General Condition of Contract with reference to delay of 37 days as claimed by the claimant alleged to be attributable to the respondent for approval of drawing.

186. Mr.Narichania, learned senior counsel for the claimant on the other hand submits that the respondent had raised its claim for liquidated damages only at the time of filing its written statement on 27th October, 2000. It is submitted that as late as on 22nd December, 1997 in a fax addressed to the claimant by the respondent, it was stated that the respondent was still considering whether or not to grant the claimant extension of time. It is submitted that the said claim for liquidated damages made on 27th October, 2000 was ex-facie barred by law of limitation. The scheduled date of completion was 15th May, 1994. The date of completion of the work was 8th February, 1995. It is submitted that even if the date

of last application made by the claimant for time extension i.e. 30th April, 1996, is considered, the counter claim for liquidated damages filed on 27th October, 2000 was ex-facie barred by law of limitation. He submits that cause of action for recovery of liquidated damages arose on the date the claimant had committed breaches causing delay in carrying out work which was prior to 8th February, 1995.

187. It is submitted by the learned senior counsel that since the respondent was solely responsible for delay, the respondent could not have made any claim for liquidated damages against the claimant. He submits that in any event the nature of the counter claim made by respondent was such that it was capable of computation and proof and thus was required to be strictly proved. It is submitted that since the respondent did not lead any evidence to prove the actual loss suffered by the respondent if any due to alleged delay on the part of the claimant, the arbitral tribunal could not have allowed even part of the claim. He distinguished the judgment of Supreme Court in case of **ONGC vs. Saw Pipes** (supra) and placed reliance on judgment of Supreme Court in case of **Fateh Chand vs. Balkishen Das, AIR 1963 SC 1405** and in case of **Maula Bux vs. Union of India, AIR 1970 SC 1955**.

188. Learned senior counsel for the claimant also placed reliance on the judgment of this court in case of **Board of Trustees for Jawaharlal Nehru Port vs. Gateway Terminals India Pvt. Ltd. (2014) 2 Bom.C.R.73** and also on the judgment of this court in case of **Oil and Natural Gas Corporation Ltd. vs. M/s.Rais Coastal Survey & Consultancy Services Pvt. Ltd., 2005(3) All M.R. 470**. It is submitted that since the respondent had failed to lead any oral evidence and failed to prove the actual loss, the impugned award allowing part of the liquidated damages is totally illegal and contrary to law laid down by the Supreme Court and this court.

190. In support of the plea that the counter claim made by the respondent was barred by law of limitation, learned senior counsel for the claimant placed reliance also on the judgment of Supreme Court in case of ***Voltas Limited vs. Rolta India Limited, (2014) 4 SCC 516***. It is submitted by the learned senior counsel that unless the arbitral tribunal would have rendered a finding that the claimant was responsible for any alleged delay and in view of such alleged delay, the respondent had actually suffered any damages and had proved the same, the arbitral tribunal could not have awarded any amount as and by way of liquidated damages in favour of the respondent.

191. Learned senior counsel for the respondent also placed reliance on the unreported judgment of this court delivered on 21st April, 2015 in case of ***M/s. Continental Transport Organization Pvt. Ltd. vs. Oil & Natural Gas Corporation Ltd. in Arbitration Petition No.372 of 2013*** on the issue that the party making any claim for liquidated damages is required to prove not only the breaches committed by the contractor but also the actual loss suffered by such party due to such breaches and/or delay.

192. Mr.Narichania, learned senior counsel for the claimant also sought to justify the rejection of substantial part of the counter claim made by the respondent by relying upon various documents on record and also in support of the submission that even part of the counter claim towards the liquidated damages could not have been awarded by the arbitral tribunal. He submits that if all those documents would have been considered by the arbitral tribunal, the arbitral tribunal would not have allowed even part of the counter claim in favour of the respondent.

193. Mr.Narichania, learned senior counsel for the claimant also placed reliance on the judgment of this court in case of ***Satpal P.Malhotra & Ors. vs. Puneet Malhotra & Ors.*** delivered on 14th June, 2013 in ***Arbitration Appeal No.12 of 2010*** and would submit that the claimant also can assail part of the findings recorded by the arbitral tribunal at the stage of hearing of the arbitration petition under section 34 though such finding has not been specifically challenged. Learned senior counsel also distinguished the judgment of this court in case of ***Bombay Intelligence Security (India) Ltd. vs. Oil & Natural Gas Corporation Limited*** delivered on 21st August, 2015 in ***Arbitration Petition No. 822 of 2012***.

194. Mr.Sancheti, learned senior counsel for the respondent in his rejoinder arguments relied upon the reasons recorded by the arbitral tribunal insofar as part of the counter claim is allowed and would submit that the arbitral tribunal could not have rejected the remaining part of the counter claim. He submits that the claim for liquidated damages made by the respondent was incapable of calculations and proof. Learned senior counsel made an attempt to distinguish various judgments relied upon by Mr.Narichania, learned senior counsel for the claimant on the issue whether claim for liquidated damages was required to be proved or not. He submits that the arbitral tribunal has rightly rendered a finding that the counter claim was not barred by law of limitation.

195. Mr.Sancheti, learned senior counsel submits that the documents, pleadings which were forming part of the record if were not considered by the arbitral tribunal in the impugned award, the claimant cannot rely upon those documents at the stage of hearing of the petition under section 34 so as to support the conclusion drawn by the arbitral tribunal for the first time. In support of this submission, learned senior counsel placed reliance on the judgment of this court in case

Bombay Intelligence Security (India) Ltd. vs. Oil & Natural Gas Corporation Limited (supra) and also placed reliance on the judgment of Supreme Court in case of ***Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others, AIR 2978 SC 851.***

REASONS AND CONCLUSIONS ON COUNTER CLAIM

196. The arbitral tribunal has considered the counter claim made by the respondent in paragraphs 398 to 490 of the impugned award. Insofar as counter claim (1) i.e. for the reimbursement of the excess payment of foreign exchange variation is concerned, the arbitral tribunal has rejected that counter claim while discussing the claim made by the claimant for foreign exchange variation by recording reasons.

197. Insofar as issue of limitation raised by the claimant in respect of the counter claim is concerned, the arbitral tribunal has rejected the said plea on the ground that by their fax dated 22nd December, 1997, the respondent had informed the claimant that their request for extension in the project completion date vis-a-vis liquidated damages was under the process of approval. It is held that it was thus apparent that the respondent had thus levied the liquidated damages any time after 22nd December, 1997 and the fact that the amount was quantified on any day subsequent thereto did not affect the period of limitation. The arbitration was invoked on 17th December, 1999 and thus the claim for liquidated damages was held to be within the period of limitation on that ground. It is held that the respondent had informed the claimant vide their letter dated 2nd March, 1996 that the claimant had delayed the completion of the project beyond the scheduled completion date which attracted the levy of liquidated damages and the same was being examined.

198. Insofar as allowance of part of the counter claim and rejection of the substantial part is concerned, the arbitral tribunal held that the respondent was responsible for delay of 37 days in approval of Bombay High North side drawings. The arbitral tribunal held that the delay was in respect of ID-ICP pipeline which came to 97 days, delay in respect of EB-SCI came to 64 days and SM-ICP came to 58 days. It is held that in case of other pipelines, there was delay as per expected date of completion due to delay attributable to the respondent. It is held that the respondent however had not quantified the precise amount of liquidated damages either in their pleadings or in any document filed before the arbitral tribunal and submitted a calculation sheet before the arbitral tribunal on 11th February, 2005.

199. The arbitral tribunal accordingly quantified the liquidated damages in respect of delay attributable on the part of the claimant and awarded a sum of Rs.3,44,51,538/-. The arbitral tribunal however refused to grant any interest on the said claim on the liquidated damages partly allowed by the arbitral tribunal on the ground that the respondent had not filed any calculation of the amount of the liquidated damages during period 2000 to 2005 and was thus not eligible for any interest.

200. The arbitral tribunal after referring to the provisions of the liquidated damages has held that the parties had used the expression that the amount of liquidated damages mentioned therein was ascertained and agreed and has been pre-determined by the parties. The arbitral tribunal accordingly held that the principles laid down by the Supreme Court in case of **ONGC vs. Saw Pipes Ltd.** (supra) were applicable to the facts of this case and allowed the part of the counter claim at Rs.3,44,51,538/-.

201. Mr.Narichania, learned senior counsel for the claimant distinguished the judgments relied upon by Mr.Sancheti, learned senior counsel for the respondent in his rejoinder arguments on the ground that the same were not applicable to the facts of this case.

Reasons and conclusions in respect of the award in respect of the counter claim made by the respondent :

202. The respondent had made two counter claims viz. (1) for reimbursement of payment for foreign exchange variation and (2) for liquidated damages for delayed completion of work in respect of 4 platforms and 6 pipelines in the sum of Rs.24,46,37,396.75 i.e. at the rate of 3% of the contract value.

203. Insofar as counter claim for non payment of foreign exchange variation is concerned, the arbitral tribunal considered the claim made by the claimant for reimbursement of the foreign exchange variation and rejected this counter claim made by the respondent for the reasons recorded therein. A perusal of the award in respect of the said claim no.3 which was made by the claimant herein clearly indicates that the date of remittance admitted by the respondent to the claimant was on 31st March, 1995. The claimant had admittedly invoked arbitration agreement on 17th December, 1999. As far as counter claim made by the respondent is concerned, the respondent had made this claim only in the counter claim which was filed by the respondent along with the written statement on 27th October, 2000.

204. In my view, the claim made by the claimant for non-payment of foreign exchange rate variation and counter claim made by the respondent for reimbursement of the payment in the foreign exchange variation both were barred

by law of limitation. The claimant as well as the respondent ought to have made their respective claims within three years from the date of remittance of the foreign exchange. Merely because the invoices were issued by the claimant on 24th July, 1997 and 13th January, 1998, the same would not extend the period of limitation. Similarly the limitation in respect of the counter claim made by the respondent in this case would stop only on the date of filing such counter claim by the respondent before the arbitral tribunal i.e. 27th October, 2000. The respondent did not invoke arbitration agreement for recovery of foreign exchange fluctuation before filing counter claim. The cause of action for seeking reimbursement of the payment in foreign exchange variation thus had arisen much prior to three years of the respondent filing such counter claim before the arbitral tribunal on 27th October, 2000. In my view the arbitral tribunal rightly rejected the counter claim made by the respondent. Be that as it may, even otherwise the said counter claim made by the respondent was barred by law of limitation. There is thus no merit in the challenge to the said part of the award made by the respondent by which the said counter claim of the respondent was rejected by the arbitral tribunal. The arbitral tribunal has interpreted the terms of the contract which is a possible interpretation and thus no interference is permissible under section 34 of the Arbitration Act.

Counter Claim no.2.

205. There is no dispute that the claimant had already completed work of 14 platforms and 5 pipelines on or before 5th May, 1994. On 8th February, 1995 the claimant had completed 5 platforms and 6 pipelines. Even according to the respondent, on 9th April, 1996 the warranty period in view of the condition of 2.2.6 of the General Condition of Contract expired. The liquidated damages claimed by the respondent was on account of alleged delay on the part of the claimant in carrying out the work during the execution of the work. The breaches if any on the

part of the claimant which caused delay in completion of the work thus were alleged to have been committed during the execution of work i.e. much prior to May 1995 or thereabout. The right to recover any liquidated damages of the respondent from the claimant subject to the proof of damages suffered if any was within three years of such alleged breaches or atleast when the work was completed. It is not in dispute that the respondent did not recover any amount from the claimant towards liquidated damages. The respondent made this counter claim for the first time when the respondent filed counter claim along with written statement on 27th October, 2000.

206. The respondent had not issued any notice invoking arbitration agreement in respect of such counter claim within three years from the date of accrual of cause of action. Though in the letter dated 2nd March, 1996, the respondent had alleged that delay on the part of the claimant attracted liquidated damages, neither any demand was made for recovery thereof nor arbitration agreement was invoked by the respondent before filing the counter claim. The limitation in respect of such counter claim thus would stop only when the respondent had lodged their counter claim before the arbitral tribunal i.e. on 27th October, 2000. The entire claim for recovery of liquidated damages was for the period which was much prior to three years of the respondent filing counter claim before the arbitral tribunal. The counter claim for recovery of the liquidated damages in my view thus was ex-facie barred by law of limitation. The finding of the arbitral tribunal on the issue of limitation insofar as counter claim that the respondent had levied the liquidated damages any time prior to 27th December, 1997 and thus would not affect the period of limitation is totally perverse. The submissions made by the respondent on the issue of limitation regarding award of claims in favour of claimant would equally apply to the respondent.

207. The arbitral tribunal rendered such finding based on fax dated 27th December, 1997 from the respondent informing the claimant that the request for extension in the project completion date vis-a-vis liquidated damages was under the process of approval. In my view even if the request of the claimant for extension of time was under the process of approval, the limitation for making such counter claim by the respondent against the claimant would not stop. Once the claimant had committed delay or had committed breaches of their obligation under the provisions of the contract, the right of the respondent to claim liquidated damages commenced upon the claimant committing such breaches or in case of continuous breaches when such breaches ceased. Admittedly in this case the work was completed in the month of May 1995 whereas the counter claim was made for the first time only on 27th October, 2000.

208. There is no dispute that the respondent had urged similar issue of limitation in respect of the claims made by the claimant. Even according to the respondent, the cause of action in respect of each of those claims made by the claimant would arise only when the amount was due for the work done or insofar claim for damages is concerned when the breach was alleged to have been committed by the respondent. Even according to the respondent, the cause of action had arisen in respect of each and every claim much prior to three years of the claimant invoking arbitration agreement vide notice dated 17th December, 1999. The respondent cannot be allowed to blow hot and cold at the same time.

209. In my view, the claimant is thus right in their submission that the counter claim allowed by the arbitral tribunal insofar recovery of liquidated damages and interest thereon partly is concerned is barred by law of limitation and is

accordingly set aside.

210. Supreme Court in case of ***Voltas Limited vs. Rolta India Limited*** (supra) has held that the limitation for counter claim has to be strictly in accordance with Section 43(1) of the Arbitration Act read with Section 3(2)(b) of the Limitation Act, 1963 and any deviation therefrom is required to be authorized by any other provision of law. It is held by the Supreme Court that the notice issued under section 21 by one party upon another saves the limitation for filing the counter claim, if a respondent against whom a claim has been made satisfies the twin test, viz. he had made a claim against the claimant and sought arbitration by serving a notice to the claimant.

211. A perusal of the record indicates that the respondent never made any demand for recovery of liquidated damages nor issued any notice invoking arbitration agreement in respect of the liquidated damages. The notice thus issued by the claimant invoking arbitration agreement on 17th December, 1999 would not stop limitation in respect of the counter claim made by the respondent. The judgment of Supreme Court in case of ***Voltas Limited*** (supra) would apply to the facts of this case and would assist the case of the claimant.

212. Be that as it may, the claimant had opposed the said counter claim for recovery of liquidated damages also on the ground that the claimant had not committed any delay in execution of the work or any breaches of their obligation under the provisions of the contract or in any event the respondent had not suffered any damages and/or loss arising out of such alleged breaches and had not even proved the same.

213. It is not in dispute that the respondent had not laid any evidence before the arbitral tribunal to prove the actual loss suffered by the respondent on the alleged delay on the part of the claimant. It is also not in dispute that the liquidated damages claimed by the respondent against the claimant was capable of calculation. In my view even if the arbitral tribunal is considered as right in rendering a finding of delay for part of the period against the claimant and in favour of the respondent, the arbitral tribunal in my view was required to decide whether in view of such alleged delay on the part of the claimant, whether the respondent had suffered any damages or not which was capable of calculation and proof and whether the respondent had proved such damages or not.

214. This Court in case of ***Oil & Natural Gas Corporation Limited vs. M/s. Rais Coastal Survey & Consultancy Services Pvt. Ltd.*** (supra) after adverting to the judgment of the Supreme Court in case of ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*** (supra) has held that for claiming damages either under section 73 of the Indian Contract Act or under section 74 of the said Act, proof of loss is necessary. It is held that in case the amount of damages is predetermined in the contract, it will not be necessary to prove what is the extent of loss but there is no escape from proving the nature of loss suffered and that in fact loss is suffered. It is held that neither under section 73 or section 74 of the said Act, the damages can be awarded without there being an element of loss to the parties, who is claiming damages.

215. This Court in case of ***Board of Trustees For Jawaharlal Nehru Port vs. Gateway Terminals India Pvt. Ltd.*** (supra) has after adverting to the various judgments of the Supreme Court and this Court in which similar provisions for recovery of the liquidated damages have been construed and held that there was no

agreement that the amount of compensation mentioned in the agreement was a genuine pre-estimate of loss. This Court held that since the damages was capable of being calculated and proved and has not been proved by the ONGC in that case, the arbitral tribunal could not have awarded the claim of liquidated damages. The said judgment would squarely apply to the facts of this case.

216. In case of *M/s.Continental Transport Organization Pvt. Ltd.* (supra) this Court after adverting to the various judgments of the Supreme Court and this Court and after construing the identical provision for recovery of the liquidated damages, has held that if the damages or loss is not suffered, the law does not provide for windfall. The Supreme Court in case of *Kailashnath Associates vs. Delhi Development Authority, (2015) SCC Online 19* has held that unless and until the loss is pleaded and proved, cannot be recovered by the owner from the contractor. It was not the case of the respondent herein in the arbitral proceedings that the loss alleged to have been suffered by the respondent was not capable of being calculated and/or proved. In my view the finding of the arbitral tribunal while allowing part of this claim is totally contrary to law laid down by the Supreme Court and this Court. The impugned award thus allowing part of the counter claim for recovery of the liquidated damages is in conflict with the public policy and is accordingly set aside. In view of the aforesaid reasons this court need not deal with the judgment of this court in case of *Satpal P.Malhotra & Ors. (supra)* and in case of *Bombay Intelligence Security (India) Ltd. (supra)*.

217. Insofar as reliance placed by the arbitral tribunal on the judgment of the Supreme Court in case of *O.N.G.C. vs. Saw Pipes (supra)* is concerned, the facts before the Supreme Court in the said judgment were totally different than the facts before this Court in this case. In the matter before the Supreme Court, the Supreme

Court had rendered a finding that the loss claimed by the ONGC could not be computed and/or proved in the facts and circumstances of the said case. There was neither any such pleading on record nor any proof of damages produced by the respondent in this case.

218. Insofar as submission of the learned senior counsel for the claimant that since the respondent has already complied with the directions issued by the arbitral tribunal and has returned the bank guarantee of Rs.25 crores to the claimant, the arbitration petition filed by the respondent is not maintainable is concerned, in my view there is no merit in this submission of the learned senior counsel for the claimant. Merely because part of the reliefs granted by the arbitral tribunal is complied with, it cannot be urged that the respondent could not have challenged the remaining part of the award which was against the respondent.

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

- (a) Award in respect of claim no.5 is upheld for the period from 18th December, 1996 till the date of the award with interest thereon at the rate awarded by the arbitral tribunal and thereafter at the same rate till the date of payment.
- (b) Counter claim awarded by the arbitral tribunal in respect of claim of liquidated damages in favour of the respondent is set aside.
- (c) The award of the arbitral tribunal directing the respondent to release the bank guarantee of the claimant for the sum of Rs.25 crores having been implemented by the

respondent, no further order in respect thereon is required to be passed.

(d) Rest of the award awarding claims in favour of the claimant is set aside.

(e) Arbitration petition Nos.267 of 2011 and 630 of 2011 are disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]