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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION (LDG.) NO. 681 OF 2019

The Konkan Irrigation Development Corporation,  
Water Resources Department, Sinchan Bhavan,  
Kopri Colony, Thane (West). ...Petitioner

....Versus....

1. M/s. F.A. Enterprises  
A partnership firm having their  
office at Plot No. 112, 1<sup>st</sup> Floor,  
TPS – III, 6<sup>th</sup> Floor, Opp. Hotel Oriental Palace,  
Khar (W), Mumbai – 400 052.
2. City and Industrial Development Corporation,  
CIDCO Bhavan, CBD-Belapur,  
Navi Mumbai – 400 614.
3. State of Maharashtra,  
Through Water Resource Department,  
Mantralaya, Mumbai – 400 032. ...Respondents

WITH  
ARBITRATION PETITION NO. 793 OF 2019

City and Industrial Development Corporation,  
CIDCO Bhavan, CBD-Belapur,  
Navi Mumbai – 400 614. ...Petitioner  
(Orig. Resp. No.3)

....Versus....

1. M/s. F.A. Enterprises  
A partnership firm having their  
office at Plot No. 112, 1<sup>st</sup> Floor,  
TPS – III, 6<sup>th</sup> Floor, Opp. Hotel Oriental Palace,  
Khar (W), Mumbai – 400 052.
2. State of Maharashtra,  
Through Water Resource Department,  
Mantralaya, Mumbai – 400 032.
3. Konkan Irrigation Development Corporation,  
Water Resources Department, Sinchan Bhavan

Kopri Colony, Thane (East). ...Respondents  
(Res. No.1 is Orig. Claimant  
& Resp. Nos.2 and 3 are  
Orig. Resp. Nos.1 and 2)

WITH  
COMMERCIAL ARBITRATION PETITION NO. 921 OF 2019

The State of Maharashtra,  
Through Water Resources Department,  
Mantralaya, Mumbai – 400 032. ...Petitioner  
(Orig. Resp. No.1)

....Versus...

1. M/s. F.A. Enterprises  
A partnership firm having their  
office at Plot No. 112, 1<sup>st</sup> Floor,  
TPS – III, 6<sup>th</sup> Floor, Opp. Hotel Oriental Palace,  
Khar (W), Mumbai – 400 052.
2. Konkan Irrigation Development Corporation,  
Water Resources Department,  
Sinchan Bhavan, Kopri Colony, Thane (East).
3. City and Industrial Development Corporation,  
CIDCO Bhavan, CBD-Belapur,  
Navi Mumbai – 400 614. ...Respondents  
(Res. No.1 is Orig. Claimant  
& Resp. Nos.2 and 3 are  
Orig. Resp. Nos. 2 and 3)

Mr. S.G.Aney, Senior Counsel along with Ms.Shweta Sangtani,  
Mr.Yash Momaya i/by Mr. Dinesh B. Khaire, Advocate for the  
petitioner in CARBPL/681/2019 and Respondent No.3 in ARBP/793/  
2019 and Respondent No.2 in CARBP/921/2019.

Mr.Gopal Krishna Shivaram Hegde along with Ms.Pinky Bhansali,  
Advocates for the Petitioner in ARBP/793/2019 and Respondent  
No.2 in CARBPL/681/2019 and Respondent No.3 in  
CARBP/921/2019.

Ms.Geeta Shastri, Additional Government Pleader, State, Advocate  
for the Petitioner in CARBP/921/2019 and Respondent No.2 in  
ARBP/793 2019 and Respondent no.3 in CARBPL681/2019.

Mr. Vikram Nankani, Senior Counsel, along with Mr. A.V. Anturkar,  
Senior Counsel along with Mr.P.Narayan,Mr. Shyam Dewani,

Mr. Prasanna Patil, Mr. Chiddanand Kapil, H. Kapoor Ms. Shilpa Kapil, Mr. Chirag Chanani, Advocates for the Respondent No.1 in all Arbitration Petitions.

**CORAM : R.D. DHANUKA, J.**  
**RESERVED ON : 24<sup>th</sup> JANUARY 2020**  
**PRONOUNCED ON : 19<sup>th</sup> MAY 2020**

**JUDGMENT :-**

1. By consent of parties, all the aforesaid petitions filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act) were heard together and are being disposed of by a common judgment. Commercial Arbitration Petition (Lodging) No.681 of 2019 is filed by Konkan Irrigation Development Corporation (hereinafter referred to as “KIDC” for the sake of convenience). The said KIDC has impugned the majority award dated 3<sup>rd</sup> April, 2019 passed by the Arbitral Tribunal directing the KIDC to pay to the respondent no.1 i.e. M/s.F.A. Enterprises Rs.303 crores approximately with other directions (hereinafter referred to as ‘claimant’). Commercial Arbitration Petition No.793 of 2019 is filed by the City and Industrial Development Corporation (hereinafter referred to as CIDCO” for the sake of convenience) *inter-alia* praying for quashing and setting aside the impugned award dated 3<sup>rd</sup> April, 2019 insofar as the same is against the CIDCO. Commercial Arbitration Petition No.921 of 2019 is filed by the State Government *inter-alia* praying for setting aside the impugned award dated 3<sup>rd</sup> April, 2019. Some of the relevant facts for the purpose of deciding these petitions are as under :

2. It is the case of KIDC that to cater the need of drinking water for industrial purpose in sub region-6, Panvel and sub-region – 8, Urban Metropolitan region, a meeting was held under the chairmanship of the Minister, WRD, Water Supply and Sanitation Department, Government of Maharashtra. It was decided in the said meeting to construct Balganga Dam. In the meeting held on 28<sup>th</sup> January, 2009 and the officers of KIDC , Water Supply Department of

CIDCO and MMRDA, it was decided to execute Balganga Dam for CIDCO instead of SEZ. It is the case of KIDC that CIDCO was also desirous of developing the water resources for its expanding areas in Navi Mumbai. The management of CIDCO agreed to provide the capital fund for the construction of the dam on Balganga river, near village, Niphad, Talula Pen, District Raigad. CIDCO approved the funds of approximately Rs.488 crores for construction of the said Balganga Dam.

3. KIDC prepared D.P.R. based on old data which was available with the Thane Irrigation Circle and submitted to Water Resources Department on 6<sup>th</sup> February, 2009. In the board meeting of CIDCO held on 24<sup>th</sup> February, 2009, a resolution was passed to execute Balganga project for the CIDCO and accorded administrative approval to the said project. It was decided that the work shall be executed by KIDC and shall be funded by the CIDCO. The Chief Engineer, WRD, technically sanctioned the dam portion work based on DPR submitted on 24<sup>th</sup> February, 2009 and invited the tender for construction of Balganga project.

4. In the meeting held under the chairmanship of the then Chief Minister of Maharashtra, it was decided that the CIDCO would bear the capital cost of the development of the Balganga project and also get the ownership right of the water of the dam. In the month of February, 2009, the KIDC invited the tenders for work of construction of Balganga dam for an amount of Rs.353.89 crores. It is the case of the KIDC that the said Balganga dam was to be constructed by the KIDC on deposit basis where the funding agency for the construction of the said dam was CIDCO.

5. On 23<sup>rd</sup> September, 2009, the KIDC and CIDCO entered into an agreement for such funding and for other related issues on the terms and conditions recorded in the said agreement. The claimant submitted the bid in response to the said tender notice. The bid of the

claimant was found to be the lowest bid. On 1<sup>st</sup> April, 2009, the claimant submitted the revised copy of the quotation and revised the cumulative percentage from 59.16% to 55.50% above the tender cost. The said amount came to Rs.550.299 crores. The claimant however, submitted its final offer of tender on 21<sup>st</sup> April, 2009 to the Chief Engineer and revised the cumulative percentage from 55.40% to 40% above the tender cost which amount came to Rs.495.45 crores.

6. On 12<sup>th</sup> May, 2009, the KIDC issued a work order in favour of the claimant as per its revised and final offer for cost of Rs.495.45 crores on the terms and conditions described in the said work order. It is the case of the KIDC that after taking the review of the procedure adopted by the officers of the KIDC in deciding update cost of the tender, the revised updated cost tender came to be calculated at Rs.374.08 crores which was 4.73% above the original tender cost. In the meeting held, the Executive Director, KIDC and the claimant, the claimant accepted the revised cost of project by letter dated 7<sup>th</sup> May, 2010.

7. KIDC accordingly issued a revised work order on 11<sup>th</sup> June, 2010 while maintaining all the terms and conditions of earlier work order in part. It is the case of the KIDC that the earlier work order issued on 12<sup>th</sup> May, 2009 was not cancelled by the revised work order dated 11<sup>th</sup> June, 2010. It is the case of the KIDC that the work order dated 11<sup>th</sup> June, 2010 pertains only to the cost of project and did not mention about any other conditions. The work order dated 11<sup>th</sup> June, 2010 was not issued in supersession of the work order dated 12<sup>th</sup> May, 2009.

8. It is the case of KIDC that as per the terms of the contract, the respondent no.1 was required to obtain Forest Clearance before commencement of the project. The respondent no.1 was to carry out all incidental procedures such as demarcation of forest land, joint measurement and identification of alternative Government land to the

department for Forestation in consultation with Deputy Conservator of Forests and Collector, Revenue Authority, preparation of proposal with the help of Forest Department and Revenue Authority. According to the KIDC, the respondent no.1 was required to submit the proposal to the Forest Department as per clause 70.2.5 of the agreement after a period of 24 months on the date of issuance of the work order.

9. On 10<sup>th</sup> June, 2011, the cost price of the project was revised to Rs.1220 crores. It is the case of KIDC that the claimant submitted various RA bills to the KIDC which were in turn forwarded by the KIDC to CIDCO. The CIDCO used to release the funds from time to time. All such bills were sent by the KIDC to CIDCO for its approval. It is the case of KIDC that the claimant submitted 11<sup>th</sup> RA bill to the KIDC which was forwarded to the CIDCO. The CIDCO however neither approved the said RA bill nor credited the funds to the KIDC. CIDCO appointed a committee under the chairmanship of R.G. Kulkarni, Retired Secretary, WRD (first expert committee). On 29<sup>th</sup> February, 2012, the first expert committee submitted a report estimating the cost of construction of Rs.1191.36 crores.

10. It is the case of the KIDC that the said report of the first expert committee was not acceptable to the CIDCO. The CIDCO accordingly took a decision to appoint second expert committee of three senior Engineers. The second expert committee submitted a report on 6<sup>th</sup> July, 2012. It is the case of the KIDC that CIDCO was not satisfied with the report submitted by the second expert committee and appointed a third expert committee. On 16<sup>th</sup> March, 2013, the respondent no.1 issued a notice to the KIDC for payment of Rs.326 crores under 11<sup>th</sup> RA bill. On 10<sup>th</sup> June, 2013, the third expert committee of five members which committee was appointed to study the findings of the first and second expert committee as per the report. It is the case of the KIDC that the CIDCO did not accept the report of the third expert committee also.

11. On 28<sup>th</sup> October, 2013, the claimant filed a Writ Petition bearing No.11019 of 2013 in this Court *inter-alia* praying for a direction against the CIDCO to pay the KIDC to enable the KIDC to release the payment of the pending bills to the claimant for the work done by it. In the month of November, 2013, the KIDC cleared the payment of Rs.25 crores to the claimant out of the amount released by the CIDCO. On 28<sup>th</sup> January, 2014, this Court passed an order in the said Writ petition No.11019 of 2013 directing the respondent no.1 to resume work on receiving Rs.100.30 crores.

12. It is the case of the KIDC that on the direction of this Court in the said Writ Petition No.11019 of 2013, the internal committee of CIDCO assessed the total project of Rs.972.17 crores. The Chief Engineer and the General Manager of CIDCO however, recommended the cost of Rs.632.73 crores. On 30<sup>th</sup> May, 2014, Justice M.G. Gaikwad committee consisting of three members submitted a report. On 17<sup>th</sup> July, 2015, this Court passed an order in the said Writ Petition No.11019 of 2013 thereby referring all the disputes and differences between the parties regarding the construction of Balganga dam in Taluka Pen, District Raigad and payments / non-payments for the same to Arbitral Tribunal comprising of five members. The KIDC, CIDCO, State Government and the respondent no.1 appointed one arbitrator each. This Court appointed a former Judge of this Court as a presiding arbitrator. It was agreed by the parties that all the disputes / claims / counter claims etc. arising out of and between the parties in respect of the irrigation project were referred to arbitration of the said tribunal. In the said writ petition, KIDC, CIDCO and the State Government were the respondents.

13. On 25<sup>th</sup> August, 2015, the Anti Corruption Bureau filed an FIR in respect of the said Balganga project against the claimant, some of the erstwhile offices of the KIDC and others under section 420, 467, 468, 471, 120(b) and 109 of Indian Penal Code and sections 13(1) (c) and 12(1)(d) read with section 12(2) of the Prevention of

Corruption Act, 1988. On 23<sup>rd</sup> September, 2016, the State Government passed a Government resolution observing that the contracts costing more than Rs.25 crores in 12 projects in Gosikhurd in Vidarbha as well as Kikvi project on Godavari Marathawada Development Corporation are being investigated by the Anti Corruption Bureau. The Wadnere Committee has also raised the objections about certain contracts in respect of Gosikhurd project. Though the Government had provided the funds and had speeded up the land acquisition process, due to various enquiries, required progress in the work was not being achieved.

14. The State Government observed in the said resolution that on this background the proposal to cancel the contracts which are under investigation by the Anti Corruption Bureau and also the contracts of Gosikhurd project on which the objections were raised by the Wadnere Committee was under consideration of the Government. The said proposal was placed before the Council of Ministers for its consideration on 30<sup>th</sup> August, 2016. The Council of Ministers gave a consent to the proposal of Corporation and consciously gave approval to cancel the contract of 12 projects from Konkan viz. Balganga and several other projects and 81 from Gosikhurd totalling to 94 contracts to facilitate the officers and claimants to work without any pressure and complete the project work in time bound manner with full transparency to extend irrigation benefits to farmers.

15. The said Government Resolution recorded that the agreements / contracts of 12 projects including Balganga project and 40 agreements of Gosikhurd on which the investigation by the Anti Corruption Bureau was under progress and balance 41 agreements out of 93 agreements of Gosikhurd on which Wadnere Committee had raised the objections except for 43 agreements on which the work was complete and also dealing with 9 agreements of which the balance cost of the work was less than Rs.1 crore shall be terminated on merits

and in conformity with the condition of the contract and as per the provisions of the Indian Contract Act, 1872.

16. In paragraph 2 of the said resolution, it was provided that while terminating the contract, speaking order shall be passed by the competent authority, taking due cognizance of the provisions of the agreement / contract and the Indian Contract Act, 1872. The said Government Resolution further stated that the same was issued with concurrence of the Law and Judicial Department and also with the concurrence of the Finance Department and as per the approval by the Council of Ministers in the meeting dated 30<sup>th</sup> August, 2016.

17. On 9<sup>th</sup> September, 2016, the respondent no.1 filed a statement of claim before the Arbitral Tribunal *inter-alia* praying for an amount of Rs.536.56 crores comprising of 186.89 crores towards RA bill no.11, Rs.75 crores as a difference in rate and interest of Rs.160.08 crores and various other claims. It is the case of the petitioner that the Anti Corruption Bureau thereafter filed a charge sheet against the claimant and others.

18. On 28<sup>th</sup> October, 2016, KIDC terminated the contract awarded to the claimant on various grounds. On 23<sup>rd</sup> November, 2016, the KIDC filed statement of defence before the Arbitral Tribunal. On 19<sup>th</sup> December, 2016, the Arbitral Tribunal passed an order of status-quo in respect of the letter of termination dated 28<sup>th</sup> October, 2016 issued by the KIDC against the claimant in respect of the said contract awarded to the claimant.

19. In the said notice of termination dated 28<sup>th</sup> October, 2016 issued by the Executive Engineer of the KIDC to the claimant, the KIDC relied upon the Government Resolution dated 28<sup>th</sup> September, 2016. It was the case of the KIDC that by the said resolution passed by the Government of Maharashtra, the KIDC was ordered to rescind the contract awarded to the claimant considering various factors affecting

the progress of completion of works due to on going ACB inquiry and for various reasons.

20. The KIDC filed statement of defence on 23<sup>rd</sup> November, 2016. On 19<sup>th</sup> December, 2016, the Arbitral Tribunal passed an order of status-quo in terms of termination of the contract. On 2<sup>nd</sup> January, 2017, the claimant applied for amendment to the statement of claim *inter-alia* challenging the termination of the contract by the KIDC. It is the case of the KIDC that though the claimant mentioned about the Government Resolution in the application for amendment to the statement of claim, the claimant did not challenge the validity of the said Government Resolution. The Arbitral Tribunal allowed the said application for amendment filed by the claimant. On 16<sup>th</sup> January, 2017, the KIDC filed a reply to the amended statement of claim before the Arbitral Tribunal.

21. On 7<sup>th</sup> February, 2017, the Arbitral Tribunal passed an order directing that the work shall not be allotted to any other claimant. On 7<sup>th</sup> June, 2017, the KIDC filed an affidavit of evidence of Mr. Godsey before the Arbitral Tribunal. On 8<sup>th</sup> March, 2017, the Arbitral Tribunal framed points for determination. The additional points for determination were thereafter framed by the Arbitral Tribunal. The claimant examined three witnesses before the Arbitral Tribunal. KIDC and CIDCO examined one of the witness each. State Government did not appear before the Arbitral Tribunal. The three members of the Arbitral Tribunal rendered a majority award on 3<sup>rd</sup> April, 2019 directing the KIDC to pay to the claimant a sum of (i) Rs.177.65 crores, (ii) Rs.45.30 crores, (iii) Rs.50 lakhs, (iv) Rs.18.35 crores and (v) Rs.44,43,00,000/- totaling to Rs.286,23,00,000/- excluding amount of interest granted under claim nos. 2, 4 and 5.

22. The Arbitral Tribunal directed that the amount of Rs.28.20 crores to be deposited by CIDCO in Fixed Deposit along with accrued interest as per the directions of this Court dated 10<sup>th</sup> April, 2014 shall be paid to the claimant and the total amount payable to the claimant as per the majority award may be reduced to the extent of Rs.28.20 crores. The Arbitral Tribunal directed the KIDC to pay further interest @ 6% p.a. on the amount of interest granted on the amounts mentioned in paragraph A of the impugned award. The Arbitral Tribunal directed the KIDC and CIDCO to each pay Rs.15,00,000/- to the claimant by way of costs of the arbitral proceedings.

23. The Arbitral Tribunal directed that all such amounts awarded by the Arbitral Tribunal should be paid by the KIDC to the claimant within the period of 60 days from the date of the award, failing which, all amounts payable including the amount of interest payable as per the said award would carry interest @ 9% p.a. from the date of expiry of 60 days till the date of actual payment to the claimant. The Arbitral Tribunal also declared the Government Resolution dated 23<sup>rd</sup> September, 2016 and the notice of termination dated 28<sup>th</sup> October, 2016 issued by KIDC as illegal, null and void in law and quashed and set aside the same. The Arbitral Tribunal also granted prayer for specific performance of the contract viz. Agreement No.B1/1 of 2009-10.

24. The other two members of the Arbitral Tribunal have rendered minority award rejecting some of the claims made by the claimant by recording separate reasons. Being aggrieved by the said majority arbitral award dated 3<sup>rd</sup> April, 2019, the KIDC filed Comm. Arbitration Petition (L) No. 681 of 2019. CIDCO filed Arbitration Petition No. 793 of 2019 and State of Maharashtra filed Comm. Arbitration Petition No.921 of 2019.

25. During the pendency of these three petitions, the State of Maharashtra filed a Notice of Motion No. 2192 of 2019 in Comm.

Arbitration Petition No. 921 of 2019 *inter-alia* praying for permission to the State of Maharashtra to file on record the affidavit of Mr. Godsey, Secretary to Government Water Resources Department dated 21<sup>st</sup> August, 2019 for placing on record the two documents namely copy of FIR bearing no.123/15 with all the annexures and the copy of charge-sheet dated 8<sup>th</sup> August, 2016 under Section 34(2)(a) of the Arbitration Act. The KIDC also filed a separate Notice of Motion (L) No. 2007 of 2019 *inter-alia* praying for permission to place on record the charge-sheet in the Comm. Arbitration Petition (L) No. 681 of 2019. By an order dated 22<sup>nd</sup> October, 2019, this Court has dismissed the Notice of Motion No. 2192 of 2019 filed by the State of Maharashtra and Notice of Motion (L) No. 2007 of 2019 filed by the KIDC. After dismissal of the those two notices of motion, this Court proceeded with the further hearing of these petitions.

26. Shri S.G. Aney, learned senior counsel for the KIDC – petitioner in Comm. Arbitration Petition (L) No. 681 of 2019 invited my attention to various pleadings, oral evidence and documents annexed to various compilation filed by both the parties, the various orders passed by this Court in the writ petition filed by the claimant in this Court and also to various findings rendered by the Arbitral Tribunal in the majority award as well as minority award.

27. It is submitted by the learned senior counsel that during the pendency of the proceedings before the Arbitral Tribunal, the State of Maharashtra issued a resolution dated 23<sup>rd</sup> September, 2016 in respect of various projects being carried on by various authorities including the Balganga River Project, which was funded by CIDCO and carried out by KIDC through the claimant. It is submitted that the KIDC thereafter terminated the contract awarded to the claimant, in view of the said Government Resolution issued by the State of Maharashtra after following the due process of law. He invited my attention to the said Government Resolution issued by the State of Maharashtra and also to the amendment to the statement of claim carried out by the claimant.

He submits that in the said amended statement of claim, though some of the grounds were raised by the claimant regarding the said Government Resolution, there was no prayer for declaring the said Government Resolution as void *ab-initio* or illegal. The KIDC had filed additional written statement to the amended statement of claim filed by the claimant before the Arbitral Tribunal.

28. The learned senior counsel for the KIDC placed reliance on entry 17 of List II of the VII<sup>th</sup> Schedule of the Constitution of India and would submit that under the said provision, the State Government is empowered to legislate on the matter pertaining to “Water, Water Supplies, Irrigation and Canals, Drainage and Embankments, Water Storage and Water Power”. He submits that in exercise of the said power and the pressing need for irrigation and storage of water in Konkan region, the State Government enacted the Konkan Irrigation Development Corporation Act, 1998 (hereinafter referred to as “KIDC Act” for short) for the purpose of promotion and operation of irrigation projects in Konkan region. The KIDC was constituted under the provisions of the KIDC Act for giving effect to the purposes of the KIDC Act. He relied upon Section 25 of the KIDC Act in support of his submission that the State Government is empowered to issue general or special directions to KIDC as to policy, exercise of KIDC’s powers, performance of its’ functions with the exception of the matters set out in Section 25. He submits that KIDC is bound to follow and act upon such directions issued by the State Government under the said provisions.

29. It is submitted by the learned senior counsel that as the executive powers of the State is co-extensive with its legislative power, in the absence of any legislation, State can exercise its executive power as provided by Article 162 of the Constitution of India. He submits that such Government Resolution issued by the State Government by exercising powers under the said provisions amounts to a special directive covered by Section 25 of the KIDC Act. He submits that

exercise of powers conferred under Section 25 of the KIDC Act gives the Government Resolution the status of sub-ordinate legislation having force of law. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Edward Mills Co. Ltd., Beawar and Ors. v/s. The State of Ajmer and Ors., (1955) 1 SCR 735*** and in particular paragraph 17.

30. Learned senior counsel also placed reliance on the judgment of Supreme Court in case of ***Bishambhar Dayal Chandra Mohan and Ors. v/s. State of Uttar Pradesh and Ors., (1982) 1 SCC 39*** and in particular paragraphs 20 and 22. He submits that the copy of the said Government Resolution was brought on record by the claimant before the Arbitral Tribunal. Learned Senior Counsel invited my attention to the minutes of meeting dated 12<sup>th</sup> February, 2019 held by the Arbitral Tribunal and would submit that in the said meeting the Arbitral Tribunal re-arranged the points for determination. Point No.2 was added as under :-

*“Does Respondent No.2 KIDC prove that the purported termination of the Agreement B-1/01 for 2009-10 vide notice dated 28.10.2016 is legal and valid?”*

The Arbitral Tribunal also added point no.4 which read thus:-

*“Does Respondent No.2 KIDC prove that the Govt. Resolution dated 23.09.2016 issued by Respondent No.1 i.e. Govt. of Maharashtra directing Respondent No.2 KIDC to terminate the Agreement with the Claimant is valid?”*

31. It is submitted by the learned senior counsel that the Arbitral Tribunal has cast burden of proof on the KIDC illegally that the Government Resolution dated 23<sup>rd</sup> September, 2016 issued by the Government of Maharashtra directing the KIDC to terminate the agreement with the claimant was valid. He submits that the KIDC has not issued any such Government Resolution and thus even otherwise could not have discharged such burden. No such issue could be decided by the Arbitral Tribunal at all.

32. Learned senior counsel invited my attention to paragraphs 50 to 52 of the majority award and would submit that the majority award has declared the Government Resolution as null and void stating that several irrelevant and extraneous considerations have weighed with the State Government. He submits that by the said Government Resolution, the State Government has issued general or special directions under Section 25 of the Konkan Irrigation Development Corporation Act, 1997 (for short “the said KIDC Act”) and has the force of law being a sub-ordinate instrument. It is applicable not only to the KIDC and the claimant, but applies in *rem*. He submits that the said resolution was applicable to the KIDC, Godawari Marathwada Irrigation Development Corporation as also the contracts and claimants in respect of 93 other projects in the State of Maharashtra including 12 allotted by the KIDC to various claimant’s firms closely related to the claimant.

33. It is submitted that the constitutional validity of sub-ordinate legislation cannot be decided in arbitration proceedings even with the consent of parties. No such consent was given by any of the petitioners before the Arbitral Tribunal. He submits that the finding and order of the majority award that the Government Resolution is void and thus set aside is determinative of not only the rights in *personam* between the parties in the arbitral proceeding but determines rights in *rem*. An arbitral Tribunal, being a creature of contract, is not empowered to determine rights in *rem*.

34. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of **Booz Allen and Hamilton Inc. Vs.SBI Home Finance Ltd. & Ors. (2011) 5 SCC 532** and in particular paragraphs 37 and 38 and also the judgment in the case of **Vimal Kishor Shah & Ors. Vs.Jayesh Dinesh Shah & Ors. (2016) 8 SCC 788** and in particular paragraphs 41, 51 and 53. It is submitted by the learned senior counsel that the parties cannot confer jurisdiction upon the Arbitral Tribunal to

determine rights in *rem*. The majority award is thus liable to be set aside under Section 34(2)(a)(iv), Section 34(2)(b) and Section 34 (2A) of the Arbitration Act.

35. It is submitted by the learned senior counsel that the Government Resolution was not included or envisaged as a part of the contract between the parties. The said Government Resolution is an independent decision taken by the Government of Maharashtra for various cogent and germane reasons and considerations. The Arbitral Tribunal being a creature of contract, can act only on matters covered by the contract and not on matters which are extraneous or outside the contract. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of ***Food Corporation of India Vs.Chandu Construction & Anr. (2007) 4 SCC 697*** and in particular paragraphs 11, 12 and 15. He also placed reliance on the judgment of the Supreme Court in the case of ***Sharma and Associates Contractors Pvt. Ltd. Vs.Progressive Constructions Ltd. (2017) 5 SCC 743***.

36. It is submitted by the learned senior counsel that the KIDC have followed not only the Government Resolution but had terminated the contract on its own merit. No fundamental rights of the claimant were violated by the said Government Resolution. It is submitted by the learned senior counsel that the directions were issued by the State Government to achieve objects under the said KIDC Act. Section 25 of the KIDC Act must be read with preamble and purpose of such enactment. Setting aside of the said Government Resolution by the Arbitral Tribunal in the majority award affects large number of the parties and also the members of public. Determination of rights by the Arbitral Tribunal has affected beyond the rights in *personam* which is not permissible in law.

37. The next submission of the learned senior counsel for KIDC is that an FIR and the charge sheet have been filed against the claimant

and erstwhile officers of the KIDC by the Anti Corruption Bureau, in the Sessions Court at Thane. The offences alleged are under Sections 420, 467, 468, 471, 120B and 109 of the Indian Penal Code and Sections 13(1)(c) and 12(1)(d) read with 12(2) of the Prevention of Corruption Act, 1988. These serious criminal allegations in the matter were brought before the Tribunal by the claimant in the amendment to the Statement of Claim, in reply filed by the KIDC to the amendment to the Statement of Claim, in the affidavit of Mr. Godse filed by the KIDC and in particular paragraphs 23 and 26 which are ignored by the Arbitral Tribunal in the majority award. He submits that the arbitral award is contrary to the principles of law laid down by the Supreme Court in the case of **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49** and in particular paragraphs 17 to 19, 27, 42.2.

38. It is submitted that there were serious allegations of fraud in the public domain against the claimant which are complex in nature requiring detailed and voluminous evidence to appreciate. Such matters could not be resolved by arbitration. Reliance is placed on the judgment of the Supreme Court in the case of **Ayyasamay Vs. A. Paramasivam (2016) 10 SCC 386** and in particular paragraphs 16, 17, 23, 45.1 and 45.2. The majority award makes extensive reference to the pending criminal proceedings and the nature of the allegations against the claimant and the erstwhile officers of the KIDC. He also relied upon some of the paragraphs in the minority award in support of this issue.

39. It is submitted that the Arbitral Tribunal could not have proceeded with the arbitral proceedings in view of the pending criminal investigation fraught with criminal prosecution. He submits that the contract thus entered into between the claimant and the KIDC itself would not have been enforced. He relied upon some of the paragraphs of the amendment to the Statement of Claim referring to the pending FIR and ACB enquiry. The Arbitral Tribunal ought to

have kept in mind the pending criminal investigation while proceeding with the arbitral proceedings. Partners of the claimant have been facing the criminal prosecution.

40. Without prejudice to the aforesaid submissions, the next submission of the learned senior counsel for KIDC is that in view of the Government Resolution being an executive action under Article 162 and having the force of law and a direction to the KIDC under Section 25 of the said KIDC Act, the agreement between the KIDC and the claimant has become void under Section 56 of the Indian Contract Act, 1872. He submits that Section 56 refers not to a physical or literal impossibility. It ought to be interpreted as impracticable and useless from the point of view of the object and purpose that the parties had in view when they entered into the contract. This impracticable or uselessness could arise due to some intervening or supervening circumstance which the parties had not contemplated. This change in circumstance includes a supervening law which renders the performance of the contract unlawful or illegal for whatever reason.

41. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of ***Delhi Development Authority Vs. Kenneth Builders & Developers (P) Ltd. (2016) 13 SCC 561*** and in particular paragraph 30 and 36. He also relied upon the judgment of the Madhya Pradesh High Court in the case of ***Firm Bachraj Amolakchand & Anr. Vs. Firm Nandlal Sitaram & Ors., AIR 1966 MP 145*** and in particular paragraphs 17, 19 to 21 thereof.

42. It is submitted by the learned senior counsel that by reason of operation of law i.e. the said Government Resolution, the contract became void, making the specific performance thereof, impossible. The Arbitral Tribunal however, has awarded specific performance of the contract in paragraph 59 of the impugned majority award though

there was a change in law i.e. the said Government Resolution which set out the Government's decision to the discontinue all contracts referred to in the said Resolution. The very basis of the entire contract was thus frustrated. The discretionary powers conferred on the Arbitral Tribunal under Section 14 of the Specific Performance Act, 1963 thus could not have been exercised by the Arbitral Tribunal by granting a decree for specific performance in the facts and circumstances of this case. The Court is not bound to grant such relief merely because it was lawful to do so. The discretion cannot be exercised arbitrarily. The discretion can be exercised on sound and settled judicial principles. The Court may decline to grant decree for specific performance if it would be inequitable to enforce specific performance and such discretion can never be contrary to law or public policy.

43. Learned senior counsel placed reliance on the judgment of the Allahabad High Court in the case of ***Shiam Sunder Lal Vs. Durga & Anr., 1965 SCC OnLine All 14*** and in particular paragraphs 5 and 7 and the judgment of the Himachal Pradesh in the case of ***Raj Kumar Gupta & Ors. Vs. Des Raj & Ors., AIR 1995 HP 107*** and in particular paragraph 20 thereof. Learned senior counsel also placed reliance on the judgment of Supreme Court in the case of ***Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Haribhai Patel, (2001) 5 SCC 101*** and in particular paragraphs 60 and 61.

44. The next submission of the learned senior counsel for the KIDC is that as per clause 70 of the contract entered into between the claimant and the KIDC, the claimant was required to obtain necessary forest clearance before commencement of the project. Under clause 70.3 of the contract, the responsibility of the KIDC was limited to extending necessary help to the claimant in that regard. He submits that the Arbitral Tribunal however, in paragraphs 53 to 55 of the majority award relied upon Sections 2, 3, 3A and 3B of the Forest

Conservation Act, 1980 and held that the claimant had no role to play in obtaining the necessary forest clearances and that the necessary steps had been undertaken by the claimant.

45. Learned senior counsel relied upon Section 2 of the said Forest Conservation Act, 1980 and would submit that the said provision only provided that it was for the State Government to declare that a reserved forest may be utilized for a non-forest purpose and prior approval of the Central Government is necessary. The said provision does not contemplate that various steps including the requisite contacting, pursuit and follow-up of such permission is to be undertaken by the State Government. There was no bar under the said Act from making such application by a third party. The said provision also cannot be interpreted to mean that the State Government cannot enter into a contract to appoint a private agent such as the claimant to do this work. He submits that the claimant was responsible for failure to get the necessary clearances under the Forest Act and the claimant was solely responsible for breach of contract. The KIDC was thus justified in terminating the contract awarded to the said claimant.

46. It is submitted that the Arbitral Tribunal thus could not have awarded any damages or specific performance in favour of the said claimant. The Arbitral Tribunal has ignored the specific terms of the contract entered into between the parties and had committed a jurisdictional error on the face of the award. He submits that the claimant even could not have started the work without obtaining forest clearance. The contract awarded to the claimant was not only for construction of Dam but was also for rehabilitation which involved forest land and forest clearance. The land was to be acquired for rehabilitation. The findings rendered by the Arbitral Tribunal on this issue in paragraphs 52 to 55 that the steps were taken by the claimant are perverse. He also invited my attention to the findings rendered in paragraphs 53 and 57 of the majority award. The Arbitral

Tribunal has misconstrued the letters mentioned in those paragraphs which shows patent illegality.

47. It is submitted by the learned senior counsel for KIDC that the claimant was fully aware of the funding arrangement of KIDC and CIDCO and more particularly with regard to the final authority to sanction disbursement of funds, rates, additional works etc. vesting with CIDCO. He referred to various correspondence annexed to the statement of claim and forming part of compilation of documents exchanged between the claimant, KIDC and CIDCO.

48. Learned senior counsel invited my attention to various paragraphs from minority award rendered by two of the arbitrators out of Tribunal of five members. He submits that how much amount should be paid to the claimant has not been enquired by the Arbitral Tribunal in the said minority award.

49. Learned senior counsel invited my attention to various paragraphs of the majority award dealing with the claims made by the said claimant while dealing with Issue No.1 i.e. "whether the claimant is entitled to claim nos.1 to 8 as stated in the Statement of Claim?" dealt with in paragraphs 19 to 66 of the majority award. He submits that in the minority award, two of the arbitrators have rejected the claims made by the claimant. In the majority award, the Arbitral Tribunal has directed the payment of Rs.177.65 crores in so far as claim no.1 is concerned. The Arbitral Tribunal has allowed the claim no.2 to the tune of Rs.45.30 crores. The Arbitral Tribunal also allowed Rs.50 lacs under claim no.4 towards payment alleged to have been made by the claimant to the State Police Authorities for police protection at site. The Arbitral Tribunal awarded sum of Rs.18.35 crores under claim no.5 towards machinery and Labour Idling charges. In so far as interest is concerned, the Arbitral Tribunal awarded interest at different rates on the amount awarded by the Arbitral Tribunal in the majority award.

50. In so far as claim no.1 is concerned, it is submitted by the learned senior counsel for KIDC that the original tender cost was Rs.495 crores which was revised to Rs.373 crores. In the month of February 2010, the claimant informed the KIDC that the excavation costs would be much higher on account of the rock being hard. The claimant proceeded to submit the revised rates to KIDC in May 2010 and KIDC, as per procedure, submitted the claim for revised rates to CIDCO for its consideration and sanction in the month of January, 2011. It is submitted that in the month of January 2011, the design of the project was altered by KIDC and the claimant was asked to provide six gates instead of the originally planned four gates. The revised estimated cost was Rs.1220.19 crores.

51. CIDCO however, appointed three member committee ("Kulkarni Committee") which submitted its report on 29<sup>th</sup> February 2012 which recommended a revised total cost of Rs.962 crores. It was clarified that the rates of the extra items mentioned in the report were only for reference. He submits that the claimant thereafter suspended the work. CIDCO thereafter appointed two member committee comprising of the Chief Engineer and the General Manager (Technical) of CIDCO being CIDCO Internal Committee to study the rate analysis prepared by KIDC and to work out the rates independently. The said committee in its report dated 7<sup>th</sup> October 2014 came to a finding that the cost of construction would be Rs.632.73 crores. CIDCO thereafter appointed a five member committee to suggest the rates. The said five member committee submitted its report on 10<sup>th</sup> June 2013 suggesting that the revised cost of construction would be Rs.808 crores.

52. It is submitted by the learned senior counsel that Justice Gaikwad Committee submitted its report dated 30<sup>th</sup> May 2014 recommending the constitution of a joint cell of experienced engineers to reassess correctly, the quantum of the executed quantities and recast the revised estimate accordingly. He submits that the claimant

has already been paid a sum of Rs.495 crores under the contract awarded which is the subject matter of this dispute. He submits that at no point of time, rates for extra items were finalised. The KIDC and CIDCO were never *ad idem* on the rates to be paid.

53. It is submitted by the learned senior counsel that while awarding the claim no.2 for Rs.177.65 crores pertaining to the R.A. Bill No.11 in the majority award, the Arbitral Tribunal has relied upon a supposed admission by the KIDC to the tune of Rs.177.65 crores based on paragraph 98 at page 331 of the statement of defence filed by the KIDC and in paragraph 5 at page 381 of the reply to Amended Statement of Claim. He submits that the said supposed admission appeared to flow from the KIDC's written submissions tendered before the Arbitral Tribunal and in particular paragraph 36 of the written submissions which referred to KIDC's reply to the application filed by the claimant before the Arbitral Tribunal under Section 31(6) of the Arbitration Act.

54. It is submitted that on a plain reading, those written submissions did not constitute an admission. The said written submissions must be read with the pleadings of the KIDC filed before the Arbitral Tribunal and not in isolation as has been done by the majority award. The written submissions could not be considered as pleadings by the Arbitral Tribunal. He submits that reply of KIDC to the application under Section 31(6) filed by the claimant was also not an admission but merely a recommendation, on a plain reading thereof. He placed reliance on paragraph 12 page 209 Vol.VII of the claimant's Compilation of Documents by the claimant in this Court.

55. It is submitted that even assuming for the sake of argument, reply to the application filed by the claimant under Section 31(6) is taken to be an admission, on the face of it, the same amounts to an admission of only Rs.117 crores. He submits that the impugned majority award thus suffers from patent illegality, perversity and

gross non-application of mind and shocks the conscience of this Court. He submits that no enquiry has been held by the Arbitral Tribunal on the amount payable to the claimant by the KIDC based on various rival submissions made by the parties and based on evidence produced on record by the parties. The Arbitral Tribunal could not have relied upon the so called admissions only in the impugned majority award while allowing the major claims made by the claimant.

56. It is submitted by the learned senior counsel that the Arbitral Tribunal in the majority award has totally ignored the fact that as disbursing authority, the agreement between KIDC and CIDCO which is a back-to-back contract to the contract between the claimant and the KIDC, while KIDC could recommend payment, it was for CIDCO alone to disburse the amount after due verification. He submits that any recommendation made by the KIDC would not constitute an admission as to the quantum and rate of the work done. There was ample evidence on record in the form of various committee reports and the pleadings of parties including CIDCO to show why the quantum and rate claimed were unacceptable.

57. In so far as the claim no.2 pertaining to the difference in the rate of M-15 Concrete allowed by the arbitral Tribunal in the majority award at Rs.45.30 crores is concerned, learned senior counsel submits that in claim no.1, the quantity M-15 Concrete was considered by the Arbitral Tribunal at Rs.8,756.85 per cubic meter and the claimant claimed a rate of Rs.14,000 per cubic meter. He submits that while awarding the claim in paragraph 37 of the majority award, the Arbitral Tribunal relied upon a supposed admission by the KIDC to the tune of Rs.45.30 crores. He submits that paragraph 37 of the majority award is in and of itself riddled with typographical and arithmetical error.

58. Learned senior counsel invited my attention to the letter dated 10<sup>th</sup> June 2011 wherein the then Executive Engineer, KIDC

allegedly recommended the rate of Rs.12,073/- per cubic meter to CIDCO. The majority award relied upon the rate of Rs.12,073/- per cubic meter to arrive at the figure of Rs.45.30 crores on the assumption that KIDC had admitted Rs.45.30 crores. Learned senior counsel submits that the said letter dated 10<sup>th</sup> June 2011 did not amount to an admission Rs.45.30 crores or otherwise at all but was merely a recommendation and subject to approval. He relied upon the reply to the amendment to the statement of claim at page 282 and 283 and would submit that the then Executive Engineer who was the signatory of the said letter is facing prosecution in the matter and has been charge sheeted by the ACB.

59. Learned senior counsel submits that the final authority in this regard vested with CIDCO as no amount could have been disbursed or agreed to the disbursed by the KIDC without prior approval by CIDCO. The Arbitral Tribunal could not have considered recommendation made by the KIDC, if any, to pay Rs.12,073/- per cubic meter for the item “M-15 Concrete” as admission of liability. He submits that admittedly the CIDCO had not approved the said recommendation made by the KIDC. Learned senior counsel submits that the majority award in respect of this claim also thus suffers from patent illegality, perversity and gross non-application of mind and ought to shock the conscience of this Court. He relied upon the judgment of the Supreme Court in the case of Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49 and in particular paragraphs 28, 30, 36, 42.2 and 42.3 thereof.

60. In so far as the claim no.4 towards reimbursement of the payment alleged to have been made to the police authorities awarded at Rs.50 lakhs by the Arbitral Tribunal in the majority award is concerned, it is submitted by the learned senior counsel that in the matter of contractual obligation, there was no power vests in the Arbitral Tribunal to make any award on the basis of equity or some such principle of equity. The cost incurred by the claimant to carry

out its work must be deemed to include all ancillary and incidental costs such as cost for police protection. The police protection was not part of the contract awarded by the claimant to the KIDC. He submits that the majority award failed to consider the pleadings and the case of the KIDC in respect of this claim. The KIDC had specifically pleaded that the said claim was not maintainable and was beyond the scope of contract.

61. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of ***Jaiprakash Associates Ltd. Vs. Tahri Hydro Development Corporation of India, 2019 SCC OnLine SC 143*** and in particular paragraphs 4 and 14 to 18. He also relied upon the judgment of the Himachal Pradesh High Court in the case of ***Raj Kumar Gupta & Ors. (supra)*** and in particular paragraph 22 thereof. He submits that the claimant had not produced any proof in support of this claim. The Arbitral Tribunal however, still allowed the said claim without any basis and evidence.

62. In so far as the claim no.5 i.e. “being idling charges towards machinery and labour” awarded by the Arbitral Tribunal at Rs.18.35 crores is concerned, it is submitted by the learned senior counsel that the claimant had discontinued its work on its own. The claimant thus ought to have demobilized the work. The claim was for three periods as set out in paragraph 40 at page 112 of the majority award. The Arbitral Tribunal had allowed the claim only for first of the three periods on the basis that the claimant had the duty to mitigate its losses for the second and the third period. He invited my attention to a letter from the then Executive Engineer dated 1<sup>st</sup> March 2014 which is reproduced by the Arbitral Tribunal in the majority award at page 111.

63. It is submitted that the claimant had relied upon Clause 69 of the Special Conditions of Contract which referred to Clause 15(3) of the Conditions of Contract. He submits that since the work was not

suspended by the KIDC but was admittedly suspended by the claimant itself, Clause 69 of the Special Conditions of Contract read with Clause 15(3) of the Conditions of Contract were not applicable. He relied upon the plea raised by the KIDC in paragraph 3 of the Statement of Defence. Learned senior counsel submits that the majority award has exceeded its jurisdiction by travelling beyond the four corners of the contract and deserves to be set aside. Learned senior counsel relied upon the judgment of the Supreme Court in the case of ***Jaiprakash Associates Ltd. (supra)*** also in respect of this claim awarded by the Arbitral Tribunal. Learned senior counsel placed reliance on various depositions of Mr.Dhananjay Maruti Godse who was examined as one of the witnesses by KIDC before the Arbitral Tribunal on various issues and opposing all the claims made by the claimant.

64. In so far as the claim for interest awarded by the Arbitral Tribunal is concerned, learned senior counsel placed reliance on Clause 19 of the Specific Conditions of Contract and would submit that in view of there being a specific bar for payment of interest, the Arbitral Tribunal could not have awarded the said claim from the date of cause of action till the date of award. In support of this submission, learned senior counsel also pressed in service Section 31(7)(a) of the Arbitration Act and would submit that in view of specific bar, no claim for interest could be awarded by the Arbitral Tribunal for the past period. He also placed reliance on the judgment of Supreme Court in case of ***Jaiprakash Associates Ltd. (supra)*** and the judgment of Himachal Pradesh High Court in the case of ***Raj Kumar Gupta & Ors. (supra)*** in respect of this claim.

**Submission of the CIDCO (petitioner in Arbitration Petition No. 793 of 2019).**

65. Mr. Nankani, learned senior counsel for the appellant raises a preliminary objection in respect of maintainability of the arbitration petition filed by CIDCO. It is submitted that the CIDCO has only impugned the arbitral award regarding payment of cost of Rs.15 lakhs and had accordingly paid the Court fees of Rs.15,615/-. He submits that the CIDCO had not challenged the entire award and thus cannot be allowed to advance submission in respect of the claims awarded by the Arbitral Tribunal on merits. All R.A. Bills were submitted by the KIDC to CIDCO for release of payment. The CIDCO however unreasonably withheld the said payment.

66. Mr. G. S. Hegde, learned counsel for the CIDCO tendered copy of the Writ Petition No. 11029 of 2013 filed by the claimant against the State of Maharashtra, KIDC and CIDCO in this Court and also the affidavit in reply filed by CIDCO in the said writ petition. He also invited my attention to various orders passed by this Court in the said writ petition. Learned counsel also tendered copy of the written submissions filed on behalf of CIDCO. According to CIDCO, the amount claimed was on higher side and thus various committees were formed for evaluating the cost of the work done at the site. Justice Gaikwad Committee had suggested that a cell of experienced engineers of KIDC and CIDCO could be constituted to assess correctly the quantum of executed quantities and also to get the revised estimate properly prepared from KIDC, considering the recommendation of Justice Gaikwad Committee including rates covered in Chapter VI and rates acceptable to CIDCO.

67. It is submitted by the learned counsel for CIDCO that his client had received 11<sup>th</sup> R.A. Bill submitted by KIDC. There was dispute as to whether the amount claimed in the 11<sup>th</sup> R.A. Bill was based on the measurement of the work allegedly done and the rates applied was correct or otherwise. He submits that such dispute was

referred to arbitration. The Arbitral Tribunal was thus expected to render their finding on this aspect, after considering all the materials on record. The Arbitral Tribunal however relied on the alleged admission on the part of KIDC and allowed various claims made by the claimant. The Arbitral Tribunal could not have accepted the amount suggested/allegedly admitted by KIDC and based on their award on such alleged admission. The reports of various committees were already on record. It was apparent that the claims of the claimant were not accepted by the committees or atleast by Justice Gaikwad Committee. The Arbitral Tribunal was thus required to decide the claim independently regarding the quantity of work done and the rates applicable and about payability thereof.

68. Learned counsel for CIDCO invited my attention to the grounds raised in the said Writ Petition No. 11019 of 2013 filed by the claimant before this Court. He submits that it was one of the ground raised in the said writ petition that though KIDC had repeatedly called upon CIDCO to clear the dues of the contract, the CIDCO had failed and neglected to do so. The CIDCO had been constituting committee of the officers of the State of Maharashtra to evaluate the extra cost. It was also contended in the said writ petition that it was incumbent on CIDCO to fund KIDC for the smooth working and completion of the project and by stopping to fund without any cause, CIDCO was obligating its duty for such a large project of public importance. The claimant contended that it was incumbent on the State Government to direct CIDCO to fund KIDC for completion of the project. The CIDCO was bound to act fairly and reasonably and must make its decision within reasonable time. It was the case of the claimant that the inaction of the CIDCO was dilatory, unjust, unfair against the public interest and without any reasons which had caused manifest injustice, inconvenience and loss to the claimant.

69. Learned counsel for the CIDCO invited my attention to the prayers in the said writ petition and would submit that in prayer (a) of

the said writ petition, the claimant had sought a writ of mandamus against the CIDCO to fund KIDC regarding payment of all the pending bills of the work done by the claimant for work done for Balganga River Project, Tal. Pen, Dist. Raigad so that KIDC could make payment to the claimant.

70. Learned counsel for CIDCO also invited my attention to the affidavit in reply filed by KIDC dated 17<sup>th</sup> December, 2013 and would submit that the said affidavit filed by KIDC would clearly show the collusion between KIDC and the claimant. He invited my attention to some of the paragraphs of the affidavit dated 18<sup>th</sup> January, 2014 filed by Pranik V. Mul in the said Writ Petition, working as Executive Engineer, Hatawle, working with CIDCO. He submits that in paragraph 3 of the said affidavit, it was clearly mentioned that there were disputed questions of facts in the said writ petition.

71. It is submitted that in the said affidavit, it was clearly mentioned that as per Agreement dated 23<sup>rd</sup> September, 2009 executed between KIDC and CIDCO, KIDC was required to seek official approval in the event of variation in the quantity or execution of some additional work. The KIDC however had not obtained any such approval though the extent of work carried out by the claimant was beyond the original work allotted to them. The alleged additional work carried out by the claimant with variation in the quantities thereof was not approved by the CIDCO and thus CIDCO was not liable to pay any amount under additional claim lodged by the claimant. The amount claimed by the claimant in the sum of Rs.1220.19 crores for the cost of the project was highly excessive.

72. It is submitted by the learned counsel that in the said affidavit the CIDCO had also referred to expert committee reports appended by the CIDCO. He submits that the CIDCO has already paid Rs.494.10 crores to the claimant. The claimant did not complete the construction work of the said dam. The CIDCO had prayed for

dismissal of the said writ petition with cost. Learned counsel for the CIDCO also invited my attention to the orders dated 10<sup>th</sup> September 2013, 28<sup>th</sup> January 2014, 4<sup>th</sup> February 2014, 6<sup>th</sup> May 2015 and 17<sup>th</sup> July 2015 passed by a Division Bench of this Court in the said Writ Petition.

73. It is submitted by the learned counsel that the Division Bench of this Court in the said writ petition while disposing of the said writ petition by order dated 7<sup>th</sup> October, 2014 made it clear that all the disputes and differences between the parties regarding construction of the Balganga Dam and payments/non-payments for the same was referred to the Arbitral Tribunal consisting of five arbitrators. This Court also recorded that the parties agree that all disputes, claims/counter-claims arising out of and between the parties in respect of the said irrigation project were referred for arbitration to the said tribunal. In paragraph 4 of the said order dated 17<sup>th</sup> July, 2015, this Court recorded that the contract in the said project was given by KIDC to the claimant and KIDC was receiving the funds from CIDCO and hence the State of Maharashtra was not directly involved in the controversy amongst the parties. However, the State Government was respondent no.1 and other parties had agreed that the State Government may also appoint an arbitrator.

74. Learned counsel invited my attention to paragraph 6(F) of the said order dated 17<sup>th</sup> July, 2015 and would submit that this Court in the said paragraph had recorded that as regards the amount of Rs.28.20 crores deposited by CIDCO in compliance with the direction dated 10<sup>th</sup> April, 2014 of this Court, the amount has already been invested in the Fixed Deposit with a Nationalized Bank and the said amount shall continue to remain invested and the said Fixed Deposit with accrued interest thereon shall abide by the award of the Arbitral Tribunal.

75. Learned counsel for the CIDCO submits that in the said order dated 28<sup>th</sup> January, 2014, passed by the Division Bench of this

Court, this Court had noticed that in view of the fact that CIDCO had raised dispute about the claim of the claimant for the higher cost, CIDCO had appointed three member committee which had submitted a report on 29<sup>th</sup> February, 2012 recommending revised cost of Rs.972.17 crores. In the said order, this Court also recorded the contention of CIDCO in the affidavit in reply dated 18<sup>th</sup> January, 2014 that the claim of the claimant towards cost of the project was highly excessive. He submits that this Court also recorded the submission of the learned counsel for the claimant in paragraph 9 of the said order that CIDCO should make the payment as per the report of the three members committee, which has already revised the total cost of project to Rs.972.17 crores as against the claim of the contract at Rs.1220.19 crores.

76. The claimant had also prayed for a direction against the CIDCO to make payment of 80% of the said amount on the basis of three members committee. By the said order, the Division Bench of this Court directed the claimant to file an undertaking in this Court that it shall forthwith resume the project work from the stage where it was earlier left and after it receives Rs.100.20 crores and also to complete the project work as per revised specifications of the contract subject to its right to get the amounts which may be determined and paid in accordance with law. The Division Bench of this Court accordingly directed the CIDCO to first release Rs.28.20 crores to KIDC who in turn pay the said amount to the claimant. This Court also directed CIDCO to pay Rs.72.10 crores to KIDC within three weeks from the date of such order which in turn would pay the said amount to the claimant within one week thereafter. It was further provided that the said amount of Rs.72.10 crores will be released by the CIDCO by providing a bank guarantee of a Nationalized Bank for Rs.72.10 crores within one week from the date of receipt of Rs.28.20 crores from KIDC.

77. In the said order, the Division bench clarified that in case CIDCO for any reason required to and does encash the bank guarantee for Rs.72.10 crores the amount so encased will be deposited by CIDCO in this Court. Such amount will be withdrawn by CIDCO only after obtaining the direction of this Court. It was made clear that those interim directions were issued by the Division Bench of this Court without prejudice to the rights and contentions of the parties and the claimant had agreed to give an undertaking, in view of the fact that by those interim directions, CIDCO and KIDC were required to pay Rs.100.30 crores subject to the condition of giving bank guarantee for Rs.72.10 crores.

78. Learned counsel for the CIDCO submits that by order dated 4<sup>th</sup> February, 2014, this Court recorded that the claimant was not in a position to give any undertaking as contemplated in order dated 28<sup>th</sup> January, 2014 and was prepared to furnish at the most bank guarantee for 25% of Rs.72.10 crores. This Court accordingly recalled the directions contained in paragraph 12 of the order dated 28<sup>th</sup> January, 2014.

79. It is submitted by the learned counsel that in the said order, this Court had permitted CIDCO and KIDC to place before three members committee constituted by CIDCO and headed by Justice Gaikwad (retired) the report dated 29<sup>th</sup> February, 2013 of three members committee indicating revised total cost of construction of project at Rs.972.17 crores, Report dated 10<sup>th</sup> June, 2013 of five members committee showing revised cost of construction at Rs.808 crores. This court directed that the committee will give an opportunity of hearing to CIDCO, KIDC and the claimant. This Court also granted liberty to CIDCO, KIDC and the claimant to produce their own material/ evidence in support of their respective cases before the said committee.

80. This Court directed the said committee headed by Justice Gaikwad (retired) to submit its report preferably by 31<sup>st</sup> March, 2014. Learned counsel invited my attention to paragraph 5 of the said order thereby recording the submission made by CIDCO through its counsel that CIDCO had already paid Rs.150 crores to KIDC for rehabilitation of project affected persons but the amount did not appear to have been spent so far as with the result, in the absence of rehabilitation of project to affected persons, the claimant will not be able to make any further progress for execution of the project.

81. By an order dated 17<sup>th</sup> July, 2015, this Court recorded the agreement between the parties that the claim of the claimant would be examined and adjudicated upon by an Arbitral Tribunal consisting of five members. It was mentioned in the said order that a former Judge of this Court would be appointed as the presiding arbitrator. It is submitted by the learned counsel that it is thus clear that all disputes between the parties including the disputes raised by CIDCO about the quantity and the rate claimed by the claimant was referred to the arbitration. He submits that CIDCO never admitted the quantity and the rate demanded by the claimant. KIDC had not obtained any approval from CIDCO for payment of the demand raised by the claimant in 11<sup>th</sup> R.A. Bill and for additional items. The CIDCO had deposited Rs.28.20 crores without prejudice to their rights and contentions.

82. Learned counsel for the CIDCO strongly placed reliance on paragraph 5 of the order dated 7<sup>th</sup> October, 2014 passed by this Court in the said writ petition and would submit that it was clearly recorded in the said order that there was a dispute about quantity and rate. He submits that in the order dated 23<sup>rd</sup> June, 2014, this Court recorded that there was a dispute between the claimant and KIDC and between KIDC and CIDCO. The entire dispute about quantity and rate also existed. The Arbitral Tribunal however awarded the amount based on the alleged acknowledgment/admission of the amount by KIDC though

a clear dispute about quantity and rate was raised by the CIDCO and there being dispute between the CIDCO and KIDC also.

83. It is submitted by the learned counsel that different committees appointed by CIDCO had suggested different quantities and rates. There was no determination of dispute regarding quantity and rate. The Arbitral Tribunal thus ought to have called upon the claimant to prove the entire quantity and the rate claimed by it and could not have awarded the claims on the basis of such alleged admission of quantity and rate by the KIDC. The Arbitral Tribunal ought to have independently decided the quantity and rate in view of the dispute between the parties and more particularly raised by CIDCO.

84. It is submitted by the learned counsel that there was correspondence between CIDCO and KIDC after 5<sup>th</sup> Bill was forwarded by KIDC to CIDCO. The onus was on the claimant to prove the disputed quantity and rate. There was budget of Rs.490.5 crores earmarked by CIDCO for those projects. However, upto 10<sup>th</sup> R.A. Bill, entire sanctioned amount was already exhausted. He submits that all payments made by CIDCO towards R.A. Bills were by way of advance, all quantities in R.A. Bills were tentative. Learned counsel for the CIDCO relied upon various recommendations made by Shri Justice M.G. Gaikwad (retired) committee. It is submitted by the learned counsel for CIDCO that even if any concession was made by the KIDC before the Arbitral Tribunal in respect of the claims made by the claimant, such concession would not be binding on the CIDCO. The Arbitral Tribunal thus was required to decide the entire matter on merits and not on the basis of such alleged concession made by the KIDC.

85. Learned counsel for the CIDCO invited my attention to paragraphs 6 and 7 of the written statement filed by the CIDCO before the Arbitral Tribunal and would submit that the CIDCO had clearly

disputed the measurement, quantity and rate in the written statement. The Arbitral Tribunal however had not considered the case of CIDCO in the impugned award at all and has overlooked the pleadings and documents produced by CIDCO.

86. Learned counsel invited my attention to an additional issue i.e. issue no.6A framed by the Arbitral Tribunal on the issue of limitation. He submits that though the said additional issue was framed regarding limitation in respects of the enhanced claims made by the claimant, the Arbitral Tribunal has neither dealt with the said issue of limitation nor has recorded any finding thereon in the impugned majority award. Application was made by KIDC to recast the issue on 5<sup>th</sup> June, 2018.

87. It is submitted by the learned counsel that the claimant had made an application under Section 23(3) of the Arbitration Act *inter-alia* praying for amendment to the statement of claim on 8<sup>th</sup> May, 2018. The Arbitral Tribunal allowed the said application for amendment without any basis and permitted the claimant to demand higher rate in respect of claim no.2. He submits that the claimant had demanded payment @ Rs.8756.85 per cubic meter in the original statement of claim and demanded the payment @ Rs.14,400/- per cubic meter in the application for amendment of claim.

88. Learned counsel appearing for the CIDCO invited my attention to the finding rendered by the Arbitral Tribunal in the majority award and more particularly in paragraph 36 and would submit that the amount of Rs.177.65 crores awarded by the Arbitral Tribunal was merely on the basis of alleged admission/concession made by the KIDC in respect of the said amount and not on the basis of any proof or evidence produced by the claimant independently to prove the said disputed quantity and rate.

89. It is submitted by the learned counsel that claim no.2 is also allowed by the Arbitral Tribunal in the sum of Rs.30.51 crores on the basis of alleged admission/concession made by KIDC. The claimant had not led any other evidence independently to prove the disputed quantities and rates before the Arbitral Tribunal. He submits that the award discloses total non application of mind on the part of the Arbitral Tribunal. The entire award is based on no evidence. The claimant had made claim against three respondents including CIDCO and State of Maharashtra in the statement of claim.

90. In so far as the extra amount awarded by the Arbitral Tribunal towards excavation of hard rock is concerned, it is submitted by the learned counsel that the tender invited by the KIDC for the allotment of instant work provided for a site visit. The proposed tenderers were expected to visit the site and familiarize themselves with the nature of work to be done. He relied upon clause 1.1.1, Vol. II of the tender documents in support of this submission. He submits that the tender also contained the borehole details which indicated the nature of soil prevalent at the site. The tenderers were made aware or should have asserted themselves about the nature of regular soil and the site and the method to be adopted by them for digging/drilling. The tenderers were required to subject their tender, keeping in view, the nature of soil at the site and the method required to be adopted by them for digging/drilling at the site. The claim for hard rock drilling itself was not justified and was not an extra item of the work which was ascertainable by the tenderers by referring to borehole data. The Arbitral Tribunal in the majority award has not considered this submission of the CIDCO at all.

91. In so far as the controlled blasting and security issue is concerned, learned counsel relied upon the minutes of the previous meeting held on 18<sup>th</sup> March, 2009. In the said meeting, the claimant had opposed certain points. He submits that the said minutes of meeting would clearly show that the claimant was fully aware of the

factual situation and thus should have submitted a bid after taking into consideration all the exigencies mentioned in the letter dated 18<sup>th</sup> March, 2009. The claimant had asked for additional mobilization in advance. The claimant was fully aware of the site condition and thus could not claim any extra amount. The claim for providing security and for adopting control blasting method was beyond the terms of the contract. The tender bid had already provided for control blasting and chiseling wherever required. He placed reliance on clause 4.11.1, Vol. II of the tender document in support of this submission. He submits that the control blasting could not be deemed as an extra item and also payment for providing security could not be claimed by claimant. He relied upon by the minority award in respect of this claim and more particularly in paragraph 6.1.1(5). He submits that the Arbitral Tribunal has not considered this issue raised by CIDCO in the impugned award while awarding the said claim made by the claimant.

92. Learned counsel for the CIDCO invited my attention to the evidence of the witness examined by the claimant and in particular evidence of Mr. Rithe, who was an ex-officer of KIDC. He submits that in reply to question no. 140, the said witness had clearly admitted that local people had given their land willingly for construction of the dam. He submits that since the lands were given by the local people willingly, they could not have created any hurdles for construction of the dams and thus there was no necessity of providing additional security. The said claim awarded by the Arbitral Tribunal at Rs.50,00,000/- was untenable and beyond the terms of the contract.

93. Learned counsel for the CIDCO strongly placed reliance on the recommendation made by Shri Justice M.G. Gaikwad Committee in respect of cast of M-15-concrete recommending that the payment in respect of the said item could be made as per the tender rates. He submits that the Arbitral Tribunal however did not consider the said report.

94. Learned counsel for the CIDCO also invited my attention to the written arguments filed by the CIDCO before the Arbitral Tribunal and would submit that though CIDCO had raised various disputes about quantity and rates also in the said written arguments summarizing the oral arguments made by CIDCO, the Arbitral Tribunal has totally overlooked the submission made by CIDCO in toto in the arbitral award.

95. In so far as the claim no.5 towards idle charges awarded by the Arbitral Tribunal in favour of the claimant is concerned, it is submitted by the learned counsel that the claimant itself on its own had stopped the work and were thus responsible for creating situation where the machines and labours had alleged to have remained idle. The claimant could have very well planned in advance to move the machinery and labour and could have mitigated the alleged loss. No such claim could have been thus awarded by the Arbitral Tribunal. The said claim was also not proved by the claimant payable under the contract or otherwise.

96. It is submitted by the learned counsel that Rs.10.38 crores mobilization advance were left with the claimant. Though in the written arguments filed by CIDCO, the CIDCO had prayed for refund of excess mobilization advance of Rs.10.38 crores, the Arbitral Tribunal did not consider the said prayer and also did not direct the claimant to give credit of the said amount to CIDCO.

97. It is submitted by the learned counsel for CIDCO that the Arbitral Tribunal having held that CIDCO was not liable to pay any amount to the claimant, the Arbitral Tribunal in the majority award could not have permitted the claimant to withdraw the amount of Rs.28.20 crores which was deposited by CIDCO in compliance with the order dated 17<sup>th</sup> July, 2015 passed by this Court in the said Writ Petition No. 11019 of 2013. He submits that the award shows patent illegality and thus deserves to be set aside.

98. In so far as the claim for interest awarded by the Arbitral Tribunal is concerned, learned counsel submits that under clause 19 of the said Special Condition of Contract, there was bar against the payment of interest. The arbitral award thus awarding interest upto the date of award is without jurisdiction.

99. It is submitted by the learned counsel that though the Arbitral Tribunal has held that the CIDCO was not liable to make any payment to the claimant, the Arbitral Tribunal has directed CIDCO to pay cost of Rs.15,00,000/- to the claimant. This part of award also shows patent illegality and non application of mind.

**The submissions of Ms.Geeta Shastri, learned Additional Government Pleader on behalf of the State of Maharashtra (petitioner in Commercial Arbitration Petition No.921 of 2019) :-**

100. Learned counsel for the State Government invited my attention to the annexures to the arbitration petition filed by the State Government, some of the annexures from the compilation of the documents filed by the KIDC and the claimant. She submits that the Government of Maharashtra had decided to develop Balganga Dam on 28<sup>th</sup> January,2009 to cater to the need of drinking water and water for irrigation purpose of Navi Mumbai. It was decided that the CIDCO shall provide capital fund for construction of Balganga Dam by KIDC. In the month of February 2009, CIDCO had approved the fund of Rs.488.34 crores. KIDC had invited tenders from various agencies. She submits that four bids were received by the KIDC viz. (1) F. A. Enterprises, (2) M/s. R. N. Naik & Sons, (3) F. A. Construction and (4) M/s. Mahalaxmi Infra Project Ltd. The contract was awarded to F. A. Enterprises.

101. It is submitted that the investigation report and FIR revealed that M/s. R.N.Naik & Sons had not submitted any bid or documents nor had participated in pre-bid process but in its name forged documents including bank guarantee were submitted. It was also revealed that the earnest amount of all the four bids were paid by one person i.e. F.A.Construction. The partners of F.A.Construction and F.A.Enterprises were from the same family and three partners of F.A.Enterprises are also the partners of F.A.Construction. In the month of September 2009, a separate agreement was entered into between the CIDCO and KIDC regarding construction of work.

102. Learned counsel for the State Government invited my attention to various orders passed by this court in writ petition filed by the claimant. She submits that the State Government was also a party respondent to the said writ petition. All the disputes between the parties regarding construction of Balganga Dam and payments/non payment were referred to the Arbitral Tribunal consisting of five members by an order dated 17<sup>th</sup> July, 2015. She submits that the State Government had also nominated one of the arbitrator out of the five members of the Arbitral Tribunal. The name of the arbitrator nominated by the State Government was subsequently replaced by an order dated 3<sup>rd</sup> May, 2016. On 25<sup>th</sup> August, 2015, Anti Corruption Bureau filed an FIR against the claimant and others including officers of KIDC under sections 420, 467, 468, 471 of the IPC and under sections 13 and 12 of the Prevention of Corruption Act, 1988.

103. It is submitted by the learned counsel that in view of the ongoing Anti Corruption Bureau and investigation into various contracts awarded by KIDC to various claimants including the claimant in the instant case in respect of the irrigation projects and the project being stalled, Government of Maharashtra took policy decision by Government Resolution dated 23<sup>rd</sup> September, 2016 in the public interest, after considering the investment in the irrigation project and deprivation of irrigation benefit to the farmers by giving directions to

KIDC and other irrigation development corporation to terminate the contract on merits after confirming the provisions of Indian Contract Act and other law and also the terms of agreements/contracts by passing a speaking order.

104. It is submitted by the learned counsel that the alleged notice dated 5<sup>th</sup> August,2015 by the advocate of the claimant and the notice dated 7<sup>th</sup> August,2015 by the Arbitral Tribunal was addressed to the Government Pleader (Appellate Side) and G.O.M., Urban Development Department and not to the GOM, Water Resources Department. Those notices were issued prior to the change of one of the arbitrator. It is submitted by the learned counsel that on 21<sup>st</sup> January,2017, the claimant appears to have addressed a letter to the Government Pleader (Appellate Side) in respect of the amended statements of claim. No such notice was served upon the Government of Maharashtra, Water Resources Department. The State of Maharashtra was not served with any such statements of claim or notice by the claimant.

105. Learned counsel for the State Government states that on 8<sup>th</sup> March,2017, the Arbitral Tribunal framed issue. No copy of the issues however were furnished or sent to the Government of Maharashtra, Water Resources Department. The issue no.2 regarding Government Resolution had cast burden on KIDC and not on the Government of Maharashtra, Water Resources Department. She submits that a copy of the impugned award duly signed by the Arbitral Tribunal is not served upon the Government of Maharashtra, Water Resources Department even till today. A copy of the arbitral award was given to the Government of Maharashtra, Water Resources Department only by KIDC.

106. It is submitted by the learned counsel that the Government Resolution dated 23<sup>rd</sup> September,2016 was not even in existence when the disputes between the parties were referred by the Division Bench of

this court to the Arbitral Tribunal for adjudication. The notice issued by the claimant's advocate and the Arbitral Tribunal on the Government Pleader's Office (Appellate Side) was not received by the Government of Maharashtra, Water Resources Department. There was no prayer in the statement of claim to challenge the validity of the Government Resolution dated 23<sup>rd</sup> September, 2016. She invited my attention to the amended statement of claim filed by the claimant and would submit that though there was a reference made to the said Government Resolution dated 23<sup>rd</sup> September, 2016 in the amended statement of claim, the claimant had not prayed for setting aside the said Government Resolution. She submits that the validity of such Government Resolution even otherwise could not have been challenged in the arbitral proceedings.

107. Learned counsel appearing for the State Government invited my attention to the issues framed by the Arbitral Tribunal on 8<sup>th</sup> March, 2017 and would submit that by the said issue no.2, the onus of proof was erroneously cast on the KIDC to prove the validity of the said Government Resolution. She submits that after framing of such issues, the State of Maharashtra, Water Resources Department was not served with any notices or pleadings, documents or evidence at any point of time.

108. Learned counsel submits that the issue of validity of Government Resolution dated 23<sup>rd</sup> September, 2016 was beyond the scope of reference to the arbitration. The Arbitral Tribunal had thus acted beyond the jurisdiction by declaring the said Government Resolution as null and void.

109. It is submitted by the learned counsel that the notice of termination was issued by the KIDC during the pendency of the arbitral proceedings. Leave to amend was accordingly granted to the claimant by the Arbitral Tribunal after issuance of such Government Resolution. Amended copy of the statement of claim was also never

served upon the State of Maharashtra, Water Resources Department or any other department. The said resolution was issued in public interest and was not forming part of the contract awarded to the KIDC. By the said Government Resolution, the State Government had cancelled 94 contracts.

110. Learned counsel for the State Government invited my attention to the findings of the Arbitral Tribunal in paragraphs 50 to 52 and 58 of the impugned award and would submit that the said Government Resolution has been declared as null and void by stating that several irrelevant and extraneous consideration weighed with the State Government and that it was exercised in absolutely casual, wholly *malafide* and without jurisdiction. The said resolution was an independent decision of the Government of Maharashtra and was issued in view of the situation prevailing at that time and was not a part of contract between parties and was also applicable to various projects relating to irrigation. The validity of Government Resolution can only be decided by the constitutional court and not by the Arbitral Tribunal.

111. It is submitted by the learned counsel that the power of the State Government to issue Government Resolution dated 23<sup>rd</sup> July, 2016 was under entry 17 of List II of Schedule VII of Constitution of India read with Article 162 of the Constitution of India and section 25 of Konkan Irrigation Development Corporation Act, 1997. These provisions give the said Government Resolution a status of sub-ordinate legislation having the force of law. The Arbitral Tribunal thus had no power to declare the said Government Resolution as null and void and illegal. She submits that the said Government Resolution was issued by the State Government in public interest and was approved by the cabinet of the State of Maharashtra.

112. Learned counsel for the State Government relied upon the judgment of Supreme Court in case of ***Directorate of Education and others vs. Educomp Datamatics Ltd. & Others, (2004) 4 SCC 19*** and

in particular paragraph (12) and would submit that the court cannot strike down the terms of the tender prescribed by the Government. The Government must have free hand in settling the terms of the tender. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.

113. Learned counsel for the State Government placed reliance on the judgment of Supreme Court in case of ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., (2003) 5 SCC 705*** and in particular paragraph (74) (iv) and 74(3). It is submitted that since the Arbitral Tribunal has dealt with the validity of the Government Resolution which was not the subject matter of the dispute referred to the Arbitral Tribunal nor contemplated by or not falling within the terms of the submission to the arbitration and thus deserves to be set aside on that ground itself. She submits that the impugned award is also against the public interest of India and is contrary to the fundamental policy of Indian law and the interest of law. The impugned award discloses patent illegality. Learned counsel for the State adopts the other submissions made by Mr.S.J.Aney, learned senior counsel for the KIDC on the issue whether the Arbitral Tribunal had powers to declare the Government Resolution as null, void, invalid and *malafide* or not and would submit that this part of the award is ex-facie perverse and shows patent illegality and deserves to be set aside.

**The submissions made by Mr.V.S.Nankani, learned senior counsel for M/s.F.A.Enterprises (claimant):-**

114. Learned senior counsel invited my attention to various part of the pleadings, documents, oral evidence led by the parties, the findings recorded by the Arbitral Tribunal in the majority award and various judgments of the Hon'ble Supreme Court and this court. He also submitted written submissions during the course of the arguments.

115. Learned senior counsel for the claimant submits that in the year 1990, the Government of Maharashtra informed CIDCO that Balganga River Dam Project was reserved for CIDCO subject to the condition that the cost would be borne by the CIDCO and the work be undertaken by the Irrigation Department. On 6<sup>th</sup> February, 2009, CIDCO passed a resolution at its Board of Directors' meeting held on 24<sup>th</sup> February, 2009 for the project to be executed by KIDC and funded by the CIDCO.

116. After pre-bid meetings and post-bid negotiations on 12<sup>th</sup> May, 2009 the KIDC issued a work order in favour of the claimant for Rs.353.89 crores as against the original tender cost of Rs.495.45 crores. In the said work order, it was recorded that since the work was to start after 2.375 years, as per clause 33 of the Conditions of the Contract, considering the price escalation for first 2.375 years, the offer comes to Rs.495.45 crores, which is 4.73% above the updated cost of Rs.473.04 crores. On 23<sup>rd</sup> September, 2009, CIDCO and KIDC entered into Memorandum of Understanding in relation to the project. It is submitted by the learned senior counsel that the claimant was asked to start the work immediately by KIDC by letter dated 28<sup>th</sup> January, 2010 because KIDC had got the Government of Maharashtra to initiate proceedings against the Land Acquisition Act, 1894. Out of the total area of the land required for the project, being above 1,500 hectares, covering 13 villages, only about 365 hectares was a forest land and about balance 1,200 hectares was a private land.

117. It is submitted that the claimant has already started working in February 2010 as directed by KIDC, as against the scheduled date of commencement in October 2011. KIDC issued a revised work order on 11<sup>th</sup> June, 2010 for Rs.374.07 crores. Several unforeseen difficulties arose during the course of progress of the work. There were issues relating to excavation of hard rock, which required change in the method of controlled blasting, change in the location for procurement

of sand for preparation of concrete due to ban on sand mining in Raigad District, use of batching plant, casing of embankment etc. The claimant had accordingly submitted a proposal for approval of the revised rates of concrete (M-15). He submits that the claimant had demanded claim for the said item at Rs.14,000/- per cubic metre. KIDC however approved the rate of Rs.12,073/- vide letter dated 14<sup>th</sup> December, 2010. There was also a change in the design of the dam which materially increased the scope of work.

118. It is submitted that RA Bill No.1 was for mobilization advance. RA Bill Nos. 2 to 10 were for the work done. All these bills have been paid without dispute or objection. The total amount paid till date to the claimant was Rs.494.15 crores. It is submitted by the learned senior counsel that on 10<sup>th</sup> June, 2011, the KIDC submitted a revised estimate to CIDCO and projected the cost of work at Rs.1,220.19 crores. The revised estimate also gave a break-up of the revised rate of concrete upto Rs.12,073.00 per cubic metre. He submits that the CIDCO appointed series of committees set up by CIDCO, which eventually resulted in non-payment of the dues to the claimant. RA Bill No.11 was submitted for about Rs.317 crores. Since the KIDC did not approve the said RA Bill No.11, the claimant was required to stop the work in the month of June 2012.

119. Learned senior counsel for the claimant submits that the claimant was required to file a writ petition bearing no. 11019 of 2013 in this court for a writ of *mandamus* directing the CIDCO to fund the KIDC regarding payment of all the pending bills of the work done by the claimant of the Balganga River Project so that KIDC could make payment to the claimant and for other reliefs. Learned senior counsel placed reliance on various orders passed by the Division Bench of this Court in the said writ petition thereby referring the disputes and differences between parties to the Arbitral Tribunal comprising of five members. He submits that the said arbitration was confined to disputes and differences on account of non-payment of dues to the claimant

arising out of and in relation to the work order dated 29<sup>th</sup> May, 2009 and the revised work order dated 11<sup>th</sup> June, 2010.

120. It is submitted that the disputes in relation to or arising out of the separate and an independent contract, subsequently entered into between CIDCO and KIDC on 23<sup>rd</sup> September, 2009 did not form part of the reference made to the Arbitral Tribunal by the Division Bench of this court. He submits that the disputes and differences referred to in the order dated 17<sup>th</sup> July, 2015 were confined only to the contract between the claimant and KIDC. The parties to the proceedings had understood the reference to arbitration to be throughout the conduct of the arbitral proceedings.

121. It is submitted by the learned senior counsel that KIDC was an alter ego of the State Government. The scope of reference to the Arbitral Tribunal was in respect of the non-payment of the dues by the KIDC to the claimant. The KIDC was always *ad-idem* with the claimant. There was no privity of contract between the claimant and CIDCO and thus approval of CIDCO was not required to be taken for the purpose of making any payment by KIDC to the claimant. Such plea raised by the CIDCO and by KIDC in the pleadings filed before the Arbitral Tribunal and now before this court is a self destructive. The claimant had followed all the tender drawings issued by the KIDC.

122. It is submitted by the learned senior counsel that CIDCO was made party to the writ petition so that the writ of mandamus could be issued to the CIDCO since KIDC had always taken the position that the CIDCO was not releasing the funds. The State Government had no direct role to play but was of joined on account of Water Resources Department being the nodal agency for KIDC. In the writ petition, the claimant had invoked a constitutional remedy. The *inter se* dispute between KIDC and CIDCO did not form part of writ petition and was thus no a part of the reference to the Arbitral Tribunal. At no stage CIDCO sought to file any such statement of claim against KIDC.

There was no iota of material on record to show that two separate references under two separate contracts were either prayed for before this court in the said writ petition accompanied by a request for consolidation of the two references or CIDCO making a claim against KIDC before the Arbitral Tribunal.

123. It is submitted that the order dated 17<sup>th</sup> July, 2015 passed by this court in the said writ petition referring the disputes thus cannot be given a wide interpretation. He submits that this court in the order dated 23<sup>rd</sup> June, 2014 passed in the said writ petition had noticed that the arbitration agreement between CIDCO and KIDC is different from the arbitration agreement between the claimant and the KIDC and therefore, reference in the later order was confined only to the arbitration agreement between claimant and KIDC.

124. Learned senior counsel for the claimant invited my attention to the affidavit in reply filed by the KIDC in the said Writ Petition No.11019 of 2013 and would submit that even in the said writ petition, the KIDC did not dispute its liability to pay the dues of the claimant however had only raised an issue that the funds were to be provided by CIDCO in the said project. He submits that the claimant was not concerned with the *inter se* agreement between the CIDCO and KIDC regarding funding of the project by CIDCO. He submits that KIDC is managed by the Government under the provisions of Konkan Irrigation Development Corporation Act, 1997 and fully owned, controlled and governed by the State Government.

125. Insofar as the reliance placed by the learned counsel for the CIDCO on Gaikwad Committee report is concerned, it is submitted by the learned senior counsel that all the parties had appeared before the Gaikwad Committee pursuant to the order passed by the Division Bench of this court on 23<sup>rd</sup> June, 2014. This court did not accept the said Gaikwad Committee Report. He submits that even the said committee report had assessed the total cost of Rs.808 crores. The said

Gaikwad Committee had recommended appointment of another committee. The CIDCO itself had instructed that the claimant shall complete the work and has not challenged the grant of specific performance of the contract by the Arbitral Tribunal.

126. It is submitted that in the order dated 6<sup>th</sup> April, 2015 passed by the Division Bench in the said writ petition, the Division Bench recorded the statement made by KIDC and CIDCO that the claimant was not required to continue the work. It is submitted that the order passed by the Division Bench of this court for referring the dispute to the arbitration must be construed to mean the dispute about the payment to be made to the claimant by KIDC. The dispute only between the claimant and the KIDC was referred to the arbitration. The Arbitral Tribunal thus rightly did not frame any issue regarding inter se dispute between the CIDCO and KIDC.

127. Learned senior counsel for the claimant submits that an application for recast of the issues was filed by the KIDC before the Arbitral Tribunal. The parties agreed to the procedure for conducting the arbitral proceedings under section 19 of the Arbitration Act. The CIDCO suggested an additional issue on limitation. Learned senior counsel invited my attention to the points for determination framed by the Arbitral Tribunal initially and the additional points for determination. He submits that though the points for determination were re-arranged, the substance was not changed.

128. It is submitted by the learned senior counsel that the issue no.5 for determination was rightly framed by the Arbitral Tribunal i.e. “whether the KIDC proves that the extra items executed by the claimant were not necessary and were without permission of CIDCO?”. He submits that the Arbitral Tribunal has rightly rendered a finding that there was no reference to the agreement between the CIDCO and KIDC and no such approval was required from the CIDCO.

129. Learned senior counsel placed reliance on various monthly progress reports and would submit that most of the meetings were held between the claimant, KIDC and CIDCO. The CIDCO was fully aware of the work done by the claimant and the rate demanded by the claimant and approved by the KIDC. It is submitted by the learned senior counsel that all the parties were given ample opportunity to file pleadings. The claimant had filed a statement of claim on 9<sup>th</sup> September, 2016 and amended statement of claim on 2<sup>nd</sup> January, 2017 and further amendment to the statement of claim. The KIDC had filed statement of defence on 23<sup>rd</sup> January, 2016 and reply to the amended statement of claim on 16<sup>th</sup> January, 2017 and additional statement of defence on 5<sup>th</sup> June, 2018. CIDCO filed a statement of defence on 19<sup>th</sup> October, 2016 and also filed a reply to the statement of claim and also additional written statement in May 2017. All the parties were given an opportunity to lead evidence both documentary and oral.

130. It is submitted that the claimant had produced three witnesses including one pursuant to an order passed by this court under section 27 of the Arbitration and Conciliation Act, 1996. KIDC and CIDCO produced one witness each, viz. Mr. Godse and Mr. Mul respectively. The witness examined by the parties were cross examined. KIDC not only cross examined the claimant's witness but also cross examined CIDCO's witness.

131. It is submitted that the State Government had also appeared before the Division Bench of this court in the said Writ Petition No. 11091 of 2013 and was represented by a counsel. The State Government had also given consent to the reference to the arbitration. Notices were also issued by the Arbitral Tribunal on 7<sup>th</sup> August 2015, 19<sup>th</sup> August 2015 and 21<sup>st</sup> December 2015. He submits that the notice was served on the Government Pleader who had appeared before this court. The State Government thus cannot be allowed to urge that the notice dated 4<sup>th</sup> August, 2015 was issued to the wrong department of the Government of Maharashtra i.e. Urban Development Department and

not the Water Resources Department. Subsequent notices were issued to the correct Department of the State Government.

132. It is submitted that the arbitrator appointed by the State Government i.e. Mr.H.T.Mendegiri expressed his inability to continue which was recorded by the Arbitral Tribunal in the minutes of the meeting held on 17<sup>th</sup> December,2015. On the Civil Application No.382 of 2016 filed by the claimant in the said writ petition,State Government nominated Mr.S.L.Bhingare vide letter dated 2<sup>nd</sup> May, 2016 tendered in this court. This court accordingly disposed of the said Civil Application No.382 of 2016 vide order dated 3<sup>rd</sup> May, 2016. The State Government however did not appear before the Arbitral Tribunal at any point of time though served.

133. It is submitted that in any event, no prejudice is caused to the State Government since KIDC is an alter ego of the State Government as can be seen from its constitution under section 4 of the KIDC Act, 1997. He submits that the State Government was aware and/or deemed to have been aware with full knowledge of the proceedings before the Arbitral Tribunal and consciously chose not to participate in the arbitration proceedings. The contention raised by the State Government that the notices were not served upon the State Government is afterthought and contrary to the factual position on record.

134. It is submitted that there was a tacit approval to the revised estimate submitted by the KIDC for approval of CIDCO which was clearly demonstrated by subsequent conduct and events of the CIDCO. The claimant was asked by the parties to continue the work and thus KIDC was liable to pay the amount for the work done to the claimant. The classification of the work as extra items was already approved by KIDC as well as CIDCO.

135. Learned senior counsel for the claimant submits that this court cannot re-appreciate the evidence already appreciated by the Arbitral Tribunal in this petition filed under section 34 of the Arbitration Act. This court cannot sit as an Appellate Court to interfere with the findings of fact rendered by the Arbitral Tribunal. None of the petitioners have demonstrated any patent illegality appearing on the face of the award. The Arbitral Tribunal is the sole master of the quality and quantity of evidence.

136. It is submitted that the Arbitral Tribunal has interpreted various terms and conditions of the contract and even if two interpretations are possible, this court cannot substitute the possible interpretation of the Arbitral Tribunal by another possible interpretation. Even if there is any error of law on the part of the Arbitral Tribunal, so long as the same does not go to root of the matter and is beyond the scope of the jurisdiction, the court cannot interfere with an arbitral award. The arbitral award is not contrary to the fundamental policy of Indian law or against basic notions of justice or morality and thus cannot be interfered with by this court under section 34 of the Arbitration Act.

137. Learned senior counsel for the claimant submits that after 2015 Amendment and insertion of the explanation of section 34(2)(b) of the Arbitration Act, the Legislature has restricted the meaning of an award being in conflict with the public policy of India. Only if making of the award is induced or affected by fraud or corruption or is in violation of section 75 or 81 or is in contravention with fundamental policy of India Law or is in contravention with fundamental policy of Indian Law or is in conflict with most basic notions of morality and justice, which is also specified to be not permitting review on merits of the disputes, challenges of such award is permissible and not otherwise. No grounds of challenge are made out by any of the petitioner warranting interference with the impugned arbitral award. Learned senior counsel placed reliance on the judgment of Supreme

Court in case of Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49 and in particular paragraphs 28, 30, 31, 35, 36 to 40 and 40.2 and 40.3.

138. Learned senior counsel for the claimant placed reliance on clauses 1.2b, 14, 15.3, 17.4, 30.1 of the Conditions of Contract and would submit that the 'Engineer-in-charge' is defined under clause 1.2 which would mean the Executive Engineer in charge of works and shall also include the superior officers of the Engineering Department of the Corporation i.e. Superintending Engineer, Thane Irrigation Circle, Thane or Chief Engineer, Water Resources Department, Konkan Region Mumbai or the Executive Director of KIDC Thane. He submits that the Engineer-in-charge of the KIDC was empowered to make any alteration or additions to the original specification drawings design and instruction. The rates were to be mutually agreed between the Engineer-in-charge and the claimant. CIDCO has no role whatsoever in either issuing any instructions or about the quality of work done or the rates payable for such work done.

139. Learned senior counsel also placed reliance on clauses 19, 32, 69 and 70 of the Special Conditions of Contract in support of the claims made by his clients before the Arbitral Tribunal and would submit that none of the claims are contrary to those provisions of Special Conditions of Contract. It is submitted that CIDCO vide its letter dated 8<sup>th</sup> October, 2010 after referring to the site visit of the Chief Engineer had accepted that there were difficulties faced in the rock excavation and that in the opinion of the senior Geologist, who visited the site on 13<sup>th</sup> August, 2010, recovery was very less and rock was harder, closely jointed and energy dissipates. KIDC had accordingly directed the claimant to continue with the work while awaiting sanction of the demanded rate of Rs.2,200/- per cubic metre for excavation in hard rock by rock breaker.

140. It is submitted that in the revised estimate prepared by KIDC and submitted to CIDCO on 10<sup>th</sup> June, 2011, KIDC approved the rate of Rs.1,152.90 and the payment at this rate was made upto RA Bill No.10. He submits that KIDC having directed the claimant to continue the work during the pendency of the approval on the revised estimate submitted by the KIDC to CIDCO could not have refused to pay the amount already decided by the KIDC with the said revised estimate. He submits that the KIDC had by letter dated 13<sup>th</sup> January,2011 instructed the claimant to bring the sand from Umbraj, District Satara at a distance of about 270 kms from the project site and thus the same would be treated as an extra item of concrete while submitting the revised proposal. KIDC had also reconfirmed the change of design from 4 gates to 6 gates and the width requirement to 120 meters which was originally 70 meters in the Tender drawings, based on the recommendation originally decided by the letter dated 13<sup>th</sup> January,2011. Several changes were effected by the KIDC in the scope of work provided from time to time by issuing various instructions to the claimant.

141. It is submitted by the learned senior counsel that the KIDC had prepared RA Bill No.11 on 31<sup>st</sup> March,2012 after receipt of Kulkarni Committee report, adopted the rate of concrete at Rs.8,750/- per cubic metre mentioned therein. In the said RA Bill No.11, there were other extra items, viz. excavation costs shown as Rs.1,152.90 per cubic metre and embankment casing at Rs.432.5 per cubic metre. An amount of Rs.20.61 crores was also covered in RA Bill No.11 towards other tender items in respect of which no dispute was raised before the Arbitral Tribunal.

142. It is submitted by the learned senior counsel that in view of the financial constraint on account of the increasing interest cost on loans taken from the banks, the claimant vide its letter dated 1<sup>st</sup> August,2012 had accepted the rate of concrete mentioned in the

Kulkarni Committee Report i.e. Rs.8,750/- per cubic metre. The said rate for M-15 concrete was admitted by the claimant only under protest without prejudice to its rights to claim for the entire quantity of concrete i.e. Rs.14,000/- per cubic metre. He submits that the said rate awarded by the Arbitral Tribunal thus could not have been challenged by the KIDC at all.

143. Learned senior counsel invited my attention to the letter dated 1<sup>st</sup> August,2012 addressed by the claimant to the KIDC and would submit that the claimant had agreed to accept the lower rate suggested by the KIDC provided the KIDC would have released the payment immediately. He submits that the KIDC however did not release the said payment immediately. The lower rates accepted by the claimant thus were not binding on the claimant.

144. It is submitted by the learned senior counsel that RA Bill No.11 was divided into four parts. The claim in respect of the concrete (M-15) executed at site was part of 11<sup>th</sup> RA Bill. The excavation in hard rock in Cut of Trench and claim for excavation in hard rock in tail channel and approach channel was also the part of the said 11<sup>th</sup> RA Bill. A major amount regarding the item of excavation in hard rock in Cut of Trench and excavation in hard rock in tail channel and approach channel was already paid by CIDCO to KIDC and KIDC to the claimant from 2<sup>nd</sup> RA Bill to 10<sup>th</sup> RA Bill. A major amount regarding the said item of embankment had been already paid in 2<sup>nd</sup> to 10<sup>th</sup> RA Bill and only a small component was outstanding in 11<sup>th</sup> RA Bill. Other admitted items were not disputed by any of the parties.

145. It is submitted by the learned senior counsel that in the original statement of claim filed by the claimant, the said particular claim was to the tune of Rs.292.24 crores. However on 8<sup>th</sup> May, 2018, the claimant restricted/amended claim no.1 to Rs.186.89 crores by seeking amendment. The KIDC had filed a reply to the amended statement of claim on 5<sup>th</sup> June, 2018 before the Arbitral Tribunal. He

submits that the KIDC had admitted the quantity of concrete executed at site by the claimant of 1,36,634 cubic metre. In the said additional statement of defence filed by KIDC, KIDC also admitted the total quantity of hard rock excavation in approach channel, spillway and tail-channel as well as for cut-off trench as 44,44,546 cubic metre. In support of this submission, learned senior counsel relied upon paragraph (4) of the additional statement of defence filed by the KIDC.

146. Learned senior counsel submits that there was thus no dispute about the quantity of the work executed by the claimant raised by the KIDC. Learned senior counsel relied upon the interim application filed by the claimant under section 31(6) of the Arbitration Act on 20<sup>th</sup> November, 2018 before the Arbitral Tribunal. He also invited my attention to the reply filed by the KIDC to the said application on 11<sup>th</sup> December, 2018 before the Arbitral Tribunal. He submits that the KIDC had clearly admitted the rate of Rs.8756.85 per cubic metre for M-15 concrete to be paid to the claimant.

147. Learned senior counsel for the claimant invited my attention to the paragraph (36) of the written notes of arguments filed by KIDC on 1<sup>st</sup> February, 2019 and would submit that KIDC had admitted the claim no.1 of the claimant to the extent of measurements admitted by KIDC and also the rates. The Arbitral Tribunal has granted claim no.1 in favour of the claimant to the tune of Rs.177.65 crores as allegedly admitted in the pleadings of the KIDC. He submits that the KIDC had also admitted the claim of the claimant in several documents including monthly progress reports and Steering Committee meetings and letters/ correspondences exchanged between the claimant and KIDC, Control Board meetings between CIDCO and KIDC and the evidence led before the Arbitral Tribunal by all the parties.

148. It is submitted by the learned senior counsel that in respect of item M-15 (concrete), the admitted quantity executed by the claimant was 1,36,634 cubic metre. KIDC had agreed to the rate as

Rs.8,756.85 per cubic metre. The claimant had been already paid a sum of Rs.25 crores under the said items leaving balance of amount of Rs.94.64 crores. It is submitted by the learned senior counsel that insofar as item 'excavation in hard rock in COT' is concerned, admitted quantity was 41,326.83 cubic metre. The KIDC in its revised estimate had approved and paid the rate as Rs.1152.90 per cubic metre and had applied for approval of the CIDCO. KIDC had already paid at the same rate till 10<sup>th</sup> RA Bill submitted in April 2011.

149. It is submitted by the learned senior counsel that insofar as the item 'excavation in hard rock in tail channel and approach channel is concerned, the admitted quantity was 44,02,346 cubic metre. He submits that KIDC had sanctioned the rate as Rs.744.70 per cubic metre in the revised estimate and had paid at the said rate to the claimant till 10<sup>th</sup> RA Bill dated April 2011. He submits that out of the amount payable under RA Bill nos. 1 to 10 of Rs.271.98 crores under those two items. The KIDC is still liable to pay the outstanding amount of Rs.60.75 crores. He submits that insofar as the item 'embankment' is concerned, the admitted quantity is 29,21,881.10 cubic metre. The KIDC had agreed to pay the said amount at Rs.432.50 per cubic metre. Against the said item, a sum of Rs.1.65 crores is still outstanding. He submits that total claim no.1 awarded by the Arbitral Tribunal is Rs.177.65 crores in respect of those items.

150. It is submitted by the learned senior counsel that as per joint measurement recorded in presence of CIDCO carried out in the month of February 2016, the quantity measurement was 1,29,851 cubic metre. The claimant had made a claim for the quantity of 1,46,000 cubic metre. The KIDC had determined the quantity as 1,36,634 cubic metre. KIDC did not agree with the joint measurement record on the ground that the actual top with width taken at site, the actual top level and actual slope measured wherever possible on the site assuming the foundation level and depth was not considered in the Joint

Measurement Report submitted by CIDCO vide letter dated 28<sup>th</sup> April,2016.

151. Insofar as rate in respect of the said item M-15 concrete is concerned, it is submitted by the learned senior counsel that the claimant had originally claimed the rate of Rs.14,000/- per cubic metre for executing the work of M-15 concrete. The Executive Engineer of KIDC vide its letter dated 14<sup>th</sup> December,2010 had requested the claimant to continue the work and sanctioned the rate of Rs.12,073/- per cubic metre for M-15 concrete by treating the said item as extra item. The KIDC had prepared a revised estimate approval and justified the rate of Rs.12,073/- per cubic metre and filed it before CIDCO on 10<sup>th</sup> June, 2011 for releasing the payments. The said rate of Rs.12,073/- per cubic metre was reflected at page 185 of convenient compilation before this court. He submits that the said revised rate was signed by all the officers of KIDC and was reflected at page 370 of convenient compilation. CIDCO appointed an Expert Committee by the name of R.G.Kulkarni Committee to evaluate the revised estimate approval filed by KIDC.

152. It is submitted by the learned senior counsel that the reduction from the original claim of Rs.292.24 crores to Rs.186.89 crores was on account of the restriction in the quantity of concrete. The further restriction from Rs.186.89 crores to Rs.177.65 crores was also on account of the change in the quantity of the actual work, from 1,46,000 per cubic metre as claimed by the claimant as against 1,36,634 cubic CuM accepted by KIDC. He submits that the claim no.1 which consist of 11<sup>th</sup> RA Bill only reflects the rate of Rs.8,756.85 per cubic metre and thus the total claim as calculated was restricted to Rs.177.65 crores to avoid further dispute.

153. It is submitted by the learned senior counsel that the Arbitral Tribunal has construed and interpreted the relevant clauses of the contract, being clause no.14 which provides for alteration and specifications and designs not to invalidate contracts and Clause 30 which provides that the decision of the Superintending Engineer of the Circle shall be final, conclusive and binding on all parties of the contract on various issues set out therein including specification, designs, drawings and instruction etc.

154. It is submitted by the learned senior counsel that insofar as the excavation claimed by the claimant is concerned, these two items had been approved by the RA Bill nos. 7 to 10, all of which had been paid by KIDC to the claimant and for which payment has also been released by CIDCO to KIDC. He submits that the payment for actual balance portion of the work in respect of these two items under RA Bill no.11 was correctly accepted by KIDC and agreed to be paid. Out of Rs.332.71 crores in respect of those two items, Rs.271.98 crore was paid upto RA Bill no.10 by KIDC to the claimant. The balance amount of Rs.60.73 crores was agreed to be paid under RA Bill No.11. Even in respect of claim for embankment also, the balance amount of Rs.1.65 crore was agreed to be paid under RA Bill no.11 by KIDC. He submits that in respect of other items in RA Bill No.11 at the tender rate of Rs.20.61 crore has not been disputed by KIDC or CIDCO at any time.

155. It is submitted by the learned senior counsel that the Arbitral Tribunal has considered the work order dated 12<sup>th</sup> May, 2009 and the revised work order dated 10<sup>th</sup> June, 2010 and the relevant clauses of the contract, the revised estimate submitted by the KIDC to CIDCO on 10<sup>th</sup> June, 2011, letter dated 14<sup>th</sup> December, 2010 from KIDC to the claimant, letter dated 22<sup>nd</sup> September, 2010 from the KIDC to CIDCO, correspondence relating to increase in the number of gates from 4 to 6, joint measurement and concrete rates admitted by KIDC and alleged conflicting stand taken by KIDC and CIDCO. He submits

that to have the dispute settled once and for all, in relation to RA Bill No.11 with regard to this extra item, the claimant accepted both the area of 1,36,634 cubic metres at the rate of Rs.8,756.85 per cubic metre for the actual work done and the reduced its claim from Rs.186.89 crores to Rs.177.65 crores. He submits that no interference is thus warranted with this impugned award insofar as claim no.1 is concerned. He submits that since there was no privity of contract even according to CIDCO between the claimant and CIDCO, nor any MOU or separate contract entered into. KIDC could not have withheld the payment for extra items for 11<sup>th</sup> RA Bill on the ground that the revised estimate was not approved by CIDCO.

156. Insofar as claim no.2 is concerned, it is submitted that according to the original statement of claim, the said claim was made for approximately Rs.106 crores. However, due to typographical error, the said claim no.2 was typed as Rs.50.52 crores. The said claim was arising out of the difference in rate of M-15 concrete between the rate demanded by the claimant i.e. Rs.14,000 per cubic metre and the rate admitted by KIDC in reply to interim application filed by the claimant. The amended claim of the claimant dated 8<sup>th</sup> May, 2018 in respect of the claim no.2 was of Rs.75.81 crores.

157. It is submitted by the learned senior counsel that KIDC had filed additional statement of defence dated 5<sup>th</sup> June, 2018 and admitted the quantity of concrete in paragraph (4) of the said additional statement of defence. In the reply to the interim application, KIDC admitted the rate of Rs.12,073/- per cubic metre for M-15 concrete and also approved the said rate at the revised proposal submitted before CIDCO. He submits that the difference of concrete rate admitted by KIDC vide letter dated 14<sup>th</sup> December, 2010 i.e. Rs.12,073/- and Rs.8,756.85 per cubic metre works out to be Rs.45.30 crores according to the quantities of concrete admitted by KIDC. He submits that claim no.2 is independent of claim no.1. The claimant however accepted the rate Rs.8,756.85 per cubic metre under protest. The claimant

subsequently reduced its claim based on the rate approved by KIDC vide letter dated 14<sup>th</sup> December,2010 at the rate of Rs.12,073/- per cubic metre. The Arbitral Tribunal has awarded under claim no.2, the difference between Rs.12,073/- per cubic metre and Rs.8,756.85 per cubic metre i.e. Rs.45.30 crores. The claim no.2 touches upon only the first item of RA Bill No.11 which is the subject matter of claim no.1.

158. It is submitted by the learned senior counsel that in the final notes of arguments dated 1<sup>st</sup> February,2019 filed by the KIDC, KIDC had admitted that an amount of Rs.45.30 crores was to be granted to the claimant by the Arbitral Tribunal. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Union of India vs. Khetra Mohan Banerjee in Civil Appeal No.206 of 1961*** and would submit that on interpreting similar clauses of the contract in this case, the Supreme Court had held that if the rate proposed by the claimant is not refused by the employer, then it would be appropriate to hold that the employer accepts the rate claimed by the claimant. He submits that since in this case, the KIDC had accepted the rates demanded by the claimant at the particular rate or at reduced rate, KIDC could not refuse to refuse to pay the RA Bill No.11 on the ground that the said revised estimate was not approved by the CIDCO.

159. Learned senior counsel placed reliance on the letter dated 14<sup>th</sup> December, 2010 which was in reply to the letter of the claimant and would submit that the said letter of KIDC was signed by the Executive Engineer with copy to the Chief Engineer, WRD, Konkan Region and Superintending Engineer, Thane Irrigation Circle. By the said letter dated 14<sup>th</sup> December,2010, the KIDC had recommended the rate of Rs.12,073/- for M-15 concrete and Rs.12,836.45 for M-20 concrete and had directed the claimant to treat this item as 'extra item'.

160. Learned senior counsel for the claimant placed reliance on paragraph (39) of the written notes of arguments filed by KIDC on 1<sup>st</sup> February,2019 before the Arbitral Tribunal and submitted that KIDC

had categorically admitted that in the revised estimate the KIDC had sanctioned the rate of Rs.12,073/- per cubic metre for M-15 concrete. The said revised estimate was prepared by KIDC after directing the claimant to carry out the said work of concrete item by considering the rate of Rs.12073 per cubic metre vide its letter dated 14<sup>th</sup> December,2010. He submits that since the claimant did not press amended claim no.2, the Arbitral Tribunal awarded the amount lesser than the original claim. In support of this submission, learned senior counsel invited my attention to paragraph (32) and (37) of the impugned majority award rendered by the Arbitral Tribunal. Learned senior counsel submits that the issue of limitation thus raised by the learned counsel for the CIDCO in respect of the claim is of no significant.

161. Insofar as claim no.3 for return of security deposit is concerned, it is submitted by the learned senior counsel that the Arbitral Tribunal has not considered the said claim since the Arbitral Tribunal has allowed the prayer for specific performance of the balance work.

162. Insofar as claim no.4 is concerned, it is submitted by the learned senior counsel that it was the responsibility of KIDC to ensure that the site was free from encumbrances of any kind so as to enable the claimant to work without disruption or interruption. Arbitral Tribunal has considered the evidence on record including the Minutes of the Meeting held on 19<sup>th</sup> March,2010 and the evidence of three witnesses examined by the claimant as well as the evidence of the RW-2. He submits that this cost was not part of the work order or the revised work order and this cost was unforeseen on account of the strong opposition by the local persons claiming to be affected by the project. The claim was based on actual payments made to the police authority and photocopies of the demand drafts and the receipts in respect of the payments were produced before the Arbitral Tribunal. He submits that though the claimant had demanded a sum of Rs.75

lakhs in the statement of claim, the Arbitral Tribunal has awarded only sum of Rs.50 lakhs. The findings of fact rendered by the Arbitral Tribunal cannot be interfered with by this court under section 34 of the Arbitration Act.

163. Insofar as claim no.5 towards machinery and labour idling charges is concerned, it is submitted by the learned senior counsel that the Arbitral Tribunal has considered and interpreted clauses 34 and 69 of the Special Conditions of Contract. The Arbitral Tribunal has also referred to letter dated 1<sup>st</sup> March,2014 at page 393 of the convenient compilation written by the Executive Engineer of the KIDC to the claimant acknowledging receipt of the claim under this head and recording that the proposal had been submitted for approval at the appropriate level. He submits that KIDC did not reject the said claim at any point of time.

164. It is submitted that though the said claim was for an aggregate sum of Rs.48.58 crore covering the period 1<sup>st</sup> March,2012 to 31<sup>st</sup> July, 2013, 1<sup>st</sup> August,2013 to 30<sup>th</sup> June, 2014 and 1<sup>st</sup> July, 2014 to 31<sup>st</sup> August,2016, the Arbitral Tribunal has rejected the claim in respect of the second and third period and awarded only a sum of Rs.18.35 crores for the period 1<sup>st</sup> May, 2012 to 31<sup>st</sup> July, 2013. He submits that the Arbitral Tribunal has held that since the claimant had stopped the work on account of non-payment by KIDC which was in or about June, 2012, it ought to have returned the hired machinery to mitigate the loss after the expiry of a reasonable period till 31<sup>st</sup> July, 2013. Arbitral Tribunal rejected the claim of Rs.30.23 crores for the balance period. Learned senior counsel submits that the findings of fact rendered by the Arbitral Tribunal and the award allowing the said claim on interpretation of clauses 34 and 69 of the special Conditions of Contract cannot be interfered with by this court.

165. Insofar as claim no.6 for loss of profits is concerned, it is submitted by the learned senior counsel that this has not been awarded

by the Arbitral Tribunal. Insofar as claim no.7 i.e. for interest is concerned, it is submitted by the learned senior counsel that the transaction between the claimant and the KIDC was of commercial nature under which the parties are entitled to the interest. He submits that in the application filed under section 31(6) of the Arbitration Act, on 20<sup>th</sup> November,2018 by the claimant before the Arbitral Tribunal, the claimant had submitted before the Arbitral Tribunal that it had taken heavy loans from banks for executing the said project and has paid heavy interest on the said loans for executing the said project. The claimant had been demanding interest for the amounts due and outstanding from time to time at the rate of 18% to the claimant.

166. It is submitted that KIDC had consistently written to CIDCO about the said outstanding amounts payable to the claimant and had also affirmed the stand of the claimant that the delay in payments shall lead to payment of 18% interest on the said outstanding amount to the claimant. He relied upon the letter dated 17<sup>th</sup> March,2012 from KIDC to CIDCO clearly stating that if the outstanding amount of the claimant was not cleared then the CIDCO will have to pay 18% of the said outstanding amount. He also placed reliance on the copies of the letters dated 30<sup>th</sup> March 2012, 17<sup>th</sup> May 2012 and 11<sup>th</sup> June 2012 addressed by the KIDC to CIDCO in this regard. Learned senior counsel placed reliance on the letters dated 8<sup>th</sup> March 2010, 24<sup>th</sup> March 2011 and letter dated 17<sup>th</sup> August,2011 addressed by the claimant demanding interest on the outstanding dues. He submits that KIDC vide its letter dated 9<sup>th</sup> March,2011 had communicated to CIDCO about the demand of interest made by the claimant.

167. Learned senior counsel place reliance on the judgment of Supreme Court in case of ***Raveechee and Co. vs. Union of India, 2018 SCC OnLine SC 654*** and judgment of Supreme Court in case of ***Board of Trustees for the Port of Calcutta vs. Engineers De Space Age (1996) 1 SCC 516***. He submits that the claimant had claimed interest

at the rate of 18% per annum for the pre-arbitration period and has demanded Rs.133.29 crores after considering part payment of Rs.25 crores received by the claimant in the month of November 2013. Arbitral Tribunal however has awarded at the rate of 6% per annum aggregating to about Rs.44.43 crores in favour of the claimant. The second claim was made in respect to claim no.2. The Arbitral Tribunal has granted interest in respect of that claim also at the rate of 6% per annum.

168. Insofar as third claim of interest is concerned, learned senior counsel submits that the said claim was made in respect of claim nos. 4 and 5. The Arbitral Tribunal has allowed the said claim at the rate of 9% per annum from 1<sup>st</sup> May, 2012 and 1<sup>st</sup> August, 2013 respectively till the date of filing of the statement of claim on 31<sup>st</sup> August, 2016. The Arbitral Tribunal has allowed the *pendente lite* interest at the rate of 9% per annum and has allowed future interest at the rate of 12% per annum from the date of expiry of 60 days till the date of payment under section 31(7)(b) of the Arbitration Act.

169. Learned senior counsel for the claimant submits that KIDC has relied upon clauses 17.4 and 19 of the Special Conditions of the Tender. He invited my attention to those two provisions relied upon by KIDC and would submit that there were several mistakes in clause (19). Clause 17.4 refers to Thane Municipal Corporation which has nothing to do with the said project. He submits that none of those clauses were applicable to the present case. The Arbitral Tribunal has applied the law laid down by the Supreme Court in case of **Hyder Consulting (U.K.) Ltd. vs. Governor, State of Orissa, (2015) 2 SCC 189** while allowing the claim for interest. He submits that the said judgment squarely applies to the facts of this case and has been rightly followed by the Arbitral Tribunal. It is submitted that since there was no prohibition under any of the clauses of the contract for payment of interest, the Arbitral Tribunal is empowered to award such interest under section 31(7) of the Arbitration Act. The Arbitral Tribunal has

awarded reasonable rate of interest and thus no interference is warranted with the award for interest by the Arbitral Tribunal.

170. Insofar as issue nos.2 and 3 regarding validity of the termination of contract vide notice dated 28<sup>th</sup> October, 2016 by KIDC is concerned, learned senior counsel for the claimant invited my attention to the termination notice dated 28<sup>th</sup> October, 2016 issued by KIDC alleging breach of condition no.70 of the Special Conditions of Contract. He also invited my attention to the G.R. which was referred in the said notice dated 28<sup>th</sup> October, 2016 . Learned senior counsel placed reliance on the letter dated 12<sup>th</sup> May, 2009 addressed by the Executive Engineer, Raigad Irrigation Division thereby issuing first work order to the claimant to commence the work after 2.375 years with an estimated cost of Rs.495.04 corers. He submits that in the first work order, there was a condition of forest clearance imposed by KIDC. On 28<sup>th</sup> January, 2010, Executive Engineer of KIDC however informed the claimant that a notification under section 4 of Balganga Project had been issued in Gazette dated 19<sup>th</sup> January, 2010. Though the first work was to be started after 2.375 years, Executive Engineer, KIDC directed the claimant to mobilize the resources and to commence the work immediately. He submits that the said letter itself clearly indicated that the condition to obtain forest clearance prior to the date of commencement of the work order was diluted by the said letter dated 28<sup>th</sup> January, 2010 by KIDC itself.

171. It is submitted by the learned senior counsel for the claimant that about 1200 hectares of land out of 1500 hectares was the private land and not the forest land. The ground of termination of contract raised in the said notice of termination that the claimant had started the work without obtaining prior forest clearance was itself false and erroneous.

172. It is submitted by the learned senior counsel that on 11<sup>th</sup> June, 2010, KIDC had issued a revised work order thereby reducing the cost of Rs.374.07 crores without imposing any condition with respect to the time frame in obtaining the forest clearance. He submits that in the original tender cost of Rs.495 crores the price escalation of 2.375 years was considered. Since the work was directed to be started with an intention to save 120.93 crores approximately, there was novation of contract.

173. It is submitted by the learned senior counsel that in the month of February, 2011, a joint measurement in the presence of the office of KIDC, Divisional Forest Officer and other officers and Engineers from the claimant's office commenced. In the month of June, 2011, the said joint measurement was completed. The claimant had appointed a consultant in tune with clause 70.1 to obtain necessary forest clearance. On 10<sup>th</sup> October, 2011, the proposal for diversion of 361.763 hectares of forest land was submitted by Deputy Forest Officer, Alibag to Chief Conservator of Forest, Thane. There was further correspondence between the claimant and the authority in respect of the said issue of forest clearance. On 3<sup>rd</sup> February, 2012, a proposal of diversion of 361.763 hectares of forest land was submitted by the Chief Conservator of Forest, Thane to the Principal Chief Conservator of Forest, Nagpur. On 8<sup>th</sup> May, 2012, the remarks on the proposal were raised by Principal Chief Conservator of Forest, Nagpur. On 16<sup>th</sup> May, 2012 the said remarks were communicated by CCF, Thane to Executive Engineer, Raigad Irrigation Division of KIDC.

174. It is submitted by the learned senior counsel that the Arbitral Tribunal had noted that vide letter dated 28<sup>th</sup> January, 2010, the Executive Engineer, KIDC had directed the claimant to start the work immediately on the land acquired through consent of the farmers. The Arbitral Tribunal relied upon the minutes of Steering Committee held on 19<sup>th</sup> March, 2010. Before the claimant was directed to commence the work in 2010, the matter was discussed in Steering

Committee meeting dated 19<sup>th</sup> March, 2010. The Forest Officer as well as the Deputy Collector were special invitees to the said meeting and in the presence of these persons, it was decided by the Committee to issue directions to Claimant to commence the work on private land. The claimant had accordingly commenced the work and was paid various amounts upto 10 RA Bills.

175. Learned senior counsel placed reliance on the letters dated 10<sup>th</sup> October, 2011, 21<sup>st</sup> November, 2011, 13<sup>th</sup> November, 2012, 3<sup>rd</sup> February, 2012, 8<sup>th</sup> May, 2012 and 16<sup>th</sup> May, 2012 exchanged between the authorities in respect of the said issue of forest clearance. He submits that the Arbitral Tribunal after considering section 2 of the Forest Conservation Act, 1980 read with section 3, 3-A and section 3-B thereof held that the responsibility of obtaining the forest clearance under the statute was on the officers of the State Government. He submits that the evidence and material on record clearly indicated that KIDC and CIDCO could not decide as to who shall make the application for forest clearance to the Ministry of Environment Forest. No application was made to the competent authority and thus the question of the claimant obtaining forest clearance did not arise at all.

176. In support of this submission, learned senior counsel placed reliance on the findings rendered by the Arbitral Tribunal in paragraphs 53 to 57 of the impugned majority award. The NOC was also required to be obtained from the authorities of Karnala Bird Sanctuary in respect of any project which NOC was to be obtained by User Agency / Project Proponent. He submits that only on 11<sup>nd</sup> January, 2016, Government of India issued a notification and dispensed with the requirement of NOC for the project beyond 500 mtrs. of Karnala Bird Sanctuary. A copy of the said notification was produced on record before the Arbitral Tribunal. He submits that the State Government as well as CIDCO made a statement before this Court in Writ Petition No.11019 of 2013 that the claimant was not required to continue the construction work as recorded in the order

dated 6<sup>th</sup> April, 2015 by this Court. The claimant had already taken substantial steps to fulfill the requirement of clause 70 of the contract by appointing the consultant and arranging for the joint measurement of the private land and the forest land, that exercise was completed after two years from the date of the work order and for which the claimant incurred substantial costs.

177. Learned senior counsel placed reliance on the minutes of the meeting dated 6<sup>th</sup> / 20<sup>th</sup> July, 2015 and more particularly item no.7 and would submit that in the said meeting held on 27<sup>th</sup> December, 2017, it was decided that KIDC shall submit a proposal for forest clearance as User Agency. He submits that there was no question of any breach of clause 70.3 of the Special Condition of Contract committed by the claimant. The termination of the contract awarded to the claimant on the ground of the claimant not having obtained prior forest clearance is *ex-facie* illegal. KIDC did not raise any such objection at any point of time prior to the date of commencement of the arbitration and on the contrary released the payment of 10 RA Bills. It is submitted that the Arbitral Tribunal had rightly set aside the letter of termination and has directed specific performance of the contract awarded to the claimant for completion of balance work of 20%. Learned senior counsel placed reliance on the order dated 15<sup>th</sup> September, 2016 in Public Interest Litigation No.12 of 2016 in case of Janmanch vs. State of Maharashtra & Ors. in which a Division Bench of this Court had allowed the claimant to complete the balance work. He states that the decision of the Arbitral Tribunal thus cannot be faulted with by KIDC.

178. Insofar as issue no.4 relating to specific performance is concerned, it is submitted by the learned senior counsel that 80% work of construction of the Dam valued at Rs.594.45 crores was already completed. The claimant was all through out was ready and willing to complete the balance work. The Arbitral Tribunal was thus justified in granting prayer for specific performance of balance 20% work.

179. Insofar as issue no.5 i.e. “whether KIDC proves that extra items executed by the claimant were not necessary and were without the permission of CIDCO” is concerned, it is submitted by the learned senior counsel that the claimant was not a party to the contract dated 23<sup>rd</sup> September, 2009 between KIDC and CIDCO. The Arbitral Tribunal rightly held that no clause in that contract between KIDC and CIDCO would affect the rights of the claimant. Learned senior counsel once again placed reliance on clauses 14 and 30 of the contract relating to extra items provided and on clause 32 of the Special Conditions of the Contract. It is submitted that that five issues have been correctly decided by the Arbitral Tribunal after due and proper application of mind and on perusal of voluminous evidence and material on record. The interpretation of contract and appreciation of evidence is exclusively within the domain of the Arbitral Tribunal. No interference is thus warranted with the arbitral award under section 34 of the Arbitration Act.

180. Learned senior counsel invited my attention to various alleged admissions in the evidence of Mr.D.M. Godse, Executive Engineer, KIDC and more particularly to questions 23, 25 to 29, 38 and 40 and the cross-examination of Mr.Pranik Vasudeo Mul, Superintending Engineer, CIDCO (RW-2) and more particularly from question nos.18 to 20 and 30 to 32, 65 to 68, 83 to 98, 111 and 112 and would submit that the witness examined by CIDCO and KIDC made various admissions in favour of the claimant regarding quantity and rate and on various important aspects. The Arbitral Tribunal having considered the entire oral and documentary evidence has rendered various findings of fact which cannot be interfered with by this Court. In support of this submission, he placed reliance on the judgment of the Madras High Court in **Gammon India Ltd. vs. Sankarnarayana Construction (Bangalore) Pvt. Ltd.** reported in **2009 SCC OnLine Madras 2261**, judgment of the Supreme Court in case of

**Uttam Singh Duggal & Co. Ltd. vs. Union Bank of India (2000) 7 SCC 120** and the judgment of the Delhi High Court in case of **Numero Uno vs. Prasara Bharti 2008 101) DRJ 479 (DB)**.

181. In so far as the issue of limitation framed as issue no.6A by the Arbitral Tribunal in respect of the claim no.2 is concerned, learned senior counsel for the claimant submits that the said issue was framed by the Arbitral Tribunal on 15<sup>th</sup> June, 2018 in relation to claim no.2 which was part of issue no.1. The claimant had revised the claim by an amendment in May, 2018 from Rs.50.52 crores to Rs.75 crores. The original claim no.2 was actually for sum of Rs.106 crores based on the quantity of concrete shown in R.A. Bill No.11. Inadvertently, the same was typed as Rs.50.52 crores in the statement of claim as originally filed. The said claim was rectified to Rs.75 crores based on the quantity of work as 14600 m<sup>3</sup> into the rate difference. There was no actual increase in the said claim. The claimant had restricted its claim no.2 from Rs.106 crores to Rs.75 crores and has not enhanced the claim from Rs.50.52 crores to Rs.75 crores as canvassed by CIDCO.

182. It is submitted by the learned senior counsel that the Arbitral Tribunal has awarded claim no.2 for the amount lesser than the original claim which was filed within the time prescribed. It was not the case of the KIDC or CIDCO that the original claim in the sum of Rs.50.52 crores itself was barred by law of limitation. He submits that merely because the Arbitral Tribunal did not consider the said issue no. 6A on limitation in relation to the enhanced claim no.2, that would not have any bearing on the said claim made by the claimant and as awarded by the Arbitral Tribunal.

183. In so far as the submission made by learned senior counsel for KIDC and learned counsel for CIDCO and State Government based on the criminal proceedings filed against the claimant are concerned, it is submitted by the learned senior counsel for the claimant that none of those submissions can be advanced for the first time in the arbitration

petitions filed by KIDC, CIDCO and the State Government. He submits that in any event, all those issues are already dealt with by this Court by order dated 22<sup>nd</sup> October, 2019 in Notice of Motion (L) No. 2007 of 2019 and Notice of Motion No.2192 of 2019 in Commercial Arbitration Petition (L) No. 681 of 2019 and Commercial Arbitration Petition No. 921 of 2019 respectively.

184. In so far as the submission urged by the learned senior counsel for KIDC that the validity of the Government Resolution dated 23<sup>rd</sup> September, 2016 was beyond the jurisdiction of the Arbitral Tribunal is concerned, it is submitted by the learned senior counsel that in the notice of termination a reference was made to the said Government Resolution. While deciding the question of validity and the termination which was an issue specifically framed by the Arbitral Tribunal with the consent of parties, the Arbitral Tribunal was bound to decide the applicability or otherwise of the said Government Resolution in order to determine the validity of the notice of termination. He submits that the findings of the Arbitral Tribunal with reference to the said Government Resolution are wholly with a view to determine the validity of the termination notice which was within the jurisdiction of the Arbitral Tribunal.

185. It is submitted by the learned senior counsel that the arbitral award in any event is not a precedent and therefore would not operate as order in rem. The findings of the Arbitral Tribunal apply only to the parties before the Arbitral Tribunal and therefore question of those findings being without jurisdiction on the ground that the same would affect all the remaining 50 projects, cannot be a ground to set aside the present award which is a fair and reasonable award. It is submitted by the learned senior counsel that without prejudice to the submissions advanced by the claimant, the findings in relation to the said Government Resolution can be read down to apply only to the parties before the Arbitral Tribunal and in an extreme and the rare situation be severed from the rest of the award, without affecting the legality and

the validity of a well reasoned award. He submits that the rest of the submissions on those issue would be advanced by Mr. Anturkar, learned senior counsel for the claimant in the other two arbitration petitions.

186. Mr.Anturkar, learned senior counsel for the respondent in Writ Petition No. 793 of 2019 and 921 of 2019 submits that no reliance on minority award can be placed by the petitioner. He submits that in any event KIDC itself has raised grounds assailing the minority award. All the observations of the minority award are wholly perverse, absurd and irrational.

187. In so far as the reliance placed on Section 18(m) of the KIDC Act by the learned senior counsel for the KIDC is concerned, it is submitted by the learned senior counsel for the claimant that if the said KIDC Act applies to the certain area, then the entire provisions of the Act from first section to last section will apply only to that area. Section 18 would also apply to only that area which the main Act applies.

188. In so far as the reliance on Article 162 of the Constitution of India placed by the learned senior counsel for the KIDC is concerned, it is submitted that the said Government Resolution does not state that the Government had taken the decision to terminate the contract awarded to the claimant. He submits that on the contrary, the said Government Resolution had clearly directed the concerned boards that such boards should take the decision on the merits of the case, on the basis of facts of the case, after considering the provisions of the contract and after approvals of the provisions of the Contract Act. He submits that the said Government Resolution does not indicate that the Government had intended to terminate all the contracts but had intended that the concerned boards shall decid the issue of termination, case to case.

189. It is submitted by the learned senior counsel that though the State of Maharashtra was served with various notices from time to time by the claimant and also by the Arbitral Tribunal, State of Maharashtra did not bother to appear before the Arbitral Tribunal and thus cannot be allowed to now urge that the impugned Arbitral Tribunal award against the State Government was decided *ex-parte*. No issue about the correctness of the issue framed by the Arbitral Tribunal was raised by the State Government before the Arbitral Tribunal. He submits that in the ground of challenge in the Comm. Arbitration Petition filed by the State of Maharashtra, no ground has been raised that after amendment of the statement of claim, no copy of the notice or papers and proceedings were served upon the State of Maharashtra.

190. It is submitted that the State Government thus cannot be allowed to urge this submission across the bar for the first time. He submits that in any event, the said Government Resolution issued by the State of Maharashtra was totally illogical and without application of mind. The said Government Resolution did not relate to any policy. The KIDC has simply obeyed the illogical instruction issued by the State Government by the said Government Resolution. It is submitted by the learned senior counsel that except payment of cost, no amount has been directed to be paid by the Arbitral Tribunal against the CIDCO.

191. Learned senior counsel for the claimant placed reliance on order VIII Rule 23 of the Code of Civil Procedure, 1908 and would submit that no such third party proceedings were filed by the KIDC, that CIDCO should be directed to pay the amount to the claimant. The Arbitral Tribunal has not issued any directions against the KIDC and CIDCO to pay the award jointly and severally. It is submitted that the termination notice as well as the Government Resolution were issued during the pendency of the arbitral proceedings.

192. Learned senior counsel placed reliance on Section 34(2)(iii) of the Arbitration Act and would submit that no notice under the said provisions is contemplated after framing issues to be served upon the opposite parties. He submits that by the said Government Resolution 90 contracts were not terminated by the State Government. The inquiry initiated by the Anti Corruption Bureau was pending. The work was not completed not because of the delay on the part of the claimant. He submits that the KIDC did not even otherwise carry out the instruction issued by the State Government in the said Government Resolution. No directions were issued under the said Government Resolution thereby directing the KIDC to straight way rescind the contract. CIDCO had not privity of contract with the claimant. There was no arbitration clause between the claimant and the CIDCO.

193. It is submitted by the learned senior counsel that even in the suit for declaration, Court can declare the validity of the Government Resolution illegal. It is submitted by the learned senior counsel that Section 113 of the Code of Civil Procedure, 1908 does not apply to the Government Resolution. Order XXVII A of the Code of Civil Procedure, 1908 provides that a notice to Attorney General or Advocate General has to be issued. Suit, however would be still maintainable. He submits that under Section 25 of the KIDC Act, there is difference between a general direction and special direction. He relied upon the preamble to KIDC Act, 1987 and also Sections 1 and 2 thereof. He also invited my attention to the schedule appended to KIDC Act and would submit that the said Balganga Project was not included in the said schedule. Section 25 of the KIDC Act, thus could not be relied upon by the KIDC in support of the submission that the said Government Resolution was in the nature of a special directions and was binding on the KIDC.

194. In so far as the issue raised by the KIDC as well as by the State Government that no burden of proof could be cast on KIDC to prove that the said Government Resolution was valid is concerned, it is

submitted by the learned senior counsel that the issues were framed by the Arbitral Tribunal after hearing the parties. State Government did not appear before the Arbitral Tribunal. No written statement was filed by the State Government. The State Government has thus no locus to file arbitration petition for challenging the arbitral award on the issue of validity of Government Resolution. Learned senior counsel invited my attention to the termination notice dated 28<sup>th</sup> October, 2016 and would submit that the KIDC has failed to prove that the the said termination of the contract was legal and valid.

195. In so far as locus of CIDCO to file arbitration petition is concerned, learned senior counsel for the claimant submits that the impugned award does not direct the CIDCO to make any payment to the claimant. Only directions issues in para B and D of the operative part of the impugned award are against CIDCO and not the entire award. Learned senior counsel invited my attention to the order dated 28<sup>th</sup> January, 2014, passed by the Division Bench of this Court in the writ petition filed by the claimant and more particularly paragraph 11 thereof and would submit that even according to CIDCO, the said amount of Rs.28.20 crores remained to be payable to the claimant by CIDCO. The KIDC shall be directed to pay the balance amount after giving credit of the said amount of Rs.28.20 crores. He submits that the CIDCO had made a statement that the said amount would be invested and would abide by the award and thus could not have challenged that part of the award by filing a petition. Even according to the CIDCO, the claimant was not required to continue the work during the pendency of the arbitral proceedings.

196. Learned senior counsel placed reliance on the judgment of this Court delivered by Nagpur Bench on 15<sup>th</sup> September, 2016 in case of ***Janmanch vs. State of Maharashtra through Additional Chief Secretary, Home Department, Mantralaya and others*** and would

submit that this Court in the said judgment had allowed the claimant to complete the balance work in public interest in the said Public Interest Litigation.

197. It is submitted by the learned senior counsel that the Arbitral Tribunal has allowed the claim in respect of the liability admitted by KIDC. The learned senior counsel placed reliance on various documents, pleadings and evidence in support of the submission which were relied by Mr. Nankani, learned senior counsel for the claimant in support of the submission that the KIDC had already admitted the quantity and the rate as demanded by the claimant in various correspondence, pleadings and the evidence led before the Arbitral Tribunal.

198. Learned senior counsel for the claimant invited my attention to a letter addressed by the CIDCO to the Arbitral Tribunal annexed in Vol. 4 at page 5 requesting not to make any inquiry against any allegations of fraud in the arbitral proceedings. He submits that in 10 Steering Committee meetings, the Chief Engineer of the CIDCO was present. The CIDCO thus cannot be allowed to now contend that they had not given any sanction in respect of the payment they had not agreed for the quantity and the rate which was agreed by KIDC. He submits that the CIDCO had filed an affidavit on 29<sup>th</sup> January, 2019, before the Arbitral Tribunal to the effect that CIDCO had inadvertently sent the charge-sheet to some of the arbitrators and had tendered apology.

199. On the issue of interest awarded by the Arbitral Tribunal, learned senior counsel placed reliance on the judgment of this Court in case of **Aspen Infrastructures Limited v/s. Sterling and Wilson Limited, 2016 SCC OnLine Bom 15062** and in particular paragraphs 8 and 9 and would submit that since there was no bar under any of the provisions of the contract for payment of interest, the Arbitral Tribunal

had multiple powers to award interest under Section 31(7)(a) and (b) of the Arbitral Act.

**Arguments in Rejoinder of Mr.S.G. Aney, learned senior counsel for KIDC :-**

200. It is submitted by the learned senior counsel that the directions issued by the State Government under the Government Resolution, irrespective of the fact whether or not binds the KIDC under Section 25 of the KIDC Act read with Schedule thereunder or not, such directions are not the matters under the contract and were not submitted to arbitration and thus were not a arbitrable. The validity of the Government Resolution was not an issue before the Arbitral Tribunal and could not have been struck down by the Arbitral Tribunal.

201. It is submitted by the learned senior counsel that the plain reading of the Government Resolution indicates that a conscious policy decision was taken by the State Government to terminate various projects including Balganga Project. The claimant had not challenged the majority award holding that the Government Resolution was a direction issued by the State Government. That finding rendered by the Arbitral Tribunal remained unchallenged and has been accepted by the claimant.

202. It is submitted that the said Government Resolution was not relating only to Balganga Project but other 91 contracts. The said Government Resolution was issued by way of mandatory injunction by the Cabinet Minister of the State of Maharashtra to pass a speaking order, to keep in mind the provisions of contract and also the contract Act. The said Government Resolution did not form part of the contract awarded to the claimant. Those 91 contracts were dealt with by several agencies and not only by KIDC.

203. Learned senior counsel strongly placed reliance on Article 162 of the Constitution of India and would submit that entry 17 of list II of 7<sup>th</sup> Schedule clearly provides for the subjects such as water supplies, irrigation and canals, embankments, water storage, water drainage and power subject to the provisions of entry 56 of List I. Under entry 18 of list I, the subject “rivers”. This case would clearly fall under entry 17 of list II and thus State Government is empowered to issue Government resolution under entry 17. Executive appointed under KIDC Act has powers to issue such directions under Article 162 of the Constitution of India. Directions issued by the State Government are binding on the KIDC. The said Government Resolution was issued under Article 162 of the Constitution of India.

204. Learned senior counsel placed reliance on Sections 1(1) and 1(2) of the KIDC Act and the schedule appended to the said Act. He also invited my attention to Section 2(a) and Section 18(m) of the KIDC Act and would submit that the State Government had notified the Balganga project to the KIDC. Learned senior counsel submits that the KIDC has not admitted any claims made by the claimant in any of the pleadings or any written submission filed before the Arbitral Tribunal. He submits that assuming without admitting that there exist any admission in those pleadings or written submissions filed by the KIDC before the Arbitral Tribunal, the same is *ex-facie* only with regard to the claim pertaining M-15 concrete and not for the extra item work which constituted the remaining portion of the said claim amount. He submits that the Arbitral Tribunal could not have awarded the claim no.1 for Rs.186 crores based on any such alleged admission.

205. In so far as the claim no.2 is concerned, it is submitted by the learned senior counsel that the reliance placed by the claimant on the judgment of Supreme Court in case of ***Union of India vs. Khetra Mohan Baneerjee*** is misplaced. The entire majority award with regard to claim no.2 is based on the alleged admission and not upon any principles laid down in the judgment of the Supreme Court in the said

judgment. He submits that in any event the principles laid down by the Supreme Court in case of ***Union of India vs. Khetra Mohan Baneerjee*** (supra) cannot be extended to the facts at hand. KIDC has simply recommended the quantity and the rate to CIDCO for approval and had not admitted any such quantity and rate.

206. In so far as claim no.5 is concerned, it is submitted by the learned senior counsel that in paragraph 102 of the statement of defence filed by the KIDC before the Arbitral Tribunal dated 23<sup>rd</sup> November, 2016, the KIDC had denied the said claim in its entirety.

207. In so far as the claim for interest is concerned, learned senior counsel strongly placed reliance on the judgment of Supreme Court in case of ***Jaiprakash Associates Limited v/s. Tehri Hydro Development Corporation of India, 2019 SCC OnLine SC 143*** and in particular paragraph 14 and would submit that in view of the specific bar in this contract for payment of interest under clauses 17 and 19, the Arbitral Tribunal could not have awarded any interest upto the date of award.

208. Learned senior counsel distinguished the judgment of Supreme Court in case of ***Boettcher and Company*** (supra) on the ground that the said judgment was delivered considering the provisions of Arbitration Act, 1940 and not the provisions of Arbitration and Conciliation Act, 1996. There was no bar from awarding interest *pendente lite* in the contract which was considered by the Supreme Court in the said judgment. Learned senior counsel distinguished the judgment of Supreme Court in case of ***Board of Trustees*** (supra) also on the same ground.

209. In so far as the submission of the learned senior counsel for the claimant that there were several mistakes in clause 19 of the contract and no such correction can be made by the KIDC across the bar and to read the prohibition under the said clause as permissible is

concerned, learned senior counsel for the KIDC submits that the entire clause has to be read to understand the intention of parties.

210. Ms. Shastri, learned counsel for the State Government adopted the submission made by Shri S. G. Aney on the issue whether Arbitral Tribunal could have declared the Government Resolution illegal and null and void or not. She re-iterate that State Government was not served with the papers and proceedings of the arbitration and also the notice.

**Rejoinder Arguments by CIDCO :-**

211. Mr. Hegde, learned counsel for CIDCO submits that there was serious dispute about the measurement and about the work done by the claimant raised by CIDCO. In support of these submissions, learned counsel invited my attention to the paragraphs 4 and 5 of the affidavit in lieu of examination-in-chief filed by the Mr. Pranik V. Mul. He also invited my attention to the order passed by the Division Bench of this Court directing the CIDCO to deposit sum of Rs.28.20 crores in this Court and making it clear that the said deposit would be subject to the final disposal of the arbitral proceedings. He submits that unless there would have been a finding rendered by the Arbitral Tribunal about the liability of CIDCO to pay any amount to the claimant, amount deposited by the CIDCO could not have been adjusted against the alleged dues of KIDC. He submits that no decree on admission has been passed by the Arbitral Tribunal against the CIDCO in respect of the said amount of Rs.28.20 crores deposited by the CIDCO pursuant to an order dated 17<sup>th</sup> July, 2015 passed by the Division Bench of this Court. It is submitted by the learned counsel that the Arbitral Tribunal could not have awarded any claim for payment of cost against the CIDCO.

212. Learned counsel invited my attention to the order dated 23<sup>rd</sup> June, 2014 passed by the Division Bench of this Court in the writ

petition and would submit that it is clearly recorded by this Court that apart from the disputes between the claimant on one hand and CIDCO on the other hand, there were disputes between KIDC and CIDCO. By order dated 17<sup>th</sup> July, 2015, Division Bench of this Court had referred all the disputes/claims/counter claims etc. arising out of and between the parties in respect of the said irrigation project to arbitration. If there was no dispute between the claimant, KIDC and CIDCO, this Court would not have passed an order for payment against the CIDCO or KIDC to pay an alleged admitted liability to the claimant.

213. It is submitted by the learned counsel for the CIDCO that the attitude of officers of the KIDC was in favour of the claimant. He submits that in the statement of claim, the claim was made by the claimant against all the respondents. There was no prayer for challenging the Government Resolution in the statement of claim though the statement of claim was amended. He submits that three committees appointed by the CIDCO gave different revised project cost. The CIDCO categorically disputed the measurement and rate and thus the claimant was required to prove the quantity as well as rate before the Arbitral Tribunal independently.

214. Learned counsel invited my attention to the averments made in paragraphs 22 and 23 of the statement of defence filed by the KIDC and would submit that CIDCO had denied the measurement and the claims in the statement of defence demanded by the claimant. The Arbitral Tribunal thus ought to have independently adjudicated upon the dispute in respect of the measurement, rates and payability of each of the claims while making an award.

215. It is submitted that merely on the basis of the so called admission on the part of the KIDC in favour of the claimant, no amount could have been awarded against CIDCO. He submits that this Court had already noticed the dispute between the claimant and KIDC on one hand and between the KIDC and CIDCO on another

hand. The Arbitral Tribunal thus ought to have decided the claims made by the claimant only after considering the oral and documentary evidence led by all the parties and not only on the basis of the so called admission made by the KIDC in favour of the claimant.

216. In so far as the issue of locus raised by the learned senior counsel for the claimant is concerned, it is submitted by the learned counsel that admittedly the CIDCO was impleaded as party-respondent to the writ petition filed by the claimant before this Court with reliefs against the CIDCO. CIDCO was also allowed to nominate an arbitrator so as to constitute a panel of five members of the Arbitral Tribunal. CIDCO was also impleaded as party-respondent to the statement of claim and allowed to oppose the said statement of claim. Various reliefs were also granted against CIDCO. He submits that the revised estimate submitted by the KIDC to CIDCO for approval admittedly was not approved by the CIDCO. The claimant was fully aware of the provisions of the Contract between the KIDC and CIDCO and more particularly to the effect that approval of the CIDCO was required for releasing any payment in favour of the claimant under the said Balganga Project by the KIDC.

217. Mr.Nankani, learned senior counsel for the claimant submits that KIDC cannot be allowed to urge any submissions beyond the pleadings made in the statement of defence. In support of this submission, he invited my attention to some of the averments made in paragraph 104 of the statement of defence filed by the KIDC before the Arbitral Tribunal and also paragraph 7 of the written statement to the amended statement of claim. It is submitted that neither in the original statement of defence filed by the KIDC nor in the written statement to the amended statement of claim, the KIDC has raised an objection that payment of interest demanded by the claimant was prohibited under any of the provisions of the Contract entered into between the claimant and the KIDC.

218. Learned senior counsel invited my attention to paragraph 18 of the affidavit of evidence filed by the witness examined by the KIDC relating to the issue of interest. He submits that in the written arguments filed by the KIDC, reliance was placed only on paragraph 17(4) of the Contract and not on clause 19. The Arbitral Tribunal has interpreted clause 17(4) of the Contract and has rightly rejected the said arguments while awarding the claim for interest by the claimant. He submits that in so far as clause 19 is concerned, the said clause has to be read in its entirety. Clause 58 of the Contract was not relevant.

219. The word “commission” cannot be read as “omission” as sought to be urged by the learned senior counsel for KIDC. Learned senior counsel for the claimant placed reliance on the judgment of this Court in the case of **Aspen Infrastructures Ltd. vs. Sterling & Wilson Ltd. (2016) SCC OnLine Bom 15062** and in particular paragraphs 8 & 9 in support of the submission that in absence of any prohibition under the Contract for payment of interest, the arbitrator has power to award interest from due date till realisation at reasonable rate. He submits that the rate of interest awarded by the Arbitral Tribunal is reasonable and cannot be interfered with.

220. It is submitted by the learned senior counsel that the CIDCO had already paid for all the extra items at the rate agreed upon by the KIDC in R.A. Bill Nos.1 to 10. He submits that various committee reports were neither tendered in evidence nor could be relied upon by the Arbitral Tribunal till the contents thereof were proved.

221. Mr.Anturkar, learned senior counsel for the claimant in Commercial Arbitration Petition Nos.793 of 2019 and 921 of 2019 relied upon Section 1 (2) of the KIDC Act and would submit that Schedule II appended to the said Act admittedly did not include Balganga Project. In so far as the applicability of Article 162 of the

Constitution of India while issuing Government Resolution is concerned, learned senior counsel fairly submits that there is no dispute about the applicability of the said Article under which the said Government Resolution could be issued. He submits that if this Court comes to the conclusion that in absence of any prayer in the statement of claim inter alia praying for setting aside the said Government Resolution as illegal or void ab initio or for quashing and setting aside the said Government Resolution could not be set aside, this Court can sever that part of the impugned award and can save other part of the arbitral award.

### **REASONS AND CONCLUSIONS:**

222. By consent of parties, all the arbitration petitions were heard together impugning the same arbitral award. I shall first decide the preliminary objection raised by the learned senior counsel for the claimant that the Arbitration Petition No.793 of 2019 filed by CIDCO is not maintainable.

#### **Whether Arbitration Petition No.793 of 2019 filed by CIDCO is maintainable or not?**

223. It is an admitted position that on 28<sup>th</sup> January, 2009 in a meeting held under the chairmanship of the then Hon'ble Minister, Water Resource Department, Government of Maharashtra, it was decided to develop the Balganga Dam as the development of Balganga Dam to cater to the need of drinking water and water for industrial purposes in Sub Region-4, New Mumbai, Sub Region-5, Neral, Karjat, Khopoli, Khalapur, Sub Region-6, Panvel and various other regions. The CIDCO was desirous of developing the water source of Balganga River, near village Niphad in Pen Taluka of Raigad District as a source of water supply to CIDCO areas.

224. The Directors of CIDCO agreed to provide capital fund for

construction of Balganga Dam. It is the case of the claimant also that on 1<sup>st</sup> March, 2009, in a meeting held under the chairmanship of the Hon'ble Chief Minister, Government of Maharashtra, it was decided that the capital cost of the development of Balganga project should be borne by CIDCO and CIDCO will get the ownership right on the water of the dam. The construction of the Balganga Dam would be carried out by Water Resource Department of the CIDCO through KIDC, Thane. The CIDCO by resolution no.10070 dated 24<sup>th</sup> February,2009 approved the funds of Rs.488.34 crores without centages for construction of the said Balganga Dam.

225. It is not in dispute that pursuant to the said decision taken by the State Government and the CIDCO, the Executive Engineer, Raigad Irrigation Department, Kolad on behalf of KIDC published an advertisement in the newspaper and website of Maharashtra Government Water Resource Department inviting tenders for the said work. The claimant was found a successful bidder pursuant in the bid submitted by the claimant pursuant to the said advertisement issued by the KIDC.

226. The dispute mainly arose between the parties because of the non-payment of 11<sup>th</sup> RA Bill according to the claimant. It is not in dispute that the claimant had filed a Writ petition bearing no.11019 of 2013 in this Court against the State of Maharashtra, KIDC and CIDCO. In paragraph (3) of the said Writ petition, it was averred by the claimant that the claimant had challenged the inaction and/or non-payment of the running account bill no.11 dated 12<sup>th</sup> June, 2012 submitted by the claimant for Rs.317.24 crores and memo of the idle charges/bill dated 16<sup>th</sup> August,2013 of Rs.16.53 crores.

227. It was also averred in the Writ petition that the CIDCO had agreed to provide capital fund for construction of Balganga Dam. In the Writ petition various minutes of the meeting held by the State of

Maharashtra, CIDCO and KIDC had been referred. In the grounds in the said Writ petition filed by the claimant, it was specifically urged that inspite of the KIDC repeatedly calling upon the CIDCO to clear the dues of the claimant, the CIDCO had failed and neglected to do so. The CIDCO had been constituting committees of officers of the State Government to evaluate the extra cost. The CIDCO has refused to take any action pursuant to various recommendations made by various committees.

228. It was urged that it was incumbent on CIDCO to fund KIDC for the smooth working and completion of the project and by stopping to fund without any cause, CIDCO was obligating its duty for such large project of public importance. It was further urged that it was incumbent on the State Government to direct the CIDCO to fund KIDC for completion of the said project. CIDCO was bound to act fairly and reasonably and to take its decision within reasonable time. It was contended that inaction of the CIDCO was dilatory, unjust, unfair against the public interest and without any reasons which had caused alleged manifest injustice, inconvenience and loss to the claimant.

229. With these averments in the said Writ petition, the claimant prayed that the CIDCO shall be directed by a Writ of mandamus to fund KIDC regarding payment of all the pending bills of the work done by the claimant of Balganga river project so that KIDC can make payment to the claimant. The claimant sought various other prayers in the said Writ petition. It is not in dispute that the said Writ petition was opposed by the KIDC as well as CIDCO by filing affidavit in reply. Insofar as affidavit in reply filed by CIDCO in the said Writ petition is concerned, it was the specific case of CIDCO before this Court that original cost of the concerned project was Rs.495.45 crores and the work of constructing the dam was given to the claimant in the year 2009. As per the agreement dated 23<sup>rd</sup> September, 2009 between the CIDCO and KIDC, the KIDC was required to seek financial

approval of CIDCO in the event of variation in the quantity or execution of some additional work. The KIDC had however not obtained any such approval though the extent of work carried out by the claimant was beyond the original work allotted to them. The additional work alleged to have been carried out by the claimant or the variation in the quantities thereof was thus not approved by the CIDCO. It was urged that the CIDCO was not liable to pay the additional claim lodged by the claimant.

230. In the said affidavit in reply, the CIDCO also placed on record about the appointment of various committees made by the CIDCO to study independently various rate analysis with cross verification of quantities and to submit comments on the rate analysis prepared by the KIDC for the work carried out by the claimant. It was averred by the CIDCO in the said affidavit that CIDCO had already paid Rs.494.15 crores to the claimant till date of filing the said affidavit. The construction work had not been completed by the claimant and was stopped. It was also averred in the said affidavit that the claimant should be directed to complete the project at the cost ultimately finalized by the Board of CIDCO. In the affidavit in reply filed by CIDCO before this Court in the said Writ petition filed by the claimant, the CIDCO had alleged collusion between KIDC and the claimant.

231. The CIDCO had also contended that there were various disputed questions of fact in the Writ petition. It was the case of CIDCO that KIDC had not obtained any approval though the extent of work carried out by the claimant was beyond the original work allotted to them, from CIDCO. A perusal of the order dated 28<sup>th</sup> January, 2014 passed by a Division Bench of this Court in the said Writ petition filed by the claimant indicates that after considering various affidavits filed by the respondents therein including CIDCO, this Court recorded that it was the case of the CIDCO in the affidavit in reply dated 18<sup>th</sup>

January, 2014 that the claim of the claimant for Rs.1220.19 crores towards cost of the project was highly excessive. The CIDCO had already appointed various committees.

232. This Court also recorded that there was no dispute about the fact that so far, CIDCO had paid Rs.494.15 crores to the claimant. In paragraph (7) of the said order, this Court recorded the submission made by the learned counsel for the claimant that in view of non-payment of full cost of the work done so far, it was impossible for the claimant to resume the work. This Court recorded the submission made by the learned counsel for the CIDCO that the dispute would be now resolved shortly as it had appointed another committee comprising of a retired judge and other members. It was submitted that after the said committee would submit its report, CIDCO would finalize the rates and would make payment to the claimant accordingly through KIDC.

233. A perusal of the said order indicates that the claimant made a submission before this Court that CIDCO should make the payments as per the reports of the three-member committee which had revised the total cost of project at Rs.972.17 crores as against the claim of the claimant of Rs.1220.19 crores. The claimant also submitted before this Court that CIDCO should be directed to make payment of 80% of the project cost on the basis of the report of the three members committee. In paragraph (11) of the said order, this Court recorded that in response to a query from the Court, the learned counsel for the CIDCO stated that according to CIDCO, only Rs.28.20 crores remains payable by them to the claimant for the work of project already done. This Court after hearing the parties, passed an order that claimant was required to be paid a sum of Rs.100.30 crores for the work actually done by the claimant so far according to the report of the said committee. There was however some disagreement between the parties which can go on and, in the meantime, the public interest is suffering because of such

project getting delayed.

234. This Court accordingly held that some interim arrangement was required to be made at that stage so that claimant was paid the undisputed amount without bank guarantee and some part of the disputed claim on furnishing bank guarantee so that claimant could resume and complete the project work. This Court accordingly directed that the claimant shall file an undertaking in this Court on or before 5<sup>th</sup> February, 2014 that it would forthwith resume the project work from the stage where it was earlier left and after it receives Rs.100.30 crores, also to complete the project work as per revised specifications of contract, subject to its right to get the amounts which may be determined and paid in accordance with law.

235. This Court directed that within one week of filing such undertaking by the claimant before this Court, CIDCO shall first release Rs.28.20 crores to the KIDC who in turn will pay the said amount to the claimant. It was made clear that no bank guarantee was required to be given by the claimant for Rs.28.20 crores because even according to CIDCO, the said amount was payable to the claimant for the work already executed so far.

236. This Court directed CIDCO to release a sum of Rs.72.10 crores thereafter out of the said amount of Rs.100.30 crores to the KIDC within three weeks from the date of the said order with a direction that KIDC in turn would pay the said amount to the claimant within one week thereafter. It was made clear that the said amount of Rs.72.10 crores would be released by the CIDCO provided the claimant gives bank guarantee of a nationalized bank for the said amount within one week from the date of receipt of Rs.28.20 crores from KIDC. It was further clarified that in case CIDCO for any reason is required to and thus encashes the bank guarantee given by the claimant for Rs.72.10 crores, the amount so encashed will be deposited

by CIDCO in this Court. Such amount would be withdrawn by CIDCO only after obtaining further directions from this Court. This Court made it clear that such interim directions were issued without prejudice to the rights and contentions of the parties and that the claimant had agreed to give an undertaking as recorded therein in view of the fact that by that interim direction, CIDCO and KIDC were required to pay the petitioner Rs.100.30 crores subject to the conditions of giving bank guarantee for Rs.72.10 crores.

237. By order dated 4<sup>th</sup> February, 2014, a Division Bench of this Court recorded the submission of the learned counsel for the claimant that the claimant was prepared to furnish at the most bank guarantee for 25% of Rs.72.10 crores. The said suggestion of the claimant was not acceptable to CIDCO. This Court accordingly directed that there was no alternative but to recall the directions issued by this Court in order dated 28<sup>th</sup> January, 2014 and also the observations made in second part of the paragraph (11) of the said order and directed that KIDC and CIDCO shall place before three-member committee recently constituted by CIDCO and headed by Justice M.G. Gaikwad (Retired). This Court further directed that the said committee will give an opportunity of hearing to CIDCO, KIDC and the claimant. It would be open to the CIDCO, KIDC and the claimant to produce their own material/evidence in support of their respective cases. This Court directed the said committee to submit its report preferably by 31<sup>st</sup> March, 2014.

238. On 23<sup>rd</sup> June, 2014, this Court passed an order in the said Writ petition filed by the claimant. This Court noticed the contentions raised by the CIDCO in the affidavit in reply that the claim of the claimant for Rs.1220.19 crores towards cost of the project was highly excessive. This Court also recorded that there was no dispute about the fact that so far, CIDCO had already paid a sum of Rs.494.15 crores to the claimant. In paragraph (5) of the said order, it was specifically

recorded by this Court that the issues which are subject matter of the report submitted by the committee are quite technical. This Court recorded that apart from the disputes between the claimant on one hand and CIDCO on the other hand, there were disputes between CIDCO and KIDC.

239. This Court referred the agreement between CIDCO and KIDC dated 23<sup>rd</sup> September, 2009 providing for resolution of dispute to be referred to Chief Secretary, Government of Maharashtra, through Secretary WRD, Government of Maharashtra. The said clause provided that the decision given by the Chief Secretary, Government of Maharashtra in the matter would be final and binding on both the parties. This Court noticed that neither CIDCO nor KIDC had taken recourse to the said clause. This Court in paragraph (6) noticed that the claimant claimant was not a party to the said agreement between CIDCO and KIDC and therefore, even if the Chief Secretary, Government of Maharashtra takes any decision in the dispute between CIDCO and KIDC, the same would not bind the claimant. This Court recorded the statement made by the learned counsel for the claimant that the claimant is ready to go before the Arbitral Tribunal having three arbitrators with technical experts, one to be appointed by each of the parties i.e. CIDCO, KIDC and the claimant.

240. This Court recorded the statement made by the learned senior counsel for the KIDC that KIDC was also ready to go for an arbitration. The matter was adjourned to enable the learned counsel for the CIDCO to take instruction whether CIDCO was willing to refer the dispute to the arbitration. This Court in the said order accordingly made it clear that if an Arbitral Tribunal is appointed, same would consist of three technical officers each one not below the rank of Chief Engineer having experience in construction of dams. CIDCO, KIDC and the claimant to appoint one arbitrator each. In paragraph (8) of the said order, this Court recorded the submission made by the learned

counsel for the CIDCO that CIDCO may be inclined to accept the suggestion for appointment of Arbitral Tribunal if the claimant agrees to complete the remaining project work in the light of the award which may be made by the Arbitral Tribunal i.e. to say that the claimant should agree to accept the amount as may be awarded by the Arbitral Tribunal.

241. By an order dated 7<sup>th</sup> October, 2014 passed by the Division Bench of this Court in the said Writ petition, this Court noticed that several committees were appointed by CIDCO to assess the value of the work done by the claimant. The five members committee had also assessed the cost of project at Rs.808 crores in June 2014. In paragraph (5) of the said order, this Court recorded that as regards percentage of the work completed by the claimant, there does not appear to be much dispute that the claimant had done 80% of the work. The dispute was mainly on the rates at which the payment should be made to the claimant.

242. This Court also noticed that it appeared that in view of the disputes, still another three members committee headed by Mr.M.G. Gaikwad, a former Judge of this Court was appointed and that committee had recommended the lower rates than the rates recommended by the previous committees. But that committee recommended appointment of another committee to assess the work actually done by the claimant so far. In paragraph (6) of the said order, this Court recorded that in view of the above dispute and absence of any final finding/decision and inability expressed by the claimant for continuing the work without getting payment as per pending bills or atleast as per the report submitted by the five member committee on 9<sup>th</sup> June, 2014, the project has not made any further progress beyond 80% and the important work of the construction of the dam for providing drinking water to the people in Navi Mumbai and Raigad District has remained incomplete. In paragraph (7) of the said order,

this Court suggested to the parties for appointment of an Arbitral Tribunal.

243. This Court recorded that the claimant as well as KIDC had agreed to refer the disputes to arbitration. CIDCO sought instruction from the Chief Secretary to the Government of Maharashtra. The Chief Secretary suggested the appointment of an Arbitral Tribunal consisting of five members, viz. one each to be appointed by the three parties, the fourth to be appointed by the State Government and the fifth member who would be the presiding member of the Arbitral Tribunal to be a retired judge of this Court. In paragraph (8) of the said order, this Court recorded that however a difference has now arisen between CIDCO and the claimant. According to CIDCO, the claimant should continue with the contract work and to complete the same during the pendency of the arbitral proceedings. However, it was the contention of the claimant that it cannot resume the construction work unless it is paid about Rs.100 crores.

244. By order dated 25<sup>th</sup> February, 2015 passed by the Division Bench of this Court in the said Writ petition, this Court recorded the statement made by the Assistant Government Pleader for the State Government that disputes amongst the parties be referred to the arbitration. The State Government was agreeable that the disputes need to be referred to arbitration comprising of five members each to be appointed by the State Government, CIDCO, KIDC, claimant and the presiding arbitrator to be appointed by this Court. This Court once again recorded the statement made by the learned counsel for the claimant that it was not possible for the claimant to carry out the remaining construction work which was to the tune of about 20% without getting payment of the work already done. This Court accordingly directed the Government to take a final decision on both these issues. By order dated 17<sup>th</sup> July, 2015 passed by the Division Bench of this Court in the said Writ petition, this Court recorded that

contract for the said project was given by KIDC to the claimant and KIDC was to receive the funds from CIDCO. Hence the State of Maharashtra was not directly involved in the controversy amongst the parties. However, the State Government as well as other parties had agreed to appoint arbitrators.

245. This Court accordingly in paragraph (6) of the said order recorded that the Arbitral Tribunal shall comprise of a former Judge of this Court as the presiding arbitrator, a former Chief Justice of Kerala High Court as the arbitrator nominated by the claimant, Mr.H.T. Mendegiri nominated by the State Government, Mr.M.C. Modak nominated by CIDCO and Mr.D.M. More nominated by KIDC. This Court in the said paragraph recorded that all the disputes and differences between the parties regarding construction of Balganda Dam in Taluka Pen, District Raigad and payments/non-payments for the same are referred to Arbitral Tribunal comprising of those five members.

246. This Court also recorded that the parties agree that all disputes/claims/counter claims etc. arising out of and between the parties in respect of the said irrigation project were referred to arbitration of the said Arbitral Tribunal. This Court issued further directions about the first meeting of the Arbitral Tribunal to be held within the time prescribed. Insofar as an amount of Rs.28.20 crores deposited by CIDCO in compliance with the order dated 10<sup>th</sup> April, 2014 passed by this Court is concerned, this Court directed that the said amount shall continue to remain invested in a nationalized bank and the said deposit with accrued interest thereon shall abide by the award of the Arbitral Tribunal. This Court directed the Arbitral Tribunal to dispose of the dispute expeditiously as possible and preferably by 31<sup>st</sup> March, 2016. This Court accordingly disposed of the said Writ petition in those terms. On 6<sup>th</sup> April, 2015, this Court recorded that the CIDCO did not insist that the claimant should be

required to carry on with the remaining construction work of the dam upon referring the dispute to arbitration.

247. A perusal of the prayers in the statement of claim filed by the claimant clearly indicates that in prayer clause (a), the claimant had prayed for an order and direction against all the respondents to permit the claimant to execute/perform the balance work under the said agreement bearing no. B1/1 for 2009-10. In prayer clause (b) the claimant prayed for an order and direction against all the respondents to pay to the claimant entire pending payment or any part thereof which the Arbitral Tribunal would feel just and reasonable for commencing the work. In the alternative, in prayer clause (c), the claimant prayed that the Arbitral Tribunal be pleased to award the claims to the claimant being claim nos.1 to 8 made therein.

248. A perusal of the record clearly indicates that CIDCO filed the Written statement to the original statement of claim and also additional Written statement to the amended statement of claim before the Arbitral Tribunal. CIDCO also examined a witness before the Arbitral Tribunal and cross examined the witnesses examined by the claimant. CIDCO also filed written arguments before the Arbitral Tribunal. A perusal of the impugned arbitral award and more particularly paragraph 66(B) clearly indicates that insofar as amount of Rs.28.20 crores deposited by CIDCO pursuant to the interim order passed by this Court in the said Writ petition filed by the claimant which was subject to the outcome of the arbitral proceedings is concerned, the Arbitral Tribunal permitted the claimant to withdraw the said amount of Rs.28.20 crores along with accrued interest to the claimant. In paragraph 66(D), the Arbitral Tribunal also directed CIDCO to pay cost of Rs.15 lacs to the claimant out of Rs.30 lacs awarded towards arbitration cost. In my view, there is thus no substance in the submission made by the learned senior counsel for the claimant that the CIDCO was not aggrieved by any part of the arbitral

award impugned by CIDCO in the Commercial Arbitration petition filed by it or that petition filed by CIDCO was not maintainable.

249. Insofar as objection about payment of Court fees raised by the learned senior counsel for the claimant in the arbitration petition filed by CIDCO is concerned, pursuant to the directions issued by this Court, CIDCO has already paid the deficit Court fees in the said arbitration petition. There is thus no substance in that objection raised by the learned senior counsel for the claimant. This Court thus shall decide the matter on merits including the objections raised by CIDCO in the arbitration petition and in the oral submissions made through the learned counsel across the bar in the later part of this petition on merits.

**Whether impugned arbitral award has proceeded *ex-parte* against the State of Maharashtra in violation of principles of natural justice ?**

250. The Arbitral Tribunal has made an observation in the impugned award by the Arbitral Tribunal that State Government did not appear before the Arbitral Tribunal nor filed any written statement or counter claim though was served with the notices from time to time by the Arbitral Tribunal. In view of this controversy and rival submissions made by the parties, I have perused the minutes of the arbitral proceedings produced on record by the parties and also the pleadings and documents on record. It is not in dispute that State of Maharashtra was one of the respondents in the writ petition filed by the claimant before this court. All disputes between the parties arising out of the said Balganga Project were referred to Arbitral Tribunal. A perusal of the minutes of the arbitration meetings dated 4<sup>th</sup> August, 2015 along with covering letter dated 7<sup>th</sup> August, 2015 indicates that the minutes of the said meeting were alleged to have been forwarded to the Government of Maharashtra through Urban Development

Department, Mantralaya, Mumbai and to the Government Pleader, Appellate Side insofar State of Maharashtra is concerned.

251. In the said meeting, the Arbitral Tribunal has issued various directions about payment of fees. The directions to pay fees was also issued to the State of Maharashtra. Thereafter the Arbitral Tribunal held a meeting on 19<sup>th</sup> August, 2015. In the said meeting also the Arbitral Tribunal gave various directions to the parties to pay fees of the Arbitral Tribunal. A covering letter dated 19<sup>th</sup> August, 2015 signed by the learned presiding arbitrator indicates that a copy of the said letter was marked to the Government of Maharashtra through Water Resources Department, Mantralaya and also to the Government Pleader, Appellate Side, High Court, Bombay. It was seriously disputed by the learned Additional Government Pleader that any such notice was served upon the said Department by the Arbitral Tribunal.

252. The third meeting of the Arbitral Tribunal was held on 17<sup>th</sup> December, 2015. In the said meeting, the Arbitral Tribunal recorded that the claimant had filed an application under sections 12 and 13 of the Arbitration Act. No reply was filed by any of the respondents. The Arbitral Tribunal heard the learned counsel for the claimant and the respondents i.e. KIDC and CIDCO and reserved the order on the said application filed under sections 12 and 13 filed by the claimant raising an objection about the appointment of Shri H.T.Mendhegiri, learned co-arbitrator appointed by the State Government. A copy of the covering letter dated 21<sup>st</sup> December, 2015 signed by the learned presiding arbitrator indicates that a copy of the said minutes was addressed to the Government of Maharashtra through Water Resources Department, Mantralaya and also to the Government Pleader, Appellate Side insofar as State of Maharashtra is concerned. The factum of receipt of this minutes of meeting is also disputed by the Government Pleader. None of the parties could produce any record before this court whether such notices were infact served upon the

Government of Maharashtra, Water Resources Department or to the Government Pleader.

253. Be that as it may, the covering letters of the rest of the minutes of the meeting held by the Arbitral Tribunal do not even indicate that any of those minutes of the meeting were even sent to the Government of Maharashtra, Water Resources Department or to the Government Pleader. None of the subsequent directions including filing of statement of claim, framing of issues, application for seeking amendment of claim filed by the claimant from time to time were not served upon the State of Maharashtra. It is also not in dispute that State of Maharashtra did not pay any fees to any of the arbitrators nor the Arbitral Tribunal made any grievance in respect thereof in any of the minutes of the meeting. None of the pleadings filed by any of the parties were served upon State of Maharashtra. None of the decisions taken by the Arbitral Tribunal during the pendency of the arbitral proceedings including the copy of the final award was served upon the State of Maharashtra.

254. In my view, the finding of the Arbitral Tribunal that State Government did not appear though served is factually incorrect and contrary to the records produced by the parties before this court. None of the parties could produce any proof that any signed copy of the award was ever served upon the claimant by the Arbitral Tribunal as contemplated under section 31(5) of the Arbitration and Conciliation Act, 1996. I am thus inclined to accept the submission of Ms. Shastri, learned Additional Government Pleader for the State of Maharashtra that her client was not served with any of the notices or the papers and proceedings including copy of the award and atleast the minutes of the arbitral proceedings and the pleadings and record after third arbitration meeting held by the Arbitral Tribunal.

255. A perusal of the record indicates that in the arbitration meeting held on 8<sup>th</sup> March, 2017, the Arbitral Tribunal framed issues/points for determination. Issue no.3 framed by the Arbitral Tribunal was relating to validity of the said Government resolution dated 23<sup>rd</sup> September, 2016 issued by the State of Maharashtra. Even at that stage neither copy of those issues framed by the Arbitral Tribunal nor minutes of the meeting were even forwarded or served to the State of Maharashtra. When the writ petition was filed by the claimant before this court, State of Maharashtra was a formal party. It was also recorded in one of the order passed by this court to this effect. This court however granted an opportunity to the State of Maharashtra to appoint an arbitrator out of panel of the five arbitrators.

256. In my view, even if the presence of State of Maharashtra was not necessary when first three meetings were held by the Arbitral Tribunal, when the issues were framed by the Arbitral Tribunal and more particularly issue no.3 which had some bearing on the validity of the Government resolution issued by the State of Maharashtra, atleast at that stage the Arbitral Tribunal ought to have directed the parties to serve all the pleadings and notices upon the State of Maharashtra and ought to have served the minutes of all the meetings for various hearings held by the Arbitral Tribunal to the State of Maharashtra.

257. In my view, there is thus no substance in the submissions made by the learned senior counsel for the claimant that State of Maharashtra remained absent though served and thus cannot be allowed to agitate the validity of the arbitral award insofar as Government resolution issued by the State of Maharashtra having been declared as invalid, *void ab initio* is concerned. In my view, since the State of Maharashtra was not served with the papers and proceedings and the notices and atleast from the stage when an issue was framed which had bearing on the validity of the Government resolution issued by the State of Maharashtra, any decision that was being taken by the

Arbitral Tribunal would have affected the State of Maharashtra, the Arbitral Tribunal ought to have served upon the State of Maharashtra all the notices and ought to have directed the parties to serve the pleadings and documents upon the State of Maharashtra.

258. In my view, Ms. Shastri, learned Additional Government Pleader is right in her submission that the State of Maharashtra thus could not remain present before the Arbitral Tribunal atleast at the stage when the issues were framed which would have affected the rights of the State of Maharashtra and thereafter and was unable to present its case. In my view, the Arbitral Tribunal has violated the principles of natural justice by not effecting service of the notice and the papers and proceedings upon the State of Maharashtra and deciding the matter *ex-parte* insofar as the said issue regarding validity of the Government resolution is concerned. The State of Maharashtra was thus unable to present its case. The State of Maharashtra is thus aggrieved by that part of the arbitral award and has locus to file the arbitration petition impugning that part of the arbitral award.

259. In my view, there is no merit in the submission of the learned senior counsel for the claimant that State of Maharashtra is even otherwise not affected by any part of the award. If the impugned award setting aside the Government resolution or declaring such Government resolution as invalid and *void ab initio* is not set aside, State of Maharashtra and several others would be seriously prejudiced. In my view, the State of Maharashtra thus has made out a case for setting aside that part of the award declaring the said Government resolution as invalid and *void ab initio*.

260. I shall now decide the validity of the award insofar as claims awarded by the Arbitral Tribunal in favour of the claimant are concerned. Issue no.1 provides whether the claimant is entitled to its claim nos.1 to 8 as stated in the statement of claim. Issue no. (v)

provides whether respondent no.2 KIDC prove that the extra items executed by the claimant were not necessary and were without the permission of respondent no.3 CIDCO. The claimant had filed statement of claim before the Arbitral Tribunal which was amended twice during the course of hearing of the arbitral proceedings at different stages. Statement of claim was resisted by the KIDC as well as by CIDCO by filing written statement. CIDCO as well as KIDC also filed additional written statement to the amended statement of claim. The claimant examined three witnesses whereas CIDCO as well as KIDC examined one witness each before the Arbitral Tribunal.

261. The Arbitral Tribunal has allowed claim no.1 at Rs.177.65 crores and Rs.45.30 crores in respect of claim no.2. In the operative part of the award, it is mentioned by the Arbitral Tribunal that KIDC is directed to pay to the claimant a sum of Rs.177.65 crores which is the admitted liability in respect of claim no.1 and Rs.45.30 crores which is the admitted liability in respect of claim no.2. Similar observations are made by the Arbitral Tribunal in various parts of the impugned arbitral award that the claim of the claimant was admitted by KIDC from time to time allegedly and thus claimant was entitled to be awarded the said amount of Rs.177.65 crores towards claim no.1 and Rs.45.30 crores towards claim no. 2.

262. It is the contention of learned senior counsel for CIDCO and also KIDC that there were no admissions on the part of KIDC as held by the Arbitral Tribunal in respect of claim nos. 1 and 2. CIDCO as well as KIDC through their learned counsel invited my attention to various portions of their pleadings and written arguments and also the oral evidence led by their respective clients and also portion of the evidence led by the witnesses examined by the claimant. In view of the rival submissions made by the parties on the contentions issue whether any part of the claim made by the claimant forming part of claim nos. 1 and 2 were admitted by KIDC or not, with the assistance of the learned

counsel for the parties, I have perused the record on this issue including various pleadings and evidence forming part of the record. This court also has to consider whether Arbitral Tribunal has allowed both those claims only on the basis of alleged admission of liability by KIDC or has independently considered the pleadings and evidence led by the respondents as well as the claimant in respect of those two claims in the impugned arbitral award or not.

263. I shall now deal with claim no.1 and the pleadings in respect thereof including the evidence first. It is not in dispute that the CIDCO was the funding agency for the said Balganga Project to the knowledge of the claimant. This court also will decide whether the finding of the Arbitral Tribunal that approval of CIDCO was not necessary for releasing any payment in respect of the work done by the claimant shows patent illegality or not. It is not in dispute that the dispute between the parties mainly arose in respect of running account bill no.11 submitted by the claimant to the KIDC which involved payment in respect of various alleged extra items carried out by the claimant, revised rates in respect of those items in respect of which a revised estimate was prepared by KIDC and was submitted to CIDCO for sanction to the knowledge of the claimant.

264. In the original statement of claim filed by the claimant, insofar as claim no.1 is concerned, it was alleged by the claimant that the 11<sup>th</sup> R.A. Bill was submitted by the claimant to KIDC which was duly accepted and verified by the KIDC. The amount of Rs.317.24 crores is allegedly due and payable by KIDC to the claimant. The said R.A. Bill was submitted to the executive engineer of KIDC vide letter dated 30<sup>th</sup> July, 2012. The KIDC made payment of Rs.25 crores on 7<sup>th</sup> November, 2013. The claimant demanded a sum of Rs.292.24 crores insofar as claim no.1 is concerned. On 8<sup>th</sup> May, 2018 and 9<sup>th</sup> May, 2018 i.e. after completion of the evidence of the witnesses examined by the respondents, the claimant filed two applications *inter-alia* praying for

amendment of various claims in more particularly claim no.1, claim no.2 and claim no.7. Insofar as claim no.1 is concerned, the claimant sought deletion of para 131A made in the statement of claim and sought permission to add another paragraph.

265. It was alleged in the said paragraph that the quantities of M-15 concrete and quantities of excavation in R.A. Bill for the purpose of the claim of the claimant be considered as 144590.80 cubic meter for concrete and 4464890.30 cubic meter for excavation in hard rock and for casing from borrow. It is mentioned that the claimant is entitled to claim Rs.186.89 crores. In paragraph 19 of the amendment application dated 9<sup>th</sup> May, 2018, the claimant applied for permission to delete para no. 131A and sought insertion of the prayer that the quantities of M-15 concrete and the quantities of excavation in R.A. Bill for the purpose of the claim of the claimant be considered as 146000 cubic meter for concrete and 4465000 cubic meter for excavation in hard rock. The claimant demanded a sum of Rs.186.89 crores under claim no.1 after deducting Rs.25 crores paid in 2013. The Arbitral Tribunal allowed the said amendment application without any basis. The KIDC as well as CIDCO filed their additional written statement to the amended statement of claim.

266. I shall now deal with some of the averments made by KIDC in various pleadings filed by it and also in the written arguments filed before the Arbitral Tribunal. In the written statement filed by KIDC in the month of November 2016, insofar as claim no.1 is concerned, KIDC categorically denied that 11<sup>th</sup> R.A. Bill was duly accepted and verified by KIDC. KIDC also denied that the amount of Rs.317.27 crores was due and payable by KIDC to the claimant. It was contended by KIDC that 11<sup>th</sup> R.A. Bill submitted by the claimant to the executive engineer of KIDC on 30<sup>th</sup> July, 2012 was merely a demand letter with R.A. Bill abstract performa i.e. form no.47 of MPW manual 1984. It was contended that the rates assumed in the said bill by the claimant

were not sanctioned and thus amount of bill was not accepted by KIDC. It was further averred that the detailed measurements with the bills had not been produced by the claimant to substantiate its claim.

267. In the said written statement it was contended by the KIDC that documents in CD-9 which was submitted by the claimant were only in respect of total quantity of earth work. However, for a detailed scrutiny purpose, the detail measurement of total work done by the claimant on the said project along with cross section and L section were required which had not been produced by the claimant. It was contended that in the absence of detail measurement of total work done, cross section and L section, the claim submitted by the claimant could not be scrutinized and could not be accessed. The entire claim was payable only after all sanction by competent authority and sanction of cost by CIDCO.

268. In the written argument filed by KIDC before the Arbitral Tribunal on 1<sup>st</sup> February, 2019 insofar as claim no.1 is concerned, it was contended that as per the measurements recorded in measurement book by the then field officer, total quantity of hard rock excavation in approach channel, spillway and tail channel as well as for cut off trench is recorded as 4444564 cubic meter. The respondent while filing reply to the application filed by the claimant under Section 31(6) of the Arbitration Act had stated that considering the same, the rate of Rs.8,756.85/- per cubic meter for M-15 concrete which was corrected by three member expert committee appointed by CIDCO, can be considered for the interim relief. However, in the said paragraph it was also contended that KIDC is a merely nodal agency. They had submitted 11<sup>th</sup> R.A. Bill to CIDCO for the release of funds for the said project. The CIDCO however has not released the payments for the 11<sup>th</sup> R.A. Bill. It is stated that claim no.1 deserves to be considered as per measurements carried out by KIDC and the rates stated in para 12 of the reply filed by the KIDC to the application filed by the claimant

under Section 31(6) of the Arbitration Act. In last paragraph of the said reply it is contended by KIDC that the claims made by the claimant be dismissed with heavy cost. In the amended written statement filed by the KIDC also, KIDC had disputed the claim made by the claimant insofar as claim no.1 is concerned.

269. In the written statement filed by the CIDCO before the Arbitral Tribunal, CIDCO placed reliance on clause B12 and B13 of the agreement entered into between CIDCO and KIDC in respect of the said Balganga project on 23<sup>rd</sup> September, 2009 in support of the submission that KIDC was obligated to ascertain excess expenditure over the estimated cost from time to time. In the event of variation in the quantities, rates or items, which were not covered in the approved estimate, the chief engineer, water resources department, KIDC shall obtain prior written approval of CIDCO for execution of such additional work well in advance to avoid delay. It was further provided that the total administrative approval of the project should not exceed the approved cost by CIDCO and the chief engineer of the Water Resources Department, Konkan region shall submit the proposal to CIDCO and only after written approval as mentioned therein shall execute the works. In the event of reduction in the cost of work, the executive direction, KIDC, on completion of work shall refund the said amount to CIDCO.

270. Clause B13 of the said agreement provided that KIDC shall seek financial approval of CIDCO in the event of variation in the quantities or execution of some additional work, which in the opinion of the chief engineer, water resources department, Konkan region is absolutely necessary. CIDCO shall bear additional enhanced cost in excess of the approved project cost incurred for additional quantities or additional work which will be executed with the prior written approval of CIDCO. Under clause B20 of the said agreement, KIDC and CIDCO agreed that in case any dispute between the parties cannot be settled

amicably as described in clause B15 thereof, the matter will be referred to the Chief Secretary, Government of Maharashtra through Secretary, WRD, Government of Maharashtra. It was further provided in the said clause that the decision given by the Chief Secretary, Government of Maharashtra in the matter will be final and binding on both the parties.

**Whether the arbitral award declaring the Government Resolution dated 23<sup>rd</sup> September 2016 issued by the State of Maharashtra declaring the Government Resolution as invalid and null and void in law was within the jurisdiction of the Arbitral Tribunal ?**

271. It is not in dispute that when the disputes were referred to the Arbitral Tribunal by this Court by an order dated 17<sup>th</sup> July 2015 passed by this Court in Writ Petition No.11019 of 2013 filed by the claimant, the said resolution was not even issued by the State of Maharashtra. Notice of termination of contract dated 28<sup>th</sup> October 2016 was also not issued when the order of reference was passed by this Court in the said writ petition. It was the case of the State of Maharashtra that in view of the serious allegations of fraud upon against the claimant and various officers of KIDC and for various other reasons, the said Government Resolution was required to be issued by the State of Maharashtra in public interest.

272. It is not in dispute that though the claimant amended the statement of claim twice before the Arbitral Tribunal and had made reference to the said Government Resolution dated 23<sup>rd</sup> September 2016 issued by the State of Maharashtra while impugning the notice of termination dated 28<sup>th</sup> October 2016, the claimant did not challenge the validity of the said Government Resolution dated 23<sup>rd</sup> September 2016. In my view, even if the claimant would have challenged the validity of Government Resolution, the Arbitral Tribunal could not have considered the validity of the said Government Resolution in the

arbitral proceedings.

273. A perusal of the issues and more particularly issue no.II framed by the Arbitral Tribunal on 8<sup>th</sup> March 2017 i.e. “whether the respondent no.2 KIDC proved that the Government Resolution dated 23<sup>rd</sup> September 2016 issued by the Government of Maharashtra directing the KIDC to terminate the agreement with the claimant is valid?” itself could not have been framed by the Arbitral Tribunal. The Arbitral Tribunal did not have jurisdiction to decide the validity of such Government Resolution. In my view, even if KIDC or CIDCO did not raise any objection before the Arbitral Tribunal to decide the said issue no.II as well as framing of such issue, by conduct of parties and by consent, the Arbitral Tribunal would not derive jurisdiction which it did not have in law.

274. In paragraph 52 of the impugned award, it is held by the Arbitral Tribunal that preamble of the said Government Resolution refers to 12 projects in the State and then it refers to the direction to terminate 41 contracts in accordance with the provisions of Contract and Indian Contract Act, 1872. The contract awarded to the claimant is included in the list of 41 contracts. There is no specific finding in respect of any illegality or irregularity in the contract of the claimant. It is held by the Arbitral Tribunal that it is obvious from a bare reading of Government Resolution that several irrelevant and extraneous consideration have weighed with the State Government while issuing the said Government Resolution. It is held that the exercise of power is absolutely causal, wholly malafide and without jurisdiction and thus is null and void in the eyes of law.

275. In paragraph 58 of the impugned award, it is held by the Arbitral Tribunal that no show cause notice was issued to the claimant either before issuing the said Government Resolution or the notice. Principles of natural justice, were honoured more in breach than in

observance, throughout the execution of the work. It is held that the authorities and agencies like the respondents are required to follow the principles of natural justice and cannot act arbitrarily. Despite service of notice, State Government has chosen not to appear in the present proceedings. The Arbitral Tribunal held that in the circumstances, they had no hesitation in holding that the Government Resolution dated 23<sup>rd</sup> September 2016 along with notice dated 28<sup>th</sup> October 2016 suffer from vice of non application of mind, failure to consider the relevant facts, consideration of irrelevant facts and failure to comply with elementary principles of natural justice which amounts to malafide in law. The Arbitral Tribunal accordingly held that the Government Resolution dated 23<sup>rd</sup> September 2016 and notice dated 28<sup>th</sup> October 2016 are not only invalid but are totally null and void in law. The issue No.II framed by the Arbitral Tribunal is accordingly answered in negative.

276. This Court shall deal with the question whether the decision of the Arbitral Tribunal in declaring the notice of termination dated 28<sup>th</sup> October 2016 as invalid and null and void shows patent illegality in later part of this judgment. Entry 17 of List II of Seventh Schedule of the Constitution of India provides for the subject such as water, water supplies, irrigations, canals, embankments, water storage, water and drainage and power subject to the provisions of Entry 56 of List I. It is thus clear that subject of water supply would clearly fall under Entry 17 of List II. In my view, under Article 162 of the Constitution of India, State Government is empowered to issue such Government Resolution under Entry 17 insofar as subject of water is concerned. The Executive appointed under KIDC Act has power to issue such directions under Article 162 of the Constitution of India. Such directions issued by the State Government by way of Government Resolution were in the nature of subordinate legislation and were binding not only on KIDC but also all parties concerned. Mr.Anturkar, learned senior counsel for the claimant could not dispute

the powers of the State Government to issue such Government Resolution under Article 162 of the Constitution of India under Entry 17 of List II of Seventh Schedule of the Constitution of India. Learned senior counsel also could not dispute that the subject “water” would fall in list II of Entry 17 and thus State Government would be empowered to issue Government Resolution under Entry 17 by exercising powers under Article 162 of the Constitution of India.

277. The question that arises for consideration of this Court is whether the Government Resolution which is in the nature of the subordinate legislation can be declared as null and void and invalid by the Arbitral Tribunal. The Arbitral Tribunal is a private forum appointed by consent of parties by this Court. The validity of Government Resolution could be considered only by Court of law and not by the Arbitral Tribunal. The validity of Government Resolution which is in the nature of subordinate legislation would be action in *rem* and not action in *personam*. The said Government Resolution was not relating only to Balganga Project but other 91 contracts. The dispute between the parties before the Arbitral Tribunal was in respect of the dispute arising under the said contracts in respect of Balganga Project. In my view, Mr.Aney, learned senior counsel for the KIDC and Ms.Geeta Shastri, learned Additional Government Pleader for State Government are right in their submissions that the Arbitral Tribunal has acted beyond their jurisdiction to declare such Government Resolution as invalid and null and void.

278. It has been held by the Hon’ble Supreme Court in case of **Booz Allen (supra)** that action in *rem* cannot be referred to the Arbitral Tribunal. In my view, even by consent of parties, action in *rem* cannot be referred to the Arbitral Tribunal. The Arbitral Tribunal has traveled beyond the scope of their powers as well as beyond the scope of reference of dispute referred to by this Court. The impugned award, insofar as this part of the award is concerned, shows patent

illegality being in violation of the principles of law laid down by the Supreme Court in the case of **Booz Allen (supra)**.

279. There is no substance in the submission of the learned senior counsel for the claimant that since the said Government Resolution was even otherwise illogical as canvassed by the learned senior counsel, this Court can declare the said Government Resolution as invalid or shall not interfere with the impugned award rendered by the Arbitral Tribunal declaring the said Government Resolution as invalid and void ab initio. In my view, the Arbitral Tribunal has already committed patent illegality by exceeding its powers and jurisdiction to declare the said Government Resolution as invalid and void ab initio. This Court will not commit another patent illegality by declaring the said Government Resolution as invalid and void ab initio while exercising powers under Section 34 of the Arbitration and Conciliation Act, 1996 while hearing the arbitration petition challenging an arbitral award. Even this Court has no power under Section 34 of the Arbitration and Conciliation Act to declare a Government Resolution as invalid and void ab initio.

280. Insofar as the submission of the learned senior counsel for the claimant that issue no.II was framed by the Arbitral Tribunal with consent of parties and thus the Arbitral Tribunal was bound to decide the applicability or otherwise of the said government resolution in order to determine the validity of the notice of termination is concerned, in my view, there is no substance in this submission of the learned senior counsel for the claimant. Since the action in *rem* cannot be referred to the Arbitral Tribunal even by consent, there would be no waiver on the part of the respondents even if the Arbitral Tribunal had framed such issue by consent of parties and had finally determined the validity of the Government Resolution which is in the nature of subordinate legislation. There is also no merit in the submission of the learned senior counsel that the findings of the

Arbitral Tribunal with reference to the Government Resolution are only with a view to determine the validity of termination notice which was within the jurisdiction of the Arbitral Tribunal. The Arbitral Tribunal could only determine the validity of the notice of termination as invalid and not the validity of Government Resolution as invalid and void ab initio.

281. Insofar as the submission of the learned senior counsel that the arbitral award in any event is not a precedent and therefore, would not operate as order in *rem* is concerned, there is no substance in this submission of the learned senior counsel. If an arbitral award rendering a particular decision which is patently illegal and shows perversity is not set aside by exercising powers under Section 34 of the Arbitration and Conciliation Act, 1996, such decision would be executed as if a decree and can be relied upon not only by the parties to the proceedings but others also. Even other claimants whose contracts were the subject matter of the said Government Resolution can also place reliance upon the award of the Arbitral Tribunal and would contend that the Government Resolution has been rightly or wrongly accepted by this Court, no reliance thereon can be placed by the State Government. If the validity of such arbitral award declaring the Government Resolution as invalid and void ab initio is accepted by this Court, , decision of this Court would certainly be relied upon as a precedent in the other proceedings even by third parties.

282. I am thus not inclined to accept the submission of the learned senior counsel for the claimant that those findings rendered by the Arbitral Tribunal cannot be a ground to set aside the arbitral award which is a fair and reasonable award as canvassed by the learned senior counsel for the claimant. I am not inclined to accept the without prejudice submission made by the learned senior counsel for the claimant that the findings in relation to the said Government Resolution can be read down to apply only to the parties before the

Arbitral Tribunal and can be severed from rest of the award without affecting the legality and validity of the impugned award.

283. Insofar as the submission of Mr. Anturkar, learned senior counsel for the claimant that no directions mentioned in the said Government Resolution were followed by the concerned boards is concerned, I do not propose to go into such issue in this petition. The Government Resolution was admittedly not part of the contract awarded to the claimant. The said Government Resolution was issued by the State Government subsequently. Some of the 91 contracts were dealt with by several agencies. The said Government Resolution was not relating only to Balganga project but other 91 contracts.

284. Insofar as the submission of the learned senior counsel for the claimant that the State Government cannot be allowed to challenge the powers of the Arbitral Tribunal to decide the validity of the Government Resolution on the ground that the State Government did not raise any objection about correctness of the issue framed by the Arbitral Tribunal before the Arbitral Tribunal is concerned, a perusal of the record indicates that no such copy of the issues framed by the Arbitral Tribunal was served upon the State Government and that also to the concerned department i.e. water resources department.

285. Be that as it may, even if the State Government also would have agreed to frame such issue by the Arbitral Tribunal, even by consent of parties an action in *rem* cannot be referred to the Arbitral Tribunal and thus would not amount to waiver under Section 4 of the Arbitration and Conciliation Act, 1996. The State Government or other two petitioners namely KIDC and CIDCO cannot be estopped from raising an issue challenging the validity of the Arbitral Tribunal on the ground that the Arbitral Tribunal could not have decided the validity of the Government Resolution and could not have declared

such Government Resolution as invalid and void ab initio. In my view, principles of law laid down by the Supreme Court in the case of **Adward Mills Company Limited (supra)**, in case of **Bishambhar Dayal Vs. Chandramohan and others (supra)** and the judgment of the Supreme Court in the case of **Booz Allen (supra)** relied upon by Mr.Aney, learned senior counsel for the KIDC would clearly apply to the facts of this case. I am respectfully bound by the principles of law laid down by the Hon'ble Supreme Court in those judgments. In my view, declaration of the Government Resolution which was in the nature of subordinate legislation as invalid and void ab initio by the Arbitral Tribunal discloses patent illegality and total perversity and thus this part of the award deserves to be set aside.

### **Discussion and Conclusion on merits of claims**

286. A perusal of the written arguments filed by CIDCO before the Arbitral Tribunal clearly indicates that CIDCO had opposed each and every claim made by the claimant. CIDCO had also relied upon various provisions of the contract entered into between the claimant and KIDC while opposing those claims. The CIDCO had specifically set out the reason as to why claim made by the claimant for extra amount towards excavation of hard rock should not be granted. The tendered contained the borehole details which indicated the nature of soil prevalent at the site. The tenderers were made aware or tenderers should have ascertained themselves, about the nature of rock/soil at the site and the method to be adopted by them for digging/drilling. The tenderers were required to quote their rates accordingly. The CIDCO had also relied upon the cross-examination of Mr.Rithe who was one of the witness examined by the claimant who admitted in his cross-examination and more particularly in reply to question no. 127 to questions no. 139 that no deviation was seen by him in the year 2009. It was contended by CIDCO that there was thus no change in alignment which may have resulted in the nature of soil being changed.

287. The CIDCO had also relied upon various portion of the cross-examination of the said witness Mr. Rithe examined by the claimant in respect of various claims. The cross-examination of the said witness was contrary to his deposition in the examination-in-chief. The claimant filed an affidavit in lieu of examination-in-chief of Mr. Syed M. Peer who was a Civil Engineer by profession having diploma in Civil Engineering. He was cross-examined by the learned counsel KIDC as well as CIDCO. In his cross-examination by the learned counsel for KIDC, he deposed that he had handed over the measurement to the sectional engineer. The R.A. Bills were prepared by sectional engineer. The claimant had only submitted the joint measurement taken along with sectional engineer.

288. When the witness was asked whether he had produced the copies of cross section, L sections and quantity statement along with the 11<sup>th</sup> R.A. Bill on record, he deposed that he did not know. When he was asked whether the detailed measurement of the executed work in 11<sup>th</sup> R.A. Bill recorded in the measurement book have been produced on the record of the tribunal, he deposed that he did not know. In question no. 68 the said witness was put a suggestion by the KIDC's counsel that as per the measurement submitted by the claimant along with 11<sup>th</sup> R.A. Bill, the claimant was entitled to receive an amount of Rs.26,50,38,509/- only, the said witness did not agree to the said suggestion of the learned counsel for KIDC. In his cross-examination by the learned counsel for CIDCO in reply to question no. 78 'whether it would be correct to say that the CIDCO was not directly liable to make any payments in respect of the claims made by claimant without CIDCO's approval', the witness deposed that he did not know.

289. When the witness was called upon to point out the measurements taken by anti-corruption bureau which according to the said witness he

had filed on record, he referred to the documents marked as CD-9 which was only in respect of earth work. He did not know whether there was any difference between the measurements taken by anti-corruption bureau and the joint measurements taken by the claimant and KIDC. In reply to question no. 98 whether the claimant was given a letter of termination or stoppage of work, the witness answered in negative.

290. Claimant also filed an affidavit in lieu of examination-in-chief of Mr. Nisar Khatri, the partner of the claimant as one of the witness. The said witness was also cross-examined by KIDC as well as by CIDCO. He admitted that out of three partners of the claimant firm, none of them was civil engineer. He admitted that the work of dam was stopped by the claimant in the month of April 2012. In reply to question no. 33 when the said witness was asked whether the rate of Rs.14,000/- for M-15 per cubic meter for the construction of concrete was approved by the competent authority, the witness deposed that the claimant had demanded the rate of Rs.14,000/- per cubic meter but the claimant was asked to continue with the work by recommending the rate of Rs.12,073/- for M-15 concrete.

291. In the cross-examination of the said witness by the learned counsel for CIDCO he deposed that the work of excavation by using rock breaker was commenced prior to 30<sup>th</sup> April, 2010. In his affidavit of evidence he had deposed that the work commenced from 1<sup>st</sup> week of February, 2010 and while carrying out the work of excavation the claimant found that excavation of cot and spillway, approach and tail channel could only be done by a rock breaker and accordingly claimant started the work by using the rock breaker. When the witness was asked as to when he took permission from KIDC for carrying out the work of excavation by using rock breaker, he deposed that such permission was taken by letter dated 20<sup>th</sup> May, 2010. He admitted that the said work was commenced prior to 30<sup>th</sup> April, 2010.

292. The claimant had also examined Mr. Rajesh Chandrakant Rithe as one of the witness. The said Mr. Rajesh Rithe was in the employment of KIDC for part of the period when the work was going on. He was however examined by the claimant as one of the witness. The said witness was also cross-examined by the KIDC as well as by CIDCO. The said Mr. Rithe gave various reply in his cross-examination contrary to his deposition in the affidavit in lieu of examination-in-chief. The KIDC examined Mr. Dhananjay Maruti Godase as the sole witness who was working as executive engineer. The said witness was cross-examined by the claimant's advocate as well as by CIDCO's advocate. In paragraph 12 of his affidavit in lieu of examination-in-chief, insofar as claim no.1 is concerned, he deposed that the 11<sup>th</sup> R.A. Bill was only received but not accepted and verified by the KIDC. The amount of Rs.317.27 crores was not due and payable by KIDC to the claimant as per terms of the contract.

293. The said witness also deposed that the 11<sup>th</sup> R.A. Bills submitted by the claimant to the executive engineer of KIDC on 30<sup>th</sup> July, 2012 was merely a demand letter with R.A. Bill abstract proforma. The rates assumed in the said bill by the claimant were not sanctioned. The amounts of bill were not accepted by KIDC. He further deposed that detailed measurements with the bills had not been produced by the claimant to substantiate his claim. All the documents in CD-9 referred by the claimant and produced by the witness examined by the claimant pertain to joint measurements record taken by anti-corruption bureau in February 2016 for earth work whereas the claimant has submitted its abstract proforma in the year 2019 the said documents in CD-9 were only in respect of total quantity of earth work.

294. The said witness deposed that for a detailed scrutiny purpose the detailed measurement of total work done by the claimant on Balganga Dam project along with cross section and L section were required

which had not been produced by the claimant. In the absence of detailed measurement of total work done, cross section and L section, the claim submitted by the claimant could not be scrutinized and could not be assessed. He further deposed that entire claim was payable only after all sanctioned by competent authority and sanctioned of cost by CIDCO. He deposed that as per office record 11<sup>th</sup> R.A. Bill was for an amount of Rs.26,50,38,509/- dated 7<sup>th</sup> November, 2013 and Rs.25 crores were already paid to the claimant against the said advance R.A. Bill. The said amount of Rs.25 crores had been accepted by the claimant.

295. In his examination-in-chief the said witness examined by KIDC deposed that the claimant at the time of finalizing the contract mainly at the pre-bid meeting, did not mention about the circumstances and difficulties which the claimant may face on account of hard rock. Before the commencement of work, no geological survey was carried out by the claimant and an estimate to that effect was not sanctioned by the respondent. The claimant never produced any evidence of hard rock except its correspondence in respect of the same. The findings of the geologist report dated 30<sup>th</sup> August, 2010 nowhere mentioned that there was very hard rock. The report suggested to use appropriate suitable method for excavation in hard rock other than ordinary blasting and control blasting.

296. The said witness deposed that the Chief Engineer of KIDC had visited the site on 30<sup>th</sup> April, 2010 and also submitted an inspection note. The chief engineer in his inspection note dated 30<sup>th</sup> April, 2010 did not state about allowing the claimant to continue work by chiseling. There is a disparity between the letter issued by the executive dated 20<sup>th</sup> May, 2010 and inspection note of the chief engineer dated 30<sup>th</sup> April, 2010. The letter dated 28<sup>th</sup> May, 2010 issued by the executive engineer was not in consonance with the inspection note of the chief engineer and thus the said letter dated 28<sup>th</sup> May, 2010

cannot be accepted. It was deposed that though the claimant by its letter dated 7<sup>th</sup> May, 2010 had requested for extra expenditure, the said demand being not in consonance with the terms of the contract agreement and thus could not be considered.

297. The said witness deposed that prior approval for the proposal submitted by letter dated 12<sup>th</sup> June, 2010 was never taken by the claimant and thus claim raised as regards to hard rock excavation of tail channel, chainage 200 meter to 900 meter at the rate of Rs.600/- per cubic meter could not be accepted. He deposed that the rates demanded by the claimant were never approved by the KIDC. The extra items claimed by the claimant vide letter dated 17<sup>th</sup> July, 2010 are beyond the scope of contract agreement. In para 41 of his affidavit of evidence, he deposed that neither the KIDC nor CIDCO had approved the project cost of Rs.1038.77 crores. He deposed that the payment was made as per tender. The extra provisional rates were subject to approval from CIDCO. The claimant had used excessive machineries and excessive manpower without prior permission of the respondent.

298. In paragraph 45 of his affidavit in lieu of examination-in-chief the said witness deposed that though the executive engineer is the engineer in charge as per the terms of the contract, however it is obligatory on the said engineer in charge to obtain prior approvals from the competent authority before giving any approvals for use of batching plant for concrete work to the claimant by letter dated 14<sup>th</sup> December, 2010. In this case, the executive engineer had not obtained any such prior approval from the competent authority. He deposed that the said letter dated 14<sup>th</sup> December, 2010 was thus not binding upon the KIDC. It was the responsibility of the claimant to get the approvals of the rates for the concrete using batching plant from the competent authority before starting of the concrete by batching plant. The claimant ought not to have acted in anticipation of sanction of the executive engineer. In the said affidavit the said witness deposed that

entire claim petition filed by the claimant deserves to be dismissed. There was no cross-examination of the said witness by the claimant's counsel on various parts of the affidavit in lieu of examination-in-chief.

299. CIDCO examined Mr. Pranik V. Mul who was working as superintendent engineer as the sole witness. He filed his affidavit in lieu of examination-in-chief before the Arbitral Tribunal to prove the contents of the written statement filed by CIDCO. In his examination-in-chief he relied upon clause B13 of the agreement entered into between the CIDCO and KIDC which provides that KIDC shall seek financial approval of CIDCO, in the event of variations in the quantities or execution of some additional work which in the opinion of the chief engineer, WRD Konkan region was absolutely necessary prior to execution. CIDCO was to bear the additional enhanced cost in excess of the approved project, which work however was to be executed only with the prior written approval of CIDCO. The said witness deposed that the work allegedly undertaken by the claimant was without approvals/sanction of CIDCO, hence CIDCO was not liable to pay for any such alleged additional work carried out by the claimant. In the said affidavit the CIDCO disputed the claims made by the claimant in toto. It was deposed that the amounts claimed by the claimant were highly inflated. The said witness also disputed the correctness of the measurement which were recorded by the claimant and KIDC. He deposed that those measurements were still on ad-hoc basis and the final measurements were required to be certified by KIDC so as to ascertain the nature of work and the extent of work carried out by the claimant at site.

300. The said witness examined by the CIDCO was cross-examined by the KIDC as well as by claimant's counsel. There was hardly any cross-examination of the said witness by the claimant's counsel. The deposition made by the said witness thus remained uncontroverted. In his cross-examination by the claimant's counsel whether it would be

correct to say that work of concreting was being carried out using the batching plant, the said witness deposed that at that time in the month of October or November 2011, no concrete work was in progress but the batching plant was at sight.

301. A perusal of the oral evidence led by the claimant, KIDC and CIDCO clearly indicates that there was a serious dispute raised by KIDC and CIDCO in respect of the measurement submitted by the claimant and the rates. There was no sanction of any additional rates even according to KIDC in the affidavit in lieu of examination-in-chief filed by its witness. Similar deposition was made also by the witness examined by the CIDCO. There was no cross-examination on this part of deposition made by the learned counsel for the claimant. The witness examined by the claimant could not produce any cross section or L section required for the purpose of carrying out measurement. Only document relied upon by the claimant's witness volume CD-9 which was the measurement only in respect of earth work and was in possession of anti-corruption bureau.

302. The question that arises for consideration of this Court is whether Arbitral Tribunal has considered any part of the oral evidence led by any of the parties in respect of claim nos.1 and 2 or not. Insofar as other claims are concerned, this Court will consider that issue separately while dealing with those claims. In light of the aforesaid crucial part of the evidence on record, I will now examine whether Arbitral Tribunal has ignored any vital piece of evidence while allowing claim nos. 1 and 2 or has only allowed those claims merely on the basis of alleged admission on the part of KIDC or not.

303. A perusal of the impugned award insofar the claim nos.1 and 2 is concerned, it is held by the Arbitral Tribunal that in the statement of defence of KIDC and CIDCO have taken inconsistent stands. KIDC

has categorically admitted in its pleadings before the High Court that the claimant was entitled to some of the items claimed by it. Even in the statement of defence and its elaborate written submissions submitted before the Arbitral Tribunal, KIDC has categorically admitted some of the claims of the claimant. It is held that as far as CIDCO is concerned, despite the repeated finding by its own expert committee, CIDCO has denied most of the claims. There is thus great variance and inconsistency between the pleadings of KIDC and those of CIDCO before the Arbitral Tribunal.

304. It is held that it was one of the contentions of the claimant before the Arbitral Tribunal that the contract dated 12<sup>th</sup> May 2009 was between the claimant and KIDC. CIDCO was not party to the said contract. It is held that the claimant is not a party to the contract dated 23<sup>rd</sup> September 2009 between KIDC and CIDCO. The terms of the contract between the claimant and the KIDC cannot be changed unilaterally, behind the back of the claimant, either by KIDC or by CIDCO, particularly when such change is clearly prejudicial and detrimental to the interest of the claimant and its rights under the contract with KIDC. The claimant has admitted that KIDC had recommended the claims made by the claimant to CIDCO however, contended that there was neither any acceptance nor any refusal on the part of CIDCO.

305. It is also contended by the claimant before the Arbitral Tribunal that the claimant was called upon to proceed with the work so as to adhere to the schedule of the work and site inspections were carried out repeatedly by the engineers of both KIDC and CIDCO and progress of work was recorded in the inspection notes. However, the KIDC has refused to make payment to the claimant. It was urged before the Arbitral Tribunal that KIDC being an instrumentality of State within the meaning of Articles 12 and 14 of the Constitution of India cannot act arbitrarily even in the realm of contract. The claimant also

placed reliance on various judgments of the Supreme Court in support of the submission that promissory estoppel applies to the contract between the parties.

306. It was contended by the claimant before the Arbitral Tribunal that the claimant relied upon the instructions of the KIDC and the conduct of engineer of CIDCO and consequently altered its position to its detriment which attracts the principle of promissory estoppel in favour of the claimant. The Arbitral Tribunal placed reliance on the judgment of the Supreme Court in the case of ***Union of India Vs. Khetra Mohan Banerjee*** delivered in Civil Appeal No.206 of 1961 on 21<sup>st</sup> November 1962 and held that the clause of the contract considered by the Supreme Court in the said judgment was identical to clause 14 of the contract awarded to the claimant by KIDC and held that the claimant had complied with the requirement of clause 14 of the contract would be entitled to the rate of Rs.12,073/- per cubic meter for M-15 concrete. It is held that the basis of KIDC recommending the rate of Rs.12,073 per cubic meter is explained in the revised estimate. The Arbitral Tribunal also placed reliance on the judgment of the Supreme Court in the case of ***Hyderabad Municipal Corporation Vs. M. Krishnaswami Mudhaliar and another***, (1985) 2 SCC 9 and in the case of ***Bharat Petroleum Corporation Limited Vs. M/s.Great Eastern Shipping Company Limited***, (2008) 1 SCC 503.

307. In paragraph 32 of the impugned award, the Arbitral Tribunal held that insofar as the claim for work of M-15 concrete is concerned, the said claim was major component of the first claim for Rs.186.89 crores. The rate claimed by the claimant for M-15 concrete was Rs.8,756.85 per cubic meter for quantity of 146000 cubic meter. However, on actual measurement, the quantity was found to be 136634 per cubic meter. The KIDC recommended only Rs.12,073 per cubic meter by letter dated 14<sup>th</sup> December 2010 signed

by the Executive Engineer of KIDC. Learned counsel for the claimant also placed reliance on letter dated 22<sup>nd</sup> September 2010 issued by the KIDC to CIDCO after joint inspection was carried out by all parties concerned including CIDCO on 17<sup>th</sup> September 2010 before the Arbitral Tribunal.

308. The Arbitral Tribunal thereafter referred to the order passed by this Court in the writ petition filed by the claimant holding that since the completion of project was in public interest, the claimant was directed to resume the work on receiving Rs.100.30 crores. In my view, the Arbitral Tribunal failed to notice that the said order passed by this Court was without prejudice to the rights and contentions of all the parties and on the terms and conditions imposed by this Court while passing the said order. The claimant however, did not comply with those terms and conditions and thus could not avail of the liberty granted by the said order passed without prejudice to the rights and contentions of both the parties. The reliance thus placed by the Arbitral Tribunal on the said order is misplaced. In paragraph 34 of the impugned arbitral award, the Arbitral Tribunal held that the claimant was not a party to the contract between the KIDC and CIDCO and there was no privity of contract between the KIDC and CIDCO. The claimant had received all payments under RA Bill Nos.1 to 10 from KIDC and the claimant was not concerned with the internal arrangement between the KIDC and the CIDCO.

309. Before the Arbitral Tribunal, the claimant itself placed reliance on minutes of meetings of steering committee which were attended by the Officers of CIDCO, KIDC and the State of Maharashtra. It was also the case of the claimant specifically before the Arbitral Tribunal and also before this Court that CIDCO was participating in all meetings and also used to visit the site through its Officers from time to time. The claimant also admitted that the earlier 10 RA bills were paid by CIDCO to KIDC and in turn, the KIDC to the claimant. It is

not in dispute that the claimant itself had filed a writ petition before this Court seeking relief against CIDCO for funding the KIDC in respect of the same dispute. The involvement of CIDCO from time to time in the contract awarded to the claimant was admitted by the claimant before the Arbitral Tribunal and also before this Court.

310. The claimant itself relied upon the revised estimate submitted by the KIDC to CIDCO for approval. KIDC had informed the claimant about such revised estimate submitted by KIDC to CIDCO for approval. The claimant never raised any objection at any point of time that KIDC was not required to obtain any approval or sanction for any payment from CIDCO. The claimant also did not raise any objection as to why the CIDCO had paid the first 10 RA bills through KIDC. The CIDCO was directed to deposit more than Rs.28 crores in this Court which is lying deposited in the Fixed Deposit. This Court while passing the said order and referring the dispute between the parties, had made it clear that the said amount would be subject to the outcome of the arbitral award. Learned arbitrator also has permitted the claimant to withdraw the said amount deposited by the CIDCO. In rejoinder filed before the Arbitral Tribunal, the claimant did not dispute that the KIDC was required to obtain sanction from CIDCO for any variation in quantity or extra work. The Arbitral Tribunal has totally ignored the pleadings and the evidence filed and led before the Arbitral Tribunal to this effect in the impugned award.

311. In paragraph 36 of the impugned award, the Arbitral Tribunal allowed the claim of Rs.177.65 crores, insofar as claim no.1 is concerned, based on the alleged admissions on the part of the KIDC. The Arbitral Tribunal held that amount of Rs.186.89 crores was as per the rate of Rs.8756.85 per cubic meter. The KIDC has allegedly admitted the claim only to the tune of Rs.177.65 crores. The Arbitral Tribunal accordingly allowed the said claim of Rs.177.65 crores. The claimant did not press the remaining amount of Rs.9.24 crores out of

the claim of Rs.186.89 crores. The Arbitral Tribunal while awarding the said claim @ Rs.177.65 crores has not considered the dispute raised by KIDC itself and also by CIDCO, not only in the pleadings but also in the oral and documentary evidence led before the Arbitral Tribunal disputing the said claim no.1. The Arbitral Tribunal has totally overlooked the important aspect of the matter that making recommendation and grant of sanction are two different stages. Merely because the claim made by the claimant was recommended by the KIDC to CIDCO for payment, that would not amount to sanction of the claim. Recommendation will be enforceable only when it is sanctioned.

312. There was non-compliance of condition 14 of the contract by the claimant. The claimant was fully aware that the entire project of Balganga was funded by CIDCO. The claimant thus could not have been allowed to urge that CIDCO was not at all concerned with the project. All payments were received by the claimant made by CIDCO through KIDC. Even in these proceedings, the claimant had pressed interim relief against CIDCO. CIDCO has deposited Rs.50 crores in this Court without prejudice to the rights and contentions of both the parties. The claimant has already withdrawn the said amount upon furnishing security as directed by this Court by an interim order.

313. It is not in dispute that in the writ petition filed by the claimant before this Court, CIDCO was the main party in the said writ petition and the relief was sought against the CIDCO. The CIDCO had raised various disputes in respect of claims made by the claimant. This Court had accordingly recorded the consent of the parties that all disputes between the parties were referred to the arbitration. The claimant had agreed specifically to refer all disputes to the arbitration irrespective of whether there was separate arbitration clause in the contract between the KIDC and the CIDCO or not. The parties also agreed that each of the parties shall appoint or nominate one arbitrator each.

This Court has also granted liberty to the respondents to file written statement and counter claim. In my view, the Arbitral Tribunal thus was not right in holding that CIDCO had nothing to do with the matter and more particularly in respect of the contract between the claimant and the KIDC. The dispute between the CIDCO and KIDC was also referred to the arbitration of the same Arbitral Tribunal.

314. It is not in dispute that the claimant had made claim not only against the KIDC but also against the CIDCO and the State Maharashtra in the statement of claim. CIDCO was also allowed to file written statement and to lead oral and documentary evidence before the Arbitral Tribunal and also to cross-examine the witnesses examined by the claimant. In my view, the award thus shows total perversity and patent illegality on the face of it while allowing the claim no.1. Since there was dispute raised not only by CIDCO in various parts of the written statement, amended written statement and in the oral evidence led before the Arbitral Tribunal specifically denying all the claims, the Arbitral Tribunal could not have allowed the said claim no.1 on the basis of the alleged admissions on the part of the KIDC but ought to have considered the pleadings and oral evidence.

315. The Arbitral Tribunal, in any event, ought to have been considered the entire paragraphs in the pleadings and not any paragraph in isolation of the pleadings filed by the KIDC. The Arbitral Tribunal ought to have appreciated that the claimant was required to prove its claims independently and could not have allowed the claim only on the basis of the alleged admissions on the part of the KIDC. The Arbitral Tribunal itself has taken a view that the pleadings of KIDC also shows inconsistency in its own pleadings and also there is inconsistency of pleadings between KIDC and CIDCO. Be that as it may, any alleged admissions in the pleadings can be explained at the time of evidence. In this case, the witness examined by the KIDC had

disputed the claim of the claimant in the oral evidence led by the said witness and also during the course of the cross-examination of the claimant's witness.

316. Insofar as the reliance placed by the Arbitral Tribunal on the judgment of Supreme Court in case of ***Union of India vs. Khetra Mohan Banerjee*** (supra) is concerned, a perusal of the clause of the contract considered by the Supreme Court in the said judgment and the facts before the Supreme Court clearly indicates that the clause as well as the facts before the Supreme Court were totally different than the facts and the clause before this court. In this case the KIDC had not accepted the rates demanded by the claimant and had only conveyed to the claimant that the claims made by the claimant were sent to the CIDCO by way of revised estimate for approval. The said approval was pending before the CIDCO. The claimant was fully aware of the formation of the committees by CIDCO in view of the vast difference in the rates claimed by the claimant.

317. Similarly the reliance placed by the Arbitral Tribunal on the judgment of Supreme Court in case of ***Bharat Petroleum Corporation Limited vs. Great Eastern Shipping Company Limited*** (supra) is also totally misplaced. There was no silence on the part of KIDC or CIDCO on the claims made by the claimant. The claimant was fully aware that the KIDC was required to obtain prior approval from CIDCO for all extra items and the rate for such extra items. The judgment of Supreme Court in case of ***Bharat Petroleum Corporation Limited*** (supra) is thus not applicable to the facts of this case and is clearly distinguishable. Similarly Supreme Court judgment in case of ***Hyderabad Municipal Corporation*** (supra) is also clearly distinguishable in the facts of this case. Supreme Court in the said judgment held that the claimant would be entitled to 20% extra payment over and above the original rates since the Government had failed to communicate its acceptance of the claimant's demand for

higher rates. The facts before the Arbitral Tribunal were totally different and thus no reliance on the said judgment could be placed by the Arbitral Tribunal.

318. Insofar claim no.2 is concerned, the said claim was also in respect of work of M-15 concrete for the difference of Rs.3,316.15 per cubic meter in the two rates i.e. Rs.14,000/- per cubic meter claimed by the claimant for the quantity of 136634 per cubic meter and Rs.8,756.85 per cubic meter which was the rate claimed for the same quantity under claim no.1. The Arbitral Tribunal has allowed the claim of Rs.45.30 crores on the basis of alleged admission on the part of KIDC for the said amount of Rs.45.30 crores as per revised rate of Rs.12,073 per cubic meter. The Arbitral Tribunal has already awarded part of the said claim for M-15 concrete at the rate of Rs.8,756.85 per cubic meter while allowing the claim of Rs.177.65 crores under claim no.1.

319. Since this claim is also allowed by the Arbitral Tribunal on the basis of alleged admission on the part of KIDC, it would be appropriate to refer to some of the paragraphs of the pleadings filed by KIDC, written arguments filed by KIDC, pleadings filed by CIDCO, written arguments filed by CIDCO and also the oral evidence led by the parties. In the original statement of claim filed by the claimant, it was the case of the claimant that the KIDC vide their letter dated 14<sup>th</sup> December, 2010 informed the claimant that the rate demanded by the claimant for the concrete M-15 as 14,000 and M-20 as 15,000 was considered by the KIDC. It was the case of the claimant that the claimant was further informed that KIDC had analyzed the rate analysis and as per CWC Guidelines, was recommending the rate for concrete M-15 as Rs.12,073/- and M-20 as Rs.12,836.45. The claimant had claimed the rate of Rs.8,756.85 for M-15 concrete. It was urged in the statement of claim that the claimant was entitled for the rate of Rs.14,000/- per cubic meter. The total amount in the bill was

Rs.1,78,37,99,592.88. It was alleged that the claimant was entitled for the total payment of Rs.2,28,90,00,000/-. The amount claimed in the bill was Rs.1,78,37,99,592.88. The claimant claimed the balance amount at Rs.50,52,00,408/- in the said original statement of claim.

320. In the application for seeking amendment to the statement of claim and more particularly in respect of claim no.2 filed on 8<sup>th</sup> May, 2018 and 9<sup>th</sup> May,2018, it was the case of the claimant that the respondent no.1 KIDC vide their letter dated 14<sup>th</sup> December,2010 informed the claimant that the rate demanded by the claimant for concrete M-15 as Rs.14,000/- and M-20 as Rs.15,000/- is considered by KIDC. It was the case of the claimant that it was further informed that KIDC analyzed the rate as per CWC Guidelines and was recommending the rate for concrete M-15 at Rs.12,073/- and M-20 at Rs.12,836.45. The claimant has claimed the rate of Rs.8,756.85 for M-15 concrete as per claim no.1. The claimant however is entitled for rate of Rs.14,000/- per cubic meter according to the letter dated 14<sup>th</sup> December, 2010. It was alleged by the claimant that claimant is thus entitled for total payment of Rs.75.82 crores and demanded the said amount in the said application for amendment of claim no.2. The Arbitral Tribunal allowed the said application for amendment without any basis.

321. In the written statement filed by KIDC on 23<sup>rd</sup> November, 2016 and more particularly in paragraph 99, the KIDC specifically denied that the rates demanded by the claimant for concrete M-15 as Rs.14,000/- and M-20 as Rs.15,000/- was considered by KIDC. KIDC also denied that KIDC had recommended the rate for concrete as Rs.12,073/- for M-15 and Rs.12,836.45 for M-20. The KIDC did not accept the total amount in the bill of Rs.1,78,37,99,592.88 as the rate of concrete assumed by the claimant was not approved by CIDCO and KIDC. The KIDC specifically denied the claim of Rs.50,52,00,408/- claimed by the claimant in that paragraph. The KIDC also contended

that the claim of Rs.50.52 crores against the difference in the rate of concrete cannot be scrutinized merely on the basis of demand submitted by the claimant or merely on the basis of letter dated 14<sup>th</sup> December, 2010 addressed by the Executive Engineer recommending report of concrete as suggested by the claimant. It was specifically contended by KIDC that claimant had to submit a detailed measurement of the work of concrete done by the claimant in the Balganga Dam Project. KIDC also denied the additional claim made by the claimant in the application for amendment of various claims.

322. Insofar as written statement of CIDCO filed on 19<sup>th</sup> October, 2016 is concerned, CIDCO specifically denied the said claim no.2 on the ground that the claims made by the claimant were inflated claims and the rates mentioned as per CWC Guidelines were also inflated rates. CIDCO denied the said claim in *toto* in the written statement. In the additional written statement filed by CIDCO, CIDCO had specifically raised a plea of limitation insofar as additional amount claimed by the claimant in the said application for amendment which was allowed by the Arbitral Tribunal on the ground that those claims were made more than three years of the letter dated 14<sup>th</sup> December, 2010. Even on merits, the CIDCO specifically denied the said claim and contended that even the amount of Rs.8,756.85 claimed by the claimant was also on higher side and was denied. It was specifically contended in the additional written statement that the claimant has not proved its alleged claim of even Rs.8,756.85 in the evidence already led before the Arbitral Tribunal. It is not in dispute that the said application for amendment was made by the claimant after oral evidence of all the parties was already concluded. In the said additional written statement, CIDCO also contended that the said claim no.2 was without support of any documents and was liable to be rejected on that ground also.

323. A perusal of the affidavit in lieu of examination in chief filed by

the first witness of the claimant Mr.Syed M.Peer dated 8<sup>th</sup> May, 2017 clearly indicates that in paragraph 33 of the affidavit in lieu of examination in chief filed by him, the said witness had relied upon the said letter dated 14<sup>th</sup> December, 2010 addressed by the Executive Engineer of KIDC to the claimant and based on the said letter and the CWC Guidelines, the claimant demanded the balance amount of Rs.50,52,00,408/-. Even at that stage also, the claimant did not seek any amendment to the statement of claim and also in the said affidavit in lieu of examination of chief for demanding more amount than Rs.50,52,00,408/-. There was already a cross examination of the said witness on the said affidavit in lieu of examination in chief by KIDC as well as by CIDCO. There was further examination in chief of the said witness by the learned counsel for the claimant. However, no liberty was sought to amend the said affidavit of evidence even at that stage. In the cross examination of the said witness and more particularly in question no.68, a suggestion was put to the said witness by the learned counsel for the KIDC that as per the measurement submitted by the claimant along with 11<sup>th</sup> RA Bill, the claimant was entitled to receive an amount of Rs.26,50,38,509/- only. The said witness however denied the said suggestion. The said witness however in reply to question no.67 admitted that the claimant had received a payment of Rs.25 crores after submission of 11<sup>th</sup> RA Bill.

324. In the affidavit in lieu of examination in chief dated 29<sup>th</sup> July, 2017 filed by a partner of the claimant, in paragraph 46 thereof, though the said witness amended 5<sup>th</sup> line of the said affidavit by deleting the words 'in the bill' and in the 6<sup>th</sup> line substituted the amount of Rs.8,756.85 by Rs.14,000/- for M-15 concrete, the claimant did not amend the claim for the balance sum of Rs.50,52,00,408/- even at that stage in the affidavit of evidence. The said witness was also cross examined by the CIDCO as well as KIDC.

325. A perusal of the affidavit in lieu of examination-in-chief filed by

the witness examined by the KIDC and more particularly paragraph 12 indicates that the even in the affidavit of evidence also KIDC had deposed that the rates assumed by the claimant in 11<sup>th</sup> R.A. Bill were not sanctioned. Detailed measurements with the bills had not been produced by the claimant to substantiate his claim. It was further deposed by the said witness that as per office record, 11<sup>th</sup> R.A. Bill was for an amount of Rs.26,50,38,509/- dated 7<sup>th</sup> November, 2013 and Rs.25 crores were paid to the claimant addressed the said advance R.A. Bill. The said amount of Rs.25 crores had been accepted by the claimant. In para 13 of the said affidavit the said witness specifically disputed the total amount in the bill of Rs.1,78,37,99,592.88/- on the ground that the rate of concrete assumed by the claimant was not approved by KIDC and accepted by CIDCO. The claim of Rs.5,05,200,408/- was specifically disputed in the said affidavit in lieu of examination-in-chief. It was also specifically deposed that merely on the basis of demand submitted by the claimant or merely on the basis of executive engineer's letter dated 14<sup>th</sup> December, 2010 recommending rate of concrete as suggested by the claimant, difference in rate of concrete could not be scrutinized or claimed.

326. It was specifically deposed that as per the prevailing conditions, the rates of extra items were to be approved by the competent authority i.e. Chief Engineer, Water Resources Department. However, there was no cross-examination of the said witness on this crucial aspect. The deposition of the said witness thereby disputing the claim nos.1 and 2 remained uncontroverted. In para 39 of the said affidavit of evidence, the witness of KIDC deposed that the rates demanded by the claimant were never approved by KIDC. Extra items claimed by the claimant vide letter dated 17<sup>th</sup> July, 2010 were beyond the scope of the contract agreement.

327. In the affidavit in lieu of examination-in-chief filed by the witness examined by CIDCO, the said witness also disputed the said

claim no.2 made by the claimant on various grounds. There was hardly any cross-examination of the said witness on various issues including the dispute raised by CIDCO in respect of the claim made by the claimant either by KIDC or by claimant. In the written arguments filed by KIDC insofar as claim no.2 is concerned, the KIDC denied the total amount mentioned in the claim as the rate of concrete assumed by the claimant for the said claim was neither approved by KIDC nor accepted by CIDCO. KIDC also raised an issue that said claim of Rs.75.82 crores against the difference in the rate of concrete could not be scrutinized merely on the basis of demand submitted by the claimant or merely on the basis of the letter dated 14<sup>th</sup> December, 2010 issued by the executive engineer of KIDC recommending rates of concrete as suggested by the claimant.

328. A perusal of the award indicates that though the said claim was specifically disputed by not only CIDCO but also by KIDC, the claimant did not prove the measurements as well as the rate independently, the Arbitral Tribunal totally ignored the vital part of the pleadings and evidence in the impugned award and simplicitor allowed the said claim on the basis of an alleged admission on the part of executive engineer of KIDC in one of the letter recommending the said payment to CIDCO for payment. The Arbitral Tribunal failed to consider that the authority of the said executive engineer challenged by the witness examined by KIDC in his affidavit was not controverted by any cross-examination by the claimant.

329. Be that as it may, since there were serious disputes about the said claim by KIDC as well as CIDCO as is apparent on the face of the record raised in the pleadings as well as in the evidence, the Arbitral Tribunal could not have allowed the said claim merely on the basis of an alleged admission in a letter addressed by executive engineer recommending the said payment. I do not propose to go into the allegations made by CIDCO against some of the officers of KIDC who

were involved in the project in view of the inquiry against the claimant as well as some of the officers of KIDC being pending before various authorities. In my view, the impugned award allowing claim no.2 based on such alleged admission thus shows patent illegality and perversity and thus deserves to be set aside.

330. It is not in dispute that the applicant had applied for amendment of the claim no.2 also seeking larger amount than the amount claimed in the original statement of claim. The applicant did not allege in the application for amendment which was made after completion of the entire oral evidence led by the parties that there was a mistake in the amount claimed in the bill as well in the statement of claim. A perusal of the said application for amendment indicates that the applicant relied upon the said letter addressed by the executive engineer by making the original claim and also while seeking amendment.

331. It is an admitted position that in the additional written statement filed by CIDCO that was a specific plea of limitation raised by CIDCO insofar as additional claims made by the claimant are concerned. Based on such plea raised by the CIDCO, an additional issue of limitation wherein issue no.6A was admittedly framed by the Arbitral Tribunal. A perusal of the arbitral award indicates that though an additional issue of limitation was specifically raised and was later framed by the Arbitral Tribunal in the impugned award, the Arbitral Tribunal has not dealt with the said specific plea of limitation raised by CIDCO at all. It is not in dispute that the claimant had claimed higher amount in the application for amendment insofar as claim no.2 is concerned after expiry of three years from the date of the said letter addressed by the executive engineer. Three years had also expired from the date of the accrual of cause of action in respect of the said claim. In my view, since there was a specific issue of limitation raised and such issue having been framed by the Arbitral Tribunal, the Arbitral Tribunal itself was bound to decide the said issue of limitation in the impugned

arbitral award. The Arbitral Tribunal however has totally ignored the said issue of limitation raised by the CIDCO and framed by the Arbitral Tribunal itself.

332 Learned senior counsel for the claimant vehemently urged before this Court that ultimately the Arbitral Tribunal had awarded the amount lesser than the amount originally claimed in the statement of claim and thus would not have any bearing on the merits even if the issue of limitation is not decided by the arbitral. I am not inclined to accept the submissions made by the learned senior counsel for the claimant that though Arbitral Tribunal has not decided the plea of limitation, it would have no effect on the outcome of the amount awarded by the Arbitral Tribunal.

333. On perusal of the award it cannot be said as to which part of the said additional amount claimed by the claimant has been awarded by the Arbitral Tribunal. Learned senior counsel for the claimant made an attempt to persuade this Court and to take a view that even at this stage Court can decide that the said claim no.2 was not barred by law of limitation. In my view, there is no substance in this submission of the learned senior counsel. If the Arbitral Tribunal has not decided the issue of limitation though specifically raised, this Court while deciding the arbitration petition under Section 34 of the Arbitration Act cannot decide that issue for the first time by going into the merits of the claim and to adjudicate the issue of limitation at this stage. This Court cannot decide whether claim was barred by law of limitation or not in absence of any adjudication by the Arbitral Tribunal on that issue. In my view, the award in respect of claim no.2 awarded by the Arbitral Tribunal thus deserves to be set aside on this ground also.

334. Insofar as the submission of the learned senior counsel for KIDC that the scope of reference to the Arbitral Tribunal was in respect of the non-payment of the dues by the KIDC to the claimant is concerned, in

my view this submission of the learned senior counsel is contrary to the order of reference passed by this Court in the writ petition filed by the claimant itself. All disputes between all the parties were referred to arbitration tribunal by this Court by consent of all the parties. The respondents were also allowed to file counter claim against the claimant. There is no substance in the submission made by the learned senior counsel for the claimant that the *inter-se* dispute between the KIDC and CIDCO did not form part of the writ petition and was thus not part of the reference to the Arbitral Tribunal.

335. perusal of the order passed by this Court clearly indicate that there was a composite reference made by this Court to the Arbitral Tribunal by consent of all parties. This Court while passing the said order had also taken note of the fact that there was no separate arbitration agreement between the KIDC and CIDCO in the agreement entered into between them. There was a separate methodology provided under the said agreement for resolution of dispute. In my view, by consent of all the parties an arbitration agreement was recorded by this Court in the said order of reference between all the parties to the writ petition. There is thus no substance in the submission made by the learned senior counsel that a separate reference was required to be made also in respect of the dispute *inter-se* between KIDC and CIDCO.

336. There is no substance in the submission of the learned senior counsel for the claimant that KIDC did not dispute its liability to pay the dues of the claimant before this Court in the said writ petition. This Court had noticed in the orders passed by this Court from time to time in the said writ petition that there was dispute not only between the claimant and the KIDC on one hand but also between KIDC and CIDCO on another hand which were required to be referred to the arbitration. There is also no substance in the submission that claimant

was not concerned with the *inter-se* agreement between the CIDCO and KIDC regarding funding of the project by CIDCO.

337. Insofar as various submissions made by the learned senior counsel based on the documents and pleadings forming part of the record in support of the case of the claimant however not considered by the Arbitral Tribunal while allowing the claims made by the claimant are concerned, this court cannot consider those submissions and documents while deciding this petition under Section 34 of the Arbitration Act. This Court cannot come to the conclusion that the Arbitral Tribunal though has not referred to those submissions and documents must have kept in mind those submissions and documents also while allowing the claims made by the claimant. The arbitration award itself should speak and disclose the reasons and set out the submissions and documents considered by the Arbitral Tribunal. This Court cannot probe into the mind of the Arbitral Tribunal and consider those additional submissions and documents which were not considered by the Arbitral Tribunal and to come to a conclusion that even those submissions, pleadings and documents also would support the case of the claimant.

338. Insofar as submission of the learned senior counsel for the claimant that an application for recast of the issue was filed by KIDC before the Arbitral Tribunal is concerned, it is not in dispute that the KIDC had filed an application for recast of various issues. Though the Arbitral Tribunal had passed an order that those issues will be considered at the time of final hearing keeping all contentions of all parties open, the arbitration tribunal did not consider those issues sought to be recast by KIDC in the final award rendered by the Arbitral Tribunal.

339. Insofar as issue no.5 framed by the Arbitral Tribunal is concerned, there is no substance in the submission of the learned senior

counsel for the claimant that the Arbitral Tribunal has rightly rendered a finding that there was no reference to agreement between CIDCO and KIDC and thus no such approval was required from CIDCO. The claimant never raised any objection at any point of time while receiving payment of 1 to 10 R.A. Bills and while KIDC seeking approval of CIDCO in respect of R.A. Bill No.11 from CIDCO. The factum of seeking approval from CIDCO was brought to the notice of claimant by KIDC repeatedly. Even the said revised estimate which was relied upon not only by the claimant but also by the Arbitral Tribunal in the impugned award also clearly indicated that the said revised estimate was sent for approval to CIDCO. The learned senior counsel for the claimant had relied upon the conduct of CIDCO while approving the amount claimed by the claimant and also during the course of execution of the work. The claimant thus cannot be allowed to urge that CIDCO had no role to play in the execution of the contract by the claimant or while sanctioning the rates in respect of various alleged extra work and the additional rate demanded by the claimant.

340. Insofar as submission of the learned senior counsel for the claimant that this Court cannot re-appreciate the evidence already appreciated by the Arbitral Tribunal under Section 34 of the Arbitration Act or that the Court cannot sit as an Appellate Court to interfere with the findings of the fact rendered by the Arbitral Tribunal is concerned, in my view since the Arbitral Tribunal has not considered the vital oral and documentary evidence at all, it discloses patent illegality. This Court has power to interfere with such arbitral award under Section 34 of the Arbitration Act.

341. Insofar as the judgment of Supreme Court in case of ***Food Corporation of India*** (supra), ***Hyderabad Municipal Corporation*** (supra), ***M/s.Motilal Padampat Sugar Mills Company Ltd.*** (supra) relied upon by the learned senior counsel for the claimant on the issue of promissory estoppel is concerned, in my view none of these

judgments would apply to the facts of this case. The claimant was not assured of any additional payment either by the KIDC or by CIDCO. KIDC had applied for sanction of CIDCO by submitting a revised estimate to the knowledge of the claimant. The principle of estoppel decided by the Hon'ble Supreme Court in those three judgments would not even remotely apply to the facts of this case. Reliance placed on those three judgments by the learned senior counsel for the claimant is thus totally misplaced.

342. Similarly reliance placed on various judgments of Supreme Court by the learned senior counsel for the claimant on the issue that Article 14 would apply to the facts of this case are also misplaced. It was a commercial contract entered into between the claimant and the KIDC. Learned senior counsel for the claimant failed to demonstrate as to how Article 14 of the Constitution of India was at all attracted to commercial contract post execution of contract or as to how such alleged violation of Article 14 was committed by any of the respondent. Reliance thus placed by the learned senior counsel on those judgments would not assist the case of the claimant.

343. Insofar as the judgment of Supreme Court and Delhi High Court relied upon by the learned senior counsel for the claimant in support of the submission that the principles regarding admissions of parties in pleadings apply to the arbitral proceedings also is concerned, there is no dispute about the propositions of law laid down by the Supreme Court and Delhi High Court in the said judgment. The admissions, if any, in the pleadings however can be explained in the oral evidence. In this case the Arbitral Tribunal has referred to the alleged admission of liability in few paragraphs of the pleading/written argument of KIDC and has totally overlooked the oral evidence led by all the parties including KIDC and CIDCO who had clearly disputed the claim of the claimant. Those judgments thus would not assist the case of the claimant.

344. Claim No.3 :- The claimant had claimed a sum of Rs.23.79 crores towards the refund of security deposit lying with KIDC. The Arbitral Tribunal has dealt with this claim with the claim for specific performance. The Arbitral Tribunal has granted the relief for specific performance in favour of the claimant for the balance work and has held that this claim does not survive.

345. Claim No.4 :- The claimant has claimed a sum of Rs.75 lacs towards the payments alleged to have been made by the claimant to State Police Authorities for the police protection at site. It was the case of the claimant that the police protection was required at the site for carrying out the work. The Arbitral Tribunal held that the fact that the police protection was required at the site for carrying out the work was not seriously disputed before the tribunal. It is held that even the joint measurements were carried out under police protection. Arbitral Tribunal also held that some of the farmers had given their consent for acquisition of their lands for construction of dam. However majority of farmers whose lands were getting sub-merged had opposed the acquisition which was the usual experience, where farmers refused to give up their permanent source of livelihood.

346. Arbitral Tribunal relied upon the affidavit of evidence of the CW-1, CW-2 and also CW-3. It is held by the Arbitral Tribunal that the said CW-3 has deposed that right from the date of survey before starting construction and till the construction was stopped by the claimant, there was requirement of police protection. Arbitral Tribunal accordingly held that payments required to be made to the State Police Authorities were made by the claimant. It is held that there is no provision in the contract between the parties which disentitles the claimant from claiming such expenditure actually incurred by it. The Arbitral Tribunal allowed the said claim in the sum of Rs.50 lacs out of the claim for Rs.75 lacs.

347. This claim was vehemently denied by the KIDC as well as CIDCO in *toto*. It was also urged by both these respondents that this claim was beyond the scope of contract. It is not the case of the claimant that the claimant had at any point of time informed KIDC or CIDCO that police protection was required to protect the site and the equipments and machinery at site and also for protection of the workers and the engineers of the KIDC. Under the provisions of the contract entered into between the parties, it was the responsibility of the claimant to protect the site, its workers, equipments and machinery and not the responsibility of the KIDC. The Arbitral Tribunal has allowed a claim of Rs.50 lacs beyond the terms of the contract and without any basis. The claimant through its witness admitted that remaining earthwork of gorge was not possible to be completed before clearance of forest land. The claimant thus should not have kept the machinery for earthwork at site which would have required any alleged police protection. This part of the claim being beyond the terms of the contract and without proof thus deserves to be set aside.

348. Claim No.5 :- The claimant had claimed a sum of Rs.48,58,44,602/- towards alleged idle machinery, idle labour and idle overheads during three different periods i.e. for the period 1<sup>st</sup> May, 2012 to 31<sup>st</sup> August, 2016. Arbitral Tribunal has allowed this claim at Rs.18.35 crores for the period 1<sup>st</sup> May, 2012 to 31<sup>st</sup> July, 2013. Arbitral Tribunal has held that the letter of demand was issued by the claimant on 16<sup>th</sup> August, 2013. KIDC did not deny this claim and informed the claimant that the claim was submitted for approval. Arbitral Tribunal placed reliance on clauses 34 and 69 of the Special Conditions of Contract and held that the claimant would be entitled to the said amount.

349. A perusal of the evidence led by the claimant in support of this claim indicates that though three witnesses were examined by the

claimant, none of the witnesses produced any proof of any alleged idle labour or machinery or manpower for any of the three periods including the period 1<sup>st</sup> May, 2012 to 31<sup>st</sup> July, 2013. The claimant also did not prove the mitigation of the alleged losses suffered by the claimant, if any, before the Arbitral Tribunal. This part of the award is based on no evidence and contrary to the deposition of the witnesses examined by the claimant in the cross examination by KIDC and CIDCO. The witness CW-1 examined by the claimant when was put a suggestion whether it would be correct to say that after stoppage of work on subject site, the claimant could have moved its workmen and machineries, the said witness deposed that he did not agree with that suggestion. But he agreed that the work was stopped on the site in the year 2012.

350. A perusal of clause 15(3) of the contract clearly provides that if the work is suspended at the instance of KIDC, then the claimant is entitled to claim idle charges for either machinery and labour as per the provisions of clause 69 of the Special Conditions of Contract. It is an admitted that at no point of time, KIDC had issued any notice to stop the work. On the contrary, KIDC had produced sufficient evidence on record to show that the claimant was asked to proceed with the work however the claimant did not recommence the work after stoppage of the work inspite of repeated instructions issued by KIDC. In the evidence led by the claimant, the witness CW-1 admitted in his cross examination that no stop work notice was issued by the KIDC at any point of time to the claimant. The claimant also did not produce any evidence whether he was directed by the KIDC to stop the work nor produced any proof of alleged idleness of labour, machinery, equipment and manpower before the Arbitral Tribunal. The claimant was fully aware and has also admitted in the oral evidence that remaining earthwork of gorge was not possible to be completed before clearance of forest land. The claimant thus should not have kept any machinery for earthwork at site of work idle as alleged by the claimant.

This part of the claim awarded by the Arbitral Tribunal thus deserves to be set aside. In my view, the Arbitral Tribunal has awarded the said claim contrary to the provisions of clause 15(3) of the contract read with clause 69 of the Special Conditions of Contract and the award thus shows patent illegality.

351. Claim No.6 :- The claimant has claimed a sum of Rs.40.66 crores for loss of profit. Arbitral Tribunal has held that since the Arbitral Tribunal has allowed the claim for specific performance of the balance work of 20%, this claim for loss of profit does not survive.

352. Claim No.7 - The Arbitral Tribunal has awarded a sum of Rs.44,43,00,000/- by way of interest under claim no.7 and has awarded further interest @ 6% p.a. on interest in the operative part of the award. The KIDC as well as CIDCO had denied the claims made by the claimant including claim for interest in the written statement as well as in the written arguments filed by them. Arbitral Tribunal has awarded claim for interest on Rs.177.65 crores, on Rs.45.30 crores, on Rs.50 lakhs and on Rs.18.35 crores awarded towards idle charges. In my view, since the award in respect of the principle amount awarded by the Arbitral Tribunal itself deserves to be set aside, arbitral award in respect of the interest awarded by the Arbitral Tribunal consequently also deserves to be set aside.

353. Be that as it may, in the written statement filed by the KIDC as well as CIDCO or either of them there was a reference to clause 17 (4) of the Contract which prohibits payment of interest in favour of the claimant. That clause was specifically relied upon in the written statement filed by KIDC. The Arbitral Tribunal however in the impugned award has totally ignored the said clause while awarding claim for interest. Though in para 57 of the impugned award there is a passing reference to clause 17(4) of the Contract which prohibits any

payment of interest, Arbitral Tribunal held that there were several mistakes in the said clause. It is also held by the Arbitral Tribunal that if the said clause is accepted, it would render the provisions of Section 73 of the Indian Contract Act, 1872 completely nugatory. Arbitral Tribunal held that such clauses would show a typical case of unequal bargaining power between the contracting parties where printed documents running into hundreds of pages are signed without verifying the same. In appropriate case, such clauses may be held to be in the teeth of provisions of either Section 16(2)(a) or 19 of Indian Contract Act, 1872.

354. It was not the case of the claimant before the Arbitral Tribunal that the said clause 17(4) or clause 15(1) which also prohibited payment of any compensation for alteration, restriction of work had rendered the provisions of Section 73 of the Indian Contract Act nugatory or that there was any unequal bargaining between the claimant and the KIDC. It was also not the case of the claimant that the claimant had signed the contract document running into hundreds of pages without verifying the same. Arbitral Tribunal has decided contrary to the pleadings and exceeded jurisdiction by awarding interest contrary to clause 17(4) of the Contract and clause 15(1) thereof.

355. Arbitral Tribunal has also illegally exercised the power of a writ court in the arbitration proceedings by holding that such clauses of the contract would render the provisions of Section 73 of the Indian Contract Act nugatory. The Arbitral Tribunal also illegally held that there was unequal bargaining power between the parties illegally contrary to the case of the parties. The parties as well as the Arbitral Tribunal were governed by the provisions of the contract entered into between the parties. The Arbitral Tribunal in my view has exceeded its jurisdiction by declaring that there was an unequal bargaining power between the contracting parties. This part of the finding rendered by

the Arbitral Tribunal thus deserves to be set aside.

356. The Arbitral Tribunal has also awarded interest on interest in the operative part of the arbitral award and more particularly in clause (C) of the impugned award which also deserves to be set aside.

357. In my view, judgment of Supreme Court in case of ***Jaiprakash Associates Ltd.*** (supra) and judgment of Himachal Pradesh High Court in case of ***Rajkumar Gupta and Ors.*** (supra) relied upon by the learned senior counsel for the KIDC would clearly apply to the facts of this case. The arbitral award awarding interest contrary to the provisions of contract in the facts and circumstances of this case is contrary to the principles of law laid down by the Supreme Court in the case of ***Jaiprakash Associates Ltd.*** (supra) and also contrary to Section 31(7)(a) of the Arbitration and Conciliation Act, 1996.

358. Claim No.8 Arbitration Cost :-

Arbitral Tribunal has awarded cost of Rs.30,00,000/- payable by KIDC and CIDCO to be divided between them equally. In my view, since the entire award insofar as claim for interest as well as principle deserves to be set aside, Arbitral Tribunal could not have awarded any arbitration cost in favour of the claimant. That part of the award also thus deserves to be set aside.

359. The claimant had voluntarily accepted all the terms and conditions recorded in the contract entered into between the claimant and KIDC which contract was in the realm of concluded contract with KIDC. All the rights, obligations and liabilities of the parties were governed by the provisions of the said contract. The clause of the contract permitting the KIDC to terminate the contract does not provide for issuance of any show cause notice to be issued to the claimant before effecting termination of the contract awarded to the claimant by KIDC. However, the Arbitral Tribunal while dealing with

issue nos.2 and 3 has erroneously held that no show cause notice was issued to the claimant either before issuing the Government Resolution or the notice of termination. Principles of natural justice were thus allegedly violated by the KIDC in terminating the contract as well as by the State Government while issuing Government Resolution. The Arbitral Tribunal accordingly declared the said notice dated 28<sup>th</sup> October, 2016 as invalid and null and void and also the said Government Resolution.

360. In my view, since there was a concluded contract between the claimant and KIDC, the terms and conditions of the contract entered into between the parties purely in its executive capacity by KIDC. The relations between the claimant and the KIDC were not governed by any constitutional provision after execution of the contract but were governed only by the terms and conditions of the concluded contract entered into between the parties. Both the parties were entitled to enforce their rights and obligations under the said contract in case of any violation thereof by each other and not under the provision of Constitution of India. The Arbitral Tribunal however proceeded on the premise that the Arbitral Tribunal can exercise the powers of a writ court under Article 226 of Constitution of India and declare the termination of contract as illegal on the ground that there was violation of principles of natural justice in view of the KIDC not issuing any show cause notice before issuing such notice of termination.

361. In my view, Arbitral Tribunal has no power to exercise the powers of a writ court available to High Court or the Supreme Court under Article 226 and 32 of Constitution of India respectively. Parties were governed by the terms and conditions of the contract entered into between the parties. Article 14 of the Constitution of India were not at all attracted in the facts of this case. It was also not the case of the claimant that Article 14 of the Constitution of India was attracted in the facts of this case and the termination of the contract was contrary to Article 14 of the Constitution of India by KIDC by not issuing a show

cause notice. No such show cause notice was contemplated under any of the provisions of the contract entered into between the parties. In my view, the Arbitral Tribunal has thus exceeded all their powers by treating the arbitration proceedings as a writ petition and by exercising powers of constitution court under Article 226 of Constitution of India while dealing with a dispute arising under a commercial contract. None of the judgments relied upon by the Arbitral Tribunal on this issue would at all be attracted to the facts of this case even remotely. The award shows total perversity and patent illegality on this issue also.

362. Insofar as issue no.IV i.e. “whether the claimant is entitled to the specific performance of the agreement” is concerned, the Arbitral Tribunal has answered the said issue in affirmative and in the operative part has held that the claimant is entitled to specific performance of the contract. A perusal of the record clearly indicates that the claimant on its own had stopped the construction work though KIDC had repeatedly called upon the claimant to recommence the construction work. Even before this Court in the said Writ Petition filed by the claimant, this Court had directed the claimant to recommence the balance work on the condition that CIDCO will deposit a sum of Rs.100 crores and claimant would withdraw the same subject to certain conditions. The claimant did not bother to comply with those conditions imposed by this Court without prejudice to the rights and contentions of both the parties. At no stage prior to the commencement of arbitral proceedings or even during the course of arbitral proceedings the claimant showed readiness and willingness to complete the balance work awarded by KIDC. The claimant had failed to prove its readiness and willingness to complete the balance work.

363. There was a serious dispute about the validity of the claims made by the claimant raised by KIDC as well as by CIDCO. The work was stopped by the claimant long back. The Arbitral Tribunal has simplicitor held that the claimant would be entitled to specific

performance of the contract without issuing any further directions. In my view, in the facts of this case where the claimant itself had stopped the work long back, after lapse of so many years, the Arbitral Tribunal could not have exercised their discretion in awarding relief of specific performance in this case. No further directions were even otherwise given by the Arbitral Tribunal. The award is totally vague insofar as relief of specific performance is granted and shows patent illegality.

364. It is not in dispute that forest clearance which was one of the mandatory condition under the contract has not been obtained till date. Substantial part of the balance work falls in the forest area. On this ground, the Arbitral Tribunal could not have awarded relief of specific performance in favour of the claimant. The Arbitral Tribunal while considering the issue nos.2 and 3 has also considered at length about the obligation of party to obtain forest clearance. It is erroneously held by the Arbitral Tribunal that forest clearance was to be obtained by the officers of the KIDC and not the claimant. The contract clause referred by the Arbitral Tribunal in the impugned award and more particularly clause 70.3.2 clearly provided that the claimant shall have responsibility towards forest clearance mentioned in the said clause. The witness CW1 more particularly admitted in his cross-examination that forest clearance was not obtained by the claimant though various steps were taken by the claimant according to the said witness. In my view, the Arbitral Tribunal acted contrary to the terms of the contract and also have not considered the vital evidence while deciding issue nos.2 and 3 in the impugned award. The award thus disclose his patent illegality and deserves to be set aside on this ground also.

365. I therefore pass the following order :-

- (a) Impugned Majority Award dated 3<sup>rd</sup> April, 2019 passed by the Arbitral Tribunal is quashed and set aside.

(b) Claimant i.e. M/s. F.A. Enterprises is directed to return the sum of Rs.50 crores deposited by CIDCO pursuant to an interim order passed by this Court to CIDCO with interest @ 7% p.a. from the date of withdrawal of such amount within 8 weeks from today without fail.

(c) Commercial Arbitration Petition (Lodging) 681 of 2019 with Arbitration Petition No. 793 of 2019 and Commercial Arbitration Petition No. 921 of 2019 are allowed in aforesaid terms.

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

366. This order will be digitally signed by the Private Secretary of this Court. Sheristedar of this Court is permitted to forward the petitioner and the respondent copy of this order by e-mail. All concerned to act on digitally signed copy of this order.

***(R.D. Dhanuka, J.)***