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

Reserved on: 28.01.2020

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Pronounced on: 08.06.2020

+ **O.M.P. (COMM) 370/2017, IA. Nos. 11989/2017, 15164/2017,
3984/2018, 4012/2018**

NTPC LIMITED

..... Petitioner

Through: Mr. Vikas Singh, Senior Advocate
with Mr. Puneet Taneja and Mr.
Mrityunjai Singh, Advocates.

versus

SRI AVANTIKA CONTRACTORS (I) LIMITED. Respondent

Through: Mr. Sachin Datta, Senior Advocate
with Mr. Pallav Palit, Mr.
Lalitendra Gulani, Mr. Amit
Mahajan & Mr. Sankalp Brahma,
Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G M E N T

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Award dated 07.07.2017 passed by the Arbitral Tribunal to the extent it has allowed some of the Claims of the Respondent and has rejected the Counter-Claims of the Petitioner herein. Respondent herein

was the Claimant before the Arbitrator and the Petitioner was the Respondent.

2. It is the case of the Petitioner that vide letter dated 27.02.2012, NTPC awarded the work of 'Site Leveling and Infrastructure Works Package' for its Kudgi Super Thermal Power Project Stage-I (3x800 MW), Karnataka to the Respondent. Contract Agreement was executed on 02.04.2012 with the value of the work being Rs. 1,54,34,54,426/-. The scheduled period for completion was 30 months with the start date as 27.02.2012 and completion date 26.08.2014.

3. Respondent agreed that it shall provide adequate manpower and equipment at the site and would carry out mobilization of resources within one month of the Letter of Award i.e., by the end of March, 2012. Thereafter, the work of site clearance and leveling in the main plant area was to be started. The reciprocal obligation of the Petitioner to handover the land for construction work was to start after expiry of 30 days from the date of Letter of Award as per Clause 6.0.0 of the Agreement.

4. Respondent committed breach in failing to mobilize its resources within one month and deployed only one official, while the Petitioner handed over approx. 175 acres of land in respect of Block Nos. 1 & 2 and progressively handed over land from April, 2012 onwards which was recorded in the Joint Survey records.

5. Scope of civil work to be executed by the Respondent, included site leveling for the plant; construction of phase roads and drains in plant area; sewerage in plant area; diversion of existing drains; raw water

reservoirs; plant boundary wall; watch towers and approach road from State Highway. Subsequently, two Amendments were carried out and the scope of work increased and consequently, the value of work. Petitioner extended the original time period by a further six months i.e., till February, 2015. On 24.03.2014, Petitioner terminated the Contract.

6. Disputes having arisen between the parties, the same were referred to Dispute Resolution Board (DRB), but the decision was not acceptable to both the parties. Respondent, therefore, invoked the Arbitration Agreement on 30.11.2015 and the Arbitral Tribunal, entered upon reference on 23.01.2016. Respondent filed its Statement of Claim raising 36 claims, while the Petitioner filed its Statement of Defence and also raised 16 counterclaims. Respective claims and counter claims are as under:-

“(A) Claims by the Claimant:

<i>Description of Claims</i>	<i>Amount in Rs.</i>
<i>Claim-1: Termination of contract with risk and costs is illegal and arbitrary.</i>	
<i>Claim-2: Refund of Performance Bank Guarantee amount illegally encashed by the Respondent.</i>	3,08,69,089
<i>Claim-3: Refund of Mobilisation Advance Bank Guarantee amount illegally encashed by the Respondent.</i>	4,50,00,000
<i>Claim-4: Refund of retention money withheld at 10% of the gross RA bills</i>	5,94,98,878

<i>Claim-5: Refund of Mobilisation Advance recovered from RA Bill</i>	<i>1,08,74,198</i>
<i>Claim-6: Payment of total work done bills</i>	<i>57,01,01,198</i>
<i>Claim-7: Payment of expenditure incurred towards labour charges and re-handling the steel of 30 metric tonnes.</i>	<i>4,80,000</i>
<i>Claim-8: Payment of balance escalation amount.</i>	<i>6,74,09,612</i>
<i>Claim-9: Payments for unutilized aggregates for road works.</i>	<i>28,50,000</i>
<i>Claim-10: Payments for production of aggregates for filter from excavated rock.</i>	<i>45,00,000</i>
<i>Claim-11: Payments for sand collected at site.</i>	<i>44,10,000</i>
<i>Claim-12: Payments for sand extracted from back waters.</i>	<i>1,20,00,000</i>
<i>Claim-13: Payments for clay bricks available at site</i>	<i>21,00,000</i>
<i>Claim-14: Payments for idling charges for heavy machineries and equipment.</i>	<i>5,75,53,337</i>
<i>Claim-15: Payment of idling charges for skilled and unskilled manpower.</i>	<i>4,26,15,660</i>
<i>Claim-16: Payment for extra lead charges of 1 km on an average due to handing over of site in bits and pieces by the Respondent.</i>	<i>4,50,00,000</i>
<i>Claim-17: Payment for stock piling of approved quality rock excavated by blasting to be used for rock fill works.</i>	<i>60,00,000</i>

<i>Claim-18: Payment for shuttering and scaffolding materials.</i>	<i>1,10,00,000</i>
<i>Claim-19: Payment of advance paid to machinery</i>	<i>80,00,000</i>
<i>Claim-20: Payment of advance paid to skilled and unskilled workers</i>	<i>50,00,000</i>
<i>Claim-21: Payment of advance paid to materials</i>	<i>60,00,000</i>
<i>Claim-22: Payment of advance paid to land owners</i>	<i>20,00,000</i>
<i>Claim-23: Payment of advance for office building and staff accommodation.</i>	<i>1,50,00,000</i>
<i>Claim-24: Payment towards overheads and profits.</i>	<i>11,89,52,804</i>
<i>Claim-25: Payments towards litigation and legal expenses.</i>	<i>14,61,728</i>
<i>Claim-26: Payment towards compensation for trauma and mental agony suffered by the Claimant.</i>	<i>5,00,00,000</i>
<i>Claim-27: Payment towards loss of good will and reputation.</i>	<i>20,00,00,000</i>
<i>Claim-28: Payment of expenditure incurred towards construction of cement storage godown.</i>	<i>20,00,000</i>
<i>Claim-29: Payment towards construction of workshop.</i>	<i>15,00,000</i>
<i>Claim-30: Payment towards office furniture, computers, printers, etc.</i>	<i>35,00,000</i>
<i>Claim-31: Payment towards mess/canteen facilities for the staff and workers.</i>	<i>20,00,000</i>
<i>Claim-32: Payment towards establishing a field</i>	<i>7,00,000</i>

<i>laboratory and with survey instruments.</i>	
<i>Claim-33: Cost of MS Pipes</i>	<i>70,00,000</i>
<i>Claim-34: Payment of hire charges for the equipment, infrastructure facilities taken over by the Respondent.</i>	
<i>Claim-35: Financial compensation towards payment of interest at 18% per annum from the date the amount fell due till the date of payment.</i>	
<i>Claim-36: Financial compensation on account of cost incurred towards the arbitral proceedings.</i>	

(B) *Counter-Claims by the Respondent:*

<i>Description of Claims</i>	<i>Amount in Rs.</i>
<i>Counter-Claim-1: Liquidated damage for delay</i>	<i>9,45,16,626</i>
<i>Counter-Claim-2: Risk & Cost</i>	<i>169,93,00,000</i>
<i>Counter-Claim-3: Recovery against owner issue materials.</i>	<i>1,73,11,839</i>
<i>Counter-Claim-4: Repair charges of electrical installations</i>	<i>8,94,956</i>
<i>Counter-Claim-5: Energy Consumption Charges</i>	<i>3,77,730</i>
<i>Counter-Claim-6: Transportation & loading charges of Steel & Cement</i>	<i>1,43,923</i>

<i>Counter-Claim-7: Royalty Payments</i>	81,56,850
<i>Counter-Claim-8: Removal & Disposal of the Dumped materials from the Reservoir area</i>	2,60,77,680
<i>Counter-Claim-9: Charges for final slope dressing of Site levelling areas</i>	32,00,000
<i>Counter-Claim-10: Final bending & binding charges of steel</i>	1,50,000
<i>Counter-Claim-11: Charges for final slope dressing of embankment</i>	69,91,769
<i>Counter-Claim-12: Contingent water storage facility for hydro-test</i>	-
<i>Counter-Claim-13: Loss of Generation of Electricity</i>	-
<i>Counter-Claim-14: Differential amount in execution of Levelling work</i>	-
<i>Counter-Claim-15: Payment towards litigation & legal expenses</i>	11,26,176
<i>Counter-Claim-16: Payment of Interest</i>	-

7. After completion of pleadings, Tribunal framed the following issues:-

“Issue-1: Whether the Respondent is liable for various delays as set out in the Statement of Claims and, if so, to what extent?”

Issue-2: Whether the Claimant is liable for various delays as set out in the Statement of Defence / Counter Claims and, if so, to what extent?”

Issue-3: *Whether the termination of the Contract by the Respondent at the risk and cost of the Claimant is contractually and legally sustainable?*

Issue-4: *Whether the issue of measurements falls within the jurisdiction of the Arbitral Tribunal to Adjudicate?*

Issue-5: *Whether the Claimant is entitled to the claims from Claim-1 to Claim-36 as set out in the Statement of Claims and, if so, to what amounts?*

Issue-6: *Whether the Respondent is entitled to its Counter Claims from Counter-Claim-1 to Counter-Claim-16 as set out in the Statement of Counter Claims and, if so, to what amounts?"*

8. Out of a total 36 claims raised by the Respondent for a total amount of Rs. 139.14 crores, Tribunal awarded Rs. 50,21,54,497/- towards claim Nos. 2, 4, 5, 6 and 24 and rejected the rest of the Claims. Tribunal awarded interest @ 14% per annum from the date of cause of action till the date of award and post Award interest @ 8.9 % Simple Interest, from the date of the Award till payment. With respect to the Counter-claims of the Petitioner, Tribunal awarded Rs. 2,67,23,699/- towards Counter-claims No. 3, 4, 5 and 6. Accordingly, after setting off, an amount of Rs. 47,54,30,798/- along with interest is due to the Respondent.

Issue Nos. 1 & 2

9. Respondent set out various delays attributable to the Petitioner while the Petitioner denied the same.

A. Delay-1: Due to Handing Over the Site Free from Encumbrances.

Provision of the Contract towards handing over the site is Clause 20, GCC and is as under:-

“20. Handing over of Site

20.1 The Employer shall make available the Site to the Contractor as soon as possible after the award of the Contract free of encumbrance. The Contractor shall not be permitted to enter on (other than for inspection purposes) or take possession of the Site until instructed to do so by the Engineer-in-Charge in writing.

20.2 The Employer reserves the right to hand over the Site in parts progressively to the Contractor: The Contractor will be required to take possession of the Site without any undue delay and do Work on the released fronts in parts without any reservation whatsoever.

20.3 However, in case of any delay in handing over of the Site to the Contractor, which delays the performance of the Work, commensurate to the resources, mobilized by the Contractor, then the Contractor will be eligible for suitable extension in time for completion of the Works or any other compensation as per the provisions of GCC Sub-Clause 29.7.”

Clause containing provisions with respect to delay by the employer is as under:-

“29.7 Delays by Employer or his Authorised Representative

29.7.1 In case the Contractor's performance is delayed due to any act of omission on the part of the

Employer or his authorised representative, then the Contractor shall be given appropriate extension of time for the completion of the Works, to the extent such omission on the part of the Employer has caused delay in the Contractor's performance of his work. Regarding reasonableness or otherwise of the extension of time, the decision of the Engineer-in-Charge shall be final.

29.7.2 If such delays by the Employer have resulted in any increase in the cost to the contractor, the Contractor shall be eligible to claim demonstrable and reasonable costs supported by full details of such increased costs incurred by him with all documentary evidence. The Employer shall examine the justification for such a request for claim and if satisfied, the extent of compensation shall be mutually agreed depending upon the circumstances at the time of such an occurrence."

In Clause 8 of SCC, 5 milestones were set for completion of the work which are as under:-

<i>Sl. No.</i>	<i>Completion period from date of Award</i>	<i>Details of works to be completed</i>	<i>Value of works (as percentage of total value of contract) to be completed during the specified period</i>
<i>1.</i>	<i>At the end of 6th month</i>	<i>Site clearance and levelling in main plant area and other</i>	<i>20 %</i>

		priorities areas of Stage-I (Part), Site clearance and levelling in balance areas (Part) excavation/embankment works for raw water reservoir works for live storage (part), excavation / embankment works for dead storage (Part), priority area roads and drains in plant area (Part), boundary wall for plant area (Part).	
2.	At the end of 12 th month	Balance site clearance and levelling in main plant area and other priorities areas of Stage-I , Site clearance and levelling in balance areas (Part), excavation / embankment works for raw water reservoir works for live storage (part), excavation / embankment works for dead storage (Part), finishing works for reservoir for live storage (Part), finishing works for reservoir for live storage (Part), finishing works for reservoir dead storage (Part), priority area roads and drains in plant area (Part), watch towers (Part), sewerage works (Part).	50%
3.	At the end of 18 th month	Site clearance and levelling in balance areas (Part), balance excavation / embankment works for raw water reservoir works for live storage, excavation / embankment works for dead storage (Part), finishing works for reservoir for live storage (Part), finishing works for	70%

		<i>reservoir for live storage (Part), finishing works for reservoir for dead storage (Part), balance priority area roads, drains in plant area (Part), balance boundary wall for plant area, watch towers (Part), sewerage works (Part), diversion drain works (Part).</i>	
4.	<i>At the end of 24th month.</i>	<i>Balance site clearance and levelling in balance area, excavation/ embankment works for dead storage (Part), excavation/ embankment works for raw water reservoir works for live storage, finishing works for reservoir for live storage (Part), finishing works for reservoir for dead storage (Part), balance works for drains in plant area, balance works for watch towers, sewerage works (Part), balance works for diversion drain works.</i>	90%
5.	<i>At the end of 30th month.</i>	<i>Balance excavation/ embankment works for raw water reservoir works for dead storage, finishing works for reservoir for live storage (Part), balance finishing works for reservoir for dead storage, balance sewerage works (Part).</i>	100%

(a) Petitioner contended that it had reserved its right to handover the site in parts to the Respondent and relied on Clause 20.2 that no delay can

be attributed on account of site being handed over in parts and progressively. Respondent contended that site free from hindrances was not handed over on time and this delayed the execution of work. Tribunal perused the Joint Protocol Statements regarding handing over of the site, signed by both parties and observed that the first handing over of the site was on 18.04.2012, which was two months after the Contract and despite the Respondent requesting for Survey Numbers which were not yet acquired, no information of the Survey Numbers and in some cases, even the extent of the area handed over, was given. Tribunal found, based on Clause 20.1, that the Employer was under a mandate to make the site available as soon as possible, after the Award of the Contract, free of encumbrance and Respondent was prohibited from entering upon the Site or taking possession, until so instructed in writing by the Engineer-In-Charge. Clause 20.3 provided that in case of delay in handing over the site, Respondent was entitled to suitable extension of time/compensation under Clause 29.7. A finding was rendered on a conjoint reading of Clauses 20.1, 20.2 and 20.3, that the clauses could not be construed to give an unqualified right to the Petitioner to handover sites in parts, at any time and delay in handing over is not abated by Clause 20.2.

(b) Tribunal dealt with the dates of handing over of the blocks and the remarks of the Respondent, while taking over the land, that survey numbers had not been acquired in certain Blocks, while in the others, though acquired, there was no free access and in one of the Blocks, Petitioner had only handed over symbolic possession on 13.02.2013. Respondent's letter dated 24.09.2013 indicated that work started in

December, 2012, only for Lagoon-1 comprising 175 acres, out of which 38 acres were still not handed over. Likewise for Lagoon-2, with total area of 210 acres, nearly 147 acres were not available. The Tribunal referred to a table (extracted in Para 35 of the Award) and concluded that the start of work was delayed, resulting in initial delay of six months, and this was on account of the delay in handing over the areas. Tribunal was of the view that reasonable extension to the Respondent should have been afforded by the Petitioner and the six months' extension granted was not reasonable, as even on the date of termination, 24.03.2014, large areas were not handed over to the Respondent.

(c) Petitioner had contended that Respondent had not mobilized its men, material and machinery and thus the work got prolonged and relied on certain Minutes of Meeting(s). Based on the Joint Protocol documents, Tribunal found that various areas, required on priority, had been handed over jointly by the Respondent, to the other agencies, after completion of leveling between 18.08.2012 and 06.02.2014 and there was no delay by the Respondent. The contention of delay in mobilization was also rejected by the Tribunal on the ground that unless the land was handed over as per the schedule, Respondent could not be faulted. Secondly, within 11 months from July, 2012 to May, 2013, total quantity of excavation and site leveling was 50 lakh CUM, which could not be achieved without adequate mobilization. Thirdly, Petitioner had issued two Amendments, increasing the volume and the value of work. Amendment-1 was issued on 18.11.2013, while revised L-2 network schedule was finalized on 09.11.2013. Amendment-2 was issued on 28.02.2014, increasing the

volume and value of the Contract and this was after the issue of revised construction drawings for the reservoir on 19.02.2014. Despite the Amendments, the Contract was terminated on 24.03.2014, within the original contract period ending on 26.08.2014, ignoring that extension of time had been granted upto February, 2015.

(d) Finally the Tribunal concluded as under:-

“44. In the light of the above findings and observations, the Arbitral Tribunal holds that the Respondent is liable for the delay due to handing over of hindrance free site for execution of the work and further that there was a continuing delay in the handing over of 28% of land in the Lagoon-1 and 70% of land in Lagoon-2 which entailed the Claimant for a just and reasonable extension of the Contract for a period of 13.50 months beyond the original end of Contract i.e., 26.08.2014 to 11.10.2015.”

B. Delay-2: Delay Due to Obstructions/Agitations by Land Owners/Locals.

(a) Respondent contended that the intermittent delay of six months between May, 2012 and March, 2014 was on account of obstructions caused by the locals. Petitioner was obliged to provide hindrance free site and address the issue of local disturbances and Respondent was thus entitled to extension of time, on account of the default by the Petitioner, under Clause 29.5 and Clause 7, GCC. Petitioner denied any delay and argued that it had addressed all the issues promptly and yet, reasonable extension of time was granted taking a practical view in the matter. Taking the delay under this Head concurrent with the period of Delay-1,

Tribunal held that no additional time was required to be granted and held as under:-

“48. The period of delay is sought from May-2012 to March-2014. This delay is not for a continuous period but it is intermittent days for which details are not made available. In any case this delay falls under Delay-1 which is continues till March-2014. As such the Arbitral Tribunal finds that there are no grounds to award to consider this delay.”

C. Delay-3: Delay in Issuing Construction Drawings and Belated Revision thereon.

(a) Respondent set out that there was delay in issuing construction drawings as well as major revisions in the drawings for construction of Lagoons I and II, which constituted more than 40% of the Amended contract value. Petitioner refuted the same on the ground that main revised layout drawings for reservoir were released on 02.04.2013, incorporating additional area and further modified one on 19.02.2014, recording that modification was necessitated due to failure of Respondent to arrange filter materials in time. Relying on the letters on record, as well as detailed Minutes of Meetings between the parties dated 12-13/11/2013, Tribunal found that Respondent had requested for change in the design, through their letters dated 13.04.2013 and 25.10.2013, especially for modification in the design of reservoir embankment and after due verification, Petitioner had modified the drawings and issued them on 19.02.2014. Petitioner was at liberty to reject the request but on the contrary, it actually carried out the modifications and issued modified designs on 19.02.2014.

(b) Tribunal concluded as under:-

“56. In view of the above the Arbitral Tribunal finds that modified construction drawing in respect of embankment sections of the reservoir work was issued for execution on 19.02.2014. This period from 13.04.2013 to 19.02.2014 was on account of the process of modification of the embankment design.

57. In view of the above findings and observations the Arbitral Tribunal holds that delay for the above period is a concurrent delay with Delay-1 period.”

D. Delay-4: Delay Due to Non-Availability of Required River Sand Due to Prohibition of Sand Mining by NGT and Non-Availability of Required Aggregates Due to Ban on Quarrying by the Karnataka State Pollution Control Board.

(a) Respondent submitted that due to the restrictions it was not possible to extract sand from the river bed which had serious implications, both, on time and cost. A request was also made to Petitioner to recommend, as a special case, to the Deputy Commissioner, for granting permission to borrow sand from certain adjoining projects/ areas and Respondent also undertook to clear the liability for payment of Royalty. Aggregates were not available due to restrictions by the Karnataka State Pollution Control Board on quarrying and letters in this regard were placed before the Tribunal.

(b) Petitioner denied the contentions stating that river sand was available in plenty in the nearby project until 05.08.2013, the date on which ban was imposed by NGT. It was the inaction of the Respondent which was the reason for poor progress towards construction of on the

boundary walls, drains watch towers etc. Besides, Petitioner had permitted use of M-sand and it relied on various documents in this regard.

(c) Tribunal found that the letter of the Respondent dated 04.04.2012 was merely a letter intimating to the Petitioner that there was inadequacy of sand and requested to make a recommendation to the Deputy Commissioner to grant permission to borrow sand. Petitioner had requested Deputy Commissioner for blasting license for aggregates and NOC was given by him on 11.10.2012, where after, the Controller of Explosives granted permission on 19.10.2012. The Order of NGT regarding the ban was on 05.08.2013 and therefore, till that date no responsibility could be cast on the Petitioner. In the light of the above, the finding of the Tribunal is as under:-

“65. Further the Arbitral Tribunal finds from the MOM dated 12-13/11/2013, Pg.1530, SOC Vol.8, reproduced earlier, at Para-5 of the MOM, regarding scarcity of sand, the Respondent has stated that "NTPC informed that they have already taken up the issue with the state govt. at the level of secretary mining and recently with chief secretary, Govt. of Karnataka for early resolution for issue of sand availability in the area. The issue is being pursued with the State Govt. for specific allocation for the Kudgi project and NTPC will inform of the further developments". This aspect has been already dealt with by the Arbitral Tribunal under delay regarding issue of revision of drawings wherein it is held by the AT that consequent upon the non availability of sand the Respondent modified the designs as per the MOM dated 12-13/11/2013, as observed earlier, and the modified designs were issued for the reservoir embankment on 19.02.2014.

66. *In the light of the above facts, circumstances, observations and findings of the AT, the delay due to the consequent effect of non availability of sand and aggregates resulted in modification of drawings and continued up to 19.02.2014.*

67. *In view of the above, the Arbitral Tribunal holds that the Delay-4 is a concurrent delay with Delay-1 period.”*

E. Delay-5: Delay in Release of Price Escalation Bill Amount

(a) Respondent set out the delay on the ground that monthly Bills for price adjustment were based on value of work carried out in particular months, while the Petitioner restricted the price adjustment Bills considering the value of the work as per L-2 network, for a particular month, which according to the Respondent, was contrary to the Contract and there was delay in payments. Petitioner denied the contention relying on Clause 25.6 and 25.7 GCC.

(b) Tribunal perused the Clauses and observed as under:-

“72. However as per Clause 25.6 the emphasised portion, reproduced above, the provision therein makes it clear that the eligibility for claims of price adjustment shall lie always when the quantum of work done is more than or equal to the scheduled quantum of work as per the work schedule. As this is a provision under the Contract the AT finds that when the price adjustment is regulated as per the provisions of the Contract by the Respondent no delay or responsibility can be cast on the Respondent. Further Clause-25.7 deals with entitlement for payment of claim or liable for refund of Contract price adjustment

for the period beyond the schedule date of execution of work viz., 26.08.2014. As the Contract was terminated on 24.03.2014 within this Contract period the question of applicability of Clause-25.7 does not arise.

73. In the light of the above observations and findings, the Arbitral Tribunal is of the considered opinion that no delay can be cast on the Respondent with respect to Delay-5.”

F. Delay-6: Delay Due to Non-Payment of Work Done Bills as Per the Contract.

(a) Respondent contended that it had raised RA Bill-15 in March 2014, while Petitioner contended that this Bill did not take into account the initial levels as produced by it. As per the Respondent, Volumes 6 & 7 contained disputed levels and the correct ones were jointly signed by the authorized representative and were available in Volumes 3/1 to 3/10 of the rejoinder. Petitioner disputed and submitted that Book 12 to Book 16 contained the agreed levels, jointly taken by the parties.

(b) Tribunal found that Book 12 to Book 16 were the same, as the levels in Volume 6 & 7 of Statement of Claim and were disputed and therefore, the focal point of dispute was whether the levels given by Respondent in Volumes 3/1 to 3/10 were correct or those furnished by Petitioner in Books 12 to 16. The Tribunal held as under:-

“76. The AT finds that the adjudication of this matter and the consequent outcome of the adjudication are covered under Issues 4 & 5. In view of this, the AT finds that it is unnecessary to go into these details of

dispute regarding the levels while deciding on the delay under this issue. Be it as it may. The RA Bill-15 which was initially submitted in Feb-2014 for an amount of Rs.47.15Cr and later re-submitted during Mar-2014 and that the termination of Contract was made on 24.03.2014. In view of this, the AT finds that the date of RA Bill-15 and the date of termination of the Contract are very close-by and no delay prior to the date of submission of RA Bill-15 can be attributed to the Respondent as the Contract was terminated on 24.03.2014. Hence, the AT finds that the consequences of this delay in payment under this issue for the work executed can only be construed as having an adverse impact subsequent to the submission of this bill which was first made in Feb-2014 and re-submitted on Mar-2014 while the Contract was terminated on 24.03.2014.

77. Accordingly the AT finds that in so far as this delay is concerned no delay in payment can attributed to the Respondent leaving all the other contentions of the parties regarding quantification which will be addressed by the Tribunal respectively under Issues 4 & 5.”

G. Delay-7: Delay Due to Execution of Increased Quantity and Additional Items.

(a) Respondent had claimed delay of 7 months on ground of increased quantity and value of work under Amendment-1 and accordingly claimed compensation. Petitioner refuted the same on the ground that Clause 29.5, GCC was not applicable for variations which were not beyond the limits prescribed therein, as also for extra items, yet, on a practical view, extension of six months was granted.

(b) Tribunal found, after analyzing Clause 29.5, that the provisions for extension of time and cost were applicable where work schedules are far beyond the Deviation limits and accordingly held as under:-

“82. Based on the provisions of permissible deviation limit as specified in Sub-Clause-49.2.2 for the items of work below the ground surface which includes the excavation, the deviation limit is (+) 100% and (-30%). A conjoint reading of (i) Clause-49.2 regarding the permissible deviation limits; (ii) Clause-49.5 regarding work schedule for variation and deviations limits for extra items and (iii) Clause-49.6 provisional payments, the Arbitral Tribunal is of the considered opinion that Clause-29.5 regarding extension of time for completion does not apply to the works within the deviation limits as specified in Clause 49.5.1, Clause-49.6.1 and Clause-49.2.

83. In the light of these findings and observations and also keeping in view that the variations do not fall beyond the deviation limits under Clause 49.2, the Arbitral Tribunal holds that Clause-29.5.(b) will have no application for this delay.

84. In view of the above facts and circumstances under the provisions of the Contract, the Arbitral Tribunal finds no delay can be attributed to the Respondent with regard to Delay-7.”

H. Delay-8: Delay in Prompt Decisions by the Petitioner.

(a) Respondent argued that there was abnormal delay in giving decisions for the item of Rock Requiring Blasting (RRB) which had a severe impact on the progress of work. Extension of time and cost was claimed under Clause 29.5.1 (c) and Clause 29.7, GCC. Petitioner denied

the claims by stating that criteria for determining the quantity of RRB were mentioned in the drawing and specifications. When the core recovery is more than 50% based on the bore logs of Geotechnical Investigations carried out at the site earlier by an agency, the same has to be considered as RRB and there was no delay, as alleged and the Petitioner had in any case granted 6 months extension.

(b) Tribunal after a detailed analysis of the documents on record and the minutes of meeting, which were extracted in the Award, held as under:-

“91. It is clear from the above minutes that additional boreholes were to be taken only in the areas where the excavation has not been made so as to determine the rock quantity. This fortifies the view of the tribunal expressed earlier that determination of quantity of rock based on the boreholes for investigation as provided under the Contract at such far of distances may not be realistic.

92. Be it as it may, in so far as this delay is concerned, this delay is with respect to the delay in prompt and quick decisions with respect to the RRB.

93. From the above facts and circumstances, the Arbitral Tribunal finds that there is a delay in taking decisions for finding the final classification of RRB but this delay is a concurrent delay with Delay-1 period.”

I. Delay-9: Delay Due to Stoppage of Work Due to Stay Granted by NGT.

(a) Respondent submitted that the work suffered with effect from 13.03.2014 due to status quo Order by NGT, while Petitioner denied the same and contended that Respondent had slowed down the progress of work in all areas and withdrawn some equipment from the site from June, 2013 onwards and completely stopped the work on 15.08.2013.

(b) Tribunal after perusing the Order of the NGT, letter of the Petitioner communicating to the Respondent about the temporary stoppage of work, as well as an Order dated 25.03.2014 passed by the Supreme Court, held the delay to be concurrent with delay-I.

Issue No.1

10. Based on the observations made separately with respect to each of the 9 periods of delay, Tribunal answered issue No. 1 as under:-

“103. Issue-1: Is answered in the Positive. Based on the various delays as set out in the SOC, the Arbitral Tribunal finds that the Respondent is liable for the delays as dealt in detail from Delay-1 to Delay-9 and the extent of delay as determined by the Arbitral Tribunal is that the Claimant is entitled for reasonable and fair extension of the Contract up to 11.10.2015.”

Issue No.2

11. With respect to issue No. 2, Tribunal analysed the alleged reasons for delay separately. With respect to performance of the Contract in the initial days, Tribunal found that Delay-1 was attributable to the Petitioner and the contention of the Petitioner alleging non-mobilization of equipment and machinery in the first five months, was not sustainable. For release of work fronts for site leveling works, Tribunal applied

Delay-1 *mutatis mutandis* to this Claim and rejected the contentions of the Petitioner. For delay due to release of construction drawings, belatedly, the Tribunal held the delay to be concurrent with Delay-3 and did not agree with the Petitioner. For site leveling works, Tribunal held that the delay was not on account of the Petitioner. For delay on account of construction of boundary wall etc., Tribunal was of the view that these delays were concurrent with Delay-1 to Delay-9. Finally, after analyzing the respective allegations of delay by both the parties, the Tribunal concluded that there was delay in the initial stages in handing over the hindrance free site for execution of work and there was a continuing delay in handing over of 28% of land in Lagoon-1 and 70% in Lagoon-2, entitling the Respondent for extension of 13.50 months beyond the original contract period.

Issue No. 3

12. The Issue was whether the termination of the Contract by the Petitioner, at the risk and cost of the Respondent, was contractually and legally sustainable. To examine the issue, the Tribunal first relied on the findings under Issue Nos. 1 & 2 and then traced the entire chronology of dates and events from the date of issue of the NIT, on 17.03.2011 till the termination. Reference was made to several documents on record, as well as Clauses of the Contract. Reliance was also placed on the Order of the NGT and the Supreme Court in case of *NTPC v. M.P. Patil, Civil Appeal No. 3870 of 2014*. Tribunal noted that the status quo order of NGT passed on 13.03.2014 was vacated by the Supreme Court on 25.03.2014, in the above mentioned Appeal. Detailed reference was thereafter made to the

judgment of the Supreme Court in *Hind Construction Contractors v. State of Maharashtra*, AIR 1997 SC 720, for the proposition that where the Contract provides for extension of time or levy of penalty for delay, time is no longer of essence of the Contract. Applying the law to the present contract and examining the sequence of events, Tribunal answered the Issue as under:-

“162. The Arbitral Tribunal, in view of the above facts & circumstances, observations, findings and judicial pronouncement is of the considered opinion that it is just and appropriate to hold that the termination of the Contract on 24.03.2014 is unlawful, wrongful and not sustainable. Accordingly the question of considering any risk and cost of the Claimant as imposed under the termination order is also unlawful, wrongful and not sustainable.

163. In the light of the above findings, the Arbitral Tribunal answers the Issue-3 in the negative and holds that the termination of the Contract by the Respondent at the risk and cost of the Claimant is unlawful, wrongful and not sustainable.”

Issue No. 4:

13. The dispute under this Issue pertained to the initial levels called the Original Ground Levels (OGLs), as there was no dispute regarding the final levels. Petitioner relied on Clause 37.6 of the Contract regarding a prohibition for the Tribunal to exercise its jurisdiction with respect to measurements. Clause 37.6 is as under:-

“37.6 Measurements shall be signed and dated by both parties each day on the Site on completion of

measurement. If the Contractor objects to any of the measurements recorded, a note to that effect shall be made in the Measurement Book against the item objected to and such note shall be signed and dated by both parties engaged in taking the measurement. The decision of the Engineer-in-Charge on any such dispute or difference or interpretation shall be final and binding on both the parties and shall be beyond the scope of the provisions of settlement of disputes under the Contract”.

13(a). Petitioner contended that the issue of measurements was already decided by the Engineer-In-Charge and thus, being an excepted matter, was beyond the jurisdiction of the Tribunal. Respondent on the other hand claimed that the measurements of the OGLs submitted along with the Rejoinder Volumes 3/1 to 3/10 were the levels which were signed by the Authorized Representative of the Respondent while those in Books 12 to 16 submitted by the Petitioner, were not signed by the Authorized Representative of the Respondent and this issue was open for adjudication by the Tribunal.

13(b). The Tribunal analyzed Arbitration Clause 7.3, incorporated in the Contract and was of the view that the Clause was wide enough, enabling the parties to refer ‘any dispute or difference’ to Arbitration and the measurements relating to OGLs, not being an excepted matter, could be adjudicated by the Tribunal. Relevant part of the finding of the Tribunal is as under:-

“168. In view of this the main issue before the Arbitral Tribunal particularly with respect to the Claim-6 for adjudication is regarding which of the documents viz., the Book-12 to Book-16, as relied by the Respondent, or the

Rejoinder Vol. 3/1 to 3/10, as relied by the Claimant, contains the authorised signatories of the parties. Only after this dispute is determined the quantification is a different issue. This is a peculiar case where the parties are disputing the initial levels in an excavation and therefore this dispute does not fall under Clause-37.6 because the entire Clause-37 deals with the measurements of the work and not regarding any disputes in the initial levels itself as prominently brought out by the parties in the instant case. Further, taking initial levels is a preliminary task for measurement and cannot be construed as measurement of the quantity as contemplated under Clause-37.

169. The Respondent relied on in the case of 2014(9) SCC 246 between Harsha Constructions Vs Union of India & Others and contended that wherein the Clause-39 therein of that Contract was relied to advance the proposition that when the Contract specifies that it will be final and binding, it will be an excepted matter. On a perusal of the Arbitration Clause-63 in that said Contract the Apex Court after construing the provisions under the Arbitration Clause held in Para-4 "Upon perusal of Clause-63 of the aforesaid Contract it is quite clear that the matters for which provision has been made in Clauses 18, 22(5), 39, 45(a), 55, 55-A(5), 61(2) and 62(1)(xiii)(B)(e)(b) of the general conditions of Contract were 'excepted matters' and they were not be referred to the arbitrator". Therefore in this case the Supreme Court was dealing with the arbitration clause wherein specific clauses were excepted from the purview of being referred to arbitration.

170. It is settled law that the Arbitration Agreement in a Contract is an independent Contract based on the doctrine of severability of the arbitration clause as being an independent Contract from the entire Contract. It is also settled law that the power of the Arbitrators shall be confined to the provisions under the Arbitration Agreement. As per Sec.7(2) of the AC Act an arbitration agreement may

be in the form of an Arbitration Clause in a Contract or in the form of a separate agreement. Under Sec. 16(a) the AC Act provides that "an Arbitration Clause which forms part of a Contract shall be treated as an agreement independent of the other terms of the Contract".

171. In the instant case before the Arbitral Tribunal, the Arbitration clause 7.3.1 & 7.3.2 read as follows:

"7.3 Arbitration

7.3.1 If either the Employer or the Contractor is dissatisfied with the decision of DRB, or if the DRB fails to give a decision within forty-two(42) days of a dispute being referred to it, then either the Employer or the Contractor, as the case may be, within a further period of twenty eight (28) days, may give notice to the other party, with a copy for information to the DRB, of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute. No arbitration in respect of this matter may be commenced unless such notice is given.

7.3.2 Any dispute or difference in respect of which a notice of intention to commence arbitration as above has been given, it shall be finally settled by arbitration".

*172. Clause-7.3.2 of the Contract is the arbitration Clause and it specifies "Any dispute or difference in respect of which a notice of intention as per Clause-7.3.1 shall be finally settled by Arbitration. It is clear that this clause does not provide any exception for arbitration". Particularly keeping in view the words '**any dispute or difference**', which is of the widest amplitude, it is to be held that it includes all disputes and differences. In the case of Harsha Constructions, supra, the arbitration clause itself provided certain exceptions but which is not the case in the present*

arbitration clause before the Arbitral Tribunal. Therefore, the Arbitral Tribunal finds that based on the facts, circumstances and provisions of the Arbitration Agreement under the Contract, the Respondent's reliance on the decision in the case of Harsha Constructions, supra, will not apply and therefore it is rejected.

173. In the light of the above observations and findings, the Arbitral Tribunal is of the considered opinion that the Claim-6 which involves dispute in the initial levels falls within the jurisdiction of the Arbitral Tribunal.

174. In view of the above facts, findings & Circumstances, the Issue-4 is answered by the Arbitral Tribunal as above.”

14. Having answered the issues as pointed above, Tribunal adjudicated the Claims and Counter-Claims of the parties on merits and finally, after setting off the amounts under the Counter-Claims allowed in favour of the Petitioner, an Award of a sum of Rs. 47,54,30,798/- was made in favour of the Respondent, with interest @ 14% p.a. from the date of cause of action till the Award and interest @ 8.9% simple interest from the date of the Award, till the date of payment.

15. Challenge to the Award by the Petitioner can be bifurcated into two compartments:

- (a) Award of Claim No. 6: Payment of Total Work Done and Escalation on the Amount Determined under Claim No. 6.
- (b) Termination of Contract and consequential Award under Claim Nos. 2, 4, 5, 24 and rejection of counter Claim No.2 (risk and cost).

Claim No. 6: Payment of Total Work Done Bills

16. (A)(a). Principal contention of Learned Senior Counsel for the Petitioner is that the Tribunal has dealt with a matter which was beyond its jurisdiction, being an 'excepted matter' under Clause 37.6 of GCC. Under Clause 37.6, it was clearly provided that measurements shall be signed and dated by both parties, each day, on the site, on completion of measurements. Any objection of the Contractor would be noted in the Measurement Book and the Note shall be signed by both the parties. Decision of the Engineer-In-Charge on any dispute or difference or interpretation on such measurements shall be binding on both the parties and shall be beyond the scope of provisions of Settlement of Disputes. Learned Senior Counsel submits that in accordance with the Dispute Resolution Mechanism, when the matter was before the DRB, Petitioner had taken an objection regarding the jurisdiction, being an excepted matter. The Tribunal has completely overlooked the fact that OGL forms a part of the measurements of the work executed. Recording of OGLs is itself recording of measurements since this is the Zero Point or the start point for determining the quantum of work done by a Contractor.

(b). As per Technical Specification 2.9.0 the 'Mode of Measurement' for excavation is as under:-

“Contract Clause 2.9.0

2.9 MODE OF MEASUREMENT

The item of excavation & filling for site levelling work shall be measured and paid for the volume of actual earthwork in cutting measured in cum correct to two decimal places. The volume shall be calculated based

*on the spot levels of the area(s) in cutting, taken jointly by the Engineer and the Contractor before commencement of cutting (but after the site clearance and removal of trees has been completed) and after the cutting has been completed (i.e., after the area has been finished to the required levels and slopes after excavation). The spot levels shall be taken at 12.5 metres interval and at closer interval where pits; undulations etc. are met with. These levels shall be taken in two orthogonal directions / grids along project grids. **The spot levels shall be recorded in a field book and plotted on plans and shall be signed by the Contractor and the Engineer.** The labour, materials, tools, equipment, safeguards and incidentals required for taking levels shall be supplied by the Contractor at his own cost.”*

(c). Mr. Vikas Singh, Learned Senior Counsel explains that the first step in the entire procedure is that the Contractor takes over the site and removes the vegetation to expose the soil. Next, spot levels are taken at maximum spacing of 12.5M intervals and are called OGLs. These levels are segregated and kept Block-wise and form the initial set of measurements. OGLs are taken using the total station, downloaded in the computer, printouts taken and endorsed by both parties. Thereafter, excavation/filling is carried out, followed by recording of Levels, post excavation/filling and these Levels are called ‘Post Levels’. The volume excavated is then calculated. It is further argued that the work was measured and duly paid till 14th RA Bill for the period 27.02.2012 (date of start) till 30.09.2013, amounting to Rs. 55,18,25,188/-, without any protest. 15th RA Bill was raised on 07.02.2014 for the period 01.10.2013 to 31.12.2013 for Rs. 47,15,34,723/- and being a fraudulent Bill, was

rejected by Engineer-In-Charge on 10.02.2014 and again on 18.03.2014. 16th RA Bill raised on 20.07.2014, after termination on 24.03.2014, for Rs. 1,12,19,26,386/- (including the amount till 14th RA bill, and the 15th RA bill and another sum for work done upto 24.03.2014) was for the first time notified only in DRB proceedings and vehemently disputed by the Petitioner. It is thus obvious that the OGL was a part of the overall measurement of the work executed and could not have been adjudicated upon by the Tribunal. Reliance is placed on the judgments in the case of *Harsha Constructions v. Union of India*, (2014) 9 SCC 246 and *Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises*, (1999) 9 SCC 283, to argue that excepted matters are not 'arbitrable' disputes, before an Arbitral Tribunal.

(d). In so far as the Award of Rs. 13,17,67,675/- plus interest is concerned, it is argued that the Claim was based on no evidence and the Tribunal has relied on fabricated levels which were never proved. There were no disputes raised by the Respondent till 14th RA bill and its payment and only in the 15th RA Bill, Respondent raised a frivolous Claim. Tribunal has reopened the entire measurements from the first RA Bill, when the same was not even the Claim of the Respondent and while doing so it has gone into the issue of the OGLs. Tribunal relied on OGLs of the Respondent which were disputed by the Petitioner and rejected by the Engineer-In-Charge. No evidence was led by the Respondent to prove that the OGLs submitted by the Petitioner were not signed by the Authorized Representative of the Respondent. The OGLs produced by the Respondent were fabricated documents, which is evident from the fact

that they were purportedly jointly signed from April, 2012 onwards, while they were forwarded to the Petitioner for signing only in February, 2013. In the letter dated 21.06.2013, Respondent admitted the recording of levels by NTPC. Engineer-In-Charge called for a joint meeting on 10.07.2013, but Respondent refused to sign the Minutes. Tribunal was informed that signing of the OGLs relied upon by the Respondent in Volumes 3/1 to 3/10 was a matter of investigation with the CVC. After the investigation ended, Disciplinary action was initiated against the NTPC Offices and Penalties have been imposed. CBI has also registered an FIR in this respect.

(e). It is further argued by Learned Senior Counsel for the Petitioner that after adopting fabricated levels, Tribunal accepted the quantity of excavation theoretically, based on Simpson's Rule and not the actual quantity executed. Theoretical quantity does not account for the volume of Rock and has inherent problems. It is beyond imagination that Respondent claimed to have executed approximately 30 lakh CUM of earth work between 01.10.2013 till termination, when it is undisputed that until 14th RA Bill i.e., in 18 months, only 46 lakh CUM for earth work was executed.

(f). It is next argued that the Tribunal committed a patent illegality in awarding Price Escalation on the further quantity of soil excavation. The Tribunal has in a perverse manner held the Petitioner guilty of delay in handing over the site and thus, erroneously held the Respondent entitled to further extension till 11.10.2015. Accordingly, Tribunal concluded that termination of contract on 24.03.2014 was illegal and consequently

rejected the Counter-Claim of risk & cost. The finding of delay in handing over the land with respect to Lagoon-I and Lagoon-II is also erroneous.

(g). Learned Senior Counsel submits that the entire scope of work was under three Heads i.e., Site Levelling, Lagoon work and other works like roads, drains, sewerage etc. Clause 22 of GCC clearly provided that the Employer reserved the right to hand over the site in parts progressively to the Contractor. Under the first head, survey number wise land was made available from April, 2012 onwards. As on March, 2013, 88.5% of the cutting area as well as 89% of filling area was handed over to the Respondent and is supported by a communication dated 04.03.2013. Respondent could not carry out its activities due to the non-availability/shortage of its own equipment and resources. No evidence of non-availability of land was placed before the Tribunal by the Respondent.

(h). In so far as the land for Lagoon-I and II was concerned, Tribunal itself observed that major portion of the land was given on 12.12.2012. Substantial land was in fact handed over in December, 2012 i.e., 70% for Reservoir I and 25% for Reservoir II. Respondent was aware that reservoir was for future units of Kudgi Super Thermal Power Project, which was to come up at a later point in time and was not an immediate necessity. In any case, the status of work on the date of termination shows the poor progress of the Respondent itself, reason being, non-availability of equipment and mobilization of resources. Petitioner had placed on record several letters and Minutes of Meeting, in this regard.

(i). In so far as non-availability of river sand and delay in issue of drawings is concerned, learned Senior Counsel argues that the Respondent completely failed to mobilize/procure sand and due to the slow progress, pushed the work to a situation where restrictions were placed by the NGT vide its Order dated 05.08.2013. Petitioner again started considering the request of the Respondent for modification of a part of the embankment design. Petitioner permitted Respondent to even use crushed/manufactured sand but still, the Respondent did not resume work. Ultimately, Petitioner was left with no alternative but to revise the drawing for Reservoir Embankment on 19.02.2014. This indulgence was shown as the Respondent showed its willingness to complete the work in a time bound manner till August 2014, by submitting a Catch-Up Plan on 14.12.2013.

(j). Learned Senior Counsel submits that looking at the continuous failure on the part of the Respondent in completing the work, a 7 days' Show-Cause Notice was issued on 27.02.2014, still, there was no progress on the part of the Respondent and hence, the contract was rightly terminated by the Petitioner. Learned Senior Counsel has relied on the judgment of the Supreme Court in ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India Ltd., 2019 SCC OnLine SC 677***, to contend that the Award is contrary to the fundamental policy of India being patently illegal and can be interfered with by this Court under Section 34 of the Act. Reliance is also placed on the judgment in ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., 2019 SCC OnLine SC 1656***, where the scope of interference under Section 34 of the Act has been circumscribed.

(B)(a). Per contra, learned Senior Counsel for the Respondent submits that the Tribunal on Issue Nos. 1 and 2 and Delay-1 to 9 has examined Clauses 20.1, 20.2, 20.3, 29.5 & 29.7 conjointly and concluded that Petitioner did not have unfettered right to hand over the Site, any time it wished and observed that the delay in handing over the Site led to delay in execution of the work. This is a pure finding of fact and cannot be interfered with. Learned Senior Counsel has taken the Court to the various findings of the Tribunal on this aspect and argued that the conclusion that Respondent was entitled to a reasonable extension upto 26.12.2015 was a plausible view. Likewise, it has been argued that even with respect to the other delays, the Tribunal has made an in-depth analysis of the documents on record and the contractual clauses and wherever the delay was not found attributable to the Petitioner, it was so observed.

(b). With respect to Issue No. 3, Respondent argues that the Tribunal has correctly held that the termination was unlawful and unsustainable and therefore, Petitioner was not entitled to risk & cost. The conclusion is based on the findings of delay attributable to the Petitioner under Issue Nos. 1 & 2. The Tribunal also considered the judgment in ***Hind Construction (supra)*** to hold that time was no longer of essence of the Contract, as there were provisions for extension of time or levy of penalty. The Tribunal correctly observed that, despite the status quo Order of NGT being in operation on 24.03.2014, Petitioner illegally terminated the contract. Since there was a Stay Order, the contention of the Petitioner that no work progressed from 13.03.2014 was without any basis.

(c). With respect to Issue No. 4, Learned Senior Counsel for the Respondent argues that Issue No. 4 and Claim No. 6 are inter-twined. Claim No. 6 pertains to non-payment of work done bills for site levelling work. For adjudication of the said Claim, Tribunal was required to ascertain the total quantity of earth works undertaken and quantity of earth work for which consideration had been received by the Respondent, against interim running accounts payment. Clause 2.9 under Section II, Part B, of Detailed Technical Specifications provided for determination of the total volume of the earth work executed. Bare reading of the Clause provides that spot levels are to be recorded twice and jointly in the Field Book and signed by the parties and the Engineer. Volume of the work is calculated based on the difference in spot level at commencement and end of the work. Recording the OGLs is the preliminary task for quantification of the earth work done. These form the datum for further excavation. Petitioner, relying on Clause 37.6 contended that initial levels filed by them ought to be treated as correct and the recording of these levels was a part of the measurements under Clause 37.6 and thus, an excepted matter, without appreciating that the spot levels/initial levels filed by the Petitioner were not genuine, on various grounds. The Tribunal with its expertise and wisdom, made an analysis of the entire factual matrix, looked into the Clauses of the Contract and came to a finding that it was not an excepted matter. The view is a plausible view and cannot be interfered with as held in various judicial pronouncements, viz.: *Ssangyong Engineering & Construction Co. Ltd. (supra)*; *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49*; *State of Jharkhand and Ors. v. HSS Integrated SDN & Anr., 2019 SCC*

OnLine SC 1363; MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 and NHAI v. Progressive-MVR, (2018) 14 SCC 688.

(d). In respect of Claim No. 6, learned Senior Counsel argues that the final levels were never in dispute between the parties. Volume Nos. 3/1 to 3/10 running into 1670 pages, duly signed by AR of Respondent and an officer on behalf of the Petitioner were believed to be genuine by the Tribunal. Reliance was placed on the letter dated 25.02.2012 whereby Respondent had authorized the said officer, Mr. Reddy, to sign the initial levels on its behalf. Book 12 to Book 16 running into 600 pages was signed by an officer of the Petitioner and one Mr. Augustine on behalf of the Respondent, who was merely, a member of the survey team with no authorization to sign the measurements. In this background, the Tribunal believed the document which is signed by Authorized Representative of both parties.

(e). Based on the correct set of initial levels accepted by the Tribunal, it proceeded to quantify the Claim raised. Tribunal went into the detailed calculation of the volume excavated and the other measurements etc. and finally arrived at the figure that was awarded to the Respondent. The other claims awarded by the Tribunal have been defended by the Respondent by arguing that there was enough material available on record to arrive at the findings in favour of the Respondent. It is not the domain of this Court to enter into the findings of facts or calculations or re-appreciate the evidence before the Tribunal.

(f). With respect to Claim under 'Overheads' and 'Loss of Profit', it is argued that the Tribunal has rightly awarded overheads of 6% by carrying out the necessary calculation based on the documents before it. Loss of

profit of 10% of the amount of the balance executed work has been awarded as per the norms under the Construction Contracts. The Supreme Court in case of ***Dwaraka Das v. State of Madhya Pradesh & Ors***, AIR 1999 SC 1031 and the Division Bench of this Court in ***Himachal Joint Venture v. Panilpina World Transport***, 2008 SCC OnLine Del 922, have upheld the Claim for loss of profit when the termination of contract is held to be illegal. Reliance is also placed on the judgment in the case of ***AT Brij Paul Singh & Ors v. State of Gujrat***, AIR 1984 SC 1703.

17. I have heard the Learned Senior Counsels for the parties and examined their rival submissions.

Issue Nos. 1 & 2

18. (a). Respondent had alleged delays under 9 Separate Heads attributable to the Petitioner. Relying on Clauses 20.1, 20.2, 20.3, 29.5 and 29.7, Tribunal came to a conclusion that the Petitioner did not have a vested right to hand over the site free of encumbrances in parts or progressively. Relevant part of the Award is as under:-

“30. From the joint protocol documents from Pgs . 730 to 737 and with the remarks of the Claimant seeking the survey nos. or seeking hand over of physical possession, there is a delay in handing over of possession. The contention of the Claimant is that there is a delay and the contention of the Respondent is that based on Clause-20.2 of GCC that the Respondent can handover the site in part and progressively deserves to be examined with respect to the provision under Clause-20.1 reproduced earlier. The Arbitral Tribunal finds from this Clause-20.1 the Employer is mandated to make available the site to the Claimant as soon as possible after the award of

the Contract free of encumbrance. Further the Clause-20.1 also prohibits the Contractor from entering on the site or take possession of the site until so instructed by the Engineer-in-Charge in writing. Further, Clause 20.3 provides that in case of any delay in handing over of site to the Contractor which delays the performance of the work, it is specified that the Contractor will be eligible for suitable extension of time or any compensation as per Clause-29.7. A conjoint regarding of these Clauses 20.1, 20.2 & 20.3 cannot be construed as giving an unqualified right to the Respondent to interpret Clause-20.2 as to mean that the Respondent can give the sites in parts progressively at anytime. Hence, the AT is of the considered opinion that in the facts and circumstances the delay in handing over cannot be abated by the Sub-Clause-20.2.

31. Further the AT finds that the Clause-29.7.1, reproduced earlier, also specifies that if there is a delay due to any act of omission on the part of the Employer or his representative then a time extension would be an entitlement to the Claimant for performance of this Contract. It is settled law that the Contract is to be interpreted to bring homogeneity and to make each clause consistent with the others and the Contract should be read in its entirety. The Contract also provides under Clause-29.5 for extension of time for completion. It is pertinent to reproduce the Clause-29.5.1.

“29.5.1 The Time for Completion specified shall be extended if the Contract is delayed or impeded in the performance of any of the obligations under the Contract by reason of any of the following:

- a) any occurrence of Force majeure as provided in GCC Clause entitled 'Force Majeure', or
- b) Work Schedules far beyond deviation limits and Extra Items as provided in GCC Sub-Clause 49.5, or
- c) any default or breach of the Contract by the Employer, or delay on the part of other contractors engaged by the Employer in executing work not forming part of this Contract, or
- d) any suspension order given by the Employer under GCC Sub-Clauses 50.1 (ii) and 50.1 (iii), or
- e) Any other sufficient cause which, in the opinion of the Engineer-in-Charge, is beyond the Contractor's reasonable control;

by such period as shall be fair and reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by the Contractor.”

(b). To arrive at this conclusion, the Tribunal analyzed various contemporaneous documents on record, such as Joint Protocol Statements recording the dates of handing over of the sites, agreed Schedules with start dates and end dates, Minutes of Meetings, etc. Tribunal observed that there was initial delay of 6 months in handing over the Site. The reservoir sites were the longest time consuming works but, they were also not handed over till 24.09.2013. Tribunal relied on Petitioner's admission that it had handed over 100% land only in January, 2014 and observed that around 16 months' time beyond the contract period would have been required to complete the Lagoon work and therefore, reasonable extension upto 26.12.2015 ought to have been given.

(c). Under Delay-2, the Tribunal found the delay to be concurrent with Delay No. 1. Likewise, for Delay-3, Delay-8 and Delay-9, the delay was found to be concurrent with Delay-1. Delay-7, 6 and 5 were held not attributable to the Petitioner. Delay-4 was also found to be concurrent with Delay-1, however, the Tribunal observed that mining of sand was permitted prior to the Stay Order of the NGT. Respondent had made requests to the Petitioner to seek permission from the State Authorities to borrow sand from the adjoining projects and obtain necessary licenses. The license for obtaining sand from aggregates through use of explosives was granted only in December, 2012 and there was thus, a delay of two months. The Tribunal found that the delay caused due to non-availability of sand and aggregates was genuine. Finally the Tribunal concluded that delay in the activity of reservoirs was the net delay towards the completion of work under the Contract, while all other delays were either concurrent or had no impact.

Issue No. 3

19. (a) The Tribunal found that the termination of the Contract was unlawful and accordingly, the Claim for risk & cost was unsustainable. Under Issue Nos. 1 & 2, it had concluded that delays were attributable to the Petitioner under some heads and more particularly, delay in handing over the site, which delayed the execution of the work. Reliance was placed on the judgment in *Hind Construction (supra)* to hold that time was not of the essence of the contract. Seven days' notice was issued by the Petitioner to the Respondent alleging breach of contract. Respondent replied vide its letter dated 04.03.2014 pointing out various factors such as delay in handing over the site, delay in classification of rocks, increase

in quantities under the two Amendments, release of drawings belatedly, etc. The Tribunal observed that this reply dated 04.03.2014 was not even adverted to by the Petitioner in the Termination Order. Tribunal found that the status quo Order of NGT was in operation on 24.03.2014 and yet, the Contract was terminated on the said date, though, the Contractor was entitled to an extension of time, beyond the Contract Period. According to the Tribunal, the Petitioner being guilty of delay, terminated the contract, which was in teeth of the judgments of the Supreme Court in *State of Karnataka v. Rameshwara Rice Mill*, AIR (SC) 1987 1359 and *J.G. Engineers Private Ltd. v. Union of India & Another* (2011) 5 SCC 758, that no party can be an Arbiter in its own cause.

(b). The Tribunal, under Issue Nos. 1 and 2 dealt with the factum of delay and reached a conclusive finding that Petitioner was responsible for the various delays as alleged by the Respondent under Issue No.1. It further, answered Issue No.2 regarding responsibility of Respondent for the delays in the negative and held that the extension of 6 months was insufficient and calculated 13.5 months as the correct duration for extension, as should have been awarded. It further observed that these findings shall apply *mutatis mutandis* to Issue No. 3.

(c). Petitioner has raised challenge to the Tribunal's findings in this regard on the following 5 grounds:

1. Extension of Time:-

Petitioner has contended that the Tribunal gave perverse findings on grant of extension. However, under Delay-1 Tribunal has in detail, dealt with

the issue of grant of extension of time and given a finding in favour of the Respondent. In its consideration of Delay-1, the Tribunal gave well-reasoned findings in Paras 30, 32, 36 and 38, in accordance with law and its interpretation of the Contract, which is not open to be re-examined by this Court under Section 34 of the Act. In this regard, the following observations in *Govt. of NCT of Delhi v. M/s. Kabil Pawan & Associates (JV) 2012 SCC OnLine Del 5665* are relevant :-

“11. The law with regard to Section 34 of the said Act is well settled that the Courts exercise limited jurisdiction over the award of the Arbitrator and cannot go into the merits of the case nor reappraise and re-examine the evidence, nor look into the insufficiency of the evidence as the scheme of the said provision aims at keeping the supervisory role of the Court at a minimum level. It has also been held that parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for Arbitration as they prefer the expediency and finality offered by it.

12. It is well settled that an award is not a subject matter of an appeal nor can a challenge under Section 34 be construed as an “appeal” against the award. [See (2001) 2 Arb LR 469 (Del) & (2008) 2 Arb LR 175].

2. Issues arising post grant of Extension of Time:-

(a) Increase in the quantity of item no. 1 and item no. 3 of BOQ thereby increasing the value of the contract from Rs. 154.34 Crores to Rs. 189.03 Crores:

Amongst other things, this challenge to the arbitral Award is premised on the provisions of Clause 29.5 GCC read with Clauses 49.2 and 49.5 of

GCC, which provide for deviation limits. The Petitioner contends that since earth work is an underground work, Clause 49.2.2.2 of GCC would apply, which provides that in case item of work is below the ground surface, the permissible limits of deviation over the original value of each item will be +100% or -30%. This has to be seen in terms of BOQ Item Nos. S 1 & 3, however there has been no discussion to this effect in the Award. What is important to note is the discussion in the award pertaining to river embankment and the quantities claimed by the Respondent in Paras 139 and 140, read with Clause 49.1.1 regarding ground work. This contention of the Petitioner cannot be accepted as the Tribunal has considered this aspect in light of the various other delays attributable to Petitioner, including delay in handing over. In **CMDR. S.P. Puri v. Alankit Assignments Ltd 2008 SCC OnLine Del 985**, Court held as under :

“9. Arbitrators are not required to give elaborate judgments dealing with each and every ground or reason. They have to consider the entire facts in proper perspective and give an indication of the grounds and reasons that prevailed upon them to decide the matter. Law requires arbitrators to give reasons and nothing more. If the reasons are clear and indicate the basis for the decision, the award should be upheld and cannot be set aside. Law does not require arbitrators to give detailed judgments dealing with each and every contention raised by the parties. What is required to be indicated is the basis on which the arbitrators have taken a particular view. Arbitrators need not legal luminaries, well versed with legal skills and having benefit of legal training. Arbitrators can be men from the trade or relatives etc. and enjoy substantial latitude and flexibility in deciding matters in a just and equitable manner. If the

arbitrators have set out grounds and reasons in the award why they are taking a particular view while deciding claims, the award will be a reasoned award. Requirement in law is that the arbitrators must give reasons. It is not the requirement of Section 31(3) of the Act, that the arbitrator must elaborately discuss all contentions raised by the parties. To satisfy the requirements of the Act, reasons should be intelligible comprehensible, but need not be unnecessarily lengthy or elaborate. Reasons should indicate and provide a precise link between questions/issues and the conclusion reached in regard thereto. It is sufficient if the arbitrator makes his mind clear in the award on what and why decision is made. Short intelligible indications of the grounds should be discernible to indicate the mind of the arbitrator. Sufficiency of reasons depends upon facts of each case, (refer Em & Em Associates v. Delhi Development Authority, ILR (1987) 2 Del 526, Bank of Barod a v. B.J. Bhambani, 1988 Supp SCC 785, Indian Oil Corporation v. Indian Carbon Ltd., (1988) 3 SCC 36, Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd., (1989) 1 SCC 532)".

(b) Modified drawings for reservoir embankment:-

While Petitioner contends that the drawings were issued on 29.03.2012, the Tribunal has given a categorical finding that it was an admitted fact that the modified drawings for the reservoir embankments were issued on 19.02.2014. Further, findings regarding MOM dated 12-13.11.2013 have been given in Para 139 by the Tribunal including Petitioner's acceptance and conduct with respect to the Respondent's list of 5 concerns/ points raised by it in the MOM. A categorical finding has been given by the Tribunal in this regard in Para 113.

(c) NGT ordered status quo with regard to construction of Kudgi Super Thermal Project:-

The Tribunal gave detailed findings regarding stoppage of work due to NGT Order in Paras 99 to 101 and held that the Respondent was not responsible for the delay due to suspension of work from *13.03.2014 to 25.03.2014, both days inclusive*. Petitioner on one hand contends that the seven (07) days' notice came to an end on 05.03.2014 and since the Respondent failed to take any steps, the contract had come to an end, but only a "formal notification" of termination of contract was required to be issued, after seeking necessary approvals from the Competent Authority. While, on the other hand, it contends that on 14.03.2014, it had issued necessary orders to all the subsisting contractors including respondent herein for stoppage of work with respect to execution of Kudgi super Thermal Power Project.

This contention of the Petitioner cannot be sustained in the light of the provisions of Clause 51.3.1, especially sub-clause (b). Clause 51 provides for Termination for Contractor's Default and is as under:

"51.3.1. If the Contractor:

(a) xxx

(b) commits default in complying with any of the terms and conditions of Contract and does not remedy it or take effective steps to remedy it within seven (7) days after a notice in writing is given to him in that behalf by the Engineer-in-Charge ; or

*...the Employer may, without prejudice to any other right to remedy which shall have accrued or shall accrue thereafter to the Employer **by written notice cancel the Contract as a***

whole or only such items of work in default, from the Contract.”

Thus, the Contract did not come to end, automatically by lapse of 7 days, and a written notice for cancellation was required to be served by or on behalf of the Competent Authority.

3. Time was not of the essence of the contract:-

This finding of the Tribunal is premised on its conclusion that the Petitioner was responsible for the delays and not the Contractor. Even though it is contended that reliance on the case of ***Hind Construction Contractors vs. State of Maharashtra 1979 (2) SCC 70*** was misplaced, but it was not shown how the reliance was misplaced. Judgement in the case of ***Union of India v. M/s Gujrat Co-Operative Grain Growers Federation Ltd., 2009 SCC OnLine Del 3979***, squarely covers the present case and relevant part is as under:

*“3. By the impugned Award, the learned Arbitrator has dismissed the claim of the petitioner for risk purchase costs inter alia on account of the fact that time of performance was not the essence of the contract. The Arbitrator relied upon the judgment of this court reported as **Panipat Food Limited v. Union of India 1995 (60) DLT 258**. I may note that this judgment relies upon the judgment of the Supreme Court reported as **Hind Construction Contractors v. State of Maharashtra AIR 1997 SC 720**. These judgments lay down the ratio that even if time of performance is mentioned to be the essence of the contract, but if, the contract provides for levy of liquidated damages for delay, then the time of performance is not the essence of the contract though so stated in the contract.*

4. In the present case, the aforesaid two judgments apply squarely because even in the extension letters given by the petitioner, the application of the clause of liquidated damages continued to operate. Therefore, I do not find any fault in the Award by which it is held that time of performance is not of the essence of the contract. Once time of performance is not of the essence and no notice is given fixing a specific date for performance of the contract, then in such a case the contract cannot be cancelled on the ground that time of performance is the essence of the contract. Accordingly, I do not find any illegality or perversity in the Award for this court to interfere under Section 34. It is settled law that this court will not interfere with the Award merely because two views are possible. In the facts of the case, I find that the view taken by the Arbitrator is one plausible view and therefore the same cannot be challenged under Section 34.

Once the principal claim of the petitioner does not survive, then, the issue of grant of interest also would not arise.”

4. Non-consideration of Respondent's letter dated 04.03.2014 in response to the notice issued by petitioner on 27.02.2014.

Tribunal has given detailed findings regarding the letter of the Petitioner dated 24.03.2014 and concluded that the same has not adverted to the Contractor's letter dated 04.03.2014. This is a finding of fact based on evidence adduced before it and as such merits no interference. A co-ordinate Bench of this Court in the case of ***National Highways Authority of India v. Som Dutt Builders-NCC(JV)***, 2018 SCC OnLine Del 10783, held as under:-

“18. It is not for this court to sit in appeal over the said finding of fact recorded by the learned arbitral tribunal.

19. *The Supreme Court in Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49 held as follows:

“12The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or
2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse. A good working test of perversity is contained in two judgments. In *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In *Kuldeep Singh v. Commr. of Police*, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable

person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594, this Court held:

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent,

but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

.....”

20. Hence, merely because while passing the award the learned Arbitral Tribunal has not referred to the correspondence placed on record by the petitioner does not vitiate the award. Arbitral Tribunal has instead given greater weightage to the reports prepared by the petitioner's officials when granting extension of time to arrive at the findings of fact. The arbitrator is the master of quality and quantity of evidence. No fault can be found in this approach.”

5. Termination Letter dated 24.03.2014 was not signed by Competent Officer as per clause 5.1 of the contract:-

Tribunal while dealing with the Termination Letter, referred to Clause 5 of the GCC, whereby signatures of the Competent Authority were an essential to constitute a valid notice of termination of Contract. Detailed findings have been given in this regard by the Tribunal in Para 158. Tribunal, in taking cognizance of the terms of the Contract between the

parties cannot be said to have committed an illegality. Moreover, when the parties, of their own free will, chose to enter the Contract, they decide to be bound and governed by the stipulations contained therein. In the case of ***Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises, (1999) 9 SCC 283, at page 308***, the Supreme Court held as follows, in view of which, it is evident that the Tribunal did not commit any illegality :-

“42. The aforesaid judgment was considered in H.P. SEB v. R.J. Shah and Co. [(1999) 4 SCC 214] and in para 26, the Court held as under: (SCC p. 225)

“26. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction.”

xxx

xxx

xxx

44. From the resume of the aforesaid decisions, it can be stated that:

XXX

(b) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

XXX

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd. [(1988) 3 SCC 82 : (1988) 3 SCR 103] by relying upon the following passage from Alopi

Parshad v. Union of India [AIR 1960 SC 588 : (1960) 2 SCR 793] which is to the following effect: (SCC p. 88, para 5)

“There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events, the performance of the contract may become onerous.”

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.”

(d). This Court finds no infirmity with the finding of the Tribunal that the Termination was unlawful. Accordingly, the challenge by the petitioner to rejection of the counter claim in respect of charges for risk and cost cannot be sustained.

Issue No. 4

20. (a) The Tribunal in order to decide Issue No.4, analyzed Clause 2.9 of the Technical Specifications, which has been extracted above. It also examined Clause 37.6 which is the basis of the argument of the Petitioner that the OGLs being 'excepted matter' were not arbitrable. Tribunal was of the view that the main issue that arose for consideration was regarding the initial level itself wherein, not only was a quantity in dispute, but also the signatures of the authorized representative of the Respondent, on the documents produced by the Petitioner. While the Petitioner relied on Book 12 to Book 16, Respondent relied on Volumes 3/1 to 3/10. Only after the said dispute of the signatures was determined, the quantification could be done in the perception of the Tribunal. The Tribunal distinguished the judgment in the case of ***Harsha Construction (supra)***. Relevant paras have been extracted in the earlier part of the judgment.

(b). The Tribunal drew a distinction between the measurements envisaged under Clause 37.6 and the OGLs and concluded that Claim No. 6 involves disputes in initial levels, which was not an excepted matter under Clause 37.6. Relevant paras of the Award are as under:-

“207. The Arbitral Tribunal has dealt with the Respondent's contention that the measurements are excepted matter as per Clause-37 of the Contract. The Arbitral Tribunal after examining the various rival

contentions of the parties has held under Issue-4 as follows:

“In the light of the above observations and findings, the Arbitral Tribunal is of the considered opinion that the Claim-6 which involves dispute in the initial levels falls within the jurisdiction of the Arbitral Tribunal”.

208. The Arbitral Tribunal finds that the provisions under the Contract with respect to taking of initial levels deserve to be first traversed. Clause 2.9.0, Pg.196 Contract Vol.1/3 under Section-II Part-B Detailed Technical Specifications, states as follows:

"2.9.0 MODE OF MEASUREMENT

*The item of excavation & filing for site levelling work shall be measured and paid for the volume of actual earthwork in cutting measured in cum correct to two decimal places. The volume shall be calculated based on the spot levels of the area(s) in cutting, taken jointly by the Engineer and the Contractor before commencement of cutting (but after the site clearance and removal of trees has been completed) and after the cutting has been completed (i.e., after the area has been finished to the required levels and slopes after excavation). The spot levels shall be taken at 12.5 metres interval and at closer interval where pits, undulations etc. are met with. These levels shall be taken in two orthogonal directions/ grids along project grids. **The spot levels shall be recorded in a field book and plotted on plans and shall be signed by the Contractor and the Engineer.** The labour, materials, tools, equipment, safeguards and incidentals required for taking levels shall be supplied by the Contractor at his own cost”.*

(Emphasis supplied)”

209. It is clear from this clause that the spot levels of the area in cutting shall be taken jointly by the engineer & contractor before commencement of cutting and after the site clearance and removal of trees has been completed. This is being referred to as the original ground level or the initial levels. These levels actually are the datum for determining the quantities depending upon the depth to which the excavation is to be made. Further, it is also clear from the above clause that such joint levels shall be taken after the cutting has been completed i.e., after the area has been finished to the required levels and slopes after excavation. This joint level is a second set of joint level that should be taken jointly by the Engineer and the Contractor after completion. This is being referred to as the final levels which are to be reached as per the Contract. Further it is also clear from this that these spot levels shall be taken at 12.5 metres intervals and at closer intervals where pits, undulations etc., are met with and also that these levels shall be taken in two orthogonal directions / grids along the project grid.

210. It is admitted by the parties that the initial levels are taken in grids of 10m in two orthogonal directions viz., Northing and Easting directions. The Parties are not in dispute regarding the final levels recorded after the excavation has been made till the date of termination. However, the main dispute is regarding the initial ground levels i.e. Original Ground Level. As observed by the Arbitral Tribunal earlier, while dealing with Delay-6, there are two sets of initial levels produced before the Arbitral Tribunal. The Claimant's initial levels are furnished in Vol.3/1 to 3/10 of the Rejoinder. The Respondent's initial levels are furnished in Book -12 to Book-16. The AT finds that these Book-12 to Book-16 are the same as the levels in Vol.6 &7 of SOC produced by the Claimant. From these it is clear that the main dispute is regarding the initial levels. Therefore, the question that

arises before the Arbitral Tribunal is as to whether the Rejoinder Vol.3/1 to 3/10 as furnished by the Claimant are the appropriate joint levels or the Book-12 to Book-16 as furnished by the Respondent are appropriate joint levels as per the Contract?

211. The Arbitral Tribunal has examined these documents viz., Rejoinder Vol.3/1 to Vol.3/10 of the Claimant and Book-12 to Book-16 of the Respondent. The following are the observations.

212. Both parties have agreed that the survey is conducted by the Total Station Method (TSM) and that the Northing and Easting forms the orthogonal grid and each block is subdivided into number of sub-blocks of about 100m by 100m and the end blocks are adjusted for the balance dimensions in each of the block. The spot levels are taken by the TSM at 10m intervals in each sub-block in the orthogonal direction representing northing and easting. Thereby roughly 100 spot levels are taken in each sub-block subject to the variations caused on account of the ends of the Sub-blocks. The dates on which the levels were taken and recorded are also indicated along with the grid boundary Northing and Easting. As specified under Clause-2.9.0, Pg.196 Contract Vol.1/3 under Section-II Part-B Detailed Technical Specifications, the contractual provision is that "The spot levels shall be recorded in a field book and plotted on plans and shall be signed by the Contractor and the Engineer". By virtue of this being a survey by TSM the raw data obtained from the levelling is only in the electronic form and is utilized. However, in whatever form the raw data is, it is necessary that as per the Clause-2.9.0 all these data shall be signed by the Contractor and the Engineer. With this back ground, as admittedly stated by the parties, the Arbitral Tribunal finds that the initial spot levels or the OGL, as is referred to, forms the datum for all further excavations. It is for

this reason that it is the Engineering Practice in all excavation works to have a joint signature of both the Contractor and the Engineer duly authorised to avoid any dispute at a later date. This is for the reason that once the to player of the excavation is excavated, this original data cannot be obtained and it will lead to unnecessary and avoidable disputes in excavation works as the OGL becomes a non-susceptible and non-existent physical quantity when once the top layer is excavated and it cannot be re-measured. With this back ground invariably in all Engineering contracts it is also the accepted trade usages to have joint levels undisputedly before the construction is started. This is also a requirement under this Contract under Clause-2.9.0. Therefore, the Arbitral Tribunal finds that essentially these documents Rejoinder Vo1.3/1 to 3/10 relied by the Claimant and Book-12 to Book-16 relied by the Respondent for the initial levels are examined.

With regard to Rejoinder Vo1.3/1 to 3/10 of Claimant's document for OGL Records:

a) The Rejoinder Vo1.3/1 is from Pg.1635 to Pg.1844 and is in respect of Block-I and gives the plan of Block-I and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent. In addition other officers of the Claimant and Respondent have also signed.

b) The Rejoinder Vo1.3/2 is from Pg.1845 to Pg.1965 and is in respect of Block-2 and gives the plan of Block-2 and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent. In addition other officers of the Claimant and Respondent have also signed.

c) The Rejoinder Vol.3/3 is from Pg.1966 to Pg.2127 and is in respect of Block-3 and gives the plan of Block-3 and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent. In addition other officers of the Claimant and Respondent have also signed.

d) The Rejoinder Vol.3/4 is from Pg.2128 to Pg.2364 and is in respect of Block-4A and gives the plan of Block-4A and its disposition along with the adjacent boundaries. These levels are signed by the authorised representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent. In addition other officers of the Claimant and Respondent have also signed.

e) The Rejoinder Vol.3/5 is from Pg.2365 to Pg.2425 and is in respect of Block-5 and gives the plan of Block-5 and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent. In addition other officers of the Claimant and Respondent have also signed.

f) The Rejoinder Vol.3/6 is from Pg.2426 to Pg.2546 and is in respect of Block-5 and gives the plan of Block-6 and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent. In addition other officers of the Claimant and Respondent have also signed.

g) The Rejoinder Vol.3/7 is from Pg.2547 to Pg.2892 and is in respect of Block -7 and gives the plan of Block-7 and its disposition along with the adjacent boundaries. It is also noted that this is a large block having 40 sub-blocks of 100m each. These levels are signed by the authorized

representative of Claimant Mr. Prasath Kanda Reddy and Mr. Praveen on behalf of Respondent.

h) The Rejoinder Vol.3/8 is from Pg.2893 to Pg.3153 and is in respect of Block-9 and gives the plan of Block-9 and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Kanda Reddy and Mr. Praveen on behalf of Respondent.

i) The Rejoinder Vol.3/9 is from Pg.3154 to Pg.3248 and is in respect of Block-10A and gives the plan of Block- 10A and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent.

j) The Rejoinder Vol.3/10 is from Pg. 3249 to Pg.3311 and is in respect of Block-13 and gives the plan of Block -13 and its disposition along with the adjacent boundaries. These levels are signed by the authorized representative of Claimant Mr. Prasath Konda Reddy and Mr. Praveen on behalf of Respondent.

From the above it is seen that: (i) in the Vol.3/1 to 3/10 running from pages 1635 to 3311 (nearly 1670 pages) have been signed by the duly authorized representative of the Claimant. Mr. Prasath Konda Reddy and Mr. Praveen on behalf of the Respondent; (ii) but it is seen other officers of the Claimant and the Respondent have also signed only in the Vol.3/1 to 3/6 (nearly 900 Pages) and not signed in Vol. 3/7 to 3/10.

With regard to Book-12 to Book-16 of Respondent's document for OGL Records:

i. The Book-12 is from Pg.1 to Pg.114 and is in respect of Blocks 1 & 2. These levels are signed by Mr. Praveen on

behalf of the Respondent and other officers of the Respondent. There is a signature of one Mr. Augustine who was stated by the Respondent to be the authorized representative of the Claimant.

ii. The Book -13 is from Pg.1 toPg.111 and is in respect of Blocks 3, 4B &5. These levels are signed by Mr. Praveen on behalf of the Respondent and other officers of the Respondent. There is a signature of one Mr. Augustine who was stated by the Respondent to be the authorized representative of the Claimant.

iii. The Book-14 is from Pg.1to Pg.112 and is in respect of Blocks 4A &10A. These levels are signed by Mr. Praveen on behalf of the Respondent and other officers of the Respondent. There is a signature of one Mr. Augustine who was stated by the Respondent to be the authorized representative of the Claimant. Further in so far as Block-10A is concerned one Mr. Vivek has signed in place of Mr. Praveen on behalf of the Respondent along with other officers

iv. The Book-15 is from Pg.1 to Pg.133 and is in respect of Blocks 6, 7, 12& 13. These levels are signed by Mr.Praveen on behalf of the Respondent and other officers of the Respondent. There is a signature of one Mr.Augustine who was, stated. by the Respondent to be the authorized representative of the Claimant. Further in so far as Block-7, Pgs.58 to 98, is concerned one Mr. Vivek has signed with date in place of Mr. Praveen on behalf of the Respondent along with other officers. Further in Pgs.99 to 133Mr. Praveen has signed but without any date.

v. The Book-16 is from Pg.1to Pg.141 and is in respect of Blocks 8 &9. These levels are signed by Mr. Praveen on behalf of the Respondent and other officers of the Respondent. There is a signature of one Mr. Augustine

who was stated by the Respondent to be the authorized representative of the Claimant.

From the above it is seen that in the Book-12 to Book-16 nearly 600 pages have been signed by Mr. Praveen on behalf of Respondent along with other officers of the Respondent. But on all the pages there is only one signature of Mr. Augustine who was stated by the Respondent to be the authorised representative of the Claimant.”

(c). The Tribunal in my view has arrived at this finding based on the interpretation of the contractual clauses as well as the technical interpretation of various levels such as OGLs, site levelling and final levels, as used in field of Construction Contracts and Engineering. The Tribunal comprised of Technical Experts and it is not open to this Court to substitute the said findings, more particularly, when as per settled law, the Arbitrator is the master of quality and quantity of evidence before it. The law on excluding an ‘excepted matter’, from the scope of Arbitration has been laid down by the Supreme Court in ***Madnani Construction Corporation (P) Ltd v. Union of India & Ors, Civil Appeal No. 8385 of 2004*** and relevant paras read as under:-

“19. A plain reading of Clause 45(a) of the GCC makes it clear that re-measurement are to be made by the Engineer or the Engineer's representative in the presence of the Contractor. It may be done in the absence of the contractor but that has to be done only after due notice. On a proper construction of Clause 45(a) it appears that it gives the contractor, (a) an opportunity to take a specific objection to any recorded measurement within seven days of such measurements; (b) Then any remeasurements is to be taken by the Engineer or the Engineer's representative in the

presence of the contractor or in his absence after due notice; if 11 the steps under (a) and (b) are strictly followed, (c) no claim whatsoever by the contractor shall be entertained about the classification or the accuracy of the measurement.

20. Under Clause 62 of the GCC it is provided that matters for which provisions have been made in Clause 45(a) shall be excepted matters.

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22. It is well settled that the arbitrator is the master of facts. When the arbitrator on the basis of record and materials which are placed before him by the railways came to such specific findings and which have not been stigmatized as perverse by the High Court, the High Court in reaching its conclusions cannot ignore those findings.

23. But it appears that in the instant case, the High Court has come to the aforesaid finding that the items mentioned above are excepted matters and non-arbitrable by completely ignoring the factual finding by the arbitrator and without holding that those findings are perverse.

24. It goes without saying that in order to deny the claims of the contractor as covered under excepted matters, the procedure prescribed for bringing those claims under excepted matters must be scrupulously followed. The clear finding of the arbitrator is that it has not been followed and the High Court has not expressed any dis-agreement on that. Therefore, the finding of the High Court that those items are non-arbitrable cannot be sustained.”

(d) The Tribunal in entertaining this claim relied on its other finding that the dispute did not fall under Clause 37.6 of the GCC, as it pertained to initial levels of excavation and the entire Clause-37 deals with the

measurements of the work and not regarding any disputes in the initial levels itself. It further held that taking initial levels is a preliminary task for measurement and cannot be construed as measurement of the quantity as contemplated under Clause-37. This is an interpretation to Clause 37.6 with respect to the Original Ground Level and not on measurement. In this context, it is pertinent to refer to the Bombay High Court judgment in ***Country Club (India) Ltd. v. Choudhury & Choudhury (India) Ltd.*** 2016 SCC OnLine Bom 8993, wherein the arbitrator had given an interpretation to the ‘excepted matters’ clause and the same was upheld by the Court. Relevant para is as under:

“92. A perusal of the award indicates that though the petitioner had given up the issue of jurisdiction initially raised in the written statement on the ground that the claims fell in the excepted category of matters, the learned arbitrator still dealt with the oral submissions made by the petitioner through their learned counsel on this issue at great length in paragraphs 89 and 105 of the impugned award and has rejected the submission of the learned counsel for the petitioner on merits after interpreting the terms and conditions of the contract. In my view the interpretation of the learned arbitrator on the issue whether any of the claims made by the respondent fell under “excepted category of matters” or not is not only a possible interpretation but is a correct interpretation. In my view even if the interpretation of the learned arbitrator on the provisions is a contract is a possible interpretation, such a possible interpretation cannot be substituted by another interpretation by this court under section 34 of the Arbitration Act.”

(e) Further, in determining the amount of work done, the Tribunal has chosen Simpson's Formula as against Auto Plotter Software method after holding that it is a reliable, reputed and time-tested method. This is the domain of the Arbitrator as categorically held in ***McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181***, wherein the following observations were made:

“106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.

107. If the learned arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court.

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109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted

internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.”

(f) In so far as the Petitioner's objections regarding measurements taken by the Tribunal and quantities relied upon, or the authority of Mr. Augustine to sign as Authorised Representative of the Respondent etc. are concerned, same are beyond the scope of examination under Section 34 of the Act and the same fall squarely within the Tribunal's domain, which is best equipped to deal with the same on the basis of appropriate technical expertise/know-how. In ***Associate Builders v. Delhi Development Authority, reported in (2015) 3 SCC 49***, it was clearly held that that the Arbitrator is the final authority on the quantity and quality of evidence and unless the Arbitrator's approach is found to be arbitrary or capricious or so unfair and unreasonable that it shocks the conscience of the court, the Award should be sustained. The Tribunal in giving these findings has also referred to Section 19(4) of the Act which reads as under:

“The power of the Arbitral Tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence”.

(g) It must also be noted that the Tribunal, after an in-depth study of the measurements on record, observed that terms of the contract provided that initial levels were to be jointly recorded in presence of both the parties, appending their signatures on them. However, examination of the initial level records showed that there were discrepancies including the records not bearing the signatures of the Authorized Representative of the

Respondent. In the letter dated 15.06.2013, Petitioner had claimed that initial level records were self certified without signatures of the Respondent, but there were contradictions noticed by the Tribunal. Tribunal observed that this was a strange case where parties were disputing initial levels in excavation and thus the dispute does not fall in Clause 37.6, because entire Clause 37 deals with measurements of work. Most importantly, Tribunal notices that taking initial levels is a preliminary task for measurement and cannot be construed as measurement of quantity under Clause 37. This Court finds no reason to interfere with the findings of fact of the Tribunal as well as the interpretation given to Clauses 37.6 and main Clause 37.

(h) Based on the findings under Issue No. 4, Claim No.6 has been allowed. Tribunal observed that the dispute in relation to initial level arose in February, 2013 when Respondent supplied its set of OGL records. It also observed that when two different set of documents are produced, the set of documents signed by an unauthorized representative has no weight and cannot be relied upon. Relying on the two letters dated 15.06.2013 and 21.06.2013, written by the Respondent disputing the records maintained by the Petitioner, the Tribunal observed as under:-

“222. From the above two letters dated 15.06.2013 and 21.06.2013, the following emerges:

Letter dated 15.06.2013

a) The levels were taken at 10m intervals using TSM observed jointly by the Respondent and the Claimant.

b) The level observed through the TSM were immediately stored in the system as a soft copy in the presence of the Respondent's Engineer and Claimant's Engineer. On download of the stored level readings they are printed by the Respondent's Engineer only and duly signed by the Respondent's site Engineer and counter signed by the Respondent's section incharge at the site.

c) The level document so prepared is filed and kept by the Respondent and the level records are being maintained by the Respondent.

d) That in each RA Bill, after receipt of the Claimant's bill, quantities of earth work done by the Claimant monthly were assessed by the Respondent and paid to the Claimant based on the aforesaid level documents.

e) In Feb-2013 the Claimant's site in charge forwarded a document to the Respondent which contained the recorded levels of various blocks handed over and that on scrutiny of these documents and comparing it with the spot levels of the block record kept with the Respondent, difference of recorded levels are noted and further that this discrepancy observed was verbally communicated to the Claimant. But no action has been taken from the Claimant's end.

Letter dated 21.06.2013

a) The contentions of the Respondent was denied by the claimant as the pre-level of the areas were supposed to be signed jointly by the Respondent and the Claimant as per the Contract, while as per the Respondent's letter dated 15.06.2013 2nd para, it is the Respondent who is maintaining the relevant records with self certification of the Respondent's officials without obtaining the signature of the Claimant's authorised representative.

b) That the Claimant requested the Respondent to verify the block wise spot levels with respect to jointly signed records

to avoid any ambiguity for deriving the quantities for filling and cutting.

223. From the above two letters the Arbitral Tribunal finds that primarily the dispute in the levels started when the Claimant in Feb-2013 forwarded the documents containing the recorded levels of various blocks handed over. It is also clear that the levels observed through TSM are immediately stored as a soft copy by the Respondent and these stored levels are printed by the Respondent. It is also admitted that these level documents prepared by the Respondent are filed and kept with the Respondent, Further, these printed documents of levels duly signed by the Respondent's site Engineer and counter signed by the Respondent's section in charge of site levelling and infra works is the one which is filed and kept by the Respondent. It is this document which according to the Respondent is the basis for determining the quantities month wise in all the bills of the Claimant. However, the Arbitral Tribunal finds contrary to this admission in the letter dated 15.06.2013 all the measurements in the RA bills from 1 to 14 in respect of BOQ Item-1 are based on layers for each block and not on initial levels / OGL. Hence, based on the RA-Bills 1 to 14 what is recorded in the measurement is the number of layers, the length, the width and depth of meters in cutting. It is conspicuously seen that in all these measurements, the thickness of each layer is 0.6m right from the beginning irrespective of any variation in the ground levels intrinsically recorded in the spot levels. Thus, these quantities determined are only based on 0.6 m depth of the excavation for the respective length and width of the blocks considered as such these quantities are not based on the jointly taken levels. Hence, the statement of the respondent in its letter dated 15.06.2013 that "These level records are being maintained by NTPC. In each R/A bill, after receipt of your bill, quantities of earthwork done by SACIL monthly have been assessed and paid by us, based on the aforesaid

level documents” is apparently contradictory to the factual situation in the RA bills and hence not sustainable.

224. Further, as per the Respondent's letter dated 15.06.2013, the Respondent has stated that the levels observed through TSM are immediately stored in system as a soft copy in the presence of Claimant's Engineer and NTPC Engineer. Further, the Respondent also stated that after downloading this stored levels readings, the levels are printed by the Respondent which is duly signed by the site Engineer of the Respondent and countersigned only by the Respondent's section in charge. The Arbitral Tribunal finds that as per Clause-2.9.0 the initial levels to be taken are to be signed by both the parties. Hence, the soft copy which was printed is admittedly not signed by the Claimant's Engineer although the TSM data is said to have been stored in the system of the Respondent in the presence of Claimant's Engineer. Storing the soft copy of data in the presence of Claimant's Engineer is one thing but signing the data printed from the soft copy by both parties is another thing. In this case the printed copy is admittedly signed by only the Respondent's Engineer. Hence, the Arbitral Tribunal finds that the contentions of the Respondent are not sustainable in this regard.

225. As regards the downloaded data which have been produced by the Respondent in Book-12 to Book-16, the dates on which these data have been downloaded, as already observed by the Arbitral Tribunal, is from various dates from June-2012 to Jan-2013. It is pertinent to find that majority of these 600Pgs are signed with date by Mr. Praveen on behalf of the Respondent and for dates between Jun-2012 to Jan-2013 and some are signed by other person on behalf of Respondent. However, the other signatory to these documents is one Mr. Augustine who has not put any date. As per the Respondent's letter dated 15.06.2013 the printed data of levels are signed by the Respondent's site Engineer and counter signed by the Respondent's section in-

charge of site levelling and infra works. However, in Book-12 to Book-16 the contention of the Respondent is that these are the joint levels of the Claimant and the Respondent. This contention deserves to be held as not sustainable for the reason that if this data was available on 15.06.2013, in all fairness to the contentions made in Para-2 of the letter dated 15.06.2013, it was the responsibility of the Respondent to put forth these data to the Claimant to demonstrate its contention that the levels in Book-12 to Book-16 were the correct and not the levels produced by the Claimant in Feb-2013.

226. Further, the Arbitral Tribunal, finds from the Claimant's letter dated 21.06.2013, in reply to the Respondent's letter dated 15.06.2013, it has denied various contentions of the Respondent and has reiterated the need for taking the pre-levels documents to be signed jointly by the Respondent and the Claimant as per the Contract and further contended that the Respondent's letter dated 15.06.2013 - confirms that the Respondent is maintaining all the relevant records with self certification of its officials without obtaining the signature of the representative of the Claimant. The Arbitral Tribunal finds that the Respondent did not find it necessary to produce these documents in Book-12 to Book-16, if it was available with it by Jan-2013, even after Claimant submitted RA Bill-15 or the 16 & Final Bill but has held these documents for reasons best known to the Respondent. Be it as it may, the requirement of authorized signatures of both Claimant and the Respondent should be an undisputed fact as both of them should know where they are standing with respect to the initial levels so that the final quantities can be undisputedly determined. But in this case the Arbitral Tribunal finds that the Claimant has given all the documents in Vol.3/1 to 3/10 to the Respondent much prior to the final bill but the Respondent has held back his documents in Book-12 to Book-16 until the matter reached dispute resolution mechanism.

227. Based on the various observations and findings of the Arbitral Tribunal in this regard, the logical conclusion to which the Arbitral Tribunal is driven is that the documents Book-12 to Book-16 signed by Mr. Praveen and Mr. Augustine cannot be construed as a proper document for the reasons recorded earlier. Various other contentions of the parties are not relevant and material for deciding this aspect and as such they stand rejected.”

(i) In the opinion of the Tribunal, in case the initial levels relied by the Petitioner were available on 15.06.2013, the same could have been produced and shown to the Respondent to support the authenticity of Book 12 to Book 16 as showing the correct levels. However, Petitioner did not even produce these records even after the submission of 15th & 16th RA Bills. Having rendered these findings, the Tribunal quantified the amount under Claim No. 6 as under:-

“231. With regard to the quantification of the claim, the Arbitral Tribunal finds that the Claimant has claimed in respect of Items 1 & 3 i.e., the quantity paid and the details of quantity claimed in RA Bill-14, RA Bill-15 and 16th & Final Bill as under:

BOQ Items	RA Bill-14 Pg. 128 Book-17	RA Bill-15 Pg. 575 SOC Vol.4	16th & Final Pg. 624 SOC Vol.4
1. Earth Work in Soil not requiring blasting	46,85,050 Cum	55,02,293 Cum	59,66,702 Cum
3. RRB	4,36,443 Cum	25,22,462 Cum	25,22,426 Cum
Total=	51,21,493 Cum	80,24,755 Cum	84,89,128 Cum

232. The total quantity of Items 1 & 3 is 51,21,493 Cum paid in RA Bill- 14. While the Claimant has made a claim in RA Bill-15 for a total quantity of 80,24,755 Cum. Further, this quantity is changed in 16th & Final Bill to 84,89,128 Cum. The Claimant contends that the quantities in RA Bill-15 and 16th & Final Bill are based on the initial levels as per Rejoinder Vo1.3/ 1 to 3/10 for various blocks and the final levels to be achieved as per the drawings. The Arbitral Tribunal finds that there is no dispute with respect to the final levels achieved in various blocks. The quantities as set out by the Claimant in respect of these Items 1 & 3 in the 16th & Final bill are in variance from the quantities in the RA Bill-15.

233. The Arbitral Tribunal finds that as far as the Item-I is concerned, the Initial levels are to be considered as per Rejoinder Vo1.3/1 to 3/10 for the reasons already recorded by the Arbitral Tribunal and further finds that the total volume of excavation from the initial level to the final level includes both Items 1 & 3 of BOQ. It is specifically observed by the Arbitral Tribunal that in so far as the item-I is concerned the initial levels are not considered for measurements. But they are in 0.6m layers where Length, Breadth is recorded in all the 14 bills from RA Bill-1 to RA Bill-14. The provision under the Contract is that the quantities should be measured based on the initial levels and the final levels reached. Hence for purpose of determination of initial levels to arrive at the quantity, what should be the initial level has been dealt with in detail in the earlier paras and the Arbitral Tribunal has held that the initial levels are as per documents in Rejoinder Vo.3/1 to 3/10 as appropriate levels that are to be considered. Also the Arbitral Tribunal finds that the quantities as claimed by the Claimant in RA Bill-15 and 16th & Final Bill, in respect of Items 1 & 3 is considering that the final levels are reached, while actually the final levels were not achieved on the date of termination.

234. The Claimant produced its witness Mr. G. Paramasivam, CW-1 for examination. The affidavit of CW-1 was submitted and the examination in Chief and Cross examination were conducted. In this regard the Arbitral Tribunal finds that, based on the initial levels in Rejoinder Vol 3/1 to 3/10, the CW-1 has determined the total volume of excavation. The total volume of excavation is computed in Annexure-2 of the affidavit by two different methods viz., auto-plotter software with cross sections and application of Simpson's rule. The total quantity as per Auto Plotter Software method is 73,62,256.141Cum. While the quantity determined as per Simpson's rule is 72,49,731.121Cum. The Simpson's rule is a time tested and established method in vogue for many decades and still continues to hold the field of computation of quantities. Accordingly the Arbitral Tribunal finds that the total quantity as determined by Simpson's rule deserves to be considered which is 72,49,731.121Cum. Hence, the total excavation volume is 72,49,731.121Cum which includes the entire volume of excavation from the original ground level up to the finished final levels in blocks 1, 2, 3, 4A, 5, 6, 7, 8, 9 & 13. The CW-1 in Annexure-3 to the Affidavit, based on the actual levels that have been achieved in the Blocks 1, 3, 4A, 6, 7, 8 & 9, determined the balance quantity of excavation required to be done in these blocks to reach the final level as per the Contract. Based on this, the Blocks 4A, 6 & 8 are the three blocks where the respective final levels are not achieved and corresponding to these, the total quantity not achieved is 5,74,831.982Cum. The quantity not achieved in each of the blocks 4A, 6 & 8 are respectively 1,37,841.481Cum, 3,30,777.183 Cum and 1,06,213.318 Cum. This quantity 5,74,831.982 Cum is the quantity which is not executed as on the date of termination and as such this is to be deducted from the total quantity of 72,49,731.121 Cum which is the quantity determined based on Simpson's rule for excavation up to the final level. Hence, the actual quantity executed to be considered is 66,74,899.139Cum (72,49,731.121Cum

minus 5,74,831.982Cum) which includes the total quantity of both Items 1 & 3. Hence the Arbitral Tribunal holds that the total excavation made from the initial levels as per Rejoinder Vol.3/1 to 3/10 and the actual levels of excavation as achieved before termination is 66,74,899.139Cum.

235. It is seen from the RA Bill-14, the total quantity of excavation of Items 1 & 3 is 51,21,493Cum which includes excavation under Item-3 RRB for a quantity of 4,36,443Cum. In so far as the quantity of RRB excavation under Item-3 is concerned, the Arbitral Tribunal finds from the RA Bills 4 to 8 wherever the quantity of Item-3 RRB is determined, the quantity is determined based on the levels of the rock which are clearly marked. In view of this, the quantity of Item-3RRB cannot be considered on the same footing of Item-1 where the initial levels have not been considered as per documents in Rejoinder Vol. 3/ 1 to 3/ 10. Hence, the Arbitral Tribunal finds that it is just and appropriate to hold that the total quantity under Item-3 Viz., RRB shall be 4,36,443Cum only and not the quantity of 25,22,462 Cum as claimed by the Claimant. This is in view of the fact that the CW-1 in its examination,' in answer to Question-33, has clearly stated that his quantity determination is limited to the quantity of cutting & filling and classification was not in his scope. And further in Question-34 it was asked "Is it correct -"that quantification carried out by you does not account for the two separate items of earthwork in excavation". In reply to this Question-34, the CW-1 has stated "It is a consolidated volume of both two separate items". Further answers to Questions 35, 36 & 37 makes it clear that the volume computation as given in Annexures 2 & 3 of the Affidavit of CW-1 is for the total volume given in Annexures 2 & 3 of his affidavit and that the calculations made by him are as per Engineering Practice. In view of this the total quantity of 66,74,899.139 Cum comprising the entire volume of excavation from the ground level up to the excavated levels, it is just and ,appropriate to deduct the volume of RRB quantity of 4,36,443Cum, which is measured and paid based

on the levels. Accordingly the balance quantity of 62,38,456.139Cum (66,74,899.139Cum minus 4,36,443Cum) deserves to be considered only under Item-I.

236. The Arbitral Tribunal finds that the quantity paid under Item-I up to RA Bille14 is 46,85,050Cum. Hence the unpaid balance quantity is 15,53,406.139Cum (62,38,456.139Cum minus 46,85,050Cum).

237. In the light of the above findings and observations, the Arbitral Tribunal finds that it is just and appropriate to award the balance unpaid quantity of 15,53,406.139 Cum at the BOQ rate of Rs.87/- per Cum for Item-1 which amounts to Rs.13,51,46,334/- and after effecting the discount of 2.5%, as in BOQ, the amount works out to Rs.13,17,67,675/-.

238. In respect of total amount payable under the Contract is concerned, the Arbitral Tribunal finds that there is no dispute regarding the amount up to RA Bill-14 i.e., Rs.55,18,25,188/-. The main dispute arose in the RA Bill-15 when the quantities for the actual executed work based on levels in respect of Items 1 & 3 were made. No payment was made by the Respondent for this and the Contract was terminated. Post termination of the Contract the Claimant has made 16th and Final bill including the disputed quantities in Item 1 & 3 for a total amount of Rs.112,19,26,386/-. The Claim-6 is for an amount of Rs.57,01,01,198/- in respect of the difference amount between the amount paid in RA Bill-14 and unpaid amount in 16th & Final Bill. The Arbitral Tribunal after examining the rival contentions of the parties in respect of the disputes in Items 1 & 3 has held that the Claimant is entitled for an amount of Rs.13,17,67,675/- only in respect of items 1 & 3 and accordingly the Arbitral Tribunal awards the same.

239. The Arbitral Tribunal finds that the quantities of Items 1 & 3 claimed in the 16th & Final Bill are quite exorbitant

when compared to the quantities agreed in the RA Bill-14 as stated in the above table. The issue relating to Items 1 & 3 has been adjudicated and the Arbitral Tribunal has come to a finding in the earlier paras. In view of this and as regards various other items & quantities under 16th & Final Bill it was neither pleaded nor argued by the parties. Thus, all other items under 16th & Final Bill stand rejected.

240. The Arbitral Tribunal finds that the total amount under the Contract is the sum of RA Bill-14 which is already paid and the amount of Rs.13,17,67,675/- as awarded which works out Rs.68,35,92,863/ (Rs.55,18,25,188 plus Rs.13,17,67,675).

241. Based on the above facts, circumstances and findings of the Arbitral Tribunal, the Arbitral Tribunal awards an amount of Rs.13,17,67,675/- towards this Claim-6.”

(j) Tribunal observed that in the RA Bills 15 & 16, Respondent had quantified the volume of earth work considering the final levels achieved and considered the calculation of total volume of excavation filed by CW-1. Calculation was done on the basis of time-tested *Simpson's Formula*. Volume of RRB was deducted from the volume of excavation so calculated. The amount which had been paid to the Respondent against RA Bills 1 to 14 was also deducted and then the final Award was made. No infirmity can be found with this part of the Award. Manner and methodology of calculation, application of formulas and interpretation of contractual clauses is purely the domain of the Tribunal and must pass muster. There is no scope of interference by the Court with respect to this claim.

Escalation on the amounts under claim no. 6:

21. (a) As per the Petitioner the Escalation bills upto RA Bill-14 were paid as per the Petitioner, including arrears, arising out of revision of L2 schedule. This was accepted by the Respondent before the Tribunal. Regarding award of Claim 8-Escalation in respect of RA Bill-15 by the Tribunal, the two contentions of the Petitioner are that:

- 1). Pages 671 & 672 were in contravention of Clauses 25.6, 25.7, GCC
- 2). The amount payable as escalation should be adjustable against risk and cost, based on the premise that the Termination was legal.

(b) Clauses 25.6, 25.7, GCC, were interpreted by the Tribunal and it was of the view that Clause 25.7 shall not apply as it was in respect of Price Adjustment for the period beyond the schedule date of execution of work, if there is a delay on the part of the Respondent. Having already held the delay attributable to the Petitioner, the Tribunal gave this finding. It further held that since the Contract was terminated on 24.03.2014, prior to the end of original Contract period, Clause 25.7 will not apply. Petitioner contended before the Tribunal that Clause-25.6 provides that the Contractor *would* be eligible for payment / recovery of price adjustment or shall be liable for refund on the quantum of work scheduled or the actual quantum of work done, provided that the quantum of work done is more than or equal to the scheduled quantum. Relevant portion of the Clause reads as under:

“Provided further that the Contract or would be eligible for such claims or shall be liable for refund on the quantum of

Work scheduled or the actual quantum of Work done provided always that the quantum of work done is more than or equal to the scheduled quantum of work as per the agreed Work Schedule.”

(c) It is argued that the Tribunal in its Award has failed to deal with this express provision of the contract and solely in light of its findings under Claim 6, Tribunal directed the parties to calculate the amount due. In my view, this was solely the domain of the Tribunal and a finding of fact. It is useful to refer to the judgment in ***Food Corporation of India v. A.M. Ahmed & Co., (2006) 13 SCC 779 at page 794***, relevant para of which reads as under:-

“32. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion.”

Under Claim No. 1, Tribunal has given detailed reasons for holding that the Termination was unlawful. Claim Nos. 2, 4 and 5 are consequential to the determination of the legality of the Termination Order and cannot be interfered with.

22. (a) There were two sub-claims under Claim No. 24. One related to claim for Overheads and other to Loss of Profit. The contention of the Respondent for claiming Overheads was that 10% of the total cost is normally provided towards overhead charges to cover up various costs such as office expenses, legal charges, general establishment, watch and ward, travelling expenses, salaries of staff, etc. The overhead cost is the time related cost, which is incurred independent of the progress achieved and is to be realized from the rates in the BOQ for the works executed under the Contract. Due to the delays not attributable to the Respondent, the work was delayed and therefore, Respondent sustained huge overhead expenses. Petitioner disputed the claim and contended that Respondent must first establish that the delay was on account of the Petitioner before any such claim is made and also argued that there was no contractual provision entitling the Respondent to overheads. Tribunal allowed the claim as under :-

“292. The Arbitral Tribunal after hearing to the rival contentions of the parties and perused the documents. This claim is consequential to the determination of the legality or otherwise of the termination of the Contract by the Respondent at risk and cost of the Claimant. Under Issue-3 and Claim-1 the Arbitral Tribunal has held that the termination of the Contract by the Respondent at the risk and cost of the Claimant is unlawful, wrongful and not sustainable. When once the termination made by the Respondent is unlawful, wrongful and not sustainable, the consequential effect is that the question of risk and cost to be imposed on the Claimant does not arise and various contentions of the Respondent raised regarding the termination are not sustainable. Therefore, this Claim-24 is an entitlement to the Claimant.

293. *The Respondent relied on Clause 29.7 of the Contract, this Clause has been dealt in detail while answering Issues 1 & 2 and therefore, the Arbitral Tribunal finds that in the instant case based on the observations and finding of the Arbitral Tribunal regarding Issues 1, 2 & 3, the reliance on Clause 29.7 will not be of any assistance to the Respondent.*

294. *In the case of 2006 (6) SCALE 220 between McDermott International Inc. and Burns Standards Co. Ltd. and Others, the Apex Court held in para 116 regarding the determination of compensation for loss of overheads after dealing with formula adopted viz., Hudson's Formula, Emden Formula and Eichley Formula and held as follows :*

"116. We do not intend to delve deep into the matter as it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Arbitrator."

295. *Further the Apex Court, in the above case, has held in paras 119 & 120 regarding the methodology of determination of compensation as follows :*

"119. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

120. As computation depends on circumstances and methods to compute damage, how the quantum thereof should be determined is a matter which would fall for the decision of the Arbitrator. We, however, see no reason to interfere with that part of the award

in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian Law”.

296. *In view of the above, the compensation towards loss of overheads is an entitlement to the Claimant. As regards the quantification is concerned the Contract amount was Rs.154,34,54,426/- . The final value of the work including the RA Bill 14 and the amount awarded under Claim-6 for the reasons stated therein is Rs.68,35,92, 863/- and not Rs.112,19,26,386/- as claimed by the Claimant. The overheads at 10% of the rates built in to the Contract is an accepted standard trade practice in Engineering contracts which is to be recovered from the value of the work executed. However, the Arbitral Tribunal finds that it is reasonable to consider 6% overheads in the nature of work under this Contract. In view of this, considering 6% of the contract amount of Rs.154.34 Cr. Works out to Rs.9,26,07,265/- . This amount is time dependent cost spread over the Contract period of 30 months. The average monthly overhead costs over the period of 30 months of the Contract is Rs.30,86,908/-. In the facts and circumstances of this case the termination was made on 24.03.2014 while the end of the original Contract period was 26.08.2014. Thus during the 5 months of the original Contract period from the date of termination till the end of original Contract, the question of incurring any overheads or compensating for such overheads during this post termination period is wrong. Therefore, the overheads towards this period after termination cannot be considered. Accordingly, the overheads that can be reasonably considered is only up to 24.03.2014. Hence, based on the average monthly overheads the total overheads for this period before termination is Rs.7,71,72,721/-. Further the overheads recovered at 6% is Rs.4,10,15,572/-. In the final value of work done of Rs.68,35,92,863/- till termination including the work done in the RA bill-14 and the amount awarded*

under Claim-6. The unrecovered overheads is Rs.3,61,57,149/-.

297. In the light of the above facts and circumstances and findings of the Arbitral Tribunal, the Arbitral Tribunal awards an amount of Rs.3,61,57,149/- towards loss of overheads.”

(b) Tribunal has made a detailed consideration of the Overheads incurred by the Respondent. It has denied the Overheads during the five months of the original Contract period from the date of termination till the end of original Contract, but found the Respondent entitled for the period upto 24.03.2014. Tribunal further relied on the judgment of the Supreme Court in **McDermott** (*supra*) wherein the Supreme Court has held that determination of compensation for loss of Overheads based on different formulas and in the facts and circumstances of the case, would be in the domain of the Arbitrator. Accordingly, the Tribunal worked out the Overheads at 6% of the Contract amount relying on its findings under Issue Nos. 1 and 2. There is no infirmity, in my view, in this part of the Award.

23. (a) In so far as loss of profit is concerned, the Claim was allowed as under:-

“302. In the light of the above it is settled law that when a termination is held wrongful, awarding damages / compensation for loss of profit of the unexecuted value of the work is just and reasonable. Therefore, the Arbitral Tribunal finds that the Claimant is entitled for this claim in view of the fact that the Arbitral Tribunal has held under Issue 3 and Claim 1 that the termination by the Respondent

at the risk and cost of the Claimant is unlawful, wrongful and not sustainable. The Arbitral Tribunal finds that awarding 10% profit is just, reasonable and appropriate in the facts and circumstances.

303. As regards the quantification is concerned it is undisputed that the Contract as entered into between the parties is for an amount of Rs.154,34,54,426/-. The termination made on 24.03.2014 is held to be unlawful, wrongful and not sustainable under Issue-3. The Claim made by the Claimant towards loss of profit is for an amount of Rs.7,68,00,000/- at 10% of the balance unexecuted amount which was considered by the Claimant on the premise that the work completed was Rs.112.19 Cr by considering the Contract value inclusive two amendments which amounts to Rs.189.03Cr. The Arbitral Tribunal finds that considering the amended value of the Contract is not correct and only the Contract value as executed should be the basis for determining the damages under this claim.

304. Further as the work completed as considered by the Claimant is not just and appropriate, as held by the Arbitral Tribunal, while dealing with Claim-6 and the value of the work to be considered is only Rs 68,35,92,863 / -. The balance unexecuted value of the work as per the Contract is Rs.85,98,61,563/- (Rs.154,34,54,426 minus Rs.68,35,92,863). 10% of the balance unexecuted value of the Contract works out to Rs.8,59,86,156/-.

305. In the light of the above facts and circumstances the Arbitral Tribunal finds it just and appropriate to limit this amount under this head of the claim Rs.7,68,00,000/- as claimed by the Claimant.

306. In view of the above facts, circumstances and findings of the Arbitral Tribunal, the Arbitral Tribunal awards an amount of Rs.7,68,00,000/- towards loss of profit.”

307. In the light of the above findings and observations of the Arbitral Tribunal, the Arbitral Tribunal awards an

amount of Rs.11,29,57,149/- (Rs.3,61,57,149 plus Rs.7,68,00,000/-) towards this Claim-24.”

(b) Law, with regard to claiming loss of profit is no longer *res integra*. Loss allegedly suffered has to be pleaded and proved through documents and evidence. In ***NHAI vs. HCC, 2016 SCC OnLine Delhi 6112***, this Court has held that a person claiming loss of profit must establish that he had the opportunity to deploy his resources in other ventures and those ventures would have yielded profit. In the case of ***DDA vs. PC Sharma, FAO(OS) 143/2006, decided on 02.02.2009***, a Division Bench of this Court held that in order to be entitled to loss of profits, a contractor will be required to establish the loss. Loss of profits is a Claim in the form of damages under Section 73 of the Indian Contract Act and therefore, must be proved through evidence. In ***Kailash Nath Associates vs. DDA and Anr., (2015) 4 SCC 136***, Supreme Court held as under:-

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is

the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

(c) Bombay High Court in ***Essar Procurement Service Ltd. v. Paramount Constructions***, 2016 SCC Online Bom 9697 held that Sections 73 & 74 of Contract Act require actual damage or loss and proof

cannot be dispensed with. In *Ajay Singh v. Suneel Darshan*, 2015 SCC Online Bom 1412, a Division Bench of the Bombay High Court relying on *Maharashtra State Electricity Board v. Sterlite Industries (India) Ltd.*, 2000 SCC Online Bom 89, held that if a party has not suffered any loss, even if the defaulting party commits a breach, in the absence of proof of loss, the opposite party cannot be awarded the claim of loss of profit.

(d) Perusal of the Award shows that the Tribunal allowed the Claim by taking profit as 10% of the value of the balance work as a norm. In my opinion, this part of the Award is clearly against the settled law. In *Murlidhar Chiranjilal v. Harishchandra Dwarkadas & Anr.*, AIR 1962 SC 366, the Supreme Court clearly held as under:-

“9. The two principles on which damages in such cases are calculated are well settled. The first is that, as far as possible, he who has proved a breach of a bargain is to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the Contract had been performed; but this principles is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Ry.Co. of London [(1912) AC 673. at P.689]. These two principles also follow from the law as laid down in Section 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the Respondent’s duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss.

Even if the Respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.”

24. This part of the Award deserves to be set aside being against the settled law with respect to a claim for loss of profit.

25. Petition is partly allowed, upholding the Claims awarded in favour of the Respondent under Claim Nos. 2, 4, 5 and 6 and partially under Claim No. 24, but setting aside the Award to the extent the Tribunal has allowed the Claim of Loss of Profit. Pending applications are also disposed of.

JYOTI SINGH, J.

JUNE 8th, 2020
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