IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 1985 of 2014

The Kolkata Municipal Corporation

Versus

Rajpath Contractors & Engineers Limited

Mr. Jaydip Kar, Sr. Adv.
Mr. A.N Banerjee
Mr. Rudranil De

.....For the KMC

Mr. Sakya Sen
Mr. Priyankar Saha
Mr. Amritam Mondal
Mr. Hemant Tiwari
Ms. Ananya Chakraborty
Ms. Shipra Nashar

.....For the respondent

Hearing Concluded On : 16.05.2023

Judgment on :14.07.2023

Krishna Rao, J.:

1. This is an application under Section 34 of the Arbitration and Conciliation, Act, 1996 challenging the Award passed by the Learned Sole Arbitrator dated 22.09.2014 wherein the Learned Arbitrator has awarded an amount of Rs. 2,69,05,241/- (Rupees two crores sixty nine lakhs five thousand two forty one) with the direction upon the petitioner herein i.e. Kolkata Municipal Corporation Limited (herein after referred to as "KMP") to pay the said amount to the respondent within a period of thirty (30)days from the date of Award. In default of payment of the same within the aforesaid time period, the awarded amount shall be paid by the KMC to the respondent along with interest @ 18% per annum for the period from date of the award till the date of payment.

2. The Kolkata Municipal Corporation invited a tender on 17th October, 1996 for renovation of existing 7 M.G. Semi Underground Reservoir at Tallah and the value of the said work was fixed at Rs. 3,53,00,288/-. The respondent had participated in the said tender and the respondent had accepted the tender of the petitioner for a total value of Rs. 3,77,39,537/- and accordingly the respondent had deposited an earnest money of Rs. 1,10,751/-. After receipt of the tender of the petitioner, work order was issued on 24th July, 1997 and as per the work order the work was to be completed within 12 months from the date of the work order. An Article of Agreement was entered between the parties which stipulated all the conditions of the contract as laid down in the tender document.

3. The respondent has completed the work on 31st July, 1999 and after completion of the work the respondent has submitted his 3rd Running Account and Final Bill on 16th September, 1999 which was received by the petitioner on 20th September, 1999. Even on receipt of the Final Bill, no amount was paid by the petitioner to the respondent inspite of several reminders. Accordingly, the respondent had filed writ petition being W.P No. 1925 of 2002 praying for appropriate direction for release of payment and during the pendency of the writ application, by a letter dated 15th May, 2005, the petitioner has blacklisted the respondent.

4. Challenging the order of blacklisting, the respondent had filed another writ application being WP No. 779 of 2005 and by an order dated April 25, 2005, the order of blacklisting was set aside. Being aggrieved with the said order, the petitioner has preferred an appeal and the said appeal was disposed of at the ad interim stage on 17th May, 2007 with the modification by deleting the word 'set aside' and incorporating the words 'operation of the impugned notification till the disposal of the writ petition'. Finally, the writ petition was disposed of on 24th February, 2015 wherein the Hon'ble Court had set aside the said order of blacklisting.

5. This Court by an order dated 26th August, 2009 had disposed of the first writ application filed by the respondent by giving liberty to the respondent to file a civil suit or arbitration seeking appropriate remedy as no relief can be granted in the writ petition. While disposing of the first writ petition, the Hon'ble High Court also observed that the period during which the first writ petition was pending before the Hon'ble High Court shall be excluded for the purpose of limitation under Section 14 of the Limitation Act, 1963.

6. After the disposal of the first writ application, the respondent had initiated a Civil Suit being CS No. 255 of 2009 on 1st September, 2009. In the said suit, the respondent had also filed an application under Chapter XIIIA of the Original Side Rules of this Court and during the pendency of the said application, the parties have decided to enter into an arbitration agreement resolving to settle all disputes and differences between the parties with respect of the work awarded to the respondent.

7. On 5th April, 2011, both the parties have entered into an agreement wherein the parties agreed to resolve their disputes pursuant to such arbitration agreement and accordingly the Hon'ble High Court referred the dispute to the arbitration on 5th April, 2011. As the petitioner has not made the payment till 17th May, 2011, accordingly, the respondent initiated an arbitration proceeding by filing a statement of claim for a total sum of Rs. 11,28,29,317/-. Before the Learned Arbitrator, the petitioner made an overall application under Section 16 of the Arbitration and Conciliation Act, 1996 challenging the jurisdiction of the learned Arbitrator to decide upon certain claims on the ground that the claims mentioned under Category- A & C of the Statement of Claim are outside the purview of civil suit referred to the arbitration and the said claims cannot be the subject-matter of the arbitration. The Learned Sole Arbitrator after hearing of the parties rejected the objection raised by the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 on 26th September, 2012. After considering the submission of the parties and the evidence laid by the parties, the learned sole Arbitrator has passed the impugned order on 22nd September, 2014.

8. Mr. Jaydip Kar, Learned Senior Advocate representing the petitioner "KMP" submitted that the arbitration agreement contemplates that only the claim and counter claims, if any, of the parties which are the subject-matter of CS No. 255 of 2009 are referred to arbitration but the learned Arbitrator without considering the said clause of the agreement has rejected the application of the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 and taken into consideration of Schedule–A as well as Schedule–C of the claim of the respondent.

9. Mr. Kar submitted that from the order dated 5th April, 2011 wherein the matter was referred to arbitration, it was clarified that there is no further doubt that only the matters which were the subject-matter of CS No. 255 of 2009 are referred to the arbitration. He submits that the words used in order dated 5th April, 2011 are *"an agreement has been entered into today between the parties by which they have decided to* *refer the matters covered by the suit to arbitration"*, these means that the reference is limited to the subject-matter of the suit.

10. Mr. Kar by relying upon the judgment reported in ***AIR 1985 SC 1156 (Renusagar Power Corporation Limited –vs- General Electric Company & Anr.)*** had submitted that the Supreme Court has held that "whether a given dispute inclusive of arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ". He submits that there is no doubt, the expression *"arising out of" or "in connection with"* are the widest amplitude but used in the context of the present arbitration agreement they are descriptive of and reflect the amplitude of the suit itself but not the scope of the arbitration agreement. The scope of the arbitration agreement would be wider than the scope of the suit.

11. Mr. Kar submitted that the claimant has divided his claims into three categories i.e. Category-A, Category-B and Category-C. He submits that Category-B claims have been described as particulars of the dues as claimed in the suit but there is no heading in respect of Category-A and Category-C to indicate what their origin is or even to indicate that their origin is not related to the subject-matter of the suit.

12. Mr. Kar submitted that Claims A and C ought not to have been entertained as the respondent have raised the said claims for the first time by a letter dated 4th May, 2011 and the purported claim is false, frivolous and fatuous.

13. Mr. Kar relying upon the judgment reported in ***AIR 1999 SC 2102 (Olympus Superstructures Limited vs. Meena Vijay Khetan & Ors.)*** submitted that the Hon'ble Supreme Court allowed the plea of jurisdiction to be raised even at the stage when the application for setting aside of the award was under consideration under Section 34 of the Act of 1996.

14. Mr. Kar submitted that the Hon'ble Arbitrator has awarded a sum of Rs. 46,86,644/- in respect of Claims of Category-A which have surfaced for the first time in the reference and do not form the subject-matter of the suit. He submits that the Learned Arbitrator has awarded part of the Claim of the Category-A on account of off-site and on-site expenses and costs on account of area, apart from being non-arbitrable and barred by limitation. He further submits that there can be no dispute that such claim must have been arisen prior to completion of the work and no on site and off site expenses could have been incurred by the respondent after completion of the work.

15. Mr. Kar submitted that disregarding the date of completion of the work and taking into account, the date of Final Bill as the starting point of limitation, then also, the claim towards on-site and off-site expenses are barred by limitation. He submits that the sum of Rs. 37,73,952/- was awarded on account of on-site and off-site expenses did not form part of the suit filed before the Hon'ble High Court and thus period during which the suit was pending before this Court would not matter for the purpose of limitation. He submits that as long as the on-site and off-site expenses are concerned, no evidence has been adduced by the respondent to support the claim and thus the award of Rs. 37,73,952/- is vitiated as the same has been awarded without any evidence.

16. Mr. Kar submitted that the Arbitrator has awarded a sum of Rs. 9,12,692/- on account of costs whereas the claim was for Rs. 5,40,692/- though there is no computation by the claimant, nor any evidence adduced in support of the claim for Rs. 4 lakhs (over and above Rs. 5,40,692/-) made in the statement of the claim. He submits that the additional sum of Rs. 4 lakhs is without any basis and without any evidence.

17. Mr. Kar submitted that as regard Claim of Category-B are concern, the Arbitrator has awarded a sum of Rs. 1,45,02,288/- towards the balance of 2nd Running Account Bill and a sum of Rs. 50,41,348/- on account of 3rdRunning Account and Final Bill. He submits that the said claims are also barred by limitation as 2ndBill was issued on 31st August, 1998 and part payment was made on 27th May, 1999. He submits that the respondent claimed for two bills separately on the basis that they did not represent advance against work done/to be done and to be adjusted against the final bill but payment on account of the work actually done in the concern bill. He submits that the cause of action accrued on the date of receipt of such bill and limitation for recovery of the amount thereunder expired three years from the date of receipt of the said bill by the petitioner. He submits that taking into account, the exemption towards the 2ndRunning Account Bill is barred by limitation. He also submitted that taking into account the date of receipt of 3rd Running Account and Final Bill the claim is barred by limitation. He submits that the Hon'ble Court while referring the parties to arbitration in terms of the arbitration agreement dated April 5, 2011 did not grant any exemption under Section 14 of the Limitation Act nor did it hold that the time taken in processing the suit should be excluded while computing limitation.

18. Mr. Kar submitted that the amount awarded on account of escalation aggregating Rs. 18,86,977/- would not have been awarded as the same being contrary to the express terms of the contract between the parties. He submits that the contract expressly bars and prohibits the award for escalation and in face of such prohibition, no award could have been made by the Learned Arbitrator. He submits that the claim of escalation is not proved and the Learned Arbitrator has taken various parameters in the formula for escalation/de-escalation have been misapplied. He submits that on account of retention money and refund of earnest money are not payable. Retention money has been claimed twice over and above the respondent is purporting to make unjust enrichment out of such award and having been failed to perform his contractual obligations cannot be entitled to refund of security deposit and earnest money.

19. Mr. Kar submits that the finding of the Learned Arbitrator are bad in law and there are errors on the face of the award and the materials of the record go to show, inter alia, that the Learned Arbitrator had come to its finding and conclusion without any basis. He submits that the Learned Arbitrator came to the findings, which are unreasonable, perverse and against the public policy of India.

20. Mr. Kar submits that the arbitral award is bad by virtue of Section 34 (2) (a) (iv) of Section 34 (2) (b) (i) (ii) of the Act of 1996.

21. Mr. Kar relied upon the following judgments in support his submissions :

i. (2020) 14 SCC 643 (Geo Miller & Co. Pvt. Ltd. –vs- Chairman Rajasthan Vidyut Utpadan Nigam).

ii. (2010) 8 SCC 563 (Rashtriya Chemicals & Fertilizers Limited –vs- Chowgule Brothers &Ors.).

iii. (2012) 12 SCC 581 (State of Goa –vs- Praveen Enterprises).

iv. (2022) 1 SCC 131 (Delhi Airport Metro Express Pvt. Ltd. –vs- Delhi Metro Rail Corporation Ltd.).

22. Mr. Sakya Sen, Learned Advocate representing the respondent submits that the main point which was argued by the petitioner before the Learned Arbitrator was the claims under Category-A and Category-C of the Statement of the Claim were not the subject-matter of the suit and therefore, not arbitrable. He submits that the Hon'ble High Court by its order dated 5th April, 2011, gave effect to the arbitration agreement and was executed between the parties herein on the same date. The arbitration agreement envisages settlement of all disputes between the parties: “arising out of and in connection with the work order dated 24th July, 1997” and also “the disputes and differences in respect of and/or in relation to and/or arising out of the said agreement dated 27th August, 1997 being claims of the plaintiff and the counter claims, if any of the defendant in CS No. 255 of 2009 referred to above through arbitration……..”.

23. Mr. Sen submits that the word “also” must be taken as “including” in the facts and circumstances of the case. In other words that all disputes arising between the parties in connection with the subject contract/work order including the disputes which were covered by the suit were agreed to refer to arbitration. He submits that the arbitration agreement did not cover only the disputes referred to the suit.

24. Mr. Sen submitted that after receipt of the statement of claim, the petitioner has filed statement of defence but the petitioner has not raised any issues to the effect that the claims which were not in the suit are not arbitable before the Arbitral Tribunal.

25. Mr. Sen submitted that final bill was submitted on 16th September, 1999 and the writ petition was filed on 6th September, 1999. He submits that within three years from submitting the final bill, the respondent has filed writ petition. The writ petition was disposed of on 26th August, 2009 and the suit was filed on 1st September, 2009. He submits that the respondent has filed the suit within the stipulated period of time and thus it cannot be said that the claim made by the respondent is barred by limitation.

26. Mr. Sen submitted that by way of letter dated 4th May, 2011, additional claim was raised which was duly incorporated in the statement of claim and the same was duly decided by the Learned Arbitrator by taking into consideration of the order of reference, agreement and the suit filed by the respondent.

27. Mr. Sen relied upon Clause 1 (b) (ii), Clause 1 (c), Clause 7, Clause 8 and additional condition Clause 21 and submits that the said clauses of the agreement are relevant for the purpose of deciding as to how limitation could have been applied.

28. Mr. Sen submitted that Final Bill is prepared and the same is certified for payment, the question of limitation does not arise in the work's contract. He relied upon unreported judgment passed by the Division Bench of this Hon'ble Court in ***FMA No. 1093 of 2013 (M/s. Biptrade vs. Union of India &Ors.)*** and submitted that if there was any question of right to go to arbitration being barred by limitation, such issue ought to have been decided at such stage as it was incumbent on the Chief Justice or his designated exercising authority under Section 11(6) of the Act to adjudicate on such aspect before referring the disputes to the arbitration. The second aspect of limitation could not have been re-opened by the employer after the arbitral reference commenced in terms of the order under Section 11 of the Act.

29. Mr. Sen submitted that admittedly final bill was accepted on 20th September, 1999 thereby three years period would lapse on 19th September, 2002 but the writ petition was filed on 6th September, 2002 i.e. before 15 days, the limitation could expire and after disposal of the writ petition on 26th August, 2009 i.e. within 5 days the suit was filed on 1st September, 2009 and hence, there is no limitation as alleged by the petitioner.

30. Mr. Sen submitted that additional claims being Category-A and Category-C of the Statement of the Claim are incidental claims arising out of the claims made in the suit. Such claims are consequential to the claims made in the suit and would arise with the claim in the suit and would die down if the claim made in the suit does not succeed. He submitted that the claim do not have any independent existence.

31. Mr. Sen submitted that in the agreement itself the escalation Clause is existing and accordingly by virtue of the said formula, the Learned Arbitrator has granted escalation.

32. Mr. Sen submitted that the factual finding as held by the Learned Arbitrator it was not open to challenge and the findings are not contrary to the fundamental policy of Indian Law. He relied upon the Judgment reported in ***(2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority)*** and submitted that when a Court is applying the "public policy" test to an arbitral award, it does not act as a Court of appeal and consequently errors of facts cannot be corrected. A possible view by the arbitrator on factsis necessarily to pass muster as the arbitrator is the ultimate master of quantity and quality of evidence to be relied upon when he delivers his arbitral award.

33. Mr. Sen submitted that relying upon the judgment reported in ***2017 (5) CHN 221 (DB) (State of West Bengal vs. Pam Developments Private Limited)*** and submitted that in the said case also by which the claim of escalation was allowed in the face of no damage clause was not interfered with by the Hon'ble Supreme Court.

34. Mr. Sen further relied upon the judgment reported in ***(2007) 13 SCC 43 (K.N. Sathyapalan (Dead) by Lrs. vs. State of Kerala & Anr.)*** and the judgment reported in ***(2008) 16 SCC 128 (Associated Construction vs. Pawanhans Helicopters Limited)***.

35. **<u>Clause 1 (b) (ii) :</u>**

For the value of work above Rs. 10.00 lakhs –

Ernest money deposited shall be converted into security deposit at the time of execution of agreement in case of successful tenderer and a further amount is to be deposited at the time of execution of agreement to total S.D. @ 2%.

The security deposit will be refunded to the party immediately after payment of Final Bill.

Clause 1 (c) :

Another 8 % will be deducted as Retention Money progressively from R.A. Bills at the time of passing of the bills contractors. The Retention Money is not to be released before one year from the date of completion of the work and subject to issuing of satisfactory reports by the concerned department.

Clause 7 :

No payment shall be made for works estimated to cost less than ten thousand rupees, till after the whole of the works shall have been completed and certificate of completion given. But in the case of works estimated to cost more than ten thousand rupees, the Contractor shall on submitting the bill therefor, be entitled to receive monthly payment proportionate to the part thereof, then approved and passed by the Engineer-in-Charge whose certificate passing of the sum so payable shall be finaland conclusive against the Contractor. But all such intermediate payments shall regarded as payments by way of advance against the final payment only and not as payment for work actually done and completed, and shall not preclude the requiring of bad, unsound and imperfect or unskillful work to be removed and taken away and reconstructed or re-erected, or be considered as an admission of the due performance of the contract, or any part thereof. In any respect of and reconstructed, or re-erected or be considered as an admission of the due performance of the contract, or any part thereof. In any respect of the accruing of any claim, nor shall it calculated, determine or affect in any way the powers of the

Engineer-in-Charge under these conditions or any of them as to the final settlement or adjustment of the accounts otherwise or in any other way vary or affect the contract. The final bill shall be submitted by the Contractor within one month of the date fixed for completion of the work, otherwise the Engineer-in-charge's certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on all parties.

Clause 8 :

A bill regarding works executed in the previous month shall be submitted by the Contractor in each month on or before the date fixed by the Engineer-in-Charge, and the Engineer-in-Charge shall take or cause to be taken the requisite measurement for the purpose of having the same verified and the claim as far as admissible adjusted, if possible, before the expiry of ten days from the presentation of the bill. If the Contractor does not submit the bill within the time fixed as aforesaid, the Engineer-in-Charge may depute a subordinate to measure up the said work in the presence of the Contractor whose counter-signature to the measurement list will be sufficient warrant ; and the Engineer-in-charge may prepare a bill from such list which shall be binding on the Contractor in all respects.

Bills to be on printed forms.

Clause 21 :

Work Programme :

The contractor shall have to submit within three days from the written order to commence work a detailed time schedule for completion of the works in all respect to the Engineer-in-Charge. The time schedule approved by the Engineer-in-charge will form the work programme for the work and shall be binding on the contractor. The work programme shall no violate the provision of clause-2 of the printed tender form in any way and prepared in conformity with the condition laid down in clause-2 of the printed tender form and the contractor must maintain the progress of work in accordance with the work programme. Failure to maintain the progress of work and completion thereof in accordance with the work programme will tender the contractor liable to action as laid down to contract agreement.

Special condition for price contingency of materials and labour

Price escalation or de-escalation will be applicable on tendered amount for the quantum of the work actually executed on the basis of the quoted rate as per formula below separately for materials and labour. The formula is based on consumer price index number of the Reserve Bank of India Bulletin published periodically. No other formula or method or calculation will be acceptable.

The escalation or de-escalation will be applicable from the commencement of the work and will remain valid for the entire period work in including extended period if any, which extension has been granted for valid reasons like force majure and or any delay on the part of the Calcutta Municipal Corporation. Escalation will not however be allowed if the work is delayed for the fault of the Contractor, even though extension might have been granted. De-escalation during the period if any, will however be applicable.

The total escalation cost permissible, calculated on the basis of formula, will be subject to a maximum limitation of 5 p.c. of the tendered amount for the quantum of the work actually executed.

Formula for Escalation/De-escalation

(a) Materials :

vm	=	$(0.60W\text{-}Md) \times \frac{Im - Imo}{Imo}$
Where	=	Escalation/de-escalation on account of variation of price of materials.
W	=	Total gross value of the work done at tendered rate.
Md	=	Value of the materials issued by the Deptt. At fixed price. Or Value or materials prevailing at the time of submission of tender.
Im	=	Wholesale price index number for all commodities as ruling during the period under consideration as published in the Reserve Bank of India Bulletin.
Imo	=	Wholesale price index number for all commodities ruling in the month of submitting Tender as published in the Reserve Bank of India Bulletin.

(b) Labour

VL		$0.25w \times \frac{IL - Ilo}{IL}$
Where	=	

VL		Escalation de-escalation on account of variation of price of Labour.
W	=	Total gross value of the work done at tendered rate.
IL	=	Consumer price index No. for industrial workers applicable for Calcutta Region as ruling during the period under consideration as published in the Reserve Bank of India Bulletin.
IL	=	Consumer price index number. for industrial workers applicable for Calcutta Region as ruling in the month of submitting Tender as published in the Reserve Bank of India Bulletin.
(C)		Provided that, recovery of materials used less or in excess as indicated in paragraphs (a) and (b) of the sub-clause shall be subject to the decision of the Dy. Chief Engineer (P&D) who may allow variation according to Statement III.

ESCALLATION OF RATE BEYOND STIPULATED TIME PERIOD

If for no fault of the Contractor work is required to be executed beyond stipulated time period for a period of two years, contractor will execute the work in the extended period at escalated rate as per Reserve Bank of India Formula given in this schedule.

Statement-III

Consumption of different materials of construction in the corresponding contract item of Tender shall be computed on the basis of the quantities shown in the Calcutta Municipal Corporation schedule of rates, subject to a variation of plus/minus five percent except in case of steel materials in respect of which the variation shall be 10%. Where, however, the circumstances of work so require, the Dy. Chief Engineer, (P&D) shall be competent to allow (for recorded reasons) for a greater variation.

36. According to Mr. Kar, Learned Senior Advocate the claims made in the suit are also barred by limitation on the date of Learned Arbitrator entered into arbitration. As per the submission, the suit is governed by Article 18 of the Limitation Act which provides a limitation of three years from the date when the work was completed. He submits that the work was completed on 31st July, 1999 and thus the dates of filing of writ petition as well as the civil suit were barred by limitation. As per record, the work was completed on 31st July, 1999 and the respondent submitted his 3rd Running Account and Final Bill dated 16th September, 1999 which was accepted by the petitioner on 20th September, 1999 and thus the period of three years would lapse on 19th September, 2002 but the respondent had filed writ petition claiming the said amount on 6th September, 2002 i.e. 15 days before the limitation could expire and after disposal of the writ petition on 26th August, 2009 immediately within 5 days, the respondent has filed the suit on 1stSeptember, 2009 and thus this Court does not find any delay of the claim raised by the respondent.

37. As regard additional claims being Category-A and Category-C of the Statement of Claim, the Hon'ble High Court by an order dated 5th April, 2011 had appointed a Sole Arbitrator to decide the disputes and differences between the parties in relation to and/or arising out of one contract dated 27th August, 1997 entered between the parties. The relevant portion of the order dated 5th April, 2011 reads as follows :

> *"An agreement has been entered into today between the parties by which they have decided to refer the matters covered by the suit to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The agreement records the name of the Arbitrator … Accordingly, C.S. No. 255 of 2009 and all interlocutory applications therein, including G.A. No. 3173 of 2009, has been disposed of by referring the disputes covered thereby to arbitration in accordance with the agreement filed in Court today."*

The High Court has appointed Arbitrator on the basis of the agreement entered between the parties on 5th April, 2011 and the relevant portion of the agreement reads as follows :

> *"The parties abovenamed do hereby resolve and agree to settle the disputes between them arising out of and in connection with the said work order dated July 24, 1997 for the work of renovation of the said existing 7 mg. Semi underground reservoir at Tallah and also the disputes and differences in respect of and/or in relation to and/or arising out of the said agreement dated August 27, 1997 being claims of the plaintiff and Counter-Claims, if any, of the defendant in the said C.S. No. 255 of 2009 referred to above through arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. By consent of parties, Mr. Arijit Banerjee, Barrister-at-Law of premises No. 1/1B, Deodar Street, Kolkata – 700 019."*

The respondent being the claimant before the Arbitrator has set up three claims in three categories as Categories – A, B & C which reads as follows :

"<u>PARTICULARS</u>

1. Loss of profit as per Schedule-I of the letter dated May 4, 2011 …………. Rs. 37,73,952.00

2. Offsite and onsite expenses as per Schedule-II of the letter dated May 4, 2011 …………. Rs. 37,73,952.00

3. Costs as per Schedule-III of the letter dated May 4, 2011……….<u>Rs, 5,40,692.00</u>

Sub Total Rs. 80,88,596.00

4. Interest @18% per annum on the due amount of Rs. 80,88,596.00 from August 01, 1999 to April 05, 2011 as per Schedule-IV of the letter dated 5th April, 2011 …… Rs. 1,70,16,633.00

5. Interest @18% per annum on the due amount of Rs. 80,88,596.00 from April 6, 2011 to May 17, 2011 (Rs. 80,88,596/- X 0.18 X 42 days/365 days) ….. Rs. 1,67,534.00

6. Loss of reputation on the ground of illegal black-listing <u>Rs. 1,00,00,000.00</u>

Sub Total (A): Rs. 3,52,72,763.00

<u>Particulars of the dues as claimed in the suit</u>

1. Principal amount of second running account bill

…………………. Rs. 1,95,02,287.00

Less paid vide cheque No. 988502 dt. 7.5.1999

Rs. 50,00,000.00

Rs. 1,45,02,287.00

2. Principal amount of third running account & final bill ………………………………………. Rs, 40,51,347.81

3. Escalation Bill ………. Rs. 31,81,630.15

4. Retention Money……..Rs. 16,67,233.00

5. Refund of security deposit and earnest money
Deposit <u>*Rs. 2,34,478.00*</u>
Rs. 91,34,689.00

Sub Total: Rs. 2,36,36,976.00

6. Interest for delayed payment against first running
Account bill @18% from 01.03.1998 to 16.07.1998
= 138 days on Rs. 1,36,00,000.00
(Rs. 1,36,00,000.00 X 0.18 X 138 days/365 days)
Rs. 9,25,545.00

7. Interest for delayed payment against second
Running account bill @18% from 01.09.1998
to 07.05.1999 = 249 days on Rs. 1,95,02,287.00
….. Rs. 23,94, 774.00

8. Interest for delayed payment against second
running account bill @18% from 08.05.1999 to
19.09.1999 = 135 days on Rs. 1,45,02,287.00
(Rs. 1,45,02,287 x 0.18 x 135 days/365 days)
Rs. 9,65,495.00

9. Interest for delayed payment against second
and third running account and final bill
@18% from 20.09.1999 to 31.08.2009 = 3634 days
on Rs. 2,36,36,976.00
(Rs. 2,36,36,976 X 0.18 X 3634 days/365 days)
<u>*Rs. 4,23,60,051.00*</u>

Sub Total (B) Rs. 7,02,82,841.00

10. Interest for delayed payment against second and third running account and final bill @18% from 01.09.2009 to 17.05.2011 = 624 days on Rs. 2,36,36,976.00

(Rs. 2,36,36,976 X 0.18 X 624 days/365 days) Sub Total (C)

Rs. 72,73,713.00

Grand Total (sub total A+B+C): Rs. 11,28,29,317.00"

The Arbitration Agreement envisaged of all disputes between the parties arising out of and in connection with the said work order dated 24th July, 1997 and also the dispute and differences in respect of and/or in relation to and/or arising out of the agreement dated 27th August, 1997 being the claims of the plaintiff and counter claims, if any of the defendant in CS No. 255 of 2009 referred to the arbitration. Combined reading of the agreement entered between the parties during the pendency of the suit includes the claims and counterclaims of the suit, work order and the agreement entered between the parties with respect of the said work order. The disputes arose between the parties with respect of the payment of the work executed by the respondent. Initially, the respondent has filed writ petition and as per the liberty given by the Writ Court, the respondent has filed civil suit and during the pendency of the civil suit, the petitioner agreed for arbitration and entered into an arbitration agreement. The Learned Arbitrator considered the whole aspect of the matter when the petitioner has raised the issue with regard to the maintainability of Claims A & C of the respondent and the Learned Arbitrator had rejected the objection raised by the petitioner and proceeded with the Arbitration. In the case of ***Associate Builders (supra),*** the Hon'ble Supreme Court has categorically held that a Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. The award can be challenged only under the grounds mentioned in Section

34 (2) of the Act. In the present case, the Arbitrator after hearing of the parties and after appreciating the relevant orders and documents held that the claims made by respondent with respect of Claim A and Claim C are arbitrable and thus this Court does not find any infirmity to interfere with the finding of the Arbitrator.

38. As regard the escalation, the same has been provided in the agreement itself in Clause 21 of the additional condition of the agreement and the formula has also prescribed. The Learned Sole Arbitrator while deciding the claim of escalation has adopted the method as prescribed in the agreement. The said clause specified that the total escalation cost as permissible or calculated on the basis of the formula mentioned therein, will be subject to maximum limitation of 5 p.c of the tender amount for the quantum of work actually executed. The Learned Arbitrator taking into consideration of the said clause has passed the award and as such this Court does not find any infirmity with regard to the award passed by the Arbitrator on account of escalation.

39. As regard refund of security deposit and earnest money admittedly the respondent has deposited a sum of Rs. 1,10,751/- as earnest money with the petitioner by way of cheque at the time of submitting the tender form and admittedly the respondent has completed the work tothe satisfaction of the petitioner and inspite of completion of the work, the petitioner has not released the said amount in favour of the respondent and thus the Learned Arbitrator has rightly awarded the said amount in favour of the respondent.

40. As regard the cost, the Learned Arbitrator has categorically held that the petitioner has not released the payment of the respondent inspite of completion of the work and the petitioner has approached the writ Court, subsequently, the Civil Court and also in the arbitration proceeding and thus this Court does not find any illegality for awarding the said cost.

41. In view of the above, this Court does not find any illegality to interfere with the award passed by the Learned Arbitrator dated 22nd September, 2014. Accordingly, **AP 1985 of 2014** is thus **dismissed**.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)