

IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

AP-COM 486 of 2024
(Old No. AP 443 of 2014)

J.G. Engineers Private Limited

Versus

M/s. National Building Construction Corporation Ltd.

AND

AP-COM 485 of 2024
(Old No. AP 489 of 2014)

M/s. National Building Construction Corporation Limited

Versus

J.G. Engineers Private Limited

Mr. Devajyoti Barman
Ms. Sanjukta Basu Mallick

.....For the N.B.C.C.

Mr. Surajit Nath Mitra, Sr. Adv.

Mr. Suman Dutt

Mr. U.S. Menon

Ms. Sananda Mukhopadhyay

Mr. Abhirup Chakraborty

.....For the J.G. Engineers Pvt. Ltd.

Hearing Concluded On : 22.04.2024

Judgment on : 01.07.2024

Krishna Rao, J.:

1. Both parties have preferred an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the Sole Arbitrator dated 17th December, 2013. The Contractor namely; J.G. Engineers Private Limited had preferred the application under Section 34 of the Arbitration and Conciliation Act, 1996, being AP-COM 486 of 2024 (Old No. A.P. 443 of 2014) praying for the following relief(s):

- a) *The award dated December 17, 2013 passed by Mr. S. C. Vasudeva, Learned Sole Arbitrator in the matter of arbitration between M/s J.G. Engineers (Pvt.) Ltd. and M/s. National Buildings Construction Corporation Limited in so far as the same held that the petitioner was primarily responsible for the delay in completion of the contract beyond March 25, 1995 and rejected and/or reduced the claims of the petitioner and allowed various counter claims of the respondent be set aside;*
- b) *Ad-interim order in terms of prayer above;*
- c) *Costs of this application be directed to be paid by the respondent;*

- d) Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Court may seem fit and proper."*

2. The M/s. National Building Construction Corporation Limited (hereinafter referred to as "NBCC") has also preferred an application under Section 34 of the Arbitration and Conciliation Act, 1996 against the award dated 17th December, 2013, being AP-COM 485 of 2024 (Old No. A.P. 489 of 2014) praying for the following relief(s):-

- (a) Condone the delay of about 7 days which have occurred in filling this application;*
- (b) Upon condonation of such delay an Order any be passed that Issue No. (i) & (ii) as decided in Award dated 17.12.2013 in Annexure "A" to the petition be set aside by this Hon'ble Court to the extent mentioned in the grounds of the instant application;*
- (c) That Claim No. 5, 6, 7(c), 14 & 15 in Award dated 17.12.2013 in Annexure "a" to the petition be set aside by this Hon'ble Court to the extent mentioned in the grounds of the instant application;*
- (d) The respondent/ claimant be restrained from giving any or any further effect to the said Award dated 17.12.2013;*
- (e) Ad-interim order in terms of prayer (b) (c) and (d) above;*
- (f) The respondent/ claimant be directed to pay the cost of and incidental to this application;*
- (g) That Counter Claim no. 1 & 7 of the petitioner may be allowed as specified to the extent mentioned in the grounds of the instant application;*
- (h) That restricting the entire amount awarded against counter claims no. 1, 7, 8, 10, 11, 12,*

13, 15, 17 to Rs. 65.00 lacs as per award dated 17.12.2013 be set aside and that the same may be allowed to the full extent as specified in the grounds of the instant application;

- (i) That pendente lite interest @ 9% per annum on counter claim no. 2, 3, 4, 5, 6, 9 & 18 from date of award i.e. 17.12.2013 till date of actual payment as contained in the award be allowed from the date of appointment of arbitrator till the date of actual payment as specified in the grounds of the instant application;*
- (j) Such further order or orders be passed and/or direction or directions be given as this Hon'ble Court may deem fit and proper;*

3. For the purpose of appropriate decision, the facts of the present case are required to be narrated, which are as follows:-

- (a) The NBCC was appointed by the National Airports Authority of India as a Project Management Consultant and was entrusted amongst other works, the work of Model Airport at Bhubaneswar, Odisha for getting the same constructed by engaging appropriate contractors.
- (b) The NBCC had published a tender notice on 25th December, 1993, inviting tender offers for construction of Terminal Building and allied works of the Bhubaneswar Airport. In response to the said tender notice, the contractor, namely, J. G. Engineers Private Limited had submitted its offer and, after negotiations with the contractor and the NBCC, the offer of the contractor was accepted and awarded the contract for executing the work amounting of

Rs.5,71,13,541/-. After the acceptance of the offer, an agreement was entered into between the NBCC and the contractor on 13th March, 1993, specifying the conditions of contract. The relevant clauses of contract will be discussed at the time of taking decision in the matter.

- (c) The value of the contract was Rs.5,71,13,541/- and the stipulated date of start of the work was 01.03.1993 and the stipulated date of completion was 31.10.1994. As the work was not completed within the stipulated date of time, NBCC granted extension of time without levy liquidated damages from time to time, lastly it was extended up to 15.12.1995.
- (d) On 09.11.1995, a Show Cause Notice was issued calling upon the contractor to explain as to why the contract should not be terminated and why the balance work should not be executed at the risk and cost of the contractor. On the same day the NBCC issued another notice to the contractor by extending the time for completion of work up to 15.12.1995.
- (e) The contractor has submitted his reply to the show cause notice to the NBCC on 25.11.1995. On receipt of reply to the show cause notice, the NBCC by a letter dated 20.03.1996 terminated the contract by forfeiting the performance guarantee and security deposit without prejudice to their right to realize NBCC's all dues, losses and damages under the clause of contract.

- (f) Being aggrieved with the termination of contract, the contractor has invoked the Arbitration Clause of the Agreement and accordingly Arbitrator was appointed.
- (g) Before the Arbitrator, the contractor had raised together twenty (20) claims, which are as follows:

Claims/ Counter -Claims	Description	Amount Claimed (In Rupees)	Awarded Amount (In Rupees)
<i>Claim Nos. 1 & 5</i>	<i>On account of balance payment for executed work and payment of less amount allowed in final bill prepared by NBCC.</i>	<i>20,23,569.41 5,00,000.00 Revised to 25,09,363</i>	<i>(1,94,131+5,00,000) = 6,94,131.00</i>
<i>Claim No.2</i>	<i>For balance payment on account of less payment made due to wrongful assessment of rate of admitted extra items of work.</i>	<i>14,15,318</i>	<i>12,44,317.00</i>
<i>Claim No.3</i>	<i>Extra items not admitted by the respondent.</i>	<i>24,90,6412.99 revised to 18,12,389</i>	<i>1,32,620.00</i>
<i>Claim No.4</i>	<i>Compensation for suspension of the work.</i>	<i>95,756.00</i>	<i>NIL</i>
<i>Claim No.6</i>	<i>Refund of money wrongfully obtained by NBCC from the claimant's bank.</i>	<i>77,11,354.18 revised to 42,22,698.00</i>	<i>41,22,698.00</i>
<i>Claim No.7 (a)</i>	<i>Claim of additional payment towards escalation bill for materials (other than steel and cement) P.O.L. and labour upto the stipulated date of completion,</i>	<i>16,06,667.50/-</i>	

	<i>prepared wrongly and not as per contract provision.</i>		
7(b)	<i>Claim of balance payment towards escalation for materials (other than steel and cement) P.O.L and labour beyond the stipulated date of completion and upto date of termination of contract as per contractual formulas with indices/minimum wages pegged on the schedule date of completion.</i>	3,54,890.00	
7(c)	<i>Claim for additional payment towards escalation for materials (other than steel and cement) P.O.L. and labour beyond the stipulated date of completion as per the contract formula with indices/minimum wages applicable upto the date of termination of contract and without importing any ceiling.</i>	8,11,557	
		<i>(total revised to Rs.26,73,115.20</i>	13,66,579
Claim No.8	<i>For non-payment of 2.5% towards overhead and handling charges for cement and steel.</i>	6,00,000.00	NIL
Claim No.9	<i>Claim of compensation extra over escalation claim under claim No.7 for works executed during prolonged period.</i>	3,36,026.00	NIL
Claim No.10	<i>For payment of Rolling Margin.</i>	3,14,228.00	NIL

<i>Claim No.11</i>	<i>Claim for Sales Tax on rates of extra items.</i>	<i>55,840.00</i>	<i>NIL</i>
<i>Claim No.12</i>	<i>Reimbursement of increase in rate of Sales Tax.</i>	<i>2,44,000.00</i>	<i>NIL</i>
<i>Claim No.13</i>	<i>Claim of additional rate for items of work executed beyond deviation limit.</i>	<i>9,10,570.00</i>	<i>NIL</i>
<i>Claim No.14</i>	<i>Claim of compensation for (i)(a) longer retention of plant & machinery upto 10.4.96.</i>	<i>50,41,185.00</i>	<i>5,94,595.00</i>
	<i>(i)(b) hire charges/cost of steel shuttering materials retained by NBCC and not released till date,</i>	<i>22,22,309.00</i>	<i>NIL</i>
	<i>(ii) on-site and off-site overhead expenses during the prolonged period.</i>	<i>23,22,000.00</i>	<i>18,15,567.00</i>
<i>Claim No.15</i>	<i>Claim of compensation for retaining longer on the job without earning corresponding benefit.</i>	<i>48,54,000.00</i>	<i>11,83,400.00</i>
<i>Claim No.16</i>	<i>Claim of compensation for underutilized mobilization expenses incurred at site for the whole job.</i>	<i>8,42,160.42</i>	<i>NIL</i>
<i>Claim No.17</i>	<i>Claim of compensation on account of underutilization of infrastructure and facilities provided to NBCC.</i>	<i>1,40,000.00</i>	<i>NIL</i>
<i>Claim No.18</i>	<i>Claim for loss in anticipated profit on balance unexecuted value of work.</i>	<i>24,85,000.00</i>	<i>NIL</i>
<i>Claim No.19</i>	<i>Claim of interest for (i) pre-reference period, (ii)</i>		<i>NIL</i>

	<i>pendent-lite period, & (iii) future period up to the date of realization of the award amount.</i>		
<i>Claim No.20</i>	<i>Cost</i>	<i>38,16,904.00</i>	<i>NIL</i>
<i>Counter Claim No.1</i>	<i>On account of recovery of excess expenditure incurred in getting the balance work of the claimant's contract completed by another agency namely M/s P.D. Agarwal.</i>	<i>79,99,389.00</i>	<i>NIL</i>
<i>Counter Claim No.2</i>	<i>Recovery of special advance for materials paid to the suppliers of the claimant.</i>	<i>4,37,981.84</i>	<i>3,05,382.00</i>
<i>Counter Claim No.3</i>	<i>Recovery of unadjusted special advance for steel given to Claimant.</i>	<i>15,36,872.77</i>	<i>12,97,518.00</i>
<i>Counter Claim No.4</i>	<i>Interest for special advance for procurement of steel and interest bearing advance of Rs.15.00 lakhs paid in three installments.</i>	<i>3,94,917.00</i>	<i>3,94,917.00</i>
<i>Counter Claim No.5</i>	<i>Non-recovery of advance given against extra items to the claimant.</i>	<i>40,148.00</i>	<i>40,148.00</i>
<i>Counter Claim No.6</i>	<i>Payment on account of non-adjustment of secured advance paid to the claimant.</i>	<i>3,89,254.00</i>	<i>3,89,254.00</i>
<i>Counter Claim No.7</i>	<i>Interest on increased cost of balance works being executed through the other agency.</i>	<i>7,19,945.00</i>	<i>NIL</i>
<i>Counter Claim</i>	<i>Compensation for delay.</i>	<i>65,00,000.00</i>	<i>NIL</i>

No.8			
Counter Claim No.9	<i>Non-payment of Electricity charges to M/s Airports Authority of India (Bhubaneswar Airport).</i>	4,35,933.00	4,35,933.00
Counter Claim No.10	<i>Field Overheads expenses of the respondent.</i>	16,72,000.00	5,90,000.00
Counter Claim No.11	<i>Delay in the completion of the Terminal Building leading to delay in the execution of other packages of HVAC, sub-station, conveyor belt and D.G.Set resulting in increased cost of account of payment of escalation etc. to these agencies.</i>	23,16,000.00	9,99,000.00
Counter Claim No.12	<i>Interest on investment for non-completion of the works in time by M/s J.G. Engineers (P) Ltd. (Claimant) at Bhubaneswar Airport.</i>	1,42,31,000.00	71,77,000.00
Counter Claim No.13	<i>Loss of operational and commercial revenue by M/s. Airport Authority of India (owner).</i>	3,38,00,000.00	NIL
Counter Claim No.14	<i>Loss of interest on release of cash security deposit against bank guarantee.</i>	4,15,000.00	NIL
Counter Claim No.15	<i>Interest for prolonged utilization of mobilization advance.</i>	9,45,000.00	NIL
Counter Claim No.16	<i>Extra cost in structural steel due to changes made by the claimant in its shop drawings.</i>	21,00,000.00	NIL
Counter Claim No.17	<i>Loss of profit due to prolongation of work by the claimant.</i>	1,10,00,000.00	30,00,000.00

<i>Counter Claim No.18</i>	<i>Non-preparation of as-Built drawings.</i>	<i>2,50,000.00</i>	<i>2,00,000.00</i>
<i>Counter Claim No.19</i>	<i>Interest on non-payment of claims</i>		<i>Counter claims 2 to 6, 9 & 18 @ 9% per annum w.e.f. 09.08.1996 and for counter claim nos. 10 to 12, 15 & 17 (for restricted amount of Rs. 65,00,000/-) @ 9% p.a w.e.f. 17.12.2013</i>
<i>Counter Claim No.20</i>	<i>Costs</i>		<i>NIL</i>

e) Before deciding the claims and the counterclaims of the respective parties, Learned Sole Arbitrator had framed three issues, which are as follows:

- (i) Whether there was delay in execution and if so, who was responsible for the same?
- (ii) Whether the termination of the contract by the respondent was lawful?
- (iii) Whether parties are entitled to claims and counterclaims?

f) At the time of deciding the issue no.(i), Learned Arbitrator has come to the finding that delay in execution of the work upto the stipulated date of completion and even up to 25.03.1995, the first extended date of completion, was primarily attributable to the NBCC. The arbitrator has also come to the finding that beyond

25.03.1995 is attributable primarily to the contractor though to some extent NBCC too was also responsible.

- g) While considering the issue no.(ii), the arbitrator come to the finding that the termination of the contract by the NBCC on 20.03.1996 was unlawful.
 - h) As regard to the issue no.(iii), the arbitrator has taken up for consideration of claims and counter claims of the parties.
 - i) In the award, Learned Arbitrator has given a specific note specifying that *“the counter claim nos.1, 7, 8, 10, 11, 12, 13, 15 & 17 are in the nature of damages and the total amount awarded against these counter claims viz Rs.123.06 lacs (i.e. 0 + 0 + 0 + 5.90 + 9.99 + 71.77 + 0 + 5.40 + 30.00, all figures in lacks of Rupees) has to be restricted to Rs.65.00 lacs which, as per the Contract Clause 72 (10% of 650 lacs as per Exhibit D-366), is an agreed pre-estimation of the maximum compensation/liquidated damages that can result from delay. As such, I am limiting the amount awarded against these counter claims to Rs.65.00 lacs only”*.
- 4.** Mr. Surajit Nath Mitra, Learned Senior Advocate representing the contractor submits that the Learned Arbitrator misdirected himself by holding that the contractor on its part did contribute somewhat to the delay upto March 25, 1995, on account of delay in mobilizing or establishing field testing laboratory or in conducting designs mix on or in arranging weight batches or bricks or excavation work by overlooking

the fact that there could not be any delay on the part of the contractor on any of the said accounts until all the essential correct drawings good for construction were given by the NBCC and until the shop drawings prepared and submitted by the contractor were approved by the NBCC and as such, the award passed by the Learned Arbitrator is perverse.

5. Mr. Mitra submits that the Arbitrator, while deciding the issue no.(i), erroneously took into consideration the period after 31.10.1994 when both the parties proceeded on the basis that the delay under consideration was only up to the stipulated date of completion and not beyond that and doing so, the Arbitrator misconducting himself.
6. Mr. Mitra submits that the findings of the Learned Arbitrator that the delay beyond March 25, 1995, is attributable primarily to the contractor are perverse and illegal. He submits that the NBCC failed to provide many essential drawings good for consideration, as a result, the delay upto March 25, 1995, was attributable to the NBCC could not come to a finding that the delay beyond the said date was primarily attributable to the contractor without recording the date when such drawings were approved by the NBCC.
7. Mr. Mitra submits that the Arbitrator has made out the case against the contractor which was not even made out by the NBCC and by doing so show the Arbitrator committed patent illegality. He submits that the Learned Arbitrator converted the grounds made out by the NBCC in support of its case of breaches committed by the contractor as alleged

grounds for delay and by doing so the Learned Arbitrator has acted perversely and illegally.

- 8.** Mr. Mitra submits that it is undisputed facts that the contract was not terminated under Clause 72.1(iii) on any of the breaches allegedly committed by the contractor and that in view of the admitted non-approval of any of the shop drawings by the NBCC, there was no scope for the contractor either to achieve the target fixed by the NBCC or to achieve progress either of work or of financial target or financial turnover. He submits that the contract was not terminated under Clause 72.1(iii) of the Conditions of Contract on the ground of alleged breach committed by the contractor.
- 9.** Mr. Mitra submits that it was the obligation on the NBCC to approve the shop drawings submitted by the contractor with respect to structural steel work, aluminum work, plumbing work and sanitary work, firefighting work, electrical work etc. in the absence of which it was not possible for the contractor to proceed with the work and to complete the contract.
- 10.** Mr. Mitra submitted that admittedly during continuance of the pendency of approval of the shop drawings, the NBCC from time to time extended the time to complete the contract and lastly it was extended till 15.12.1995 without imposing any liquidated damages upon the contractor and as such the impugned award passed by the Arbitrator is patently illegal.

11. Mr. Mitra submitted that the Learned Arbitrator has completely ignored three vital documents being crucial evidence on record which were not disputed by the NBCC before the Arbitrator and have remained uncontroverted by the NBCC. There is no denial in the affidavit-in-opposition in connection with AP No.443 of 2014. He submits that first is the Pert chart prepared by the contractor demonstrating that the shop drawings were required for everything and upon which the timely completion of entire project was dependent while the other two documents are necessary but was not provided. He submits that Learned Arbitrator found that the delay up to 25.03.1995 was on account of drawings which were ultimately required to be prepared shop drawings by the contractor holding the contractor responsible for delay for the self-same reason beyond 25.03.1995 by relating drawings to immateriality is shockingly unreasonable and perverse. He submits that admittedly drawings were outstanding from NBCC till the date of termination. The shop drawings have a direct correlation with the amount of balance work and the time required to complete it as the subsequent contractor P.D. Agarwal took more than 18 months to finish the balance work.

12. Mr. Mitra submitted that the findings of the Learned Arbitrator that works like sanitary and plumbing, hand railing, stone cladding etc. were allegedly found to have not been started by the claimant even till termination of the contract is not correct. He submits that these are all finishing works in respect of terminal building which could not have

been undertaken unless and until the structure was erected for which the balance shop drawings were not approved.

13. Mr. Mitra submitted that each and every submission of the parties have been recorded during the hearing before the Learned Arbitrator from the month of August, 2010 to 4th May, 2013 but while publishing the award, the Learned Arbitrator has not considered the recording of the Minutes of the Meeting.
14. Mr. Mitra submitted that in one hand, the Learned Arbitrator has come to the finding that the termination of contract by the NBCC dated 20.03.1996 was unlawful and on the other hand, the Learned Arbitrator has allowed the counterclaim of the NBCC and made responsible against the contractor. The said finding of the Learned Arbitrator is perverse and illegal.
15. Mr. Mitra has relied upon the judgment reported in **(2019) 15 SCC 131 (SSANGYONG Engineering & Construction Company Limited vs. National Highways Authorities of India)** and submitted that the Hon'ble Supreme Court in the said case held that principles of pre-amendment would apply to applications made before 23.10.2015 and affirmed the judgment reported in **(2003) 5 SCC 705 (ONGC vs. Saw Pipes Ltd.)** and **(2014) 9 SCC 263 (ONGC v. Western GECO International Ltd.)**.
16. Mr. Mitra further relied upon the judgment reported in **(2015) 3 SCC 49 (Associate Builders vs. Delhi Development Authority)** and

submitted that the awards are liable to be struck down under Section 34 of the Arbitration and Conciliation Act, 1996.

- 17.** Mr. Devajyoti Barman, Learned Advocate representing the NBCC submits that the Learned Arbitrator failed to appreciate the breaches committed by the contractor which was highlighted in various correspondences including in the final show cause notice dated 09.11.1995.
- 18.** Mr. Barman submitted that the Arbitrator erred in law in coming to the finding that NBCC could not terminate the contract without issuing a notice fixing reasonable time for completion of the balance work, making such time the essence of contract. He submits that as per the letter of extension dated 09.11.1995, provisional extension of time for completion of work was given up to 15.12.1995 making time the essence of the contract and as such there was no chance that the contractor could not complete the work in near future and matched up the schedule given to him through various correspondences between December, 1995 to March, 1996.
- 19.** Mr. Barman submitted that the Learned Arbitrator has committed an error by holding that by issuing letter of extension of time on the same date as issuing a show cause notice to the contractor, the NBCC had given a go-bye to its show cause dated 09.11.1995.
- 20.** Mr. Barman submitted that the Learned Arbitrator failed to appreciate that the Arbitrator himself has held that the contractor found guilty of

breaches which have been brought out by the NBCC in the show cause notice dated 09.11.1995 and the termination of the contract was legal and valid.

- 21.** Mr. Barman submitted that the NBCC had issued several reminders to the contractor to expedite the work for meeting the targets. The contractor was required to complete the work by 30.10.1994 and the contract was terminated on 20.03.1996 that is more than one and a half years after the date initially fixed for completion of the project within the extended period, the contractor failed to complete the work.
- 22.** Mr. Barman relied upon the Clause 72 of the Contract and submits that the Clause 72 of the Contract gives the authority to the NBCC for terminating the contract, if the contractor breaches any of the terms and conditions of the contract. He submits that the show cause notice dated 09.11.1995 clearly spells the number of breaches on the part of the contractor including the delay being caused by the contractor but the Learned Arbitrator failed to appreciate the correspondences and the show cause notice in which the NBCC narrated about the violation of the terms and conditions of the contract by the contractor.
- 23.** Mr. Barman submitted that the Learned Arbitrator failed to appreciate that the NBCC had to make extra expenditure for getting the balance work executed through another agency for fault of the contractor by not completing the work within the extended time. He submits that the

termination was lawful and findings of the Arbitrator is perverse and is liable to be set aside.

24. Mr. Barman submitted that the finds of the Learned Arbitrator that the termination of contract by the respondents on 20.03.1996 was unlawful is perverse and illegal and the same is liable to be set aside.

25. Mr. Barman relied upon the following judgments:-

- (i) *2007 (3) Supreme 399 (Food Corporation of India vs. M/s Chandu Construction and Another);*
- (ii) *2022 Supreme (SC) 620 (Indian Oil Corporation Limited vs. NCC Limited);*
- (iii) *2017 Supreme (SC) 243 (M/s. Sharma & Associates Contractors (P) Limited vs. Progressive Constructions Limited);*
- (iv) *2021 Supreme (SC) 696 (Union of India vs. Manraj Enterprises);*
- (v) *1999 Supreme (SC) 1079 (Rajasthan State Mines & Minerals Limited vs. Eastern Engineering Enterprises and Another);*
- (vi) *2006 Supreme (SC) 1277 (Ramnath International Construction vs. Union of India).*

26. Heard the Learned Counsel for respective parties, perused the materials on record and the judgments relied upon by the parties.

27. Before deciding the matter on merit, the following Clauses of the agreement is required to be deal with, which are as follows:-

“Clause No. 1.2 - PROJECT MANAGEMENT CONSULTANTS:

Project Management Consultants means M/s National Buildings Construction Corporation Limited (A Government of India Enterprise) who has been retained as Project Management Consultants by M/s National Airports Authority to tender services such as calling of Tenders. Evaluation of Tenders, awarding of works, supervision and certification of measurement and payment of contractors bills.

Clause No. 1.3

National Buildings Construction Corporation Limited, hereinafter called 'NBCC' propose to construct a New Terminal Building at Bhubaneswar for NAA. These buildings will be constructed as per drawings "GOOD FOR CONSTRUCTION" to be released by the Architect appointed by NAA for this project.

Clause No. 1.4

a) Engineer-in-Charge means the Engineer of NBCC and incharge of the project.

Clause No.11.6

All designs, drawings, bill of quantities etc. for all works shall be supplied to the contractor for all buildings services and development works by NBCC as the works progress. However, it shall be the duty and responsibility to bring to the notice of the NBCC in writing as to any variation to the sub-soil or any design assumptions or any other changes required and to obtain revised drawings and designs and/or approval of the NBCC in writing for the same no claim/allowance. Whatsoever shall be entertained for any such revision.

Clause 11.9

Contractor shall have to prepare the shop drawings if required for any of the items of work. Five copies of these shop drawings will be submitted to NBCC for approval. Before executing the item, shop drawings should be approved by NBCC.

Clause No. 16 ESCALATION PAYMENT.

If the prices of materials (not being supplied or services rendered at fix prices by the NBCC) and/or wages of labour required for execution of the work increase the contractor shall be compensated for such increase as per provision detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the contract is extended under the provision of time extension clause of this contract without any action under the compensation for delay clause of this contract and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such compensation for escalation in the price of materials and labour when due shall be worked out based on the following provisions.

Clause 69.1

The Engineer-in-Charge shall have power to make any alterations in omissions from additions to or substitutions for, the original specifications, drawings, designs and instructions that may appear to him to be necessary during the progress of the work and the contractor shall carry out the work in accordance with any instruction which may be given to him in writing signed by the Engineer-in-Charge and such alterations, omissions, additions or substitutions shall not invalidate the contract and any altered, additional or substituted work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work. The time for the completion of the work shall be extended in the proportion that the altered, additional or substituted work bears to the original contract work and the certificate of the Engineer-in-Charge shall be conclusive as to such proportion. Over and above this is if a further period to the extent of 25 percent of such extension shall be allowed to the contractor. The rates for such additions, altered or substituted work

under this clause shall be worked out in accordance with the flowing provisions in their respective order.

Clause No. 72 COMPENSATION FOR DELAY.

The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the tenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent or such smaller amount as the Chief Project Manager (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished after the proper dates.

72.1 *The Engineer-in-Charge may without prejudice to his right against the contractor in respect of any delay or inferior workmanship or otherwise or to any claims for damage in respect of any breaches of the contract and without prejudice to any rights or remedies under any or the provisions of this contract or otherwise and whether the date of completion has or has not elapsed by notice in writing absolutely determine the contract in any of the following cases.*

72.3 *If the contractor shall desire an extension of time for completion of the work on the grounds of his having been unavoidable hindered in its execution or on any other ground, he shall apply in writing to the Engineer-in-Charge within 30 dyas of the date of hindrance or account of which he desires such extension as aforesaid, and the Engineer-in-Charge shall, if in his opinion (which shall be final) reasonable grounds be shown therefore authorize such extension of time if any he may in his opinion be necessary or proper.*

72.4 DELAY BY NBCC OR BY OWNER (NAA) OR THEIR AUTHORIZED AGENTS

In case the CONTRACTOR's performance is delayed due to any act of omission on the part of the OWNER or his authorized agents, then the CONTRACTOR shall be given due extension of time for the completion of the WORK to the extent such omission on the part of the OWNER has caused delay in the CONTRACTOR's performing of his work.

No adjustment in CONTRACT PRICE shall be allowed for reasons of such delays and extensions granted except as provided in TENDER DOCUMENT, where in the OWNER reserves the right to seek indulgence of CONTRACTOR to maintain the agreed time Schedule of completion.

In such an event the CONTRACTOR shall be obliged to arrange for working by CONTRACTOR's personnel for additional time beyond stipulated working hours as also on Sundays and Holidays and achieve the completion date/interim targets."

- 28.** The NBCC provided 94 drawings as "Good For Construction" based on which the contractor submitted time/per chart for completion of the work within 31.10.1994. It is admitted that most of the aforesaid drawings marked as "Good for construction" particularly drawings in respect of foundation, column beams both for structural steel & RCC, required to commence the work, were defective and the same underwent numerous changes/revisions till January, 1994. In the meeting held on 24.12.1993, NAA, NBCC and the contractor unanimously resolved as follows:

- (i) *Work was held up from 01.08.1993 to 15.09.1993 and NBCC handed over redesign of 20 main columns to claimant on 02.11.1993 and balance 3 columns on 16.11.1993.*

- (ii) *Increase in excavation quantity by 200% from the SOQ quantity.*
- (iii) *Progress of work affected due to various decisions and drawings pending with the Architect.*
- (iv) *NBCC confirming that 230 mm. size bricks are not available in Orissa and the claimant has to explore manufacturing 230 mm. bricks by approaching the local manufacturer by changing the mold size.*
- (v) *Further, due to changes in foundation level there was additional requirement of huge Quantity of Rock excavation, which were not provided in the SOQ/BOQ.*

In the premises, the essence of the PERT CHART prepared by the claimant was frustrated and only on the ground of excavation of 200% excess quantity of Hard soil and additional Rock excavation, in terms of Cls. 69.1 the claimant was entitled to extension of time for 429 days.

29. The NBCC provisionally extended the stipulated date of completion upto 25.03.1995. while extending the period up till 25.03.1995, the NBCC has not imposed any liquidity damages upon the contractor. In the counter claim, the NBCC admitted that the reason for non-completion of the contract within 31.10.1994 is not attributable to the contractor. The contractor has made several requests to the NBCC for approval of pending shop drawings with respect to structural steel work, aluminum work, plumbing work, electrical work etc. and removal of defects in the drawings of Kalash but the NBCC has not given any response to the request made by the contractor. Due to which the contractor could not complete the contract within 25.03.1995 and

accordingly, the NBCC has extended the time for completion of the contract upto 30.06.1995 without imposing any liquidity damages upon the contractor.

- 30.** The provisionally extended time to complete the contract expired but in the absence of final decision of Kalash and pending approval of shop drawings of structural steel, aluminum, electrical, fighting work etc. by the NBC, the contractor was not able to complete the contract.
- 31.** From 16.12.1995, the contract continues and both the parties proceeding with the contract, without the NBCC fixing any new or fresh stipulated date of completion. Admittedly, the time for completion of the contract was set at large. It was duly recorded in the Minutes of the Meeting dated 01.06.2012, 02.06.2012, 14.09.2012, 15.09.2012, 03.05.2013 and 04.05.2013. The contractor has received final decision of Kalash from the NBCC only on 16.01.1996.
- 32.** The contractor could cast the roof of Kalash on 19.01.1996 and continued with the other works which were accepted and measured and paid for by the NBCC. After casting of Kalash, de-shuttering was done, without completion of Kalash, the contractor had no scope to carry out any other works underneath the Kalash.
- 33.** On 16.02.1996, during inspection at site by the officers of the NBCC and the Regional Executive Director of NAA, the contractor was instructed to stop fabrication and erection of structural steel work and the suspension of work at structural steel activities were not lifted by

the NBCC till 20.03.1996. When the contract was subsisting and the time for completion of the contract was set at large and the suspension of work at the steel structural zone was subsisting, the NBCC has terminated the contract on 20.03.1996.

- 34.** The grounds for termination of the contract are narrated that the contractor could not complete the work within the provisionally extended period i.e. 15.12.1995 and the reply submitted by the contractor dated 25.11.1995 to the show cause notice dated 09.11.1995 was not satisfactory.
- 35.** On 09.11.1995, the NBCC had issued show cause notice to the contractor and on the same day by a subsequent letter, the NBCC has provisionally extended the time to complete the work till 15.12.1995.
- 36.** The Learned Arbitrator while deciding the issue whether there was any delay in execution and if so who is responsible for the same, the Learned Arbitrator has recorded the finding that there was no dispute that the contract could not be completed within the stipulated time of 20 months i.e. 31.10.1994, but as regards the responsibility of delay in completion of the project upto the stipulated date of completion, namely 31.10.1994, it is clear that the NBCC failed to provide many essential drawings good for construction raised on which the contractor was supposed to prepare shop drawings.

- 37.** The Learned Arbitrator also recorded the finding that another reason for delay was in abnormal excess in quantity of excavation in additional work of rock cutting for which the contractor was not responsible.
- 38.** In the finding, the Learned Arbitrator has also recorded that the contractor on their part did not contribute somewhat to the delay on account of delay in mobilization, establishing field testing laboratory in conducting design mix in arranging weight batches or bricks or excavation work etc. The Learned Arbitrator, considering the various reasons of delay has not attributable to contractor, a fair assessment has been made to grant extension of time to the contractor upto 25.03.1995 and accordingly he come to the conclusion that it is clear that the delay in execution of the work upto the stipulated date of completion and even upto 25.03.1995, the first extended date of completion was primarily attributed to the NBCC.
- 39.** In the finding, the Learned Arbitrator has held that beyond 25.03.1995 is attributable primarily to the contractor though to some extent the NBCC too were responsible but while coming to the conclusion, the Learned Arbitrator came to the conclusion that the delay beyond 25.03.1995 was attributable primarily to the contractor.
- 40.** This Court finds that the NBCC provided 94 drawings as good for construction based on which the contractor submitted time/pert chart for completion of the work within 31.03.1994.

- 41.** It is admitted that most of the drawings marked as good for construction, particularly drawings in respect of foundation, column beam both for structure steel and RCC was required to commence the work were defective and the same underwent numerous changes/revisions till January 1994 and the stipulated date of completion was 31.10.1994. The said fact was also admitted by the parties in the Minutes of the Meeting on 24.12.1993. Thus, this Court finds that the first part of the finding of the Learned Arbitrator with respect to issue no. (i) does not require any interference.
- 42.** As regards the second part wherein the Arbitrator has held that the delay beyond 25.03.1995 is attributable primarily to the contractor to some extent the NBCC too were responsible but, this Court do not find any reason as to why the Learned Arbitrator has come to the conclusion that beyond 25.03.1995 primarily the delay is attributable to the contractor. The Learned Arbitrator before coming to the findings has recorded the reason that sanitary, plumbing, septic tank, roof treatment in terminal building, granite finishing, firefighting, quota stone flooring, electrical items, door frame and shuttering, glaze tides, stone caddlings etc. no activity was started by the contractor till the termination of the contract.
- 43.** The findings of the Learned Arbitrator with regard to above, this Court finds that the structure drawings were not completed and shop drawings were not provided and the approval with regard to the shop drawings was pending. Unless and until the structure construction is

completed, no finishing work can be executed. With regard to sanitary and plumbing, septic tank, roof treatment in the terminal building etc. are the finishing work that is to be carried out only after finishing of all the structural work.

- 44.** Considering the above, this Court finds that the second part of the finding with regard to the issue no.(i) wherein the Learned Arbitrator has come to the conclusion that the delay beyond 25.03.1995 is attributable primarily to the contractor is perverse and without application of mind. Accordingly, the second part of the issue no.1 is set aside and quashed.
- 45.** The Learned Arbitrator has decided the issue no.2 whether the termination of contract by the NBCC was lawful. By considering the submission of the parties and materials on record, the Learned Arbitrator has come to the conclusion that the termination of the contract by the NBCC on 20.03.1996 was unlawful.
- 46.** By a letter dated 09.11.1995, the NBCC has extended the time for completion of work till 15.12.1995. Simultaneously on the same day, the NBCC had issued show cause notice upon the contractor as to why the contract should not be terminated and as to why the balance work should not be executed at risk and cost of the contractor. As per the extension of the NBCC, the contractor continued with the work and the contractor has also submitted the reply to the show cause notice. After the period of five months, the NBCC terminated the contract on

20.03.1996 on the ground that the contractor could complete the work within the extended period and the reply submitted by the contract was not satisfactory.

47. The Learned Arbitrator has considered both the letters and come to the conclusion that the last extension of time was granted by the NBCC to the contractor on 15.12.1995 and even though the contract subsisted beyond that date. The Learned Arbitrator also come to the conclusion that the time was not an essence of the contract and the same could not be terminated without fixing a reasonable time limit for completion of the contract. This Court has also considered the show cause notice, reply of the contractor, the letter wherein the NBCC has extended the time for completion of the work till 15.12.1995.

48. In the show cause notice, the NBCC has not fixed any time by which the contractor has to complete the work. Simply mentioning several correspondences and clauses of the agreement, issued the show cause notice. The contractor has submitted his detailed reply and even after the completion of the period of extension of time, the contractor was allowed to complete the work. On 16.02.1996, during inspection at site by the officers of the NBCC and the Regional Executive Director of NAA, the contractor was instructed to stop fabrication and erection of structural steel work and the suspension of work at structural steel activities were not lifted by the NBCC till 20.03.1996 and as such, this Court finds that the findings of the Learned Arbitrator wherein it was

decided that the termination of the contract by the NBCC dated 20.03.1996 was not unlawful, does not require any interference.

- 49.** NBCC in their application being AP No. 489 of 2014 has challenged the claim of the contractor with respect to claim nos. 5, 6, 7(c), 14 and 15 in prayer (c) of the application. Claim no.5 of the contractor was as follows:

“Claim No.5: Claim on account of less payment allowed towards differences in quantity in various item of work actually executed and vis-a vis allowed by NBCC in final bill prepared.- Rs.5,00,000/-.”

The NBCC has challenged the said claim of the contractor in ground XVIII of the application. Learned arbitrator has decided Claim No.1 and Claim 5 of the contractor together. The claim of the contractor that certain works were executed as per schedule items of the work based on drawings and as per direction issued but measurement of certain items was not incorporated in the measurement book inadvertently. The Arbitrator by considering the submissions and the documents has allowed the said claim in favour of the contractor.

- 50.** Claim No. 6 is with regard to refund of encashed sum on account of wrongful invocation of bank guarantee furnished on various heads amounting to Rs. 42,22,698/-. As per the claim of the contractor, the NBCC out of the total amount of Rs. 77,11,354/- recovered an amount of Rs. 42,22,698/-. The case of the NBCC that due to the termination of the contract for the reasons that the contractor failed to execute the

work as per the conditions of the contract, the NBCC has encashed the performance guarantee and forfeited the security deposit as per Clause 72.1(IV) and 9.0 of the Contract agreement. The Learned Arbitrator has already held that the termination of the contract by the NBCC dated 20.03.1996 was unlawful and thus there is no question of encashment of performance guarantee and forfeiture of security deposit.

- 51.** Claim 7(c) of the contractor with regard to additional payment towards escalation for materials (other than steel and cement), P.O.L. and labour beyond the stipulated date of completion as per the contractual formula with indices /minimum wages applicable up to the date of termination of contract and without imposing any ceiling.- Rs. 8,11,557/-. The contentions of the NBCC that the contractor is not entitled for the time extension beyond 25.03.1995. The provisional extensions of time were granted to the contractor, subject to levy of the compensation for delay if any as per the conditions of contract. The Arbitrator has taken all the three claims i.e. 7(a), 7(b) and 7(c) together. The Arbitrator came to conclusion with respect to 7(c) that criterion of free of freezing the indices will also applied up to 25.03.1995. The Arbitrator also held that the calculation of the contractor is required to be modified by considering the amount against the item nos. 7.7 and 11.6. the Arbitrator also considered that an amount of Rs. 5,00,000/- also awarded with respect to claim no.5, accordingly, only an amount of Rs. 1,48,968/- was awarded to the claimant.

- 52.** The Contractor has claimed the Claim No. 14 in three parts :

14(1)(a): For longer retention of plants, machineries, shuttering, staging materials etc. assessed at Rs. 50,41,185/-.

As per the claim of the contractor, after completion of major centering work the contractor requested for release of shuttering and staging materials but the NBCC has not allowed the contractor to remove the said materials. The contractor claimed compensation for longer period of retention of the said materials beyond the stipulated date of completion upto 10.04.1996. It was the further claim of the contractor that for shuttering and staging materials the contractor is entitled for further hire charges from 10.04.1996 till the release as the same was not released and the NBCC enjoyed the benefits out of the said materials. As per the contention of the NBCC, the contractor wanted to remove the said materials from the site when those materials were required to complete the remaining work to be executed. The NBCC admitted that even after termination of contract, the centering and shuttering materials have not been allowed to remove by the contractor but all other equipments and materials have been allowed to remove by the contractor. It is also admitted by the NBCC that part of the materials have been used in the said work and considerable amount are recovered from the contractor. The Arbitrator while considering the claim of the contractor came to the conclusion that though the contractor has not produced any supporting document to prove that the materials, plants and machineries were actually

deployed at site for which the contractor had bear hire charges but the NBCC have specifically contested the point.

14(1)(b) : For the period from 10th April, 1996 till date of actual release of all materials. The contractor in the claim has not assessed the amount and it was mentioned that to be assessed and well considering the claim of the contractor, the Arbitrator has come to a finding that he has already hold that the termination of the contract was unlawful and by taking into considering of the shuttering and staging materials by the NBCC was not justified and the arbitrator also come to the finding that the materials were taken over by the NBCC and after considering the reasonable figure of the deprecated cost of the material taken by the NBCC, the Learned Arbitrator has awarded only Rs.6,29,272/- in favour of the contractor.

Claim No. 14(2) of the Contractor for longer retention/involvement of onsite and offsite overhead and establishment charges: Rs.23,22,000/-.

The contractor has claimed compensation for additional offsite and onsite overhead and establishment charges. The NBCC has denying the said charges on the ground that the prolong execution of the work was due to the reasons attributable to the contractor but at the time of consideration of the claim, the Learned Arbitrator came to the finding that the Arbitrator has already held that up to 25th March, 1995 i.e. 145 days delay was attributable to NBCC and as such considering the

pro rata basis and the amount of indirect expenses for a period of 145 days has been rightly works out Rs.5,91,700/-.

53. Claim No. 15: The contractor has claimed compensation for retaining longer on the job without earning corresponding benefit due to the latches of NBCC for an amount of Rs.48,54,000/-. As per the claim of the contractor, prolong involvement of the claimant in the work was due to latches on the part of the NBCC due to which the contractor has to retain longer on the job for performing the work without earning any corresponding additional benefit. The NBCC has denied for the said claim on the ground that the prolong involvement in the work was due to latches on the part of the claimant. The Learned Arbitrator while considering the same has considered that the Arbitrator has already held that 145 days of delay i.e. upto 25th March, 1995, the contractor was not responsible and as such the contractor is entitled for the loss of profit only for the period of 145 days and upon calculation, the Learned Arbitrator has awarded Rs.11,83,400/- out of the total claim of Rs.48,54,000/-.

54. NBCC has claimed an amount of Rs.79,99,389/- from the contractor as counter-claim no. 1 on account of recovery of excess expenditure incurred in getting the balance work of the contractor's contract completed through another agency, namely, M/s. P.D. Agarwal. While deciding the said claim, the Learned Arbitrator has rejected the claim on the finding that the Arbitrator at the very beginning of the award held that the termination of the contract of the contractor was

unlawful. Subsequently, the Arbitrator has awarded some of the counter-claims, namely, counter-claim nos. 2, 3, 4, 5, 6, 9, 10, 11, 12, 15 and 17.

In the case of **Sikkim Subba Associates -vs- State of Sikkim** reported in **(2001) 5 SCC 629**, the Supreme Court held that:

“14. It is also, by now, well settled that an arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. An arbitrator was held not entitled to ignore the law or misapply it and he cannot also act arbitrarily, irrationally, capriciously or independently of the contract (see Rajasthan State Mines and Minerals Ltd. v. Eastern Engg. Enterprises [(1999) 9 SCC 283]). If there are two equally possible or plausible views or interpretations, it was considered to be legitimate for the arbitrator to accept one or the other of the available interpretations. It would be difficult for the courts to either exhaustively define the word “misconduct” or likewise enumerate the line of cases in which alone interference either could or could not be made. Courts of law have a duty and obligation in order to maintain purity of standards and preserve full faith and credit as well as to inspire confidence in alternate dispute redressal method of arbitration, when on the face of the award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so unreasonable and irrational that no reasonable or right-thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere. So far as the case before us is concerned, the reference to the arbitrator is found to be a general reference to adjudicate upon the disputes relating to the alleged termination of the agreement by the State and not a specific reference on any particular question and consequently, if it is shown or substantiated to be erroneous on the face of it, the award must be set aside.

15. *The award under challenge, in our view, stands vitiated on account of several errors of law, apparent on the face of it and such infirmities go to substantiate the claim of the State that the arbitrator not only acted arbitrarily and irrationally on a perverse understanding or misreading of the materials but was also found to have misdirected himself on the vital issues before him so as to render the award to be one in utter disregard of law and the precedents. Although the award purports to determine the claims of parties, a careful scrutiny of the same discloses total non-application of mind to the actual, relevant and vital aspects and issues in their proper perspective. Had there been such a prudent and judicious approach, the arbitrator could not have awarded any damage whatsoever and, at any rate, such a fabulous and astronomical sum on mere conjectures and pure hypothetical exercises, absolutely divorced from rationality and realities, inevitably making law, equity and justice, in the process, a casualty. The arbitrator has acknowledged when recording a finding on the basis of indisputable facts that except for the first set of draws in respect of eight lotteries in Groups A and B, the prize money obliged to be deposited seven days before the draw (since the winners have to be paid only out of such deposits, after the draw) as well as the agency fee running into crores was not deposited/remitted in time constraining thereby the State to mobilise funds to distribute prize money from State funds in order to preserve and protect the fair name and reputation of the State, the lotteries being run as that of and for and on behalf of the State. Even, as late as 8-2-1994 when the award came to be passed the appellants were in arrears, due to non-deposit of prize money within the stipulated time, a sum of Rs 1,37,47,026 besides non-remittance of agency fee of Rs 3,72,87,884. Despite this, the arbitrator tried to find an alibi for the appellant defaulters in the fact that the State, in spite of warnings and threats, did not actually stop either those draws or the further subsequent draws and allowed the lotteries to go on without any break. From the above, the arbitrator as well as the learned District Judge chose to infer that the respondent State had condoned or waived the lapses and defaults completely overlooking the vital fact that the arbitrator is not dealing with any claim*

for damages from the respondent State against the appellants who defaulted in respect of such defaults but on the other hand a claim from the appellant defaulters itself for damages against the State for not willing to put up any longer with a recurrent and recalcitrant defaulter. The arbitrator grossly omitted to give due weight to such defaults committed by the appellants and further misdirected himself in not drawing the legal inferences necessarily flowing from them. Even if it is assumed for purposes of consideration that the State had waived past lapses, they cannot be compelled to condone the persistent and continuous wrongs and defaults and continue to perform their part of the contract to their disadvantage and detriment and also further penalise them with damages for not doing so, when even dictates of common sense, reason and ordinary prudence would commend for rejecting the claim of the appellants as nothing but a gamble and vexatious. The arbitrator who is obliged to apply law and adjudicate claims according to law, is found to have thrown to the winds all such basic and fundamental principles and chosen to award an astronomical sum as damages without any basis or concrete proof of such damages, as required in law.”

In the Award, the Learned Arbitrator has given the special note, which reads as follows:

“The counter-claims no. 1, 7, 8, 10, 11, 12, 13, 15 and 17 are in the nature of damages and the total amount awarded against these counter claims viz Rs.123.06 lacs (i.e. 0+ 0+ 0+ 5.90+ 9.99+ 71.77+0+5.40+3.00, all figures in lacs of rupees) has to be restricted to Rs. 65.00 lacs which, as per the Contract clause 72 (10% of 650 lacs as per Exhibit D-366) is an agreed pre-estimation of the maximum compensation/ liquidated damages that can result from delay. As such I am limiting the amount awarded against these counter claims to Rs.65.00 lac only.”

This Court failed to appreciate that in the counter-claim no. 1, the Learned Arbitrator has rejected the claim of the NBCC on the ground that the termination of the contract was unlawful and if it is held that the termination was unlawful how the Arbitrator can allow the further counter-claim of the NBCC.

- 55.** This Court has already held that first part of the issue no. (i) does not require any interference and with regard to the second part of issue no. (i) is set aside and quashed wherein the Learned Arbitrator had come to the conclusion that the delay beyond 25th March, 1995, is attributable primarily to the contractor. As this Court had set aside the second part of the issue no. (i) and thus question of awarding counter-claim in favour of the NBCC are perverse and illegal.
- 56.** The Learned Arbitrator has categorically decided the issue and come to the conclusion that the termination of contract by the NBCC dated 20.03.1996 was unlawful but while deciding the claims and counter claims raised by the parties, the Learned Arbitrator has allowed the counter claim of the NBCC which is contrary to the decision taken by the Learned Arbitrator while deciding the issue no. (ii). This Court finds that once the Learned Arbitrator has come to the conclusion that the termination dated 20.03.1996 was unlawful and as such the Learned Arbitrator ought not to allow the counter claim raised by the NBCC.
- 57.** The NBCC has relied upon the Clause 72 of the contract and submitted that as per 72.1, the Engineer-in-Charge may without prejudice to his

right against the contractor in respect of any delay or inferior workmanship or otherwise or to any claims for damage in respect of any breaches of the contract and without prejudice to any rights or remedies under any or the provisions of the contract or otherwise and whether the date of completion has or has not elapsed by notice in writing absolutely determine the contract. This Court has perused the provisions of the Clauses 72 and 72.1.

- 58.** In the present case, admittedly, the stipulated date of completion was fixed by 31.10.1994 but the NBCC has admitted that the delay was not attributable to the contractor as several drawings were not provided or approved by the competent authority.

In the case of ***Oil and Natural Gas Corporation Ltd. –vs- Western Geco International Limited*** reported in **(2014) 9 SCC 263**, the Supreme Court held that:

“39. *No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.*

40. *It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would*

constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

- 59.** The NBCC has extended the period of contract from time to time. In one hand, the NBCC has extended the time by a letter dated 09.11.1995 but on the other hand, on the same day i.e. on 09.11.1995, the NBCC has issued show cause notice upon the contractor for termination of the contract. On 25.11.1995, the contractor has submitted reply and even after the completion of the extended period, the contractor was allowed to continue with the work and after the period more than five months, the NBCC has come to the conclusion that the reply submitted by the contractor was not satisfactory and the contractor has not completed the work within the stipulated period of time and it was terminated. Though the Authority is having right to terminate the contract in terms of Clause 72 of the Contract but in the present case, this Court finds that Clause 72 is not applicable as the NBCC have extended the time by one letter and by another letter, the NBCC has issued show cause notice. The contractor has submitted the reply and after the period of about five months, the NBCC has come to

the conclusion that the reply is not satisfactory and thus this Court is of the view that the NBCC cannot take the benefit of the Clause 72 of the contract.

In the case of **Ssangyong Engineering & Construction Co. Ltd. –vs- National Highways Authority of India (NHAI)** reported in **2019 SCC OnLine SC 677**, the Supreme Court held that:

“Applicability of the Arbitration and Conciliation (Amendment) Act, 2015

13. *Since the Section 34 petition in the present case is dated 30-7-2016, an important question as to the applicability of the parameters of review of arbitral awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 [“Amendment Act, 2015”] with effect from 23-10-2015 — in particular, in the “public policy of India” ground for challenge of arbitral awards. The question which arises is whether the amendments made in Section 34 are applicable to applications filed under Section 34 to set aside arbitral awards made after 23-10-2015. This Court, in BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 [“BCCI”], has held that the Amendment Act, 2015 would apply to Section 34 petitions that are made after this date. Thus, this Court held :*

“75. *Shri Viswanathan then argued, relying upon R. Rajagopal Reddy v. Padmini Chandrasekharan [R. Rajagopal Reddy v. Padmini Chandrasekharan, (1995) 2 SCC 630] , Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2001) 6 SCC 356] , SEDCO Forex*

*International Drill. Inc. v. CIT [SEDCO Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717] and Bank of Baroda v. Anita Nandrajog [Bank of Baroda v. Anita Nandrajog, (2009) 9 SCC 462 : (2009) 2 SCC (L&S) 689] , that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that “for the avoidance of any doubt, it is clarified”, this is not language that is conclusive in nature, but it is open to the court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to the learned Senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being *Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705]* and *Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12]* , as has been held in para 18 in *HRD Corpn. v. GAIL (India) Ltd. [HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401]* , it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and,*

therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.”

78. *The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,*

‘... have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act’.

and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as

stated in HRD Corpn. v. GAIL (India) Ltd. [HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] of limiting the grounds of challenge to awards as follows : (SCC p. 493, para 18)

‘18. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] has been expressly done away with. So has the judgment in ONGC v. Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , where “public policy” will now include only two of the three things set out therein viz. “fundamental policy of Indian law” and “justice or morality”. The ground relating to “the interest of India” no longer obtains. “Fundamental policy of Indian law” is now to be understood as laid down in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . “Justice or morality” has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the court as understood in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] ,

making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.’]

It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated.”

14. *There is no doubt that the amendments made in Explanations 1 and 2 to Section 34(2)(b)(ii) have been made for the avoidance of any doubt, which language, however, is not found in Section 34(2-A). Apart from the anomalous position which would arise if the section were to be applied piecemeal, namely, that Explanations 1 and 2 were to have retrospective effect, being only to remove doubts, whereas sub-section (2-A) would have to apply prospectively as a new ground, with inbuilt exceptions, having been introduced for the first time, it is clear that even on principle, it is the substance of the amendment that is to be looked at rather than the form. Therefore, even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been changed substantively. Thus, in *SEDCO Forex International Drill, Inc. v. CIT* [*SEDCO Forex International Drill, Inc. v. CIT*, Derhadun, (2005) 12 SCC 717 [**“Sedco”**] this Court held :*

“17. As was affirmed by this Court in *Goslino Mario* [*CIT v. Goslino Mario*, (2000) 10 SCC 165] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (See also *Reliance Jute and Industries Ltd. v. CIT* [*Reliance Jute and Industries Ltd. v. CIT*, (1980) 1 SCC 139 : 1980 SCC (Tax) 67] .) An explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an explanation can add to and widen the scope of the main section (See *Sonia Bhatia v. State of U.P.* [*Sonia Bhatia v. State of U.P.*, (1981) 2 SCC 585 : AIR 1981 SC 1274] , SCC at p. 598, AIR at p. 1282, para 24). If it is in its nature clarificatory then the explanation must be read into the main provision with effect from the time that the main provision came into force [See *Shyam Sunder v. Ram Kumar* [*Shyam Sunder v. Ram Kumar*, (2001) 8 SCC 24] , SCC para 44; *Brij Mohan Das Laxman Das v. CIT* [*Brij Mohan Das Laxman Das v. CIT*, (1997) 1 SCC 352] , SCC at p. 354; *CIT v. Podar Cement (P) Ltd.* [*CIT v. Podar Cement (P) Ltd.*, (1997) 5 SCC 482] , SCC at p. 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are “it is declared” or “for the removal of doubts”.”

15. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of “public policy of India” in *ONGC v. Saw Pipes Ltd.* [*ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705] [“Saw Pipes”] and *ONGC v. Western Geco International Ltd.* [*ONGC v. Western Geco International Ltd.*,

(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] [“Western Geco”] has been done away with, and a new ground of “patent illegality”, with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.”

- 60.** In the present case, the Award under challenge is dated 17th December, 2013 which is before 23rd October, 2015.
- 61.** There is no dispute with regard to the settled law on the basis of which the Counsel for the NBCC has relied upon the judgments. This Court has perused the judgments and found that the judgments relied upon by the Learned Counsel for the NBCC are distinguishable from the facts and circumstances of the present case.
- 62.** Considering the above, this Court find that the award passed by the Learned Sole Arbitrator wherein in issue no.1 in second part wherein the Learned Arbitrator has held that the contractor is primarily attributable beyond 25.03.1995 is perverse and the same is set aside.
- 63.** The Learned Arbitrator while deciding the issue has come to the conclusion that the termination of the contract by the NBCC on 1996 was unlawful and as such the counter claim allowed by the Learned Arbitrator is not sustainable and accordingly all the counter claims

allowed by the Learned Arbitrator in favour of the NBCC are set aside and quashed.

64. As regards the award passed by the Learned Arbitrator in favour of the contractor is not required to be interfered with.

65. Accordingly, **AP-COM 486 of 2024 (Old No. AP 443 of 2014)** is **allowed** and **AP-COM 485 of 2024 (Old No. AP 489 of 2014)** is **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.)