

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

Present:

The Hon'ble Justice Krishna Rao

AP-COM 102 of 2024
(Old No. AP 579 of 2008)

State of West Bengal

Versus

PAM Developments Private Limited

Ms. Noelle Banerjee
Mr. Paritosh Sinha
Mr. Arindam Mandal
Mr. Shourya Samanta

.....For the State/Petitioner

Mr. Suman Dutt
Mr. Aniruddha Mitra
Ms. Monica Jaiswal
Mr. Madan Mohan Roy

.....For the Respondent

Hearing Concluded On : 22.03.2024

Judgment on : 14.06.2024

Krishna Rao, J.:

1. The petitioner, State of West Bengal has filed the present application under Section 34 of the Arbitration and Conciliation Act, 1996, challenging the award passed by the Learned Sole Arbitrator dated 21st August, 2008.
2. The State of West Bengal, through its Superintending Engineer, State Highway Circle No. 1, P.W (Roads) Department issued Notice inviting Tender for the work “Construction of Reinforcement Concrete Viaduct Structures with bored piles foundation and the retaining wall on the eastern side of the proposed road over bridge over the Howrah-Bandel Railway line of the Eastern Railway on replacement of the existing level crossing No.1/1A at Liluah Howrah under the Howrah Highway Division”.
3. The estimated value of the tender was for Rs.1,97,00,000/- and pursuant to the said tender, the respondent by a letter dated 30th September, 1997, submitted its offer in Parts “A” and “B” with certain conditions. The conditions were not acceptable to the petitioner and accordingly, the respondent by its letter dated 28th October, 1997, withdrew the conditions contained in Part “A” of the letter by reserving its right to go for arbitration in case of any disputes and submitted revised offer at 4.80% above the rate put to the tender and enclosed the bar chart showing the tentative programme for executing the tender work.

4. The Superintending Engineer by a letter dated 3rd December, 1997, had accepted the revised offer of the respondent for a sum of Rs.1,93,46,553/-. As per the letter dated 3rd December, 1997, the time for completion of work was 24 months and the same will be counted on and from 23rd December, 1997.
5. As per Clause 2 of the conditions of contract, the contractor is bound to execute $1/4^{\text{th}}$ of the total work in $1/4^{\text{th}}$ time, $1/2$ of the work in $1/2$ of the time, $3/4^{\text{th}}$ of the work before $3/4^{\text{th}}$ of the time and the total work within the total stipulated time and in the event, the contractor failed to execute the work in terms of the General Conditions of Contract, the Superintending Engineer concerned shall penalize the contractor for the remaining work still to be completed during the contract period to the extent of 1% or such smaller amount as he thinks fit.
6. Clause 5 of the contract provides for extension of time by or on behalf of the Superintending Engineer in favour of the respondent for completion of the works of the said contract.
7. As per Clause 12, the Executive Engineer shall have the power to make any alterations, omissions, additions or substitutions of the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to the contractor in writing and

such alterations shall not invalidate the contract but shall be deemed to have been formed as work included in the original tender.

- 8.** As per the request of the respondent, the Executive Engineer has extended the time to complete the work by communications dated 30th December, 1999, 28th June, 2000, 29th December, 2000, 22nd June, 2001 and on 14th September, 2001. On 28th December, 2001, the Executive Engineer of his own and without the request of the respondent had extended the time till 31st March, 2002 for completion of the work by the respondent. On 26th March, 2002, the respondent has again requested for extension of time and by a letter dated 27th March, 2002, time to complete the work was extended till 30th May, 2002.
- 9.** On 6th September, 2002, the respondent has submitted a letter to the petitioner stating that the petitioner has already executed including extra work for Rs.2,06,54,973/- which is above than the contract amount and if the respondent will be requested to carry out the balance work, it will be entail huge amount and it will not be possible for the respondent to complete the work without approval and assurance of the competent authority and at this stage, it would be proper to terminate the contract amicably. On receipt of the request of the respondent, the Superintending Engineer by a communication dated 20th December, 2002, amicably terminated the contract. After the termination of contract, the respondent has requested for providing completion certificate/performance certificate and finally, the respondent by a

letter dated 16th July, 2003, submitted his claim and informed the authorities that if the amount as claimed by the respondent is not paid, the respondent will invoke the provisions of arbitration. As the petitioner has neither paid the amount nor appointed an arbitrator, the respondent has filed an application for appointment of an Arbitrator and by an order dated 8th April, 2003, the Hon'ble Chief Justice of this Court has appointed an Arbitrator to adjudicate the dispute between the parties.

- 10.** The respondent has submitted the following claim before the Learned Sole Arbitrator:

CLAIMS & DUES

- | | | |
|--------|---|--------------------|
| 1. (a) | <i>Refund of Security Deposits matured on 31.12.02</i> | Rs. 18,70,964.00 |
| 1. (b) | <i>Interest on Security Deposits amounting to Rs. 18,70,964/- @ Rs. 18% p.a. beyond 31.11.2002. to till date of payment</i> | ---- As per actual |
| 2. | <i>Interest @ 18% p.a. due on account of inordinate delay in payment of Bill violating the contract terms</i> | Rs. 6,66,906.00 |
| 3. | <i>Loss suffered toward payment of idle charges</i> | |
| | i) <i>Idle labours</i> | Rs. 7,15,822.00 |
| | ii) <i>Idle Establishment</i> | Rs. 7,69,000.00 |
| | iii) <i>Idle machineries</i> | Rs. 7,81,000.00 |
| | iv) <i>Idle Rig with crew etc.</i> | Rs. 8,44,500.00 |
| 4. | <i>Loss due to cost of relating construction/ allied materials for want</i> | |

- of adequate storing place and working place.* Rs. 10,00,000.00
5. *Loss suffered due to escalation in Cost of a) Labour b) materials & c) P.O.L. since September, 1997* Rs. 45,76,492.00
6. *Cost of M25 concrete provided in cast in situ bored piles* Rs. 18,38,781.00
7. *Payment of due against 3 (Three) Nos. of Supplementary work Bills* Rs. 11,86,472.00
8. *Cost of damages shutterings and excess cost of hire charge of staging* Rs. 22,00,622.00
9. *Cost of works executed but not paid for e.g. empty boring for Piling work etc.* Rs. 5,22,858.00
10. *Refund of unlawful deduction made from our 1st R/A bill vide Deptt. Memo No. 630 dt. 30.3.99 [Ref.: CE/PW(Roads) Memo No. 290-R/ADT dt. 2.2.99.]* Rs. 8,20,950.00
11. *Loss of earning @ 20% p.a. on unexecuted work value of Rs. 1,51,84,105/= beyond 22.12.1999 i.e. contractual period* Rs. 30,36,821.00
12. *Payment against last Bill* Rs. 7,58,861.00
13. *Interest @ 18% p.a. on the aforesaid dues and claims from 30.5.2022 till the date of payment* Rs. As accrued
14. *Cost* Rs.

- 11.** The petitioner has entered into the said proceeding by filing statement of defense to the statement of claim made by the respondent. Both the parties have agreed before the Learned Sole Arbitrator that they will not adduce any oral evidences and on the basis of the correspondences exchanged between the parties, the Learned Arbitrator has passed the following Award on 21st August, 2008:

Claim No. 1(a) – *For refund of the Security deposit matured on 31.12.2002 deducted from the Bills. Particulars given at page 41 of the Statement of Claim.*

... Rs.13,70,964/-
allowed.

Claim No. 3.- *Claim for loss suffered for idle charges of labours, establishments, machinery and for rig with accessories claimed at the total figure of Rs.31,10,322. Particulars given at pages 44-45 of the Statement of Claim.*

... Allowed at 30% of the total claim as the claimant did 95% of the total work plus work under distressful conditions i.e. Rs. 9,33,096/- being 30% of the sum of Rs. 31,10,322/-.

Claim No. 5- *Loss suffered due to escalation of the price of materials since September, 1997 calculated according to the RBI Bulletin for consumer price index number for Industrial Workers published in January, 1999.*

Loss claimed at Rs. 45,76,492/- as

detailed from 1st R/A Bill upto 13th R/A Bill at pages 47 to 49 of the Statement of Claim. ... Rs.45,76,492/- allowed.

Claim No. 6- *Cost of M-25 concrete provided in Cast-in-citu for Rs. 18,33,781/-.* ... Rs.18,33,781/- allowed.

Particulars at page 50 of the Statement of Claim.

Claim No. 7 – *Payment due in respect of 3 Supplementary Work Bills for total sum of Rs. 11,86,472/-.* ... Rs.11,86,472/- allowed.

Particulars at page 51 of the Statement of Claim.

Claim No. 9 – *Cost of works executed for empty boring for piling works etc., for Rs.5,22,858/-.* ... Rs.5,22,858/- allowed.

Particulars at pages 53 – 54.

Claim No. 10 – *Amounts deducted wrongly from R/A Bills of the claimant after adjusting payment of Rs. 4,00,000/- Already paid as per respondent's Memo No. 630 dated 30.3.1999 for Rs.8,20,950/-.* ... Rs.4,20,950/- allowed.

Particulars at page 55 of the Statement of Claim.

Claim No. 11 – *Loss of earning at 20% per annum on the unexecuted work of value of Rs.1,51,81,105/- upto 22.12.1999 (stipulated period) out of Rs.1,93,46,553/- (tendered amount).* ... 8% of the unexecuted value of the sum of Rs.1,51,81,105/-.

Particulars at page 55 of the Statement of Claim.

Claim No. 12 – Payment against last R/A Bill for Rs. 7,58,861/- after adjusting previous bills.

... Rs.7,58,861/- allowed.

Particulars at page 56 of the Statement of Claim – less payment received upto 12th R/A Bill.

Claim No. 13 – Interest at 18% on the total sum awarded from 30.5.2022 till the date of payment minus interest allowed against Claim No. 1 aforesaid.

... Allowed at 8% on the total amount awarded.

Claim No. 14 – Costs incurred by the claimant in the arbitration proceedings as claimed by letter of the claimant dated 21.5.2008 addressed to the arbitrator, viz.,

1) Expenses incurred in the High Court for application for appointment of arbitration for Rs.30,000/-.

... Rs.20,000/- allowed.

2) Expenses in the arbitration proceedings for the fees of Arbitrator and his Stenographer cum Clerk for the sum of Rs.2,05,500/- being half share

... Rs.2,05,500/- allowed.

3) Expenses incurred for payment of lawyer's bills for drafting Statement of Fact and Rejoinder for Rs. 30,000/-.

... Rs.30,000/- allowed.

4) Expenses incurred for payment of professional fees for the learned advocate Mr. T.K. Sengupta for appearance in the arbitration proceedings – Claimed at Rs.4,32,000/- for 72

... Rs.3,50,000/-

sittings.

allowed.

- 12.** The Learned Arbitrator out of 14 claims has allowed 11 claims and had rejected three (3) claims being claim nos. 2, 4 and 8.
- 13.** Ms. Noelle Banerjee, Learned Advocate representing the petitioner, State of West Bengal submitted that apart from recording the submissions of the parties, the Arbitrator has not assigned any reasons while allowing the claims of the respondent. The petitioner has filed the present application under Section 34 of the Arbitration and Conciliation Act, 1996 on the following grounds:

“GROUNDS

- I. *For that the said award is in conflict with the law of the land including inter alia provisions of Sections 55 and 73 of the Contract Act.*
- II. *For that the arbitrator over stepped the confines of the contract.*
- III. *For that the arbitrator wandered far outside the designated area.*
- IV. *For that arbitrator's errors are apparent on comparing his award with that of the terms of the contract.*
- V. *For that the arbitrator acted clearly in violation of the terms of the contract by ignoring the limits and the clear provisions of the contract.*
- VI. *For that the arbitrator acted arbitrarily, irrationally, capriciously and independently of the contract.*
- VII. *For that the arbitrator traveled outside the bounds of the contract.*

- VIII. *For that the arbitrator's deliberate departure from the contract has amounted to his manifest disregard of his authority-his authority having confined by the contract.*
- IX. *For that arbitrator's conscious disregard of law and the terms of the contract from which is derived his authority has vitiated the award.*
- X. *For that the arbitrator cannot decide the matters outside his of jurisdiction on ignoring the terms of the contract.*
- XI. *For that the impugned award is illegal and not sustainable it having not taken into consideration of and/or noticed the petitioner's positive case that the respondent executed the works in the extended period having suffered the said orders of extensions and as such were/are precluded from reiterating their claims in the said award proceeding.*
- XII. *For that the respondent having executed works in extended periods upon suffering orders rejecting their claims including their claim for enhancement of price etc. were and are precluded from reiterating their claims and the Arbitrator's purported award is contrary to and in conflict with the law of the land as also the provision of the term of the contract.*
- XIII. *For that the claims of the respondent was/is not sustainable in law. That apart those were and are hit under the principle of waiver, estoppels. Even the claims being in conflict with the provisions of the contract were/are not sustainable.*
- XIV. *For that the Ld. Arbitrator being a creature of the agreement were to have conducted himself in conformity with the provision of the contract and he was not free to traverse beyond the terms of the contract.*
- XV. *For that the Ld. Arbitrator having proceeded violating the provisions of the contract by reason whereof his award is liable to be set aside. As he*

traversed beyond the terms of the contract his award is liable to be set aside.

- XVI. For that the impugned award is otherwise bad in law and contrary to the public policy and/or in conflict with the laws of the land.*
- XVII. For that the award is not sustainable it being contrary to the principles applicable in interpretation of works contract like the contract in question herein.*
- XVIII. For that the impugned award is contrary to substantive law of India including the provisions of Sections 55 and 73 of the Indian Contract Act.*
- XIX. For that the reasons purportedly given in the impugned award are vitiated by perversity in evidence on record and also by terms and conditions of the contract in question.*
- XX. For that award under challenge purportedly adjudicated disputes of the respondent although the respondent executed the works notwithstanding the position at the relevant point of time those claims were rejected by reason whereof there was no scope of giving rise to any dispute or difference between the parties.*
- XXI. For that the respondent's purported claims were/are barred by the provisions of contract and by respondent's conduct and action.*
- XXII. For that the impugned award runs contrary to and/or in contradiction of the respondents conduct in having enjoyed the benefit of extension of time that too as many as extensions under the provisions of clause 5 of W.B. F. No.2911(ii).*
- XXIII. For that the award in questions suffers from patent illegalities.*
- XXIV. For that in the impugned award errors are writ large and appearing on the face of the record.*
- XXV. For that the said impugned award is vague, unintelligible.*

XXVI. For that the award is not certain nor cable of being ascertained.

XXVII. For that order granting interest as purportedly expressed in the award does not convey any meaning and the same is not capable of being ascertained nor the actual intention of the Ld. Arbitrator is appearing from the award.”

14. Ms. Banerjee relied upon Clause 2.27 of the Contract and submitted that as per the said Clause, no further additional claim is entertainable but the Learned Arbitrator has not considered the same.
15. Ms. Banerjee submits that without any escalation clause in the contract, the Learned Arbitrator has allowed the claim of escalation. She submits that the Arbitrator has relied upon Section 70 of the Indian Contract Act but failed to appreciate that Section 70 of the India Contract Act is not applicable to the Arbitrator as the Arbitrator is a creature of the contract. She submits that the Arbitrator failed to consider that the respondent has withdrawn the price escalation clause and proceed without price escalation. She submits that the Arbitrator has not assigned any reasons as to why the respondent is entitled escalated rate during the period of contract i.e. 1999 to 2002. She submits that the Arbitrator has allowed additional amount on account of labour and material under the escalation clause though the charges have been granted under Claim No. 3.

16. Ms. Banerjee relied upon the Clauses 2.31 and 2.32 of the Contract and submitted that as per the said clauses, no claim in any shape is entertainable.

17. She relied upon the judgment in the case of ***PSA SICAL Terminals (P) Ltd. -vs- Board of Trustees of V.O. Chidambranar Port Trust Tuticorin*** reported in ***AIR 2021 SC 4661*** and submitted that the decision which is perverse, though would not be ground for challenge under the “Public Policy of India” would certainly amount to a patent illegality appearing on the face of award. She further submits that a finding based on no evidence at all or an award which ignores vital evidence in arriving its decision would be perverse and liable to be set aside on the ground of patent illegality.

18. Ms. Banerjee relied upon the judgment in the case of ***Mahanagar Telephone Nigam Limited vs. TATA Communications Limited*** reported in ***(2019) 5 SCC 341*** and submitted that in a case falling under Section 70 of the Indian Contract Act, the person doing something for another or delivering something to another cannot sue for the specific performance of contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. She submits that where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract between the parties on

a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution.

19. Ms. Banerjee submits that the respondent ought to have commenced the project on and from 23rd December, 1997 but the respondent has commenced the work from May, 1998 and in the first week of November 1998, the respondent has submitted its first running account bill only for an amount of Rs. 6,20,996/- She submits that despite providing extension of time on seven occasions, the respondent failed to complete the work and the respondent has completed only 95% of the work . The respondent did not execute any work after the month of May, 2002. She submits that without completing the balance 5% of the work has submitted its representation on 6th September, 2002 for amicable termination of the contract and accordingly on the request of the respondent, the petitioner by a Memo dated 20th December, 2002, amicably terminated the contract.

20. Ms. Banerjee submits that for the remaining 5% of the work, the petitioner has floated fresh tender but the respondent did not participated in the said tender process but on 16th July, 2003, the respondent raised his claims and by a letter dated 18/20th August, 2003, the respondent requested for appointment of an Arbitrator and when the petitioner has not appointed an Arbitrator, the respondent has filed an application before this Court for appointment of Arbitrator and the Hon'ble Court has appointed an Arbitrator.

- 21.** Ms. Banerjee submits that as per Clause 2.23, the respondent will get the refund of security deposit after the expiry of the liability period and as per Clause 2.27, no claim whatsoever in respect of idle charge, idle labour, idle establishment, idle machineries and idle rigs with its crews will be entertained. She submits that there is no escalation provision is available in the tender and in the absence of the clause in the contract, the Arbitrator has no jurisdiction to grant escalation. She submits that the contract was amicably terminated between the parties as per the request made by the respondent, thus the respondent is not entitled to claim any loss of earning. She submits that there is no document to prove that there is any loss of earning. She submits that the running account bill was lying ready for payment but the respondent did not approach the petitioner to receive the payment and thus the said bill could not be paid.
- 22.** Ms. Banerjee relied upon the judgment reported in **(2015) 3 SCC 49** ***(Associate Builders vs. Delhi Development Authority)*** and submitted that illegality must go to the root of the matter and if the illegality is of trivial nature it could be held that the award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such Award is opposed to the public policy and required to be adjudged void.
- 23.** Ms. Banerjee relied upon the judgment reported in **(2009) 12 SCC 1** ***(State of Rajasthan and Another –vs- Ferro Concrete Construction***

Private Limited) and submitted that the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.

24. Ms. Banerjee relied upon the judgment reported in **(2006) 11 SCC 181 (McDermott International Inc vs. Burn Standard Co. Ltd. and Others)** and submitted that method used for computation of damages will depend upon the facts and circumstances of each case. In the assessment of damages, the Court must consider only strict legal obligations, and not the exceptions. She submits that actual damages must be proved by bringing on record books of accounts and other relevant documents.
25. Ms. Banerjee relied upon the judgment reported in **2022 SCC OnLine SC 131 (Indian Oil Corporation Ltd. Through its Senior Manager vs. Shree Ganesh Petroleum Rajgurunagar through its Proprietor)** and submitted that an arbitral Tribunal being a creature of contract, is bound to act in terms of the contract under which it is constituted. An award can be said to be patently illegal where the Arbitral Tribunal has

failed to act in terms of the contract or has ignored the specific terms of a contract.

26. Ms. Banerjee relied upon the judgment reported in **(1988) 3 SCC 319 (Laxmi Raj Shetty and Another vs. State of Tamil Nadu)** and submitted that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in absence of the maker of the statement appearing in the Court and deposing to have perceived the fact reported.

27. Ms. Banerjee relied upon the judgment reported in **(2013) 3 SCC 747 (P. Radhakrishna Murthy vs. National Buildings Construction Corporation Limited)** and submitted that the 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. She further submits that mere delay in handing over sites will not entitle the contractor to claim damages unless it is established that the same is the consequence of breach committed by the other party.

28. Mr. Dutt, Learned Counsel appearing for the respondent submitted that though the petitioner has filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award but in none of the ground, the petitioner has stated about how arbitrator travelled outside the purview of the contract, how it is arbitrary, irrational, why the award is to be vitiated, which claims are

overlapping, how the principal of waiver and estopples are applicable, how the award is contrary to the provisions of the Sections 55 and 73 of the Indian Contract Act and how the award should be vitiated by perversity.

He submits that the petitioner has not provided any details in support of its grounds.

29. Mr. Dutt, Learned Counsel appearing for the respondent submits that the petitioner has extended the time only after the contract period. He submits that the learned Arbitrator has considered all the communications between the parties and held that the petitioner in several communications has admitted that the respondent has executed excess numbers of work as per the advice of the petitioner and the same was accepted by the petitioner without any objection. He submits that execution of additional work after the stipulated period of time is protected by the provision of Section 70 of the Contract Act.
30. Mr. Dutt relied upon the judgment in the case of ***NTPC Ltd. vs. Deconar Services Pvt. Ltd.*** reported in ***2021 SCC OnLine SC 498*** and submitted that the arbitrator noted that the petitioner accepted the work undertaken by the respondent beyond the period of the contract without objections and the arbitrator also carefully assessed the period of delay attributable to the petitioner and awarded escalation to the respondent for the same.

- 31.** Mr. Dutt relied upon the judgment in the case of ***State of West Bengal vs. Pam Development Private Limited*** reported in ***2017 SCC OnLine Cal 13272*** and submitted that it is the petitioner who is to be blamed for the delay in completion of the work and that the petitioner allowed the work to progress beyond the stipulated period of time and accepted thereof. He submits that once a party accepts the belated performance of the reciprocal obligation, the other would be entitled to make a claim for damages.
- 32.** Mr. Dutt submits that as both the parties have not adduced oral evidences and the Learned Arbitrator has proceeded in the matter on the basis of the submissions and the documents relied by the parties. He submits that the Learned Arbitrator has recorded the claims and objections of the parties in detail and recorded his findings and reasons by taking into consideration the documents of the parties. He submits that the Learned Arbitrator has recorded his findings from internal pages 73 to 91 of the award and had allowed the claim which the respondent was entitled.
- 33.** Mr. Dutt submits that the Learned Arbitrator specifically come to the finding that the extension was granted to the respondent much after the period of contract was over and thus the terms of the contract is not applicable and the Arbitrator has rightly relied upon Section 70 of the Contract Act. Mr. Dutt submits that considering the entire documents, the Arbitrator comes to the conclusion that due to the fault

of the petitioner, the respondent could not complete the work within the stipulated time provided under the contract.

34. The following Clauses of the Contract are necessary for adjudication:

“2. The time allowed for carrying the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence (time being deemed to be of the essence of the contract, on the part of the contractor) and the contractor shall pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, on the amount of the tendered amount of the whole work as shown in the tender for every day that the work remains uncommenced, or unfinished, after the proper date. The contractor shall commence execution of such part of the work as may be notified to him within seven days from the date of the order for commencement, for work and diligently continue such work and further, to ensure good progress during the execution of the work, he shall be bound in all cases in which the time allowed for any work exceeds one month, to complete one-fourth of the whole of the work, before one-fourth of the whole time allowed under the contract has elapsed; one half of the work, before one half of such time has elapsed and three-fourth of the work before three fourth of such time has elapsed. In the event of the contractor failing to comply with any of the conditions herein, he shall be liable to pay as compensation an amount equal to one per cent, or such smaller amount as the Superintending Engineer P.W.D. (whose decision in writing shall be final) may decide on the said tendered cost of the whole work for everyday that the due quantity of work remains incomplete, Provided Always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent on the tendered amount of the work as show in the tender.

5. *If the contractor shall desire an extension of the time for completion of the works on the grounds of his having been unavoidably hindered in its execution, the contractor shall give an immediate report of such hindrance to the Divisional Officer in writing and if he shall desire an extension of time for completion of the work on the ground thereof he shall apply in writing to the Divisional Officer within 7 days of the date of cessation of such hindrance on account of which he desires such extension as aforesaid and the Divisional Officer shall, if in his opinion (which shall be final) reasonable grounds be shown therefor, authorise such extension of time, if any, as may, in his opinion, be necessary or proper.*

12. *The Engineer-in-charge shall have power to make any alternations in, omissions, from, additions to or substitutions, for the original specifications, drawings, designs and instructions, that may appear to him to be necessary or advisable during the progress of the work and the contractor shall be bound to carry out the work in accordance with any instructions, which may be given to him in writing signed by the Engineer-in-charge and such alternations, commissions, additions or substitutions, shall not invalidate the contract but shall be deemed to have formed as work included in the original tender 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 rates, if any, may be specified in the tender for 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 portion. And if he altered additional or substituted work includes any class of work for which no rates is specified in the contract, then such class of work shall be carried out at the rates entered in the Schedule of rates brought about by the Superintending Engineer of the district, which was in force at the time of the acceptance of the contract minus/plus the percentage which the total tendered amount bears to the estimated cost of the entire work put to tender, and if the altered;*

additional or substituted work is not entered in the said Schedule of rates payment thereof shall be made by the Engineer-in-charge by determining the rates on analysis worked out from (a) the basic rate of materials and labour provided in the current schedule of rates or (b) the current market rates of materials and labour when even basic rates for the work are not available in the schedule. In 'cases when such rates are determined on analysis by the Engineer-in-charge under (a) above, the stipulated percentage above or below schedule of rates as provided in the contract shall also apply and in case of rates worked out on analysis under (b) above payment shall be made at the rates so determining without application of the said stipulated percentage. In the event of any dispute regarding rates determined on analysis for any altered, additional or substituted work under this clause the decision of Superintending Engineer of the Circle shall be final and binding.

2.27. *The offer is to be inclusive of all charges such as labour, materials, transport, Railway Freight, cost of fuel, lubricants, Government Taxes, Municipal Taxes, Corporation Fees/Municipal Fees for water supply, Royalty of stone materials, sand, electricity and other charges of Municipality or Statutory Bodies, toll charges, loading and unloading charges, handling charges etc. Sales Tax (Central and/or State), Income-Tax control Duty/Terminal tax, Ferry charges etc. and all other incidental charges. No claim whatsoever in these respect will be entertained.*

2.31. *A few utility service lines such as Electric Light Posts, underground water mains, drainage and sewerage pipes may exist in the work area. The foundations of different viaduct piers abutment as also for the retaining walls have been so located that these services require re-location during actual execution of work, the department will arrange the same. But the contractor shall have to suspend his works in the affected portion or phase it suitably till the relevant services have been re-located. No claim in respect of such delay in works will be entertained by the Deptt and the Contractor will only be granted normal extension of time in this regard, if so necessary and justified.*

2.32. *The site of work may be handed over to the Contractor in a phased manner and the contractor must be prepared to take up works in different stretches in conformity with handing over of site of work to him. No claim in respect of delay in handing over of site shall be entertained by the Department. Site may be handed over in piece meal manner as and when required for the work at a time entire site may not be available. No claim in this respect in any shape will be entertained.”*

35. Regarding providing of drawings by the petitioner to the respondents:

- (a) As per contract, the completion period of the work was for 24 months with effect from 23rd December, 1997 but only on 31st August, 1998, the Assistant Engineer has provided drawing to the respondent. By a letter dated 1st December, 1998, the petitioner has provided copy of drawing showing the Layout and details of piles in abutment and retaining wall of the RCC Cast-in-Situ bored piles in the eastern side. On 18th February, 1999, the Assistant Engineer has provided drawing showing re-inforcement details of pile caps in position P3 to P8. In the reply dated 20th May, 1999, the Executive Engineer informed the respondent that they will provide detailed re-enforced drawing for super structure. The Assistant Engineer by his letter dated 28th August, 1999, provided details of layout re-inforcement in pier cap, pedestal and elastomeric bearing for pier No. P1 to P8. .On 11th November, 1999, the Assistant Engineer has provided details of Superstructure for Span P-3 to P-4, P-4 to P-5, P-7 to P-8 and P-8 to common pier at Ch. 274.62M to the respondent.

(b) The Assistant Engineer by a letter dated 29th November, 1999, informed the respondent that the department is trying utmost to remove all the constraint. On 8th December, 1999, the Assistant Engineer has forwarded a copy of drawing to the respondent showing the details of pile caps for Abutment (A-1), Abutment shaft, Abutment cap, Dirt Wall, Return Wall and Approach Slab. By a letter dated 12th September, 2000, the Executive Engineer has forwarded structural drawing showing the details of different element of the viaduct structure i.e. details of super structure for Span A1-P1, P1-P2, P2-P3 and P3-P4, details of retaining wall from Ch.(-)34.6M to Ch.92.55M and details of superstructure for span P5-P6 to P6-P7 to the respondent for construction. On receipt of the said drawing, the respondent finds some discrepancies and accordingly, the respondent has intimated to the petitioner by a letter dated 25th October, 2000 and in reply to the same, the Executive Engineer by a letter dated 28th November, 2000 has admitted the same.

36. The Learned Arbitrator rightly considered the documents and came to the conclusion that the authorities failed to provide drawing to the respondent for completion of the work. From the above documents, it is crystal clear that it is not in one occasion, the petitioner defaulted in providing drawing in time to the respondent but on each and every occasion, the petitioner failed to provide drawing to the respondent to complete the project in time. The documents itself speaks that even

time period for completion of work was over as per contract, the petitioner has provided drawings till the month of November, 2000 to the respondent.

37. Regarding Supplementary and Extra Items :

By a letter dated 2nd November, 1998, the respondent had informed that he has submitted the supplementary tender covering the extra item which was executed by the respondent. On receipt of the said communication dated 2nd November, 1998, the petitioner has not denied the same. On 9th November, 1998, the respondent had submitted first supplementary bill to the petitioner along with the relevant documents. By a letter dated 15th November, 1998, the Executive Engineer has submitted that as regard to abutment, P.1 and P.8 support, the office of the Executive Engineer is in constant touch with the Railway Authority and the working space for the said work would be made available to the respondent in due course of the time. In the said letter, the Executive Engineer further admitted that regarding driving of piles under abutment and retaining wall, the land will be made available to the respondent on receipt of the further programme of mobilizing machineries at this location. By a letter dated 8th March, 1999, the respondent had submitted mixed design, M-25 grade concrete for pile cap, pier and other components of viaduct for the approval of the authorities. By a letter dated 5th April, 1999, the Executive Engineer had informed the respondent, the supplementary tender has been processed and sent to the Higher Authority and is

under active consideration. By a letter dated 11th June, 1999, the respondent had requested the authorities for release of the payment as the respondent is facing financial hardship. By a letter dated 12th November, 1999, the respondent had informed the authorities that the work has reached the pier cap level and are awaiting the details drawing of the grinder and the deck. Pedestal could have been completed by now, but for decision about the strength of concrete to be used is required. The respondent offers the assistance of the authorities towards preparation of the detailed drawing of the super structure including girder and slab. By a letter dated 22nd November, 1999, the Executive Engineer has approved the excess quantity of piles and also informed that dog kennel side would be handed over to the respondent at appropriate time. By a letter dated 10th January, 2000, the respondent has submitted his second supplementary bill to the petitioner. By a letter dated 27th December, 2000, the respondent has submitted third supplementary bill to the petitioner along with all documents.

38. Hindrances While Executing the Awarded Work:

- (a) By a letter dated 12th March, 1998, the respondent has informed the authorities, the respondent will take up the work of retaining wall for which permission may be obtained from the Railways and detailed drawings for the retaining wall may be supplied forthwith to enable the respondent to place intend for steel and cement. By a letter dated 6th May, 1998, the respondent had requested the

authorities to provide clear work front along with centralize of the structure so as to enable the respondent to execute the work. By a letter dated 15th May, 1998, the authorities have informed the respondent that the side of the work will be handed over to the respondent in different stretches as envisaged in the tender condition and informed that the petitioners are taking of the matter with the Railway Authority with the total land is available.

- (b) By a letter dated 22nd May 1998, the respondent has informed the petitioner that the respondent is apprehending unusual delay in completion of the subject work due to failure of the department to fulfill their obligations. In the said communication, the respondent has also informed to the petitioner that the respondent is waiting for removal of the obstruction standing on the alignment but no action on behalf of the petitioner is being taken. The respondent again on 6th July, 1998 by referring their letter dated 22nd May, 1998, informed the petitioner that no improvement has been noticed in discharge of contractual obligation on the part of the department, as a consequence of which the respondent is facing loss due to maintaining idle establishment, both on site and of site and in reply to the said letter, the petitioner has denied the same but on the other hand, the petitioner by a letter dated 31st August, 1998, had forwarded the copy of drawing duly signed by the officers of the Eastern Railway and the department of the petitioner to the respondent. On 1st December 1998, the Assistant

Engineer of the petitioner has supplied the copy of drawing showing the layout and details of piles in abutment at retaining wall of the RCC Cast-in-Situ bored piles in eastern side. The respondent by a letter dated 9th December, 1998, informed the petitioner about the following constraints faced by the respondent for executing the work:

a) Abutment – Target wall for practicing rifle shooting is blocking the entire length of the abutment.

b) P₁ – An underground structure previously use as magazine standing along the pier.

c) P₂ – A brick wall with structure along the length of the pier.

d) P₃ – Pilling completed.

e) P₄ – Sewerage line – Needs to be diverted.

f) P₅ – Site is free but a passage to be maintained for access to the adjacent buildings.

g) P₆ – Sewerage line – Needs diversion.

h) P₇ – Clear.

i) P₈ – Needs immediately removal.”

The petitioner by a letter dated 15th December, 1998, denied the contention made by the respondent but in the reply, the petitioner admitted that *“As regard abutment, P₁ and P₈ support, this office is in constant touch with Railway authorities. The working space in these support position would be made available to you in due course of time”*. In the said reply it is also admitted that *“As regard driving piles under abutment and retaining wall, the land will be made*

available to you on receipt of your further programme of mobilizing machineries at that location”.

- (c) By a communication dated 22nd November, 1999, the Executive Engineer has admitted the following:

- “1) You have been provided with the drawing of the piles and necessary structural drawing would be furnished to you as soon as the piling work is taken up and completed.*
- 2) Approval is hereby granted for excess quantity of piles if required during execution.*
- 3) This was also made clear to you during discussion held in the chamber of undersigned on 16.11.99 in presence of the Asstt. Engineer.*
- 4) Dog kennel site would be handed over to you at appropriate time.”*

- (d) The Assistant Engineer by a letter dated 29th November, 1999, informed the respondent that the department is trying utmost to remove all constraints. On 8th December, 1999, the Assistant Engineer had forwarded a copy of drawing showing the details of pile Cap for Abutment (A-1), Abutment shaft, Abutment Cap, Dirt Wall, Return Wall and Approach Slab to the respondent. On 16th December, 1999, the Assistant Engineer has requested the respondent that contract period of 24 months is going to be completed and requested the respondent to apply for extension of contract period.

39. It is found from the record that whenever, the respondent had informed about the hindrances, non-supply of materials by the petitioner and

requested for providing drawings, though the petitioner has accepted the same and on the other hand made allegations that the respondent has not executed the work but the said allegations of the petitioner are not in consonance with the record as described above.

40. On 22nd March, 2002, the Executive Engineer, Howrah Highway Division issued Certificate to the respondent certifying that up to date value of the work done by the respondent is 1,71,76,186/-, percentage of the work up to date is 89% (approx.) and performance of the agency is satisfactory. Similar certificate was also issued by the Executive Engineer on 28th March, 2002, certifying that the performance of the agency is normally good.

41. In the case of ***State of West Bengal vs. Pam Developments Private Limited*** reported in **2017 SCC OnLine Cal 13272**, the Division Bench of this Court held that :

“74. Indeed, the dictum in Sarvesh Chopra has been expressly read down in the most recent Supreme Court pronouncement considered herein in Buildworth Private Limited as evident from paragraph 19 of the report as quoted above.

75. On such tests as permissible, the award in the present case could scarcely have been touched. The arbitrator found that it was the appellant which was to blame for the delay in the completion of the work and that the appellant allowed the work to progress beyond the stipulated time and accepted the completion thereof. Once a party accepts the belated performance of a reciprocal obligation, the other would be entitled to make a claim for damages and if the former party is found to be in breach, the prohibitory or no-damage clauses in the contract for its benefit may be legitimately interpreted by the arbitrator to lose

their applicability during the extended period of the work. If the arbitrator, on his appreciation of the circumstances leading to the extension of the period of completion of the work, finds the employer to be in breach which results in the work not being completed on time, the arbitrator's finding that the prohibitory clauses would not apply to the extended period would not be outlandish or per se perverse. However, even on such finding if the quantum of the amount awarded shocks the conscience of the court, the court can interfere with the quantum.

76. *However, in the present case the amounts awarded under the four principal heads of claim despite the prohibitory clauses in respect of such heads, do not appear to be unconscionable, far less shocking. Cogent and acceptable reasons were furnished by the arbitrator in respect of every head of claim awarded in favour of the contractor and it did not call for any interference under any permissible ground in Section 34 of the 1996 Act read with Section 28 thereof. In particular, the tinkering with the costs awarded by the arbitrator and the rate of interest appear to be the unkindest cuts of all. Much more than a sum of Rs. 5 lakh must have been expended by the contractor in course of the 134 sittings and no "realistic assessment" on the same lines as the condemned "rough and ready justice" methodology could have prompted even a paisa to be knocked off from the costs. The award of interest was, again, within the exclusive domain of the arbitrator and subject to his discretion as recognised in original Section 31(7) of the 1996 Act and could not have been interfered with, without an express finding of perversity in the exercise of the discretion by the arbitrator."*

42. In the case of **Northern Railway vs. Sarvesh Chopra** reported in **(2002) 4 SCC 45**, the Hon'ble Supreme Court held that:

"15. *In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and*

labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is “of the essence” of an obligation, Chitty on Contracts (28th Edn., 1999, at p. 1106, para 22-015) states:

“a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and

(b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract (‘a breach going to the root of the contract’) depriving the innocent party of the benefit of the contract (‘damages for loss of the whole transaction.’)”.

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, “unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and

such notice by the contractor putting the employer on terms.”

- 43.** In the present case, admittedly the period of contract was over and subsequently, the petitioner has extended the time for complete the work by the respondent from time to time. The petitioner has also issued certificate to the respondent that the respondent has completed 89% (approx.) of the work and the performance of the respondent was satisfactory and normally good. The learned Arbitrator has also considered all the materials placed before him by the parties and come to the conclusion that due to failure of the petitioner to offer hindrance free work site, indicative of serious defaults of the petitioner to enable the respondent to complete the work. The Arbitrator also held that the contract was expired on 22nd December, 1999 and as per the conditions of the contract, a contract has to be made in the name of the Governor but in the present case no such contract was made for the work beyond the contract period in the name of the Governor.
- 44.** In the case of ***NTPC Ltd. vs. Deconar Services Pvt. Ltd.*** reported in ***2021 SCC OnLine SC 498***, the Hon’ble Supreme Court held that:

“19. With respect to the question of law as to whether the arbitrator could order such an escalation, this Court has, in a catena of judgments, upheld the same. A three-Judge Bench of this Court in Assam State Electricity Board v. Buildworth Private Limited (2017) 8 SCC 146, was faced with almost identical circumstances. In that case, the arbitrator granted escalation charges beyond what was permissible under the contract between the parties, which prescribed a cap on the

same. Upholding such an award, the Court in that case held as follows :

“13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.”

In the present case admittedly after the expiry of stipulated period of contract, the provisions and conditions of the contract became inapplicable to both the parties and thus rates for execution of the work was also not applicable after the period of contract is over. Admittedly, the respondent has executed additional works after the stipulated period of contract and thus Section 70 of the Contract Act is applicable to the respondent and the learned Arbitrator has rightly invoked the said provisions. The arbitrator has allowed the claims of the respondent on the basis of the evidence on record and as per the submissions made by the respective parties.

- 45.** The petitioner has relied upon the judgment in the case of **Associated Builders vs. Delhi Development Authority** reported in **(2015) 3 SCC 49** and relied upon :

“17. It will be seen that none of the grounds contained in sub-section (2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.

18. *In Renusagar Power Co. Ltd. v. General Electric Co., the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:*

“7. Conditions for enforcement of foreign awards.—(1) A foreign award may not be enforced under this Act—

(b) if the Court dealing with the case is satisfied that—

(ii) the enforcement of the award will be contrary to the public policy.”

In construing the expression “public policy” in the context of a foreign award, the Court held that an award contrary to

- (i) The fundamental policy of Indian law,*
- (ii) The interest of India,*
- (iii) Justice or morality,*

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a

contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

19. *When it came to construing the expression “the public policy of India” contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in ONGC Ltd. v. Saw Pipes Ltd. held: (SCC pp. 727-28 & 744-45, paras 31 & 74)*

“31. Therefore, in our view, the phrase ‘public policy of India’ used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or
 (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act,

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any

other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable;

(vii) in certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract.”

- 46.** Learned Counsel for the respondent has submitted that the petitioner has taken several grounds in the application under Section 34 of the Arbitration and Conciliation Act, 1996 but in none of the grounds, the petitioner has made out any case as to how the arbitrator travelled outside the purview of contract, how it is arbitrary, irrational, why the award is to be vitiated, which claims are overlapping, how the principal of waiver and estopples are applicable, how the award is contrary to the provisions of the Sections 55 and 73 of the Indian Contract Act, 1872 and how the award should be vitiated by perversity.

This Court considered the Award, the grounds on which the petitioner has filed the present application and the submissions of the respective parties.

It is trite law that the terms of contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrator having regard to the wide nature, scope and ambit of the arbitration agreement and the arbitrator cannot be said to have misdirected himself in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law.

47. Considering the above facts and circumstance of the case, this Court finds that the Arbitrator has not committed any error and there is no ground to interfere with the award passed by the Arbitrator.

48. AP-COM 102 of 2024 (AP No. 579 of 2008) 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.)