

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

Before:

**The Hon'ble Justice Arijit Banerjee
And
The Hon'ble Justice Om Narayan Rai**

APO 108 of 2024

With

AP 654 of 2011

State of West Bengal & Anr.

Vs.

Sambhu Nath Ghosh & Co.

For the State/Appellants	: Mr. Dhruba Ghosh, Sr. Adv. Ms. Nilanjana Addhya, Adv. Mr. Paritosh Sinha, AOR, WB Mr. Arindam Mandal, Adv. Mr. Altamas Alim, Adv.
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For the Respondent	: Ms. Noelle Banerjee, Adv. Ms. Nairanjana Ghosh, Adv.
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Hearing Concluded on	: 19.05.2025
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Judgment on	: 17.07.2025
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Om Narayan Rai, J.:-

1. This is an appeal under Section 39 of the Arbitration Act, 1940 (hereafter "the said Act of 1940") against a judgment and order dated August 16, 2024 passed by a learned Single Judge of this Court in AP 654 of 2011 whereby the challenge thrown to an award under Section 30 read with Sections 33 and 41 of the said Act of 1940 has been repelled.
2. Shorn of unnecessary details, the case run in the statement of claim is as follows.

- (a) The appellant had issued a notice inviting tender bearing no. 17 of 1983-84 for construction of an eight storied building with foundation of sixteen storied building at Alipore Collectorate Compound at an estimated cost of Rs.1,52,50,537/- (Rupees One Crore Fifty Two Lakh Fifty Thousand Five Hundred Thirty Seven Only).
- (b) The work was to be completed within a period of 24 months spanning October 24, 1983 to October 23, 1985.
- (c) The claimant i.e. respondent herein participated in the tender process and ultimately emerged successful. Thereafter, the claimant was issued the acceptance-cum-work order dated October 4, 1983 by the Superintendent Engineer, PWD, Southern Circle. Subsequently, a formal agreement was also executed between the claimant and the appellant.
- (d) Upon receipt of the work order, the claimant started the work but it was abnormally delayed due to certain breaches/default on the part of the appellant. The claimant i.e. respondent herein, therefore, invoked the arbitration clause and claimed damages on the following grounds.
- (i) Delay in finalization of site and further delay in removing obstruction like cable lines, water etc. from the site of the works.
 - (ii) Delay in issuing drawings and necessary decision.
 - (iii) Delay in issuing specified departmental materials like cement and steel as per requirement in right time.
 - (iv) Failure to make proper and timely on account payments.

(e) On the aforesaid grounds, the claimant made as many as six principal claims aggregating to Rs.57,01,574/- (Rupees Fifty Seven Lakh One Thousand Five Hundred Seventy Four Only) under several heads.

(f) These were followed by a separate claim for interest at the rate of 18% per annum on the aforesaid aggregate sum.

3. The appellant (i.e. respondent before the arbitrator) filed its counter statement thereby denying all the material allegations in the statement of claim and alongside also lodged a counter claim.
4. The dispute between the parties was ultimately decided by the arbitrator by an award made and signed on October 23, 2010, whereby all the claims of the claimant except claim no. 1, claim no. 2(f), claim no. 2(h), claim no. 3, claim no. 5 and claim no. 6 were allowed. The claimant was thus awarded an aggregate sum of Rs. 23,99,106/- (Rupees Twenty Three Lakh Ninety Nine Thousand One Hundred Six Only) together with interest at the rate of 15% per annum thereon for the period October 1, 1991 till December 31, 1999.
5. A further interest at the rate of 10% per annum on the aforesaid sum was also allowed for the period January 1, 2000 till payment or till the award became decree of Court whichever was earlier. A further sum of Rs.1,60,000/- (Rupees One Lakh Sixty Thousand Only) was awarded as costs to be paid by the appellant herein to the respondent (claimant).
6. Assailing the aforesaid award, the appellant herein (i.e. the respondent before the arbitrator) approached this Court by filing an application being AP No. 654 of 2011 under Section 30 read with Section 33 and 41 of the said

Act of 1940. The said application has been dismissed by the order impugned. Hence the present appeal.

7. Mr. Dhruba Ghosh, the learned Senior Advocate appearing for the appellant has criticised the order passed by the learned Single Judge on several counts. He has firstly submitted that the learned Single Judge has failed to appreciate that the impugned award purported to give reasons which were utterly baseless. Mr. Ghosh submitted that under the regime of the said Act of 1940, a reasoned award was required to be tested under a stricter scanner than that of an unreasoned award. He elaborated by submitting that if the award was wholly unreasoned there would not have been any scope for the Court to interfere with the award while deciding a challenge mounted to such an award inasmuch as the said Act of 1940 did not require the arbitrator to assign any reason for the conclusion that the arbitrator had reached but according to him, situation would be entirely different if the arbitrator purported to give reasons. In such a case, a Court deciding a challenge under Section 30 read with Sections 33 and 41 of the said Act of 1940 would be entitled to go into the worth of the reasons and would be justified in setting aside the award if the reasons assigned were either not proper or inadequate.
8. It was further submitted by Mr. Ghosh that the award is based on no evidence and as such it is perverse. It was submitted that perversity and lack of reasons are established grounds for setting aside an award under the said Act of 1940.
9. Mr. Ghosh took us through the award and submitted that the arbitrator has before deciding the various claims made by the claimant (respondent herein)

very briefly referred to the facts and then indicated that he would pronounce his findings on various claims made “*as hereunder*”. Mr. Ghosh further submitted that the award is based on the statements made at pages 8 to 11 of the award and that the statements have been used by the arbitrator as his reasoning in support of his conclusion by referring to the same as “*pre-going*” reasons.

10. Mr. Ghosh referred to a judgment in the case of ***State of Madhya Pradesh vs. Satyapal Wasson***¹. He drew our attention to a passage extracted therein from a judgment of the Hon’ble Supreme Court in the case of ***Union of India vs. Bungo Steel Furniture Private Ltd.***² wherein the following has been observed-

“If an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself.”

11. Mr. Ghosh further submitted that the arbitrator has of his own incorporated a formula and decided the amounts towards increment in prices (cost escalation). It was submitted that the arbitrator could not have ventured forth and adopted a formula without the parties’ consent therefor. In support of the aforesaid contention, Mr. Ghosh relied on a judgment of the

¹ 1979 MP LJ 208

² AIR 1967 SC 378

Hon'ble Supreme Court in the case of ***State of Rajasthan & Anr. vs. Ferro Concrete Construction Private Limited***³. It was submitted that in the said case the Hon'ble Supreme Court had held that if an arbitrator overlooked the provisions of the contract or if the arbitrator had passed the award without there being any evidence in support thereof the same would amount to misconduct.

12. Mr. Ghosh further submitted that in the instant case the arbitrator had taken the claimant's claims to be sacrosanct and had allowed them without substantiating the conclusion reached by proof or evidence. Relying on the aforesaid judgment of ***State of Rajasthan & Anr.*** (supra) it was submitted that if the claims made by the claimant could not be proved then awarding such claims without looking for or insisting on proof would amount to legal misconduct and error apparent on face of the record both of which are grounds available to set aside an award challenged under the said Act of 1940.
13. The arbitrator's reasoning that since penalty had not been levied on the claimant by the appellant for delay, despite having authority to impose penalty, therefore it could be inferred that the claimant was not at fault was vehemently censured by Mr. Ghosh. It was further submitted by Mr. Ghosh that while the arbitrator had found there were hindrances in executing the contract and that the appellant could have removed those hindrances, the arbitrator had not relied on any evidence in support of his conclusion.
14. Mr. Ghosh relied on the judgment rendered by the Hon'ble Supreme Court in the case of ***Dyna Technologies Private Limited vs. Crompton Greaves***

³ (2009) 12 SCC 1

Limited⁴ reported at to contend that the arbitrator's reasoning should be proper, intelligible and adequate.

15. Relying on the judgment of the Hon'ble Supreme Court in the case of **Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)**⁵. Mr. Ghosh submitted that any finding based on no evidence or an award which ignores vital evidence would be perverse and be liable to be set aside on the ground of patent illegality. A judgment in the case of **Associate Builders vs. Delhi Development Authority**⁶ was also relied on for the said proposition.
16. Mr. Ghosh referred to the said judgment in the case of **Associate Builders** (supra) and submitted that in the facts and circumstances of this case where the arbitrator had purported to give reasons, the aforesaid judgment was relevant. Referring to paragraphs 1 and 34 of the said judgment Mr. Ghosh submitted that reasons if given should be proper, intelligible and adequate. He submitted that the arbitrator in the instant case had purported to give reasons but the same were neither intelligible nor proper and as such the award required to be interfered with.
17. Mr. Ghosh then cited the judgment in the case of **McDermott International Inc vs. Burn Standard Co. Ltd. & Ors.**⁷ to drive home the point that if there was patent illegality in the award which went to the root of the matter the award must be set aside. It was submitted that requirement of reasons in an award has always been insisted upon inasmuch as reasons assure that the arbitrator does not act capriciously.

⁴ (2019) 20 SCC 1

⁵ (2019) 15 SCC 131

⁶ (2015) 3 SCC 49

⁷ (2006) 11 SCC 181

18. Mr. Ghosh then relied on a judgment by the Hon'ble Supreme Court in the case of ***Bharat Coking Coal Ltd. vs. L.K. Ahuja***⁸ and placed paragraph 24 thereof to contend that loss of profit or opportunity must be proved by evidence and when there is no such evidence in the present case the claim therefor should not have been allowed.
19. Mr. Ghosh next relied on the judgment of the Hon'ble Supreme Court in the case of ***Unibros vs. All India Radio***⁹ and placed paragraphs 15 to 18 thereof to submit that if the claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts was made, it becomes imperative on the claimant to substantiate the presence of a viable alternative opportunity through compelling evidence.
20. Relying on the aforesaid two judgments in the cases of ***Bharat Coking Coal Ltd.***(supra) **and** ***Unibros*** (supra), it was submitted by Mr. Ghosh that claim 2(e) has been allowed by the arbitrator in absolute breach of the law laid down by the Hon'ble Supreme Court in the said two judgments.
21. Mr. Ghosh further submitted that the claim for such loss of profit could only be considered if there was evidence in support of such claim. It is further submitted that there was no clause in the agreement that permitted the claimant to claim escalation costs.
22. Mr. Ghosh further relied on a Division Bench judgment of this Court in the case of ***State of West Bengal vs. Bharat Vanijya Eastern Private Limited***¹⁰. Referring to paragraphs 17 to 21 of the said judgment Mr. Ghosh

⁸ (2004) 5 SCC 109

⁹ 2023 SCC OnLine SC 1366

¹⁰ 2019 SCC OnLine Cal 3605

asserted that even if it is found that reasons given by the arbitrator are not supported by evidence the award must fall.

23. It was submitted that mere non-imposition of penalty or compensation by the appellant could not have been treated as a ground to allow the claims for damages and to conclude that the appellant was responsible for the delay.
24. It was submitted that no evidence has been cited by the arbitrator to justify the conclusion that the appellant has in any manner breached any part of the contract or has failed in discharging its contractual obligation.
25. Mr. Ghosh further submitted that the manner in which the arbitrator has calculated 75% of the expenditure allegedly incurred by the claimant in each month during a long period of 6 months does not stand to reason. It was submitted that as regards claim 2(a), the arbitrator has allowed 75% thereof without any evidence. It was submitted that similarly 50% of claim 2(b) has been allowed again without any evidence.
26. As regards claim 2(g) for loss on account of non-execution of profitable item of work, the arbitrator has awarded the same again without there being any evidence in support thereof. Mr. Ghosh has also submitted that the arbitrator has not dealt with the appellant's counter claim at all.
27. Mr. Ghosh submitted that the award was wholly perverse and was clearly a product of legal misconduct. He submitted that the same should be set aside.
28. Ms. Noelle Banerjee, learned Advocate appearing for the claimant at the outset submitted that an award passed under the said Act of 1940 could not be assailed on the ground of the same lacking reasons or adequate reasons. Ms. Banerjee took us through the award and invited our attention to the

narration of the facts in the award which concludes with the following words “pronounce my findings on various claims made as hereunder”. Ms. Banerjee submitted that it was clear from the aforesaid observation that the arbitrator has given only the findings based on the material before him.

29. Ms. Banerjee also invited our attention to page 9 of the award wherein the following observations were made by the arbitrator-

“The question therefore, arises whether the claimant/contractor was responsible for the delays occurred in executing the job under the instant contract. Fact of the case, as is revealed from the correspondence resting with various letters exchanged between the parties, could as ascertained. On scrutiny of the relevant correspondence, I find that the hindrances which the claimant had obtained in proceeding with the work could not be removed by the Respondent in time causing delays thereby. It cannot be denied that the Claimant could have completed the work after the hindrances had been removed by the Respondent but the delays occurred in each case attributed to prolongation beyond the agreed period of 24 months which was 74 months in total.”

30. Ms. Banerjee submitted that the observations made by the arbitrator at page 9 of the award clearly provide the justification for the arbitrator holding that the claimant was not responsible for the delay. Ms. Banerjee relied on a judgment of the Hon’ble Supreme Court in the case of **Construction & Design Services vs. Delhi Development Authority**¹¹ and placed paragraph 14 thereof to contend that in cases where has been delay in execution of the contract then even if time was not of essence, it could not be presumed that

¹¹ (2015) 14 SCC 263

delay was inconsequential and in such cases delay itself can be taken to have resulted in losses.

31. Ms. Banerjee further submitted that as regards claim no. 2(c), the arbitrator found that no penalty had been levied upon the claimant and the arbitrator arrived at the finding that there were hindrances which have not been removed by the appellant and such hindrances caused delay in execution of the work.
32. Ms. Banerjee submitted that claim no. 2(b) was clearly supported by reason because in the said case the arbitrator had found that the claimant had its head office as well as the site of work in the same city and therefore the arbitrator had reduced the claim amount by 50%. It was submitted that as regards claim no. 2(b) the arbitrator found that the same was relatable to delay and as such the arbitrator allowed the same. She submitted that the reasons for allowing claim no. 2(b) have already been provided by the arbitrator while dealing with claim no. 2(c).
33. It was further submitted on behalf of the respondent that as regards claim no. 2(e) it would appear from page 17 of the award that the arbitrator had considered the documentary evidence while considering the claim of loss of profit and calculated the amount at the rate of 10% on the expected turnover for the overrun period upon taking into consideration the lean period. It was submitted that the arbitrator has allowed only 1/3rd of the calculated amount by accepting the formula applied in building contracts.
34. As regards claim no. 2(g), Ms. Banerjee submitted that the reasons therefor could be found at page 18 of the award. She submitted that the arbitrator found that the job was executed based on the drawing made by the State

and as such the claimant would not have been held responsible for less execution of work.

35. As regards claim no. 4, Ms. Banerjee drew our attention to page 20 of the award and submitted that the arbitrator found that the respondent had not refunded the security deposit because the claimant had referred the matter to arbitration which was not a good reason for withholding the security deposit. It was then submitted that on the same page, the arbitrator had given another reason that since the final bill prepared by the respondent exhibited a positive figure which showed that no amount was due and payable by the claimant to the respondent (but a sum was subsequently claimed by the State in the arbitration proceeding by filing counter claim), therefore the claimant was entitled to refund of the security deposit.
36. Referring to the judgment in the case of **Rajendra Construction Co. vs. Maharashtra Housing & Area Development Authority & Ors.**¹² and placing paragraph 23 thereof it was submitted by Ms. Banerjee that since in the instant case award has been passed under the said Act of 1940, the same cannot be set aside on the ground that it is unreasoned. She relied on a Single Bench judgment of this Court in the case of **Alstom Projects India Limited vs. Galaxy Engineering Contractors**¹³ and submitted that there is always an element of guesswork permitted in cases of this nature. She submitted that assessment of damages was within the authority of the arbitrator and since it could not be objectively demonstrated that the figure arrived at by the arbitrator was palpably erroneous, the Court would be

¹² (2005) 6 SCC 678

¹³ MANU/WB/0314/2010

inclined to uphold the arbitrator's view rather than detract from it. Reliance was also placed on a judgment in the case of **Harsh Dhingra vs. State of Haryana & Ors.**¹⁴ to contend that prospective declaration of law is a device innovated by this Court to avoid reopening of settled issue and to prevent multiplicity of proceedings.

37. The judgement in the case of **Bharat Coking Coal Ltd.** (supra) which had been relied on by the Appellant was also relied on by the Respondent and paragraph 11 thereof was cited to submit that when the arbitrator has applied his mind to the pleading, the evidence adduced before him and the terms of the contract, there is no scope for the Court to re-appraise the matter as if he was sitting in appeal and even if two views are possible, the view taken by the arbitrator would prevail. It was pointed out that it was only if there was no evidence which was apparent on the face of the award that the same could be set aside.
38. A Single Bench judgment in the case of **Batokristo Roy Co. (Pvt.) Ltd. vs. H. Polesy and Co. (Importers) Pvt. Ltd. & Ors.**¹⁵ (paragraph 14) was relied on to submit that the arbitrator has exclusive jurisdiction to decide the merit of a claim and the Court cannot review an award of an arbitrator and correct a mistake in his adjudication unless an objection to the legality of the award is apparent on the face of it.
39. Another Single Bench judgment in the case of **Eastern and North East Frontier Railway Co-operative Bank Ltd. vs. B. Guha and Co.**¹⁶ was cited by Ms. Banerjee for the proposition that the Court has no jurisdiction

¹⁴ (2001) 9 SCC 550

¹⁵ AIR 1975 Cal 467

¹⁶ AIR 1986 CAL 146

to investigate into the merits of the case and to examine the evidence on record to find out whether the arbitrator had committed any error of law or not.

40. A judgment in the case of ***NTPC Limited vs. Deconar Services Private Ltd.***¹⁷ (paragraphs 11 to 13) was placed to submit that the scope of interference in arbitral awards passed under the said Act of 1940 is very narrow. In such case it was held that the Court can neither reassess nor re-appreciate evidence nor examine the sufficiency or otherwise of the evidence. It was further pointed out that the said judgment holds that where the arbitrator has taken a possible view, although a different view could be taken on the same evidence the Court would not interfere with the award.
41. A Division Bench judgment of this Court in the case of ***State of West Bengal vs. Pam Developments Private Limited.***¹⁸ (paragraphs 48, 73 and 74) was placed to contend that once a party accepts the belated performance of a reciprocal obligation, the other would be entitled to make a claim for damages. The said judgment was placed to contend that in cases of assessment of damages it was permissible for the arbitrator to make some guesswork and employ a rough and ready method to arrive at the conclusion.
42. A Single Bench judgement in the case of ***Reliance Industries Limited vs. Khaitan Transport Company Private Limited***¹⁹ (paragraphs 4, 6 and 7) was placed to submit that in a proceeding for setting aside of an award under the said Act of 1940 the challenger has a right to assail the reason

¹⁷ (2021) 19 SCC 694

¹⁸ MANU/WB/0748/2017

¹⁹ MANU/WB/0022/2010

assigned in the award and that reasons are to be distinguished from conclusion. It was submitted that in view of the arbitrator having recorded only conclusion without assigning any reason, the award could not be faulted.

43. Another judgment in the case of **Harish Chandra & Company vs. State of U.P Through Superintending Engineer**²⁰ (paragraphs 25, 26 and 34) was placed to contend that grounds such as inadequacy of reasons in support of an award, error committed by the arbitrator on facts, alternate and/or more plausible view, could not be the ground on which award could be set aside under Section 30 of the said Act of 1940.
44. A judgment in the case of **Hindustan Tea Co. vs. K. Sashikant Co. & Anr.**²¹ was pressed into service to contend that even if the award is a reasoned award the same is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts.
45. Reliance was also placed on the case of **Santa Sila Devi & Anr. vs. Dhirendra Nath Sen & Ors.**²² to contend that the Court should approach an award with a desire to support it if that is reasonably possible than to set the same aside by calling it illegal and that the arbitrator is not bound to deal with each claim or matter separately but can deliver a consolidated award. A judgment in the case of **State of Orissa & Anr. vs. Kalinga Construction Co. (P) Ltd.**²³ (paragraphs 8 and 9) was relied on to submit that on an application for setting aside an arbitral award it was not permissible for the Court to re-examine and re-appraise the evidence which

²⁰ (2016) 9 SCC 478

²¹ 1986 Supp SCC 506

²² AIR 1963 SC 1677

²³ (1970) 2 SCC 861

had been considered by the arbitrator and it would not be open to the Court to sit in appeal over the conclusion of the arbitrator in such proceeding for setting aside an arbitral award.

46. Ms. Banerjee produced before us a copy G.O No./PWD Circular No. 1135 A/October 1, 1986 and submitted that the requirement of a speaking award and assignment of reasons in support of the award were subsequently inserted and at the time when the parties before us had entered into the contract, there was no requirement of reasons being assigned by the arbitrator. It was submitted that the contract in question was entered into in October 1983 and therefore the said circular of 1986 could not be made applicable to the claimant's case.
47. Ms. Banerjee, therefore, submitted that the award passed by the arbitrator does not require any interference and the order impugned herein should be affirmed.
48. Both Mr. Ghosh and Ms. Banerjee distinguished the judgments cited by each other.
49. We have heard the learned Counsel appearing for the respective parties and we have considered the material on record.
50. The main thrust of the submissions of Mr. Ghosh is that the learned Single Judge has failed to appreciate that the award was perverse for two reasons.
51. Firstly, that the reasons purported to have been given by the arbitrator did not have any basis and secondly, that the findings of the arbitrator are based on no evidence.
52. Mr. Ghosh has laid substantial emphasis on the usage of the expression "*pre-going*" and has sought to drive home the point that the entire basis of

the arbitrator's conclusion is the arbitrator's recording of the claimant's case.

53. We have gone through the award; we do not find Mr. Ghosh's assertion to be well founded. We are alive to the legal position that if the award contains reasons (i.e. the arbitrator has purported to give reasons), the Court shall be entitled to investigate the worth of the reasons and get satisfied as to the legality of the reasons assigned in support of the conclusion.
54. Since the petitioner before the learned Single Judge was one under Section 30 of the said Act of 1940, the provisions of the said Section are required to be noticed-

“30. Grounds for setting aside award: *An award shall not be set aside except on one or more of the following grounds, namely-*

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid.”

55. Upon a reading of the aforesaid Section, it becomes clear that the Court can ransack the award only if the Court is allowed entry into it through any of the doors provided in the three clauses of Section 30 of the said Act of 1940. It cannot be over-emphasised that a challenge under Section 30 of the said Act of 1940 can succeed on very limited grounds.
56. We agree with the submission of Ms. Banerjee that the arbitrator has provided sufficient basis for the conclusion that the arbitrator has reached,

although, in law (in the context of the said Act of 1940), it was not mandatorily required for the arbitrator to do so. We may clarify the position by referring to the manner in which the arbitrator has dealt with the several claims of the claimant while passing the award.

57. Since the challenge is at the behest of a respondent in the arbitral proceeding, we leave the claims that have been annulled by the arbitrator without any exploration while examining the arbitrator's dealing with the claims that he has allowed whether in full or in part.

58. As regards claim no. 2(c), i.e. extra additional onsite expenses during the overrun period of November, 1985 to December, 1989 i.e. for 50 months the arbitrator has allowed the same with the following observations-

“Question of adjudication, therefore, arises on the aspects eg. Who was responsible for the delays What was the repercussion of the delay in completion of the work and how to apportion the consequences of the delay. The very fact that no amount of compensation has been levied upon the Claimant/ Contractor by the Respondent despite being clothed with the jurisdiction and/or authority to claim such compensation in terms of the inbuilt provisions of the contract, has not escaped my attention. The very contention of the Respondent that the claimant in the instant case was responsible for the delays occurred has also been kept in view while adjudicating the above said aspects of the matter.

The question therefore, arises whether the claimant/contractor was responsible for the delays occurred in executing the job under the instant contract. Fact of the case, as is revealed from the

correspondence resting with various letters exchanged between the parties, could be ascertained. On scrutiny of the relevant correspondence, I find that the hindrances which the claimant had obtained in proceeding with the work could not be removed by the Respondent in time causing delays thereby. It cannot be denied that the Claimant could have completed the work after the hindrances had been removed by the Respondent but the delays occurred in each case attributed to prolongation beyond the agreed period of 24 months which was 74 months in total. In that view of the matter, I have no hesitation to say that the aforesaid prolongation could be avoided in the event Respondent could have taken steps more diligently towards removal of the hindrances on various counts about which narration has been made in brief as will appear from the pregoing.”

59. The aforesaid reasoning of the arbitrator lends sufficient basis to the arbitrator’s conclusion. It has been clearly found that the appellant was a contributory to the delay occasioned in executing the contract and had thus fallen in breach of its contractual obligations by not removing the hindrances that impeded the execution of work. The award therefore cannot be tinkered with insofar as claim no. 2(c) is concerned.

60. Claim no. 2(a) reads thus – “*Increase in cost of works due to rise in prices of labour and materials in respect of all works done in the overrun period of 50 months beyond the stipulated period of 24 months. Rs. 7,76,840.00/-*”. The arbitrator has allowed the same. We find the arbitrator’s conclusion to be justified.

61. We have noted that the arbitrator has relied on its findings and observations made in respect of claim no. 2(c). Indeed, cost overruns would occur if a contract which was supposed to be completed within a given time frame spills over beyond the agreed schedule. The arbitrator has found the appellant to be responsible for the delay and that itself forms the basis for cost overruns. The reasoning adopted by the arbitrator in respect of claim no. 2(c) would therefore be applicable to claim no. 2(a) as well. The arbitrator's observation in such regard may also be noticed.

"It has not escaped my attention that no compensation has been levied upon the Claimant/Contractor despite the respondent was clothed with such jurisdiction in terms of the contract.

I have already decided that the respondent was partly responsible for the prolongation. Therefore, I have no hesitation to arrive at the conclusion that the claimant is entitled to be compensated on account of the increment in price of materials, labour, fuel etc. as shown in the break-up filed by the claimant.

Set of calculations disclosed by the claimant has been checked by me thoroughly and have observed that there are some errors in calculation which have been corrected by me. Price indices as shown in the relevant bulletin of R.B.I. have been verified by me and the same are found to be correct.

It requires mention herein that for adjudication of this claim, my observation as noted under Claim no. 2(c) in particular has also been kept in view. It is made further clear that for arriving at the amount towards increment in prices under this claim, mode of computation

followed by the Claimant has been scrutinized by me thoroughly. Normally, the formula based on which the increased cost has been arrived at the instant case, is being followed practically by all the Engineering Department of the Govt. of India including CPWD, the pioneer engineering department executing major building works throughout the country.

The very fact that existence of escalation clause as is now a days being introduced in most of the contracts with Govt. of India in particular, is made applicable from day one till the date of actual completion provided no compensation had been levied for the period of execution of the job either in full or in part. In the instant case, respondent has admittedly levied no compensation and as such, the claimant/contractor is entitled to be compensated on account of increment in prices of both materials and labour as demanded. As there is no clause allowing such increment in prices in the contract. I do not find any reason to make award in favour of the claimant towards the aforesaid increment in prices in respect of the works executed in the stipulated period of 24 months."

62. As regards claim no. 2(b), i.e. *extra additional off-site expenses during the over-run period* - it is evident that the said claim also arises in respect of the period of over-run. Here, the arbitrator has slashed the payments claimed by the claimant by 50% and allowed the claim only in part by observing that the claimant's head-office and the site of work were situated in the same city and that off-site expenses mainly pertained to head-office expenses. The arbitrator is conscious that there is no clause allowing increment in prices in the contract and as such has declined the claimant's claim for the period

that has been stipulated in the contract for completion of work i.e. 24 months and has granted 50% of the claim only in respect of the extended period. Such reasoning cannot be faulted at all.

63. Insofar as claim no. 2(d) is concerned *i.e. extra additional higher charges and measures for the over-run period*, this again is relatable to the unnecessary prolongation of the contract for which the appellant has been found to be responsible. The arbitrator has quite justifiably relied on the evidence in respect of claim no. 2(c) and scrutinised the claim and then arrived at his conclusion “*based on the actual price of the machinery and the unconsumables*” under distinct heads. The arbitrator’s decision on this count cannot be interfered with.

64. Claim no. 2(e) pertains to “*Extended stay compensation and/or compensation for reduced turnover and/or loss of profit earning capacity being restrained longer in the contract without any corresponding monetary benefit and without being free to move else-where to earn the expected profit. Rs. 16,07,500.00/-.*” The arbitrator’s decision as regards the said claim cannot, in our considered view, be upset under the instant proceeding.

65. While dealing with the said claim, the arbitrator has found that the appellant was responsible for the protraction of the contract. The arbitrator has expressly stated that for deciding the fate of such claim, the arbitrator has relied on the evidence adduced in respect of claim no. 2(c). The arbitrator has clearly stated that he has reached his conclusion upon “*taking into consideration the facts and circumstances of the case, submissions of the parties, documentary evidence disclosed by the parties*”. This observation makes it evident that the arbitrator has considered the

submission and the evidence on record and has then returned the finding. Such a finding cannot be said to be based on no evidence inasmuch as the arbitrator has spoken of documentary evidence.

66. Furthermore, the arbitrator has calculated the expected turnover of the claimant based on the stipulated and the actual dates of completion of the contract and the period by which the contract stood prolonged. The lean period which a contractor may face has also been factored into by the arbitrator to tone down the idling charges claimed by the claimant and then a certain sum has been awarded. We do not find such decision to be perverse in any manner.
67. We are, any way, under absolute restraint from entering the domain of the sufficiency or adequacy of evidence if the award on its face discloses presence of some evidence while assessing the worth of an award under the said Act of 1940. The judgment in the case of **NTPC Limited** (supra) cited on behalf of the respondent is apt on this point. Paragraph 11 thereof may be noted in the present context-

“11. Before proceeding further, it is necessary to make note of the scope of interference by courts in arbitral awards passed under the Arbitration Act, 1940. This Court has consistently held that the Court does not sit in appeal over an award passed by an arbitrator. In Kwalitiy Mfg. Corpn. v. Central Warehousing Corpn. [Kwalitiy Mfg. Corpn. v. Central Warehousing Corpn., (2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] , this Court held as follows : (SCC pp. 146-47, para 10)

‘10. At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under Section 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it reassess or reappraise evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and

the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High Court was, whether there was any error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings.’”

68. Further law on this score is fairly well settled that the Court can set aside the award only if it is apparent from the award itself that there is no evidence to support the conclusion or if the award is based upon any legal proposition which is erroneous. (See **Indian Oil Corporation Ltd. vs. Indian Carbon Ltd.**²⁴). Since the arbitrator has expressly referred to “documentary evidence disclosed by the parties” in the award itself we cannot hold that it is a case of no evidence at all.

69. Claim no. 2(g) reads as follows-

“g) Loss on account of non-execution of profitable items of works worth Rs. 40 lakhs approx. due to reason, attributable to the department (claimed 15% as loss of profit on the value of unexecuted work). Rs. 6,00,000.00/-.”

70. While adjudicating the said claim, the arbitrator has observed that “as the job in question was executed strictly based on the drawings furnished by the Respondent and therefore, the claimant cannot be held responsible for less execution of the work, be it on account of preparation of incorrect estimate by the respondent or for any other reason”. There is sufficient force in the arbitrator’s observations. Indeed, if a job is to be executed based on the drawing furnished by the employer and the contractor has executed the job

²⁴ (1988) 3 SCC 36

in terms of the drawing so furnished, the employer cannot later on turn around and seek to make out a case that the contractor has executed lesser work than required.

71. Insofar as claim no. 4 i.e. refund of security deposit lying with the Respondent is concerned, we find that the arbitrator has mentioned as follows-

“On scrutiny of the counter statement of facts filed by the Respondent, it is observed that reason for non-refund of the said sum of Rs. 20,000/- was making reference of the claims to arbitration by the Claimant/ Contractor. Also, the respondent’s argument that huge amount stands payable towards counter claims against the claimant contractor has also not escaped my attention. It requires mention herein that in the final bill prepared by the respondent, the amount was positive and accordingly the same had been released by the respondent. The very fact that the said final bill does not contain anything about counter claim can also not be denied in this context.”

72. The arbitrator’s reasoning in support of the arbitrator’s conclusion that the claimant is entitled to such claim of refund of security deposit is apt. If in the final bill the respondent did not withhold the billed amount on the ground of there being any counter claim the security deposit furnished by the claimant for the purpose of execution of the contract cannot be withheld.
73. Insofar as the claimant’s claim of interest at the rate of 18% per annum is concerned, here again we have found that the arbitrator has dealt with the matter satisfactorily and there is no reason for us to differ with the arbitrator’s conclusion. In fact, even if we had differed, the same would not

have had any effect on the arbitral award since mere change of opinion would not lead to setting aside of the impugned arbitral award.

74. We are unable to agree with the contention of Mr. Ghosh that since there was no provision in the contract that could entitle the claimant to claim compensation for reduced turnover and/or loss of profit earning capacity for being detained longer in the contract, therefore the arbitrator could not have awarded the same. We have not been shown any clause in the contract wherefrom it would be evident that there was any prohibition on the claimant from claiming such compensation. It is well settled that in cases like the one at hand, an arbitrator indeed has the jurisdiction to determine as to who was responsible for delay in the execution of the contract. In such cases the arbitrator will, therefore, also have jurisdiction to hold the party responsible for delay liable for the consequence thereof. (See **Assam State Electricity Board & Ors. vs. Buildworth Private Ltd.**²⁵)
75. While examining the validity of an arbitral award under the said Act of 1940, the three Judges' Bench judgement of the Hon'ble Supreme Court in the case of **Santa Sila Devi & Anr.** (supra) relied on by the respondent would serve as a beacon light. In the said case the Hon'ble Supreme Court has set down the basic requirements for a Court dealing with an arbitral award under the said Act of 1940, one of which is that *a Court should approach the award with a desire to support it, if that is reasonably possible rather than to destroy it.* Acting in tune with the said guiding principle, we do not find any reason to destroy the impugned award which can be reasonably supported.

²⁵ (2017) 8 SCC 146

76. As regards the appellant's contentions that the arbitrator has not dealt with its counter claim at all, we find that the same is not correct. The appellant's counter claim that has been dealt with at pages 24 to 25 of the award and has been declined by observing as follows-

"As regards Counter Claims, I have kept in view the submission of the parties and have weighed the argument advanced by the parties and have fully appreciated the facts as is revealed from the pleadings of the parties.

The very fact that the amount, which according to the Respondent, was payable have been released through the final bill prepared by them and that too without any reservation for claiming any sum from the claimant, has not escaped my attention. It is on record that the Respondent did not even whisper about making any claim from their end prior to preferring claims by the claimant.

Apart from what have been stated hereinabove, I have thoroughly scrutinized the counter claims together with break-up of the same and calculations as set out by the respondent in the Counter Statement of Facts filed and verified by Sri D.K. Chakraborty, Executive Engineer-II, Alipore Division-I, PWD of the Respondent.

However, considering all the pleadings of the parties as submitted, argument advanced by the parties with regard to the said counter claims and viewed in the context of totality of the circumstances. I find no reason to allow any of the counter claims in favour of the respondent. Award in respect of each of counter claims serialled as (a) to (e) under para-18 of the Counter Statement of Facts is nil."

77. Mr. Ghosh's argument on this score, therefore, cannot be countenanced. Here again in view of the various decisions of the Hon'ble Supreme Court already cited hereinabove, the arbitrator's decision to annul the appellant's counter claim cannot be interfered with on the same grounds wherefor the

arbitrator's decision to allow the claims that the arbitrator did has been upheld. Once the arbitrator has found that the appellant was responsible for the delay in the undue prolongation of the contract and that the Final Bill of the respondent had been released without any reservation there can be no reason to award counter claim. It has neither been argued nor demonstrated before us that the arbitrator has not taken into consideration any material that could have led the arbitrator to form a different opinion on the appellant's counter claim.

78. Mr. Ghosh had argued that the arbitrator had of his own used a formula for the purpose of calculation of the claims without the consent of parties which is not permissible.
79. Such contention of Mr. Ghosh fails to impress us in view of the distinctive pronouncement of the Hon'ble Supreme Court in the case of **McDermott International Inc.** (supra). Paragraphs 109 and 110 thereof, relied on by Ms. Banerjee clearly answer Mr. Ghosh's contention. The same are extracted herein below.

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

110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however,

see no reason to interfere with that part of the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.”

(Emphasis supplied by us by underlining)

80. Since we have found the award to be sustainable, we are not repeating the authorities cited by the respondent in support of the award however, the judgments cited by Mr. Ghosh in order to destroy the award are being dealt with hereunder.
81. In ***State of Rajasthan & Anr.*** (supra), the Hon’ble Supreme Court had held that if in a reasoned award the claim of a contractor is equated to proof of the claim it would be a case of legal misconduct. Such is not the case here. In the instant case the arbitrator has given cogent reasons and scrutinised the claims of the claimant. He has relied on the documentary evidence produced by the parties. The award reveals so on its face.
82. As regards the judgement in the case of ***Ssangyong Engineering & Construction Co. Ltd.*** (supra), it would suffice to say that the same was rendered in the context of the Arbitration and Conciliation Act, 1996 where grounds for setting aside the arbitral award are absolutely different from the grounds under the said Act of 1940. Indeed the ground of perversity would be available under both the Acts but for the award to be perverse it would have to be demonstrated that the same was based on no evidence. The appellant has failed to demonstrate that the award is based on no evidence. When the award refers to documents on record it was the duty of the appellant to demonstrate that there were no documents on record. The appellant has not run such a case.

83. Insofar as the case of **Associate Builders** (supra) is concerned the same is again a precedent for dealing with a perverse arbitral award. Since we have found that the arbitral award is based on evidence and the reasons assigned by the arbitrator justify the conclusion, therefore, the said judgment cannot be applied to the facts of the present case.
84. A judgment in the case of **Dyna Technologies Private limited** (supra) was cited by the Appellant to contend that the arbitrator's reasoning should be proper, intelligible and adequate. The said judgment does not aid the appellant in the case at hand inasmuch as the arbitrator's reasoning fulfils all the three requirements abundantly. **McDermott International Inc.** (supra) emphasises on the aspect that an award rendered under the earlier regime of the said Act of 1940 should be upheld despite being unreasoned and it has dealt with the difference in treatment of awards under the regime of the said Act of 1940 and under the regime of the Arbitration and Conciliation Act, 1996. The said judgment again would not help the appellant inasmuch as we have found that the arbitrator's award contains cogent reasons in support of the conclusions reached.
85. The judgment in the case of **Bharat Coking Coal Ltd.** (supra), at paragraph 11 thereof clearly notes that an award can be set aside only in cases where the arbitrator has exceeded the terms of the agreement or has passed the award *in the absence of any evidence, which is apparent on the face of the award*. Evidently, the situation here is different where the arbitrator has referred to "*documentary evidence disclosed by the parties*".
86. The judgment in the case of **Unibros** (supra) is an authority for the proposition that a claim for loss of profit arising from a delayed contract or

missed opportunities from other available contracts would only be entertained if the claimant has been able to show that the claimant had potential projects in the pipeline that the claimant could have undertaken if delays had not occurred and that the claimant has suffered loss of profitability. Here we have found that the arbitrator has considered the “*documentary evidence*” and then arrived at the finding. It is true that the “*documentary evidence*” referred to in the award has not been specified but keeping in mind the narrow scope of interference with an award under the provisions of the said Act of 1940, we cannot enter the domain of reappreciation of evidence. The arbitrator has concluded that there is documentary evidence. There is no room for disbelieving him. Above all we cannot lose sight of the fact that the judgment in the case of **Unibros** (supra) has been rendered in the context of the Arbitration and Conciliation Act, 1996 where reasons (which would include specification of evidence considered) are mandatory for an award to be held valid. The case at hand is one under the said Act of 1940 where mere conclusion would have sufficed.

87. As regards the judgment in the case of **Bharat Vanijya Private Ltd.** (supra) cited by the appellant, the same again is an authority for assessing the worth of reasons. The same does not help the appellant inasmuch as we have found that the award is sufficiently reasoned. The judgment in the case of **State of Madhya Pradesh** (supra) is again on a similar point and as such the same does not serve the case of the appellant.

88. In fine, we agree with the conclusion arrived at by the learned Single Judge and find no reason to interfere with the impugned order dated August 16, 2024 passed in AP 654 of 2011. The appeal stands dismissed. No costs.

89. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Arijit Banerjee, J.)

(Om Narayan Rai, J.)

Later

90. After delivery of judgment, learned Advocate for the State prays for stay of operation of the judgment and order. The prayer is considered and refused.

(Arijit Banerjee, J.)

(Om Narayan Rai, J.)