Essar Procurement Services Ltd. Vs. Paramount Constructions

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SooperKanoon Citation : sooperkanoon.com/1183752

Court : Mumbai

Decided On : Nov-25-2016

Judge : R.D. Dhanuka

Appeal No. : Arbitration Petition No. 470 of 2012

Appellant : Essar Procurement Services Ltd.

Respondent : Paramount Constructions

Judgement :

1. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the said Act), the petitioner has impugned the arbitral award dated 9th August 2011 made by the arbitral tribunal allowing few claims made by the respondent and directing the petitioner to pay a total sum of Rs.16,55,733/- with interest @15% p.a. from the date of award till the date of payment to the respondent. Some of the relevant facts for the purpose of deciding this arbitration petition are under:-

2. On 30th April 1998, the petitioner invited tender for erection, testing and commissioning of chemical soar water treatment facility for Issar Oil Limited at Vadinar. The respondent submitted their bid pursuant to the said offer issued by the petitioner on 11th May 1998. The petitioner accepted the final offer made by the respondent and issued a letter of intent on 29th May 1998. The parties, thereafter, entered into a Contract on 29th May 1998 for erection, testing and

commissioning of chemical soar water treating facility for a total sum of Rs.35 lacs. The respondent was required to commence the said work from 29th May 1998 and was required to achieve mechanical completion as well as commissioning on or before 28th February 1999.

3. The respondent deposited the security deposit amount @ 5% p.a. of the contract amount in the form of a bank guarantee dated 2nd June 1998 as per the terms of the contract with the petitioner. It was the case of the respondent that the petitioner, however, did not provide the work front within the contractual period though the respondent had finalized with different agencies or contractors for mechanical, electrical and instrument works as per the requirement of the subject work to achieve the mechanical completion within the contractual time period of 9 months. It was the case of the respondent that due to financial problem faced by the petitioner, work was required to be suspended.

4. By the letters dated 26th March 1999 and 3rd April 1999, the petitioner intimated through their official communication that they were facing financial crunch and admitted the request of the respondent for time extension in order to facilitate the execution of the said work. The petitioner informed the respondent during the month of March/April, 1999 that the project of Essar Oil Refinery had been put under suspension and advised the respondent that they should not proceed with further work and all the activities related to the subject project be suspended.

5. It was the case of the respondent that the respondent had no other option than to suspend all activities and the respondent had been following up with the petitioner from time to time for recommencement of the balance project activities and had informed that the delay in recommencement of the work was adding to their expenses besides huge amount remaining due from the petitioner. It was the case of the respondent that since there was no response or indication about recommencement of the activities from the petitioner, the respondent vide their letter dated 5th August 2002 informed the petitioner that the said contract could not be kept alive for an indefinite period and that the respondent was incurring heavy losses.

6. The petitioner, thereafter, proposed a meeting through a letter dated 14th August 2002 and had held a meeting on 12th September 2002 in the premises of the respondent. In the said meeting, the respondent raised various points. It is the case of the respondent that the petitioner agreed in principle for revision but later on refused to revise the contract through their letter dated 10th October 2002. The respondent reiterated their contentions and made a demand vide their letter dated 28th October 2002 and called upon the petitioner for settlement of outstanding dues before recommencement of balance work. In the said letter, the respondent also demanded the compensation for the losses alleged to have been suffered by the respondent due to suspension of work and also the payment for the work done as per the market price.

7. It is the case of the respondent that the petitioner called the respondent for a meeting at their corporate office at Mumbai on 5th March 2003 and discussed the subject of recommencement of work. The petitioner informed the respondent that financial institution had agreed to finance the project of the petitioner and desired that the respondent remobilize the resources. The petitioner also suggested the respondent to submit details of variations of present rates of all major components prevailing at that time when the work had commenced. It is the case of the respondent that the respondent accordingly collected the details as desired by the petitioner and furnished the same to the petitioner vide their letter dated 9th July 2004 for consideration of the petitioner. According to the respondent, the petitioner had called upon the respondent for discussion on 8th March 2005 at Essar Refinery site at Jamnagar.

8. In the said meeting, the petitioner agreed to reimburse the differential amount due to variation of prices or to issue the materials at a price prevailing in the year 1997-1998. The respondent agreed to complete the balance portion of the project work in 8 to 9 months.

9. It is the case of the respondent that since the petitioner, however, did not communicate their action though agreed in the meeting held on 8th March 2005, even after 4 months from the date of the said meeting, the respondent vide their letter dated 7th July 2005 once again requested the petitioner to settle the

outstanding issues. The petitioner, however, vide their letter dated 18th July 2005 proposed the short closure to short closer of the subject purchase order and made various false allegations against the respondent.

10. On 3rd June 1998, the respondent vide their letter forwarded a bank guarantee for performance security dated 2nd June 1998 in the sum of Rs.1,75,000/- along with a bank guarantee for advance dated 2nd June 1998 in the sum of Rs.1,75,000/- and invoice dated 2nd June 1998 for Rs.1,75,000/- and requested the petitioner to release payments at the earliest to the engineer in charge. By another letter dated 30th June 1998, the respondent requested the petitioner to make payment in respect of the invoice dated 2nd June 1998 for the sum of Rs.1,75,000/- as and by way of mobilisation advance against bank guarantee. The respondent sent reminder to the petitioner to make payment vide their letter dated 14th July 1998.

11. The petitioner vide their letter dated 17th October 1998 forwarded a cheque dated 30th October 1998 for the sum of Rs.18,69,225/- to M/s.Paramount Pollution Control Limited. It is the case of the petitioner that the said cheque was issued with a clear understanding that the same would be presented to the bankers only after confirmation in writing by the petitioner about availability of funds in the bank account of the petitioner. The respondent vide their letter dated 17th November 1998 requested M/s.Essar Oil Limited to make payment in respect of three other contracts.

12. The petitioner vide their letter dated 25th January 1999 requested the respondent that the payment of Rs.18,69,225/- could not be made since funds as expected earlier could not be materialised and informed the respondent that the petitioner was expecting receipt of fund shortly.

13. The respondent vide their letter dated 26th March 1999 requested the petitioner for extension of time. The petitioner agreed to provide suitable extension of time for completion of work without prejudice to the other terms and conditions of the contract.

14. The petitioner vide their letter dated 3rd April 1999 reassured the respondent that the financial position of the petitioner was strong and clarified that the articles appearing in different sections in the media regarding the Essar Group were false and misleading. The petitioner informed the respondent that due to reasons beyond their control, there was delay in effective payment to its contractors and suppliers. The petitioner assured the respondent that this was a temporary phase. The petitioner expected the financial institutions/banks to sanction and disburse loans to the petitioner at the earliest. The petitioner assured the respondent that the Group will standby all commitments made by it.

15. On 31st May 1999, the respondent informed the petitioner that pursuant to the financial crises faced by the petitioner, the project work including the work in question stood temporarily suspended. The respondent requested the petitioner not to insist extension of bank guarantees since dues of the respondent were not paid by the petitioner. The respondent also requested the petitioner to return the bank guarantee which had already expired. The respondent assured the petitioner that it shall resubmit the bank guarantees on commencement of the balance work.

16. The respondent vide letter dated 22nd January 2001 claimed the increased rates from the petitioner and assured that the respondent would commence the work as soon as its alleged dues were released by the petitioner and the points raised by them in the letter were agreed upon by the petitioner. The respondent demanded a sum of Rs.2,589.04 as and by way of interest on the delayed payment made by the petitioner beyond 21 days.

17. The respondent vide their letter dated 5th August 2002 to the petitioner alleged that the petitioner had suspended the work indefinitely in April 1999. The respondent also alleged various breaches on the part of the petitioner in the said letter and made it clear that it will resume the work only if the petitioner would inform the respondent about the exact date of recommencing the work within 15 days of the receipt of the letter by the petitioner and would agree with the mutually arrived terms in respect of the price appreciation etc.

18. The respondent vide their letter dated 7th July 2005 alleged that delay in progress of the work was caused by the petitioner. The respondent made various

allegations against the petitioner in the said letter and called upon the petitioner to clarify various issues within 15 days of the receipt of the said letter. The petitioner replied to the said letter vide their letter dated 18th July 2005 and denied the allegations made by the respondent.

19. The respondent vide their letter dated 28th October 2005 reiterated the allegations made in the earlier correspondence and called upon the petitioner to fix a date to enable the parties to meet for working out amicable mutual settlement of final accounts including the revision of rates. The petitioner responded to the said letter vide their letter dated 25th November 2005. The respondent vide their letter dated 13th January 2006 once again repeated and reiterated their contention and agreed to discuss the matter for amicable settlement.

20. The respondent vide their letter dated 22nd March 2006 called upon the petitioner to pay various amounts under different heads. The petitioner vide their letter dated 21st April 2006 denied the allegations made therein and requested the respondent to depute their representative for completion of formalities of short closure and work out an amicable mutual settlement of final accounts. The respondent vide their letter dated 29th April 2006 requested the petitioner to intimate the date on which its representative could visit the office of the petitioner for discussions.

21. The dispute was thereafter, referred to arbitration. The respondent made five claims before the arbitral tribunal. The claims made by the respondent were resisted by the petitioner by filing written statement. The petitioner also raised issue of limitation in respect of the claims made by the respondent. The arbitral tribunal framed various issues for determination including the issue of limitation. In the meeting held on 12th July 2010, the counsel appearing for both the parties made a statement that their respective clients did not wish to lead any oral evidence.

22. Two of the three arbitrators by their arbitral award dated 9th August 2011 directed the petitioner herein to pay a total sum of Rs.16,55,733/- to the respondent with interest @ 15% p.a. from the date of the award i.e. 9th August 2011 till the date of payment and further directed to pay interest @15% p.a. on the

awarded amount of Rs.8,88,782/- i.e. awarded amount on claim nos.3 and 5 till its payment. The third arbitrator rejected the claim for damages made by the respondent on the ground of wrongful termination. The petitioner has impugned the said majority award allowing the claim no.1 i.e. On account of delay in payment towards advances/bank guarantees/security deposit, the award allowing the part of the claim no.3(A) i.e. On account of Overhead in the sum of Rs.4,56,282/- and the part of the claim no.3(B) i.e. On account of Loss of Profit in the sum of Rs.3,32,500/-. The arbitral tribunal allowed the claim for interest in the sum of Rs.7,88,782/- and Rs.1,00,000/- towards arbitration costs.

23. Mr. Andhyarujina, learned counsel for the petitioner invited my attention to the findings recorded by the arbitral tribunal on claim no.1 i.e. On account of Delay in payment towards Advances/bank Guarantee/Security Deposit. He submits that there was no delay in making the payment towards Invoice No.PC 104-01 dated 31st August 1998 by the petitioner. He submits that advance payment against the said advance invoice submitted by the respondent was already paid by the petitioner by a cheque dated 18th July 1998 which payment was accepted and appropriated by the respondent towards principal debts without demur and without protest as far back as on 23rd July 1998. He submits that the respondent could not have made such claim for interest alone beyond the period of three years from the date of such payment of the principal amount by the petitioner. He submits that default, if any, committed by the petitioner in making payment of the said advance was committed on 23rd July 1998. He submits that the claim for interest on delayed payment became time barred on or about 22nd July 2001. It is submitted that admittedly the respondent had invoked the arbitration agreement vide notice dated 22nd March 2006 which was beyond the period of three years from the date of alleged cause of action. He submits that certificate was issued by the Consultant on 29th June 1998.

24. Reliance is placed on Article 7 of the contract which provides for 'Payment Terms'. It is submitted that under the said provision, the petitioner agreed to pay the advance within 15 days of submission of invoice, bank guarantee against advance and the contract performance security bank guarantee to the respondent @5% p.a. and the interest advance @5% p.a. on mobilization of resources at site

to the satisfaction of Engineer-in-charge within 21 days from the date of certification by the Engineer-in-charge against submission of bank guarantee for equivalent amount. The balance payment of 85% was required to be made by the petitioner against monthly R.A. Bills on pro-rata basis as per mutually agreed Billing schedule and on successful commissioning and performance testing of the plant duly certified by the Engineer-in-charge. Learned counsel also placed reliance on Article 25 and alternatively on Article 113 of the Schedule to the Limitation Act, 1963 and submits that limitation starts when the notice invoking arbitration agreement dated 22nd March 2006 was received by the petitioner.

25. Learned counsel invited my attention to the finding recorded by the arbitral tribunal on the issue of limitation in paragraph 4.03.4 of the impugned award holding that the contract awarded by the petitioner to the respondent was an indivisible contract and the interest on delayed advance payment was a part of payment terms and was not a distinct and separate breach and therefore, the limitation period did not start on due date of advance payment. The arbitral tribunal held that Article 55 of the Limitation Act was applicable in respect of the said claim for interest. He submits that the finding of the arbitral tribunal that the period of limitation had commenced from 22nd August 2005 when the contract was short closed is totally perverse and contrary to the provisions of the Limitation Act, 1963.

26. It is submitted that even if there was any delay in giving advance of any amount to the respondent by the petitioner, the delay had occurred prior to 27th July 1998. He submits that once the limitation had commenced, limitation did not stop. Neither any part payment was made by the petitioner nor the petitioner had acknowledged any liability to the respondent. In support of this submission, learned counsel for the petitioner placed reliance on the judgment of this Court in the case of **CMC Limited Vs. Unit Trust of India,** reported in **2016(2) ALL M.R. 589.**

27. In so far as the claim for damages awarded by the arbitral tribunal is concerned, learned counsel for the petitioner invited my attention to various findings recorded by the arbitral tribunal on Issue Nos.3 and 6 and would submit that the arbitral tribunal could not have rendered a finding that the petitioner had

suspended the contract and had committed various breaches. He submits that though the petitioner had disputed the contents of the correspondence addressed by the respondent to the petitioner alleging various breaches, no oral evidence is led by the respondent to prove the contents of such letters. The arbitral tribunal rendered various findings based on such disputed contents of the letters addressed by the respondent. He submits that the impugned award is thus in violation of the principles of natural justice, in view of the learned arbitrator having relied upon disputed documents.

28. It is submitted that the arbitral tribunal could not have rendered a finding that the contract was suspended for a period of 6 years though the contract period was valid only for a period of 9 months. He submits that the petitioner had not addressed any letter suspending the contract. It is submitted that the contract awarded to the respondent was a lump sum and fixed price contract and thus the respondent could not have raised any demand for escalation or other compensation contrary to the provisions of the contract. The respondent was bound to carry out the work at the contractual rate and could not have raised any demand for escalation or compensation. He submits that various findings recorded by the arbitral tribunal are inconsistent.

29. It is submitted that interpretation of the arbitral tribunal on the terms and conditions of the contract is untenable and is not a plausible interpretation. In support of the submission that the petitioner had not suspended the contract, learned counsel for the petitioner invited my attention to some of the correspondence annexed to the statement of claim and would submit that the respondent could not prove before the arbitral tribunal that the work was suspended by the petitioner on the ground that the financial condition of the petitioner was bad and could not be improved during the alleged suspension period.

30. Learned counsel for the petitioner placed reliance on Article 22 of the contract under which the petitioner was given right to suspend the contract. He submits that even if the contract was suspended at the instance of the petitioner under Article 22 of the contract by issuing instructions to the respondent, the respondent could

have made a claim for compensation, if any, only under the said article and not otherwise. He also placed reliance on Article 22.3 of the General Terms and Conditions for Construction Contracts and would submit that under the said provision, the petitioner was not liable for any damages or any losses or anticipated profits or losses or damages whatsoever on the part of contractor by reason of any suspension of the work subject to the Sub-Article 22.2 which provided for limited compensation mentioned therein.

31. Learned counsel placed reliance on Article 21 of the General Terms and Conditions for Construction Contracts and would submit that under the said provision, the petitioner was given an unfettered right to terminate the contract in addition to the right available to the petitioner under Article 20. He submits that since the respondent was not ready and willing to perform their part of the obligation under the contract and was demanding higher rates than what was contemplated under the contract for the work required to be done, the respondent had committed repudiatory breaches. He submits that the petitioner was justified in terminating the contract. He submits that the arbitral tribunal has thus committed a jurisdictional error by allowing the claim of loss of profit in the teeth of a bar under Article 22.3 of the General Terms and Conditions for Construction Contracts by reason of any suspension of the work.

32. Learned counsel for the petitioner invited my attention to various paragraphs of the statement of claim showing the nature of the claim made by the respondent towards loss of profit and also the defence raised by the petitioner in the written statement filed before the arbitral tribunal. He submits that though the onus was on the respondent to prove that the respondent had suffered any loss of profit due to the alleged breaches committed by the petitioner and though the respondent has not led any evidence to prove the claim of loss of profit, the arbitral tribunal had allowed the claim for loss of profit without any evidence by simplicitor applying the Hudson formula. In support of this submission, learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of **McDermott International INC. Vs. Burn Standard Co. Ltd. and Ors.,** reported in **(2006) 11 SCC 181** and in particular paragraphs 102 to 110 thereof. He also placed reliance on an unreported judgment of the Division Bench of this Court delivered on 3rd

January 2013 in Appeal No.11 of 2012 in the case of **Edifice Developers and Project Engineers Ltd. Vs. M/s.Essar Projects (India) Ltd.** and more particularly paragraphs 4 to 11 thereof.

33. Learned counsel for the petitioner also placed reliance on the relevant passage from treaties of Keating on Building Contracts of Sixth Edition in support of the submission that a Hudson formula could be applied only if the evidence was led and could not be applicable if better evidence of actual loss was available.

34. Learned counsel placed reliance on the judgment of the Supreme Court in the case of **Rajasthan State Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises and Anr.,** reported in **(1999) 9 SCC 283** and in particular paragraphs 44(g) and 44(h) in support of the submission that the prohibited claims are not arbitrable.

35. Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of **Kailash Nath Associates Vs. Delhi Development Authority and Anr.,** reported in **(2015) 4 SCC 136** and more particularly paragraph 68 thereof. Reliance is also placed on an unreported judgment of this Court delivered on 16th April 2015 in the case of **Ajay Singh (Sunny Deol) Vs.Suneel Darshan** in Arbitration Petition No.819 of 2011 and other connected matter and in particular paragraphs 86 to 91 in support of the submission that if the damages are not proved, no claim for damages can be awarded by the arbitral tribunal.

36. Learned counsel for the petitioner reliance on the judgment of the Supreme Court in the case of **Gopal Kishnaji Ketkar Vs. Mohamed Haji Latif and Ors.,** reported in **AIR 1968 SC 1413** in support of the submission that the onus was on the respondent to prove that the petitioner had committed a breach of the contract. He placed reliance on the judgment of the Privy Council in the case of **Florrie Edridge and Ors. Vs. Rustomji Danjibhoy Sethna,** reported in **(1933) Vol.XXXVIII The Law Weekly 972** in support of the submission that the respondent had committed a repudiatory breach of the contract and thus the petitioner was justified in terminating the contract.

37. Learned counsel for the petitioner placed reliance on the judgment of this Court in the case of **Sahyadri Earthmovers Vs. L and T Finance Ltd. and Anr.,** reported in **2011 (4) Mh.L.J. 200** and in particular paragraph 6 thereof in support of the submission that the arbitral tribunal was bound to follow the principles of natural justice, fair play and to provide equal opportunity to both the parties. It is submitted that though the learned arbitrator was not bound by the Code of Civil Procedure and Indian Evidence Act, the arbitral tribunal was bound by the principles thereof even in the arbitral proceedings.

38. Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of **State of Goa Vs. Praveen Enterprises,** reported in **(2012) 12 SCC 581** and more particularly paragraphs 26 to 32 in support of the submission that the arbitral tribunal could not have rejected the counter claim on the ground that there was no notice invoking arbitration agreement in respect of the counter claim.

39. Learned counsel for the petitioner made a similar submission also in respect of the claim for overheads awarded by the arbitral tribunal in favour of the respondent which was advanced by the learned counsel in respect of the claim for loss of profit. He submits that various findings recorded by the arbitral tribunal on the issue of claim of loss of overheads is also totally perverse and based on no evidence. He submits that the Division Bench of this Court on interpretation of the judgment of the Supreme Court in the case of **McDermott International INC. (supra)** has held that Hudson formula could not have been applied simplicitor and if no oral evidence is led by the parties, no claim for loss of profit or overheads is made before the arbitral tribunal.

40. In so far as the claim no.1 i.e. On account of delay in payment towards advances/bank guarantees/security deposit is concerned, Mr.Cooper, learned senior counsel for the respondent submits that under the provisions of the contract awarded to the respondent by the petitioner, all payments including advances required to be made by the petitioner to the respondent were ad-hoc payments and not final payments. All such ad-hoc payments were to be adjusted against overall payments required to be made by the petitioner to the respondent. In

support of this submission, learned counsel invited my attention to Article 7 of the contract and would submit that 5% advance on issue of Letter of Intent and 5% advance on mobilization of resources were payable by the petitioner to the respondent within the time prescribed therein. The said 10% advance was out of consideration of 100% contractual amount.

41. It is submitted that 85% payment was required to be made by the petitioner to the respondent against monthly R.A. bills on pro-rata basis as per mutually agreed Billing schedule and balance 5% payment was required to be made on successful commissioning and performance testing of the plant. He submits that the respondent had given bank guarantee in respect of both the advances to the petitioner but the petitioner gave only one advance to the respondent and subsequently returned the bank guarantee without encashment thereof. It is submitted by the learned senior counsel that the petitioner admittedly did not urge issue of limitation in respect of the other claims.

42. Learned senior counsel for the respondent invited my attention to clauses 44.1.3 and 44.6 of the General Terms and Conditions for Construction Contracts which provides for payment of running account bill and final bill. He submits that under the said provisions, the running account payment required to be made by the petitioner to the respondent was to be treated as advance which was subject to the final bill. He submits that though the petitioner had made payment of advance to the respondent against submission of the bank guarantee, there was a delay in making payment of the said advance amount. He submits that the respondent did not make claim for payment of interest on delayed payment of advances beyond the date of such payment made by the petitioner.

43. It is submitted that in view of the provisions under clauses 44.1.3, 44.6.1 and 44.6.6 of the General Terms and Conditions for Construction Contracts, the cause of action for invoking arbitration agreement did not commence till the final bill would have been submitted by the respondent on the basis of the final measurement to be entered into the measurement book. He submits that all monies payable under the contract could have become due and payable to the petitioner only after submission of the final bill by the respondent duly certified by

the Engineer-in-charge prepared in accordance with the provision of clause 44.6.1. He submits that the arbitral tribunal has rightly rendered a finding that the contract entered into between the parties was an indivisible contract and the interest on delayed advance payment was a part of payment terms and was not a distinct and separate breach and thus, the limitation period did not start on due date of advance payment.

44. Learned senior counsel for the respondent submits that the judgments relied upon by the learned counsel for the petitioner do not apply to the facts of this case and are clearly distinguishable. He submits that in this case, the arbitral tribunal has interpreted the terms of the contract and has rendered finding of fact that the contract was an indivisible contract and thus, the limitation could not have commenced from the date when the payment of advance was made by the petitioner to the respondent which interpretation being a possible interpretation cannot be substituted by this Court by another interpretation.

45. In so far as the findings recorded by the arbitral tribunal on the issue of suspension and termination of the contract by the petitioner is concerned, it is submitted that the arbitral tribunal has considered all the documents produced by both the parties and based on documentary evidence, the arbitral tribunal has rendered various findings of facts which cannot be interfered with by this Court in this petition. He submits that it was an undisputed position that the petitioner had no finance available during the entire contractual period and had addressed various letters admitting these facts which were forming part of the record before the arbitral tribunal. He submits that since the petitioner was not making any payment to the respondent and was only giving false assurances, the work was required to be suspended by the respondent on instructions of the petitioner. He submits that the petitioner had never denied that the petitioner had not issued the instructions to suspend the work.

46. In so far as the claim for damages awarded by the arbitral tribunal is concerned, it is submitted by the learned senior counsel that it is within the domain of the arbitral tribunal to apply any of the formulas such as the Hudson Formula, Emden Formula and Eichelay Formula which were considered by the Supreme

Court in the case of **McDermott International INC. (supra)**. He submits that the respondent had led documentary evidence before the arbitral tribunal showing the losses suffered by the respondent during the period of suspension of the work. He submits that the respondent had in addition to that, claimed loss of profit and overheads based on Hudson formula which is universally accepted by the Courts in India.

47. It is submitted that the arbitral tribunal had rendered a finding that the respondent had suffered damages due to breaches committed by the petitioner. He submits that the arbitral tribunal is not required to give any reason as to why the arbitral tribunal applied the Hudson formula while allowing the claim for loss of profit or overheads. He submits that though the claim made by the respondent was according to the Hudson formula, the arbitral tribunal while allowing the claim for loss of profit and overheads has not allowed the entire claim made by the respondent. He submits that this Court in such circumstances has to take a reasonable view. It is submitted that the arbitral tribunal has applied one of the formulas and this Court cannot interfere with such decision on the part of the arbitral tribunal to apply one of the formulas available which is universally accepted.

48. Learned senior counsel for the respondent distinguishes the judgment of the Division Bench of this Court in the case of **Edifice Developers and Project Engineers Ltd.(supra)** on the ground that the facts before the Division Bench were different than the facts of this case. He also placed reliance on certain paragraphs of the judgment of the Supreme Court in the case of **McDermott International INC. (supra)** in support of the submission that once the arbitral tribunal has applied the Hudson formula or one of such formulas while allowing the claim for overheads or loss of profit, this Court cannot interfere with such part of the award while allowing the claim for overheads or loss of profit under Section 34 of the Arbitration Act.

49. It is submitted that this is not the case where the respondent had not led any evidence at all. He submits that the respondent had led documentary evidence and at the same time applied for those claims based on Hudson formula. He

submits that the finding of fact rendered by the arbitral tribunal that the respondent had suffered damages cannot be challenged by the petitioner in this petition.

50. Learned senior counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of **Associate Builders Vs. Delhi Development Authority,** reported in **(2015) 3 SCC 49** and more particularly paragraphs 48 to 56 and would submit that the Supreme Court in the said judgment, after adverting to its earlier judgment in the case of **McDermott International Inc. Vs. Burn Standard Co. Ltd.,** reported in **(2006) 11 SCC 181**, has reiterated the position of law that this Court cannot interfere with the decision taken by the arbitral tribunal in applying the Hudson formula in a construction contract while allowing the claim made for loss of profit or overheads. He submits that the judgment of the Division Bench of this Court in the case of **Edifice Developers and Project Engineers Ltd.(supra)** is per incurium in view of the later judgment of the Supreme Court in the case of **Associate Builders (supra).** He submits that later judgment of the Supreme Court in the case of **Associate Builders (supra)** squarely applies to the facts of this case and is binding on this Court.

51. It is submitted by the learned senior counsel that since the petitioner had issued instructions to suspend the work and during that period, the respondent continued to deploy the resources, the respondent was entitled to demand compensation and for revision of rate. The petitioner never demanded the liquidated damages from the respondent during the period of suspension of work. On the contrary, the petitioner thanked the respondent for giving support to the petitioner by the respondent.

52. Learned senior counsel for the respondent submits that all the three arbitrators had vast experience in the field of construction work. Mr.Pandya was a technical person. It is submitted that this Court cannot interfere with the findings of facts rendered by the arbitral tribunal having vast experienced in the subject matter of the dispute. He submits that the arbitral tribunal is also empowered to consider the formula and trade practice. In support of this submission, learned senior counsel placed reliance on Section 28 of the Arbitration Act.

53. Learned senior counsel for the respondent placed reliance on the judgment of the Supreme court in the case of **Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission,** reported in **2003 930 R.A.J. 484 (SC)** and in particular paragraphs 25 and 27 in support of the submission that construction/interpretation of contract was within the exclusive jurisdiction of the arbitral tribunal having regard to the wide nature, scope and ambit of the arbitration agreement and thus this Court cannot interfere with the jurisdiction of the arbitral tribunal as having been properly exercised.

54. In so far as the submission of the learned counsel for the petitioner that the arbitral tribunal awarded the claim for loss of profit and overheads in the teeth of clauses prohibiting such claim is concerned, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of **M/s.Associated Construction Vs. Pawanhans Helicopters Pvt. Ltd.,** reported in **AIR 2008 SC 2911** and more particularly paragraphs 6, 7 and 34 thereof, in the case of **G.Ramchandra Reddy and Company Vs. Union of Indian and Anr.,** reported in **(2009) 6 SCC 414** and in particular paragraphs 35 and 36 thereof and on the judgment of the Division Bench of this Court in the case of **Oil and Natural Gas Corporation Ltd. Vs. Comex Services SA,** reported in **(2003) 5 Bom CR 146** and in particular paragraphs 4, 6 and 8 in support of the submission that no bar applies in respect of the claim for loss of profit which is claimed for direct damage or consequential losses.

55. Learned senior counsel for the respondent distinguishes the unreported judgment of this Court delivered on 14th January 2016 in the case of **M/s.Oil and Natural Gas Corporation Ltd. Vs. Essar Oil Limited** in Arbitration Petition No.267 of 2011 and other connected matter on the ground that the facts in this case are totally different.

56. In so far as the counter claim made by the petitioner is concerned, it is submitted by the learned senior counsel that the arbitral tribunal has rightly rejected the counter claim made by the petitioner. There was no demand for refund of the advance made by the petitioner to the respondent. He submits that various findings of facts recorded by the arbitral tribunal cannot be interfered with

by this Court in this petition.

57. Mr.Andhyarujina, learned counsel for the petitioner in rejoinder submits that Article 25 of the Schedule to the Limitation Act, 1963 was applicable and not Article 55. He submits that claim for interest would not fall under Article 55. The award shows non-application of mind on the part of the arbitral tribunal. He submits that cause of action arises when the amount is due for the first time. Learned counsel for the petitioner placed reliance on the judgment of the Calcutta High Court in the case of **M.L. Dalmiya and Co. Vs. Union of India**, reported in **AIR 1963 Cal 277** and in particular paragraph 14 thereof.

58. In so far as the judgment of the Supreme Court in the case **Associate Builders (supra)** relied upon by the learned senior counsel for the respondent is concerned, learned counsel for the petitioner placed reliance on paragraphs 51, 52 and 54 thereof and would submit that this Court has to interpret the judgment of the Supreme Court in the case of **Associate Builders (supra)** harmoniously. He submits that Division Bench of this Court in the case of **Edifice Developers and Project Engineers Ltd. (supra)** did not set aside the award only on the ground that the learned arbitrator did not consider the other evidence. He submits that there was no finding recorded by the arbitral tribunal that loss was suffered by the respondent, but still awarded the claim for loss of profit and overheads.

59. Learned counsel for the petitioner placed reliance on paragraphs 86 to 91 of the judgment of this Court in the case of **Ajay Singh (Sunny Deol) Vs. Suneel Darshan (supra)** and would submit that the judgment of the Supreme Court in the case of **Associate Builders (supra)** has been considered by this Court in the said judgment on the issue as to whether the arbitral tribunal could have awarded the claim in the teeth of prohibition of the contract in awarding such claim. It is submitted that the arbitral tribunal in this case has allowed the claim for loss of profit and overheads for the entire period and not during the period of suspension of work. He submits that the award is liable to be set aside on this ground also.

60. Learned counsel for the petitioner distinguishes the judgment of this Court in the case of **Oil and Natural Gas Corporation Ltd. Vs. Comex Services SA (supra)** on the ground that this Court had not decided the said issue in the said

judgment but had only made an observation about the claim for damages and thus no reliance on the said judgment can be placed by the respondent. He distinguishes the judgment of the Supreme Court in the case of **G.Ramchandra Reddy and Company (supra)** on the ground that the contract clause was not referred by the Supreme Court in the said judgment. The issue of bar was not raised before the High Court.

REASONS AND CONCLUSIONS:-

61. The arbitral tribunal framed 12 issues for determination and answered the same in the arbitral award. The arbitral tribunal allowed claim no.1 'On account of delay in payment towards advances/bank guarantee/security deposit' in the sum of Rs.2,589/-. The claim no.2 came to be rejected as not pressed by the respondent. The arbitral tribunal allowed claim for overheads in the sum of Rs.4,56,282/- and towards loss of profit in the sum of Rs.3,32,500/-. The arbitral tribunal also awarded claim for interest at Rs.7,64,362/- and towards arbitration cost at Rs.1,00,000/-. The arbitral tribunal awarded interest at the rate of 15% per annum from the date of the award i.e. 9th August, 2011 till the date of the payment on the awarded sum of Rs.8,88,782/-. One of the member of the arbitral tribunal however gave dissenting award and rejected the claim for damages made by the respondent.

62. I shall first deal with Claim no.1 i.e. 'On account of delay in payment towards advances/bank guarantee/security deposit'. A perusal of the statement of claim filed by the respondent insofar as this claim is concerned, it was the case of the respondent that as per clause 7 of the contract which provided for payment terms, 5% of the contract value of Rs.35,00,000/- i.e. Rs.1,75,000/- was to be given by the petitioner to the respondent as advance on issue of letter of intent of 15 days of submission of invoice and bank guarantee against advance for an equivalent amount and contract performance security bank guarantee.

63. The respondent issued an invoice dated 2nd June, 1998 for Rs.1,75,000/- to the petitioner. According to the respondent, the said advance was due on 23rd June, 1998, however, the petitioner released the said advance payment only on 23rd August,1998. The respondent placed reliance on Note III of Clause 7 which

provided for payment of interest at the rate of 18% per annum for delayed period by the petitioner to the respondent in case of delay in payment beyond 21 days from the date of submission of invoice. The respondent accordingly claimed Rs.2,589/- at the rate of 18% per annum on the delayed period of 30 days of Rs.1,75,000/-.

64. The petitioner denied the said claim on various grounds including on the ground of maintainability of the said claim. It was the case of the petitioner that invoice dated 2nd June, 1998 was certified by the engineer on 29th June, 1998. The payment was released by the petitioner on 18th July, 1998 after deduction of 'tax deducted at source' at Rs.1,750/-. The petitioner also raised an issue of limitation in respect of all the claims including this claim.

65. The arbitral tribunal dealt with this issue on internal pages 22 to 35 and pages 79 to 82 of the impugned award. The arbitral tribunal held that the contract involved three activities i.e. erection, testing and commissioning of water treatment facilities. It is held that in the contract, all three activities were clubbed into one contract and therefore could not be separated from each other. It is held that under clause 44.2, the contractor was entitled to submit invoices/R.A.Bills on monthly basis for the work completed as calculated by the progress measuring procedure indicated in clause 44.4 which provided for procedure of measurement.

66. The payment terms provided for payment at various stages i.e. 5% advance on issue of letter of intent, 5% mobilization advance, 85% against monthly RA bills at the rate of 85% on pro-rata basis as per mutually agreed billing and last 5% to be released on successful commissioning and performance testing of the plant. The arbitral tribunal held that the advance payment was thus not the final bill and delay in payment of advance could not be termed as distinct and separate bills. It is held that under clause 44.6.6 stipulated that all money payable under the contract shall become due and payable to the contractor only after submission to the employer of the final bill duly certified by the Engineer-in-charge. The arbitral tribunal rejected the plea of the petitioner that non payment of the invoice raised for advance as per terms of the payment on its due date was a separate and distinct breach and therefore the period of limitation of such invoices commenced on its

due date.

67. The arbitral tribunal held that since the petitioner had not prepared any certificate of measurement and the total amount payable for the work done by the respondent, there was no merit in the plea of the petitioner for limitation raised in respect of this claim. It is held that the contract awarded to the respondent by the petitioner was an indivisible contract. The arbitral tribunal held that the interest delayed advance payment was a part of the payment terms and was not a separate and distinct breach and therefore the limitation period did not start on due date of advance payment. It is held that the period of limitation commenced from 22nd August, 2005 and three years period ended on 21st August, 2008. The respondent had raised claim on 22nd March, 2006 which was denied by the petitioner on 21st April,2006 and thus the dispute arose between the parties was well within the period of limitation. The arbitral tribunal held that Article 55 of the Schedule (I) to the Limitation Act, 1963 would be applicable to this case. The arbitral tribunal accordingly allowed the claim at Rs.2,589/- by accepting the plea of the respondent that there was delay of 30 days in making the payment of the advance by the petitioner to the respondent. The arbitral tribunal rejected the plea of the petitioner that Article 25 or alternatively Article 113 of the Schedule of the Limitation Act, 1963 was applicable to the facts of this case and the claims for interest being an independent claim was rejected.

68. Mr.Andhyarujina, learned counsel for the petitioner invited my attention to Article 7 of the Contract which provided for Payment terms. He submits that under the said provisions, the petitioner had agreed to pay advance within 15 days of invoice and bank guarantee against furnishing of advance and the contract performance security bank guarantee to the petitioner within 21 days from the date of certification by the Engineer-in-charge. A perusal of Article 7 of the contract indicates that the said Article 7 provided for various payments to be made by the petitioner to the respondent at various stages in different percentage. Insofar as advances agreed to be paid by the petitioner to the respondent under the said Article is concerned, it is clear that the petitioner had agreed to make payment of 5% advance on issue of letter of intent within 15 days of submission of invoice bank guarantee against advance for an equivalent amount and the contract

performance security bank guarantee. The petitioner had also agreed to pay 5% advance of mobilization of resources at site for satisfaction of Engineer-in-charge within 21 days from the date of certification by the Engineer-in-charge against submission of bank guarantee for equivalent amount.

69. Both these bank guarantees against advance payment were to be kept valid till expiry of one month after the mechanical completion and 85% payment was to be made by the petitioner to the respondent against monthly RA Bills on pro-rata basis as per mutually agreed billing schedule within 21 days of the certification by the Engineer-in-charge. The balance 5% was to be paid on successful commissioning and performance testing of the plant duly certified by the Engineer-in-charge. The note appended to the said Article 7 provided that the retention money at the 10% of the each RA Bills shall be deducted from each RA Bill subject to the maximum of 5% of the contract price and in case of delay of payment beyond 21 days from the submission of the invoice duly certified by the Engineer-in-charge, interest at the rate of 18% per annum for delayed period shall be payable to the contract terms.

70. Article 44.1.3 provided that all running account payment shall be regarded as payment by way of advance against the final payment only and not as payment of work actually done and completed. The final bill shall be submitted by the contractor within one month from the date of physical completion of the work otherwise the employer's certificate of measurement and of total amount payable for the work done by the contractor accordingly shall be final and binding on all parties.

71. Article 44.6.6 provided that all moneys payable under the contract shall become due and payable to the contractor only after submission to the employer of the final bill duly certified by the Engineer-in-charge prepared in accordance with the provisions of Clause 44.6.1 and associated provisions thereunder accompanied by the completion certificate in respect of the work. Under Article 44.6.1 the obligation to submit final bill was on the contractor in the prescribed form with reference to the total work provided.

72. A perusal of the record clearly indicates that insofar as payment of 5% towards advance i.e. in the sum of Rs.1,75,000/- on issue of letter of intent is concerned, the same was due even according to the respondent on 23rd June 1998 whereas the same was paid by the petitioner to the respondent on 23rd July, 1998. A perusal of the Article 7 which recorded payment terms clearly indicates that the payment required to be made by the petitioner to the respondent under the said contract was to be paid at different stages in the ratio provided therein.

73. It is clear that insofar as payment of advance on issue of letter of intent was to be paid at the threshold within the time prescribed which payment was to be secured by the bank guarantee to be kept alive until expiry of one month after mechanical completion. 85% of the payment was to be made as against the monthly RA Bills on pro-rata basis subject to the deduction of retention money at the rate of 10% of gross value of each RA Bill subject to 5% of the contract price. It was not the case of the respondent that out of the advance amount of Rs.1,75,000/- paid by the petitioner to the respondent, the retention money at the rate of 10% of the gross value of the said amount was deducted from the said amount by considering the same as payment under running account bill. The petitioner had only deducted 'tax deducted at source' from the amount of Rs.1,75,000/-. In my view the payment of advance thus made by the petitioner to the respondent was a separate and distinct payment to be made at the threshold on submission of bank guarantee and could not be treated as payment under R.A.Bills which would fall under the separate category of payment of 85%.

74. A perusal of the statement of claim indicates that the respondent themselves made the claim for interest on the premise that the due date for payment of the said advance was 23rd June, 1998 whereas the same was released by the petitioner only on 23rd July, 1998 and thus the respondent was entitled to claim interest for the period of alleged delay of 30 days. In my view there is thus no merit in the submission of Mr.Cooper, learned senior counsel for the respondent that the finding of the arbitral tribunal that the contract was an indivisible contract and thus cause of action had not commenced till the final bill was prepared by the respondent not perverse. In my view, the finding of the arbitral tribunal that the obligation to make an advance payment by the petitioner was an indivisible

contract and the non-payment of invoice raised for advance as per term of the payment on its due date was not a separate and distinct breach and therefore limitation period did not start on due date of the advance payment is totally perverse and contrary to the terms of the contract. In my view the payment of advance under Article 7 read with other provisions referred to aforesaid was a separate and independent obligation and was not to be linked up with the payment required to be made against the monthly RA Bills at the rate of 85% during the course of the execution of work based on the quantum of work carried out.

75. In my view the finding of the arbitral tribunal that the limitation period does not start on due date of advance payment is contrary to the pleadings filed by the respondent itself. If according to the arbitral tribunal, the cause of action for making such claim or entitlement of the respondent to receive interest would have accrued only when the final payment was being provided or paid, the petitioner was in that event was even otherwise was not liable to make payment of any interest. The impugned award thus shows patent illegality insofar as this claim is concerned.

76. A perusal of the award indicates that the arbitral tribunal has applied Article 55 of the Schedule to the Limitation Act which provides for period of limitation of three years for a claim of compensation which cause of action starts when the contract is broken or where there are successive breaches when the breach in respect of which the suit is instituted occurred or where the breach is continued when it ceases. In my view since the claim for interest made under claim no.1 by the respondent was not a claim for compensation under section 73 of the Contract Act but was a claim for interest under note to Article 7 and more particularly in respect of the alleged delay in payment of advance which was payable at the threshold, the application of Article 55 of Schedule to the Limitation Act by the arbitral tribunal in respect of claim no.1 shows non application of mind, patent illegality and the same is contrary to the provisions of contract entered into between the parties and contrary to the provisions of Limitation Act, 1963.

77. In my view since the claim for interest simplicitor was made on the alleged delayed payment of advance which was already paid by the petitioner to the

respondent, Article 25 of the Schedule to the Limitation Act, 1963 was attracted. In my view, the claim for interest itself was an independent claim in this case which was claimed on the alleged delay in making payment of advance amount. When the payment of advance was made by the petitioner to the respondent belatedly, the respondent could claim interest from the petitioner only for the period of alleged delay from due date of such payment till such payment was made by the petitioner to the respondent. The cause of action for claiming interest thus started when the payment of the principal amount towards advance was released by the petitioner belatedly which cause of action could not be postponed till the final bill was to be prepared by the petitioner to therespondent and till the same was certified by the engineer.

78. Insofar as submission of Mr.Cooper, learned senior counsel for the respondent that the payment of advance required to be made by the petitioner to the respondent was also ad-hoc payment and not final payment and was to be adjusted towards overall payment required to be made by the petitioner to the respondent is concerned, in my view there is no merit in this submission of the learned senior counsel. Though the said payment of advance was to be adjusted against the final payment due if any by the petitioner to the respondent, insofar as claim for interest is concerned, the obligation of the petitioner to pay the advance at the threshold in the particular ratio was an independent obligation and could not be treated as ad-hoc payment for the purpose of limitation. The respondent themselves had treated the delay on the part of the petitioner in releasing advance payment thereby entitling the respondent to claim interest under Article 7 read with Article 44 as a separate breach and a separate cause of action and had made their claim accordingly and thus could not be allowed to canvass that no cause of action had arisen in respect of such claim till final bill was prepared by the respondent and was certified by the engineer. In my view, the plea of the respondent raised before the arbitral tribunal was ex-facie, inconsistent and contradictory and thus could not have been accepted by the arbitral tribunal.

79. This court in an unreported judgment delivered on 6th February,2015 in case of **CMC Limited** (supra) has considered the provisions of the contract which provided for separate payment in respect of separate activity and had held that

such contract was not an indivisible contract. This court held that once the cause of action had commenced when the breaches were committed by the other party, limitation does not stop unless there is acknowledgement of liability or part payment is made.

80. This court in case of **M/s.Oil and Natural Gas Corporation Ltd. Vs. Essar Oil Limited** (supra) has after adverting to various judgments of Supreme Court and judgment of this court in case of **CMC Limited** (supra) has held that in view of section 9 of Limitation Act, unless there is any part payment made by the other party or if the liability is acknowledged, the cause of action once having commenced when the breaches to have been committed on the other party, such cause of action would not stop.

81. In my view since the petitioner had delayed the payment of advance payment of Rs.1,75,000/- which was due on 23rd June, 1998 and was released on 23rd July, 1998, the cause of action to claim the interest and to invoke the arbitration agreement had already commenced on 23rd July, 1998 and there being no part payment towards payment of interest or there being no acknowledgement of liability in respect of this claim, the limitation did not stop for making such claim falling under Article 25 of the schedule to the Limitation Act, 1963. Admittedly, since the arbitration agreement was invoked by respondent only in the year 2006, the claim for interest under claim no.1 for delay in payment of advance amount was ex-facie barred by law of limitation. The arbitral tribunal having allowed the time barred claim has thus committed patent illegality and the impugned award in respect of this claim being in conflict with public policy deserves to be set aside.

82. I shall now deal with the claims for overhead and loss of profit awarded by the arbitral tribunal under claim no.3. Insofar as claim for overhead is concerned, the respondent had made this claim in two parts. It was the case of the respondent that the contract awarded to the respondent was required to be commenced from 29th May, 1988. The stipulated date of completion was 28th February, 1999 i.e. within the period of 9 months. The contract was alleged to have been suspended from March 1999. The petitioner had issued a notice of short closure of contract on 18th July, 2005. The respondent accordingly claimed a sum of Rs.3,32,500/-

towards the overhead alleged to have been incurred by the respondent upto the stipulated date of completion i.e. 28th February,1999 on the balance work not completed i.e. Rs.33,25,000/-. In addition to the said claim of overhead expenditure, the respondent also claimed overhead at the rate of 1% for the period between 28th February,1999 till 18th July, 2005 i.e. for the period of 76 months and 18 days amounting to Rs.2,97,821/- and totalling to Rs.6,30,321/- towards total claim for overhead expenditure.

83. The arbitral tribunal has dealt with the claim for overhead in various paragraphs of the impugned award while dealing with the issues as to whether the performance of contract was suspended by the petitioner, whether the petitioner had validly and legally terminated or short closed the contract, whether the petitioner committed the breach of contract and consequently the respondent had suffered the loss and damages as alleged, whether the respondent had committed any breach of the contract and whether the respondent had delayed the completion and performance of the obligation of delivery of the design and drawings etc.

84. It was the case of the respondent that the petitioner had no funds available during the stipulated period of contract and even thereafter had made assurances from time to time to the respondent that the payment would be released to the respondent and till the financial condition of the petitioner was improved, the respondent was asked to suspend the work. It was the case of the respondent that the petitioner finally terminated the contract illegally after several years. The respondent was required to keep their resources mobilized till the date of the termination. The respondent had demanded the payment from time to time since the original contract was kept alive by the petitioner for more than six years though the original contractual period was only 9 months which the petitioner refused to pay and kept on instructing the respondent to be on site.

85. On the other hand it was the case of the petitioner that the respondent had committed several breaches on their part of the obligation under the contract and thus the petitioner had rightly terminated the contract. The petitioner also denied their alleged liability to pay any compensation on several grounds including on the

ground of maintainability of the claims for compensation and also the quantum. It was also urged by the petitioner that the claims for overhead and for loss of profit were overlapping and both the claims could not have been claimed by the respondent. The petitioner had also disputed the basis of the claims made by the respondent by raising a specific contention in the written statement. The petitioner disputed the applicability of the formula on the basis of which the respondent had made a claim on various grounds.

86. There is no dispute that none of the parties led any oral evidence before the arbitral tribunal. The arbitral tribunal after considering the correspondence held that it was an admitted position that the work was suspended sometime in the month of April 1995 due to financial difficulty faced by the petitioner. The arbitral tribunal placed reliance on various letters addressed by the petitioner to the respondent bringing to their notice financial difficulty faced by the petitioner. It is held that it was an admitted fact that the notice under Article 22 of the General Conditions of Contract which provided for suspension of work was not issued by the respondent to the petitioner. At the same time, the petitioner did not take any action for recovery of any liquidated damages under clause 6 for alleged delay for completion of the work on account suspension of work if any by the respondent. The arbitral tribunal accordingly held that the work was under suspension due to the financial difficulty of the petitioner and on their advice.

87. The arbitral tribunal held that the petitioner had expressed sincere thanks to the respondent for giving the unwavering support to the petitioner and had assured that the group of the petitioner company will stand by all the commitments that it had made to the respondent. The petitioner also released the bank guarantee without any demur and agreed to the suspension due to their financial crisis. The arbitral tribunal dealt with large number of letters addressed by the parties while dealing with the issue no.6 and held that in the present case, the suspension was to the extent of more than six years against the contract period of 9 months. The petitioner also asked the respondent for details of outstanding dues and rise in prices of material, labour and POL etc. It is held that the respondent had co-operated all along the petitioner from April 1999 to July 2005 with a view to complete the project. The respondent however terminated the contract. The

respondent however continuously breached the conditions of contract for which the petitioner was solely responsible. In paragraph 4.08.3, the arbitral tribunal concluded that the termination/short closure by the petitioner was not valid and legal for various reasons and in view of their findings recorded in the said paragraph.

88. Insofar as submission of Mr.Andhyarujina, learned counsel for the petitioner that the finding of the arbitral tribunal on the issue of termination of the contract and/or suspension thereof is perverse and is in violation of principles of natural justice is concerned, in my view there is no substance in this submission of the learned counsel for the petitioner. The learned counsel for the petitioner could not dispute the contents of the various letters addressed by the petitioner themselves expressing their financial difficulty during the period of last several years when the contract was kept alive by the petitioner. The arbitral tribunal has considered the correspondence addressed by both the parties including the admission made by the petitioner in their letters expressing financial difficulty and in not releasing the payment. In my view the findings on the issue of suspension of contract and termination of contract rendered by the arbitral tribunal is based on the documentary evidence led by both the parties after recording detailed findings which are not perverse and thus cannot be interfered with by this court under section 34 of the Arbitration Act.

89. The question however that arises for consideration of this court is whether the respondent had proved their entitlement as well as the computation of the claim for compensation made by the respondent before the arbitral tribunal and more particularly the claims of overheads and loss of profit or not.

90. A perusal of the statement of claim filed by the respondent while making a claim for overheads during the original contractual period of 9 months indicates that it was the case of the respondent that the work could not be completed by the respondent on account of various reasons mentioned in the statement of claim within the stipulated period of time. In paragraph 35 of the statement of claim while making claim for overhead, it was pleaded by the respondent that the respondent had at the time of finalization of contract considered 10% towards overhead for the

work in question to be completed within the stipulated time period and therefore per month the respondent was incurring overhead expenditure based on recognized formula adopted under constructed contract and calculated the said amount of Rs.38,888/- per month alleged to have been incurred upto 28th February,1999.

91. It was alleged that the respondent had incurred an overhead expenditure of Rs.3,50,000/-. The respondent had executed the work to the tune of Rs.1,75,000/- and after deducting 10% of the executed portion of work i.e. Rs.17,500/- towards overhead expenditure out of the said amount, the respondent claimed total alleged unutilized expenditure at Rs.3,35,000/-. The respondent also claimed overhead at the rate of 1% i.e. Rs.38,888/- per month from 28th February, 1999 till 18th July, 2005 i.e. for the period of 76 months and 18 days which came to Rs.2,97,821/-. The respondent accordingly made a total claim of Rs.6,30,321/- on account of alleged overhead expenditure.

92. A perusal of the written statement filed by the petitioner insofar as claim for overhead is concerned, the said claim was opposed on various grounds. The petitioner denied that the petitioner had committed any breaches of contract and had alleged that the respondent had on the contrary committed breaches of contract made. The petitioner had also denied that the petitioner had incurred any overhead expenditure as claimed or otherwise. The petitioner also disputed the method of calculation/formula and urged that the same was not appropriate and/or applicable and/or was liable to be adopted. It was urged that the claim made by the respondent was hypothetical and was based on conjuncture and surmises and without any evidence. The petitioner also placed reliance on Article 19.3, 21.3 and 22.3 of the General Conditions of Contract in support of their submissions that the claims for overhead and loss of profit were clearly prohibited and claims were not maintainable on that ground.

93. A perusal of the arbitral award insofar as claim for overhead is concerned indicates that insofar as Article 4.1 relied upon by the petitioner is concerned, which dealt with quantities of various items of work to be done under the contract which were approximate and the right of the employer to increase or decrease of

the contractual quantities is concerned, it is held by the arbitral tribunal that the said provisions apply to the case where no work was ordered under certain items and because of the difference of quantities of various types of work to be done and that actually done and not for claim of overhead arising out of the breaches committed by the petitioner. In my view, Article 4.1 was not applicable for depriving the respondent for making a claim for overhead or loss of profit on the ground of wrongful termination.

94. Insofar as applicability of Article 19 and more particularly 19.3 is concerned, the arbitral tribunal has held that the said article dealt with the consequential damages and did not bar the respondent from raising claim of damages arising out of breaches committed by the petitioner. Insofar as Article 21 is concerned, it is held that since the termination/short closure of the contract was held to be invalid, the said Article was not applicable. In my view the bar under Article 19.3 which provided that the employer shall not be liable for any consequential or special damages or loss of anticipated profits sustained by the contractor or his sub-contractors would not apply since the contract was illegally terminated by the petitioner.

95. The arbitral tribunal while allowing the claim for overhead during the original stipulated period of 9 months has observed that it was an admitted position that the respondent had supervisory staff, administrative personnel, established site office etc. at site of work. The petitioner had never complained about lack of supervisory staff and site organization. It was however held that the respondent had not produced the books of account showing the expenditure incurred on overhead. It is held that it would however not mean that no expenditure was towards overhead was incurred. The arbitral tribunal held that the report of Rate and Cost Committee under the Ministry of Irrigation and Power, Central Water and Power Commission considered 10% overhead and 10% profit after the survey made by the committee on several such works and came to the conclusion that 10% overhead would be adequate to cover expenditure on supervisory establishment, head office expenses, travelling expenses etc.

96. It is held that the respondent in this case had adopted Hudson formula which has been considered by the Supreme Court in some of the cases and more particularly in case of **McDermott International INC.** (supra). The arbitral tribunal accordingly held that the respondent was entitled to claim of overhead. However considering the facts of this case, the nature of contract involved, instead of 10% as overhead, the arbitral tribunal considered 5% of the contract value as a reasonable overhead for the construction period of 9 months, inspite of the fact that the petitioner had considered 15% as supervision charges under clause 12.10.9 and had not disputed 10% overhead. The arbitral tribunal held that considering 5% overhead and applying the formula, the overhead expenditure works out to Rs.19,444/- per month and for the period of 9 months i.e. from 29th May, 1998 till 28th February, 1999, the overhead expenditure works out to be Rs.1,74,996/-. The arbitral tribunal considered 5% overhead on the unexecuted amount of work and allowed the said claim at Rs.1,66,250/-. The arbitral tribunal also allowed claim at the rate of 1% as overhead for the period between 1st May, 1999 till 18th July, 2005 and allowed the said claim at Rs.2,90,032/-.

97. Insofar as claim for loss of profit made by the respondent is concerned, a perusal of the statement of claim filed by the respondent indicates that it was the case of the respondent that the contract in question was illegally put to an end by the petitioner which deprived the respondent at their anticipated profit which the respondent had anticipated at the rate of 10% at the time of tendering the contract work in question. The respondent accordingly claimed the loss of profit at the rate of 10% on the unexecuted portion of work. The petitioner opposed this claim for loss of profit for the similar reasons and grounds canvassed while opposing the claim for loss of overhead.

98. The arbitral tribunal allowed the claim for loss of profit at the rate of 10% per annum as claimed by the respondent and allowed the claim of Rs.3,32,500/- by placing reliance on the judgment of Supreme Court in case of **McDermott International INC.** (supra) and on the judgments reported in **AIR 1977 SC 1481** and **AIR 1984 SC 1703**.

99. Insofar as claim for overhead is concerned, from the statement of claim filed by the respondent, it is clear that it was the case of the respondent themselves that at the time of finalization of contract, the respondent had considered 10% towards overhead of the work in question to be completed within the stipulated time period and were incurring overhead expenditure based on the formula alleged to have been adopted under constructed formula. It was pleaded that they were incurring overhead expenditure per month at Rs.38,888/- upto 28th February,1999. It was also alleged that the respondent was also incurring expenditure towards overhead which was computed at the rate of 1% instead of 10% during the period 28th February, 1999 till 18th July, 2005. The petitioner had specifically denied the entitlement as well as the computation made by the respondent. The petitioner had also disputed the applicability of the formula sought to be referred upon by the respondent. Both the parties also placed reliance on the judgments of Supreme Court and of this court in respect of the claim for overhead and loss of profit.

100. A perusal of the arbitral award indicates that the arbitral tribunal recorded the fact that the respondent had not produced the books of account for perusal of the arbitral tribunal and also did not lead any oral evidence in support of any of the claims made before the arbitral tribunal. The arbitral tribunal also did not consider and deal with the submissions of the petitioner that the claim for overhead and loss of profit was not proved or that the same was based on no evidence. The arbitral tribunal also did not consider and deal with the objection that the claim for overhead and loss of profit was overlapping.

101. The question that arises for consideration of this court is whether the respondent who had made claim for overhead on the basis that the respondent had considered 10% towards overhead for the work in question at the time of finalization of the contract and had incurred such amount during the contractual period ought to have proved the said claim by leading evidence including oral evidence or could have simplicitor rely upon the Hudson formula and whether in absence of any evidence of the actual expenditure incurred by the respondent, the arbitral tribunal could have allowed the claim for overhead by considering the claim on rough and ready basis by applying Hudson formula by dispensing with the proof of the overhead expenditure or not.

102. Learned counsel for both the parties have heavily placed reliance on the judgment of Supreme Court in case of **McDermott International INC.** (supra). A perusal of the judgment of the Supreme Court in case of **McDermott International INC.** (supra) indicates that in that matter, the contractor had examined a witnesses to prove the claim for compensation who had calculated the increased overhead and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled Change Orders, Overtime, Productivity commonly known as the Emden Formula. The said witness had brought out the additional project management cost at US$ 1,109,500. The Supreme Court adverted to an earlier judgment in case of **M.N.Gangappa vs. Atmakur Nagabhushanam Shetty and Ors., (1973) 3 SCC 406** in which it was held that the method used for computation of damages will depend upon the facts and circumstances of each case. Supreme Court also noticed different formulas such as Hudson Formula, Emden Formula and Eichleay Formula in the said judgment.

103. It is held that the different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator. Supreme Court noticed that the witness examined by the contractor had applied the Emden Formula while calculating the amount of damages having regard to the books of account and other documents maintained by the contractor. The learned arbitrator did not insist that sufferance of actual damages must be proved by bringing on record books of account and other relevant documents. In these circumstances, Supreme Court held that if the learned arbitrator applied the Emden Formula in assessing the amount of damages, he could not be said to have committed an error warranting interference by this Court. The learned arbitrator had also referred to other formulae but opined that the Emden Formula was widely accepted one.

104. Supreme Court also observed that in the Hudson Formula, the head office overhead percentage is taken from the contract. It is observed that although the Hudson formula has received judicial support in many cases, it has been criticized principally because it adopts the head office overhead percentage from the

contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor. Admittedly, in this case though the respondent made a claim on the premise that the respondent had considered 10% overhead while finalization of bid and had incurred overhead expenditure at that rate, the respondent did not produce any books of account or any other evidence in support of such claim. The judgment of Supreme Court in case of **McDermott International INC.** (supra) is thus clearly distinguishable in the facts of this case and would not assist the case of the respondent.

105. Division Bench of this court in case of **Edifice Developers and Project Engineers Ltd.** (supra) after adverting to the judgment of Supreme Court in case of **McDermott International INC.** (supra) and in case of **M/s.A.T.Brij Paul Singh and Bros. vs. State of Gujarat, AIR 1984 SC 1703** which judgments were relied upon by the arbitral tribunal has held that the appellant in that case had produced no evidence in support of the claim for loss of overhead and profit and award of claim was on the misconceived basis that Hudson Formula must be applied despite there being no evidence. The Division Bench also held that no material was produced before the arbitral tribunal on the nature of the practice in the trade and claim for loss of profits was based on pure conjecture and in the absence of any evidence and was thus rightly set aside by the learned Single Judge. The Division Bench upheld the conclusion drawn by the learned Single Judge that the award of arbitrator proceeded on the manifestly misconceived notion that a contractor is entitled to claim overhead losses even in the absence of evidence on the basis of Hudson's Formula.

106. In my view the impugned award rendered by the arbitral tribunal allowing the claim for overhead merely on the basis of the Hudson Formula and not based on any evidence is contrary to the principles of law laid down by this court in case of **Edifice Developers and Project Engineers Ltd.** (supra) and shows patent illegality and is in conflict with public policy.

107. Supreme Court in case of **Kailash Nath Associates** (supra) has laid down the principles to be followed by the court or by the arbitrator while considering the claim for compensation under sections 73 and 74 of the Contract Act, 1872. It is

held that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is held that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall. 108. This court in case of **Ajay Singh (Sunny Deol)** (supra) has after adverting to the judgment of Supreme Court in case of **Kailash Nath Associates** (supra), judgment of this court in case of **Maharashtra State Electricity Board vs. Sterlite Industries (India) Ltd., 2000(3) Bom.C.R. 347**, judgment of Division Bench of this court in case of **Edifice Developers and Project Engineers Ltd.** (supra) has held that if a party has not suffered any losses, even if the respondent has committed breaches, such party cannot be awarded any compensation under section 73 of the Contract Act. When loss in terms of money is prayed, the party claiming compensation has to prove such loss or damages suffered by him. It is held that unless and until the damages or loss was actually suffered, damages cannot be awarded, otherwise section 73 of the Contract Act would become nugatory and the party would be penalized though the other party suffered no loss. In my view the party who has not suffered any loss or damages cannot be awarded any compensation or damages, otherwise it would amount to unjust enrichment in favour of such party.

109. In my view, the principles laid down by the Supreme Court in case of **McDermott International INC.** (supra), in case of **Kailash Nath Associates** (supra) and judgment of this court in case of **Ajay Singh (Sunny Deol)** (supra) squarely applies to the facts of this case. The impugned award rendered by the arbitral tribunal is contrary to and in violation of the principles of law laid down by the Supreme Court and this court and thus deserves to be set aside on that ground alone.

110. Insofar as judgment of this court in case of **Associate Builders** (supra) relied upon by Mr.Cooper, learned senior counsel for the respondent is concerned, a perusal of the said judgment clearly indicates that in the said matter also the contractor had produced evidence before the arbitrator and had setout the establishment expenses in great detail before the learned arbitrator and it was only on that evidence, the learned arbitrator ultimately had awarded those claims. In my view the judgment of Supreme Court in case of **Associate Builders** (supra) thus

does not assist the case of the respondent and is clearly distinguishable in the facts of this case.

111. Insofar as submission of the learned senior counsel for the respondent that the respondent had though not led oral evidence to prove he claim for damages, had led documentary evidence and thus award of claim for loss of profit could not be challenged on the ground that the award was based on no evidence is concerned, a perusal of the arbitral award indicates that the arbitral tribunal has not allowed the claim for overhead and loss of profit by relying upon any documentary evidence placed on record by the respondent. In my view the respondent thus cannot be allowed to rely upon any such alleged documentary evidence with a view to supplement the reasons recorded by the arbitral tribunal in the impugned award at this stage in this petition under section 34 of the Arbitration Act.

112. In my view, the arbitral award itself shall indicate the evidence referred to, relied upon by the arbitral tribunal while allowing or rejecting the claims made by the parties. This court cannot probe into the mind of the arbitral tribunal and come to the conclusion by considering the evidence produced by the parties which were though on record before the arbitral tribunal but were not referred to and considered by the arbitral tribunal by drawing an inference that such evidence must have been considered by the arbitral tribunal while allowing or rejecting the claim while deciding petition under section 34 of the Arbitration Act. This view is supported by the judgment of this court in case of **Security (India) Ltd. vs. Oil and Natural Gas Corporation Limited** delivered on 21st August, 2015 in Arbitration Petition No. 822 of 2012 which is adverted by this court in case of **M/s.Oil and Natural Gas Corporation Ltd. Vs. Essar Oil Limited** (supra) relied upon by the learned senior counsel for the respondent.

113. The principles laid down by the Supreme Court and this court in the judgments referred to aforesaid while dealing with the claim for loss of overhead would also apply to the claim for loss of profit. A perusal of the impugned award indicates that the claim for loss of profit is also allowed by the arbitral tribunal simplicitor based on the Hudson Formula and not based on any evidence and thus

the same also deserves to be set aside.

114. A perusal of the impugned award indicates that though the petitioner had raised an objection that the claim for overheads and loss of profit were overlapping with each other, the arbitral tribunal has not considered this plea of the petitioner in the impugned award at all. In my view, the profit can be earned only if expenditure on various heads including overhead are incurred. The learned arbitrator thus could not have allowed both the claims i.e. claim for loss of overhead and also claim for loss of profit simultaneously which were overlapping with each other. Both the claims thus deserves to be set aside on this ground also.

115. Insofar as claim for interest and claim for arbitration cost awarded by the arbitral tribunal is concerned, since this court has set aside the claim under claim no.1 and claim no.3 in toto, the claim for interest and cost also deserves to be set aside and are accordingly set aside.

116. Insofar as counter claims made by the petitioner against the respondent are concerned, in my view since the findings rendered by the arbitral tribunal that the contract was wrongfully terminated by the petitioner, the petitioner could not have been awarded any counter claim is concerned, deserves to be accepted. The petitioner had not made any claims which were subject matter of the counter claim at any point of time earlier and had made such claims only for the first time along with written statement. The arbitral tribunal thus even otherwise could not have allowed such counter claim made by the petitioner and had rightly rejected the same. Learned counsel appearing for the petitioner could not demonstrate before this court as and how the counter claims were wrongly rejected by the arbitral tribunal. This part of the arbitral award insofar as rejection of counter claims is concerned is thus upheld.

117. I therefore pass the following order:-

(a) The impugned arbitral award dated 9th August, 2011 passed by the arbitral tribunal insofar as claims made by the respondent are allowed is set aside;

(b) The arbitral award rejecting the counter claim made by the petitioner is upheld;

(c) Arbitration Petition No.470 of 2012 is disposed of in the aforesaid terms;

(d) There shall be no order as to costs.