

State of West Bengal Vs. Pam Developments Pvt. Ltd.

State of West Bengal Vs. Pam Developments Pvt. Ltd.

SooperKanoon Citation : sooperkanoon.com/77259

Court : Kolkata

Decided On : Nov-03-2016

Judge : Soumen Sen

Appellant : State of West Bengal

Respondent : Pam Developments Pvt. Ltd.

Judgement :

IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil JURISDICTION
ORIGINAL SIDE BEFORE: THE HONBLE JUSTICE SOUMEN SEN A.P.No.736
of 2011 STATE OF WEST BENGAL VS. PAM DEVELOPMENTS PVT. LTD. For
the Petitioners : Mr. Jayanta Kr. Mitra, Ld. Adv. Gen., Mr. Samrat Sen, Sr. Adv.,
Mr. Paritosh Sinha, Adv., Ms. Manali Bose, Adv., Mr. Arindam Mondal, Adv. For
the Respondents : Mr. Suman Dutta, Adv., Mr. Priyankar Saha, Adv., Mr. Amritam
Mandal, Adv. Heard On :

21. 09.2015, 05.02.2016, 26.02.2016, 01.09.2016, 15.09.2016, 22.09.2016,
28.09.2016. Judgment On :

3. d November, 2016 Soumen Sen, J.:- This is an application for setting aside of
an arbitral award dated 6th April, 2011 in connection with disputes arising out of
the work of Widening and strengthening of Nilgang - Santoshpur - Duttapukur -
Golabari - Aminpur Road from 0.00 KMP to 28.85 KMP under Barasat Highway
Division No.II in the District of North 24 Parganas. NABARD - RIDF - VII Sl.

No.9(c) for Duttapukur - Golabari Road under Barasat Highway Division No.- II, Group No.from 14.30 KMP to 16.08 KMP. under Notice Inviting Tender No.8 of 2002 - 2003 of the Superintending Engineer, State Highways Circle No.- I, Tender NO.83 of 2002 - 2003 of the S.E., S.H.C. No.- I, P.W. (Roads), Directorate. The contract was awarded on 26th November, 2012. The estimated value of the work was Rs.2,34,88,891 out of which half of the work amounting to Rs.1,17,44,464 was awarded to the petitioner. The time for completion of the work was 12 months with effect from 2nd December, 2002 and expiring on 1st December, 2003. The project was overrun by five months. The claim in the arbitration proceeding is essentially for this period of delay. The basis of the claim of the petitioner before the arbitrator appears to be that in view of non-adherence to the payment schedule, the respondent could not complete the work within the contractual period and have thereby suffered loss and damage. A claim on account of loss of business, idle charges and price escalation was made. The respondent-claimant in its statement of claim has alleged that in spite of mobilization of all its resources at the site the execution of the work got delayed as the petitioner had failed to release payment from time to time upon successful proportionate completion of work by the claimant within due time. This has caused financial crunch for which the work could not be completed within the stipulated time. The claimant also alleged to have suffered loss towards uneconomic progress of work. The claimant relied upon Clauses 7, 8 and 9 of the Agreement in Form W.B.F No.2911(ii) and contended that failure to make monthly payment in terms of the said clauses has resulted in substantial financial loss and damages in executing the work beyond the said stipulated period and the petitioner is liable to compensate for such loss and damage. The claimant further alleged that the monsoon was to set in West Bengal officially from June 08, 2003. The Assistant Engineer, in spite of his knowledge of the aforesaid fact, through a memo no.776 dated June 27, 2003, requested the respondent to install the Hot Mix Plant immediately so that the work may be completed after monsoon but the Assistant Engineer while issuing the letter had completely overlooked the fact that MORTH does not permit execution of bituminous work during monsoon months. The instruction to install Hot Mix Plant was followed by a subsequent reminder letter No.837 dated July 10, 2003 of the said Assistant Engineer. The Assistant Engineer again through his Memo

no.932 dated July 29, 2003 referring to his aforesaid letters alleged that the respondent had failed to execute the work proportionately and instructed the respondent to start stone metal consolidation work by installing Hot Mix Plant. The claimant by its letter No.PDPL/PWD/DUTTAPUKUR/W -9/97 dated December 23, 2003, intimated the Executive Engineer that the execution of bituminous work would involve Rs.50.00 Lacs (approx) and fund need to be released for works successfully executed so far. The authority was required to consider that prior to laying of B.M. disintegrated W.B.M. surface need to be set right and the cost thereof had to be paid by the department. The authority was informed that the Hot Mix Plant was lying idle costing per day a sum of Rs.82,000/- which became chargeable as the Assistant Engineer had consistently demanded installation of Hot Mixed Plant although it was not required at that stage. The respondent by its letter No.PDPL/PWD/DUTTAPUKUR W - 14/97 dated March 05, 2004 requested the Executive Engineer for making payment of all the R/A bills for work executed up to W.B.M. stage. The authority was once again reminded that the work was suffering for want of cash flow causing delay in taking up bituminous work in spite of the fact that Hot Mix Plant and other equipments were installed in the month of September 2003. Due to non- execution of bituminous work in time W.B.M. surface deteriorated. The Executive Engineer was requested to clear dues on account of bituminous work and the work of rectification of W.B.M. surface. The respondent through its letter No.PDPL/PWD/DUTTAPUKUR/W - 16/97 dated June 10, 2004 informed the Executive Engineer that though the work was completed during the 1st week of April, 2004 and till the date of the letter no complaint was received from the department about poor or unsatisfactory performance of the work but that against the bill amount of Rs.34.17 lacs only a part payment of Rs.14.50 lacs was made in the month of March, 2004 and the balance amount had not been paid till date. Moreover, the Final Bill amounting to Rs.18 lacs was also due and required to be verified and released. The Executive Engineer on August 13, 2004 issued completion certificate in respect of the work completed in April, 2004. Despite issuance of the completion certificate, payments were withheld and the lawful dues of the claimant were not released. This has resulted in initiation of arbitration proceeding. The petitioner in their counter-statement alleged that the claimant was one of the 14 different contractors entrusted to complete the entire

job of construction of the 28.85 KMP of the Road and none excepting the claimant raised any dispute about the payment. It was further alleged that the slow rate of progress of the work would be apparent as it merely completed 1/10th of the total value of the work within the first one-third period of the schedule time of work of twelve months. The claimant did not raise any bill. It is mandatory under Clauses 7, 8 and 9 of the conditions of contract. The bill was prepared by the department as the claimant did not raise any bill and as such the question of payment within ten days, or thirty days cannot arise in the instant case. It was further alleged that due to failure of the claimant to do the proportionate work in time, the claimant could not complete the work as required before the on-set of monsoon. The petitioner further alleged that in terms of clause 8(iii) of the special terms and conditions the contractor was to arrange for installation of Hot Mix Plant and allied machineries at his own cost as per specification for road and bridge work.. The contractor firm was to submit job Mix formulae, which is within the contract and it is not permitted to make charges separately for the same. The contractor was also to bear the cost of repair construction as per contract. It was further alleged that no amount was payable to the contractor as idle charges occurred due to failure of the contractor to work as per schedule. The petitioner denied the claim on account of price escalation as in terms of the Notice Inviting the Tender such claim is not maintainable. In the Statement of Claim filed by the respondent [the claimant before the arbitrator]. the following claims were made before the arbitrator:Sl. No.1.

2. Claims Nature of Claim of Claim Loss No.1 payments/cash flow from the Department Claim Hire charges of private land (arranged by the 50,000.00 No.2 claimant for installation of H.M.P. and allied machineries]. business beyond due the to Amount [in Rs.]. irregular 4,24,534.00 initial contract period 3. Claim Reimbursement of cost for preparing the job 10,500.00 No.3 mix formulae from B.E. College (Deemed University) 4.

5. Claim Cost of account of repair and rectification 2,57,000.00 No.4 work on executed W.B.M. work Claim Losses due to Idle charges: No.5 6. Claim Hot Mix plant and other machineries 82,00,000.00 The Crews of the plant and machineries 2,69,000.00 Idle Labour 3,86,000.00 Idle on site establishment 11,39,770.00

No.5(a) 7. Claim No.5(b) 8. Claim No.5(c) 9. Claim No.5(d) 10. Claim Losses due to price escalation on the work 5,17,998.00 No.6 executed beyond the initial contractual period 11. Claim The work done but measurement not recorded 1,76,674.00 No.7 in the M.B. as well as the price for the same not paid for 12. Claim Payment due against the 5th R/A & Final Bill 4,03,106.00 Refund of Security Deposit 11,27,342.00 No.8 13. Claim No.9 14.

15. Claim Interest due from the department for delayed 3,77,826.00 No.10 payment Claim Interest @ 18% p.a. on all the aforesaid As accrued No.11 amount from 10.04.2004 to till date of payment 16. Claim Cost --- No.12 The arbitrator disallowed the Claim No.2,3,7, 10 and allowed Claim Nos.1, 4 and 9 in full and Claim Nos.5(a), 5(b), 5(c), 5(d), 6, 8 in part. The arbitrator awarded a sum of Rs.63,78,450 together with interest and costs. During the pendency of this proceeding in terms of an order dated April 24, 2015, the claimant has paid a sum of Rs.13,27,342/- representing the sum awarded under Claim Nos.8 and 9 of the Statement of Claim. The said amount was paid on or before July 10, 2015. is in respect of Claim Nos.1, 4, 5 and 6. Accordingly, the matter for consideration On the basis of the pleadings, the arbitrator has framed 15 issues. The claim Nos.1, 4, 5(a), 5(b), 5(c), 5(d) and 6 are issue Nos.4, 7, 8 and 9. The said award is assailed by the claimant primarily on the ground that the award is based on no evidence and is an unreasoned award. It is unreasoned in the sense that there was no material on record to justify the finding. The ground of perversity and against the Public Policy of India are the other grounds on which the petitioner prays for setting aside of the said award. In order to appreciate the grounds it is necessary to deal with in brief the arguments made by the learned Advocate General representing the petitioner. The learned Advocate General has submitted that the arbitrator has simply awarded loss of business at 10% of Rs.42,45,342/- without any discussion, reason or justification for the same. There was no evidence adduced before the Arbitrator to enable him to come to a finding that the value of the work done within the originally stipulated contractual period was Rs.65,12,394/- or that work done beyond the contractual period was Rs.42,45,342/-. It is submitted that no evidence was led in this regard and there is no material on record to justify such finding. As such the very basis of calculation is itself fallacious. The learned Advocate General in this regard has referred to and

relied upon the decisions of the Honble Supreme Court in Bharat Coking Coal Ltd. vs. L.K. Ahuja reported at (2004) 5 SCC109Para 11 and State of Rajasthan & Anr. Vs. Ferro Concrete Construction Pvt. Ltd. reported at (2009) 12 SCC1 It is submitted that the arbitrator has not given any reason for arriving at his finding that loss of business due to irregular payment/cash flow would be 10% of value of work done beyond the contractual period and in the absence of reasons being assigned by the Arbitrator for arriving at the aforesaid finding the award under this head of claim is liable to be set aside. It is submitted that by a long catena of decisions including the decisions of the Honble Supreme Court in Mcdermott International Inc. Vs. Burn Standard Co. Ltd. reported at (2006) 11 SCC Pg 181 at 208, Paragraphs 55-57 and Som Datt Builders Ltd. Vs. State of Kerala reported at (2009) 10 SCC259it has been categorically stated that the arbitrator is required to give proper and adequate reasons for arriving at the conclusion and such reasons shall not only be intelligible but shall be a reason connected with the case which the Court can see is proper. The learned Advocate General has laid much emphasis in Paragraph 55 to 57 of Mcdermott International Inc. (supra) in support of the aforesaid submission which reads:55. Another important change which has been made by reason of the provisions of the 1996 Act is that unlike the 1940 Act, the arbitrator is required to assign reasons in support of the award. A question may invariably arise as to what would be meant by a reasoned award.

56. In Bachawats Law of Arbitration and Conciliation, 4th Edn., pp. 85556, it is stated: Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded. The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills Arbitration. In re, proper, adequate reasons. Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons. The meaning of the word reason was explained by the Kerala High Court in the contest of a reasoned award .. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. A mere

statement of reasons does not satisfy the requirements of Section 31(3). Reasons must be based upon the materials submitted before the Arbitral Tribunal. The Tribunal has to give its reasons on consideration of the relevant materials which the irrelevant material may be ignored. Statement of reasons is a mandatory requirement unless dispensed with by the parties or by a statutory provision.

57. In *Konkar Rly, Corpn. Ltd. Vs. Mehul Construction Co.* this Court emphasized the mandatoriness of giving reasons unless the arbitration agreement provides otherwise.

. It is argued that the Arbitrator has equated loss of business with loss of profit. If, loss of business is essentially loss of profit then, as held by the Honble Supreme Court in various judgments including AIR 1984 SC1703(M/s. A.T. Brij Paul Singh & Ors. Vs. State of Gujarat) the same is to be computed as a percentage of the value of the balance work which the contractor could not do because of the contract having been wrongly terminated thereby leading to loss of anticipated profit on the value of the work which was left undone. In the instant case, the claimant has completed the work. The claimants profit margin has already been factored into his Running Account bills and Final bill in respect of which the claimant has not only received payment but also made a separate claim (Claim No.8) for balance payment due under 5th RA & Final Bill that to make an award for loss of profit separately would amount to double payment and unjust enrichment. It is submitted that having regard to the fact that the claimant has already made claims under separate heads on account of escalation; compensation for delay on account of idle labour, machinery; site expenses; hire charges for land (beyond contractual period) an additional claim on account of loss of profit is unsustainable. Even if it is contended that loss of profit arose out of diminution in turnover on account of delay in completion, the contract is, in such a situation, required to establish that had it received the amount due under the contract within time it could have utilized the same for other business in which it could have earned profit. Unless such a plea is raised and established, the claim for loss of profit could not be granted. In this case, no such material is available on record and in

the absence thereof the claim under this head cannot be granted. The Arbitrator in making his award must decide the disputes in accordance with substantive law [sec 28

(1) (a) of the said Act]. and the terms of the contract [sec 28(3) of the said Act].. Any failure in this regard would vitiate the award. Even if the Arbitrator had jurisdiction to entertain the claims, he may be prohibited by the express terms of the contract from allowing claims under specific heads. The arbitrator cannot allow claims which are, by agreement between the parties, expressly barred. An award contrary to or by ignoring or disregarding the contract would be perverse. The learned Advocate General has relied upon the decisions of the Honble Supreme Court in Ramnath International Construction Pvt. Ltd. Vs. Union of India reported at 2007

(2) SCC453 Delhi Development Authority Vs. R.S. Sharma reported at 2008

(13) SCC80and Rashtriya Chemicals & Fertilizers Ltd. Vs. Chowgule Brothers reported at 2010

(8) SCC563and submitted that the aforesaid decisions have clearly recognized that any award passed disregarding prohibition clauses in a contract is liable to be set aside. It is argued that the arbitrator has completely misdirected his mind in allowing the claim for repair and rectification in full. The arbitrator has completely ignored that there is a clear bar to pay the same in Clause 7 of the Special Terms and Conditions and Clause 14 of the WBF No.2911(ii) as the contractor is bound to keep the road in good condition. Clause 7 of the Special Terms and Conditions of the contract executed by and between the parties specifically states that the contractor is liable to maintain the subject road and to mend good potholes/ depressions and to keep the road traffic worthy from the date of work order till completion for which no additional claim shall be made. Clause 17 of the Conditions of Contract (WB Form No.2911(II) inter alia specifies that if any damage happens to the work while in progress due to any cause or any imperfection becoming apparent in it, within 6 months after a certificate of its completion have been given by the Engineer in Charge, the contractor shall make the same good at his expense or in default the Engineering in Charge may cause

the same to be done by other workmen and deduct the expense relating to the same from any sum that may be then or may at any time thereafter become due to the contractor. In this regard the learned Advocate General has referred to the Clauses 5, 7, 8(iii),13, 14, 16 29, 40 and 43 of the Conditions of Contract and Special Terms and Conditions (WB Form No.2911 (II)). The said clauses are reproduced below:Clause

5. - The contractor shall be responsible for satisfactory maintenance of the road at appropriate service level to the satisfaction of the Engineer-in-Charge for a period of 3 years from the date of completion of the work. A retention towards security amounting to 10 percent of the billed amount shall be made by Executive Engineer so as to reach a total security deposit equal to 10 percent of the total value of the work executed. The security deposit relating to the work shall be refunded after the expiry of satisfactory maintenance period of 3 years. Clause

7. No payment shall be made for works estimated to cost less than rupees one thousand, till after the whole of the works shall have been completed and a certificate of completion given. But in the case of works estimated to cost more than rupees one thousand, the contractor shall on submitting the bill therefor be entitled to receive a monthly payment proportionate to the part thereof then approved and passed by the Engineer-in-charge, whose certificate of such approval and passing of the sum so payable shall be final and conclusive against the contractor. But all such intermediate payments shall be regarded as payments by way of advance against the final payment only and not as payments for work actually done and complete, and shall not preclude the requiring of bad, unsound, and imperfect or unskillful work to be removed and taken away and reconstructed, or re-erected or be considered an admission of the performance of the contract, or any part thereof, in any respect, or the accruing of any claim, nor shall it conclude, determine or affect in any way the powers of the Engineer-in-charge under these conditions or any of them as to the final settlement and adjustment of the accounts or otherwise or in any other way vary or affect the contract. The final bill shall be submitted by the contractor within one month of the date fixed for completion of the work, otherwise the Engineer-in-charges certificate of the measurement and of the total amount payable for the work accordingly shall be final and binding on all

parties. Clause 8(iii) - The Contractor shall have to arrange land for installation of Hot Mix Plant and allied machineries etc. at his own cost and risk. Clause

13. Extension of Time: - For cogent reasons over which the Contractor had no control and which retarded the progress, extension of time for the period lost will be granted on receipt of application from the Contractor before the expiry date of contract. No claim whatsoever for idle labour, additional establishments, cost of hire and labour charges of tools and plants etc. would be entertained under any circumstances. The contractor should consider the above factor while quoting his rate. Application for such extension of time should be submitted by the Contractor in the manner indicated in Clause 5 of the printed Form of W.B.F. 2911(ii). Clause

14. If it shall appear to the Engineer-in-charge or his subordinate in charge of the work, that any work has been executed with unsound, imperfect, or unskillful workmanship or with materials of any inferior description, or that any materials or article provided by him for the execution of the work are unsound or of a quality of articles inferior to that contracted for, or otherwise not in accordance with contract, the contractor shall on demand in writing from the Engineer-in-charge specifying the work, materials or articles complained of notwithstanding that the same may have been in advertently passed, certified and paid for, forthwith rectify, or remove and re-construct the work so specified and provide other proper and suitable materials or articles at his own proper charge and cost; and in the event of his failing to do so within a period to be specified by the Engineer-incharge in his demand aforesaid, than the contractor shall be liable to pay compensation at the rate of one per cent on the amount of the estimate for every day not exceeding ten days, while his failure to do so shall continue and in the case of any such failure the Engineer-in-charge may rectify or remove and re-execute the work or remove and replace with others, the materials or articles complained of as the case may be at the risk and expense in all respects of the contractor. Clause

16. The agency will be liable to maintain road at the appropriate service level to the satisfaction of the Engineer-in-Charge at his own cost for a period of 3 years from the date of completion of the project. The agency will have to quote his rate considering the above aspect. Clause

17. If the contractor, or his workmen or servants shall break, deface, injure or destroy any part of a building, in which they may be working or any building, road, road curbs, fence enclosure, water pipes, cables, drains electric or telephone posts or wires, trees, grass or grass land or cultivated ground contiguous to the premises on which the work or any part of it is being executed, or if any damage shall happen to the work while in progress, from any cause whatever or any imperfections become apparent in it within three months (six months in the case of a road work) after a certificate final or otherwise of its completion shall have been given by the Engineer-in-charge as aforesaid, the contractor shall make the same good at his expense or in default the Engineer-in-charge may cause the same be made good by other workmen and deduct the expense (of which the certificate of the Engineer-in-charge shall be final) from any sums that may be then, or at any time thereafter become due to contractor or from his security deposit, or the proceeds of sale thereof or of a sufficient portion thereof. The security deposit of the contractor made in the manner provided in Clause 1 hereof shall be refundable on the expiry of 3 months (6 months in the case of a road work) after the issue of the certificate, final or otherwise of the completion of the work subject to the condition that no such refund or security deposit shall be allowed till the final bill has been prepared and passed. Provided however, that in the case of road work if in the opinion of the Engineer-in-charge half of the security deposit is sufficient to meet all the liabilities of the contractor under this contract, half of the security deposit will be refundable after three months of the issue of the said certificate of completion, provided further that in the case of any work (whether Road, Building, Bridge, Electrical Sanitary & Plumbing etc.) where the Engineer-in-charge is satisfied that the contractor after completion of the major portion of the contract is unable to execute remaining part of the work for reasons beyond his control, the Engineer-in-charge in his discretion may make a proportionate refund of the security deposit to the contractor. The contractor shall be responsible for rectifying defects in asphaltic work noticed within a year from the date of completion of the work and the portion of the security deposit relating to asphaltic work shall be refunded after the expiry of this period.

. Clause 29. Idle Labour: - No claim whatsoever for idle labour, additional establishment cost of hire and labour charges of Tools & Plants etc. would be

entertained under any circumstances. Clause 40. Working space stringency of land - In view of stringency of available land, working space is very limited. Planning for the work is to be made accordingly. Before tendering for the work, the contractor should ascertain the feasibility of arranging locally open space for locating his labour camp, office godown etc. at his own cost. Construction, Improvement, Widening and Maintenance of all weather roads to the above lands shall be the responsibility of contractor at his own cost. No claim in this regard will be entertained by the Department under any circumstances. Clause 43. Escalation - Payment for Escalation on prices will not be paid.

. The learned Advocate General has submitted that the mere delay in payment and that too under circumstances where no bills were admittedly raised in terms of the contract conditions, cannot fasten liability on the petitioner for the breaches committed by the contractor. The claimant, in fact, never sought nor was granted extension of time. It was never agreed that payment and/or non-payment [particularly in circumstances where no bills have been raised by the respondent and the progress by the contractor has been less than satisfactory]. would be linked with the progress at site and, in any event, the claimant never treated the same as repudiation of the contract. It is well settled that mere breach of payment does not constitute repudiation. In any event, the claimant also did not treat non-payment as abandonment by the claimant of the contract or a refusal by the claimant to perform it. The claimant also did not treat that as a ground for recession of the contract or for suspending the work nor treated such purported non-payment by the petitioner as a repudiatory breach. From the correspondence and from the pleadings of the respondent it would appear that the respondent never treated such purported delayed payment as a fundamental or repudiatory breach of contract. If it had done so the respondent could have claimed that it had the right to rescind the contract and be absolved of its obligations to perform the contract. However, not having done so, it is not open to it to raise the issue of delayed payment as the ground or a justification for failing to perform its own obligations under the contract. This is more so in circumstances where the claimant itself did not raise bills but the petitioner on its part made payment on the basis of the estimation of its Engineer-In-Charge. The decision of the House of Lords in *Fercometal SARL V Mediterranean Shipping CO SA* reported at 1988 (2)

All ER Page 742 was referred to demolish the award allowing price escalation and other claims during the extended period. The learned Advocate General has distinguished the judgment of the Honble Supreme Court in Union of India Vs. Saraswat Trading Agency reported at (2009) 16 SCC504 and submitted that the most important feature of Saraswat Trading Agency (supra) is that the fact would reveal that the contract was terminated in terms of the contractual provisions. The Railways had accepted such termination with effect from December 31, 1992. Upon termination, the terms of the original contract ceased to operate between the parties. The facts further revealed that it was only in order to avoid dislocation the Railway Authorities had requested the respondent and the respondent had accordingly carried on the work despite there being, admittedly, no subsisting contract between the parties. Such continuation was under protest on an assurance that its claim in the subsequent periods would receive due consideration. It is in this factual background that the Honble Supreme Court has held that the express bar in the contract to award of interest and damages would be applicable but only during the period that the contract was subsisting. Paragraphs 33 and 34 of the report make the aforesaid position clear: 33. In the case in hand Clause 31 of the agreement is materially different. It bars payment of any interest or damage to the contractor for any reason whatsoever. We are, therefore, clearly of the view that no pre-reference or pendent lite interest was payable to the respondent on the amount under Item 3 and the arbitrators award allowing pre-reference and pendent lite interest on that amount was plainly in breach of the express terms of the agreement. The order of the High Court insofar as pre-reference and pendent lite interest on the amount under Item 3 is concerned is, therefore, unsustainable.

34. The position with regard to the claim under Item 4 is quite different. That relates to the period after the termination of the agreement and hence, the bar of Clause 31 would not apply to it in the same way as it would apply to Item 3. We, therefore, find no infirmity in grant of pre-reference and pendent lie interest on the amount under Item 4.

. In the instant case, the contract not having been terminated the aforesaid distinction would not apply and the express prohibitions in the contract to making

an award under the aforesaid heads of claim would operate unabated during the entire period that the claimant continued to work. Saraswat Trading Agency (supra) has been referred to in later judgments of the Honble Supreme Court where the Honble Supreme Court, in considering cases where the contract had not been terminated but had been allowed to run their course and/or extended until completion of the work has relied on only paragraph 33 of Saraswat Trading Agency (supra) and held that in view of the express agreement between the parties the arbitrator cannot award a particular item of claim which stands prohibited. In all subsequent judgments of the Honble Supreme Court no distinction has been made between the original period of contract and the extended period during which the contractor worked. In view of the fact that the contract not having been terminated, the terms and conditions continued to be subsisting and binding on the parties. In this regard reliance is placed on the following judgments: (i) Sayeed Ahmed And Company Vs. State of Uttar Pradesh reported in (2009) 12 SCC26 (ii) Union of India Vs. Krafters Engineering & Leasing Pvt. Ltd. reported in (2011) 7 SCC279 (iii) Tehri Hydro Development Corpn Ltd. Vs. Jai Prakash Associated Ltd. reported in (2012) 12 SCC10 It is submitted that in view of express terms of the contract, the claimant cannot claim and the arbitrator could not have awarded compensation on the basis of principle of Quantum Meruit. The arbitrator is not empowered to rewrite the terms of the contract and make an award contrary to the express terms of the contract in respect of the agreed rate on various items or in the face of prohibition in the contract in view of the law laid down by the Honble Supreme Court in Satyanarayana Construction Co. Vs. Union of India reported at (2011) 15 SCC101 It is submitted that in the instant case, the contract not having been terminated, the express provision in the contract would operate unabated during the entire period that the claimant continued to work. The mere fact that there was an extension of time cannot entitle the respondent to escalation in the absence of a clause enabling grant of escalation or in the face of a clause prohibiting escalation. In this regard reference was made to the decision of the Honble Supreme Court in Ramachandra Reddy & Co. Vs. State of A.P. & Ors. reported at 2001 (4) SCC241 It is submitted that the award is based on inferences and presumptions rather than on evidence. A fairly recent decision of the Honble Supreme Court in Associate

Builders Vs. Delhi Development Authority reported at 2015 (3) SCC49 that has considered the law extensively was cited in support of the submissions that if the award is patently illegal and in breach of fundamental policy of Indian law the award is liable to be set aside. According to the learned Advocate General the very fact that the award is unreasoned, contrary to the express terms of the contract, irrational and based on no evidence in view of the latest pronouncement of law in Associate Builders (supra) the award is liable to be set aside. The learned Advocate General has relied upon Paragraphs 27 to 34 and 40 to 45 of the report in support of his argument. Per contra, Mr. Tilak Kumar Bose, the learned Senior Counsel appearing with Mr. Suman Dutta, Senior Advocate submits that the award is a detailed award which runs to 54 pages. The Arbitrator has recorded reasons against each of the issues, that is, for the claims which have been denied as well as the claims which have been allowed. Although each of the issues had been specifically addressed by the Arbitrator, the main finding of the Arbitrator is with regard to issue No.3 and this regard, the learned Senior Counsel has referred to the following observation of the Arbitrator in the award which reads: It is true that the discussion of the case of the respective parties as made above by me does not strictly come within the purview of issue no.3. Since I am discussing other points as mentioned above in this issue, this issue to be deemed to covering those other points also.

. The aforesaid observation was referred to counter the submission made on behalf of the petitioner that the arbitrator has not given any reasons for allowing the claims either in part or in full. It is submitted that the reason for allowing a part of the claim of the respondent has been adequately supported by reasons and it would be unfair to criticize the award by referring only to the conclusions. The award has to be read as a whole. It is submitted that the Arbitrator has come to a definite finding that there was breach of contract by the respondent. The breach of contract by the respondent was occasioned by reason of failure to make payments within time. The prohibitions in the contractual document were wholly inapplicable and did not in any way restrict a claim for damages suffered by reason of breach for period beyond 1st December, 2003. The learned Senior Counsel has referred to letters dated 19th December, 2003, 23rd December, 2003, 11th February, 2004, 14th February, 2004 and 5th March, 2004 and submitted that in order to show that

at the request of the petitioner, the respondent commenced work beyond the original contractual period and as such it cannot be said that the respondent had agreed to the original terms of the contract and has waived its right to claim price escalation and other charges, costs incurred during the extended period of time. It is submitted that the aforesaid letters would show that at the request of the petitioner the respondent commenced the balance work. The petitioner also had issued work instructions regarding testing of materials and preparation of mix design. The letter dated 5th March, 2004 would show that the claimant informed the respondent that the rectification of WBM surface involves Rs.2.57 lakhs. The learned Senior Counsel has specifically referred to the letter dated 23rd December, 2003 in which the respondent has clearly stated that in the event the respondent could receive the balance payment of the pending bills, the work could be completed in all respect within a month and the time may be extended up to March, 2004. The petitioner wanted an assurance for release of the fund. It was categorically mentioned in the said letter that the department has already breached the contract so the consequences are to be endured by the Department. This submission was made principally to counter the submission made on behalf of the petitioner that the ingredients of Section 55 of the Contract Act have not been fulfilled. It is submitted that the arbitrator in the award and in the various minutes had considered authoritative books like Hudson on Building Contracts in deciding the claim on account of loss of business. The learned Senior Counsel has referred to the following decisions of the Supreme Court and submitted that in the aforesaid decisions, the Honble Supreme Court approved awards based on Hudson formula and loss of profit of 10% was held to be reasonable: i) Dwaraka Das Vs. State of M.P. & Anr. reported at 1999 (3) SCC500 ii) Associate Builders Vs. Delhi Development Authority reported at 2015 (3) SCC49 iii) Centrotrade Minerals & Matetals Inc. Vs. Hindustan Copper Ltd. reported at 2006 (11) SCC181 iv) M/s. A.T. Brij Paul & Bros. Vs. State of Gujarat reported at AIR 1984 SC1703 It is further argued that it is now a well-settled principle of law that if there is breach, loss of profit on account of damages is a necessary consequence and in this regard the following decisions are referred:- i) M/s. A.T. Brij Paul & Bros. Vs. State of Gujarat reported at AIR 1984 SC1703 ii) Deo Kumar Saraf Vs. Union of India reported at 1988 1988 (2) CLJ325 iii) Centrotrade Minerals & Matetals Inc.

Vs. Hindustan Copper Ltd. reported at 2006 (11) SCC181 iv) Dwaraka Das Vs. State of M.P. & Anr. reported at 1999 (3) SCC500 On allowing the claim on account of cost of repair and rectification, it is submitted that the main reason why bituminous work was delayed was by reason of delay in payment of the 3rd R.A. Bill. This delay in making payment has been regarded as a breach by the learned Arbitrator. The learned Senior Counsel has referred to the letters dated 11th September, 2003, 23rd December, 2003, 5th March, 2004, and 5th November, 2004 and submits that these letters would clearly show that on the request of the claimant the said work was done although the petitioner was not required and obliged to do the same. On the aspect of the loss of damages, it is submitted that the learned Arbitrator has come to a finding that only 44 days such damages are to be calculated. The learned Arbitrator has given reason why 44 days have only been taken into account. These 44 days are all beyond the initial contractual period. This claim essentially arose for maintaining the hot mix plant beyond a particular date. The learned Arbitrator found that it was maintained for about 67 days beyond 1st December, 2003, but chose to award damages only in respect of 44 days. Having regard to the said phase of work the learned Arbitrator did not award damages for 1/3rd part of 67 days and awarded damages only for 44 days. The prohibitions mentioned in the clauses of the contract had no manner of application for work which was done beyond 1st December, 2003. The aforesaid finding of the Arbitrator is a view which is also recognized by the Apex Court. It is submitted that if there is breach, damages would follow and in this regard following decisions are referred: i) K.N. Sathyapalan Vs. State of Kerala & Anr. reported at 2007 (13) SCC43; ii) Dwaraka Das Vs. State of M.P. & Anr. reported at 1999 (3) SCC500 iii) Centrotrade Minerals & Matetals Inc. Vs. Hindustan Copper Ltd. reported at 2006 (11) SCC181 iv) M/s. A.T. Brij Paul & Bros. Vs. State of Gujarat reported at AIR 1984 SC1703 It is submitted that the learned Arbitrator has come to a finding that the prohibitions in the clause do not apply since the claim on account of price escalation is beyond December, 2003. The formula on the basis of which escalation has been awarded is mentioned in the award and is based on the RBI index. There is reference of RBI index in the 26th sitting. The learned Senior Counsel has also referred to the letters dated 11th September, 2003 and the demand letter dated 5th November, 2004. The learned Senior Counsel has

referred to the following decisions for the proposition that prohibitions in a contract do not apply in the event of breach:- i) K.N. Sathyapalan Vs. State of Kerala & Anr. reported at 2007 (13) SCC43ii) Unreported judgment of Division Bench in State of West Bengal Vs. S.N. Bhagat (MANU/WB/0894/2012) It is argued that the prohibitory clauses argued on behalf of the appellant have no manner of application once breach is established. (K.N. Sathyapalan Vs. State of Kerala & Anr. reported at 2007 (13) SCC43 It is argued that identical prohibitory clauses were considered by the Division Bench of the Calcutta High Court in State of West Bengal (supra) and argument of the State of West Bengal was rejected. It is submitted that the view of the learned Arbitrator regarding non-applicability of the prohibitory clauses is a possible interpretation which has also been recognized by the Division Bench of the Honble High Court at Calcutta. Once it is established that it is a possible interpretation, the Court usually does not interfere with the decision of the Arbitrator. With regard to the claim on account of interest it is submitted that the legitimate claim of a contractor has been denied since 2004 even for work done claims were not released and security was withheld. The claimant is entitled to compensation for denial of the money which it ought to have received. compensation is awarded in the form of interest. This The learned Arbitrator has awarded interest @12% p.a. only from April, 2004 in respect of the various claims but has awarded interest on the security deposit amount only from April, 2007 and that too @ 12% p.a. It is only for post awarded interest that the rate has been enhanced to 18% p.a. The learned Senior Counsel supports the award of costs of Rs.5 lacks on the score that 121 sittings before the learned Arbitrator and 13 more sittings before the erstwhile Arbitrator. It is submitted that the petitioner initially did not challenge the jurisdiction of the arbitrator and only at the 98th Sitting a challenge was thrown to the jurisdiction of the arbitrator on the ground that he has not been properly appointed. The petitioner has unduly delayed the proceeding and in view thereof the arbitrator was justified in awarding a nominal cost of Rs.5 lakhs as against a claim made by claimant over Rs.11 lakhs. The respondent has also filed a chart before the arbitrator in justification of such claim. It is submitted that the argument based on Section 55 of the Contract Act was never argued before the Arbitrator. This ground has not been taken in the application under Section 34 of the Arbitration and Conciliation Act, 1996. The

award speaks for itself and it does not appear that such a ground was indeed taken before the learned Arbitrator. On the other hand, it was the specific case of the State of West Bengal before the learned Arbitrator which was recorded in 98th Sitting held on 22nd July, 2009 that after the expiry of the contract the clauses of the contract are otiose. The learned Senior Counsel has referred to the submission made by the petitioner recorded in the 98th Sitting which reads: Neither any application has been made before expiry of the contract nor the respondent extended the time in terms of the provisions of the contract. Therefore, as I have already submitted that after stipulated date of expiry of the contract, i.e. 1st December, 2003 clauses of the contract became otiose and enforceable against either of the parties to the contract.

. That apart, notice of loss had been given by the claimant by the letter dated 22nd December, 2003. It is the respondent who had requested the claimant to commence work after 1st December, 2003. The learned Counsel has referred to the letters dated 19th December, 2003, 11th February, 2004 and 5th March, 2004. The non-applicability of Section 55 of the Contract Act would further be apparent from the judgment of the Apex Court in McDermott International (supra) where it was clearly held that in cases of this nature, it is the second proviso of section 55 of the Contract Act which applies, namely, that if there is a breach damages must follow. In any event, any argument on the basis of Section 55 of the Contract Act cannot be raised at this stage. The same not having been raised before the Arbitral Tribunal and not being one of the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996. In this regard reference was made to a Division Bench Judgment State of State of West Bengal Vs. Usha Ranjan Sarkar reported at 2013 (3) CHN512 The learned Senior Counsel submits that it is well-settled that if the arbitrator has come to a finding that the respondent had been in breach of contract on the basis of documents on record and after construction of various clauses in the contract, the Court would not interfere with such finding of the arbitrator. It is also not open for the Court to appreciate and re-appreciate such evidence as long as there was some evidence before the arbitrator. The construction of any prohibition clause in contract and the applicability of such clause is again a moot question of law and fact before the arbitrator to decide and it is in the exclusive domain of the arbitrator if the arbitrator has come to a definite

finding on the applicability of such prohibitory clauses. It is submitted that the Court should not interfere with such finding as long as it was a reasonable view which the arbitrator could have taken. The Court also should not criticize the award of the arbitrator in minute detail and act as a Court of Appeal. The award now needs to be examined keeping in mind the arguments advanced on behalf of the parties. The award in favour of the claimant essentially sounds in damages. The prolongation of the contract beyond the contractual period forms the basis of the claim in the arbitration proceeding. The first and foremost issue is the relevance and applicability of the prohibition clause beyond the original contractual period. If the first issue is answered in the affirmative in favour of the claimant then the claimant would be entitled to other claims subject to some evidence being on record to sustain such claim. The arbitrator on construction of the various clauses of the contract and on consideration of the materials on record has arrived at a definite finding that the prohibition clause in the contract would not apply for the work done during the extended period. In deciding the claim on account of loss of business due to irregularity of payment/cash flow from the department, the Arbitrator separated the claims into two parts, namely those arising out of alleged breach of contractual obligation by the petitioner within the contractual period and those arising after the expiry of the contractual period. The arbitrator observed that the contract was a time bound contract for the term of one year starting from 2nd December, 2002 to December 1, 2003. Under Clause 2 of the contract 1/4th of the whole of the work was to be done before 1/4th of the whole time allowed under the contract has elapsed; of the work, before of such time has elapsed; and of the works before 3/4th of such time has elapsed and the whole work within the remaining time. In case of the failure of the contractor to complete the work as stated, he shall be liable to pay compensation of an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said tendered cost of the whole work as shown in the tender for every day that the work remains uncommenced or unfinished after the proper date, provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed 10% on the tendered amount of the work as shown in the tender. The proportionate work in terms of Clause 2 of the conditions of contract could not be done by the contractor firm in terms of

clause 2 in view of failure to make monthly or intermediate payment by the respondent in proper time and for that reason it was not possible for him to work in accordance with the contract, i.e., proportionate work in proportionate time. The Arbitrator relied upon the list produced by the petitioner showing the position of the successive payments made by it to the contractor. It would appear from the same that the first RA bill was prepared on 24th March, 2003 i.e. exactly four months 23 days after the grant of contract on 1st December, 2002. The estimated value of the work done by the contractor was Rs.12,48,738/during this time. Out of this amount only Rs.1 lakh was paid to him on 31st March, 2003 and the remaining Rs.9,98,899/- (deducting income tax) was paid on 23rd May, 2003. Similarly, in the second RA bill of the next six months i.e. April, 2003 to December, 2003 which was prepared on 29th September, 2003, it would appear that out of the total estimated value of work of Rs.31,65,942/performed by the contractor only Rs.1,00,000/- was paid on 1st October, 2003 and the remaining Rs.17,86,031/- was paid after four months on 12th February, 2004. The third RA bill for the work from October, 2003 to December, 2003 was prepared on 16th February, 2004 wherein the actual value of the work was estimated at Rs.20,97,704 and that was paid on 17th February, 2004. The other two bills i.e. 4th and 5th RA were prepared on 29th March, 2004 and 4th October, 2004 respectively after the expiry of the contractual period. The 4th RA bill from January 2004 to March, 2004 of Rs.34,16,514/- was paid in three instalments, namely on 29th March, 2004, 22nd July, 2004 and 13th August, 2004. The last payment of 5th RA bill was prepared on 4th October, 2004, on the estimated value of the work at Rs.8,83,833/-. In the 5th RA bill the payment was made in two instalments of Rs.7,30,000/- on 12th October, 2004 and Rs.18,782/- on 18th November, 2004. In examining whether the aforesaid payments were made in terms of the relevant clauses of the contract, the Arbitrator has referred to Clauses 7, 8 and 9 of the contract form. Clause 7 speaks of payment on intermediate certificates to be regarded as advances. The Arbitrator held under this clause in case of works estimated to cost more than one thousand, the contractor shall on submitting the bill therefore be entitled to receive a monthly payment proportionate to the part thereof has approved and passed by the Engineer-in-Charge, whose certificate of such approval and passing of the sum so payable shall be final and conclusive against

the contractor and treated as intermediate payments as advance payments against the final payment only and not as payments for work actually done and complete. It was held that it is not a case of payment on intermediate certificate to be regarded as advances. The Arbitrator accepted the contention of the claimant that the petitioner has committed breach of contract by withholding monthly payments in terms of Clause 8 of the contract. Under this clause a bill shall be submitted by the contractor each month on or before the date fixed by the Engineer-in-charge for all works executed in the previous month, and the Engineer-in-Charge shall take or cause to be taken the requisite measurement for the purpose of having the same verified, and the claim as far as admissible adjusted, if possible, before the expiry of ten days from the presentation of the bill. If the contractor does not submit the bill as aforesaid the Engineer-in-Charge may depute a subordinate to measure up the said work in presence of the contractor, whose countersignature to the measurement list will be sufficient warrant, and the Engineer-in-Charge may prepare a bill from such list which shall be binding on the contractor in all respects. Under this clause the Engineer-in-Charge is firstly to fix a date for submission of bill for all the work executed in the previous month by the contractor and, secondly, to get the submitted measurement verified and, thirdly, to adjust the admissible claim before the expiry of ten days from the presentation of the bill. His duty under this clause does not end there. If the contractor does not submit any bill within the aforesaid time, which is the case here, the onus of preparation of the bill shifts upon the Engineer-in-Charge who will prepare the bill himself upon the measurement list prepared by the subordinate on his deputation by him and countersigned by the contractor. Payment of bill on the basis of monthly performance of work, no matter whether the contractor presented such bill or not, being prescribed under this clause, the respondent clearly committed breach of contract by non-payment of monthly bills in this case. There may be some reasonable delay in preparation of such bills where the bill is not submitted by the contractor but here in this case no such payment in proportion to the monthly work of the contractor was even made. Clause 9 prescribes that bills must be made on printed forms. The clause has no application as no bill was even submitted by the contractor. The argument of the petitioner that since no bill was prepared by contractor he has no right to claim any monthly payment did not find

favour with the arbitrator as the arbitrator was of the view that the entitlement to receive monthly payment under Clause 8 is not lost even if no such bill is submitted as the onus is then shifted upon Engineer-in-Charge for preparation of the bill, who, on compliance of necessary formalities shall make monthly payments in proportion to the work performed by the contractor during the period. On interpretation of Clauses 7, 8 and 9 the Arbitrator held that there is no breach on the part of the claimant. The Arbitrator has also taken into consideration that if there has been failure on the part of the claimant to complete the work within the stipulated time, the petitioner under Clause 2 of the contract would be entitled to impose fine for the alleged failure to perform proportionate work in proportionate time but significantly enough no fine was ever levied from the claimant and no action was taken under the said clause. This lends support to the contractor claimants case that no action was taken under clause 2 of the respondent because monthly payment, payable to the contractor, was never paid in due time. On the basis of the disclosures made the arbitrator came to a finding that the petitioner was never diligent in making quarterly payments let alone monthly payments even though the claimant contractor repeatedly drew the attention of the respondent in that matter. The arbitrator found that there was inordinate delay in making payment as it appears from the list of payments as per successive RA Bills as disclosed by the petitioner. In arriving at the said conclusion and awarding compensation for loss of business caused due to irregular payment the Arbitrator has relied upon the correspondence exchanged by and between the parties. The Arbitrator in consideration of the correspondence exchanged between the parties came to the conclusion that there was hardly any laches on the part of the claimant during execution of the work. The arbitrator has taken into consideration the letters dated 2nd May, 2003, 11th September, 2003, 1st December, 2003, 23rd December, 2003 5th March, 2004 and 5th November, 2004 issued by the claimant and the letters dated 27th June, 2003, 10th July, 2003, 23rd July, 2003, 23rd December, 2003, 10th February, 2004, 10th November, 2004, 25th November, 2004 issued on behalf of the petitioner and found that the allegations of the petitioner that the claimant has delayed the execution of the work and failed to set up the hot mix plant were unmeritorious. The arbitrator on consideration of the said letters held that due to delayed payment and non-payment in terms of

Clause 8 of the Contract, there has been some delay in execution of the contract and the claimant is no way responsible for the said delay. The insistence of the petitioner to do the proportionate work without, however, making any arrangement for reimbursement of the cost of the work within reasonable time was found to be unreasonable and held against the petitioner. In none of the letters petitioners excepting the letter dated 25th November, 2004 of the Executive Engineer, there was any whisper that the claimant has failed to perform its duty and obligation stipulated in the contract. The petitioner also did not take any action under Clause 2 of the contract form even though in series of the letters the petitioner complaints of tardy progress of the work. The Arbitrator concluded that the reason for taking no action under Clause 2 can lead to only conclusion that the department was well aware that it had itself violated the contract by not making proportionate payment for proportionate work in due time in accordance with the terms of the contract by making payment long after the same was due under the contract and has contributed to the delay in completion of work. Funds being thus not available in due time it was quite natural that there was delay in execution of the work for which the contractor cannot be held responsible. The materials disclosed before the Arbitrator further established that from the inception the claimant did not receive payment of the contract as a result whereof he had to borrow money from the bank at a high rate of interest in order to complete the work. The first payment of Rs.1,00,000/- was received on 31st March, 2003 and Rs.9,98,999/- on 23rd May, 2003 out of total estimated cost of work of Rs.12,48,703. Similarly, work worth about 50 lakh was done from March to September but that amount was also not paid in time. The provision for monthly payment under Clause 8 was, therefore, totally ignored by the department. There was no cogent evidence before the Arbitrator which would show that the irregular payment and/or non-payment as alleged by the claimant were untrue. There was virtually no denial of such assertion by the claimant with regard to the delayed release of fund. The petitioner without discharging its obligation under the Contract with regard to the release of payment by its letter dated 27th June, 2003 and by other subsequent letters insisted for installation of a hot mix plant. The claimant in his letter informed that the hot mix plant should not be set up in rainy season but it would be installed in due course. Since the contract was a time bound contract and failure to complete

work would visit the claimant with the pain of penalty under Clause 2 of the Contract, the claimant wanted to complete the work even before the onset of the monsoon and all that they demanded was timely release of payments. Ultimately, the claimant had to set up the hot mix plant in September, 2003, as it would appear from the letters but unfortunately the plant had to remain idle for certain period of time as the road was not completely ready for starting bituminous work immediately due to the deterioration of WBM surface in the meantime due to lack of maintenance on account of paucity of funds. The claimant has alleged that it had to incur huge expenditure for installation of hot mix plant and its daily maintenance required considerable expenses. It is not denied that the hot mix plant had to remain idle for a considerable period of time for no fault on the part of the claimant. The petitioner appears to have not denied that the said plant had to remain idle for no fault on the part of the claimant. It was on such conspectus of facts and evidence, the Arbitrator assessed the loss of business at 10% of the balance work done beyond the contractual period. The value of the work executed by the contractor upto contractual period was Rs.65,12,394/-. The contractor claimed 10% of the remaining amount of Rs.42,45,342/- as compensation towards loss of business, which the arbitrator found reasonable and accordingly, awarded a sum of Rs.4,24,354/- on account of loss of business/irregular payment from the department. In respect of this claim for repair and rectification of the executed WBM work the petitioner has alleged that there is a clear bar to pay the same in Clause 7 of the Special Terms and Conditions and Clause 14 of the WBF No.2911 (ii) as the contractor is bound to keep the road in good condition. The arbitrator was of the view that these clauses cannot have any application because the repair work had to be done after the expiry of the contractual period. The arbitrator relied on the letter of the claimant dated 5th March, 2004 and held that it would clear from the letter that had the bituminous work been done immediately after preparation of the same the deterioration of WBM work could not have occurred. Accordingly, the third R.A. Bill having been paid on 16th February, 2004, long after it was due to be paid, the bituminous work which was to be done immediately after WBM work could not be done for which deterioration occurred and the claimant had to incur cost of repair for no fault of its own. On that basis, the arbitrator returned a finding in favour of the claimant for reimbursement of the cost charges,

expenses incurred for repair and rectification work on executed WBM work. The Arbitrator appears to have partly allowed the claim on the ground of loss due to idle charges being the broad head of the claim subdivided in four parts, namely, 5(a) hot mix plant and other machineries, 5(b): the crews of the plant and machinery, 5(c): Idle labour and 5(d): idle of site establishments. It appears from the analysis of claim that the claimant has divided the claims in two parts, namely, the first part from 1st October, 2003 to November, 2003 i.e. 33 days and the second part from 18th December, 2003 to 2nd February, 2004 i.e. 67 days totaling 100 days. In so far as the claim from 1st October, 2003 to 2nd November, 2003 having 33 days, this period was within the contract period. The arbitrator has referred to Clause 29 of the Special Terms and Conditions which also forms a part of contract which reads as follows: - No claim whatsoever for idle labour, additional establishment cost of hire and labour charges tools and plants etc. would be entertained under any circumstances.. All claims of idle charges within this period accordingly has been rejected. In respect of the claim of idle charges from 18th December, 2003 to 2nd February, 2004 i.e. 67 days the arbitrator held that neither Clause 29 nor Clause 13 of the special terms and conditions would have in any manner of application. The contractor worked during this period on the request of the employer would be entitled to compensation for the damages sustained by him under Sections 70 and 73 of the Contract Act as the tenure of original contract expired on 2nd December, 2003. The claimant contractor claims idle charges for 67 days after the contractual period i.e. from 18th December, 2003 to 22nd February, 2004. It appears from the analysis of the statement of the claimant that the work executed beyond the contractual period was worth about Rs.42,45,342/- which means that works worth about Rs.65,12,394/- was done within the contractual period of one year. Considering the volume of the work remaining unfinished after the expiry of the contractual period, according to the arbitrator, idle charges should not have occurred for at least about 1/3rd part of 67 days had not the contractor completed the work in hot haste. More than two months work was finished by the contractor within one month and few days. Loss on account of idle charge can be assessed on calculation of the reasonable time required for completion of the project work. On this basis, such loss on account of idle charges was held to be, could not be more than 44 days. Claimant thus was allowed idle

charges at the rate claimed by him in respect of claim no.5(a) and 5(b) for 44 days. The arbitrator accordingly awarded Rs.3608000/- and Rs.1,18,360/- for claims no.5(a) and 5(b) respectively. In considering claim no.5(c) it appears that the claimant claimed compensation for 193 days. Out of these 133 days was within contractual period, i.e. within 1st December, 2003. Such claims within the contractual period were not entertained because of the bar under clause 13 of special terms and conditions. Out of the remaining 60 days the Arbitrator already awarded the claim for idle period for 44 days and, accordingly, Rs.88,000/- was allowed on the rates given by the claimant. In considering claim no.5(d) idle charges on account of site establishment for 293 days, the arbitrator held that basis for such calculation of 293 days having not been shown, the arbitrator is not in a position to allow such claim for more than 44 days only, as done above, and that too for the first two items of the claims as the claims for other items under this head have already been considered in claim No.5(b). The claim was thus allowed to the extent of Rs.37,400/-. There were various changes which were brought about in the 1996 Act from the 1940 Act. The purpose of the new Act was to have speedy disposal through the forum of arbitration. To strive towards achieving the aim, the Act proceeds to give a sense of finality to the awards of the arbitral proceedings. The new Act is based mostly on the UNCITRAL model law. The object of the new Act was to make the law less technical than it has been hitherto. As compared to the 1940 Act, the 1996 Act restricts the court interference with the awards passed by the arbitrator. The major difference between the acts can be mapped through the reading of S.30 of the 1940 Act and S.34 of the 1996 Act, which covers the grounds on which an arbitral award could be set off. Arbitration and Conciliation Act, 1940 1996 Section 30: Grounds for setting aside Section 34: Application for setting award aside arbitral award Grounds: Grounds: (a) Misconduct. of an arbitrator or (a) If the party proves that: umpire (i) (b) Invalidity. of arbitration proceedings or by an order of court the arbitration incapacity (ii) is That arbitration is invalid under the law to which parties superseded. have been subjected or under (c) Award is improperly procured or is other-wise invalid. That party was under some the law being in time force (iii) That the beyond award the submission within not terms submission (Provided: scope or the passed to if of is the falling of the arbitration. decisions on matters not

submitted can be separated from those which are submitted then only the award based on the former may be set aside) (iv) Composition of the arbitral tribunal or procedure was not in accordance to the agreement of the parties unless it was in conflict with the provisions of the Part from which parties cannot derogate or failing such agreement, was not in accordance with this Part. (b) If the Court finds out: (i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) The award is in conflict with the public policy of India. Explanation: An award is in conflict of the public policy of the India if the award was induced or affected by fraud or corruption or was in violation of S.75 or S.81. The aforesaid Table lays down the grounds which were given in the respective Act with respect to setting aside of arbitral awards. It is important to understand how the grounds for setting aside an award under the 1996 Act are more restricted than the grounds given in the 1940 Act. The 1940 Act, has grounds like misconduct of arbitrator., invalidity of arbitral proceedings. and award other-wise invalid. were wide, sweeping and open ended which used to give an extensive power to the courts to set aside an award. These expressions were usually interpreted widely by the courts and the awards were most often set aside - especially on the basis of misconduct. inter alia apparent error of law in the award. Thus, the aim of arbitration which is to reduce the burden of the courts was not being achieved. Rather, due to the number of opportunities in the hand of the litigants to ask the court for intervention regarding the award - the burden was increasing on the courts. To make the arbitration proceedings effective and binding on the parties who choose for arbitral proceedings, it was imperative to structure a new Act to fill in the loopholes of the 1940 Act. The 1996 Act was thus brought into the picture which tried to fill in the gaps of the previous law of arbitration in the country. The need of an arbitral system favoring nation was to reduce the workload of the courts and give certainty and finality to the arbitration proceedings and the awards thereon. Thus, the 1996 Act under S.34 lays down restrictive grounds of interference of the courts with the arbitral awards. Section 34 introduces itself by saying that the grounds mentioned thereunder are the only grounds on which an arbitral award may be set aside. However, apart from the grounds mentioned under S.34, the Act also provides for other grounds as under S.13, S.16, S.75 and S.81 on the basis of which the award can be set aside.

Section 13 provides for challenge under S.34 on the ground of lack of independence or impartiality or lack of qualification of the arbitrator regarding the arbitration proceedings. Section 16 authorizes an arbitration tribunal to rule its own jurisdiction and pass an award. However, an aggrieved party can challenge it under S.34 to set aside the award. Section 75 and Section 81 are provided in the explanation of Section 34(2)(b)(ii) which explains the ambit of public policy. Under Section 75, the conciliation agreement and proceedings need to be confidential and if the same is breached, there lies a challenge to an award passed from such conciliation proceeding under Section 34. Under Section 81 if an award is based on the admission of evidence which are not to be considered on a conciliation proceeding, such an award can attract the challenge under S.34. Section 5 of the 1996 Act provides that notwithstanding anything contained in any other law for the time being enforce, in matters governed by Part 1, no judicial authority is to intervene, except where so provided in the said part. Section 34, read in conjunction with Section 5 makes it clear that an arbitral award that is governed by Part 1 of the 1996 Act, can only be set aside on grounds mentioned in Section 34(2) and (3) and not otherwise. None of the grounds contained in Sub-section 2(a) of Section 34 permit the Court to adjudicate the merits of the decision rendered by an arbitral award. The grounds given under S.34(2)(a) are crisp and precise and lay the law as it is without the inclusion of any open-ended expression which otherwise would have given the courts an opportunity to widen their scope of interference with the arbitral awards. The only open-ended expression which can be and has been of concern is the ground of public policy of India. It has been under many cases defined as an unruly horse thus giving the interpretation that it can never be defined or be a certain thing. However, for the purpose of achieving the aim of the new Act, the Act of 1996 - the legislature while drafting the Act limited the scope of public policy in its explanation restricted it to: a) Fraud b) Corruption c) S.75 or S.81 (confidentiality breach or admissibility of evidence) The scope of public policy was, however, widened after Supreme Court in its decision of Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003 (5) SCC705 (also referred to as : Saw Pipes Case.) interpreted it to include patent illegality. in its definition. The case mentioned that the term public policy can be construed and understood in a narrow or with a wider meaning and then went ahead to say that it

should not have a limited meaning - thus, included the term patent illegality. within the scope of public policy. Patent Illegality. as explained by the Saw Pipes Case meant any error of law on the face of award, however, it did mention that the error which would be taken into consideration should not be trivial in nature. Lord Mansfield in *Holman v. Johnson* stated that the principle of public policy is *ex dolo malo non oritur actio*. No Court of law will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The rule has been further illustrated by Russell by stating that grounds of public policy on which an award may be set aside include: (1) that its effect is to enforce an illegal contract; (2) that the arbitrator, for instance manifested obvious bias too late for an application for his removal to be effective before he made his award. In its decision in *Oil and Natural Gas Corpn. Ltd. (supra)*, the Supreme Court has elaborated the concept of public policy at great length. The concept was extended to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. It is stated: Therefore, in our view, the phrase public policy of India used in S.34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term public policy in *Renusagars case*, it is required to be held that the award could be set aside if it is patently illegal. Result would be award could be set aside if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) Justice or morality, or (d) In addition, if it is patently illegal. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void. The expression public policy. or opposed to public policy. is not defined either in the Arbitration and Conciliation Act, 1996 or in the Contract Act, 1872. The reason is that these expressions are incapable of

precise definition. The concept has to be taken to connote larger public interest on public good. Broadly speaking it would mean policy of law and, therefore, whatever tends to obstruct justice or violate a statute, whatever is against good morals is against public policy. Public policy means the principles and standards regarded by the legislature or by the Court as being of fundamental concern to the state and the whole of the society. The notion of public policy is not static. Ideas on what is good for the public or what is in public interest, keeps changing with time. The enforcement of an award is to be refused as being contrary to public policy if it is contrary to the fundamental policy of Indian law, countrys interests, and its sense of justice and morality. The case in which this point was raised did not involve any such violation, nor any other ground for setting aside could be proved. The words public policy. are not to be confined to the Explanation appended to the provision. That would be a very narrow construction of the provision.

. In *Centrotrade Minerals (supra)* the Supreme Court has interpreted public policy to include patent illegality and such patent illegality must go to the root of the matter. It should be unfair and unreasonable so as to shock the conscience of the Court. The pleadings of the parties and the materials on record are required to be considered to lay the Court if the award is against public good on public interest. The law laid down by the Supreme Court in *Saw Pipes (supra)* has led many other courts to interpret the law to include any error of law to be hit by S.34 including the subsequent decisions of the Honble Supreme Court, for instance, in the case of *Delhi Development Authority v. R.S. Sharma* (2008(13) SCC80) the Honble Supreme Court summarized the law thus: From the above decisions, the following principles emerge: (a) An Award, which is (i) Contrary to substantive provisions of law; or (ii) The provisions of the Arbitration and Conciliation Act, 1996; or (iii) Against the terms of the respective contract; or (iv) Patently illegal, or (v) Prejudicial to the rights of the parties, is open to interference by the Court under S.34(2) of the Act. (b) Award could be set aside if it is contrary to: (i) Fundamental policy of Indian Law; or (ii) The interest of India; or (iii) Justice or morality; (iv) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court; (v) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground

that it is patently illegal and opposed to the public policy of India.

. In ONGC Ltd. Vs. Garware Shipping Corporation Ltd. reported at 2007(13) SCC434 it was held that under Section 34 of the Act, an award can be set aside on the ground that it is erroneous in law. The Supreme Court in McDermott International (supra) has commented on the scope of the powers of the arbitrator to interpret terms of the contract, and the permissible interference by the courts on the assessment of the arbitrator. It was held: It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. The 1996 Act makes the provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrator, violation of natural justice, etc. The court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the courts jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

. The Court will not judge the reasonableness of a particular interpretation accorded by the arbitrator to the terms of the contract. Even an error in interpretation, unless patently illegal, will only amount to an error within the jurisdiction of the arbitrator. In Bharat Coking Coal Ltd. (supra) the Honble Supreme Court observed as follows:¹¹. There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the

contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside.

. In KV Mohd. Zakir v. Regional Sports Centre reported at AIR 2009 SC (Supp) 2517 it held that the courts should not interfere unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his/her jurisdiction. In P.R. Shah Shares & Stock Brothers v. M/s. B.H.H. Securities (P) Ltd. reported at 2012 (1) SCC594 it states that a court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-approaching the evidence. An award can be challenged only on the grounds mentioned in S.34(2) of the Act. In Steel Authority of India Ltd. v. Salzgitter Mannesmann; OMP No.736 of 2009, decided on 18th April, 2012 (Delhi HC) it refused to set aside the award in view of courts limited and restricted powers for judicial intervention as under S.34 of the Act. The court relied upon the judgment in P.R. Shah Shares (supra) and held that the court cannot sit in appeal over the award of the tribunal by re-assessing and re-evaluating the evidence. In a fairly recent decision of Associate Builders Vs. Delhi Development Authority reported at (2015) 3 SCC49 the Honble Supreme Court had the occasion to re-consider the grounds on which an award can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996. In dealing with the grounds on which an award can be challenged, the Honble Supreme Court has noticed the distinction between Section 34(2)(a) and Section 34(2)(b)(ii) and held that it is only when arbitral award is in conflict with Public Policy of India as per Section 34 (2)(b)(ii) that merits of an arbitral award are to be looked into under certain specified circumstances it includes if it is in conflict with Public Policy of India. The Honble Supreme Court has subdivided Public Policy of India in four separate and distinct sub-heads, namely: i) Fundamental Policy of Indian Law; ii) Interest of India; iii) Justice or Morality; and iv) Patent Illegality. Fundamental Policy of Indian Law was again subdivided in four heads, namely, i) Compliance with statutes and judicial precedents; ii) Need of judicial approach; iii)

Natural justice compliance; iv) Wednesbury reasonableness. Patent Illegality principle was subdivided in three heads, namely, i) Contravention of substantive law of India; ii) Contravention of Arbitration and Conciliation Act, 1996; iii) Contravention of the terms of the contract. The Honble Supreme Court in Associate Builders (supra) had taken into consideration the object and reason for introduction of the 1996 Act and observed that the said Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration and also to provide that the Tribunal gives reasons for an arbitral award; to ensure that the Tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process. The Fundamental Policy of Indian Law requires compliance with statutes meaning thereby that an award which is patently in violation of statutory provisions is in conflict with Public interest and would be regarded as being contrary to the Fundamental Policy of Indian Law. Furthermore, the binding effect of the judgment of a superior Court if disregarded would be equally violative of the Fundamental Policy of Indian Law. The arbitral tribunal being vested with the power to determine the rights and obligations of the parties is required to show fidelity to judicial approach meaning thereby that they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach demands that a decision should be fair, reasonable and objective and not actuated by any extraneous considerations. Equal important and indeed fundamental was that the arbitral tribunal is required to follow the principles of natural justice. Audi alteram partem principle is Fundamental to the Policy of Indian Law and is also contained in Sections 18 and 34(2)(ii) of the Arbitration and Conciliation Act. The juristic principle of wednesbury reasonableness also forms part of the Fundamental Policy of Indian Law and a decision which is perverse or so irrational that a reasonable person conversant with the facts would not have arrived at the same conclusion is part of the Fundamental Policy of Indian Law and on the ground of which an award can be challenged. It is settled law that where a finding is based on no evidence or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at or includes vital evidence in arriving at its decision. Such decision would necessarily be perverse and on those grounds, an award can be set aside. This later decision of the Honble Supreme Court has reaffirmed its faith in Saw Pipes

Ltd. (supra) with a word of caution that when a Court is applying the public policy test to an arbitration award, it does not act as a Court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, and then he is the last word on facts. An award can be said to be against justice or morality only when it shocks the conscience of the Court. The instance of it can be whether the Tribunal awards a sum without any acceptable reason or justification. The concept of Patent Illegality was considered by reference to the explanation under Section 34(2)(b)(ii) of the 1996 Act which states that an award is said to be in conflict with Public Policy of Indian Law if the making of the award is induced or affected by fraud or corruption. Patent Illegality would include a contravention of the substantive law of India or if an award is based in contravention of Arbitration and Conciliation Act, 1996 - for example, if an arbitrator failed to give any reason for an award in contravention of Section 31(3) of the 1996 Act and in all cases whether the Tribunal failed to decide in accordance with the terms of the contract which in effect would be really a contravention of Section 28(3) of the Arbitration and Conciliation Act. The Honble Supreme Court, however, entered a caveat by stating that an arbitral tribunal must decide in accordance with the terms of the contract but if an arbitrator construes a term of the contract in a reasonable manner, it would not mean that the award can be set aside on this ground. Construction of the terms of the contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person would do, of course, the arbitrator cannot wander outside the contract and deals with the matters not forming the subject matter or allotted to him as in that case he would commit jurisdictional error. The said judgment also recognized and reaffirmed the settled law that where a cause or matters in differences are referred to an arbitrator, whether lawyer or layman, he is constituted the sole and final judge of all questions of law and of fact obviously with the limited grounds of interference as alluded to

above. As observed by the Supreme Court in *Associate Builders* (supra), the 1996 Act was enacted to provide for an arbitral procedure, which is fair, efficient and capable of meeting the needs of arbitration, to provide that the Arbitral Tribunal gives reasons for an arbitral award, to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction and to minimize the supervisory role of Courts. The merits of an award might only be looked into under certain specified circumstances, when an award is found to be in conflict with the public policy of India, as held by the Supreme Court in *Associate Builders* (supra). An award might be set aside as patently illegal, provided the illegality goes to the root of the award. If the illegality is of a trivial nature it cannot be said that the award is against public policy. This proposition was reaffirmed by the Supreme Court in *Hindustan Zinc Ltd. Vs. Friends Coal Carbonization* reported at (2006) 4 SCC445. In *ONGC Vs. Saw Pipes Ltd* (supra) the Supreme Court held that an award could also be set aside, if it was so unfair and unreasonable, that it shocked the conscience of the Court. In *Associate Builders* (supra) the Supreme Court held that it must be clearly understood that when a Court is applying public policy test to an arbitral award, it does not act as a Court of appeal and consequently the errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to be accepted as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his arbitral award. Thus, an award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious then he is the last word on facts. Patent illegality may render an award to be in conflict with the public policy of India. Under the explanation to Section 34(2)(b) an award may be said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. In *Indu Engineering & Textiles Ltd. Vs. Delhi Development Authority* reported at (2001) 5 SCC691 the Supreme Court held that the Arbitrator being a Judge appointed by the parties, the award passed by him is not to be interfered with lightly. When the view taken by the arbitrator was a possible or a plausible one, on his analysis of evidence and interpretation of contractual and/or statutory provisions and did not suffer from any manifest error, it was not open to the Court to interfere with the award. Even though the judgment in

Indu Engineering & Textiles Ltd. (supra) was rendered in the context of an application under Section 30 of the Arbitration Act 1940, for setting aside of an award, the same principle would apply to an application for setting aside an award, under Section 34 of the 1996 Act. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* reported at (2012) 5 SCC306 the Supreme Court held that when a clause in a contract was capable of two interpretations and the view taken by the arbitrator was clearly a possible if not a plausible one, it was not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, Court could not interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator. In *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* reported at (2010) 11 SCC296 the Supreme Court held:

"3. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

There cannot be dispute that there has been prolongation of the work beyond original contractual stipulated period. The delay in releasing payment against RA Bills is more than evident. The numerous requests by the claimant for release of the fund in order to complete the project within the stipulated time are on record. It cannot be said that time was essence of the contract as the contract contains clauses for extension of time and payment of compensation which are indicative of the fact that the time was not the essence of the contract and, thus, damages for

delay are permissible in law. The question whether or not the time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract and the correspondence exchanged by and between the parties. The Arbitrator is the sole Judge and Authority to arrive at a finding on the basis of the construction of the clause and on scrutiny of the correspondence between the parties. In the assessment of damages, the Court must consider only strict legal obligations and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. In *McDermott* (supra), the Honble Supreme Court considered Sections 55 and 73 of the Indian Contract Act and observed: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.

. The arbitrator is a Judge chosen by the parties and his decision is final. It is well-settled that the Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law or the arbitrator exceeds the terms of the agreement or passes an award in absence of any evidence. An error apparent on the face of records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is plausible one, the Court will refrain itself from interfering. The said proposition can be found in *Bharat Coking Coal* (supra) and in *State of U.P. Vs. Allied Constructions* reported at (2003) 7 SCC396 and followed in subsequent decisions. In fact, *State of U.P.* (supra) has followed the earlier decisions of the Supreme Court in this regard. However, if it is found that the arbitrator has passed an award merely on a formula and without insisting on some

proof of actual damages the Court can interfere. There cannot be any dispute that for every breach, there should be a remedy. In case of a breach of contract, the contractor would be entitled to claim for damages for loss of profit which he expected to earn by undertaking the works contract. In the instant case, it not a case of recession of a contract but the overhead costs and expenses that the contractor had to bear due to prolongation of the work. The issue before the arbitrator was not that the contract has been illegally rescinded by the petitioner. The question essentially is the quantification of compensation, if any, payable to the contractor by reason of delay in performance of the contract. This aspect of the matter was considered in *General Manager, Northern Railway Vs. Sarvesh Chopra* reported at (2002) 4 SCC 45 in paragraph 15 which reads: 15. In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option, where time is of the essence. of an obligation. Chitty on Contracts (28th Edn., 1999 at p.1106, para 22-015) states: a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract (a breach going to the root of the contract) depriving the innocent party of the benefit of the contract (damages for loss of the whole transaction).. In this regard, it would also be fruitful to refer to the observation of Lord Ackner in *Fercometal SARL (supra)* with regard to the innocent party's option in such a situation. The observation made at page 747 of the said report which reads:- When one party wrongly refuses to perform obligations, this will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages or he may ignore or reject the attempt to determine the contract and affirm its continued existence. Cockburn CJ in *Frost v Knight* (1872) LR 7 Ex Ch III at 112-113, [1861-73]. All ER Rep 22 I at 223-224 put the matter thus: The law

with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour* (1853) 2 E & B 678 [1843-60]. All ER rep

12) and *The Danube and Black Sea Co. v. Xenox* (1863) 13 CBNS825 143 ER325 on the one hand, and *Avery v. Bowden* (1855) 5 E & B 714 119 ER647, *Reid v. Hoskins* (1856) 6 E & B 953 119 ER1119, and *Barwick v. Buba* (1857) 2 CBNS563 140 ER536 on the other, may be thus stated. The promise, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promise may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss. This passage was adopted by Cotton LJ in *Johnstone v Milling* (1886) 16 QBD460 at 470. In that case Lord Esher MR described the situation thus (at 467): a renunciation of a contract or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of a contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for purpose of bringing an action upon it for the damages sustained by him in consequences of such renunciation. The petitioner was put to notice of the

breach and thereafter on the request of the petitioner, the respondent commenced work. The respondent reserved its right to claim compensation. Moreover, it appears from the minutes of the proceeding that the petitioner has contended before the arbitrator that after 1st December, 2003, the clauses of the contract became otiose and unenforceable against either of the parties to the contract and in view thereof the argument at this stage that the arbitrator is bound by the prohibition clause in the original contract lose its significance. In any event, unless there is specific prohibition in the contract any claims for works done beyond the contractual period the original terms of the contract cannot be made applicable unless the parties have agreed to the contrary. It cannot be said that beyond the contractual period, the claimant had agreed to work gratuitously. However, in so far as the claim on account of repair and rectification, the arbitrator has completely misdirected its mind in allowing such claim which is expressly barred under Clause 16 as alluded to above. The damage is a compensation for the injury sustained that some of money to be given for reparation of damages suffered should be, as nearly as possible be the sum which will put to injured party in the same position as he would have been if he had not sustained the wrong for which he is getting the damages. (B.R. Herman & Mohatta v. Asiatic Steam Navigation Co. Ltd., AIR1941 Sind

146) Compensation claimed for the delay in the completion of the work in a contract will not be allowed in the absence of evidence to show that any loss was suffered by the claimant on account of delay. In succeeding a claim based on breach of contract, no notice is required to be issued. Where the work was completed beyond the stipulated date of completion on account of delay caused by the Department, consequential effects of delay have to be to the account of the Department. The arbitrator awarded the claim on account of loss of profitability due to the prolongation of the contract period. The profits as commonly understood in commercial parlance consist of a sum arrived at by adding up the receipts of a business and by deducting all the expenses and losses including depreciation and the like incurred in carrying on the business. When it is not possible to calculate accurately or in a reasonable manner, the actual amount of loss incurred or when the claimant has not been proved the loss suffered, he would be nonetheless entitled to recover nominal damages for the breach of

contract. The court has to assess damages as best as it could on the materials available and would not decline to assume that merely because the claimant could not adduce the best evidence. Even in a case where nominal damages are only to be awarded, the extent of the sum should be assumed with reference to the facts and circumstances involved. The general principle to be borne in mind that the injured may be put in the same position as the he would have been if he had not sustained the wrong. In *K.N. Sathyapalan Vs. State of Kerala & Anr.* reported at (2007) 13 SCC43 the Honble Supreme Court referring to its earlier decision in *P.M. Paul Vs. Union of India* reported at 1989 Supp (1) SCC368 held that ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. A Division Bench judgment of this Court in *State of West Bengal & Anr. Vs. M/s. N. Bhakat & Co. & Anr.* being A.P.O. No.241 of 2012 with A.P. No.435 of 2008 reported at MANU/WB/0894/2012, relying upon *P.M. Paul* (supra) considered escalation clauses which are: (I) No claim for idle labour will be entertained under any circumstances.

42. No escalation of rate within the period of execution of the work is admissible.. Clause -7. ..It should be clearly understood that no claim whatsoever shall be entertained by the Government on account of delay in supplying materials.. The Division Bench relying upon *P.M. Paul* (supra) and *General Manager, Northern Railways* (supra) held that those clauses would not absolve the State from their liability to pay damage due to their fault in delaying the process of work. In the former case the Honble Division Bench observed that escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The Arbitrator has held that there was delay. The Arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow the claim on account of price escalation. This was a matter, which was within the jurisdiction of the Arbitrator. Hence, the Arbitrator had not mis-conducted in awarding the said amount as he has done. In *M/s. A.T. Brij Paul & Bros. Vs. State of Gujarat* reported at AIR 1984 SC1703 it was a case of

works contract and the contractor had claimed damages for loss of profit on account of wrongful termination of contract by the State of Gujarat. The ratio of the two decisions reported in AIR1963 Cal 163 (Satyendra Nath Bose v. Bibhuti Bhusan Bhar & Ors.) and AIR 1984 SC1703(M/s. A.T. Brij Paul Singh & Ors. Vs. State of Gujarat) is that once the Court has held that there is a breach of works contract the contractor would be entitled to damages by way of loss of profit and the measure of damages if proved, the damage would be awarded on that basis. But if the damage is not satisfactorily proved, still the contractor would be accorded the benefit of every reasonable presumption as to loss of damages. The Courts jurisdiction to award damages cannot be confined to the evidence on record only. In M/s. A.T. Brij Paul Singh (supra) it was held that where in a works contract, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible. In Dwaraka Das VS. State of M.P. & Anr. reported at (1999) 3 SCC500it was held this Court in A.T. Brij Pal Singh and Ors. v. State or Gujarat, [1984]. 4 SCC59 while interpreting the provisions of Section 73 of the Contract Act, has held that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed:"What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties,

a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit. Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured."

To the same effect is the judgment in Mohd. Salamatullah and Ors. v. Government of Andhra Pradesh reported at AIR (1977) SC1481 After approving the grant of damages in case of breach of contract, the court further held that the appellate court was not justified to interfere with finding of fact given by the trial court regarding quantification of the damages even if it was based upon guess work. The arbitrator, however, could not have allowed loss of business separately when claims for escalation and other claims under Claim No.5 were allowed. There was no evidence to allow such claim. In this regard the argument of the learned Advocate General based on the law of enunciated in Paragraph 24 of Bharat Coking Coal Ltd. (supra) is accepted. The said Paragraph reads:-

24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading Loss or Profit.. It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have

awarded the same. This aspect was very well settled in *Sunley (B) & Co. Ltd. v. Cunard White Star Ltd.* by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs.6,00,000 awarded to the claimant.

. Moreover, in the instant case the work was completed during the extended period for which the arbitrator has allowed some of the claims made under Claim No.5. The learned Senior Counsel has objected to an argument made on Section 55 of the Indian Contract Act on the ground that no such plea was either taken before the arbitrator or on the grounds for setting aside of the award before this Court. It is submitted that the Court can only look into the grounds mentioned in the application for setting aside of the award and not beyond that and in this regard the learned Senior Counsel has referred to a Division Bench judgment of our Court in *State of West Bengal Vs. Usha Ranjan Sarkar* reported at 2013 (3) CHN (Cal) 512 paragraph 30 where the Honble Division Bench has quoted an earlier Division Bench judgment in *Saha & Co. Vs. Ishar Singh Kripal Singh & Co.* reported at AIR1956 Cal 321 where it was held: Mr. Jayanta Kumar Mitra, the learned senior Counsel appearing with Mr. Sabyasachi Chowdhury submits that if a ground is not taken in the memorandum of appeal, such ground cannot be urged at the time of hearing of the appeal. In fact, the memo of appeal was filed in 1993 and the matter is being heard in 2012. The learned senior Counsel refers to Paragraph 25 of the said report which is reproduced hierinbelow: (AIR1956 Cal 321; *Saha & Co. Vs. Ishar Singh Kripal Singh & Co.*)

25. But I am of opinion that after an award has been made, a party, if he desires to challenge the validity of an arbitration agreement, can make his challenge only by way of advancing it as a reason for impugning the award as invalid. No independent application against the agreement would at that stage be maintainable. It follows that if a party desiring to challenge an arbitration agreement has not done so by way of asking the award to be set aside on that ground and has allowed a decree to be passed on the award, cannot thereafter launch an attack against the agreement. The true view to take appears to me to be that after an award has been made, all grounds of objection to the award, including grounds of the non-existence or invalidity of the agreement or reference, and all other grounds of nullity must be taken in an application for setting aside the

award and that no ground, not so taken, can be available after the time for making such an application has expired. All grounds not so taken must be deemed to have been waived.

. There cannot be any doubt that the Court in considering an application for setting aside an award may not permit a party to urge a point not argued before the arbitrator but the Court in view of Section 34(b)(i) and (ii) is not precluded to consider a submission that the subject matter of the dispute is not capable of settlement by arbitrator or the award is in conflict with the public policy of India. The width of public policy has been explained in details in Associate Builders (supra). In view of the aforesaid discussion, the Claim Nos.1 and 4 are disallowed and the award is partly set aside. The claim on account of costs is also reduced to Rs.3 lacs on a realistic assessment and having regard to the fact that the petitioner has defence against some of the claims. The petitioner, however, was responsible for delay inasmuch as unmeritorious submission was raised with regard to the jurisdiction of the arbitrator at the fag end of the proceeding, that is at the 98th Sitting for which the proceeding got further delayed. In view of the payments made in July 2015 for Rs.13,27,342 the interest on the award is also modified. The modified award shall carry interest @12% p.a. from April, 2004 till the date of payment excepting on the sum of Rs.13,27,342 which sum shall carry interest @ 10% p.a. from the date of the award till March, 2015. The application being A.P.No.736 of 2011 is partly allowed. Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking. (Soumen Sen, J.)

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com