IN THE HIGH COURT OF JHARKHAND AT RANCHI
(Commercial Appellate Jurisdiction)
Commercial Appeal No. 10 of 2020

Executive Engineer, Water Ways Division No.1, Chakradharpur, Water Resources Department, Government of Jharkhand, P.O & P.S- Chakradharpur, Dist - West Singhbhum, State- Jharkhand.
...Respondent/Applicant/Appellant.
Versus
M/s Modi Project Ltd., Kanke Road, Ranchi, P.O & P.S: Kanke, District- Ranchi, State- Jharkhand
... Claimant/ Respondent/Respondent.

CORAM: HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

For the Appellant : Mr. Sachin Kumar, AAG-II
For the Respondent : Mr. Ajit Kumar, Senior Advocate
: Mr. Shresth Gautam, Advocate

JUDGMENT

C.A.V. on 29th August 2023 Pronounced on 08th January 2024

Per, Anubha Rawat Choudhary, J.

This appeal has been filed challenging the judgment dated 27.01.2020 passed by the learned District Judge I – cum - Commercial Court, East Singhbhum, Jamshedpur in Original Suit No. 09 of 2018. By the impugned judgment, the petition filed by the appellant for setting aside the award passed in favour of the ***respondent (hereinafter referred to as the claimant)*** has been dismissed; the Arbitral Award was signed by the learned Arbitrator on 08.02.2017.

2. The matter was referred to the sole Arbitrator vide order dated 18.10.2013 passed by this Court in Arbitration Application No. 24 of 2010 under section 11(6) of the ***Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996).***

3. The following chart gives the summary of the claims of the claimant and the extent to which each one of them was allowed/disallowed by the learned Arbitrator:

Claims of the Claimant	**Claims allowed/rejected**
Claim no. 1- Claim for final bill for the	Allowed to the extent of Rs.

amount of Rs. 21,83,789/-.	20,00,090/-
Claim No. 2- claim for compensation regarding idling of survey team in readiness for work, but not allowed to be utilized due to public hindrance -Rs. 6,83,000/-.	Allowed in full to the extent of Rs. 6,83,000/-
Claim No. 3- claim for compensation for expenditure incurred onsite and offsite beyond 23.08.2007 (i.e. beyond the original stipulated period of completion) up to 23.08.2009 i.e. for two years -Rs. 42,00,000/-.	Allowed in full to the extent of Rs. 42,00,000/-.
Claim No. 4 - Claim for loss of profit @15% of balance value of Agreement for which execution of work under the Agreement was prevented- Rs. 7,12,62,945/-.	Allowed in full to the extent of Rs. 7,12,62,945/-.
Claim No. 5- Claim for compensation for expenditure incurred in keeping performance Guarantee valid including compensation for cost incurred in providing bank guarantee in lieu of mobilization advance. - Rs. 11,51,868/- And **Claim No. 8A –** Claim for compensation for bank guarantee commission paid to the bank in the wasteful extension of validity of performance B.G. - Rs. 8,00,000/- The appellant had revised the claim concerning compensation for the bank guarantee commission paid to the bank.	Allowed to the extent of Rs. 27,26,903/-
Claim No. 6- claim for refund of Interest deducted from on A/C bills in lieu of Mobilization Advance- Rs. 16,17,301/-	Allowed in full to the extent of Rs. 16,17,301/-
Claim no. 7- claim for compensation for loss of reputation of the company- Rs. 1,00,00,000/-	NIL (Disallowed)
Claim No. 8B- claim for refund of security deposit balance with the	Allowed in full to the extent of Rs. 18,91,496/-

department- Rs. 18,91,496/-	
Claim no. 9 – claim for interest @ 18% on the amount claimed under claims nos. 1-8B to be calculated from 24.08.2007 which was the originally stipulated period of completion of work, till 10.11.2010 when the last demand notice was served upon the Claimant by the Respondent.	**Claim no. 09 as allowed vide internal page 123 of the award –** *"Accordingly, claim under claim no. 9 and 10 are allowed. Under claim no. 9 and 10 the interest calculated on total amount of Rs. 8,43,81,735/- awarded against claim no. 1- 8B @ 15% from 24.08.2009 (being the first date of notice for resolution of dispute issued by the Claimant) till 10.11.2010 (being the date previous of the last date notice) and thereafter from 11.10.2010 to the date of Award, is allowed. The total interest calculated on the aforesaid amount is Rs. 9,42,87,919/-. Thus, an amount of Rs. 9,42,87,919/- is payable by the Respondent to the Claimant towards interest till date of award."*
Claim no. 10- claim of interest @18% on the amount as claimed under claim nos. 1 to 9 above from 11.11.2010 till date of actual payment.	**Claim no. 10 as allowed vide internal page 123 of the award –** *"Further under claim no. 10, this Tribunal does allow the claim of the Claimant for interest @18% per annum on the total amounts of Rs. 17,86,69,654/- awarded against each of the Claims of the claimant, including interest amount calculated for period 24.08.2009 up to date of Award, as also future interest calculated from the date of expiry of two months of this Award till date of final payment."*
Claim no. 11- cost of Reference amount - Rs. 15,74,000/-	Allowed to the extent of Rs. 15,00,000/-

4. Mr. Sachin Kumar, the learned Additional Advocate General has

also raised a question on the authority of the person who is opposing the present Commercial Appeal on behalf of the respondent. He has also argued the case on merits and in support of his arguments.

5. Mr. Ajit Kumar, the learned senior counsel for the respondent has at the outset raised an issue based on the provisions under Order VI Rule 15 of the Code of Civil Procedure. However, on a pointed query from the Court on instructions from Mr. Shresth Gautam, the learned counsel for the respondent a statement is made before the Court that the genuineness of any of the documents produced in the present proceedings is not disputed. He has also advanced the arguments on the merits of the case.

6. The following judgments have been referred to during the course of the argument:

(i) "Steel Authority of India Ltd. Vs. J.C. Budharaja" (1999) 8 SCC 122,

(ii) "State of Goa Vs. Praveen Enterprises" (2012) 12 SCC 581,

(iii) "Ssangyong Engineering & Construction Company Ltd. Vs. NHAI" (2019) 15 SCC 131,

(iv) "Union of India Vs. Manraj Enterprises" (2022) 2 SCC 33,

(v) "General Manager, Northern Railway & Anr. Vs. Sarvesh Chopra" (2002) 4 SCC 45, and

(vi) "Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors." (2006) 11 SCC 181.

7. **Background of the case:**

A. Tender notice no. 2 of 2004-05 was issued for the construction of the Jharjhara Reservoir Project in the district of West Singhbhum on turnkey basis. The claimant submitted its offer vide letter dated 02.08.2004 along with earnest money in the shape of Bank Guarantee No. 24 of 2004 dated 30.07.2004 for a sum of Rs. 84,00,000/-.

B. The details of the project including drawings, designs, etc. were available in the office of the Chief Engineer of the appellant and the tenderer was required to make its design

and drawings after making its survey, investigation, etc. at the site which were subject to approval by the competent authority of the appellant. It was also indicated in the tender notice that the tenderer shall have to plan its construction work program with the departmental program of transfer of land through acquisition or inter-departmental land transfer. The claimant was declared successful and an agreement was entered into between the parties. The value of the work was Rs. 51,51,00,000/- based on accepted rates and the schedule of content of work framed by the department. The letter of acceptance was issued to the claimant on 24.12.2004. In terms of the tender notice, the claimant was required to deposit security of a sum equivalent to 5% of the value of the accepted bill which was duly deposited by the claimant in the shape of a bank guarantee dated 03.01.2005. As per the letter, the claimant was required to submit its construction schedule and payment schedule within 10 days of allotment of work which was done by the claimant vide letter dated 08.01.2005. The period within which the work was to be completed was 30 months from the date of execution of the agreement specified as 23.08.2007 and vide letter dated 23.02.2005, the department had directed the claimant to proceed with the work.

C. The work awarded to the claimant comprised three main components namely: -

(i) Construction of an Earthen Dam effecting creation of a Reservoir (Agreement item Sl. Nos. 1 to 7) being cost wise approx. 80% work.

(ii) Construction of two new canal systems, namely the left Main Canal system and the Link Canal system being cost-wise approx. 12% work.

(iii) Renovation of the old Brahmani Canal system, being cost-wise approx. 8% of total work.

D. As recorded in the award and it is not in dispute that no work was done with regards to aforesaid (i) and (ii)

components and the work was almost completed with regards to component no. (iii) which constituted only 8% of the total work for which land was already available. As recorded in the award, the total required land for construction of all three components was approximately 1292 acres which included inter-departmental transfer of land from the various departments. Out of the required land, 632.6 acres were for works related to construction rehabilitation works, and 210.0 acres were required for the construction of the new canal system. Out of 632.6 acres of land, 254.89 acres were already acquired in the year 1987 and partial payment for land acquisition was also made, but the owners did not take the compensation under protest and consequently, the appellant never took physical possession of the acquired land which continued to remain in possession of the original owners. The proposal for the acquisition of 231.78 acres of land was pending before the Special Land Acquisition Officer of the appellant. For the remaining land, the proposal was sent by the appellant on 13.04.2005 to the Special Land Acquisition Officer. Some portion of the land i.e. 14.47 hectares (approx. 36 acres) of forest land was required for the project and the proposal for transfer of the land was submitted by the appellant as back as in the year 1987, but the same was pending before the Forest Department of the Government. The only area of land that was in possession of the appellant was the land needed for the renovation of the old Brahmani Canal system i.e. component no. (iii) which constituted only 8% of the total work. Paragraph nos. 10 to 12 of the award provide details in connection with the land required for the three components of the project.

E. The specific case of the claimant before the learned Arbitrator was that the land that was required for the execution of the work was either not acquired or not possessed by the appellant except concerning component no.

(iii) as mentioned above, yet the appellant had persuaded the claimant to enter into an agreement on the false assurance that the land could be made available to the claimant positively while executing the project.

F. It was the case of the claimant that immediately after the issuance of the work order, the claimant established its local office in the nearby town of Chakradharpur and submitted bank guarantees on 21.03.2005 for a total amount of Rs.1,28,77,500/- which was valid for a period of one year i.e. up to 20.03.2006 against payment of the first installment of mobilization advance as per terms and conditions of the agreement and the letter dated 21.03.2005 enclosing the bank guarantees was submitted by the claimant to the appellant.

G. It was further case of the claimant that it could not construct its site office at the head work site nor could do a separate survey of its work (Dam and appurtenant works of the main canal) on account of heavy public objections and resistance by the land owners/occupiers in the reservoir area. Under such circumstances, the claimant requested the appellant by letter dated 09.07.2005 to allow the construction of a temporary office within the land belonging to the appellant near the head work site. Since the link canal was situated at some distance from the head works area, the claimant could make a survey, planning, design and drawings of the link canal under item no.9 of the payment schedule II of the agreement which was enclosed with the letter of the claimant dated 18.07.2005. So far as the survey of other portions was concerned, there was stiff resistance from the side of the local persons and the members of the claimant survey team were also attacked on 05.08.2005. The matter was reported to the police for necessary action vide letter dated 16.08.2005. However, on being assured by the Superintending Engineer of the appellant, the claimant submitted a detailed physical and financial work program

for the year 2005-2006 along with macro planning vide its letter dated 17.08.2005. Thus, the work program was submitted in two parts; one vide letter dated 18.07.2005 in connection with which they could do the required survey and another vide letter dated 17.08.2005 in connection with which the claimant could not do the required survey on account of local resistance. There were review meetings between the parties on 30.08.2005, 16.09.2005, 17.09.2005, and 28.09.2005 in which officers of the local administration were also involved for resolving the issues.

H. It was further case of the claimant that vide various letters dated 13.01.2006, 15.02.2006 and 23.02.2006, the claimant made repeated requests to the appellant to give directions in the light of resistance by the local villagers, but nothing happened. However, the claimant, on being persuaded by the appellant's representative engineer to keep its workforce and machinery in readiness for starting the major work, mobilized its workforce and submitted to the appellant vide letter dated 23.03.2006 for payment of second mobilization advance and requested the appellant to permit submission of bank guarantees for the advance amount. In response, the claimant received a letter dated 27.03.2006 from the appellant's Superintending Engineer informing thereby that the payment of the second mobilization advance was granted. On such intimation, the claimant deposited the bank guarantees for an amount of Rs.1,28,77,000/- vide the covering letter dated 29.03.2006. Vide letter dated 24.04.2006 addressed to the Superintending Engineer and forwarding a copy thereof to the Chief Engineer, the claimant had informed that it was not being allowed to perform the survey work and the head works and works of the main canal system due to problems relating to land acquisition/non-transfer of land/resolution of the dispute and that at the time of the release of the second installment of mobilization advance in the month of March 2006, the

claimant was instructed by the officials of the appellant not to demobilize its men and machinery at the sensitive work site, but to continue the work at sites to draw positive effect as the people were in favour of the project. Though there was no fault on the part of the claimant, the Joint Secretary of the appellant department proposed modification in the clause of the agreement relating to the manner of realization of mobilization advance and levy of interest on the same. It was the specific case of the claimant that though the claimant had every intention to refund the amount of mobilization advance through its running bill, but on being pressurized by the threat of recovery of the amount in one lump sum at once, the claimant had no option but to give its acceptance to the proposed modification. The claimant, being frustrated with the lack of prompt response in delivering the hindrance-free land, requested the appellant vide letter dated 08.07.2006 to provide the site for the main work which was followed by a meeting held on 09.10.2006 and, thereafter, by letter dated 14.10.2006, the appellant informed the claimant that on account of project site situation, it was not possible to execute more than 10% of the work in the next six months period and as such, the claimant was called upon to return the total amount of mobilization advance immediately. By another letter dated 16.10.2006, the appellant threatened the claimant that if the mobilization advance is not returned, the bank guarantee submitted by the claimant shall be encashed.

I. Consequently, the claimant invoked Clause 23 of the agreement for initiation of arbitral proceedings. The claimant raised bills for a sum of Rs.2,63,05,899/- through three running bills between February 2007 and March 2007 and from the said amount, the appellant recovered a sum of Rs.2,13,01,420/- towards mobilization advance and interest thereon and other statutory deductions and the claimant was paid a sum of Rs.25,27,907/- only against its three running

bills.

J. The claimant applied for an extension of time vide letter dated 10.08.2007 for completion of work by 23.08.2009 but vide letter dated 08.05.2008 the appellant called upon the claimant to submit its revised program for starting the work for which date was fixed to start the survey work, but it could not materialize on account of attack by a violent mob. Employees of the claimant were taken hostage and could be released only with the intervention of the police.

K. Thereafter, vide letter dated 07.07.2008 the claimant was asked to show cause as to why even after the lapse of the agreement period, the progress was negligible and as to why the contract be not rescinded and security money forfeited. Meanwhile, the appellant issued letters dated 06.06.2008, 03.02.2009, and 05.02.2009 asking the claimant to extend the validity of the bank guarantees although the validity period of the contract/agreement had lapsed on 23.08.2007. However, the claimant extended the period of bank guarantees.

L. The claimant requested payment of its final bill vide letter dated 24.07.2009 which was responded to vide letter dated 06.08.2009 wherein the appellant also agreed that the agreement between the parties was no longer standing. The claimant vide letter dated 08.02.2010 enclosed the list of dues and claims payable by the appellant and served notice under Clause 23 of the agreement for resolution of dispute.

M. Vide letter dated 19.07.2010 the appellant informed the claimant that it had executed 95% of the work of the Brahmani Canal system and accused the claimant of encashing the bank guarantee in violation of the terms and conditions of the agreement and also intimated the appellant's decision to rescind the contract.

N. The date for the final measurement was fixed on 04.08.2010. Although the claimant had approached on that day, nobody appeared on behalf of the appellant.

O. The claimant submitted the 5th on-account bill for the execution of work of Brahmani Canal system (3rd component of work) on 27.06.2007 which was partly paid. Vide letter dated 24.08.2009 the claimant informed the appellant that the 5th bill submitted on 27.06.2007 was the final bill and demanded payment of Rs.21,91,323/- being the difference amount remaining unpaid in the 5th bill as the final due amount payable as the final bill. Ultimately, the claimant invoked the arbitration clause vide letter dated 11.11.2010.

P. Thus, the reason for no work under aforesaid components nos. (ii) and (iii) as per the claimant was that the work schedule was framed with the assumption that the design and drawings would be approved by the competent authority within 30 days of submission and further, that the hindrance-free sites would be handed over to the claimant within 30 days after execution of the agreement, but the department did not abide by its commitment in terms of the aforesaid schedule.

Q. On the other hand, it was the case of the appellant before the learned Arbitrator that for the first component, 632 acres of land was required out of which 255 acres were already acquired by the appellant prior to floating the ***Notice Inviting Tender (hereinafter referred to as 'NIT')*** and the process for acquisition of remaining land of about 232 acres was pending before the Land Acquisition Officer and for acquisition of 130 acres of land, the proposal was submitted before the Land Acquisition Officer and some of the forest land was under the process of inter-departmental transfer. So far as the second component of work is concerned, 660 acres of land was required, out of which 450 acres of land was under possession of the appellant for the old existing canal system and 210 acres of land was required for which proposal for acquisition was submitted before the Land Acquisition Officer. So far as the third component is

concerned, no separate land was to be acquired as the same was already in possession of the appellant. It was the case of the appellant that it was expected that the process of acquisition would be completed within 30 months.

R. It was the case of the appellant that it was specifically stipulated in Clause 27 of the NIT that the tenderer shall have to plan their construction work programme following the departmental programme for the transfer of land either through land acquisition or through inter-departmental transfer. As per Clause 13 of the NIT, the tenderers were required to see the project details, drawings etc. in the office of the department for reference only. The tenderer was required to make his designs and drawings based on his own survey, investigation etc. at the site. The technological bid was to be submitted only after visiting the worksite to study the details and conditions of the worksite in terms of Clause 17 of the NIT.

S. It was further case of the appellant before the learned Arbitrator that since the project was to be completed on turnkey basis and some part of the land was already in possession of the appellant and some was yet to be acquired or obtained by way of inter-departmental land transfer, the tenderers were asked to participate in the pre-bid conference so that their queries may be clarified, but the claimant did not participate in the pre-bid meeting.

T. However, after completion of the requirement, the agreement was executed on 23.02.2005 specifying that the work was to be completed within 30 months from the date of written order and the work was to commence on 24.02.2005. It was their further case that the claimant did not set up any establishment at the work site as required under the conditions of the contract which indicated that the claimant had no intention to execute the head work and spillway at the canal system site. It was their further case that even as per the claimant there was no hindrance in the

completion of the renovation of the Brahmani canal, which was component no. (iii) but even that was not completed within the stipulated time.

U. It was the specific case of the appellant before the learned Arbitrator that at no point in time, did the claimant commence work in connection with the head work dam and spillway at the canal system site relating to aforesaid component nos. (i) and (ii) merely on the plea of not handing over hindrance-free land at the work site. It was their case that the alleged non-execution of work at the two major sites on the plea of non-handing over of the entire work site at a time was an act of breach of contract on the part of the claimant.

V. The appellant's further contention before the learned Arbitrator was that the stand of the claimant that without handing over the entire work site, it was not possible to carry out the survey work or any activity, was incorrect and misleading. There was no obstruction in survey work on the land under acquisition by the appellant and it was a misleading statement on the part of the claimant that they were prevented from carrying out even pre-construction initial work on account of non-delivery of hindrance-free land. It was their further case that the claimant had submitted the technical bid after making the required survey and investigation and, therefore, it was not open to the claimant to say that there was no land available either to establish its establishment or to execute any construction work. It was further asserted that the claimant had applied for an extension of time knowing fully well that the process of acquisition of the land was pending. It was asserted that on account of non-commencement of work at the two sites, the appellant could not take any active step either for the acquisition of raiyati land or for the inter-departmental transfer of land.

W. It was their further case that neither any men and machinery

of the claimant was deployed at the worksite nor the claimant extended the validity of bank guarantees pledged against security amount which itself is deemed to be closure of the agreement by the claimant in the month of March 2007 and, therefore, there was no point of considering the claimant's application for extension of period since the agreement had lapsed upon expiry of 30 months on 23.08.2007. The further stand of the appellant was that the performance security was liable to be forfeited by the appellant in the event of non-performance of the project work by the claimant.

X. The claimant raised altogether 11 claims under different heads. The appellant had opposed all the claims and had also raised a counter-claim but vide order dated 19.12.2015 the learned Arbitrator did not entertain the counter-claim by observing that the same was raised at a belated stage and kept it open for the appellant to avail the remedy of filing a suit in connection with the counter-claim.

8. The following issues were framed by the learned Arbitrator:

(1) ***Whether the present arbitration proceeding is maintainable in its present form and for the reliefs claimed?***

(2) ***Whether any breach of Contract has been committed by the Respondent rendering the performance of the Contract non-performable by the claimant?***

Sub issues of issue no.(2):-

(i) ***Whether the Respondent were obliged under the contract to hand over to the Claimant hindrance free land at the sites where the proposed project work was to be executed, before commencement of work by the Claimant or within 30 days of execution of Agreement or during course of execution of construction work as per the tentative work program submitted by the Claimant, as a condition precedent and if so whether the Respondents have failed to deliver hassle free land to the Claimant***

and have thereby committed breach of Contract?

(ii) Whether the Claimant was obliged under the Contract to visit the proposed site to study the details and condition of work site before submission of its offer in pursuance of Clauses of NIT?

(iii) Whether the Claimant was obliged under the contract to put all facts at the pre bid conference or at the time of submission of its offer vide its tender or even at the time of execution of Agreement, regarding necessity of handing over the entire land to enable the Claimant to start even the pre bid construction activities?

(iv) Whether the construction program submitted by the claimant was in accordance with the departmental program for transfer of land through acquisition or for inter-departmental transfer of land?

(v) Whether the Claimant was required to purchase plant and machinery to start its construction work even prior to execution and completion of pre construction for the purpose of commencing the execution of any construction work?

(vi) Whether the Claimant was obliged under the contract to renew the Bank Guarantees submitted by it at the time of execution of work, against security deposit, till the period of Agreement and if so whether the Claimant had failed to renew the Bank Guarantee and whether such failure suggest termination of Contract by the Claimant?

(vii) Whether the Claimant had to mobilize its plant and machinery at the work site even in absence of survey and investigation of the work site and taking up pre construction work even without

establishing its own laboratory as required under the specific clause of the NIT and to keep its workforce, men and machinery idle till extension period?

(viii) Whether the Claimant had applied for extension of time of the Contract in pursuance of the relevant clause of the Contract on the reason of hindrances and objections at the work site?

(3) Whether the Claimant had committed any breach of Contract by failing to perform its obligations under the contract?

(4) Whether the claimant is entitled to any claim for compensation for expenditure incurred for the on-site office and off-site establishment either within the Agreement period or thereafter, and further claim for compensation for Bank Guarantee commission?

9. As to concerning issue no. 1, the learned Arbitrator held that the arbitration proceeding was maintainable. So far as issue no. 2 and its sub-issues are concerned, the same have been considered by the learned Arbitrator vide paragraph nos. 44 to 50 of the award and have been decided in favour of the claimant. The issue no. 3 and 4 were taken up together and decided vide paragraph nos. 51 to 55 of the award in favour of the claimant. Thereafter, the learned Arbitrator decided each claim vide paragraph 56 onwards.

10. The appellant challenged the Arbitral Award dated 08.02.2017 by filing a petition under section 34 of the Act of 1996 which was numbered as Misc. (Arb.) Case No. 1 of 2017 and raised many points including the following: -

(a) The counter-claim was wrongly refused to be entertained by the learned Arbitrator.

(b) The award was not published at Ranchi where the proceeding was initiated and continued to be heard rather it was published at Jamshedpur.

(c) The award was not fair rather seemed to be collusive. The documents of the claimant were more weighted by the learned Arbitrator than the terms of the agreement.

(d) The tender was invited after acquiring more than two-third of land required for the work and as per the NIT, the tenderers were advised to visit the work site of the scheme to study the details and conditions of work, examine project details etc. in terms of Clause-13 and 17 of the NIT. Further, the tenderers were to submit their construction work programme in accordance with the departmental programme for transfer of the balance 25% approximate land either through execution proceeding or through inter-departmental land transfer and the balance 25% of the land was to be acquired during the agreemental period for completion of the work. It was the case of the appellant that the construction work programme was submitted in the light of Clause 27 of the NIT knowing fully well that some portion of the project work was under acquisition and hence, the claimant was not justified in demanding the entire work site.

(e) It was the case of the appellant that the terms of contract cannot be ignored and the learned Arbitrator has published the award only on the basis of correspondences exhibited by the claimant and ignoring the terms of the contract. The agreement was executed on 23.02.2005 and on the same day, notice was issued to start execution of work which included pre-construction work. At the request of the claimant, mobilization advance was released twice and such requests were made without raising any grievance regarding hindrance on the work site. The mobilization advance was released in two stages, first amounting to Rs. 1,28,77,500/- in the month of March 2005 and the second instalment amounting to Rs. 1,18,17,900/- in the month of March 2006. Upon receipt of the mobilization advance, the claimant instead of establishing any site office at two major units of the scheme having 92% of the total work [item nos. (i) and (ii) mentioned above] started making unwarranted correspondences regarding handing over of hindrances free work site to even

start any pre-construction work on both the sites of the scheme.

(f) The award in connection with claim no. 1 has been awarded by relying upon statement said to have been made in the counter-claim. The learned Arbitrator had refused to entertain the counter-claim on the one hand and on the other hand, relied upon the counter-claim to award amount under claim no.1.

(g) The award in connection with claim nos. 2 and 3 has been awarded by misconstruing the Clause nos. 5 and 12 of the conditions of contract. The learned Arbitrator travelled beyond the terms of the contract for which he has no jurisdiction. Even 8% of the entire work relating to item no. 3 for which there was no hindrance could not be completed within the entire period of thirty months. The learned Arbitrator has not considered Clause 23 of the conditions of contract.

(h) The claimant did not keep the bank guarantee alive in terms of Clause 1 and 28 of the conditions of contract. The bank guarantee was required to be kept alive being the security deposit at the time of execution of the agreement till the recession or foreclosure of the agreement. The appellant also lodged a criminal case against the claimant for not keeping the bank guarantee alive.

(i) The learned Arbitrator has illegally explained and observed the meaning of Clause 5 and 12(a) of the conditions of contract only with a view to award the claim in favour of the claimant. Even the application for extension of time for completion of work was submitted after expiry of the period of completion of work and in spite of that the learned Arbitrator has blamed the appellant for not extending the period of contract. This was done only with a view to award some claims under claim nos. 5, 8(a), and 8(b). The learned Arbitrator is said to mis-constitute Clause 5 and 12(a) of the

agreement based on which the award in question was passed and published.

(j) It was asserted that the learned Arbitrator had ignored Clause 28 of the conditions of the contract and illegally observed in paragraph 54 of the award that the bank guarantee suffered its natural death after the expiry of the validity period and the claimant cannot be accused either for the lapse of the validity of bank guarantee or having encashed the bank guarantee.

(k) Clause nos. 5 and 12 of the condition of contract were also referred to submit that the learned Arbitrator had traveled beyond the terms of the agreement and it was alleged that the learned Arbitrator had allowed the claims of the claimant even though there was no breach of the terms of the contract on the part of the appellant.

(l) It was submitted that the award in question was fit to be set aside.

11. On the other hand, it was the case of the claimant before the learned Commercial Court that the award did not call for any interference within the permissible limits of interference under section 34 of the Act of 1996.

12. The learned Commercial Court recorded its findings under paragraph no. 9 onwards of the impugned order. The challenge to the award having been published at Jamshedpur instead of being rendered at Ranchi where the arbitration proceedings had taken place, was rejected vide paragraph no. 10-A of the impugned order. Not much arguments have been advanced by the learned counsel for the parties in connection with the said issue. The learned Commercial Court dealt with the further ground of challenge in connection with allegation of the award being collusive and illegal and rejected the same. The learned Court below also recorded the objection with regard to the rate of interest in paragraph no. 11 of the impugned order itself. The argument was also considered about the obligation of the claimant to keep security bank guarantees alive till recession or on foreclosure of the agreement and the case of the appellant that the claimant withdrew the security bank guarantee in the month of March 2007 whereas the scheduled date of

completion of agreement was 23.08.2007 for which a criminal case was also lodged against the claimant. The learned Commercial Court also considered the argument in connection with debarring the appellant from filing counter-claim and referred to Clause nos. 5 and 12 of the conditions of contract also. The learned Commercial Court ultimately recorded its findings in paragraph no.13 of the impugned order and held that there was some merit in the contention of the appellant. It observed that the appellant had released 1st mobilization advance of Rs. 1,28,77,500/- and 2nd installment of mobilization advance of Rs. 1,18,17,900/- which was paid in March 2006 to the claimant but on receipt of mobilization advance of two major units, no work was started. The Commercial Court also took note of the fact that the claimant withdrew security Bank Guarantee in the month of March 2007 and, in fact, the appellant was debarred from filing counter-claim. However, having recorded as aforesaid, the learned Commercial Court refused to interfere with the award by observing that even if two views are possible, reappraisal of materials on record by the Court and substituting its own finding in place of Arbitrator's view was not permissible in absence of perversity and once the Arbitrator had applied his mind to the matter before him, the Court cannot reappraise the said matter as if it were in appeal. The findings of the learned Commercial Court are recorded in paragraph nos. 13 to 15 of the impugned order which are quoted as under:

> *"13. Although, I find that some merit in the contention of learned counsel of the applicant/respondent is that (a) the applicants department has released Ist mobilization advance of Rs.1,28,77,500/- and 2nd installment of mobilization advance of Rs.1,18,17,900/- which was paid in March 2006 to the claimant, but on receipt of mobilization advance of two Major unit no work start. (b) The claimant withdraw security Bank Guarantee in the month of March 2007 (c) debarred the applicant / department for filing counter claim, but in view of the judgment referred above by the claimant/OP in which Hon'ble Court held that "even if two views are possible, reappraisal of material on record by the Court and substituting its own view in place of Arbitrator's view is not permissible in absence of perversity. Once the Arbitrator has applied his mind to the matter before him, Court cannot reappraise the said matter as if it were in appeal'. Further relying upon M/s. Associated Construction Versus Pawanhans Helicopters Pvt. Ltd., Navodaya Mass Entertainment Limited Vs. J.M. Combines, Sutlej Construction Limited Vrs. Union Territory of Chandigarh, Rastriya Ispat Nigam Limited Vrs. Diwan Chand Ramsaran, Associate Builders Versus Delhi Development Authority, Ssanyong Engineering & Construction Co. Ltd. Versus Nation Highways*

Authority of India (NHAI) (supra) the Hon'ble Apex Court has held 'an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in 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.' The Hon'ble Apex Court further observed that "the jurisdiction is not appellate in nature and an award passed by an arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. It is only when the court is satisfied that the arbitrator had misconducted himself or the proceedings or the award has been improperly procured or is otherwise invalid that the court may set aside such award." The Hon'ble Apex Court further observed that "It must also be borne in mind that a court does not sit as one in appeal over the award of the arbitrator and if the view taken by the arbitrator is permissible, no interference is called for on the premise that a different view was also possible." The Hon'ble Apex Court further observed that "Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere."

14. A perusal of impugned Award clearly shows that the learned Arbitrator has dealt with the matter and after considering the record and testimonies of witnesses etc. the impugned Award has been passed. Hence this court is not required to re-appreciate and re-evaluate the findings given by the Tribunal. Therefore, in view of the above said discussion and after considering the contentions of the learned counsels for the parties and in view of the authoritative pronouncements discussed above and also as this court is not sitting in appeal against the impugned award the court is not required to re-appreciate or re-evaluate the evidence led before the Arbitral Tribunal, I find that the Respondent / Applicant herein has failed to make out a case for any interference with the impugned award dated 08/02/2017 passed by the Arbitral Tribunal, U/s. 34 of the Arbitration and Conciliation Act in Arbitration Case no.24 of 2010.

15. Hence, issue no.1 "Whether the award is liable to be set aside in view of the objection?" is decided in favour of Opposite party/claimant against the applicant/respondent. Hence, the impugned award dated 08-02-2017 does not require any interference. Accordingly, I find that instant suit for setting aside the arbitral award dated 08-02-2017 passed by the Sole Arbitrator Hon'ble Mr. Justice D.G.R. Patnaik, former Justice of Hon'ble High Court of Jharkhand, Ranchi in Arbitration Case No.24 of 2010 is devoid of merit and liable to be dismiss.

Therefore, it is hereby,

<u>O R D E R E D</u>

Accordingly, objections are overruled. In the result, this Arbitration Case u/s 34 of the Arbitration & Conciliation Act, 1996 for setting aside the arbitral award dated 08-02-2017 passed by the Sole Arbitrator Hon'ble Mr. Justice D.G.R. Paitnaik, former Justice of Hon'ble High Court of Jharkhand, Ranchi in Arbitration Case no.24 of 2010, stand dismissed. In the circumstances of the case, there shall be no order as to costs. Let the original record of proceeding be returned to the office of the learned sole arbitrator."

Findings of this Court.

13. **The point for consideration is whether the learned Court below erred in law in refusing to interfere with the Arbitral Award dated 08.02.2017?**

Scope of interference under section 34 of the Act of 1996

14. In the present case, the award has been passed and consequently petition under section 34 of the aforesaid Act of 1996 has been filed after coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 and in view of judgment of Hon'ble Supreme Court in ***"Ssangyong Engineering and Construction Company Ltd. Vs. National Highway Authority of India"*** reported in (***2019) 15 SCC 131***, the case will be governed by the law which exists post 2015 amendment regarding the permissible grounds for setting aside an Arbitral Award.

15. Prior to coming into force of the 2015 Amendment, the Hon'ble Supreme Court in "***Associate Builders v. DDA" (2015) 3 SCC 49***, held that ***"public policy of India"*** as a ground to set-aside the arbitral award would fall into following heads and subheads:

a. Fundamental policy of Indian Law-

i. Compliance with statutes, Judicial Precedents orders of superior courts in India. (para 27)

ii. Need for judicial approach- decision be fair, reasonable and objective. (para 29)

iii. Natural Justice compliance- Audi alterem partem rule. (para 30)

iv. Wednesbury reasonableness- Perversity or irrationality. (para 31)

b. Interest of India. (Para 35) Related to foreign powers of India

c. Justice or morality (para 36), and

d. Patent illegality-

(i) Contravention of substantive law of India.

(ii) Contravention of Arbitration and Conciliation Act, 1996.

(iii) Contravention of terms of contract.

Perversity has been considered in the following terms:

31. *The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], it was held: (SCC p. 317, para 7)*

> *"7. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."*

In Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

> *"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."*

Justice *has been considered in the following terms –*

> ***"36.*** *The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him Rs 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be*

set aside on the ground that it is contrary to "justice".

***Patent illegality**: Again sub-divided into:*

a) *Para 42.1- contravention of substantive law of India*
b) *Para 42.2 – contravention of the Arbitration Act itself.*
c) *Para 42.3 – arbitrator deciding outside the terms of the contract*

16. The expanding nature of the interpretation of the term "fundamental policy of Indian law" in order to set aside an award under section 34 of the Act of 1996 was noticed and was followed by Law Commission recommendations which ultimately culminated in an amendment of the aforesaid Act of 1996 vide Amendment Act 2015. The entire background and the purpose of the Amendment Act 2015 in the aforesaid Act of 1996 have been fully narrated and explained in the judgment in the case of ***"Ssangyong Engineering and Construction Company Ltd. Vs. National Highway Authority of India"*** reported in (***2019) 15 SCC 131.*** The expansion of "public policy of India" in "***ONGC Ltd. Vs. Saw Pipes Ltd." (2003) 5 SCC 705 ["Saw Pipes"]*** and ***"ONGC Ltd. Vs. Western Geco International Ltd." (2014) 9 SCC 263 ["Western Geco"]*** *has* been done away with and a new ground of "patent illegality" with inbuilt exceptions have been introduced through 2015 Amendment. The judgment passed by the Hon'ble Supreme Court in the case of "***Ssangyong Engineering and Construction Company Ltd." (supra)*** has considered the impact of the 2015 Amendment in the Act of 1996 and, *inter alia*, held in paragraph nos. 35 to 41 of the reports that: -

A. In paragraph 35 it has been held that it is important to notice that the ground for interference insofar as it concerns the "interest of India" has since been deleted, and therefore, no longer obtains.
B. In paragraph 35 it has been also been held that the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of *Associate Builders*, as it is only such arbitral awards that shock the conscience of the Court that can be set aside on this ground.

C. In paragraph 36 it has been held that it is clear that the public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of *Associate Builders*, or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of *Associate Builders*. Explanation 2 to section 34(2)(*b*)(*ii*) and Explanation 2 to section 48(2)(*b*)(*ii*) were added by the Amendment Act only so that *Western Geco*, as understood in *Associate Builders*, and paras 28 and 29 in particular, is now done away with.

D. In paragraph 37 it has been held that insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or the public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

E. In paragraph 38 it has been held that it has been made clear that reappreciation of evidence, which is what an appellate Court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

F. In paragraph 39 it has been elucidated that paragraph 42.1 of *Associate Builders*, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award.

G. In paragraph 39 it has been elucidated that paragraph 42.2 of *Associate Builders*, however, would remain, for if an Arbitrator gives no reasons for an award and contravenes section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

H. In paragraph 40 it has been held that the change made in section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in *Associate Builders*, namely, that the construction of

the terms of a contract is primarily for an Arbitrator to decide, unless the Arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the Arbitrator's view is not even a possible view to take. Also, if the Arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under section 34(2-A).

I. In paragraph 41 it has been noted that a decision that is perverse as understood in paragraphs 31 and 32 of *Associate Builders*, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award that ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the Arbitrator would also qualify as a decision based on no evidence inasmuch as such a decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.

17. In ***"Sutlej Construction Limited Vs. Union Territory of Chandigarh" (2018) 1 SCC 718*** it has been held that when the Arbitrator has taken a reasonable view on the basis of a plausible view there is no scope of reappreciation of evidence and substitute its view unless the view taken by the Arbitrator shocks the conscience of the Court.

Rejection of counter-claim

18. The law regarding jurisdiction of Arbitrator to raising of additional claim and also counter-claim before the learned Arbitrator has been fully discussed in the judgment passed in the case of ***"State of Goa Vs. Praveen Enterprises"*** reported in ***(2012) 12 SCC 581*** which essentially depends upon the interpretation of the arbitration clause and terms of reference. It has also been held in paragraph no. 32 of the said judgment that the respondent in an arbitration proceeding has a choice of raising a dispute by way of counter-claim in the pending award proceeding or resorting to independent arbitration proceedings by

issuing notice to the claimant.

19. In the present case, the counter-claim filed by the appellant was not entertained having been filed at a belated stage and it was kept open to the appellant to file a suit with regard to the counter-claim. Suffice is to say that if the dispute raised in the counter-claim is covered under the arbitration clause, the proceedings regarding counter-claim, if any, would be governed by the Act of 1996.

Relevant terms of the contract

20. The specific case of the appellant is that various clauses of the NIT/agreement/contract have not been considered by the learned Arbitrator, those were the following clauses of the NIT/contract/agreement:-

Clauses of the NIT (Notice Inviting Tender)

"13. The works is to be done on turn key basis. The project details, drawing etc. available in the department may be seen in the office of the undersigned on any working day for reference only. The Contractor, however is required to make his own design and drawings based on his own survey, investigations etc. at site where necessary which have to be approved by competent authority in the department.

17. Tenderers are advised to visit the site (on their own cost) to study the details and conditions of work site.

20. Not claim for idle labour, men and machinery will be entertained for any reason whatsoever.

24. The contractor is required to establish his own men requisite facilities such as houses, water supply, sanitation etc. as also a fully equipped and functional Quality Control Laboratory at work site before execution of the work.

27. The tenderer shall have to plan his construction work programme in accordance with the departmental programme for transfer of land through acquisition or inter departmental land transfer."

Clauses from conditions of contract

Clause 1 : *All compensations or other sums of money payable by the contractor to the Government under the terms of his contract may be deducted from or paid by the sale of a sufficient part of his security deposit or from the interest arising there from or from any sums which may be due or may become due to the contractor by government on any account whatsoever and in the event of his security deposit being reduced by reason of any such deduction or sale as aforesaid, the contractor shall within ten days there after make good in cash or Government securities endorsed as aforesaid any sum or sums which may have been deducted from or arisen by sale of his security deposit or of any part thereof.*

Clause 5*: If the contractor shall desire any extension of time for completion of the work, on the ground of his having been unavoidably hindered in its execution he shall apply in writing to the Engineer-in-charge within 40 days from the date of starting of the hindrance on account of which he desires such extension as aforesaid and the Engineer-in-charge, if in his opinion (which shall be final) reasonable grounds shall take necessary steps for such extension of time, if any, as may in his opinion be necessary or proper. Such extension will however be normally be restricted to 1 year to be counted from the time of the removal of aforesaid hindrance.*

The Engineer-in-charge shall at the extension time inform the contractor whether the Engineer-in-charge claims compensation for the delay. No compensation however shall be payable to the contractor for any delay arising out of any reason whatsoever.

Clause 12: *If at any time after the commencement of the work the Government of Jharkhand shall for any reason whatsoever not require the whole or any part thereof as specified in the tender to be carried out, the Engineer-in-charge shall give notice in writing of the fact to the contractor who shall have no claim to any payment of compensation whatsoever on account of any profit or advantage, which he might have derived from the execution of the work in full, but which he did not derive in consequence of the full amount of the work not having been carried out. Neither shall he have any claim for compensation by reason of any alteration having been made in the original specification, drawing, designs and instruction which shall involve any curtailment of the works as originally contemplated.*

Clause 12 : (a) *The contractor shall not be entitled to claim any compensation for loss suffered by him on account of delay by or on behalf of Government in the supply of materials or stores which the Government may have undertaken to supply or the possession of worksite where such failure is due to*

(i) natural calamities (ii) act of enemies (iii) transport and procurement difficulties (iv) legal formalities (v) circumstances beyond the control of the State Government. In case of such failure or delay in the supply of materials or stores or possession of worksite on an application by the contractor within 30 days from the date of such failure or delay, such extension of time shall be granted to the contractor for completion of the work as shall appear to the Engineer to be reasonable in accordance with the circumstances of the case. The decision of the competent authority as to the extension of time shall be binding upon the contractor.

Clause 26: *Any unforeseen hindrance in so far they effect the execution of work i.e. opening of war, invasions, insurrection of military or usurped power, civil war, riot and contamination from nuclear fuel or nuclear waste or radio active explosive (unless restricted to the contractor's men), no claim for compensation will be entertain, a suitable time extension may however be allowed to make good the loss of time on account of the above mentioned exigencies.*

Clause 27: ***<u>Mobilization Advance</u>***

Mobilization advance on sanction by competent authority may be paid upto maximum of 5% of agreemented value of the work to the successful contractor after agreement and due in

regard to movement of men, machinery, equipment etc. if he so applies, against the bank guarantee of same amount issued from a scheduled in the name of the specific Executive Engineer, subject to realization/adjustment in first ten running bill payment or 1 year whichever is earlier.

Clause 28: Refund of security money

The 90% of the security deposit will be released after completion of the work in all respect. The balance 10% of the security money will be released after commissioning, maintaining the whole system and getting it tested for minimum 90% utility for projected Kharif and Rabi crop area including stability and soundness of all components. In case adequate water in reservoir does not built up one season, it may not be tested in the first year in that case further 5% of the security money may be released to the contractor after one year of partial testing and rest 5% of security money will be only be released after fulfilling the above mentioned condition.

Clause no. 11 and 38 of the conditions of contract

11. SITE INVESTIGATION

The contractor in preparing the Bid shall rely on any site investigation reports referred to in the contract date supplemented by any information available to the Bidder. However the bidder is free to collect the data as he wish to collect but no claim will be entertained by the Government.

Clause 38. Termination

TERMINATION

38.1 The Employer or the contractor may terminate the contractor if the other party cause a fundamental breach of the contract.

38.2 Fundamental breaches of the contract includes, but shall not be limited to the following:

(a) The contractor stops the work for 28 days when no stoppage of work is shown on the current programme and the Engineer has not authorized the stoppage.

(b) the Engineer instructs the contractor to delay the progress of the works and the instruction is not withdrawn within 28 days.

(c) The Employer or the contractor is made bankrupt or goes into liquidation other than for a reconstruction or amalgamation.

(d) A payment certified by the Engineer is not paid by the employer to the contractor within 56 days of the date of the Engineers certificate.

(e) The Engineer gives notice that the failure to correct a particular defect is fundamental breach of contract and the contractor fails to correct it within a reasonable period of time determined the Engineer, and

(f) The contractor does not maintain a security which is required.

(g) The contractor has delayed the completion of works by the number of days for which the maximum amount of liquidated damage can be paid as defined in the contract data.

38.3 When either party of the contract gives notice of a breach of contract to the Engineer for a cause other than those listed under sub-clause above, the Engineer shall decide whether the breach is fundamental or not.

38.4 Notwithstanding the above, the Employer may terminate the contract for convenience.
38.5 If the contract is terminated the contract shall stop work immediately, make the safe and secure and leave the site as soon as reasonably possible.

Clauses 11 and 14 of Special Conditions of Contract

11. No interest will be paid on the E.M. or Security Money Deposited.

14. The land acquisition either forest land, government land or Raiyati land and rehabilitation work will be synchronized as per construction programme approved by the department. However, due to any unavailable circumstances the land acquisition and rehabilitation progress is not at per with the progress of work for the time being, no compensation or any claim will be entertained.

The nature of contract, the termination of the contract, the mutual obligation of the parties, and the breach of contract and its consequences

21. Concerning the nature of the contract, the termination of the contract, the mutual obligation of the parties, and the breach of contract and its consequences, the learned Arbitrator has, *inter alia*, held as follows: -

a. From the perusal of the terms of the Agreement and the nature of the contract, it appeared that both parties had reciprocal obligations to perform under the contract. The claimant was obliged to commence the pre-construction activities including the survey of the work site, investigation, soil testing, establishment of its office at the work site etc. before the commencement of any construction work, the appellant was obliged to deliver and handover hindrance-free land at the proposed work site to the claimant to enable smooth progress of construction activities and completion of the same within the period stipulated in the agreement.
b. While deciding issue no.2, the learned Arbitrator recorded a finding that a breach of contract was committed by the appellant rendering the performance of the contract non-performable by the claimant. The appellant was obliged under the contract to hand over to the claimant hindrance-free land at the sites where the proposed project work was to be executed as a condition precedent and the appellant failed to deliver hassle-free land to the claimant and thereby committed breach of contract.
c. At the same time, it has been recorded that part of the contract with regards to aforesaid component no. (iii) was executed by the claimant to a great extent which constituted 8% of the entire contract value for which hindrance-free land was available and was handed over

to the claimant for execution of work. During the entire period, the work in connection with aforesaid component no. (iii) continued and was only substantially completed. In connection with the work already executed the claimant had a claim of differential payment vide claim item no.1.

d. It has also been held that the mere fact that the claimant had submitted its tender bid even knowing that the lands were not readily available would not militate against the claimant, given the assurances by the appellant that it would cooperate and deliver the lands within the period stipulated in the construction program submitted by the claimant.

e. Admittedly, hindrances were created and even violent protests were indulged by the local villages who were in occupation of the lands. Such protests and hindrances could have been quelled had the aggrieved villager been given their due compensation and provided rehabilitation and the process of acquisition pending ever since 1987, been expedited and concluded by the appellant in right earnest. No doubt to act upon its assurances, the appellant had tried to expedite the process of the land acquisition at the level of the Land Acquisition Officer and also at the various departments, but the fact remains that all its efforts had proved futile and precious time was lost in making such failed attempts only.

f. Reliance by the appellant upon Clause 5 of the conditions of contract, which is the specific clause for extension of time of the agreement period which provided that the claimant ought to have applied for extension of time for the hindrance period immediately when the hindrances arose and therefore the only period which could be excluded from the originally stipulated period of 30 months was the period of hindrance, and the argument that the claimant remained silent for 30 months and then applied for time extension after expiry of the originally stipulated date of completion, were rejected by the learned Arbitrator. It was held that from the reading of Clause 5 of the conditions of contract, it appeared that provision of the said clause is applicable only when a hindrance-free work site is delivered, thereafter the work commences, and in the course of execution of work hindrance and obstruction erupt. In the present case, except for the land at the Brahmani Canal site, the required land at the other two main worksites was not delivered to the claimant to enable the commencement of work at those sites. The facts demonstrate that the respondent (appellant herein) could manage to provide possession of land in respect of only 8% of the total work at the Brahmani Canal Site. It was held on facts that the claimant had applied

for an extension of time on 10.08.2007 before the scheduled date of completion of the contract on 23.08.2007 in connection with which no decision was communicated to the claimant.

g. Clause 12(a) of the conditions of the contract also related to the extension of the period which specifically deals with delay on account of non-delivery of possession of the work site on account of various reasons including the circumstances beyond the control of State government. As per the aforesaid provision, the contractor is obliged to submit its application for an extension of time within 30 days from the date of such failure of the obligations on the part of the appellant and such extension of time shall be granted to the contractor for completion of the work as shall appear to the engineer reasonable following the circumstances of the case. The learned Arbitrator also held that it appeared from the documents on record that the claimant had submitted its application for extension under the provision of Clause 12(a) of the conditions of contract explaining the reasons for not being able to complete the project work within the originally stipulated time. However, no decision was taken on the application for an extension of time.

h. The appellant had not made a serious effort to extend the contract, it will be deemed that the contract had suffered its natural death on the expiry of the original stipulated period of the contract and the validity period of bank guarantees had also expired after the lapse of six months from the date of expiry of the original period of contract.

i. It is the respondent (appellant herein) who failed to perform their part of the contract by failing to deliver their hindrance-free land to the claimant and thereby, preventing the claimant from executing the contract work within the stipulated time despite their knowledge that the claimant had mobilized its men and machinery with the solemn intention of executing the project work within the stipulated period.

j. The learned Arbitrator recorded a finding while dealing with claim no.3 that it was only on 30.05.2005, that the appellant had informed the claimant that even with the help of the police force, the work at the sites of the aforesaid two components was not possible to complete.

k. A finding has also been recorded that it was also evident from the various letters of the appellant addressed to the claimant that the appellant had continuously been assuring the claimant that they were taking effective steps to resolve the dispute with the local villagers and in support of such claim the appellant had also sought to mobilize the police at the local level as well as higher official levels and the local

administration. Yet, at no point in time did the appellant either declare the extension of the period of work nor did they declare that they would not give possession of the land to the claimant at the working front. Based on the assurances given by the appellant the Claimant was certainly obliged to continue maintaining the workforce and machinery in readiness to enable quick operation at any time when the appellant would be able to deliver hindrance-free land to the claimant.

l. With regards to the termination of the contract, the learned Arbitrator held that the appellant had sought to terminate the contract after the lapse of more than 36 months of expiry of the period of the contract and the rescinding of the contract by the appellant on the ground that the claimant did not perform the work under the contract and also on the ground that the claimant had encashed the bank guarantee, was held to be misconceived, misleading and unjust and was neither valid nor legal. Furthermore, the terms of the contract did not prohibit the appellant from rescinding the contract because it was not able to prevent the local villagers from creating hindrances and obstructions raised by the local villagers.

m. While deciding issue no.3 it has been held that the claimant had not committed any breach of contract by failing to perform its obligations under the contract as the claimant was not delivered hindrance-free land at any of the two main work sites rendering it impossible for the claimant even to locate the site for establishing its office and laboratory and, accordingly, the claimant was compelled to make temporary establishment at the Brahmani Canal site where land was available.

n. The learned Arbitrator also held that the acts and conducts of the appellant amounted to a fundamental breach of contract the effect of which certainly did prevent the claimant from performing its obligation under the contract and the claimant's performance was frustrated. The claimant had suffered loss on account of such breach. The claimant had purchased/hired machinery to procure the workforce-established temporary office at the nearby place at Chakaradharpur and had incurred expenses for such purposes on the genuine expectation of being able to execute the allotted work within the time stipulated under the contract and to earn profit for the work. The loss of such investment and frustration to earn profit from the contract job is certainly a loss for which the claimant can reasonably claim compensation.

22. In the judgment passed by the Hon’ble Supreme Court in the case of ***“Steel Authority of India Ltd. Vs. J.C.Budharaja”*** reported in ***(1999) 8 SCC 122*** there were specific provisions in the contract that no

claim would be maintainable for delay in giving the possession of the work site to the contractor for execution of the work or delay in obtaining necessary permissions but the Arbitrator had awarded damages on account of delay etc. ignoring such terms of contract. In the aforesaid background, it has been held by the Hon'ble Supreme Court that the award was arbitrary, capricious and without jurisdiction. Paragraph no. 17 of the aforesaid judgment is quoted as under:

> *"**17.** It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. Arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must. Dealing with similar question this Court in New India Civil Erectors (P) Ltd. V. Oil and Natural Gas Corpn. held thus: (SCC p. 79, para 9)*
>
> > *" It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account."*

23. In the judgment passed by the Hon'ble Supreme Court in the case of ***"Maharashtra State Electricity Distribution Co. Ltd. Vs. Datar Switchgear Ltd."*** reported in ***(2018) 3 SCC 133,*** the Hon'ble Supreme Court has drawn a distinction between a breach of contract and a fundamental breach of contract and has held as follows:-

> *"67. In the aforesaid backdrop, we agree with the approach of the High Court in spelling out the proposition of law that once it is established that the party was justified in terminating the contract on account of fundamental breach thereof, then the said innocent party is entitled to claim damages for the entire contract i.e. for the part which is performed and also for the part of the contract which it was prevented from performing. We may usefully refer to the following dicta laid down in Suisse Atlantique Societe d'Armament Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale: (AC pp. 397-98)*

> *"... If facts of that kind could be proved I think that it would be open to the arbitrators to find that the respondents had committed a fundamental or repudiatory breach. One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but also what was likely to happen in future. And there the fact that the breach was deliberate might be of great importance.*
>
> *If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist, including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term. ..."*

24. From the perusal of paragraph no. 67 of the aforesaid judgment, it is clear that while looking at the matter as to whether there has been a fundamental breach of contract or repudiatory breach of contract, one has to look to the situation as to whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made and the scope of inquiry would be one has to ask not only what had already happened but also what was likely to happen in future and the fact that the breach was deliberate might be of great importance. The aforesaid exercise has not been undertaken by the learned Arbitrator while recording a finding of a fundamental breach of contract by the appellant and while recording such finding, the learned Arbitrator has completely ignored the material conditions of NIT and also the contract between the parties. Accordingly, the finding of the learned Arbitrator that the appellant had committed a fundamental breach of contract is perverse on account of non-consideration of material clauses of the agreement and cannot be sustained in law. This aspect of the matter has not been considered by the learned Commercial Court while refusing to interfere with the award.

25. In the present case the learned Arbitrator held that there was a fundamental breach of contract on the part of the appellant leading to

frustration of contract on account of the non-availability of hindrance-free land about the aforesaid component nos. (i) and (ii) of the contract and the contract could be partly performed only with regards to the aforesaid component no. (iii) to a great extent which constituted only 8% of the total value of the contract. It was also held that on account of the consequences of such a breach, the claimant suffered losses as the claimant had purchased/hired machinery to procure the workforce, established temporary office at the nearby place at Chakaradharpur and had incurred expenses for such purposes on the genuine expectation of being able to execute the allotted work within the time stipulated under the contract and to earn profit from the work. It was held that the loss of such investment and frustration to earn profit from the contract job is certainly a loss for which the claimant can reasonably claim compensation. Thereafter, the learned Arbitrator considered the claims item-wise.

26. However, while recording that there was a fundamental breach of contract on the part of the appellant followed by the consequences of such a breach i.e. claim of losses under various heads, the learned Arbitrator has failed to consider the aforementioned various clauses of the NIT/ conditions of contract /special conditions of contract which have serious bearing in the matter.

27. On a plain reading of Clause nos. 13, 17, 20, 24 and 27 of the NIT, it was made clear that the required survey/investigation was to be made by the tenderer; no claim for idle labour, men and machinery will be entertained for any reason whatsoever; required facilities were to be established at the work site before execution of work and the tenderer was to plan his construction work programme in accordance with the departmental programme for the transfer of land through acquisition or inter departmental land transfer. Thus, the NIT clearly mentioned that the tenderer was required to conduct his survey before participating in the tender and it was made clear that the tenderer was to plan his construction work programme in accordance with the departmental programme for the transfer of land through acquisition or inter-departmental land transfer and thus, it was made known to the tenderer that the entire land was not immediately available for execution of work

and it was contemplated that the land was to be made available eventually and the work programme was to be synchronized accordingly.

28. Even as per the conditions of contract, any claim for compensation for loss suffered by the contractor, *inter alia*, on account of delay by or on behalf of the Government in the possession of the worksite where such failure is due to legal formalities or circumstances beyond the control of the State Government was specifically denied vide Clause 12(a) of the conditions of contract. It was further provided under Clause 12(a) that in case of such failure or delay in possession of the worksite, on an application by the contractor within 30 days from the date of such failure or delay such extension of time shall be granted to the contractor for completion of the work as shall appear to the Engineer to be reasonable in accordance with the circumstances of the case. This Court finds that although the learned Arbitrator has held that the claimant had applied for extension of time as per clause 12(a) of the conditions of contract but has completely ignored the 1st part of clause 12(a) which clearly provided that no claim for compensation for loss suffered by the contractor, inter alia, on account of delay by or on behalf of the Government in the possession of the worksite will be allowed where such failure is due to legal formalities or circumstances beyond the control of the State Government. The aforesaid clauses denying compensation for losses on account of delay by or on behalf of the Government in giving the possession of the worksites have a serious bearing in the matter. The aforesaid clauses also indicate that the parties were aware that the land for execution of work was not fully in possession of the appellant.

29. The finding of the learned Arbitrator with regards to a fundamental breach of contract is unsustainable on account of non-consideration of material clauses of the contract as the required examination of the terms and conditions of contract has not been undertaken to arrive at a finding of fundamental breach of contract. Having held as aforesaid, the exclusion clauses in the agreement become relevant consideration while dealing with each claim. Otherwise also the awarded claims are not sustainable on other grounds as they suffer

from apparent perversities as discussed below while dealing with item wise claims.

30. The learned Arbitrator considered the claims item-wise after deciding the issue nos. 1 to 4 as framed by the learned Arbitrator and the claim as well as the claimant's explanation have been placed in a chart contained in paragraph 32 of the award.

Claim no. 1

Claim no. 1	**Claimant's explanation**
Claim for final bill for the amount of bill of Rs. 21,83,789/-.	*"The claimant explains that this amount has been assessed as being the remaining unpaid amount due to the claimant."*

31. The claimant had submitted five running bills, the 5th one was dated 27.06.2007 and value of the total work claimed to have been performed was Rs.4,00,13,699/- but payment was made only to the extent of Rs. 3,78,29,910/- and the claimant had taken a stand that the remaining amount be treated as 6th and final bill and payment be made. The extent of work done and the claim was disputed by the appellant by stating that the payment made till 5th running account bill was only advance payment and the final payment was payable only after taking the final measurement of the total executed works and payable only in accordance with the provisions of Clause 8 of the conditions of the contract; the claimant's request for treating 5th running account bill could not be considered and treated as the 6th and final bill and therefore, the claimant was not entitled to the amount claimed as final payment and also that the claimant did not turn up for final measurement and such measurement was taken by the appellant unilaterally and the claimant was required to sign upon the said measurement. The learned Arbitrator allowed the claim of the claimant to the extent of the differential amount by taking the figure of the work executed by the claimant from the statements made in the counter-claim which was rejected at the threshold vide order dated 19.12.2015 as a preliminary issue having been filed at a belated stage and by holding that it was not connected with the claim of the claimant and further right was reserved with the appellant to file a suit for recovery of the counter-claim. The

learned Arbitrator recorded that even as per the assessment made by the appellant on the basis of purported final measurement, the work was done to the extent of Rs. 398.30 lakhs as mentioned in paragraph no.2(iv) of the counter-claim statement of the appellant, while the claimant had claimed the total value of such work as Rs.4,00,13,699/- and that there was not much difference between the two amounts. The learned Arbitrator allowed the claim to the extent of Rs.20,00,090/- (Rs. 3,98,30,000.00 - Rs. 3,78,29,910.00) taking the figure of executed work from the counter-claim statement filed by the appellant although the counter-claim was never taken on record by the learned Arbitrator and was rejected at the preliminary stage itself. The appellant has raised serious objection in connection with taking into consideration the statement made in the counter-claim in spite of the fact that the same was not taken on record by the learned Arbitrator and was rejected at the threshold. This Court finds that on the one hand, the learned Arbitrator rejected the counter-claim at the threshold and on the other hand, took the figure from the counter-claim filed by the appellant to award an amount of Rs.20,00,090/- to the claimant.

32. The discussions and findings of the learned Arbitrator about claim no. 1 are based on the statements said to have been made by the appellant in the counter-claim to hold that as per the appellant, the work was done to the extent of Rs. 398.30 lacs. Thus, the learned Arbitrator had relied upon the statements made in the counter-claim, although the counter-claim was never permitted to be filed vide order dated 19.12.2015 passed by the learned Arbitrator and therefore, findings based on statement of appellant in the counter-claim in order to allow the claim no. 1 is perverse and cannot be sustained in the eyes of law. The aforesaid aspect of the matter though raised in the petition filed under section 34 of the Act of 1996 was not considered by the learned Commercial Court on account of which neither the award nor the impugned order can be sustained.

Claim nos. 2 and 3

Claim no. 2	**Claimant's explanation**
compensation in regard to the idling of survey team in readiness for work, but not	*"The Claimant explains that though it was constrained by the Respondent to keep the survey team idle to be prepared in readiness,*

allowed to be utilized due to public hindrance - Rs. 6,83,000/-.	*but to mitigate the losses the Claimant utilized the survey team for other project works during the period of the instant project but on demand of the Respondent's Engineer by fixing various dates for survey with the assurances of police protection, the survey team had to be recalled at the work site and again kept idling on account of hindrances created by the local villagers, in absence of police protection."*

Claim no. 3	**Claimant's explanation**
Claim for compensation for expenditure incurred onsite and offsite beyond 23.08.2007 (i.e. beyond original stipulated period of completion) up to 23.08.2009 i.e. for two years Rs. 42,00,000/-.	*"The Claimant explains that the period of performance of the contract was prolonged for the reasons not attributable to the claimant, but solely on account of the inability of the Respondents to fulfill their primary obligation of handing over hindrance free land at the work site. The laimant, on being prevailed upon by the respondent's representatives, had to retain its on-site and off-site establishment in additional period of two years and had to incur unfruitful expenses for maintaining the same during the additional wasted period."*

33. Claim no. 2 concerning compensation on account of the idling of survey team in readiness for work but not allowed to be utilized due to public hindrance, has been allowed by the learned Arbitrator vide paragraph no. 62 of the award which is quoted as under:

> *"62. Having considered the rival submissions, it appears that the fact that the claimant had constituted and deployed its survey team at the work site, particularly at the head works and Canal work site, has not been denied by the Respondents. The further fact that as and when the survey team had visited the work site, it had to face hindrances, and hostilities from the local villagers, is also not denied by the Respondents. Rather, the Respondents had themselves contacted local police and also the local Civil Administration seeking help for preventing the local villagers from raising hindrances at the work site. The fact that the Claimant had deployed its survey team at the work site even after expiry of the date of the Contract period, on being called upon by the Respondent's Field Engineer, has not been specifically denied by the Respondent. Infact the letters correspondence available and evidences on record, do confirm that the Respondent Field Engineer and the concerned officers of the illegible… department had wanted the claimant to perform and complete the project work and had taken steps, to contain the hindrance caused by the villagers, though such attempts had proved futile. It cannot therefore be denied that the Claimant had to keep the survey team in readiness, and to retain such team idle during the periods when the team was recalled in anticipation of the fulfilment of the Respondent's assurances to deliver hindrance free land of the work site. The Claimant has given period wise assessment of the expenditure incurred for*

> *retaining the survey team idle. Since, the Claimant was obliged under the Contract to deploy its survey team but the survey work could not be conducted on account of the failure of the Respondents to deliver work site, the Claimant is certainly entitled to claim compensation for the expenses incurred by it for retaining the survey team idle during the various periods.*
>
> *The claim of the Claimant for a sum of Rs.6,83,000/- as compensation for retaining the survey team as idle is allowed and the Respondents are liable to pay the amount of Rs.6,83,000/- to the Claimant."*

34. With regards to claim no. 3 the learned Arbitrator has recorded as under :-

> *"65. In my opinion, the Claimant has made out a legitimate claim for compensation for the expenses incurred by it for retaining onsite and offsite establishment and for the expenditures incurred during the period beyond the stipulated period of contract. The details of the Claims have been stated by the Claimant in Anx-C to the Claim Statement. The claim being genuine, this claim is awarded and the Respondents are liable to pay the amount Rs.42,00,00/- as claimed, to the Claimant."*

35. Upon perusal of paragraph no. 62 of the award, it is apparent that no clause of the agreement has been considered much less Clause 20 of the NIT which categorically provided that no claim for idle labour, men and machinery will be entertained for any reason whatsoever. Even as per the conditions of contract, any claim for loss suffered by the contractor on account of delay by or on behalf of the government in possession of work site where such failure was due to legal formalities or circumstances beyond the control of the State Government was specifically denied vide Clause 12(a) of the conditions of contract. Clause 14 of special conditions of contract also provided that the land acquisition either forest land, government land or Raiyati land and rehabilitation work will be synchronized as per construction programme approved by the department. It also provides that in case due to any unavoidable circumstances if the land acquisition and rehabilitation progress is not as per the progress of work for the time being, no compensation or any claim will be entertained. Accordingly, the claim allowed under claim no. 2 is in disregard to the specific terms of the contract which has not been taken note of by the learned Arbitrator. Further, the discussions in connection with claim no. 2 do not refer to any document on evidence to show the extent of

deployment of survey team and the expenses incurred by the claimant to seek compensation on account of idling. It was only the details of the survey team deployed which was Annexure-B, has been referred to. Thus, the claim allowed under claim no.2 being in total disregard to the aforesaid clauses of the contract is beyond the jurisdiction of the learned Arbitrator and cannot be sustained in law. Similar is the position with regards to the claim no. 3.

Claim no.4

Claim no. 4	**Claimant's explanation**
Claim for Loss of Profit @15% of balance value of Agreement for which execution of work under the Agreement was prevented- Rs.7,12,62,945/-.	*"The Claimant explains that soon after receiving the work order, it had commenced planning/making bookings, purchasing various heavy machineries for execution of the works under the instant Contract. On account of being prevented from utilization of machineries and commencing the project work, the Claimant had to bear the cost of the machinery along with finance/hire charges paid to the financing company. Moreover, the Claimant was forced to keep the machinery idle and the unutilized amount of mobilization advance paid to the Claimant was in fact utilized in paying repayment of principles amounts and finance charges to the financing companies' against the machinery purchased and also in keeping the men and machinery at site in readiness for execution of the works. It is further explained that the only work the Claimant could perform was 8% of the total work, of its value of Rs. 400.03 lakhs (approx.) against the total value 5151.00 lakhs. The short fall in value of work which the Claimant was prevented from performing was valued Rs. 47,50,86,300.00. Furthermore, the total work was to be executed within period of 30 months. The Value of the Contract also included cost towards onsite and offsite expenditure expected to be incurred in execution of entire works within scope of the Agreement. The Claimant had to remain at the work site for more than 50 months instead of originally stipulated 30 months period for execution of project work whereas it was allowed to perform work value Rs. 400.13 lakhs only. It is further explained that the Claimant was prevented to do work value of Rs. 47,50,86,300/- and it is therefore entitled to damage amounting to Rs. 7,12,62,945/- being*

	15% of Rs. 47,50,86,300/-."

36. Claim under Loss of Profit was made @ 15% of the balance value of the contract work under the agreement which the claimant was prevented from completing. The claimant contended that on account of omissions on the part of the appellant to hand over hindrance free land within 30 days of the commencement of work, the appellant committed fundamental breach of contract and prevented the claimant to complete the project work due to which the claimant could perform only 8 percent of the total value of the work.

37. The learned Arbitrator recorded that non-performance by the appellant amounted to fundamental breach of contract and, therefore, the claimant was certainly entitled to claim compensation for the Loss of Profit which it could have earned had it not been prevented from completing the entire project work within the stipulated period. The argument of the appellant that the claimant did not invest any money at all, was also rejected by recording that it was admitted from facts that the claimant had commenced deployment of its men and machinery and purchased and hired machinery immediately after receiving the work order and by that time, the mobilization advance was not forthcoming, rather the advances were paid at much later date. Even the entire amount of mobilization advance was recovered by the appellants from the claimant's running bill in respect of the work performed at the Brahmani Canal and further amount by way of purported interest was also realized from the bill. The learned Arbitrator ultimately recorded his findings in paragraph 69 of the award:

> *"69. Applying the principle of law under Section 73 of the Indian Contract Act, and the guidelines given by the Hon'ble Supreme Court in its several judgments cited by the Claimant, in my considered opinion the Claimant is entitled to claim compensation for loss of profit. Therefore, in the totality of the facts and circumstances, I award 15% of the value of the uncompleted work amounting to Rs. 47,50,86,301/- to the Claimant as the amount of compensation for loss of profit, calculation of which amounts to Rs. 7,12,62,945/-. The Respondents are liable to pay against Claim no. 4, the amount of Rs. 7,12,62,945/- to the Claimant."*

38. Upon perusal of the explanation furnished by the claimant against claim no. 4 i.e. Loss of Profit, it has been stated by the claimant that the claimant was forced to keep the machinery idle and the amount

of mobilization advance was, in fact, utilized in paying repayment of principal amount and finance charges to the financing companies against the machinery purchased and also keeping the men and machinery at site in readiness for execution of the work.

39. The learned Arbitrator, while considering the claim on account of Loss of Profit has rejected the argument of the appellant that the claimant did not invest any money at all as the claimant had commenced deployment of its men and machinery and purchased and hired machinery immediately after receiving the work order and the mobilization advance was not forthcoming at that period of time, rather the advance was paid at much later date and even otherwise, the entire amount of mobilization advance was recovered by the appellant from the claimant's running bill account in respect of work performed at Brahmani Canal and further amount by way of purported interest was also realized.

40. Upon perusal of the findings recorded by the learned Arbitrator, this Court finds that the learned Arbitrator attributed the entire reason for non-completion of the work upon the appellant by holding that the appellant did not hand over the hindrance free land for execution of the works except 8% which was relatable to component no. (iii) and rejected the argument of the appellant that the claimant did not invest any money at all and straightaway awarded 15% of the value of the uncompleted work i.e. 15% of Rs. 47,50,86,301/- equivalent to Rs. 7,12,62,945/-. The learned Arbitrator has allowed the Loss of Profit by referring to section 73 of the Indian Contract Act and the judgments cited by the claimant passed by the Hon'ble Supreme Court and there is no discussion of any material or evidence in connection with Loss of Profit. Thus, the finding in connection with Loss of Profit is based only on the so-called several judgments passed by the Hon'ble Supreme Court and straightaway 15% of the value of uncompleted work has been awarded.

41. The foundational basis for a claim on account of damages arising out of loss of overheads and profits is required to be established by the claimant and amount cannot be awarded merely on *ipsi dixit* without giving any reason and basis for awarding the amount. In another

judgment in the case of ***"M/s Unibros Vs. All India Radio" decided on 19.10.2023, in SLP (Civil) No. 8791 of 2020*** the Hon'ble Supreme Court has dealt with the earlier judgments dealing with the claim for Loss of Profit. In the case of ***M/s Unibros (supra),*** the arbitral award was set aside to the extent it related to Loss of Profit which was affirmed in appeal under section 37 of the Act of 1996. The claimant was the appellant before the Hon'ble Supreme Court challenging the deletion of the award to the extent it related to Loss of Profit and reliance was placed by the claimant, *inter alia*, on the judgments in "***AT Brij Paul Singh Vs. State of Gujarat" (1984) 4 SCC 59 (paragraph nos. 9-11) and "McDermott International Inc. v. Burn Standard Co. Ltd." (2006) 11 SCC 181 (paragraph nos. 104 and 105)*** where 15% profit from work was granted. On the other hand, the respondent before the Hon'ble Supreme Court argued that there can be no material application of Hudson's formula in the matter of award on account of Loss of Profit without the aggrieved party leading any evidence as a condition precedent for application of the said formula. It was argued that in the absence of cogent evidence substantiating a genuine Loss of Profit or opportunity, it would be unjustifiable to permit the contractor to capitalize solely on the application of a formula. The issue was decided vide paragraphs nos. 9 to 21 of the judgment in ***M/s Unibros (supra),*** the relevant portions of which for the purposes of the present case are quoted as under:

> *"9. The contentions advanced on behalf of the appellant takes us to resolve a recurring issue which, while not unprecedented, has consistently confronted the courts leading it to navigate various circumstances under which a claim for loss of profit may be allowed in cases of delay simpliciter in the execution of a contract.*
> *10. ……..*
> *11……..*
> *12……..*
> *13……..*
> *14……..*
> *15. Considering the aforesaid reasons, even though little else remains to be decided, we would like to briefly address the appellant's claim of loss of profit. In* ***Bharat Cooking Coal*** *(supra), this Court reaffirmed the principle that a claim for such loss of profit will only be considered when supported by adequate evidence. It was observed:*
>
> > *"24. 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 utilised 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."*

16. To support a claim for loss of profit arising from a delayed contract or missed opportunities from other available contracts that the appellant could have earned elsewhere by taking up any, it becomes imperative for the claimant to substantiate the presence of a viable opportunity through compelling evidence. This evidence should convincingly demonstrate that had the contract has been executed promptly, the contractor could have secured supplementary profits utilizing its existing resources elsewhere.

17. One might ask, what would be the nature and quality of such evidence? In our opinion, it will be contingent upon the facts and circumstances of each case. However, it may generally include independent contemporaneous evidence such as other potential projects that the contractor had in the pipeline that could have been undertaken if not for the delays, the total number of tendering opportunities that the contractor received and declined owing to the prolongation of the contract, financial statements, or any clauses in the contract related to delays, extensions of time, and compensation for loss of profit. While this list is not exhaustive and may include any other piece of evidence that the court may find relevant, what is cut and dried is that in adjudging a claim towards loss of profits, the court may not make a guess in the dark; the credibility of the evidence, therefore, is the evidence of the credibility of such claim.

18. Hudson's formula, while attained acceptability and is well understood in trade, does not, however, apply in a vacuum. Hudson's formula, as well as other methods used to calculate claims for loss of off-site overheads and profit, do not directly measure the contractor's exact costs. Instead, they provide an estimate of the losses the contractor may have suffered. While these formulae are helpful when needed, they alone cannot prove the contractor's loss of profit. They are useful in assessing losses, but only if the contractor has shown with evidence the loss of profits and opportunities it suffered owing to the prolongation.

19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions: first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.

20. The First Award was interfered with by the High Court for the reasons noted above. The Arbitrator, in view of such previous determination made by the High Court, could have granted damages to the appellant based on the evidence on record. There was, so to say, none which on proof could have translated into an award for damages towards loss of profit. A claim for damages, whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. The arbitral award in question, in our opinion, is patently illegal in that it is based on no evidence and is, thus, outrightly perverse; therefore, again, it is in conflict with the "public policy of India" as contemplated by section 34(2)(b) of the Act.

21. For the reasons aforesaid, we find no merit in this appeal. The

same stands dismissed. However, cost awarded by the learned Single Judge is made easy."

42. In ***"Batliboi Environment Engineers Vs. Hindustan Petroleum Corporation Ltd and another"*** vide judgment dated 21.09.2023 passed in Civil Appeal No. 1968 of 2012, the Hon'ble Supreme Court has held in paragraph no. 23 that ordinarily when the completion of a contract is delayed and the contractor claims that he has suffered a loss arising from depletion of income and hence turnover of business and also for the overheads in the form of workforce expenses which could have been deployed in other contracts, the claim to bear any persuasion before the Arbitrator or a Court of law, the contractor is to prove that there was other work available that he would have secured, if not for the delay by producing invitations to tender which were declared due to insufficient capacity to undertake other work or through books of account to demonstrate a drop in the turnover and establish that this result is from the particular delay rather than from extraneous causes. It has been held that if the loss of turnover resulting from delay is not established, it is merely a delay in receipt of money and the contractor will be only entitled to interest on capital employed and not the profit which should be paid.

43. As already mentioned above, in the present case the award on account of Loss of Profit has been mechanically passed @ 15% without any evidence referred to in paragraph no.16 of the aforesaid judgment in the case of ***M/s Unibros (Supra).*** The award of 15% of the remaining value of work on account of Loss of Profit is *ex-facie* perverse and cannot be sustained in the eyes of the law. This aspect of the matter has not been properly considered by the learned Commercial Court while refusing to interfere with the award.

44. Further the reason for giving an award on account of Loss of Profit has been cited to be fundamental breach of contract by the appellant in not providing the work sites. Finding regarding fundamental breach of contract has been discussed above and has been held to be not sustainable on account of non-consideration of material clauses of the contract.

45. In view of the aforesaid findings the award passed by the learned Arbitrator suffers from 'patent illegality' appearing on the face of the award and is covered by the grounds mentioned under section 34(2-A) of the Act of 1996 as introduced vide the 2015 Amendment in the Act of 1996. This is in view of paragraphs nos. 31 and 32 of ***Associate Builders (supra)*** read with paragraph nos. 40 and 41 of ***Ssangyong Engineering and Construction Company Ltd. (supra).***

46. As a cumulative effect of the aforesaid findings, the impugned order upholding the award is set aside. Section 34 application is allowed. Consequently, the Arbitral Award passed by the learned Arbitrator is also set-aside. This appeal is allowed in the aforesaid terms.

47. Pending Interlocutory application, if any, is closed.

(Shree Chandrashekhar, A.C.J.)

I Agree.

(Shree Chandrashekhar, A.C.J.)

(Anubha Rawat Choudhary, J.)

Jharkhand High Court, Ranchi
Dated: 08th January 2024
Pankaj/Saurav/Mukul
AFR