
(2008) 11 GAU CK 0056
In the Gauhati High Court

M.R. Power Projects

APPELLANT

Vs

State of Arunachal Pradesh and Another

RESPONDENT

Date of Decision : 06-11-2008

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 11, 34, 34(2)
Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 23
English Arbitration Act, 1996 — Section 67, 68
Foreign Awards (Recognition and Enforcement) Act, 1961 — Section 7(1)
Geneva Convention Act, 1927 — Article 1
Protocol and Convention Act, 1837 — Section 7(1)

Citation : (2009) 4 GLR 154 : (2009) 1 GLT 28

Hon'ble Judges : I.A. Ansari, J;H. Baruah, J

Bench : Division Bench

Final Decision : Allowed

Judgement

I.A. Ansari, J.—A challenge has been made by this appeal against the order, dated 18.11.2004, passed by the learned Deputy Commissioner, Papumpare District, Arunachal Pradesh, in Misc. Arbitration (Appeal) No. 1/2003, whereby the award has been set aside by invoking the provisions of Section 34 of the Arbitration and Conciliation Act, 1996.

The material facts, which gave rise to the present appeal, may, in brief, be set out as follows:

2. FACTS LEADING TO ARBITRATION:

(i) A Notice Inviting Quotation, dated 18.8.1993, was issued by the Chief Engineer, Department of Power, Government of Arunachal Pradesh, for supply of 30 Hydel Power Generating Sets (in short, hydel sets) of 20KW, 30KW and 50KW capacity meant for supply of electricity to remote areas of Arunachal Pradesh. The hydel sets, to be so procured by the Government, were to be utilized with the help of natural water sources and springs for production of electricity. The

appellant herein submitted its proposal, on 29.9.1993, to the Chief Engineer (Power) for supply of the 30 hydel sets. This offer of the appellant had three distinct features, namely, (i) prices F.O.R. Itanagar, (ii) 75% on the strength of indemnity bond/undertaking/proof of despatch, and (iii) commissioning, if sought for. Following a meeting, held on 28.4.1994, between the appellant, on the one hand, and the Chief Engineer, Department of Power, Govt. of Arunachal Pradesh, on the other, the appellant confirmed that it would install the hydel sets within a period of seven days on receipt of the sites. In consequence of the meeting, so held; the appellant, in its communication, dated 28.4.1994, agreed to do the following:

1. We are maintaining all spares parts that may be required.
2. We even have spare T/G sets and in the event of major problem in the supplied sets within the Guarantee period the same shall be replaced altogether.
3. We shall arrange to provide suitable training to Departmental staff/ village people as desired by you. This training shall be provided free of cost.
4. The penstock offered by us are of GRP pipes which are suitable for such remote areas for their light weight. This will simplify the transportation and laying and no maintenance is required.
5. On receipt of site the set can be installed within a period 7 days.
6. In view of the light weight and small dimension of the sets, the size and cost of the Power House and installation shall be considerably low.
7. We shall be able to supply 15 sets per month commencing 2 months from the date of order as per the terms and conditions.

(ii) Pursuant to further negotiations, which took place between the parties concerned, the appellant issued, on 19.5.1994, a communication undertaking, inter alia, free installation and commissioning of the sets at the site including, free of cost, construction of power house. This communication, dated 19.5.1994, further clarified that the rate charged would be F.O.R. project site. The main features of this communication, dated 19.5.1994, issued by the appellant were as follows:

1. Free Installation and commissioning at site.
2. Power house building will be constructed free of cost from pre fabricated structure.
3. Rate will be F.O.R. project site.
4. We will supply pen stock pipe up to 200mm dia pipe free of cost subject to 100 mtr. each project.
5. Our offer against the above referred NIT will be valid up to 30th July, 1994.

(iii) On the same date, i.e., 19.5.1994, the appellant issued yet another communication undertaking to survey, free of cost, all the sites, identify the sources of power from its hydrologist and prepare survey data, etc., in association with the Department concerned. For the sake of convenience, the relevant portion of the second communication, dated 19.5.1994, is quoted hereinbelow:

Further, we also confirm that we will survey all the sites free of cost and identify source from our Hydrologist and prepare survey data etc., in association with your department.

(iv) On the basis of the post-tender negotiations between the parties concerned and also considering various technical and commercial aspects of the contract work, the Work Advisory Board, constituted for the purpose, approved, on 25.7.1994, the terms and conditions subject to which the appellant had agreed to supply the said hydel sets. The minutes of the proceedings of the Work Advisory Board, held on 25.7.1994, further conveyed that the Chief Secretary, Govt. of Arunachal Pradesh, had desired that the firm may be asked to explore the possibility to import turbine from a country, other than Italy, if tie-up arrangement can be made with the other country and if such a turbine can be made available at the shortest interval. A letter of intent, pending issuance of final order, was accordingly issued to the appellant. Shortly thereafter, the appellant, on 26.9.1994, requested the respondent No. 1 to pinpoint the locations, wherein survey can be Conducted for installation of the hydel sets. The respondent No. 1 did not, however, respond to the appellant's said letter, dated 26.9.1994; rather, the Chief Engineer, Department of Power, issued a letter, dated 28.10.1994, to the appellant informing the appellant that the appellant's offer for supply of the 30 hydel sets, asMentioned above, stands approved at an estimated cost of Rs. 7,70,00,000. Thereafter, a work order was issued, on 9.1.1995, by the Chief Engineer (Power), Govt. of Arunachal Pradesh, to the appellant for supply of the said 30 hydel sets. The communication, dated 9.1.1995, however, made it clear that the (time allowed for carrying out the work shall be reckoned from the 15th day of the letter, i.e., with effect from 24.1.1995. A formal deed of agreement between the parties was accordingly executed on 12.1.1995. Thus, the period of contract was for two years commencing from 24.1.1995 and ending on 23.1.1997. The said agreement contained, inter alia, the following terms:

Installation : The firm shall install and & commissioning commission the sets at site.

Guarantee : The stores and services under the contract shall be guaranteed for 18 months; Any defective equipments or part thereof shall be repaired/ replaced free of cost, if noticed within the guarantee period.

Payment (i) An advance payment of 25% of order/contract value shall be made alongwith the order/signing of the contract

(ii) Balance 70% payment shall be made on supply of equipments

(iii) Balance 5% shall be paid after installation and commissioning of the equipments with the fullest satisfaction of the department.

(v) The agreement, which the parties had, thus, entered into, made it clear that the appellant, as contractor, would receive 25% of the contract value along with the work order and payment of the balance 70% of the value shall be made on supply of the equipments and the remaining 5% of the value shall be paid after installation and commissioning of the equipments to the fullest satisfaction of the Department concerned.

(vi) Following execution of the agreement, dated .12.1.1995, aforeMentioned, the authorities concerned paid, on 14.1.1995, a sum of Rs. 1,92,51,750 to the appellant, the said sum being 25% of the contractual amount as had been agreed to under the agreement, dated 12.1.1995. By its communication, dated 28.4.1995 and 8.5.1995, the appellant requested the appellant No. 1 to hand over the sites. Pursuant to the communication, so issued by the appellant, Superintending Engineer (Civil), Department of Power, Govt. of Arunachal Pradesh, issued a handwritten note asking the appellant to visit the areas of Along and Roing and contact the Assistant Engineer (Civil) for the purpose of survey.

(vii) Thereafter, the appellant, by communication, dated 12.6.1995, addressed to the Chief Engineer (Power), requested for change of the brand of the hydel sets from IREM of Italy to CINK MVE of Czech Republic as the delivery schedule of the IREM of Italy was not matching with the time stipulated for execution of the contract, in question. The appellant also enclosed, with its communication, dated 12.6.1995, specifications of the CINK brand inasmuch as the specifications would have been necessary for the Department concerned to grant approval to the appellant's communication seeking change of the brand of the hydel sets, should the Department decide to accord such approval. An invitation was also given by the said communication to the officials of the respondent Department to inspect the hydel sets of CINK brand. The appellant also communicated, vide its letter, dated 12.6.1995, aforeMentioned, to the respondent Department, that the hydel sets, so offered, were Asynchronous type compared to the earlier brand, which was Synchronous type.

(viii) By communication, dated 13.6.1995, the Superintending Engineer (Civil) conveyed to the appellant the decision of the Department to accept, in principle, "the change in make from IREM of Italy to CINK MVE of Czech Republic subject to satisfaction of performance of the units and after the service is ensured". In the said communication, it was furtherMentioned by the Superintending Engineer (Civil) that suitable sites with heads and discharge combination, as required for the units, would be made available on arrival of the machinery. By letter, dated 13.6.1995, aforeMentioned, the appellant was also asked to arrange for installation of, at least, one unit of each of the 20KW, 30KW and 50KW hydel sets

for ascertaining their suitability and performance level.

(ix) On the ground that the sites for installation of the hydel sets had not been identified till then, the appellant, vide its communication, dated 13.10.1995, addressed to the Chief Engineer (Power), requested the latter to let the appellant know about the place, where the equipments were to be carried to and delivered. By yet another letter, dated 13.11.1995, addressed to the Superintending Engineer (Civil), the appellant requested the latter to give the name of the consignee to whom the hydel sets could be delivered as no site had been handed over to the appellant till then. On 13.11.1995 itself, the Superintending Engineer (Civil), by his letter, dated 13.11.1995, addressed to the appellant, informed the appellant that the machinery may be delivered at the storeyard of the Department of Power at Bhalukpung or Charduar, Arunachal Pradesh, as may be arranged by the Executive Engineer (Civil), Bomdila.

(x) By its communication, dated 30.11.1995, the appellant submitted to the Department concerned survey data in respect of eight different sites. These data were received by the Assistant Engineer (Civil), Department of Power, Roing Civil Sub-Division.

(xi) The appellant completed the supply of the 30 hydel sets by 21.3.1996 and the same were acknowledged by the authorized representative of the Department concerned. In fact, the Assistant Engineer (Civil), Department of Power, Government of Arunachal Pradesh, Bomdilla, took the delivery of the hydel sets on written instructions of the Chief Engineer (Power)", as conveyed by the communication, dated 14.2.1996. On 21.3.1996 itself, a sum of Rs. 3,85,02,000 was paid to the appellant. Though the agreement, in question, had stipulated that upon supply of the equipments, 70% of the total contract value, i.e., a sum as much as Rs. 5,39,04,800, would be paid to the appellant, an amount of Rs. 3,85,02,000 only was paid to the appellant.

(xii) The appellant claims that after having made supply of the 30 hydel sets, it continued to make requests, from time to time, to the respondents/authorities concerned to allot the sites, where the hydel sets were to be installed; but the respondents failed to allot the sites and it was, for the first time, on 29.7.1996, that the Chief Engineer (Power) gave to the appellant a list of 46 probable sites to be surveyed without, however, pinpointing the places, where the hydel sets were to be installed.

(xiii) The appellant, then, submitted, on 10.11.1996, to the Chief Engineer (Power), for approval, a list of 12 sites; but no action was taken by the respondents on the list so submitted by the appellant. Instead of responding to the appellant's letter, dated 10.11.1996, a show-cause notice was issued, on 22.11.1996, by the Chief Engineer (Power) informing the appellant that the hydel sets, which the appellant had supplied, could not be accepted by the Department and the appellant was further asked to show cause as to why the appellant had supplied hydel sets of CINK MVE make of Czech Republic instead of Ecowatt

make of Italy. The appellant submitted a reply, on 12.1.1997, stating therein that the hydel sets, supplied by the appellant, were as per approval granted. The respondents, on receipt of the appellant's letter, 12.1.1997, aforementioned, did not pursue the controversy, raised by them, with regard to the change in the brand of the hydel sets.

(xiv) Thereafter, the appellant, once again, submitted, on 29.1.1997, the said list of 12 sites for approval. However, on 19.2.1997, 5 sites were approved. By communication, dated 8.3.1997, the appellant requested for return of the approved drawings, duly signed and sealed, in respect of the 5 approved sites so that installation works could be taken up. The drawings, which had been submitted by the appellant seeking approval thereof, contained three sets, one set was meant for the respondent Department, one set for the contractor, and the third set was to be kept at the site. By its communication, dated 19.3.1997, the appellant sought for extension of the period of contract; but no extension was granted. This was followed by a letter, dated 21.3.1997, issued by the Executive Engineer (Civil), informing the appellant that due to non-availability of funds, the payment could not be released. However, on 28.10.1997, i.e., after about 18 months of the handing over of the hydel sets to the representative of the respondent Department, a further amount of Rs. 1,10,00,000 was paid to the appellant leaving still a sum of Rs. 44,02,900 as outstanding.

(xv) In short, the respondents did not, on receipt of the letter, dated 12.10.1997, pursue the controversy, raised by them, as regards the change in the brand of the hydel sets, rather, the Executive Engineer (Civil) informed the appellant, vide communication, dated 21.3.1997, that due to non-availability of funds, payment could not be released. Thereafter, on 29.10.1997, a further amount of Rs. 1,10,00,000 was released to the appellant. Thus, a total amount of Rs. 6,87,53,750, which was equivalent to 89.2% of the total contract value, was paid to the appellant and an amount of Rs. 44,02,900 remained outstanding. However, on 19.2.1997, out of the 12 sites, submitted by the appellant for approval, the respondent authorities approved 5 sites. At the time of submission of the survey data, three sets of drawing, in respect of each set, had been submitted to the respondent No. 1 by the appellant. Out of the three sets, one set, according to the appellant, was meant for the respondent Department, one set for the contractor, and the third set was to be kept at the site. Upon receiving the communication as regards the approval of the 5 sites, the appellant requested the respondents, vide communication, dated 8.3.1997, to return the approved drawings, duly sealed and signed, for the purpose of installation of the hydel sets. This apart, as the contract period stood expired on 23.1.1997, the appellant sought for an extension and, on 19.3.1997, extension was granted for a period of six months, i.e., up to 30.6.1997. The respondents did not, however, furnish to the appellant the approved drawings.

(xvi) Thus, the appellant contended that it was because of the failure of the respondents to show the sites, where the hydel sets were to be " installed, and

also due to the respondents' failure to return the approved drawings, duly signed and sealed, that the contract work could not be executed, the respondents, on the other hand, contended that it was the responsibility of the appellant to select the sites and install the hydel sets. The appellant, then, requested, on 19.2.1999, for appointment of arbitrator. As the respondents did not appoint any arbitrator, the appellant approached this High Court and, in terms of the provisions of Section 11 of the Arbitration and Conciliation Act, 1996, Mr. Justice R.K. Monisena Singh, former Chief Justice of this High Court, was appointed as the arbitrator.

3. ARBITRATION PROCEEDING:

(i) In the Arbitration Proceeding, the present appellant, as contractor, filed its Statement of Claim seeking an amount of Rs. 5,73,80,068 along with interest - pendente lite as well as future alleging, inter alia, that the respondents had committed breach of the contract by not providing the sites for installation of the hydel sets within the period of subsistence of the agreement and, hence, they are liable to pay not only compensation, but also interest. In its Statement of Claim, the appellant, as contractor, further alleged to the effect, inter alia, that the contract, in question, had failed due to the fact that the respondents had not fulfilled, within the stipulated period, the conditions of the contract.

(ii) The respondent No. 1 submitted its Statement of Defence and also filed a counter-claim of Rs. 16,53,12,430. In their Statement of Defence, the respondents contended, inter alia, that it was not the responsibility of the respondents to provide the sites inasmuch as it was the contractor, who was to locate the sites and install the hydel sets. The contract, in question, according to the respondents, had failed, because of the failure of the contractor to fulfill its parts of the obligations under the contract-Hence, the contractor was not entitled to receive any amount from the respondents; rather, the contractor was liable to pay compensation to the respondents for the breach of contract committed by the contractor.

(iii) The appellant, thereafter, submitted its reply to the Statement of Defence and the respondent No. 1 filed its rejoinder thereto. A reply was also filed to the said rejoinder by the appellant.

(iv) The learned Arbitrator framed as many as 13 issues. The arbitration proceedings ended with the delivery of the award on 2.12.2002. The issues, raised in the arbitration proceedings, read as follows:

(1) Whether the Respondents breached the terms of the contract by failing to perform their part of the contractual obligation, viz. by not providing the sites, by not releasing the payment on time as per the terms of the contract?

(2) Whether the Respondents failed to release 70% of the payment towards the cost of the equipments at one go against delivery of the equipments as stipulated in the contract?

(3) Whether the respondents breached the contract by failing to pinpoint/ approve the sites at the appropriate time as demanded by the Claimants and whether the sites were actually handed over as defined in the agreement?

(4) Whether the respondents defaulted in releasing the payment and the interest claimed by the Claimant?

(4A) Whether the Claimant is entitled to interest, if so, what shall be the rate of interest?

(5) Whether the Respondents failed to perform their part of contractual obligation?

(6) Which of the parties have breached the contract?

(7) Whether the Claimants were bound to perform a gratuitous offer for installation of Hydel sets and other accessories?

(7A) Whether the contract was a complete job/work?

Or

Whether the contract of installation of Hydel sets and other related works were divisible?

(8) Whether the Claimants are entitled to the relief claimed and if so, to what extent?

(9) Whether the respondents are entitled to the counter claims preferred by them, and if so, to what extent?

(9A) Whether the counter-claim is barred by limitation?

(10) To what relief any of the parties is entitled to?

(v) The question, as to whether the respondent No. 1 had committed breach of the terms of the contract, as regards the handing over of the sites and payment of the lawful dues, which the issue No. 1 and 3 had raised, was dealt with by the learned Arbitrator and the findings of the learned Arbitrator on these aspect of the case were recorded from para 7.1 to 7.2.9 of the award. The findings of the learned Arbitrator were, in brief, as under:

(a) At para 7.10, the learned Arbitrator came to a finding that the Department of Power was under obligation to identify/fix and/or make available the place or site for installation of the hydel sets. The learned Arbitrator also concluded that the appellant had been excused from the liability to install the hydel sets and perform other related works or discharge other obligations as were reflected from the letter, dated 13.6.1995, whereby the respondent Department had accepted, in principle, the change in the brand of the hydel sets from IREM of Italy to CINKMVE of Czech Republic.

(b) While dealing with the question of the release of 70% of the payment

towards the cost of equipments at one go, the learned Arbitrator came to a finding, at para 8.9, that contrary to the communication, dated 21.3 1997, of the Executive Engineer (Civil), wherein it had been mentioned that the amount was not being paid due to non-availability of fund, the pleadings, contained in paragraph Nos. II(b) and II(c) of the Statement of Defence, clearly disclosed that withholding of the payment against delivery of equipments was not on account of non-availability of funds, but due to alleged non-performance of the contract i.e., the alleged failure of the contractor to install the hydel sets.

(c) The learned Arbitrator concluded, at para 8.17, that the supply or sale of the hydel sets shall be deemed to have been completed by operation of law or by legal fiction, on 21.3.1996, when the sets were delivered at Charduwar. The learned Arbitrator further concluded, at para 8.18, that withholding of the payment by respondent No. 1 was not on the ground that the goods, supplied, were not of the specifications contracted for, but for non-installation of the hydel sets. It is in such circumstances that the learned Arbitrator recorded his findings, at para 8.19 and 8.20, as under:

In view of the above, the respondent could not withhold the sum of Rs. 44,02,000 because, if the description of the goods delivered were not answering to those contracted for, the respondent might reject the goods and get refund of price paid, which has not been done in the present case and cannot be done at this stage.

(d) Dealing with the issue No. 7 and 7(a), which essentially pertained to the questions as to whether the contract, in question, was a divisible contract, or not, and as to whether the appellant was bound to install the hydel sets, the learned Arbitrator came to a finding that the supply of the hydel sets was divisible from installation thereof. The learned Arbitrator concluded, in this regard, at para 9.9 to 9.11, that the appellant had been excused from the obligation or responsibility to install the hydel sets and perform other related works inasmuch as the respondent; Department had failed to provide the sites at the appropriate time coupled with the fact that the respondent Department had failed to furnish the approved drawings duly counter-signed and sealed.

(e) Coming to issue Nos. 5 and 6, which relate to the determination of the question as to which of the parties, between the two, namely, the appellant, on the one hand, and the respondents, on the other, had breached the contract, the learned Arbitrator came to a finding, at para 10.6.2, that the failure of the respondent Department to specify the sites at appropriate time for installation of the hydel sets and their failure to return the drawings of the approved sites amounted to breach of the fundamental terms of the contract, or, in other words, the breach of the terms, in question, goes to the root of the contract inasmuch as it was not possible for the appellant to install the hydel sets without the sites having been signified and the approved drawings having been countersigned and returned. The learned Arbitrator also concluded, at para 10.6.3 that the appellant stood relieved of its further liability to discharge any obligation on and from

11.2.1999 by treating the contract as having come to an end.

(f) Dealing with the question of interest, which was covered by issue No. 4, the learned Arbitrator, having referred to the terms of the agreement, which included the offer, dated 29.9.1993, and Clauses 29(a) as well as 29(i) of the General Conditions of the Contract, came to a finding, at para 11.7, that there was an agreed rate of interest @ 25% per annum for delayed payment and, therefore, the claimant had the right to claim interest by virtue of the agreement. The learned Arbitrator also concluded, at para 11.8 and 11.8.2, that the appellant was entitled to demand interest even if there were no written terms incorporated", in this regard, in the contract agreement. Discussing the issue No. 4, the learned Arbitrator came to a finding that the respondent No. 1 had defaulted in releasing the payment due to the appellant and the interest claimed by the appellant was, therefore, justified. The learned Arbitrator, however, based on various materials, came to a finding, that the appellant was not entitled to receive interest (a) 25% per annum, but interest @ 21%, with effect from 1.4.1996, ought to be paid to the appellant, The learned Arbitrator further concluded, at para 11.10 and 11.15, that the appellant was entitled to pendente lite interest @ 12.12% per annum with effect from 22.3.2001 to 2.12.2002 and future interest @ 18% per annum with effect from 2.12.2002 till realization of the entire awarded amount.

(g) Dealing with the issue No. 3, which related to the reliefs, the learned Arbitrator reached the finding, at para 13.2, that the appellant was entitled to an amount of Rs. 44,02,900, which was the Outstanding dues payable by the respondent No. 1 on account of supply of the hydel sets. The learned Arbitrator also concluded, at para 13.3.3, that the appellant was entitled to an amount of Rs. 91,34,220 on account of interest.

(h) As regards the appellant's demand that the unpaid 5% of the contract value, i.e., Rs. 38,50,350, with interest of Rs. 45,37,800, be also directed to be paid, the learned Arbitrator held, at para 13.4, that the appellant was entitled to Rs. 38,50,350, on account of 5% of the contract value inasmuch as the contractor shall be deemed to have completed its part of contract (as regards the sale of the hydel sets on 22.3.1996 and the appellant was not bound to install the hydel sets as it was a gratuitous undertaking. The learned Arbitrator, however, refused to grant interest pendente lite which the appellant had demanded in this regard. As regards the said amount of Rs. 38,50,350, the learned Arbitrator held the appellant entitled to interest @ 18% per annum from the date of the award until the date of payment of the said amount of Rs. 38,50,350. As regard the other claims of the appellant, the learned Arbitrator, at para 13.5 to 13.8, held that the appellant was not entitled to the other reliefs, which had been sought for. The learned Arbitrator, at para 13.8, directed the respondent No. 1 to pay interest from the fund of the Government, i.e., the Department of Power, and, thereafter, recover the same from the erring officers after making an inquiry in the light of the discussions made in the award.

(i) The learned Arbitrator also concluded, at para 14, that the Department of Power was not entitled to the counter-claim lodged by them and that the counter-claim was liable to be dismissed. The learned Arbitrator further concluded that the counter-claim was barred by limitation.

(j) On the basis of the observations made and the findings reached, the learned Arbitrator, at para 16, which related to issue No, 10, rendered his findings, which read as follows:

(i) that the principal for sum of Rs. 44,02,900 and Rs. 38,50,350 totaling Rs. 82,53,250 (Rupees eighty-two lakhs fifty-three thousand two hundred and fifty only), the principal sum as adjudged above, be paid by the Respondent (State of Arunachal Pradesh) to the Claimant (M/s. M.R. Power Projects) with interest thereon at the rate of 18% (Eighteen percent) per annum from this date (2.12.2002) to the date of realization.

(ii) that the sum of Rs. 91,34,220 (Rupees Ninety one lakhs thirty-four thousand two hundred and twenty only) on account of interest as concluded above be paid by the Respondent (State of Arunachal Pradesh) to the Claimant (M/s. M.R. Power Projects).

(iii) that the counter-claim dismissed that is the Respondent is not entitled to any relief, and

(iv) that the parties shall bear their own cost.

4. APPLICATION u/s 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996, AND THE JUDGMENT PASSED THEREIN:

By making an application u/s 34 of the Arbitration and Conciliation Act, 1996, in the court of the Deputy Commissioner, Papumpare, at Itanagar, the respondent No. 1 sought for setting aside the award, dated 2.12.2002. By judgment and order, dated 18.11.2004 (which stand impugned in the present appeal), the learned court below set aside the award and further directed one Rajendra Kumar Jain of M/s. M.R. Power Projects to pay an amount of Rs, 6,31,77,231 along with interest @ 18% per annum till the date of realization of the said amount. An amount of Rs. 7 was also directed to be paid by the appellant, as penalty, for playing fraud upon the people of Arunachal Pradesh. It was also directed that the appellant shall take back the equipments and machinery, etc., from Charduwar storeyard of the Department of Power within two months from the date of the judgment so delivered and, in the event of the appellant's failure to take back the equipments and machinery, etc., the respondents shall be at liberty to levy store charges from the appellant making it further clear that the appellant shall be allowed to take back the equipments only after making payment of the decretal amounts.

5. As alreadyMentioned above, the judgment and order, dated 18.11.2004, aforeMentioned stand impugned, in this appeal, by the contractor-claimant.

6. We have heard, at length, Dr. A.K. Saraf, learned senior counsel, appearing on behalf of the appellant, and Mr. P.C. Markanda, learned senior counsel, who has also appeared on behalf of the appellant. We have heard Mr. S. Shyam, learned Counsel for the respondents, too.

7. Before we enter into the merit of this appeal, let us settle the scope of Section 34 of the Arbitration and Conciliation Act, 1996. In this regard, it is of paramount importance to note that the Arbitration and Conciliation Act, 1996, has been brought into force, repealing the Arbitration Act of 1940, with a view to achieving the following objects:

- (i) To make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
- (ii) To provide that the arbitral tribunal gives reasons for its award;
- (iii) To ensure that the arbitral tribunal remains within the limits of its jurisdiction;
- (iv) To minimize the supervisory role of courts in arbitral process;
- (v) To provide that every final arbitral award is enforced in the same manner as if it were a decree of the court.

8. It is clear from the above that one of the important objectives of bringing into force the new Act is to reduce the supervisory role of the courts in arbitral proceedings. Thus, while the enactment, in question, minimizes the supervisory role of the courts in arbitral proceedings, it, at the same time, seeks to ensure that the arbitral tribunals remain within the limit of their jurisdiction. Every award of an arbitrator shall, therefore, remain within the limits of his jurisdiction and the courts, while exercising the powers, must ensure that if an issue, decided by an arbitrator, was within the jurisdiction of the arbitrator to decide, such a decision shall, even if erroneous, be not interfered with unless any of the conditions, prescribed in Section 34 of the Arbitration and Conciliation Act, 1996 ("the new Act") permits such interference.

9. It may be noted that Section 34 corresponds to Sections 67 and 68 of the English Arbitration Act, 1996, which, in turn, are based on Article 34 of the UNCITRAL Model Law. A bare reading of Section 34 reveals that an award can be set aside only if any of the five grounds, as contained in Section 34(2)(a) of the new Act, or any of the two grounds, as contained in Section 34(2)(b) of the Act, exists. If a party fails to establish his case within the four corners of Section 34, the award cannot be set aside.

10. Thus, an analysis of the various provisions of the new Act, particularly, Section 34 thereof, shows that the court's power to set aside awards is circumscribed, limited and far less than what a court's power u/s 30 or Section 33 of the Arbitration Act, 1940, used to be. The reason why the new Act makes provisions for the supervisory role of the courts is only to ensure fairness. Intervention of the court is, however, envisaged, under the new Act, in some

specific circumstances, such as, fraud or bias or violation of natural justice, etc. The court, u/s 34, does not have the jurisdiction to correct the errors of the arbitrators. What the court can do is merely to quash an award, if so warranted in a given case, leaving the parties free to begin the arbitration proceeding, once again, if any of the parties so desire and if the contract agreement so permits. Hence, a court, while acting in exercise of its powers u/s 34, can set aside an award only if any of the conditions precedent for exercising such power, as embodied in Section 34, is satisfied.

11. Logically, therefore, a court, while exercising its powers u/s 34, cannot set aside an award and allow a counter-claim, which the arbitrator may not have allowed. In fact, it is not in dispute before us that, in the present case, even if the learned Deputy Commissioner had found that the impugned award was fit to be set aside, he could not have allowed the counter-claim of the respondents and thereby substitute the award, already given in favour of the claimant-appellant, by an award in favour of the respondents. In the light of the limited role, which Section 34 perceives, it becomes clear that the Legislature aims at ensuring that the interference by court with awards is kept at the minimum level, for, in an arbitration proceeding, the parties make conscious efforts to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

12. By referring to the decision, in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003) 5 SCC 181, Mr. S. Shyam, learned Counsel for the respondents, has submitted that an award can be interfered with if the same is found to be in conflict with the "public policy of India". In the present case, contends Mr. Shyam, the impugned award was contrary to the established law of the land and the same was, therefore, rightly interfered with by the learned Deputy Commissioner. Countering the submissions, so made, Dr. Saraf has contended that even the expression public policy of India" does not empower courts to interfere with an award merely on the ground that it is erroneous. In order to enable a court to interfere with an award on the ground that it is in conflict with the "public policy of India", the award, according to Dr. Saraf, must be such as would make the court feel confident that the conclusions, reached by the arbitrator, are without any materials to support the conclusions or wholly against the materials on record. In short, what Dr. Saraf contends is that an award, in order to enable a court to interfere on the ground that it is in conflict with the "public policy of India", must be such as would reflect that the conclusion reached is so irrational that no prudent person would, on the basis of materials on record, agree to such a conclusion or when the award is flagrantly against any other established law in India.

13. In view of the fact that even the respondents concede that the impugned award could not have been interfered with on any grounds except the ground as given in Section 34(2)(b)(ii) of the new Act, it becomes clear that according to the respondents, the award, in question, was in conflict with the public policy of

India and it is for this reason that it ought to have been interfered with. In the light of the submissions made on behalf of the respondents, it becomes clear that the impugned order, passed u/s 34, can be sustained only if the award can be said to be not in conflict with the "public policy of India" warranting interference therewith by the court in exercise of its jurisdiction u/s 34(2)(b)(ii). As this appeal substantially revolves around the scope of Section 34(2)(b)(ii), we reproduce hereinbelow Section 34(2)(b)(ii):

34. Application for setting aside arbitral award.-

(1) *** ***(2Xa) *** ** the court finds that

(i) *** ** (ii) the arbitral award is in conflict with the public policy of India.

14. From a bare reading of Section 34(2)(b)(ii), it becomes clear, and it is, in fact, not in dispute before us, that under Sub-clause (ii) of Clause (b) of Sub-section (2) of Section 34, a court may set aside an award if it is in conflict with the public policy of India. The phrase "public policy of India" has not been defined in the new Act and, hence, the expression, "public policy of India", shall be given a meaning, which serves the scheme of the new Act, in general, and the purpose of Section 34, in particular.

15. Russell On Arbitration (21st Edition) at Paragraph 8-045, comments on the expression "fraud or contrary to public policy" as follows:

Fraud or contrary to public policy. This irregularity contemplates a situation where either the award was obtained by fraud or the way it was procured was contrary to public policy. The reference in the section to public policy is intended to cover circumstances which though not amounting to fraud would be similarly offensive.

It reflects one of the grounds for the court refusing to recognize or enforce a New York Convention Award.

16. The above comments of the learned author, Russell, on the expression, "fraud" or "contrary to public policy", show that these " expressions contemplate a situation, where either the award was obtained by fraud or the award procured was contrary to public interest. In this light, according to Russell, the expression "contrary to public policy" would be as offensive as the expression "fraud". That is to say, when an award, though not obtained by fraud, was obtained in such a way that it was as bad as fraud, such an award would be treated to be, in the view of Russell, contrary to public policy.

17. The phrase "public policy" connotes what is in public good and in public interest. While considering the concept of "public policy", it needs to be carefully noted that the perception as to what is in public good or what is in public interest or what would be injurious or harmful to public good or public interest have varied from time to time. The expression, "public policy", does not mean the policy of a particular government. In Central Inland Water Transport Corporation

Limited and Another Vs. Brojo Nath Ganguly and Another, the Supreme Court, at Paragraph 92, explained the term "public policy" as follows:

92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought - "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson v. Dhefontein Consolidated Gold Mines Ltd.*:

Public policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson v. Mellish* described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you" The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Assn. Ltd.* : "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the common law or the principles of Equity would never have evolved. Sir William Holdsworth in his *History of English Law Vol. III*, p. 55, has said:

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

It is, thus, clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers

a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

18. Even prior to the decision in Brojo Nath Ganguly (*supra*), the Apex Court, in Kedar Nath Motani and Others Vs. Prahlad Rai and Others, while dealing with the concept of "public policy", observed and held as follows:

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.

19. From a careful reading of what have been observed in Kedar Nath Motani (*supra*) and Brojo Nath Ganguly (*supra*), it becomes clear that the expressions "public policy", "opposed to public policy", and "contrary to public policy" are incapable of precise definition. The expression, "public policy", connotes some matters, which are concerned with public good and public interest. The expression, "public policy", does not, of course, mean policy of a particular government. The expression, "public policy" has been varying from time to time. If the illegality be trivial or venial, then, "public policy" demands that the defendant be not allowed to take advantage of such an illegality. If, however, the illegality is patent and so apparent that it is not required to be pleaded or proved as part of the cause of action, then, such an illegality would be interferable by the court, for, such an illegality would outrage the conscience of the court."

20. In Renusagar Power Co. Ltd. Vs. General Electric Co., a three Judge Bench of the Supreme Court had the occasion to explain the expression "public policy of India". In Renusagar Power Co. Ltd. (*supra*), the Supreme Court, at Paragraph Nos. 65 and 66, observed that the term "public policy", appearing in Section 7(1) (b)(ii), has to be used in a narrower sense and in order to attract the bar of public policy, the enforcement of the award must invoke something more than violation of the laws of India. The Supreme Court further observed, in Renusagar Power Co. Ltd. (*supra*), that the enforcement of a foreign award can be refused

on the ground that it was contrary to the public policy if such enforcement would be contrary to - (i) fundamental policy of Indian law or (ii) the interest of India or (iii) justice or morality. The relevant observations, made in paragraph Nos. 65 and 66, read as under:

65. This would imply that the defence of public policy which is permissible u/s 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article 1(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol and Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

21. We, now, turn to the case of Oil & Natural Gas Corporation Ltd. (supra), which the respondents heavily rely in order to sustain the order setting aside the award. The decision in Oil & Natural Gas Corporation Ltd. (supra) needs to be, therefore, considered very carefully. In Oil & Natural Gas Corporation Ltd. (supra), the question, raised, was, as to whether a court, in exercise of its

jurisdiction u/s 34 of the new Act, can set aside an award, passed by an arbitral tribunal if the award is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract. The two Judge Bench of the Supreme Court, while dealing with the question, so raised, at Paragraph 31, laid down the scope and ambit of the phrase "public policy of India", occurring in Section 34, as follows:

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar* case it is required to be held that the award could be set aside if it is patently illegal. The result would be-award could be set aside if it is contrary to:

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

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

22. It is also worth pointing out that in *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, the Apex Court has reiterated the proposition laid down in *Oil & Natural Gas Corporation Ltd. (supra)* with some significant observations. The relevant observations appear at paragraph Nos. 58 to 64 and the same are reproduced hereinbelow:

58. In *Renusagar Power Co. Ltd. v. General Electric Co.* this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court, in *ONGC Ltd. v. Saw Pipes Ltd. (CONGC)*. This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly* wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the

Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC this Court, apart from the three grounds stated in Renusagar, added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public-interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata.)

61. In ONGC this Court observed : (SCC pp. 727-28, para 31)

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

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

Illegality must go to the root of the matter and if the illegality is of trivial nature

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

62. We are not unmindful that the decision of this Court in ONGC had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases. (See *The Law and Practice of Arbitration and Conciliation* by O.P. Malhotra, 2nd Edn., p. 1174.)

63. Before us, the correctness or otherwise of the aforesaid decision of this Court is not in question. The learned Counsel for both the parties referred to the said decision in extenso.

64. We, therefore, would proceed on the basis that ONGC lays down the correct principles of law.

23. From the authorities, catalogued above, what becomes clear is that the term "public policy of India", which occurs in Section 34(2)(b)(ii), was, initially, interpreted, in *Renusagar Power Co. Ltd.* (supra), to include, within its ambit, (a) fundamental policy of Indian law, (b) the interest of India or (c) justice or morality. This narrow view, as expounded in *Renusagar Power Co. Ltd.* (supra), with regard to the expression, "public policy of India", was, however, broadened in *Oil & Natural Gas Corporation Ltd. case* (supra), wherein the Apex Court, apart from the three grounds aforeMentioned, added yet another ground, namely, (d) patent illegality. The term "patent illegality" has been further explained in *Oil & Natural Gas Corporation Ltd. case* (supra) to mean an illegality, which goes to the root of the matter and if the illegality, committed or occurring in an award, is trivial in nature, such an award cannot be held to be against the public policy of India. The Supreme Court, in *Oil & Natural Gas Corporation Ltd. case* (supra), further observed that to come within the ambit of patent illegality, an award shall be so unfair and unreasonable that it shocks the conscience; of the court.

24. What emerges from the above discussion is that even when an award suffers from an illegality or an erroneous conclusion, such an award is not interferable by a court in exercise of its powers u/s 34(2)(b)(ii) unless the illegality is patent, so unreasonable or unfair that it shocks the conscience of the court. When, therefore, in a given case, two views are possible, and an arbitrator has adopted one of the possible views, the court has no power to interfere with such an award. In other words, unless a court comes to the conclusion that the conclusions, reached in an award, cannot, in any view of the matter, be said to be reasonable or rational, interference with such an award Would not be possible.

25. Thus, notwithstanding the fact that *Oil & Natural Gas Corporation Ltd. case* (supra), has, undoubtedly, expanded the scope of interference by courts with arbitral awards by taking recourse to Section 34(2)(b)(ii), it cannot be denied that an award cannot be interfered with unless it is against the fundamental

policy of Indian law, or against the interest of India, or against justice or morality, or so patently illegal, unfair or unreasonable that it shocks the conscience of the court. Hence, a mere error of law, apparent on the face of an award, can still not be made a ground for interference with the award by a court in exercise of its jurisdiction u/s 34(2)(b)(ii). A court, while sitting on a challenge to an award on the ground that the award is against the public policy of India, must strike a balance between the two equally important, though conflicting, conditions, namely, giving finality to the arbitral award, on the one hand, and redressing substantial injustice caused by some patent and serious illegality in the award, on the other. An award cannot be challenged on the ground that the arbitrator's interpretation, as regards the terms of the award, is incorrect unless it can be shown that the interpretation is so irrational that it is impossible for any prudent person to agree to such an interpretation and that the interpretation is so illogical or absurd that it outrages the conscience of the court.

26. An arbitral award would remain, ordinarily, invulnerable to the errors of law on the face of the award until the error of law is jurisdictional, in nature, or wholly against the established law of the land. By holding that according to Oil & Natural Gas Corporation Ltd. case (supra), a patent illegality, going to the root of the matter, can enable a court to set aside an award by treating the same as in conflict with the public interest of India, the Apex Court cannot be stretched to have held that an award can be set aside merely because, by a process of arguments and inferences drawn therefrom, it is demonstrated that the arbitral tribunal has committed mistake in arriving at its conclusion. The reasonableness of the reasons, given by an arbitral tribunal, cannot be challenged unless it can be shown that the reasons are merely for the sake of offering reasons to reach a conclusion and that the reasons are so irrational that no prudent person would consider the reason as a reason for reaching the conclusion, which the arbitral tribunal might have reached. In this context, it needs to be remembered that the arbitral tribunal is the sole judge of the quality as well as the quantity of evidence and it is not open to a court to take upon itself the task of being the judge of the evidence laid before an arbitral tribunal. The court shall approach an award with the object of supporting it, if that is reasonably possible, rather than destroying it by calling it illegal.

27. Dr. Saraf has considerable force in his submission, when he points out that there is unanimity of judicial opinion that when the parties, with their eyes wide open, have consented to refer a matter to arbitration, then, the findings of the arbitrator should, normally, be accepted without demur, but when it is found that the arbitrator had acted without jurisdiction and put an interpretation to a clause, which is wholly contrary to law, then, in such a case, there is no prohibition for courts to set things right. Dr. Sarafs reference, made in this regard, to paragraph Nos. 17 and 24 of Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd., cannot be said to be misplaced inasmuch as the Supreme Court, in Numiligarh Refinery Ltd. (supra), has observed and held as follows:

17. We have considered the rival submissions of the parties. So far as the legal proposition as enunciated by this Court in various decisionsMentioned above, it is correct that courts shall not ordinarily substitute their interpretation for that of the arbitrator. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the arbitrator should be accepted without demur. There is no quarrel with this legal proposition. But in a case where it is found that the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case there is no prohibition for the courts to set things right. In the....

*** ** 24. Similarly, our attention was invited to a decision of this Court in Tarapore & Co. v. Cochin Shipyard Ltd. In this case, Their Lordships held that: (SCC p. 680)

If a question of law is specifically referred by the parties to the arbitrator for decision, award of the arbitrator would be binding on the parties and court will have no jurisdiction to interfere with the award even on ground of error of law apparent on the [face of] award.

We have no quarrel with this proposition. So far as other decisions of this CourtMentioned above, that the court should accept the interpretation of the terms of the agreement made by the arbitrator, and should not interfere, there are no two opinions on that question but in the present case, we are faced with a peculiar situation that the three arbitrators out of whom two have taken one view of the matter and the third has taken another view of the matter. The District Judge has also set aside (his award on some issues and the High Court has also accepted some items of the majority award of the arbitrators and some items of the minority award of the arbitrator. Therefore, in the peculiar state of affairs in the present case when there is variation of views: the majority award takes one view and the minority award takes another view, the District Judge takes the third view and the High Court takes the fourth view, in the state of these conflicting views on the subject, we have to enter into the merit to put an end to the controversy by adjudicating the conflicting views of various forums. However, general consensus of the view emerging from various judgments of this Court is that there are no two opinions that the court should not sit in appeal and normally should not interfere with the views of the arbitrator in interpretation of the terms of agreements interpreted by the arbitrator when the arbitrator is appointed with consent of parties. However, in peculiar facts and circumstances of the case, the view taken by the High Court in accepting the majority view of the arbitrators cannot be accepted. We overrule the view taken by the High Court in accepting the majority view and accept the minority view taken by Justice M.M. Dutt and decline the claim of DIC in the sum of Rs. 2.9 crores on account of fluctuation in the exchange rate.

28. What surfaces from the above observations, made in Numiligarh Refinery Ltd. (supra), is that a court shall not, ordinarily, substitute its interpretation to an

arbitrator's interpretation as far as the term(s) of a contract are concerned, for, when the parties have voluntarily, consciously, and with their eyes wide open, had consented to refer a dispute to an arbitrator, then, the finding of the arbitrator should be, normally, accepted without reservation unless the arbitrator has acted without jurisdiction, or has attributed an interpretation to a clause of an agreement, which interpretation is wholly contrary to law. It is also clear from the above observations, made in Numiligarh Refinery Ltd. (supra), that a court, while considering an award u/s 34, does not sit to exercise appellate jurisdiction and cannot, therefore, except in the cases as pointed out hereinbefore, substitute its own interpretation as regards the terms of an agreement, in place of the interpretation, which an arbitrator may have reached.

29. When an arbitral tribunal is made the final arbiter of the disputes between the parties, an award cannot be made to be challenged on the ground that the tribunal reached a wrong conclusion or failed to appreciate the facts. When there is no dispute as regards the terms of the contract, interpretation of the terms of the contract is the domain of the arbitral tribunal, and the court cannot substitute its own decision in place of the decision of the arbitral tribunal. Even if the view taken, with regard to the terms of a contract, by an arbitral tribunal is a plausible one, such a view cannot be interfered with u/s 34. It may also be borne in mind that an award can, indeed, be set aside, if an arbitral tribunal goes beyond its jurisdiction. A distinction needs to be kept in mind between an error, which is within the jurisdiction of an arbitral tribunal, and an error, which is beyond the jurisdiction of, or in excess of jurisdiction of, the arbitral tribunal. A court, even while exercising its powers u/s 34(2)(b)(ii), does not act as an appellate court and cannot, therefore, set aside an award merely because some mistake or error of fact or law has crept in, unless the error is so grave and patent that the conscience of the court gets shaken warranting its interference.

30. In the backdrop of the facts, which had led to the arbitration proceedings, the findings of the learned Arbitrator, the decision of the learned Deputy Commissioner and the position of the law governing interference with an award in exercise of powers u/s 34 of the Act, as discussed above/we, now, point out, in a crystallized form, the various controversies, which have been raised for determination, in this appeal, and we also lay down our decisions on these controversies.

31. We have already pointed out above that the agreement, reached by the parties, stipulated that an advance payment of 25% of the contract value shall be made along with the signing of the contract and that payment to the extent of 70% of the contract value shall be made on supply of the equipments by the appellant and that the remaining 5% of the contract value shall be paid to the appellant on installation and commissioning of the equipments to the fullest satisfaction of the Department concerned. The respondents had contended, in the Arbitration Proceeding, that the payments, which had been undertaken to be made at three distinct stages, were merely payment schedule and that the

contract, in question, was a composite contract in the sense that the appellant was not merely required to supply the hydel sets, but also install the same and until the time the appellant had installed the sets, the contract was not over and the appellant was not entitled to receive any payment whatsoever and, in fact, whatever payment the contractor might have received, the same ought to have been returned to the respondent Department. The appellant, on the other hand, had contended that the contract, in question, was a divisible contract and that the failure to install the hydel sets could not have been treated to be breach of the Contract so as to completely disentitle the appellant from receiving any payment for the hydel sets, which had been supplied by the appellant to the respondent Department. This apart, the appellant had also contended that it was due to the failure of the respondents that the hydel sets could not be installed and/or commissioned.

32. While the appellant had contended that it was the duty of the Department concerned to give the sites, the Department had failed to identify the sites despite repeated reminders issued, in this regard, by the appellant and that it was due to failure of the respondents to identify the sites that the hydel sets could not be installed and the contract got, frustrated, the respondents had contended, in this regard, that it was the responsibility of the appellant to identify the sites and install the hydel sets.

33. Yet another ground for the appellant to contend that the contract had failed due to inaction on the part of the respondents was that the respondents had not returned the requisite drawings, which the appellant had prepared for the purpose of installation of the hydel sets, and, as a result of not being furnished with the counter-signed drawings by the respondents, the hydel sets could not be installed and commissioned. Joining issue with the appellant, the respondents had contended that counter-signing of the drawing was not a condition precedent and that the contractor ought to have installed, at least, five sets at the sites, which had been mentioned by the communication, dated 19.2.1997, issued, in this regard, by the Superintending Engineer (Civil).

34. As the learned Arbitrator had rejected the above contentions of the respondents and upheld the contentions of the appellant, the award was impugned by the respondents by way of an application made u/s 34 of the Arbitration and Conciliation Act, 1996.

35. We have already pointed out above that the Notice Inviting Quotations was for supply of light weight small hydel sets an estimated cost of Rs. 7,70,07,000, the stipulated period of completion being two years. There was nothing, in this Notice, indicating that installation of the hydel sets would be an integral or inseverable part of the contract. However, during post-negotiation period, a meeting between the parties" concerned was held on 28.4.1994. Following this meeting, the appellant issued a communication, dated 28.4.1994 as already mentioned at para (i) that it would, on receipt of the sites, install the hydel sets within a period of seven days. This communication was followed by

another communication, dated 19.5.1994, issued by the appellant, wherein the I appellant clarified that the rates will be F.O.R. project site. Referring to their earlier communication, dated 28.4.1994, aforeMentioned, the appellant issued yet another communication, on 19.5.1994 itself, wherein the appellant further confirmed as follows:

Further, we also confirm that we will survey all the sites free of cost and identify source from Hydrologist and prepare survey data etc., in association with your department.

36. After the Work Advisory Board had done the needful, the Chief Engineer, Department of Power, formally informed the appellant, vide his letter, dated 27.10.1994, that the Work Advisory Board had decided to place the order with the appellant. In the letter, dated 27.10.1994. it was clearlyMentioned thus, "the order may be placed with M/s. M.R. Power Projects, Naharlagun, with the terms and conditions given in the offer without price variation.""

37. Pursuant to the decision taken by the Work Advisory Board, the Chief Engineer, Department of Power, issued Work Order, dated 9.1.1995, and a formal agreement was executed, in this regard, by the parties concerned on 12.1.1995. The agreement read, inter alia, as under:

Installation & : The firm shall install and commission the sets commissioning at site.

Guarantee : The stores and services under the contract shall be guaranteed for 18 months; Any defective equipments or part thereof shall be repaired/ replaced free of cost, if noticed within the guarantee period.

Payment : (iv) An advance payment of 25% of order/ contract value shall be made along with the order/signing of the contract (v) Balance 70% payment shall be made on supply of equipments (vi) Balance 5% shall be paid after installation and commissioning of the equipments with the fullest satisfaction of the department.

38. From the developments, which had taken place since the issuance of the Notice Inviting Quotation till execution of the final agreement, what becomes clear is that, initially, the NIT was merely for supply of hydel sets; but, during the post-negotiation period, the appellant assumed the responsibility to survey, free of cost, the sites, identify the source and prepare survey data. What is, however, significant to note, in this regard, is that the appellant had assumed the responsibility to survey the sites, identify the source, prepare survey data, etc., not on its own alone, but "in association with" the Department concerned. It was also a part of the post-negotiation development that the installation would be done within a period of seven days from the date of receipt of the sites. These terms, which had been agreed to during the post-negotiation period, reveal that the appellant had agreed to supply the hydel sets at the project site and that the carrying charges up to the project sites was to be borne by the contractor

inasmuch as the price included the transportation charges up to the project site. However, so far as the installation of the hydel sets was concerned, the same was undertaken to be done within a week from the date of receipt of the site(s). This indicates that it was association with the Department concerned that the appellant had undertaken to survey the sites, identify the source with the help of its hydrologist, prepare survey data, etc. There is nothing in the communications, which have been relied upon by the parties during the post-negotiation period, reflecting that the survey of the sites and/or identification of the source and/or preparation of the survey data were the exclusive responsibility of the appellant and that the respondent Department had nothing to do with the same.

39. We may, at this stage, pause to point out that a hydrologist is a person, who is an expert on science of properties of the earth water, specially, on the movement of water in relation to the earth. Theoretically, a hydrologist can identify a location from scientific point of view in relation to the earth water. In reality, however, a location, identified by a hydrologist, may not be feasible from the point of view of an engineer and/or economic necessities and/or social requirements. For instance, a hydrologist may, in a case of present nature, identify a location as suitable for installation of hydel set, but the location, so identified, may not be suitable for the needs of the Government inasmuch as the Government can approve such a site by taking into account the number of persons, who may be benefited by the generation of power as a result of installation of a hydel set at a particular place. In short, while a hydrologist could have, in the present case, identified one or more suitable locations for installation of a hydel set, it would have remained, nevertheless, for the Government to decide as to whether the location, so identified, would serve the purpose with which the hydel sets were being procured by the Government.

40. What logically follows from the above discussion is that, in a case of present nature, the appellant could have identified the locations, which might have been suitable for installation of hydel sets; but identification of such location(s) could not have been done without associating the respondent Department. N6 wonder, therefore, that the appellant had, vide letter, dated 19.5.1994, aforeMentioned, agreed to identify the source and collect the survey data "in association with the Department concerned. Consequently, the appellant had been repeatedly asking for allocating the sites and, eventually, when five sites were approved, the appellant sought for the drawings to be returned, after due endorsement, as indicated above. These drawings were, admittedly, never returned to the appellant nor did the respondent Department, at the relevant time, contend or inform the appellant that the return of the drawings, duly counter-signed and sealed, was not necessary. The respondents, it transpires, never applied their mind to this aspect of the contract work.

41. The reference, made by Dr. Saraf, to clauses 11 and 24 of the General Rules and Directions for the guidance of the contractor, which formed part of the contract, in question, is also not inappropriate inasmuch as clauses 11 and 24

aforeMentioned read as under:

Clause 11. The contractor shall execute the sole and every part of the work in the most supstitual and workmen like manner and both as regards material and otherwise in every respect in strict accordance with the specifications. The contractor shall also confirm exactly fully and faithfully to the designs, drawings and instructions in writing in respect of the work signed by the Engiaeer-in-Charge and the contractor shall be furnished free of charge one copy of such specification, designs, drawings and instructions as are not included in the Public Works Department compilation entitled PWD "specification for works...in force from time to time with up to date correction slips or any printed publication on general specifications referred to in clause wherein the contract.

Clause 24. All works to be executed under the contract shall be executed under the direction and subject to approval in all respects of the Engineer in charge who shall be entitled to direct at what point or, points and in what manner they are to be commenced and from time to time carried on.

42. A bare reading of clauses 11 and 24 leave no room for doubt that every contract work has to be executed, in every respect, by a contractor under the direction, and subject to the approval, of the Engineer-in-Charge. This, in turn, shows that unless the drawings, as regards the installation of the hydel sets, had been approved, the contractor was not free to install the hydel sets according to his own understanding. The repeated demands, therefore, made by the appellant for the drawings to be counter-signed, sealed and returned cannot be said to be impertinent, unjustified, illegal or unwarranted.

43. The respondents have heavilyRelied On the promise made by the appellant, in the appellant's communication, dated 28.4.1994, that the appellant would install the sets within a period of seven days on receipt of the sites. The expression, "on receipt of site", according to the learned Arbitrator, meant that the sites were to be handed over to the appellant by the respondents. For the conclusion, so reached, the learned Arbitrator has derived support from, amongst others, the communication, dated 13.6.1995, whereby the Superintending Engineer (Civil) had informed the appellant that "sites with suitable head and discharge combination required for the units will be made available on arrival of the machinery" Thus, the conclusion, which the learned Arbitrator has, eventually, reached, that the appellant's liability to install the hydel sets would have arisen only when the site had been handed over to the appellant by the respondents, cannot be said to be without any supporting materials on record or wholly contrary to the materials on record. At any rate, the conclusions, which the learned Arbitrator has so reached, are plausible conclusions and could not have, therefore, been interfered with by taking recourse to Section 34, for, recourse to Section 34 could have had only when the conclusion reached by the learned Arbitrator would have been without any supporting materials or wholly against the materials on record or without jurisdiction or against the law.

44. While dealing with the above aspect of the case, it is imperative to note that for installation of a hydel set, the location has to be pinpointed. Even if a particular location is identified as a site suitable for installation, the exact place of installation of the hydel set was, in a case of present nature, required to be pinpointed by the respondents. In the case at hand, for the purpose of installation of the hydel sets, not only approval of the drawings, but also the return of the drawings, after the same stood countersigned and sealed, was necessary in order to enable the appellant to install the hydel sets at the exact place, which the respondent Department would have, taking into account its own requirements, selected or identified.

45. In the circumstances, as discussed above, when the learned Arbitrator had come to the conclusion that the appellant stood excused, on the failure of the respondents, to confirm, identify the sites and return the drawings, in question, such a conclusion, which the Arbitrator had reached, could not have been regarded as a wholly irrational conclusion and/or a conclusion, which was reached without any basis. In other words, the finding, so reached by the learned Arbitrator, could not have been held to be either without any materials or wholly against the materials on record. In short, the finding cannot be described as perverse.

46. We may pause here to point out that it was within the jurisdiction of the learned Arbitrator to decide as to whose action had led to the frustration of the contract, in question, and the decision given by the Arbitrator, even if erroneous, could not have been interfered with by invoking the provisions of Section 34 inasmuch as the subject-matter of the decision was within the jurisdiction of the learned Arbitrator. This apart, the decision was not patently wrong or against any established law in this country. The question decided was a question of fact, which depended on the interpretation of the terms and conditions of the agreement and the conduct of the parties. Misinterpretation or misconstruction of an agreement alone, in the absence of any other ground, cannot become a reason for holding that the award is against the public policy of India, particularly, when the interpretation of the agreement is not wholly irrational. If a contrary argument is acceded to, every award would be liable to be set aside, if a court, while exercising power u/s 34, comes to take a view that the interpretation of the terms and conditions of a given agreement by the Arbitrator was "incorrect. Such is not the object of Section 34. Exercise of powers u/s 34, as already indicated above, is not the same as exercise of appellate jurisdiction.

47. We may also pause here to point out that in the present case, the appellant's offer was to supply the hydel sets, with the rates being F.O.R. project site, which means no more than the fact that the sale price would include the carrying charges up to the site of the project. In fact, in *Hindusthan Sugar Mills Vs. State of Rajasthan and Others*, the Apex Court has succinctly explained the expression "F.O.R. destination" as follows:

This would plainly and indubitably be in position where the contract of sale

entered into by the dealer is F.O.R destination railway station. But here it is necessary to bear in mind a rather important distinction. There may be a case where the contract of sale may not be F.O.R destination railway station, but the price alone may be so. Where such is the case, the contract does not have all the incidents of a F.O.R destination railway station contract, but merely the price is stipulated on that basis. The terms of such a contract may provide that the delivery shall be complete when the goods are put on rail and thereafter it shall be at the risk of the purchaser. Such a stipulation would make the railway agent of the purchaser for taking delivery of the goods. The freight in such a case would be payable by the purchaser though the price agreed upon is F.O.R destination railway station. The price of the goods receivable by the dealer would, in that event, be the F.O.R destination railway station price less the amount of freight payable by the purchaser. That would be the consideration payable by the purchaser to the dealer for the sale of the goods and the amount of freight being payable by the purchaser would not be included in the "sale price" within the meaning of the first part of the definition. The position would be the same even if the dealer pays the freight and obtains railway receipt "freight pre-paid" and claims the full F.O.R destination railway station price in the bill. The amount representing freight would not be payable as part of the consideration for the sale of the goods but by way of reimbursement of the freight which was payable by the purchaser but in fact disbursed by the dealer and, hence, it would not form part of the "sale price".

48. Bearing in mind what is indicated above, we, now, proceed to determine if the contract, in question, was a divisible one. The agreement, in question, stipulated, as already pointed out above, that an advance payment of 25% of the contract value shall be made along with the signing of the contract and that payment to the extent of 70% of the contract value shall be made on supply of the equipments by the appellant and that the remaining 5% of the contract value shall be paid to the appellant on installation and commissioning of the equipments to the fullest satisfaction of the Department concerned.

49. The learned Arbitrator has, while dealing with the question of divisible contract, referred to G.H. Treitel's book on Law of Contract, wherein the author has observed that a breach of contract is committed, when a party, without lawful excuse, fails or refuses to perform or performs defectively or incapacitates himself from performing the contract and that in this view of the matter, mere non-performance of the contract by a party, by itself, would not constitute a breach of contract, even though it prima facie discloses a breach of contract, provided that the defaulting party proves a justifiable excuse for non-performance. The comments, so made, by the learned author clearly show that though, to an ordinary man, mere non-performance of a contract by a party, by itself, may constitute a breach of contract, every non-performance of contract is not, in law, necessarily a breach of contract inasmuch as a defaulting party may prove a justifiable excuse for non-performance of the contract. A non-performance of contract can become a breach of contract if the party, who is

accused of the nonperformance, refuses to perform, or fails to perform, the contract without any lawful excuse or performs the contract without any justifiable excuse, defectively.

50. We may, profitably, as has been done by the learned Arbitrator, refer, now, to the "Law of Contract" by Cheshire and Fifoot, wherein a breach of contract has been described thus:

Breach occurs where a party repudiates or fails to perform one or more of the obligation imposed upon him by the contract, it may take any one of three forms.

First, and this is the normal form, it occurs where a party fails to perform his obligation upon the date fixed for performance by the contract, as for example where a seller does not deliver the goods on the appointed day.

Secondly, it may arise from express repudiation, i.e., where a party states explicitly that he will not perform his promise.

Thirdly, there is a breach if a party does some act which disables him from performing his obligation/as for instances where A. who has promised to marry B. marries C. instead. Such an act constitutes an implicit repudiation of the contract.

Of these items forms the second and the third may occur before performance is due....

51. Even the comments on Law of Contract, by Cheshire and Fifoot, clearly show that order to be held responsible for breach of a contract, the non-performance must be due to the act of omission or commission of the person, who is accused of having non-performed the contract. Consequently, when such a party has justifiable excuse for such nonperformance of contract, he cannot be blamed for breach of contract.

52. In order to test if the contract was a divisible one, let us, now, closely examine the various stages, at which the payments were required to be made by the respondents or were entitled to be received by the appellant. From a bare reading of the agreement, it becomes crystal clear that 25% of the total contract value was to be paid in advance. There is nothing, in the agreement, to show that this advance payment was to be returned even if the contractor had supplied the hydel sets, but failed to install the same. The agreement also postulates that on the supply of the equipments, 70% of the contract value was to be paid to the contractor. According to the agreement reached between the parties, since the supply was to be made at the project site, it is clear that this payment of 70% of the contract value was to be made, when the hydel sets reached the project site and not when the hydel sets were installed. On receipt of the hydel sets at the project site, the appellant was, thus, entitled to receive, in all, 95% of the contract value, i.e., 25% in advance and 70% on having completed the supply of the hydel sets at the project site. Let us assume, for the sake of argument, that the appellant had supplied to the site of the projects the

hydel sets of the quality, which it had undertaken to supply to the project site(s), and, then, refused and/or neglected and/or failed to install the hydel sets. Could the respondents, in such a case, withhold the payment of 70% of the contract value and/or demand repayment of 95% of the total contract value if, upon such a supply having been made, payment of 70% of the contract value already stood made to the contractor?

53. While answering the question posed above, what is necessary to point out is that 5% of the total contract value had been agreed to be retained by the respondents and the same would have become liable to be paid to the appellant, if the hydel sets were installed and commissioned. Though the appellant had agreed to install, free of cost, the hydel sets, and the learned Arbitrator has concluded that the installation was to be a gratuitous on the part of the appellant, the fact remains that the final agreement, which the parties had reached, clearly indicates that 5% of the total value of the contract was liable to be paid to the appellant only when the hydel sets were installed and commissioned to the fullest satisfaction of the department. Viewed from this angle, the learned Arbitrator's view, that the undertaking given by the appellant to install the hydel sets was a gratuitous act, in nature, may not be entirely correct inasmuch as the terms and conditions of the agreement, which finally envisaged, indicate that 5% of the contract value were to be paid to the appellant only on installation of the hydel sets and commissioning thereof. In effect, the payment of the 5% of the contract value was subject to installation and commissioning of the hydel sets and, hence, the value of installation and commissioning of the hydel sets was 5% of the total contract value. Consequently, if the appellant had failed, on account of its own act of omission or commission, to install the hydel sets and/or commission the same, the appellant would have forfeited its right to receive the said 5% of the contract value. In other words, on the delivery of the hydel sets at the project site(s), the appellant was, independent of the fact as to whether it had installed the hydel sets or not, entitled to receive payment of 95% of the total contract value. That such was the understanding between the parties concerned is evident from the fact that on delivery of the hydel sets at Charduwar, the respondents had paid, on 21.3.1996, a sum of Rs. 3,85,02,000 to the appellant and as regards the payment of the balance amount, the Executive Engineer, vide his communication, dated 21.3.1997, aforeMentioned, informed the appellant that it was due to non-availability of fund that the remaining amount had not been paid and, eventually, the respondent Department did pay, on 28.10.1997, to the appellant a further sum of Rs. 1,10,00,000.

54. Having referred to the authorities cited above, the learned Arbitrator has pointed out that the respondents' failure to fix sites for installation of the hydel sets at appropriate time and their failure to return the drawings of the approved sites were clearly breach of the fundamental terms of the contract. Such a breach, according to the learned Arbitrator, went to the root of the contract and made it impossible for the claimant to perform its part of the contractual

obligation and, in such circumstances, the appellant stood discharged from the liability of installing the hydel sets and, therefore, the appellant cannot be held responsible for breach of contract. For the reasons, which we have already Discussed above, we do not find that the reasons, so assigned by the learned Arbitrator, are without any application of mind, or without any supporting materials on record, or wholly against the materials on record. Such a finding of fact, we are of the firm view, could not have been upset, or set aside, by relying on the provisions of Section 34.

55. We may also point out that though it was contended, in the arbitration proceeding, that the balance amount had not been paid due to the fact that the appellant had not installed the hydel sets, and the non payment of the balance amount was not due to lack of funds, it needs to be noted that it is not permissible, in law, to construe the cause of an action by reasons subsequently assigned or supplied. The words, written or spoken, contemporaneously with the transaction, shall be the determinative factor as regards the intentions of the parties concerned. In the case at hand, the specific ground for non-payment of the balance amount was non-availability of fund. The respondents' contention that the payment had not been made due to failure to install the hydel sets is clearly an after-thought and could have been given no credence at all. At any rate, when the learned Arbitrator has concluded that the payment had been withheld due to paucity of funds and not for the omission to install the hydel sets, such a conclusion cannot be said to be wholly erroneous. In such circumstances, no interference with such a conclusion was permissible by a court in exercise of its powers u/s 34. Thus, in the facts and attending circumstances of the present case, the conclusion reached by the learned Arbitrator that the payment had not been made due to non-availability of fund and that the respondents were liable to pay 70% of the total value of the contract work, on delivery of the hydel sets, at Charduwar, cannot be said to be wholly irrational or outside the jurisdiction of the learned Arbitrator.

56. What is, now, of utmost importance to note is that the hydel sets were to be supplied at the project sites. We have already pointed out above that it was due to failure, on the part of the respondents, that the hydel sets could not be installed. In such circumstances, when the delivery of the hydel sets had been taken at Charduwar and a substantial part of the 70% of the total value of the contract had been paid to the contractor with the promise to make the remaining payment, it cannot be said that the hydel sets had not been delivered to the respondents. What needs to be noted is that the delivery of the hydel sets, at Charduwar, had nothing to do with the F.O.R. rate at the project site inasmuch as the sale price includes, in such a case, delivery at the destination. Had the respondents allotted the sites, the situation would have, perhaps, been a little different; but, when the sites had not been finalized and the hydel sets had been taken delivery of by the respondents, the transaction of sale was over. The fact that the respondents also knew that the transaction of sale was over is evident from the fact, as has been already Discussed above, that on delivery of the hydel

sets, at Charduwar, the appellant had been paid as much as Rs. 3,85,02,000 and, at a subsequent stage, a further sum of Rs. 1,10,00,000.

57. A divisible contract, according to Black's Law Dictionary (6th Edition), is one, which is in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent on each other nor intended by the parties so to be. Black's Law Dictionary further points out that if a contract is composed of several independent parts, the performance of any of which will bind the other party pro ten to, then, it is a divisible contract, meaning thereby that when a contract is composed of several independent parts, and performance of any of these independent parts casts a corresponding obligation on the other party, such a contract will be treated as a divisible contract. In this light, when the terms of the contract, in the present case, are considered, it becomes transparent that on the supply of the hydel sets, at the project sites, the claimant-appellant were to be paid 95% of the total contract value and the mere fact that the claimant-appellant had not installed the hydel sets, even if such non-installation had been due to failure of the claimant-appellant, could not have legally absolved the respondents from their liability to pay 95% of the total contract value to the claimant-appellant.

58. Thus, as we have already pointed out above, though the contract, which finally emerged, had made it necessary for the claimant-appellant to install the hydel sets, mere non-installation of the hydel sets could not have denied the claimant-appellants right to receive 95% of the contract value inasmuch as failure to install the hydel sets, even if without any lawful excuse, could have, at best, disentitled the contractor from claiming the remaining 5% of the contract value, which the contractor was to receive on installation of the hydel sets.

59. The test, as to whether a contract is divisible one or not, depends on the inferences to be drawn from the circumstances. Sometimes, the inferences can be drawn from the interpretation of the terms of the agreement and, at times, the inferences, as regards the question as to whether the contract is a divisible one, or not, can be drawn from the conduct of the parties. Where the performance of a part of a contract is not dependent on the other part, it would be a divisible contract. Viewed thus, it is clear that when the payment of 95% of the contract value was required to be made on delivery of the hydel sets and only 5% of the contract value was to be kept detained until installation, it logically follows that the claimant was entitled to receive 95% of the contract value irrespective of the fact as to whether the appellant had installed the sets or not. If the appellant could show that failure to install the sets was due to the action or inaction of the respondents, such action or inaction of the respondents would have absolved the appellant from the liability to install sets and the respondents would have, in such a case, become liable to pay the balance 5% of the contract value, too to the appellant, notwithstanding the fact that the sets had not been installed and/or the sets had not been commissioned.

60. In short, thus, the mere failure to install the hydel sets could not have, logically, disentitled the appellant from receiving 95% of the total contract value on delivery of the hydel sets at the project site. In the case at hand, the learned Arbitrator has found, on a thorough scrutiny of the materials on record, that it was due to the failure of the respondents to identify the sites and return the approved drawings, by appropriately signing and sealing the same; that it had become impossible for the claimant-appellant to install the hydel sets within the agreed period of the existence of the contract and since the respondents refused to extend the period of the contract, the claimant-appellant stood excused from the liability of installing and commissioning the hydel sets. We find no sustainable reason having been assigned by the learned Deputy Commissioner, in interfering with this finding of fact reached by the learned Arbitrator.

61. Now, turning to the question as to whether the change in the brand stood approved by the respondents or not, it needs to be pointed out, as already indicated above, that in the meeting of the Work Advisory Board, the Chief Secretary had expressed the desire that the appellant shall explore the possibility of importing turbine from a country other than Italy. In this background, it, now, needs to be noted that the appellant had addressed a communication, dated 12.6.1995, to the Chief Engineer (Power), seeking approval for a change in the brand and the Chief Engineer (Power) responded to the appellant's communication, dated 12.6.1995, by making it clear, vide communication, dated 13.6.1995, that the hydel sets would be accepted provided that their standard of performance is found to be same with that of the earlier brand. Obviously, the performance of the sets was required to be tested; but, when the delivery of the sets, in question, had been taken by the respondent Department and, until the term of the contract expired, no allocation of sites had been finalized by the respondent Department [or testing the performance level of the sets, it could not have been held that the contract had failed due to the lapse on the part of the appellant. In any case, the learned Arbitrator's conclusion that the change, in the brand, stood approved and that upon their delivery, at Charduwar, coupled with the failure of the respondents to identify the sites and return the drawings, in question, the appellant stood excused, cannot be said to be a finding, which had been reached on a subject beyond the jurisdiction of the Arbitrator, nor could such a finding be said to be so irrational as would invite interference by court in exercise of powers u/s 34. The findings, so rendered by the learned Arbitrator, are all findings of fact, which have been reached on the basis of the construction of the agreement, in question, and the inferences drawn from the conduct of the parties, such findings of fact cannot be said to be such findings, which are against the public policy of India.

62. The learned court below has observed that the award is not in accordance with the substantive law, such as, the Contract Act, Sales of Goods Act, the Transfer of Properties Act, and other laws, in force, in the country. While making such a sweeping remark, the learned court below has not, however, pointed out any of the provisions of the Contract Act and/or of the Sales of Goods Act and/or

the Transfer of Properties Act, which has been ignored or violated, while deciding the disputes, in question, by the learned Arbitrator. The learned court below has also pointed out that as the award is not in accordance with the substantial law, there is need to reassess and re-appreciate the evidence on record. A court, it needs to be repeated, while acting on an application u/s 34, is not an appellate court,, and an award cannot be set aside merely on the ground that it is erroneous. Even an error apparent on the face of the record, as had been understood in the past, would not be a reason to interfere with an award under the Arbitration and Conciliation Act, 1996. Interference with an award is not possible unless it is patently wrong, i.e., when it goes to the very root of the jurisdiction of the Arbitrator or when the award is rendered contrary to the law or the public interest. In the present case, the award, in question, is an award, which contains findings of fact and these findings have been reached, essentially, on the interpretation of the terms and conditions of the contract agreement and on the basis of the inferences drawn from the conduct of the parties concerned. Even if, in such a case, the Arbitrator reaches a wrong or incorrect decision, such an erroneous decision cannot be interfered with by invoking the provisions u/s 34 unless it can be shown that the award is against the public policy of India, that is to say, against the established law of the land.

63. In the case in hand, the most important question was as to whether the contract had failed due to failure on the part of the respondents to identify the sites and return the drawings, in question, so as to enable the appellant to install the hydel sets? This question was a question of fact and when such a question of fact has been decided on the basis of the agreement, in question, and the conduct of the parties, such a finding cannot be interfered with by invoking the provisions of Section 34. If this part of the award cannot be interfered with, the consequences would be that the appellant would stand excused from the responsibility to install the hydel sets. Similarly, the respondents, as a result of their failure to allot the sites and/or return the drawings, in question, failed to test the performance of the hydel sets supplied to them. In such circumstances, there could have been no conclusion except that the appellant stood excused from the liability to install the sets.

64. The learned Deputy Commissioner has held that the award was not rendered in accordance with the contract agreement inasmuch as interest has been awarded on money withheld for non-installation and non-commissioning of the hydel sets despite the fact that Clause 29A of the Conditions of the Contract stipulates that the Contractor will not have any claim of interest in respect of any payment withheld or retained by the Engineer-in-Charge or the Government, as the case may be.

65. Thus, the only reason, assigned by the learned Deputy Commissioner, for interfering with the award, as regards interest, was Clause 29A of the Conditions of the Contract. In view of the fact that it is Clause 29A, which has been relied upon, for the purpose of interfering with the award, so far as the same relates to

interest, we reproduce hereinbelow Clause 29a:

Clause 29A : Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of line by the Engineer-in-Charge or the Government or any other contractor person or persons through Engineer-in-Charge against any claim of the Engineer-in-Charge or Government or such other person or persons. In respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Engineer-in-Charge or the Government or with such other person or persons.

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Engineer-in-Charge or the Government will be kept withheld or retained as such by the Engineer-in-Charge or the Government or till his claim arising out of in the same contract or any other contract is either mutually settled or determined by the arbitration clause if the contract is governed by the arbitration clause or by the competent court, as the case may be, and. that the contractor shall have no claim for interest or damages whatsoever on this account or any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor.

66. A close reading of clause 29A goes to show that the Engineer-in-Charge or the Government, as the case may be, can withhold any sum of money due and payable to a contractor. However, the said right, given to the Engineer-in-Charge and the Government is saddled with a duty, on the part of the Engineer-in-Charge or the Government, as the case may be, to put to notice the contractor that his due and payable amount is being kept withheld or retained by the Engineer-in-Charge or the Government, as the case may be, in terms with the conditions mentioned in this clause. Issuing of such a notice to the contractor was mandatory if the respondent Department had sought to invoke clause 29A. It is, however, an admitted position that the appellant had not been notified about retention of the money in the terms of the conditions stipulated in clause 29A. In these circumstances. Clause 29A could not have been applied.

67. Moreover, what must also be borne in mind is that withholding of, or retention of, an amount due and payable to a contractor is permissible only as "lien", that is, when there is a counter-claim. This apart, the fact that the dues were being kept withheld or retained, as a lien", must be notified to the contractor if the Government wishes to escape the liability to pay interest on the withheld sum. Clause 29A, as a matter of fact, aims at saving the Government from making payment of interest inasmuch as the Government would not be liable to pay interest even if an arbitral Tribunal or a court, as the case may be, finds, at any subsequent stage, that the contractor was entitled to the sum of money, which had been kept withheld or retained as "lien". The Government cannot escape the liability to pay interest, in such a case, unless the Government shows that it had put the contractor to notice that his dues were being withheld as "lien," for the charges or the counter-claim, which the Government has

against him.

68. Coupled with the above, one cannot also ignore the fact that clause 29A appears in the general conditions of the contract and the same has to be necessarily read subject to the special agreement, which might have been reached by the parties concerned. In the present case, the Work Advisory Board had accepted the appellant's offer subject to which the appellant had offered to supply and install the hydel sets. Thus, the Work Advisory Board had accepted the appellant's offer and agreed to pay 25% interest on account of delayed retirement of the bills of the appellant. Viewed thus, it is clear that it was within the jurisdiction of the learned Arbitrator to determine if the appellant was entitled to receive interest. When the learned Arbitrator found that the contract, in question, stood frustrated, because of the acts of omission and commission on the part of the respondents, it was within the ambit of the jurisdiction of the learned Arbitrator to grant such interest, which were due and payable, in law, to the appellant. Except clause 29A, nothing else could be pointed out, on behalf of the respondents, to sustain their objection that the appellant could not have been granted interest.

69. In the present case, the learned court below has gone far beyond its jurisdiction in penalizing the claimant-appellant for the alleged fraud committed by the claimant-appellant on the people of Arunachal Pradesh. In fact, no such power was available to the learned court below. If it had found the award unfit to be sustained, it could have only set aside the award leaving the parties, once again, to get the dispute, if so required, decided by taking anew resort to arbitral proceedings.

70. What crystallises from the discussions, held above, is that the law does not permit a court, while acting, in exercise of its powers u/s 34, to set aside an award and substitute the same by yet another award. Viewed, thus, it is clear that while setting aside the impugned award, the learned court below could not have allowed the counterclaim of the respondents. This apart, even on merit, as already Discussed above, the counter-claim was not sustainable.

71. What further follows from the above discussions is that the impugned award does not suffer from any such defect, infirmity or error, which could have been treated to be against the public policy of India as envisaged by Section 34. In short, thus, the award, in question, was not, under the facts and circumstances Discussed above, interfereable.

72. In the result and for the foregoing reasons, this appeal is allowed. The impugned judgment and order, dated 18.11.2004, is hereby set aside. The impugned award, dated 2.12.1994, shall accordingly stand restored.

73. With the above observations and directions, this appeal shall stand disposed of.