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**(2019) 07 JH CK 0138**  
**In the Jharkhand High Court**  
**Case No : Arbitration Appeal No. 21 Of 2007**

M/s Madan Prasad

APPELLANT

Vs

State Of Bihar (now Jharkhand) And Ors

RESPONDENT

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**Date of Decision :** 06-07-2019

**Acts Referred:**

Arbitration Act, 1940 — Section 16(1)(c), 30, 33, 39  
Indian Contract Act, 1872 — Section 55, 56, 73  
Interest Act, 1978 — Section 3(1)(b)

**Citation :** (2019) 07 JH CK 0138

**Hon'ble Judges :** Anubha Rawat Choudhary, J

**Bench :** Single Bench

**Advocate :** Rohit Roy, Vibhor Mayank, Atanu Banerjee, Piyushita Tudu

**Final Decision :** Allowed

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## Judgement

1. Heard Mr. Rohit Roy and Mr. Vibhor Mayank, counsels appearing on behalf of the appellant.
2. Heard Mr. Atanu Banerjee, and Ms. Piyushita Tudu, Advocates appearing on behalf of the respondents.
3. The instant appeal has been filed under Section 39 of the Arbitration Act, 1940 against the judgment dated 23.08.2007 (decree signed on 07.09.2007) passed by the learned Sub-Judge-I, Chaibasa in Title Suit No. 1 of 2007 read with Misc. Case No. 2 of 2007 in terms of which the learned court below has been pleased to allow objection on behalf of the respondents under Section 30/33 of the Arbitration Act, 1940 and has been pleased to set aside the award dated 03.01.2007, passed by the learned sole Arbitrator.
4. Admittedly the dispute and differences between the parties arose out of the agreement for construction of Main Government Polytechnic Workshop at Adityapur, Jamshedpur under Agreement No. 14/F2/1984-85 dated 25.02.1985. An application under the Arbitration Act 1940 was filed before the learned court

below which was numbered as Misc. Case No. 10 of 2005 and by order dated 05.10.2005 the learned court below was pleased to appoint Shri R.D. Roy, Ex-Chairman-cum-Managing Director, W.C.L. as the sole arbitrator to adjudicate the dispute and differences between the parties. The parties duly participated in the arbitral proceeding before the learned Arbitrator and the learned Arbitrator after hearing the parties was pleased to allow the claim of the claimant (appellant herein) to the extent of Rs. 29,79,064/- under various heads and the award was published on 03.01.2007. The award was submitted by the sole Arbitrator before the learned court below and Title Suit No. 1 of 2007 was registered. The respondent herein, on notice filed their objection under Section 30/33 of the Arbitration Act, 1940 which was numbered as Misc. Case No. 2 of 2007 and both the Title Suit No. 1 of 2007 and Misc. Case No. 2 of 2007 were decided by the impugned judgment dated 23.08.2007 (decree signed on 7.9.2007) and the objection filed by the respondents herein was allowed and the Arbitration Award was set aside.

5. Upon perusal of the award dated 03.01.2007, it appears that admittedly in response to Notice Inviting Tender (NIT) the claimant submitted its tender and the work was allocated to the claimant vide Superintending Engineer's letter no. 1020 dated 09.04.1984 and upon taking over the possession of the construction site on 01.12.1984 the work was scheduled to be completed by 30.11.1986, but it took 46.5 months and was actually completed on 15.10.1988. It was the specific case of the claimant that delay of 22.5 months took place due to laches, lapses and defaults on the part of the respondents as a result of which the claimant suffered losses. It was the specific case of the claimant before the learned Arbitrator that the respondents failed to provide approved detailed construction drawings with all sectional details including reinforcement schedule etc. at appropriate time due to which the work got held up several times. Non supply of the approved drawings in time was utter breach of the condition precedent for execution of the work. It was further the case of the claimant that due to lapses on the part of the respondents, extension of time for completion was inevitable, but here also respondents did not act in time and kept the claimant in suspense. The application for the first extension was given on 09.03.1987 for extension up to 31.03.1988 but approval was given as late as on 27.01.1989. Similarly, the application for second extension was given on 10.06.1987 for extension up to 05.02.1989 but approval was received as late as on 18.04.1991. It was also the case of the claimant that keeping the claimant in suspense also affected the progress of the work and seeing the luke warm attitude of the respondents the claimant had requested for foreclosure of the work but request of the claimant was not entertained by the respondents. Hindrance to the work was also caused due to election, obstruction by anti social elements, Jharkhand movement etc. which was brought to the notice of the management from time to time. It was stated by the claimant before the learned Arbitrator that on account of fundamental breach of contract by the respondents the claimant was incapacitated from performing its obligations under the contract

by completing the work within the stipulated period of 24 months. However, the claimant had to keep its entire infrastructure, establishment and machinery engaged for 46.5 months instead stipulated period of 24 months and that the respondents failed to fulfil the condition precedent by not timely supplying the design, drawings and important materials like cement and steel, etc. which led to extended time on account of non-fulfilment of obligations on the part of the respondents.

6. It further appears from perusal of the award that the respondents had taken a specific plea that the completion of work was not conditional, rather, as per the terms and conditions of the agreement, the respondents were not responsible for non-completion of the work except for providing necessary design, drawings, technical advice etc. which were provided at the earliest possible. It was further the specific case of the respondents that materials which were not supplied by the respondents could have been procured by the contractor under clause 26 of the Notice Inviting Tender (NIT), accordingly forclosure of work was not warranted. The respondents had also pleaded that as per the notice inviting tender as well as special conditions of the contract the claimant was not entitled to claim for any alleged idle wages, escalation of prices of materials and labour wages. It was further pleaded that as per clause-3 of the special conditions of contract and clause 28 of the Notice Inviting Tender rates entered into the agreement were final and conclusive and nothing extra beyond that was payable on account of alleged price hike, increase in taxation rates and rates in freights and fares etc. was payable. As per clause-3 of the special conditions of contract and clause 40 of the notice inviting tender all taxes were payable by the claimant.

7. The learned Arbitrator recorded oral arguments by the counsel for the claimant and the respondents in the award. It further appears that argument was advanced considering the terms and conditions of the contract and also regarding reasons for delay and also regarding negative covenants in the agreement between the parties. Learned Arbitrator has analysed the submission of both the parties in the award and while analysing the arguments has also recorded that in course of execution of work claimant had been writing to the respondents for compensating the losses which occurred on account of delay in execution of work attributable to the respondents at the stage of extension of time. Learned Arbitrator also recorded a finding of fundamental breach of contract from the side of the respondents in the award as follows: -

"The claimant had further submitted that in view of the facts as explained above there has been fundamental breach of contract by the respondents. The various clauses of the contract forbidding extra claim towards loss suffered due to infructuous overhead and idle establishment, claim against price escalation, increase in labour wages and other losses suffered by the claimant are not applicable and the claimant is entitled to all the claims it has been made. If the claims are not entertained it would be against the very basic principles of contract pertaining to promise and reciprocal promise and also against basic

principle of natural justice and equity". I agree with the contention of the claimant that there has been fundamental breach of contract on the part of the respondents."

8. After having held that there was fundamental breach of contract on the part of the respondents, the learned Arbitrator recorded a finding that execution of work was adversely affected and its completion got delayed by 22.5 months due to non-supply of designs, drawings, technical details and materials like cement and steel in time which was not only the responsibility of the respondents, but it was also a condition precedent which ought to have been fulfilled by the respondents to ensure the completion of the work within the scheduled period. Thereafter, the learned Arbitrator considered all the claims one by one and passed the award as under: -

9. Summary of Award:

CLAIM HEAD

ALLOWED

1.

Loss on account of Infructuous expenditure on overhead Claim - 7,75,000/-

Rs. 4,95,000.00

2.

Loss due to increased cost of labour Claim - 3,09,615/-

Rs. 79,385.00

3.

Losses due to idling of men and machinery Claim - 37,500/-

Rs. 37,500.00

4.

Compensation for loss of profit Claim - 6,38,336/-

Rs. 1,70,223.00

5.

Compensation for spoilage of centring and shuttering materials Claim - 1,10,000/-

Rs. 25,000.00

6.

Interest on delayed payment on final bill Claim - 9,360.00

Nil

7.

Interest on delayed release of security deposit Claim - 89,877/-

Nil

8.

Extra burden of statutory duty of sales tax, royalty etc. Claim - 4,50,000/-

Rs. 22,882.00

9.

Interest on total amount of Rs. 8,29,990.00 (from claim no. 1 to claim no. 8) @ 14% per annum for 18 years

Rs. 20,91,574.00

10.

Preparation of claim and cost of arbitration Claim - 25,000/-

Rs. 25,000.00

11.

Respondent's share of arbitrator's fee for 30 sittings paid by the claimant

Rs. 30,000.00

12.

Respondent's share of cost of publication of the award paid by the claimant

Rs. 2,500/-

Total

Rs. 29,79,064.00

(Rupees twenty-nine lakh seventy-nine thousand sixty-four only)

10. After publishing the award, the respondents herein filed objection under Section 30/33 of the Arbitration Act, 1940 and specifically pleaded that clause 25,26,27 and 28 of the general conditions of contract mandates that no claim whatsoever will be payable to contractor on account of delay in supply of materials by Department.

11. During the course of argument counsel for the respondent has referred to the following clauses from the general conditions of contract.

12. Clauses 25,26,27 and 28 of the general conditions of contract are as follows:

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"Clause-25:- The every effort shall be made to procure and supply to the

contractor the materials which the employer has undertaken to supply, but in case of delay, it shall be incumbent upon the contractor to reduce or disband his organization and labour force according to the conditions obtaining at that time. On this score no damage or compensation shall be payable to the contractor but suitable time extension shall be granted to the contractor for completing the work.

Clause-26: - In case the employer is unable to supply the material undertaken to be supplied by him the contractor shall be free to procure them after obtaining the written permission from the Engineer-in-charge.

Clause-27: - The 24 hours' notice to the contractor shall be bound to render accounts of material issued to him departmentally and getting the balance alive in store or at sight, verify and checked by the Engineer-in-charge or his representative.

Clause- 28: - The rates entered into contract agreement shall be final and conclusive and nothing extra beyond them shall be payable either on account of price hike, increase in taxation rate and increase in freight and fair etc."

13. In the objection the respondents had also referred to clause 3 of the special conditions of contract and also condition no. 40 of the Notice Inviting Tender. Clause 3 of the Special Conditions of Contract and Condition No.40 of the Notice Inviting Tender are quoted hereunder:

Clause 3 of the Special Conditions of Contract

"Clause 3: All rates quoted in the tender should be for completed job including all carriage, royalty, sales taxes Income - tax and other taxes the payment of which will be sole responsibility of the contractor.

Condition No.40 of the Notice Inviting Tender

Condition 40. Any tax payable under local rules and Acts shall be borne by the Contractor entirely at his own cost."

14. The respondents had also taken a plea that new claims could not have been entertained by the learned Arbitrator and that originally the claim was only for an amount of Rs. 22,65,505. The rate of interest which was awarded by the learned Arbitrator was also challenged and it was stated that the award of interest both pendentlite and future ought not be more than 9%.

15. The learned court below by the impugned judgement has been pleased to set-aside the award. From the perusal of the judgement passed by the learned court below, it appears that the learned court below has set-aside the award by referring to the aforesaid clauses of the agreement and has totally ignored the finding of the learned arbitrator regarding fundamental breach of contract from the side of the present respondents and its consequences.

Arguments of the Appellant

16. Learned Counsel for the appellant has specifically argued before this court that once there is finding on fundamental breach of contract by the learned Arbitrator, the clauses of the agreement could not have been resorted to for the purposes of denying the damages which were claimed by the appellant under various heads. This argument of the appellant was itself without prejudice to the contention that otherwise also the clauses of the agreement were not an impediment for claiming the damages which were duly claimed by the appellant. It was also argued by the appellant that interpretation of contract was within the realm of the jurisdiction of the learned Arbitrator and the courts in exercise of power under Section 30/33 of the Arbitration Act, 1940 do not sit in appeal against the award of the learned Arbitrator. In this background counsel for the appellant has submitted that the learned court below has erred in law in setting aside the award passed by the learned Arbitrator. Learned Counsel for the appellant has also submitted that as is apparent from the award itself, that the extension of time, though it was applied, but was granted much after the outer date of completion and it has been specifically recorded in the award that the claimant had indicated at the stage of applying for extension of time for completion that they would claim damages on account of delay.

17. Counsel for the appellant submits that as per the agreement itself, time was the essence of contract. Counsel further submits that in view of the judgment passed by the Hon'ble Supreme Court reported in (2002) 4 SCC 45 (General Manager, Northern Railway and Anr. Vs. Sarvesh Chopra), whereby Section 55 of the Contract Act has been interpreted, it has been held that if performance is accepted after expiry of the stipulated period and the contractor had indicated regarding claim of the damages on account of such delay then the claimant would be entitled to such amount irrespective of any negative covenant to that effect in the contract. Learned Counsel for the appellant further submits that as per the finding of the learned Arbitrator, delay occurred not only on account of non-supply of material but also on account of supply of design and drawing and in any of the clauses, which have been referred to by the respondents, consequence of non-supply of drawing and design has not been indicated. Counsel has referred to following judgments: -

(2002) 4 SCC 45 (General Manager, Northern Railway and Another vs. Sarvesh Chopra);

(1985) 2 SCC 9 (Hyderabad Municipal Corporation versus M. Krishnaswami Mudaliar and Another);

(2000) 6 SCC 113 (Ghaziabad Development Authority vs. Union of India and Another);

(2007) 13 SCC 43 (K.N. Sathyapalan (dead) by LRS. Versus State of Kerala and Another);

(2009) 16 SCC 705 (Bharat Drilling and Foundation Treatment private Limited vs. State of Jharkhand and Others)

Judgment pronounced by Hon'ble Calcutta High Court in APO No. 63 of 2017 (State of West Bengal vs. Pam developments Private Limited);

(2010) 1 SCC 409 (Ravindra Kumar Gupta and Company vs. Union of India);

Commentaries of Pollock and Mulla on Indian Contract and Specific Relief Act, 13th Edition (Volume II) page 1479.

Exclusion of Right to Claim Damages by Express Contract "In certain cases, parties may exclude or restrict liability for damages. Parties may, by making express provisions, exclude the right to claim damages for its breach. Such provisions are valid, provided it is expressed in plain and unambiguous language. Under English law, attempts to exclude of limit liability for breach of contract are restricted by statute. In any case, such a term does not avail of the party himself guilty of breach. Thus, where a term in the contract for allotment of building site excluded any claim of interest by the allottee, the clause was held to apply only to such cases where the allottee was responsible for creating the circumstances providing occasion for refund, and not where the authority was itself at fault. The remedy opted for damages for breach of contract is not excluded merely because certain other remedies in case of breach are mentioned in the contract."

By referring to the aforesaid, learned counsel for the appellant has submitted that it is the fundamental principle that a party to the breach cannot take advantage of negative covenants in the contract and this principle applies with more rigors when there is fundamental breach of contract as in the present case.

#### Arguments of the respondents

18. Counsel appearing on behalf of the respondents on the other hand submitted that the Arbitrator has to confine himself within the four corners of the agreement and the Arbitrator himself, is a creature of agreement. Counsel has submitted that the Arbitrator in the instant case has travelled beyond the agreement to pass an award and has ignored the various clauses of the agreement. Counsel has referred to aforesaid quoted clauses which are alleged to have been ignored by the learned Arbitrator. It is also submitted that the learned Arbitrator has also ignored clause-2 and 5 of the general conditions.

19. However, during the course of argument it transpired that clause 12 (a) of the general conditions of contract is contradictory to clause 10 of special conditions of contract in as much as the word 'not' does not appear in clause 12 (a) of the general conditions. Clause 10 of Special Conditions and Clause 12(a) of the general conditions are quoted hereinbelow for ready reference: -

Clause 10 of Special Conditions of Contract

Clause 12(a) of the general conditions

10. The Contractor shall "not" be entitled to claim any compensation for loss suffered by him on account of failure or delay or on behalf of Govt. in supply of materials of stores which the Govt. may have undertaken to supply where such



delay in supply is due to (i) natural calamity (ii) Act of enemies (iii) Transport and procurement difficulties and (iv) are circumstances beyond the control of the State Govt.

12(a) The contractor shall be entitled to any compensation for loss suffered by him on account of failure or delay by or on behalf of Government in the supply of materials or stores which the Government may have undertaken to supply, where such failure is due to (I) natural calamity (II) Act of any enemies (III) Transport and procurement difficulties or (IV) Circumstances beyond the control of the State Government.

In case of such failure or delay in the supply of materials or stores or an application by the contractor within 30 days from the date of such failure or delay, such extension of time shall be granted to the contractor for completion of the works as shall appear to the Engineer to be reasonable in accordance with the circumstances of the case the decision of the Executive Engineer as to the extension of time shall be accepted as final by the contractor.

20. Counsel for the Respondents during the course of argument submits that there is typographical error in clause 12(a) of the general conditions in as much as the word "not" has not been printed but parties had intended that the claim which has been referred to in clause 10 of the special conditions and Clause 12(a) of the general conditions relating to compensation for loss suffered by him on account of failure or delay or on behalf of Govt. in supply of materials of stores which the Govt. may have undertaken to supply, were not payable. He has also submitted that otherwise also if there is any conflict between the general conditions and special conditions, the special conditions of contract would prevail. Learned Counsel further submits that though the award has given a finding that there has been fundamental breach of contract but in fact there is no fundamental breach and this aspect of the matter is required to be considered by referring to clauses of the agreement. He accordingly submits that in spite of the fact that there was no specific challenge by the respondents to the finding of the learned Arbitrator regarding fundamental breach of contract but upon conjoint reading of the various clauses of the agreement along with facts and circumstances of this case it would transpire that there has been no fundamental breach of agreement. In support of this contention counsel has submitted that there is specific clause 25, 26, 27 and 28 of the general conditions of contract that if the material is not supplied by the respondents the same is required to be procured by the claimant and claimant has to take specific steps to mitigate the damages on account of non-supply of material. During the course of argument counsel for the respondents has not shown any clause in the agreement dealing with non supply of the design and drawing although specific query was made by this court in this regard. Counsel submits that this is fundamental law that anything which is not specifically provided in the agreement cannot be awarded even if it arises out of the contract. He further submits that there is no question of any fundamental breach of the agreement contract in the instant case as the

contract was never rescinded and the work was executed within the extended period and was accepted subsequently. Thus, counsel has submitted that even in absence of negative covenant in the contract, when the contract is silent on the point, no compensation on such head could have been awarded. For this proposition he referred to the judgment passed by the Hon'ble Supreme Court reported in (2000) 3 SCC 27 and he submits that in the said case contract was silent on escalation and in absence of escalation clause the award on account of escalation was declared to be illegal and suffering from patent error. Counsel has also referred to the following judgments.

(2001) 4 SCC 86 (Bharat Coking Coal Ltd. vs. L.K. Ahuja and Co.);

(2007) 4 SCC 697 (Food Corporation of India vs. Chandu Construction and Another);

(1999) 9 SCC 283 (Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises and Another);

(2004) 10 SCC 566 (State of U.P. through Supdt. Engg. Tons, U.P. vs. Patel Engg. Co. Ltd. and Others);

(1988) 3 SCC 82 (Continental Construction Co. Ltd. vs. State of Madhya Pradesh);

(1955) 2 SCC 48-AIR 1955 SC 468 (Seth Thawardas Pherumal vs. Union of India);

(2001) 2 Mh. L.J.297 (Jaimal Shah vs. ILA Pandya);

(2014) 8 SCC 319 (Commercial Tax Officer, Rajasthan vs. Binai Cements Limited and Another)

and (2001) 4 SCC 241 (Ramchandra Reddy & Co. vs. State of A.P. and Others).

21. Counsel for the appellant in the rejoinder has once again summarised the argument and submits that interpretation of contract is within the exclusive domain of the Arbitrator and if there is any error in interpretation of contract, the same is error within the jurisdiction and cannot be said to be a misconduct of the learned Arbitrator or suffering from any error apparent on the face of record which are the condition precedent for setting aside an award under Section 30/33 of the Arbitration Act, 1940. Counsel further submits that concept of interpretation between special conditions of contract and general conditions of contract will not arise at the stage of setting aside of award under Section 30/33 of the Arbitration Act, 1940 as the same is certainly subject matter of interpretation of the agreement and the court does not sit in appeal to the award passed by the learned Arbitrator. He further submits that the learned Arbitrator has assigned reasons for holding that there was a fundamental breach of contract and the learned Arbitrator has given specific finding as to how and in what manner fundamental breach of contract was committed by the respondents and therefore the so called negative covenant in the contract has no role to play and the parties would be governed by Section 73 of the contract Act. The

principles of Section 73 of the contract Act has been duly applied by the learned Arbitrator and the learned Arbitrator has dealt with each and every claim which was duly substantiated by the claimant before the learned Arbitrator. He further submits that so far as quantification of claim is concerned the same was never the subject matter of challenge by the respondents before the learned court below and no such argument has been advanced by the respondents before this court also.

#### FINDINGS OF THIS COURT

22. The case of the respective parties as well as the relevant findings of the learned Arbitrator have already been mentioned in the above paragraphs.

23. After hearing the counsel for the parties and after considering the materials on record, this Court finds as follows:

(i) The matter regarding arbitration arises out of Notice Inviting Tender (NIT) for construction of Main Polytechnic Institute and Workshop at Adityapur, by the Superintending Engineer, Building Construction and Housing Department, Chotanagpur Circle, Ranchi. The claimant submitted his tender which was accepted, and finally the work was allotted to the claimant vide Superintending Engineer's Letter No. 1020 dated 09.04.1984. The possession of the construction site was handed over to the claimant on 01.12.1984 and the work was scheduled to be completed within 24 months i.e. by 30.11.1986, but it took 46.5 months and was completed on 15.10.1988. The agreement involved in this case is Agreement No. 14/F2/1984-85 dated 25.02.1985. The agreement value of the work was Rs. 50,33,664/-. The first application for extension of time was made on 09.03.1987, but the approval for extension up to 31.03.1988 was given on 27.01.1989; similarly, for the second extension, application was made on 10.06.1987, but the extension up to 05.02.1989 was given on 18.04.1991. The work was admittedly completed on 15.10.1988.

(ii) The specific case of the claimant was that the delay had taken place on account of laches, lapses and defaults on the part of the respondents as a result of which the claimant had suffered losses and damages and consequently on 15.10.1988, the claimant assessed the losses and damages and wrote to the Executive Engineer, for making good the losses and damages. As the claimant did not received any response, the claimant filed a petition in the court of learned Sub-Judge-I, Chaibasa on 23.09.1992, and the learned court directed the Superintending Engineer by order dated 07.09.1993 to enter upon reference and adjudicate the dispute who did not proceed further and ultimately retired from service. Subsequently, the learned Sub-Judge-I, Chaibasa appointed Sri. R. D. Roy, Ex-Chairman-cum-Managing Director of W.C.L as Sole Arbitrator to adjudicate the dispute vide order dated 05.10.2005.

(iii) It is apparent from the Award itself that the specific case of the claimant before the learned Arbitrator was that the respondents had failed to provide the approved detailed construction drawing with all sectional details including

reinforcement schedule etc. at appropriate time due to which the work was held up several times and such non-supply of approved drawings in time was in utter breach of the condition precedent for execution of agreement. The claimant filed claim on account of losses and damages under the heads mentioned in the award itself and it was the specific case of the claimant was that there was a fundamental breach of contract on the part of the respondents and also claimed interest @ 18% from 15.10.1988 till the date of actual payment as per Interest Act, 1978.

(iv) So far as the respondents are concerned, their specific case was that as per notice inviting tender as well as special condition of contract, the claimant was not entitled to claim any amount for alleged idle wages, escalation of prices of materials and labour wages and as per aforesaid terms and conditions of contract, rates entered into the contract agreement was final and conclusive and nothing extra, beyond that was payable on account of alleged price hike, increase in taxation rates and rates in freights and fares etc. Further, as per clause-3 of the Special Conditions and Clause-40 of NIT, all taxes were payable by the claimant. It was also the specific case of the respondents that materials which were not supplied by the management could have been procured by the contractor under Clause-26 of the Notice Inviting Tender and accordingly the foreclosure of the work was not warranted. The respondents also pleaded that the respondents were not responsible for non-completion of the work except for providing necessary design, drawing, technical advice etc. which were provided at the earliest possible. In this background, it was an admitted fact on the part of the respondents that the respondents had failed to timely supply the design, drawing etc. and the extension of time for completion of work itself was caused due to non-fulfillment of the obligation on the part of the respondents. The learned Arbitrator while analyzing the submissions of both the parties also observed that the claimant got so desperate that it had to make a request for foreclosure of the work which was not entertained by the respondents and the learned Arbitrator also recorded that the claimant had not been only complaining about the delay in supply of design, drawing and technical details, but had also been intimating the respondents that it would be claiming compensation for losses caused due to such delay.

(v) The learned Arbitrator vide Para-7 at page 25 of the Award held as follows:-

"The claimant has further submitted that in view of the facts as explained above, there has been fundamental breach of contract by the respondents. The various clauses of the contract forbidding extra claims towards loss suffered due to infructuous overheads and idle establishment, claim against price escalation, increase in labour wages and other losses suffered by the claimant are not applicable and the claimant is entitled to all the claims it has made. If the claims are not entertained, it would be against the very basic principle of contract pertaining to promise and reciprocal promise and also against the basic principles of natural justice and equity. I agree with the contention of the claimant that

there has been fundamental breach of contract on the part of the respondents."(emphasis supplied)

(vi) The learned Arbitrator further gave the following findings:

"On perusal of the submissions of both the parties and the materials on record, I am convinced that the execution of work was adversely affected and its completion got delayed by 22.5 months due to non-supply of designs, drawings, technical details and materials like cement and steel in time which was not only the responsibility of the respondents, but it was also a condition precedent which ought to have been fulfilled by the respondents to ensure the completion of the work within the scheduled period. I also find that the work was adversely affected due to delay in payments of the bills and delay in giving time extensions for completion of the work. Due to prolongation of the execution of the work beyond the scheduled date of completion the claimant has definitely suffered losses for which the respondents are responsible. Therefore, under Indian Contract Act, 1872 and Interest Act, 1978 and also in the light of several decisions of the Hon'ble Courts on such matters the claimant is entitled to compensation and interest. Considering the aforesaid facts and circumstances, I allow the claims of claimant to the extent as given below and give my award accordingly."

(vii) This Court finds that the learned Arbitrator has considered each and every item of the claim and also awarded interest @ 14% per annum for 18 years under the claim head 1 to 8. Some of the claims were rejected and some of the claims were partly allowed and while allowing the claims the learned Arbitrator has also given the details of the calculation on the basis of which the awarded amount was arrived. The total amount awarded Rs. 29,79,064.00 which included interest on Rs.8,29,990.00 (award under claim no. 1 to claim no. 8) @ 14% per annum for 18 years. The respondents were directed to pay the said amount to the claimant within a period of one month from the date of publication of the award i.e. by 03.02.2007, failing which it was mentioned that the respondents shall in addition to Rs. 29,79,064.00 would pay interest on the said amount @ 18% per annum from 03.02.2007 till final payment is made or realized.

(viii) This Court further finds that after the Award dated 03.01.2007 was published, the same was challenged by the respondents by filing objection under Sections 30/33 of Arbitration Act, 1940 and the main ground of challenge was that the learned Arbitrator has not considered clause 25, 26, 27 and 28 of the general conditions of contract which mandates that no claim whatsoever will be payable to the contractor on account of delay in supply of materials by the department. The appellants had also challenged the award on various other grounds including the ground that the learned Arbitrator had entertained new claims/additional claims. The challenge to the award of interest was also made and it was clearly mentioned that the award of interest both pendent lite and future ought not be more than 9%.

(ix) Upon perusal of the objection which was filed by the respondents before the learned court below this court finds that finding of the learned Arbitrator that there was fundamental breach of contract from the side of the respondents was never challenged and the objection was materially on the interpretation of clauses of agreement and so called negative covenants mentioned in the agreement/notice inviting tender and there was further challenge regarding award of interest.

(x) Learned court below after giving opportunity of hearing to the parties passed the impugned judgment of setting aside the award after formulating following points: -

(i) Whether a revised claim can be placed before the new Arbitrator, if the new Arbitrator has been appointed, after cancelling the appointment of earlier arbitrator?

(ii) Whether the newly appointed Arbitrator is empowered under the law to consider the revised claim of the claimant, which were not earlier placed before the Court at the time of appointment of new Arbitrator?

(iii) Whether the Arbitrator is empowered to allow those claims, which do not come within the four walls of the agreement entered in between the parties?

(iv) If the Arbitrator allowed the revised claims and acted beyond the terms of the agreement, then it comes under the purview of misconduct or not?

(v) Whether the Arbitrator is empowered under the law to Award interest @ 18% P.A. in view of the decision reported in 2007 (2) J.C.R. 87 (S.C.)?

(vi) Whether there is any error apparent on the face of the Award?

(vii) Whether the claim of the claimant is barred by law of limitation?

(xi) Out of the aforesaid points, the learned court below decided point nos. (i), (ii) and (vii) in favour of claimant; point no. (iii) and (iv) were decided in favour of respondents; point no. (v) was not decided and so far as point no. (vi) is concerned, the learned court below observed that in view of the discussions made in the judgment, the learned Arbitrator had miscondacted himself and so there is error apparent on the face of award.

(xii) This court further finds that neither any of the findings in connection with the points which were decided against the respondents by the impugned judgment has been challenged by the respondents nor any cross objection has been filed by the respondents. Thus, the findings which has been recorded by the learned court below in relation to the point nos. (i), (ii) and (vii) appears to have been accepted by the respondents. This court further finds that neither any point was raised by the respondents before the learned court below nor any finding has been recorded by the learned court below touching upon the finding of the learned Arbitrator regarding fundamental breach of contract. The entire challenge to the award by the present respondents revolved around the so-called negative

covenants mentioned in the agreement between the parties relating the clauses mentioned above. The learned court below had also held that the learned Arbitrator had travelled beyond the terms of the contract while allowing the claims of the claimant. It is relevant to note that none of the clauses relied upon by the respondents deals with consequences arising out of non-supply of designs, drawings and technical details.

(xiii) Further, this Court fully agrees with the submissions of the appellant that once there is a fundamental breach of contract from the side of the respondents (as finding given by the learned Arbitrator) the entire contract stands abrogated and the negative covenants of the contract cannot be resorted to deny the claim of damages to the appellant. In view of this position there is no need to go into the issue of the consequences of the letters issued by the appellant at the time of extension indicating that they would be claiming damages.

(xiv) This Court does not agree with the arguments of the learned counsel for the respondents before this Court that even if there is no specific challenge to the finding of fundamental breach of contract by the learned Arbitrator, this point can still be examined to come to a conclusion as to whether the learned Arbitrator has rightly examined this point.

This Court is of the considered view that the finding as to whether there was any fundamental breach of contract or not is itself a finding of fact which requires appreciation of evidence.

There is no dispute on the legal position that the courts do not sit in appeal against the award of the arbitrator and the scope of interference is very limited.

This Court is also of the considered view that the interpretation of the agreement is within the domain of the learned Arbitrator and the consequences of omission of the word 'not' in clause 12(a) of the general terms and conditions of the contract cannot be appreciated at this stage as the contract has to be read as a whole and its interpretation cannot be set aside unless it falls within the permissible grounds of challenge as provided under the provisions of Arbitration Act, 1940 itself.

(xv) This Court finds that the learned Arbitrator had not only considered the terms and conditions of the agreement, but having held that there was a fundamental breach of contract, allowed the claim of the claimants. The findings of the learned Arbitrator have been arrived after due examination of the evidences and the arguments advanced by the parties.

(xvi) Accordingly, the argument of the respondents that the learned Arbitrator had misconducted himself while allowing the claim of the appellant by holding that there was a fundamental breach of contract, is rejected.

(xvii) This Court finds that none of the judgements relied upon by the respondents deal with the circumstances where there has been fundamental breach of contract and accordingly, they do not apply to the facts and

circumstances of this case.

(xviii) In the judgment reported in (1988) 3 SCC 82 (Continental Construction Co. Ltd. v. State of M.P) at para 8, it has been held as follows:

"8. In the aforesaid light, we are of the opinion, the High Court was right that the District Judge was entitled to examine the contract in order to find out the legality of the claim of the appellant regarding extra cost towards rise in prices of material and labour. As was pointed out by the learned District Judge Clauses 2.16 and 2.4 stipulated that the contractor had to complete the work in spite of rise in prices of materials and also rise in labour charges at the rates stipulated in the contract. There was a clear finding of the arbitrator that the contract was not rendered ineffective in terms of Section 56 of the Contract Act due to abnormal rise in prices of material and labour. This being so and the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. The arbitrator misconducted himself in not deciding this specific objection raised by the State regarding the legality of extra claim of the appellant."

This judgement deals with a situation where the arbitrator had misconducted himself in not deciding this specific objection raised by the State regarding the legality of extra claim of the appellant and there was a clear finding of the arbitrator that the contract was not rendered ineffective in terms of Section 56 of the Contract Act due to abnormal rise in prices of material and labour.

In the present case, the learned arbitrator has given a finding of fundamental breach of contract on the part of the respondents and accordingly the aforesaid judgement does not help the respondents in any manner.

(xix) In the judgment reported in (1999) 9 SCC 283 (Rajasthan State Mines & Minerals Ltd. v. Eastern Engg. Enterprises), the scope of interference in the award passed under the Arbitration Act, 1940 has been considered at length and it has been summarised in para 44 of the said judgment which is quoted hereunder:

44. From the resume of the aforesaid decisions, it can be stated that:

(a) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

(d) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed



essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in *Continental Construction Co. Ltd. by relying upon the following passage from Alop Parshad v. Union of India* which is to the following effect: (SCC p. 88, para 5)

"There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events, the performance of the contract may become onerous."

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of

the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law.

It has been clearly held in the aforesaid judgement that in order to determine whether the arbitrator has acted in excess of his jurisdiction, what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

This Court is of the considered view that in the present case, the arbitrator having held that there was fundamental breach of contract on the part of the respondents, it was open to the learned arbitrator to allow the claims flowing from such fundamental breach and award damages irrespective of the negative covenant of the contract. This Court is of the considered view that the law permits the arbitrator to come to a finding of fundamental breach of contract and award reliefs flowing from such fundamental breach. Moreover, even the negative covenants in the contract are self-contradictory as discussed above and those negative covenants did not specifically cover situations of non-supply of designs, drawings etc.

Accordingly, this judgement also does not help the respondents in any manner whatsoever and the ratio of the judgement is in favour of the appellants.

(xx) In the judgment reported in (2001) 4 SCC 86 *Bharat Coking Coal Ltd. v. L.K. Ahuja & Co.*, it has been held in para 10 as under:

"10. We cannot but describe the arbitrator's awards as hybrid, which are neither speaking awards nor non-speaking- partly speaking and partly non-speaking awards. The law is well settled that if the award made by the arbitrator is a non-speaking one the difficulty of showing that there is an error apparent on the face of the award becomes insurmountable and ordinarily such award cannot be challenged at all unless it is shown that the arbitrator has wholly travelled outside the contract which gives him the jurisdiction. The law is equally well settled that in cases of speaking awards the court can interfere if there is an error apparent on the face of the award itself; it could also be shown that the arbitrator has misconducted himself in arriving at certain conclusions which are either plainly contrary to law or to the terms of the contract or ignored the provisions of contract or the evidence on record and such other similar matters. When a lump sum award is made, it is all the more difficult to find out as to what went into the mental process of the arbitrator in fixing the same, particularly when a part of the award is a speaking award and determines the portion of the claim in a particular manner, and in respect of other claims merely refers to the

pleadings but does not decide the matter but gives the award. The position of the appellant before the court is unenviable and bristles with too many complexities to get over the awards."

This judgement also does not apply to the facts and circumstances of this case as it deals with partly speaking and partly non-speaking awards and the scope of interference under such circumstances. In the present case, it is nobody's case that the award is non speaking or partly speaking and partly non speaking. In fact, the award is a speaking award.

(xxi) In the judgment reported in (2001) 4 SCC 241 (Ramchandra Reddy & Co. Vs. State of A.P and Ors.), it has been held in para 7 inter alia that the question of grant of higher rate for any extra quantity of work executed by the contractor would arise only when the contract provides for such escalated rate either expressly or by implication. In the said case there was no such acceptance by the competent authority and there was no provision in the contract permitting such escalated rate for the additional quantity of excavation made. In this background the conclusion was irresistible that the contractor will not be entitled to a higher rate for the additional excavation work. It was also held by the Hon'ble Supreme Court that the grant of extension of time will not in any way make the contractor eligible for any extra claim due to escalation in rates of labour and materials or due to any other reasons under any circumstances.

This judgement also does not apply to the facts and circumstances of cases having finding of fundamental breach of contract as the present case. Accordingly, this judgement does not help the respondents in any manner whatsoever.

(xxii) In the judgment passed by Hon'ble Bombay High Court in the judgment reported in 2001 (2) Mh. L.J. 297 (Jaimal Shah Vs. Ila Pandya), it has been held in para 16 of the said judgment as follows:

"16. We cannot forget that the Arbitration Act of 1940 was the law of the land on the subject and the proceedings thereunder must be conducted within the four corners of the law. Though they are not tied down under the shackles of the procedural rules, still the arbitrator cannot treat himself as an unruly horse. He must hold the proceedings in accordance with the broad legal frame work in compliance with the principles of natural justice and fair play. He cannot throw over-board the most fundamental concept of law that his decisions must be based on good, cogent and tangible material. Even his subjective satisfaction must have an objective base. By non-speaking award it cannot be understood to be a baseless award.

....."

The said judgement also does not apply to the circumstances of the present case where the learned arbitrator has held a party guilty of fundamental breach of contract by a speaking order.

(xxiii) In the judgment reported in AIR 1955 SC 468 (Seth Thawardas Pherumal Vs. Union of India), the Hon'ble Supreme Court in the matter arising out of arbitration proceeding under the Arbitration Act, 1940 was dealing with the clause 6 of the said agreement which reads as follows:

"The department will not entertain any claim for idle labour or for damage to unburnt bricks due to any cause whatsoever."

In the said case, the arbitrator held that the clause was not meant to absolve the department from carrying out their part of the contract and the arbitrator awarded certain amount.

The Hon'ble Supreme Court held that having contracted, the contractor cannot go back on his agreement simply because it does not suit him to abide by it. The Hon'ble Supreme Court further clarified that this is not to say that the Government is absolved from all liability, but the point was, can it be held responsible for damages occasioned by the breach of its contract?

The Hon'ble Supreme Court in para 9 of the said judgment held that the contractor had duty under Section 73 of the Contract Act to minimise the loss. In the said case there was an express contemplation that they chose to provide against a contingency by making clause 6 an express clause in the contract. The Hon'ble Supreme Court found that the construction of the terms of the contract was at fault by the arbitrator. The question which arose before the Hon'ble Supreme Court was,

"Whether the decision of the arbitrator on this point was final despite it being wrong in law?"

In this background, the Hon'ble Supreme Court held in para 11 and 12 as under:

11. In India this question is governed by Section 16(1)(c) of the Arbitration Act of 1940 which empowers a Court to remit an award for reconsideration "where an objection to the legality of the award is apparent upon the face of it".

This covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred. If a question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he has decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature. See the speech of Viscount Cave in *Kelantan Government v. Duff Development Co.* at p. 409. But that is not a matter which arises in this case.

12. The law about this is, in our opinion, the same in England as here and the principles that govern this class of case have been reviewed at length and set out with clarity by the House of Lords in *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society* and in *Kelantan Government v. Duff Development Co.* In *Durga Prasad v. Sewkishendas*<sup>3</sup> the Privy Council applied the law expounded in *Absalom* case to India: see also *Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co.* and *Saleh Mahomed Umer Dossal v. Nathoomal Kessamal*. The wider language used by Lord Macnaghten in *Ghulam Jilani v. Muhammad Hassan* had reference to the revisional powers of the High Court under the Civil Procedure Code and must be confined to the facts of that case where the question of law involved there, namely limitation, was specifically referred. An arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Courts provided his error appears on the face of the award. The single exception to this is when the parties choose specifically to refer a question of law as a separate and distinct matter."

In the said judgment, the Hon'ble Supreme Court ultimately by referring to Clause 6 as quoted above held that the award of damages arising out of breach of contract suffered from error apparent on the face of record.

The aforesaid judgement does not help the respondents in any manner. This Court is of the considered view that the learned arbitrator has neither committed any error of law nor has decided the case on inadmissible evidence or on erroneous principles of law or principles of construction.

(xxiv) In the judgment reported in (2007) 4 SCC 697 (*Food Corpn. of India v. Chandu Construction*), the Hon'ble Supreme Court while dealing with the scope of interference in the award, the issue which arose for determination has been mentioned in para 16 of the aforesaid judgment which reads as follows:

"16. Thus, the issue which arises for determination is whether in awarding Claim 9, the arbitrator has disregarded the agreement between the parties and in the process exceeded his jurisdiction and has, thus, committed legal misconduct." The Hon'ble Supreme Court, with regard to the aforesaid, held at para 19 and 20 as follows:

"19. From the above extracted terms of the agreement between FCI and the claimants, it is manifest that the contract was to be executed in accordance with the CPWD specifications. As per para 2.9.4 of the said specifications, the rate quoted by the bidder had to be for both the items required for construction of the godowns, namely, the labour as well as the materials, particularly when it was a turnkey project. It is to be borne in mind that filling up of the plinth with sand under the floors for completion of the project was contemplated under the agreement but there was neither any stipulation in the tender document for splitting of the quotation for labour and material nor was it done by the claimants

in their bid. The claimants had submitted their tender with eyes wide open and if according to them the cost of sand was not included in the quoted rates, they would have protested at some stage of execution of the contract, which is not the case here. Having accepted the terms of the agreement dated 19-9-1984, they were bound by its terms and so was the arbitrator. It is, thus, clear that the claim awarded by the arbitrator is contrary to the unambiguous terms of the contract. We are of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for. It was not open to the arbitrator to travel beyond the terms of the contract even if he was convinced that the rate quoted by the claimants was low and another contractor, namely, M/s Gupta and Company had been separately paid for the material. The claimants' claim had to be adjudicated by the specific terms of their agreement with FCI and no other.

20. Therefore, in our view, by awarding extra payment for supply of sand the arbitrator has outstepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract, manifestly ignoring the clear stipulation in the contract. In our opinion, by doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of Claim 9, on the face of it, is beyond his jurisdiction; is illegal and needs to be set aside."

In the aforesaid judgement the Hon'ble Supreme Court was of the view that the arbitrator was not justified in ignoring the express terms of the contract merely on the ground that in another contract for a similar work, extra payment for material was provided for and by doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of Claim 9, on the face of it, was held to be beyond his jurisdiction and was set aside.

In the present case, the learned arbitrator has not only interpreted the contract in favour of the appellants but also held that there was fundamental breach of contract on the part of the respondents and consequences followed. The entire exercise by the learned arbitrator was within his jurisdiction and accordingly the aforesaid judgement does not help the respondents in any manner whatsoever.

(xxv) In the judgment passed by the Hon'ble Supreme Court reported in (2000) 3 SCC 27, the contract was silent on escalation and in absence of escalation clause the award on account of escalation was declared to be illegal and suffering from patent error.

This judgement also does not apply to the facts of this case as it does not deal with a case where a finding has been arrived at by the arbitrator regarding fundamental breach of contract and its consequences.

(xxvi) In the judgement passed by the Hon'ble Supreme court reported in (2004)

10 SCC 566 the Hon'ble Supreme court upheld the order of the district court setting aside a non-speaking award under the Arbitration Act, 1940 by holding that the arbitrator exceeded his jurisdiction by allowing claim for freight charges which was specifically excluded in the contract.

This judgement also does not apply to the facts of this case as it does not deal with a case where a finding has been arrived at by the arbitrator regarding fundamental breach of contract and its consequences.

(xxvii) In the judgment reported in (2014) 8 SCC 319 (Commercial Tax Officer, Rajasthan Vs. Binani Cements Limited and Ors.) para 32 of this judgment has been relied upon by the counsel appearing on behalf of the respondents to submit that if there are two expressions used one in the general terms and other in the special words, under the rules of interpretation, it has to be understood that the special words were not meant to be included in the general expressions or in the alternative it can be said that where a statute contains both a general provision as well as special provision, the latter must prevail.

The aforesaid judgment has been relied upon by the respondent to iron out the inconsistency between the Clause 12 (a) of the special terms and conditions of the contract and clause 10 of the general terms and conditions of the contract which has been quoted above. As already stated above that apparently and admittedly, they are in conflict with each other. This Court is of the considered view that interpretation of an agreement of terms of contract is different from interpretation of statutes. The aforesaid judgment was dealing with the interpretation of statutes and the notification issued thereunder which is not the case here. Otherwise also, interpretation of the agreement is within the domain of the learned arbitrator and there is little scope of interference unless the same falls within the scope of interference under the provisions of Arbitration Act, 1940. The respondents have failed to make out a case for interference in the award on permissible grounds as provided under the provisions of Arbitration Act, 1940 and accordingly this court is of the considered view that the learned court below erred in law in setting aside the award. The learned arbitrator has come to a definite conclusion of fundamental breach of contract on the part of the respondents, which finding was never challenged by the present respondents before the learned court below. Therefore, the consequences flowing from fundamental breach of contract has to be followed which is certainly different from consequences flowing from breach of contract.

(xxviii) In the judgment reported in (1956) 1 W.L.R. 461 (J. Spurling Ltd. Vs. Bradshaw), the matter arose out of breach of contract and the applicability of the exemption clauses in the contract was resorted to by one of the parties to deny the claim of damages. In the said judgement a distinction was made between a breach of contract and a fundamental breach of contract and it has been observed that for breach which goes to the root of the contract, the party cannot rely upon the exempting clauses.

(xxix) There is no doubt that once the terms and conditions of the agreement are accepted by the parties, the parties are bound by the same and any violation of the terms and conditions would itself be governed by the terms and conditions of the contract itself. It is within the domain of the learned arbitrator to interpret the terms of the contract and determine the consequences of violation of the terms of the contract but certainly the arbitrator cannot disregard the contract and manifestly ignore the clear stipulation in the contract and if he does so, the same will be beyond his jurisdiction. The judgement relied upon by the respondents deals with consequences of violation of the terms and conditions of contract between the parties which are situations dealing with cases of breach of contract. None of the judgements relied upon by the respondents deal with a situation of fundamental breach of contract. This court is of the considered view that fundamental breach of contract and its consequences, as in the present case, is totally different from breach of contract and its consequences.

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

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

"... If facts of that kind could be proved I think that it would be open to the arbitrators to find that the respondents had committed a fundamental or repudiatory breach. One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but also what was likely to happen in future. And there the fact that the breach was deliberate might be of great importance.

If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist, including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if



the contract had run its full term. ..."

Thus, a fundamental breach by its very nature pervades the entire contract and once committed the contract as a whole stand abrogated. This Court further finds that in the said judgment, the finding of the learned Arbitrator regarding fundamental breach of contract was under challenge and in the instant case, the finding of the learned Arbitrator regarding fundamental breach of contract was never challenged by the respondents before the learned court below and entire challenge of the respondents before the learned court below revolved around the interpretation of the terms of the contract. The specific case of the respondents before the learned court below was that the learned Arbitrator has ignored the covenants of the contract, which provided for negative stipulation. This Court is of the considered view that it was not open to the respondents to resort to the various clauses of the agreement to deny the claim of the appellant as the learned arbitrator has recorded a finding of fundamental breach of contract by the respondents. Considering the scope of challenge to the award, this Court finds that the learned Arbitrator has given a detailed award considering all the aspects of the matter and arguments of the parties and has also considered the clauses of the agreement, there was no scope for the learned court below to ignore the finding of fundamental breach of contract and resort to the clauses of the contract in order to deny the claim of damages which arose out of the fundamental breach of contract. This is over and above the fact that there is apparent conflict between Clause 10 of Special Conditions of Contract and Clause 12(a) of the general conditions which is claimed by the respondents to be a typographical mistake. This Court finds that the learned Arbitrator has also considered the clauses of the agreement while passing the award. This Court further finds that none of the clauses of the agreement relied upon by the respondents specifically deal with non-supply of designs, drawings, technical details by the respondents which was, interalia, admittedly the reason for non-completion of work within time.

(xxxix) This Court finds that impugned judgement passed by the learned court below for setting aside the arbitral award is perverse and is fit to be set-aside as the learned court below totally ignored the finding of the learned Arbitrator regarding fundamental breach of contract from the side of the respondents and its consequences and has relied upon the negative covenants of the contract (some of which are self-contradictory as pointed out above) to hold that the learned arbitrator being a creature of the agreement was required to operate within the four corners of the agreement and having ignored the specific terms of the contract has committed legal misconduct and accordingly has set-aside the award. Such approach of the learned court below is ex-facie perverse and the learned court below has failed to draw a distinction between cases falling under the category of breach of contract and those falling under the category of fundamental breach of contract. The learned court below has also failed to consider that none of the clauses relied upon by the respondents specifically covers non-supply of designs, drawings, technical details which was, interalia,

the reason for delay in execution of work which certainly the appellant could not have procured from the market.

(xxxii) As a result of the aforesaid findings, the impugned judgement is hereby set-aside. However, some interference is called for in the award on the point of awarded interest.

On the point of Interest awarded

(xxxiii) In the judgment passed by Hon'ble Supreme Court reported (2017) 8 SCC 146 (Assam State Electricity Board And Others Versus Buildworth Private Limited ) it has been held that the Arbitrator has power to grant interest on Damages under section 3(1) (b) of the Interest Act, 1978 from the date mentioned in the written notice claiming such interest. From the perusal of the petition filed by the respondents before the learned court below for setting aside the Award, it is apparent that a ground was taken that the rate of interest awarded was on much higher side and the same ought to have been @ 9% and for this reference was made to the Judgement passed by the Hon'ble Supreme court reported in 2007 (2) J.C.R. 87 (S.C.). Pursuant to such objection by the respondents a specific issue was framed by the learned court below on the point of interest, though not answered, i.e.,

Whether the Arbitrator is empowered under the law to Award interest @ 18% P.A. in view of the decision reported in 2007 (2) J.C.R. 87 (S.C.)?

(xxxiv) It was never the case of the respondents before the learned court below, or, even before this Court, that there is any bar under the contract for payment of interest. Further in the instant case, the claim of interest is arising out of damages due to fundamental breach of contract on the part of the respondents.

(xxxv) This Court finds that in the judgement passed by the Hon'ble Supreme Court reported in 2007 (2) J.C.R. 87 (S.C.), the rate of interest for pre-arbitration period, pendente lite and future was reduced to 9%.

(xxxvi) The Hon'ble Supreme Court in the judgement reported in (2017) 8 SCC 146 had reduced the rate of interest to 12 % from the date of raising the demand for interest by way of legal notice till the date of award and thereafter from the date of decree prepared by the trial court till its payment as the said case was under the Arbitration Act, 1940 which does not empower the arbitrator to award interest for any period after passing of the award and it is left to the court preparing the decree in terms of the award.

(xxxvii) In (2009) 12 SCC 1 (State of Rajasthan and Anr. Vs. Ferro Concrete Construction Pvt. Ltd.), the Hon'ble Supreme Court at Para 59 to 67 has categorically dealt with the award of interest relating to pre-reference period, pendent lite and future interest. In the said judgment, the learned Arbitrator had awarded pre-reference interest from the date of application of the contractor @ 18% per annum, pendent lite interest was also awarded @ 18% and future interest from 22.09.1994 till the date of decree or payment, was awarded @

18%. The District Court did not award any post-decretal interest, but the High Court awarded post-decretal interest from the date of decree till the date of payment @ 18% per annum. The Hon'ble Supreme Court ultimately found that the Award of interest by the learned Arbitrator @ 18% per annum, was an error apparent on the face of the Award and found that in regard to Award of interest governed by Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of schedule banks in accordance with the directions given or issued to the banking companies, generally by Reserve Bank of India under the Banking Regulation Act, 1949. In this background, the Hon'ble Supreme Court reduced the rate of interest for the pre-reference period @ 9% and also found appropriate to award the same rate of interest even by way of pendent lite interest and future interest up to the date of payment. This Court finds that the award involved in the said case relates to the contract of the year 1988. So far as present case is concerned, the agreement is of the year 1985 and the work was ultimately completed in 1989 and the claim for damages was made in the year 1988. This Court further finds that although it is not clear from the award as to whether any interest was claimed on the damages as back as in the year 1988, but the learned Arbitrator had awarded interest @ 18% per annum for the earlier periods and the respondents had challenged the award of interest only on its rate and claimed that the rate of interest ought to have been 9% per annum.

(xxxviii) Considering the facts and circumstances of this case and considering the ratio which has laid down by the Hon'ble Supreme Court, which also relates to almost the same period, this Court finds that the rate of interest which has been awarded by the learned Arbitrator, both pre-reference, pendent lite, future and till the actual payment requires modification and is accordingly reduced to 9% per annum, as was done by the Hon'ble Supreme Court in the aforesaid judgment reported in (2009) 12 SCC 1. Accordingly, the interest is to be awarded from 15.10.1988 on claim Nos. 1 to 8 @ 9% per annum till its payment.

24. This appeal is allowed to the aforesaid extent.

25. Office is directed to prepare a 'Decree' in terms of this judgement.