

(2013) 04 DEL CK 0058
In the Delhi High Court
Case No : FAO (OS) 554 of 2010

National Hydroelectric Power Corporation Ltd.	APPELLANT
Vs	
General Electric Company Ltd. and Others	RESPONDENT

Date of Decision : 29-04-2013

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 39

Citation : (2013) 04 DEL CK 0058

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Sachin Datta and Ms. Neha Gupta, for the Appellant; Trideep Pais, Ashwath Sitaraman, Ms. Natalia Shibli and Ms. Prabhsahay Kaur, Advocates for the Respondent No. 1, for the Respondent

Judgement

Vipin Sanghi, J.—The appellant has preferred the present appeal u/s 39 of the Arbitration Act, 1940 ("the Act") directed against the judgment and order dated 18.05.2010, whereby the Learned Single Judge dismissed the objections to the arbitral award dated 07.05.1996 (preferred vide I.A. No. 4860/2004 under Sections 30 and 33 of the Act) and made the same a "rule" of the court. A contract was entered between the Appellant/objector, National Hydro Electric Power Corporation Ltd. (NHPC) as the owner of the project, and (i) SNC/ACRES - a joint venture of SNC Inc. and Acres International Ltd.; (ii) MIL Group Inc. (MIL), and; (iii) the Canadian General Electric Company Ltd. (GE) - incorporated under the laws of Canada, as the supplier of equipment and services on 03.08.1984. The project in question was the Chamara Hydroelectric project on Raavi River in the State of Himachal Pradesh. The contract involved the construction of a dam, an underground power house complex containing three hydro turbine generator units, tunnels, switchyards and a transmission line. SNC/ACRES - the two component companies are each engaged in the business of professional engineering. GE is engaged, inter alia, in the business of designing, manufacturing and installing electrical equipment. MIL is engaged in the business, inter alia, of designing, manufacturing and installing hydroelectric

equipment. In regard to the project, SNC/ACRES provided engineering and project management services. GE and MIL were responsible for manufacture and supply of turbines, generators, gates and other equipment for the Turbine Generator Units, each providing different parts of that equipment.

2. Disputes arose between NHPC on the one hand, and GE and MIL on the other hand with respect to price variation claims made by GE and MIL against the NHPC in respect of the equipment and tools supplied, as also the consultancy services provided by them. Under the contract, the respondents, GE and MIL were entitled to claim price variation - both during the contractual period, and for the period after the contract delivery period. In terms of the arbitration agreement contained in the contract, these disputes were referred to arbitration. SNC/ACRES were not concerned with these disputes and were, therefore, not parties to the Arbitration. Issues pertaining to the existence of Force Majeure conditions; the interpretation of the price variation clause; and, limitation were raised before the Arbitral Tribunal. The arbitrators accepted the price variation claims of the respondents GE and MIL and also awarded interest to them. The learned Single Judge has dismissed the appellant's objections - also raising the same issues before the Court.

Submissions of the Appellant:

3. Mr. Datta, learned Central Government Standing Counsel, appearing for the appellant has primarily made two submissions.

4. At the outset, Mr. Datta submits that so far as the entitlement to claim price variation for the contractual period is concerned, the same is not under dispute, and what is disputed is the manner of calculation of the same. This aspect - i.e. with regard to the formula to be applied for computation of price variation, shall be examined a little later. The submission of Mr. Datta is that the claims of respondent Nos. 1 & 2 for price variation for the period after the contract delivery period were founded on the alleged existence of Force Majeure conditions from 1988-1990. To claim price variation for the period after the contract delivery period, it was essential for the respondent GE and MIL to show that the delay was on account of existence of Force Majeure conditions. The existence of such conditions is given as the reason for the delay in supply of the equipment. Respondent nos. 1 and 2 claim that the prices of the equipment and services have suffered upward revision during the said period, and they claimed the same. Mr. Datta submits that since the appellant had disputed the existence of Force Majeure conditions during the entire period 1988-90, it was incumbent upon the respondent to prove the same and it was the obligation of the Arbitral Tribunal to decide this basic and the central issue that arose for adjudication. Mr. Datta submits that the Arbitral Tribunal, however, proceeded simply on the assumption that Force Majeure conditions existed between 1988-1990. Mr. Datta draws our attention to Clause 4 of the contract, which provides for price variation on Turbine Core Package and Generator Core Package. It, inter alia, stipulates that the prices shall not be subject to price variation for the period during which

the delivery is delayed by the manufacturer for reasons other than Force Majeure. Clause 4 of the contract, which deals with the aspect of price variation, repeatedly emphasizes that:

However, the prices shall not be subject to variation for the period during which the delivery is delayed by the Manufacturer for reasons other than Force Majeure.

5. Mr. Datta relies upon the stipulations governing the Force Majeure conditions as embodied in Clause 14. The same, inter alia, provides that:

14.1 A party shall not be in default in the performance of any of its obligations or responsibilities as a result of an event of Force Majeure. Notwithstanding anything herein contained to the contrary, Force Majeure shall not be an acceptable reason for NHPC to fail to make payments due for work performed.

14.2 The parties whose performance is so affected, shall within a period of 7 days of such occurrence of Force Majeure condition notify the other parties thereof by notice as laid down in Article 21 of the General Terms and Conditions. If the affected party fails to give such notification, it shall not be entitled to rely upon such event/events. The burden of proof that the circumstances of Force Majeure existed shall lie with the party that claims it.

(Emphasis supplied)

Mr. Datta submits that clause 14.3 inclusively defines what is meant by Force Majeure. It includes floods, landslides and washouts.

6. Mr. Datta places reliance on Clause 21 of the contract, which provides that:

All notices to anyone of the below will be given in writing in English and sent by personal delivery or any registered mail, telex or cable to the address set forth below and specifically sent to the attention of its representative or any other officer nominated from time to time by it in writing and shall be deemed to have been received if delivered personally, upon delivery, if by registered mail, on the date shown by the registered mail, on the date shown on the return receipt, if by telex or cable, on the 5th day after the date of sending.

7. Mr. Datta submits that no notice was given of the alleged existence of the Force Majeure conditions between the said period in terms of clauses 14 and 21 aforesaid.

8. Learned counsel for the appellant has drawn our attention to the pleadings of the parties before the Arbitral Tribunal in relation to the existence of alleged Force Majeure conditions, which are reproduced hereinbelow:

Pleadings of claimants/respondents

52. The project experienced approximately a three year delay from August 1988 to 1990 due to Force Majeure conditions of earthquakes and floods in India. On 23 August, 1988 SNC/Acres duly wrote to NHPC" stating that:

In accordance with the provisions of Article 14 of the General Terms and Conditions, we are notifying the Corporation [NHPC] that a Force Majeure condition is developing Same in the source as a result of floods and washouts, which may affect the timely commissioning of the Generating Units in accordance with the Contract" (Appendix A Exhibit 11)

As a result of the floods and washouts, the infrastructure had to be substantially reconstructed before the GE and MIL equipment could be shipped. Due to these conditions, the Claimants could not commission the equipment they had manufactured and delivered until 1991-92. The various turbines and generators and related equipment were kept in storage for approximately three years pending clean-up and repairs to the power house complex. The earthquakes and floods had thus set the project back about three years.

53. In 1990-91, as work recommenced by the Claimants, the issue of NHPC" inexplicably withholding payments, was revisited. It appeared that there was a dispute over the escalation calculations, but NHPC" had not expressed any particular objection.

[Emphasis supplied]

Pleadings of Objector/Appellant

52. The Respondents deny that Force Majeure conditions because of earthquakes and floods continued for three years from August 1988 to 1990 as alleged by the Claimants. Damages to the infrastructure due to the floods in August 1988 were restored promptly and the construction activities on most of the installations in the Project had continued without interruption during the above said period.

The letter dated August 23, 1988 referred to by SNC/ACRES is not traceable in the records of the respondents. Nonetheless this letter in no way dilutes the responsibility of MIL and GE to supply the equipment on order with them as per the contractual delivery schedules. It may be noted that the above letter is purported to have been written by SNC/ACRES in August, 1988 while according to the respondents the contractual delivery period for supply of equipment by MIL & GE had expired in December, 1987/September, 1988 and June, 1988 respectively. The respondents once gain reiterated that they reserve their right to review the price variation payments made to the claimants and restrict the same upto the original contracted delivery periods stipulated in the contract.

53. The contents of this para are completely denied. As already explained in Para 52 above, the construction work at Chamera Project had not remained suspended during the period August, 1988 to 1990 as alleged by the Claimants. The construction activity on all the installations in the Project had continued uninterruptedly during the said period. The payments pertaining to the price variation claims of the Claimants were regulated as per the relevant contractual provisions and the so-called "with-held payments" as alleged by the Claimants

were, in fact, the result of recoveries/set off of the over-payments made earlier by the respondents on the basis of wrong price variation of the Claimants.

[Emphasis supplied]

9. Mr. Datta submits that the respondents did not discharge the burden of proof of existence of Force Majeure conditions for the period August 1988 to 1990 as alleged by them, in terms of clause 14.2 aforesaid before the Arbitral Tribunal.

10. Mr. Datta submits that the letter dated 23.08.1988 - allegedly sent by SNC is not traceable in the records of the appellant. In any event, the said alleged letter did not mention that any Force Majeure conditions existed between 1988-1990. The said letter in no way diluted the responsibility of MIL and GE to supply the equipment as per the delivery schedules. In any event, conditions which may amount to Force Majeure for one contractor, does not necessarily amount to Force Majeure for the other contractor(s) as the scope of their obligation under the contract differs. All the three entities viz. SNC/ACRES, GE and MIL were independent entities and notice given by one did not bind, or enure for the benefit of the other. Reference is made to clause 8 of the contract, which reads as follows:

8. INDEPENDENT PARTIES

8.1 The parties to this contract have joined together for the Chamera Project, in compliance with the aforesaid Memorandum of Agreement in Principle dated November 25, 1983 executed between the Government of India and the Government of Canada and to enable NHPC to have proper co-ordination of the work awarded to and be carried out by the parties separately and therefore nothing contained in this contract is intended nor shall be construed as creating a joint venture, consortium or a partnership or association of persons among the said parties for the purpose of execution of this contract nor any agency or continuing relationship and commitment amongst the parties.

8.2 Each party to this contract is separately responsible for the performance of its respective part of the work and shall be individually entitled to all rights and obligations under this contract and each shall be responsible for its loss or profit.

8.3 No party shall have any authority or right or hold itself out as having authority or right on behalf of any other as representative, agent or employee of any other party for any purpose whatsoever.

(emphasis supplied)

11. Mr. Datta submits that the equipment was to be manufactured in Canada (to be supplied FAC Canadian port) and the entire payment was to be made before shipping of equipment. The final payment was to be made upon the claimant/GEs "readiness to ship". He further submits that the consultancy services under the contract were to begin from "the date which the manufacturer notifies to NHPC as the date of its readiness to mobilize for that part of the work to be performed

at the site" [Clause 3.4.2 - page 217, Vol. II]. So the alleged floods in Himachal Pradesh could possibly have no bearing on the performance of their obligation by GE and MIL, justifying their claim for price variation beyond the contractual period. Mr. Datta submits that so far as the supply of equipment by GE was concerned, the same was to be made between August 1984 and June 1988 i.e. much before the alleged floods, landslides and washouts. The payments were scheduled between October 1988 to May 1990. Mr. Datta submits that the work was, however, performed and invoices were raised only between February 1992 to March 1994. He submits that the first consultancy invoice was raised on 09.02.1992. GE's final invoice for equipment was issued only on 01.10.1995. He, thus, submits that the alleged Force Majeure conditions between 1988-1990 does not serve as a justification for the delayed performance of the contract and for claiming price variation for the said period. He further submits that the existence of Force Majeure conditions between 1988-1990 is negated by the fact that MIL raised certain invoices for "consultancy services" towards "installation, testing and commissioning" in 1990. There was no justification for GE to cite Force Majeure as the ostensible reason for failure to perform its corresponding "consultancy services". He submit that GE had merely raised the issue of Force Majeure as an afterthought by banking upon the alleged communication of SNC/ACRES dated 23.08.1988 which neither existed in the appellants records, nor threw any light on the existence of Force Majeure conditions during the entire period 1988-90, much less qua GE and MIL. Mr. Datta submits that there has been no adjudication on the aforesaid aspects by the Arbitral Tribunal, though these aspects were specifically raised by the appellant in their defence.

12. Mr. Datta submits that the appellant had specifically challenged the entitlement of the respondents to claim price variation for the post contract delivery period. Though the same was recorded by the Arbitral Tribunal in the Terms of Reference (TOR) drawn by it, the Arbitral Tribunal had skirted the said issue while rendering its award. He submits that the Arbitral Tribunal could not have brushed aside the defense of the appellant without consideration of the same. Thus, the Arbitral Tribunal has misconducted the proceedings. Learned counsel also submits that since the burden to prove the existence of Force Majeure conditions lay upon the claimants - in which they failed, the Learned Single Judge committed a patent error in holding that the objector/appellants had not disputed that Force Majeure conditions existed in August 1988. He submits that the Arbitral Tribunal has ignored the stipulation in clause 14 of the contract which places the burden of proof of circumstances leading to Force Majeure upon the party that claims it. The respondents/claimants had raised the said plea which had been denied by the appellant. Consequently, it was obligatory on them to prove the existence of Force Majeure condition between the period 1988-1990 to maintain their claim for price variation.

13. He further submits that the learned Single Judge fell in grave error in holding that the onus was on NHPC to establish the non existence of Force Majeure conditions during the entire period between 1988-1990. He submits that the

clause 14 had been adverted to by the appellant in its written submissions before the learned Single Judge, but the same has been overlooked by him leading to an erroneous decision.

14. The second submission of Mr. Datta is with regard to the formula which is to apply for computation of price variation. He submits that the Arbitral Tribunal has resorted to invention of the "grossing up" formula while computing the variation in price. He submits that the said grossing up formula is not contained in the contract between the parties. The said grossing up formula had been propounded by the respondents/claimants to inflate their price variation claim. He submits that the Arbitral Tribunal was bound by the contractual terms and could not have - in the process of interpreting the same, introduced a new formula for computation of price variation which is not contained in the contract and, tinkered with the existing formula for computation of price variation contained in the contract.

15. Before proceeding further, we may set out the relevant extract from clause 4 of the contract, which also contains the formula for computation of price variation in respect of the Generator Core Package. The same reads as follows:

4. Price Variation

4.1 Turbine Core Package

4.1.1 Turbines

All prices for the turbines and butterfly inlet valves are subject to variation for changes in labour and material costs. Such variation, involving increases or decreases in the prices stated herein, is to be determined in accordance with the following:

Labour

(a) For the purpose of variation, the proportion of the price representing labour is accepted as an amount equal to 50% (fifty percent) thereof.

(b) The above amount accepted as representing labour will vary for changes in labour cost. Such variation will be based upon the average hourly earnings in the electrical industrial equipment manufacturing S.I.C. 315 Cat. No. 72-002, Table No. 11 for total Canada, Published monthly by Statistics Canada.

*However, the prices shall not be subject to variation for the period during which the delivery is delayed by the Manufacturer for reasons other than Force Majeure.

Material

(a) For the purpose of variation, the proportion of the price representing material is accepted as an amount equal to 40% (forty percent) hereof.

(b) The above amount accepted as representing material will vary for changes in material costs. Such variation will be based upon the selling price of primary

metal industries (D52710) Cat. No. 62-011, Table No. 1, published monthly by Statistics Canada.

FORMULA

Each payment will be subject to price variation as follows:

a) 100% (one hundred percent) of the claim for price variation shall be chargeable and payable on quarterly basis, based on 100% (one hundred percent) of the progress payment claimed , i.e. without holdback, for the quarter.

P1 - Amount of variation claimed.

Po - Payment for which variation is being claimed without holdback.

A - Percentage of payment applicable to labour (50%)

B - Percentage of payment applicable to material (40%)

Lo - Labour index at base date April 1984.

L1 - Labour index as averaged over the quarterly variation period*.

Mo - Material index at base date April 1984.

M1 - Material index as averaged over the quarterly variation period**.

* For the variation claimed in respect of the last two quarterly payments prior to shipment, the labour index used in respect of the second previous quarterly payment shall be used.

** For the variation claimed in respect of the last 2 quarterly payments prior to shipment, the material index used in respect of the second previous quarterly payment shall be used.

4.2 Generator Core Package

All prices for the Generator Core Package are subject to variation for changes in labour and material costs*. Such variation, involving increases or decreases in the prices stated herein, is to be determined in accordance with the following:

LABOUR

a) For the purpose of variation, the proportion of the price representing labour is accepted as an amount equal to 50% (fifty percent) thereof.

b) The above amount accepted as representing labour will vary for changes in labour cost. Such variation will be based upon the average hourly earnings in the electrical industrial equipment manufacturing, S.I.C. 336 Cat. No. 72-002, Table No. 11 for total Canada, published monthly by Statistics Canada.

MATERIAL

a) For the purpose of variation, the proportion of the price representing material

is accepted as an amount equal to 40% (forty percent) thereof.

b) The above amount accepted as representing material will vary for changes in material costs. Such variation will be based upon the selling price of primary metal industries (D527100) Cat. No. 62-011, Table No. 1, published monthly by Statistics Canada.

*However, the prices shall not be subject to variation for the period during which the delivery is delayed by the manufacturer for reasons other than Force Majeure.

FORMULA

Each payment will be subject to price variation as follows:

a) 100% (one hundred percent) of the claim for price variation shall be chargeable and payable on a quarterly basis, based on 100% (one hundred percent) of the progress payment claimed, i.e. without holdback, for the quarter.

P1 = Amount of variation claimed.

P0 = Payment for which variation is being claimed without holdback.

A = Percentage of payment applicable to labour (50%)

B = Percentage of payment applicable to material (40%)

L0 = Labour index at base date April 1984.

L1 = Labour index as averaged over the quarterly variation period.*

M0 = Material index at base date April 1984.

M1 = Material index as averaged over the quarterly variation period.* *

* For the variation claimed in respect of the last quarterly payment prior to shipment, the labour index used in respect of the previous quarterly payment shall be used.

** For the variation claimed in respect of the last 2 quarterly payments prior to shipment, the material index used in respect of the second previous quarterly payment shall be used.

4.3 Consultancy Services

Prices for the Consultancy Services are subject to variation. However, the prices shall not be subject to variation for the period during which the Manufacturer is delaying the Consultancy Services for reasons other than Force Majeure. Such variation, involving increases or decreases in the prices stated herein, is to be determined in accordance with the following formula and each payment will be subject to such price variation:

a) 100% (one hundred percent) of the claim for price variation shall be chargeable and payable on a monthly basis, based on 100% (one hundred

percent) of the progress payment claimed, i.e. without holdback, for the month.

P1= Amount of variation claimed.

P0= Payment for which variation is being claimed without holdback.

L0= Labour index at base date of 1st April, 1984.

L1= Labour index at date for which payment is claimed.

The above labour indices shall be those published monthly by Statistics Canada, for the relevant month, Electric Utility Construction Price Index (Cat. No. 62-007 D 482208) for Engineering and Administration of Hydro Electric Generating Stations.

(Emphasis supplied)

16. The submission of Mr. Datta is that the contract does not postulate "grossing up" as claimed by the respondent/claimant. He submits that the aforesaid clause prescribes both-the formula, and the manner of its application. The price variation is to be determined in accordance with the formula provided in the contract. The contract did not contemplate any price variation on the interest free advance payment. The contract only provides for price variation of the progress payment. The formula is self contained and for applying the same all that needs to be done is to fill in/plug in the data for the concerned quarters. He submits that if the intention of the parties had been to provide for price variation even in respect of the advance payment, and not just in respect of the progress payments, the parties would have provided for the same while evolving the formula. He refers to the invoices raised by the respondent/claimant to submit that the methodology adopted by them to claim price variation is absurd. He submits that the "grossing up" formula propounded by the respondents/claimants, and adopted by the Arbitral Tribunal could not be super imposed on the price variation formula contained in the contract. He submits that it was not for the Arbitral Tribunal to device a new formula to give benefit to the respondent/claimant in accordance with their own sense of justice. The Arbitral Tribunal had no jurisdiction to alter the contractual formula for computation of price variation and, by doing so, it has misconducted itself.

17. Learned counsel for the appellant places reliance on the judgments of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, ; Delhi Development Authority Vs. U. Kashyap, ; In case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, ; Pt. Munshi Ram and Associates (P) Ltd. Vs. Delhi Development Authority, ; and S. Bedi Construction Co. Vs. Delhi Development Authority

Submissions of Respondents:

18. Learned counsel for the respondents firstly draws the attention of the Court to the TOR drawn by the Arbitral Tribunal on 05.12.1994. He submits that the issues to be determined have been formulated in para (xi) of the terms of

reference, which reads as follows:

XI Issues to be Determined

The following matters appear to arise as issues that have to be determined by the Arbitral Tribunal.

1. Is there any claim made by the Claimants which is arbitrable under the Contract?
2. If there is, are the claims made by the Claimants valid in principle in so far as they rest upon the contention that price variation is payable upon 100% of the Contract Prices?
3. If the claims are valid, to what sum or sums is MIL entitled in respect of price variation?
4. Likewise, to what sum or sums is GEC entitled in respect of price variation?
5. [Is NHPC entitled to recover, by way of overpayment \$58,106.82 Cdn from GEC?]
6. [Is NHPC entitled to recover, by way of overpayment \$132,049 Cdn from MIL?]

19. He submits that no issue was framed by the Arbitral Tribunal on the aspect of Force Majeure, as the existence of the Force Majeure was not seriously disputed by the appellant.

20. Learned counsel submits that Article 23(4) of the ICC Rules under which the arbitration was held, provides that:

After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

21. Learned counsel submits that, consequently, it was not open to the appellant to later on argue that the claims for price variation made by the respondents for the period beyond the contract delivery period were not maintainable on account of non existence of Force Majeure conditions during the period 1988-1990. He further submits that the inclusion - in the TOR, of the issue with regard to price variation itself is indicative of the fact that the appellant did not press the issue of Force Majeure, which is now sought to be urged before this Court.

22. Learned counsel submits that in para 39 of the statement of claim, the respondent/claimant had specifically averred that "GE and MIL began the manufacturing of their respective equipment under the contract in the fourth quarter of 1984. The Force Majeure interruption of the project occurred in 1988-1991 (described below in para 52). As a result, most of the consultancy work of GE and MIL under the contract was not carried out until the project

resumed in 1991". He submits that the appellant did not dispute the aforesaid averment in its counter statement/reply. In response to paras 39 and 40 of the statement of claim, all that was stated by the appellant was that "these paras call for no reply as these are merely factual in content". Learned counsel submits that it is on account of the aforesaid pleadings that no issue was framed by the Arbitral Tribunal with regard to the existence of Force Majeure conditions.

23. Learned counsel for the claimants/Respondents submits that under Clause 6.1 of the contract between the parties, NHPC was responsible, at its expense, for the performance of all the activities in a timely manner so as to commission the Generating Units within 6 years with effect from 1st April 1984. Therefore, the delay in the completion of project cannot be attributed to the Respondents at all. Learned Counsel for the respondents also places reliance on clause 2.25 of the contract, which provides that GE will provide supervisory services for the management of installation and supervision of testing and commissioning of the generator core package described as "consultancy services". It further provides that the installation of generator core package "shall be the responsibility of NHPC who shall award the contract to an installation contractor under a separate contract in consultancy with CGE."

24. Learned counsel for the respondents submits that the contract prices for MIL and GE were fixed by the virtue of Clauses 3.1 and 3.2 respectively. It is submitted that clauses 3.1.3 and 3.2.3 of the contract stipulate that the "Contract prices are subject to variation in accordance with the price variation" as per Articles 4.1 and 4.3 (for turbine core package), and as per Articles 4.2 and 4.3 (for the generator core package).

25. Learned counsel submits that clause 4.2 of the contract provides that "All prices for the generator core package are subject to price variation for change in labour and material costs" (emphasis supplied). Therefore, the advance payments and the final payments are also subject to price variation. Reliance is also placed on the price variation formula. The said formula provides that "Each payment will be subject to price variation"

(emphasis supplied).

26. Learned counsel for the respondents submits that the correct application of the formula envisages the "grossing up" of the relevant progress payments in relation to which the price variation is being claimed. In short, the claimants contend that the price variation is to apply to the whole of the contract price, and not simply to 75% or 85% thereof.

27. Learned counsel for the respondent places reliance on Clauses 3.3.1 & 3.3.2. Clause 3.3.1 provides that 15% of the contract price shall become due and payable in advance, immediately after the date of signing of the contract and upon the presentation of invoice and the advance payment bond. Clause 3.3.2 of the contract provides for payment of 75% of the FAS Contract price (for the supply of Turbine core package and Generator Core Package) as quarterly

progress payments as per the schedule of payments shown in Appendix B1 and B2 respectively to Annexure B related to the schedule of work progress.

28. Learned counsel submits that the only difference between the parties is that, while the appellant contends that the price variation formula should not apply to the advance payments and to the final payments, i.e. it should apply to only the progress payments, the claimants contended - and this contention has been upheld by the Arbitral Tribunal, that the price variation would apply to all payments including the advance payments and the final payment.

29. The respondents have relied upon the discussion in the impugned award and submit that the view of the Arbitral Tribunal being plausible, this Court would not interfere with the same as the Court is not sitting as an appellate court and if two views are possible, one of which has been adopted by the Arbitral Tribunal, the Court would not substitute the same with its own view only on the ground that the Court would have preferred another view.

Rejoinder

30. In his rejoinder, learned counsel for the appellant submits that the price variation formula applies to both - the original contractual period, and to the delayed period. The dispute, firstly, is with respect to some of the invoices raised by the respondents during the contractual period in which they have resorted to the "grossing up" method. Secondly, it is in relation to the invoices raised after the expiry of the contractual period, where grossing up formula has been adopted. In respect of those invoices, the issue with regard to the existence of Force Majeure conditions also arises for consideration.

31. Mr. Datta submits that the reliance placed by the respondents on the TOR is misplaced. He submits that in the TOR itself, while setting out the summary of the appellants claim, the Arbitral Tribunal had noted that "NHPC further claimed that the claimants should be put strictly to proof of their claims if the Arbitral Tribunal considers that the merits of the claim should be entered into". He submits that the dispute on merits of the claim for price variation, inter alia, included the dispute as to the justification therefor on the basis of existence of Force Majeure conditions during 1988-1990 as claimed by the respondent/claimants for the price variation claims for the post contract delivery period. He submits that the pleading of the appellant contained in paras 52 and 53 is clear. So far as reliance placed on averments made in para 39 of the statement of claim, and the appellants response thereto is concerned, Mr. Datta points out that para 39 of the statement of claim refers to para 52 of the same statement of claim. Therefore, while dealing with para 52 of the statement of claim, the appellant had in categorical terms refuted the allegation of existence of Force Majeure conditions during the entire period of 1988-1990.

32. Mr. Datta submits that Article 13(5) of the ICC Rules of Conciliation and Arbitration in force between 01.01.1988 and 31.12.1997, inter alia, provides in Rule 13(5) that "in all cases the arbitrator shall take into account of the

provisions of the contract and the relevant trade usages". He submits that this Rule has been breached by the Arbitral Tribunal which amounts to misconduct.

DISCUSSION:

33. It is well settled that it is not for this Court to substitute its view in place of the view of the Arbitral Tribunal, if the Arbitral Tribunal has adopted one of the plausible views. However, if the Arbitral Tribunal accepts a view which is clearly not borne out from the contract, or is contrary to the contract, or if it borders on perversity, the Court would step in and set aside the award as it would be a case of a patent error on the face of the award. The other grounds on which the arbitral award may be interfered with under sections 30 and 33 of the Act are where the Arbitral Tribunal has misconducted itself, or the proceedings.

34. In the present case, the respondents sought to raise their claim for price variation by resort to clause 4.1. Price variation applies to the contract delivery period and also to the period thereafter. However, for the post contract delivery period, one of the fundamental conditions for sustaining a claim for price variation is that "the prices shall not be subject to variation for the period during which the delivery is delayed by the manufacturer for reasons other than force majeure". The respondents were conscious of the fact that their claim for price variation for the period beyond the contract delivery period would not be sustainable, if the delay in delivery is for reasons other than Force Majeure. It was for the respondents to aver and establish that the delay in delivery was for reasons other than Force Majeure. It is for this reason that the respondents made the averments as set out herein above in para 39 and 52 of the statement of claim, wherein they specifically averred the existence of Force Majeure conditions during the period 1988-1990.

35. The appellant controverted the said assertion of the respondents by squarely denying the existence of Force Majeure condition for the continuous period of three years from August 1988 as alleged by the respondents. The appellant averred that the damage to the infrastructure due to floods in August 1988 was restored promptly. Not only that, the construction activities on most of the installation of the project had continued without interruption during the above said period. Reliance placed by the respondent/claimants on the letter dated 23.08.1988 purportedly sent by SNC/ACRES was also squarely met by stating that the said communication is not traceable in the appellant's record. It was further stated that the same in no way dilutes the responsibility of MIL and GE to supply the equipment on order with them as per the contractual delivery schedules. It was specifically averred that even though the purported letter of SNC/ACRES is stated to have been issued in August 1988, the delivery period under the contract for supply of equipment by MIL and GE expired in December 1987/September 1988 and June 1988 respectively i.e. practically before the purported earth quake and floods in August 1988. In response to para 53 of the statement of claim, it was again stated that the project had not remained suspended during the period August 1988-1990 as alleged and that the same

continued uninterruptedly during the said period.

36. In the face of these averments, to say that the issue with regard to the existence of Force Majeure conditions did not arise, or was not raised, would be wholly inappropriate. The TOR drawn by the Arbitral Tribunal squarely acknowledge the fact that the appellant had averred that the claimants should be put strictly to proof of their claims i.e. for price variation, if the Arbitral Tribunal considers that the merits of the claim should be entered into. The relevant extract from the TOR reads as follows:

NHPC further claims that the Claimants should be put strictly to the proof of their claims if the Arbitral Tribunal considers that the merits of the claim should be entered into.

37. The appellants averment that the respondents/claimants be put to strict proof of their claims for price variation means - and could only mean, that, firstly, the claimants establish the existence of the conditions necessary to establish the said claim. The respondents, therefore, had to establish the correctness of various indices/variables to be plugged into the formula for each quarter. Secondly, for the post contract delivery period, this meant that the respondents/claimants establish, in respect of the delayed period for which price variation was sought by them, that the delay occurred for reason of existence of Force Majeure conditions.

38. A perusal of the impugned award shows that the Arbitral Tribunal proceeds on the assumption that Force Majeure conditions existed from August 1988 onwards, which is what led to the delay of the project. In para 1.6 of the award under the heading "Introduction", the arbitral observed as follows:

1.6. GE and MIL started to manufacture their respective Equipment in late 1984. Work was done under the Contract and various invoices submitted by each of them over the next year. In August 1998 earthquakes and floods in India caused a delay to the Project (a force majeure event). The commissioning of the Equipment did not take place until about 1991-92.

39. In para 4.1 of the impugned award under the heading "qualification of claim", the Arbitral Tribunal summarily dismisses the objection of the appellant with regard to non existence of Force Majeure conditions by observing as follows:

4.1 A further issue was raised relating to the calculation of any sums which might be owing by one party to another by reason of the interpretation which the Tribunal placed on the payment provisions. So far as the Terms of Reference are concerned, nothing is contained in these suggesting an issue as to quantification existed. It was clear that at the stage of Memorial and Counter-Memorial the parties were in agreement in relation to at least some figures. That is, at that stage, the parties were at least in agreement as to the indices to be applied for the purpose of variation. However, at the stage of the hearing the Respondents sought in their later submissions to argue an entitlement to resist all the price

calculations. The apparent basis upon which they sought to do so was that the delay of some three years between 1998 and 1991 which the Claimants attributed to force majeure was not entirely so. No material was put or attempted to be put before the Tribunal bearing on this issue. In these circumstances the Tribunal is not concerned with any question of delay.

(Emphasis supplied)

40. Let us examine the aforesaid observations of the Arbitral Tribunal in the light of the contractual terms and conditions. The claim of the respondents/claimants essentially was for price variation. The period covered not only the contractual delivery period but also a period for which the delay had taken place. So far as the contract delivery period was concerned, the issue only related to the formula to be applied for computation of price variation. For the period after the contract delivery period; an additional issue of entitlement arose, as the respondents/claimants pleaded existence of Force Majeure conditions which was denied by the appellants. Therefore, merely because the appellant made its submissions to oppose "grossing up" method invoked by the respondents/claimants, it could not mean that they conceded the position that Force Majeure conditions did exist. The issue relating to existence/non-existence of Force Majeure condition was relevant only for a period after the contract delivery period. Therefore, even if the claim for the post contract delivery period were to be held to be not sustainable on account of non-existence of Force Majeure conditions, the issue with regard to "grossing up" payments for purposes of price variation still needed to be returned. These two arguments were, therefore, independent of each other and the fact that the appellant did not question the entitlement of the respondents/claimants to claim price variation for the contract delivery period as per the contract formula, could not be taken to mean that they had conceded that Force Majeure conditions exist so as to justify a claim for price variation for the period - post the contract delivery period. The aforesaid aspect evidently has not been appreciated by the Arbitral Tribunal as well as by the learned Single Judge. The Arbitral Tribunal as well as the learned Single Judge have proceeded on the basis that because the appellant did not raise a dispute with regard to the claim for price variation but only disputed the formula to be applied to compute the same, the appellant could not have at a late stage, raised the issue of non-existence of Force Majeure.

41. The observations of the Arbitral Tribunal - in para 4.1 of the impugned award, give an impression that the appellants raised the said issue only at the time of hearing. This appears to be patently incorrect, inasmuch, as, the said issue was squarely raised in the pleadings and finds reflection in the TOR as stated above. The appellant was not obliged to raise the said issue until the respondents/claimants raised the same while leading their evidence to prove the existence of Force Majeure conditions, since it was not for the appellant to prove the non existence of Force Majeure conditions, and it was for the respondents/claimants to positively prove the existence of Force Majeure conditions during the

period August 1988 to 1990, and how it affected the performance of their contractual obligations. Therefore, to say that the appellants did not raise the said issue till the stage of hearing is of no avail, and cannot be treated as an act of waiver by the appellants of their said plea/objection.

42. The observation of the Arbitral Tribunal that "No material was put or attempted to be put before the Tribunal bearing on this issue" betrays the fact that the Arbitral Tribunal has overlooked and ignored clause 14 of the contract which, in express terms, puts the onus to establish the existence of Force Majeure conditions on the party that pleads/claims the same to exist. In fact, the said observation is in favour of the appellant and against the respondents/claimants. Failure to produce evidence of existence of Force Majeure could not be attributed to the appellant. It was the failure of the respondents/claimants to establish the existence of Force Majeure, as it was their obligation to establish that such conditions existed between August 1988 to 1990, as it is they who had made a claim for price variation on the basis of existence of such conditions.

43. Pertinently, the Arbitral Tribunal did not refuse to deal with the issue regarding existence of Force Majeure conditions between August 1988 and 1990 on the ground that the said issue was either not raised, or was not framed. It was not answered, because no evidence was led on the said issue. Issue nos. 3 and 4, as framed, encompassed within themselves the issue whether the claim for price variation was not valid. The said issues read as follows:

3. If the claims are valid, to what sum or sums is MIL entitled in respect of price variation?

4. Likewise, to what sum or sums is GEC entitled in respect of price variation?

(Emphasis supplied)

44. The question of validity/invalidity of the said claim (for the period after the contract delivery period) was linked on the determination of the issue: Whether the delay was on account of existence of Force Majeure conditions. Therefore, to say that the issue with regard to existence of Force Majeure conditions was not framed cannot be accepted. That is not the way the Arbitral Tribunal has interpreted the issues framed by it.

45. Reliance placed by learned counsel for the respondent on the averments made by the respondent/claimants in para 39 of the statement of claim and the appellants response thereto, in our view, is of no avail as para 39 of statement of claim itself refers to para 52 thereof, and in response to para 52 and 53 of the statement of claim, the appellant had made a clear and categorical denial of the existence of Force Majeure conditions.

46. We also find merit in the appellant's submission that reference made to the alleged communication of SNC/ACRES of 23.08.1988 by the respondents in their statement of claim could be of no avail, since each of the contractors namely, SNC/ACRES, MIL and GE were independent contractors. The scope of their work

was different. What may amount to Force Majeure conditions for one contractor may not amount to Force Majeure conditions for the other contractor. Unfortunately, the Arbitral Tribunal has not gone into these serious issues which arise for its consideration.

47. We cannot agree with the reasoning adopted by the learned Single Judge in the impugned judgment to reject the aforesaid objection of the appellant. The respondents/claimants claimed the existence of Force Majeure conditions during the period August 1988 to 1990. It was for them to show that such conditions existed or continued to exist throughout for such a long time. Pertinently, the appellant had altogether denied existence of Force Majeure conditions. It cannot be presumed that earthquakes and floods, necessarily, should result in the existence of Force Majeure conditions. Because the appellants stated that "damages to the infrastructure due to the floods in August 1988 were restored promptly", it does not tantamount to an admission of existence of Force Majeure conditions on the part of the appellant. The appellant had gone to state that "the construction activity of most of the installations in the project had continued without interruption during the above said period". The learned Single Judge could not have read and picked up a part of the appellant's averment and ignored the rest.

48. Whether Force Majeure conditions existed, or not, and if so, for what period, is a matter of fact is to be determined on the basis of evidence led by the contesting parties. It also depends on the contractual obligations of the contesting parties under the contract whether, or not, the existence of such conditions effects the rights and obligations of one or the other party. The existence of Force Majeure conditions at one place may not necessarily affect the obligation of the promisor who is to perform the contract. What may constitute Force Majeure conditions for one party need not necessarily tantamount to Force Majeure conditions for the other. Unfortunately, neither these aspects nor the aspects raised by the appellant as noticed hereinabove while recording the appellant's submissions, have received due consideration from the Arbitral Tribunal. The onus to prove the existence of Force Majeure conditions in terms of clause 14 was on the respondents/claimants. The learned Single Judge, unfortunately, has not adverted to the said contractual clause. In our view, the onus continued to remain upon the respondents/claimants and did not shift on the appellant to show that Force Majeure conditions did not exist because, firstly, the appellant did not admit the existence of Force Majeure conditions and, secondly, it was for the respondent/claimants to establish that, even if such Force Majeure conditions existed in August 1988, the same continued to exist till 1990; the same had a bearing on the performance of the obligations of the respondents, and; if so, to what extent.

49. We cannot agree with the reasoning adopted by the learned Single Judge in the impugned judgment. Firstly, we may note that the said plea regarding Force Majeure has been dealt with by the learned Single Judge, as if, the learned

Single Judge was dealing with it for the first time on merits. That is not the scope of the enquiry undertaken by the Court while dealing with the objections under Sections 30 and 33 of the Act. The learned Single Judge, in our view, fell in error in observing:

From the aforesaid pleadings one fact is absolutely clear that there were damages to the infrastructure due to floods in August, 1988. Once force majeure conditions are found to exist, if the objector contended that the situation was restored promptly, the onus of proof surely shifted upon the objector to show as to when the force majeure conditions ceased to exist. Surely when there is damage on account of floods and earth quakes "promptly" cannot have any meaning.

It was not for the learned Single Judge to appreciate the pleadings and evidence and return a finding of fact.

50. Secondly, there was no question of the plea of non existence of Force Majeure conditions being canvassed before the arbitrators "with fervor and vehemence". If the plea has been taken in the pleadings; is incorporated-though generally, in the terms of reference, and; is urged at the stage of hearing before the Arbitral Tribunal, it cannot be said that the said plea has not been seriously urged by the appellant. A party is not expected to resort to fervor and vehemence to advance its plea. It is enough if the party raises its plea at the appropriate time in its pleadings; raises an issue on the basis of the said plea and; finally argues the same before the adjudicator. In our view, the appellant did all that it could to advance the plea of non existence of Force Majeure conditions. The onus to prove the existence of such conditions was on the respondents/claimant. It is clear to us that the learned Single Judge has failed to deal with the aforesaid aspect in the light of the contractual clauses and in terms of clause 14 thereof.

51. We may refer to the decision of the Supreme Court in *State of Orissa Vs. Orient Paper and Industries Ltd.*, . The Supreme Court in this case upheld the decision of the High Court in setting aside the award on the ground of non application of mind by the arbitrator who had failed to decide the points in dispute. The Arbitrator had merely agreed with an official note appended to the arbitration agreement, with the result that the questions referred to arbitration remain unanswered. The dispute in this case arose out of an agreement regarding exclusive rights and license to fell, cut and remove bamboo. According to a note appended under clause 10 of the agreement, the Chief Conservator of Forests had determined that 2300 metres of 7475 running feet of salia bamboo and 600 metres of 1950 running feet of daba bamboos respectively make it a tonne in weight. Three specific questions were referred to the arbitrator: (1) whether the determination regarding the weight of the bamboo was justified; (2) whether the calculation was scientific, and (3) whether the calculation would apply in all cases with effect from 01.10.1973. In his award the arbitrator merely stated that the determination was final and binding on both parties. He did not

mention, much less, deal with the other questions at all. The award was made "rule" of court by the Sub-Judge. In appeal, the High Court set it aside and remitted it to the arbitrator for redetermination. The Supreme Court (speaking through Santosh Hegde, J) while upholding the decision of the High Court setting aside the award, observed as follows:

10. The award of the learned arbitrator in regard to the first dispute referred to him merely says that the Chief Conservator had determined under clause 10 of the agreement that 2300 metres or 7475 running feet of salia bamboos and 600 metres or 1950 running feet of daba bamboos respectively make a tonne and the same is held to be final and binding on both the parties. He did not even advert to the other points. In my opinion, the High Court was right in coming to the conclusion that the learned arbitrator did not decide the question whether the method adopted by the Chief Conservator of Forests was scientific or not. He also did not determine whether this methodology could be made applicable to all cases w.e.f. 1-10-1973. In my opinion by merely agreeing with the decision of the Chief Conservator of Forests, the arbitrator has not addressed himself to other points arising in the first dispute and has not answered those points. Therefore, in my opinion the High Court is justified in setting aside the award and remitting it back to the arbitrator.

52. In our view, for the aforesaid reasons, the impugned award, insofar as it grants price variation for the period after the contractual delivery period, cannot be sustained on the ground of there being a patent error in the award inasmuch, as, clause 14 of the contract has been completely overlooked by the Arbitral Tribunal, and the award proceeds on a basis contrary to the contractual terms. The award also suffers from non application of mind to the issue raised by the appellant.

53. The impugned award, by not dealing with the said primary defence of the appellant, has clearly resulted in miscarriage of justice and cannot be sustained and, thus, the award of price variation for the period after the expiry of the contractual period is set aside.

54. To appreciate the appellant's second submission that the Arbitral Tribunal has acted beyond its jurisdiction by devising a new formula for computation of price variation in the quarterly progress payments, it would be essential to examine the relevant contractual provisions. We are conscious of the legal position that the task of interpretation of the contract falls primarily within the domain of the Arbitral Tribunal, and if the Tribunal has adopted an interpretation which is plausible, the court would not substitute the same with another interpretation merely because the court may prefer another plausible interpretation. However, there is a caveat to this rule - the same being that the interpretation adopted by the Tribunal is such that no reasonable person would adopt i.e. it is unreasonable or; which is perverse, or; which goes contrary to the plain meaning of the contractual terms. Since the submission of the appellant is that the Arbitral Tribunal has gone contrary to the contractual formula while

computing the price variation, and gone beyond its jurisdiction by modifying the contractually prescribed formula for computation of price variation, it is necessary to consider and examine the relevant contractual terms [see para 22 of the judgment of the Supreme Court in Rajasthan State Mines and Minerals Ltd. (supra), which is extracted in K.C. Goyal (supra) later].

55. At this stage, it would also appropriate to take notice of the relevant extract of clause 3 which deals with the respondent MIL and GE's Contract Prices. The same reads as follows:

3. CONTRACT PRICES AND TERMS OF PAYMENT

3.1 MIL Contract Prices

3.1.1 The Contract Price for the Equipment delivered FAS Eastern Canadian Port or other port of origin, described in Articles 2.1.1, 2.1.2 and 2.1.3 hereof shall be thirty-nine million two hundred and sixty thousand CANADIAN dollars (CAN \$39,260,000.00) Net.

3.1.2 The Contract Price for the Consultancy Services described in Article 2.1.4 hereof shall be three million six hundred and forty thousand CANADIAN dollars (CAN. \$3,640,000.00) Net.

3.1.3 The Contract Prices are subject to variation in accordance with the Price Variation as per Articles 4.1 and 4.3 hereof.

3.2 CGE Contract Price

3.2.1 The Contract Price for the Equipment delivered FAS Eastern Canadian Port or other port of origin, described in Articles 2.2.1, 2.2.2, 2.2.3 and 2.2.4 hereof shall be twenty million seven hundred and eighty one thousand, six hundred and thirty nine CANADIAN dollars (CAN. \$20, 781, 639.00) Net.

3.2.2 The Contract Price for the Consultancy Services described in Article 2.2.5 hereof shall be two million four hundred and eighteen thousand, three hundred and sixty-one CANADIAN dollars (CAN. \$2,418,361.00) Net.

3.2.3 The Contract Prices are subject to variation in accordance with the Price Variation as per Articles 4.2. and 4.3 hereof.

3.3 Terms of Payment

NHPC shall pay or cause to be paid the Contract Price as set forth in Articles 3.1.1 and 3.2.1 hereof (referred to as FAS Contract Price in this Article 3.3) in accordance with the following terms:

3.3.1 Subject to Articles 13.1.1, 13.1.2 and 13.1.3 of the General Terms and Conditions of this Contract, 15% (fifteen percent), free of interest, of the FAS Contract Price for the supply of the Turbine Core Package and Generator Core Package shall become due and payable as advance, immediately after the signing date of the Contract and upon presentation of the invoice and advance payment

bond as per Article 12.1 of this Annex B.

3.3.2 75% (seventy-five percent) of the FAS Contract Price for the supply of the Turbine Core Package and Generator Core Package in quarterly progress payments as per schedule of payments shown in Appendix B1 and B2 respectively to this Annex B related to the schedule of work progress.

(Emphasis supplied)

56. We proceed to examine the price variation clause i.e. Clause No. 4. After setting out as to what is the price variation to which the contractors/respondents would be entitled to, the contract proceeds to set out the formula to be applied for computing the price variation. Clause 4.1 deals with Turbine Core Package and clause 4.2 deals with price variation in respect of the Generator Core Package. A perusal of the said formula shows that the entire i.e. "100% of the claim for price variation" shall be "chargeable and payable on a quarterly basis". Therefore, price variation is chargeable only on quarterly basis. It shall also be payable on quarterly basis. Most pertinently, the price variation clause shall be "based on 100% (one hundred percent) of the progress payment claimed, i.e., without holdback for the quarter". The plain grammatical meaning of this clause is that the price variation shall be claimed on the entire quarterly progress payment - nothing being left to be claimed later in respect of the quarterly payment. The formula sets out, as L1 and M1, the average price index of labour and material respectively during the quarter for which progress payment is claimed. As per clause 3.3.2, the 75% progress payments are "related to the schedule of work progress". The first footnote to the said formula shows that in respect of the last quarterly payment prior to shipment, the labour index that shall be used shall be the same as used in respect of the previous quarterly payment. The second footnote provides that for computing variation claimed in respect of last two quarterly payments prior to shipment, the material index used in respect of the second previous quarterly payment is required to be used. The parties were, therefore, conscious while devising the formula of the fact that price variation is to be claimed on the 100% progress payments claimed.

57. From a perusal of the contractual terms dealing with the terms of payment, the price variation clause; the formula; as also the various appendix to Annexure B of the contract, it is clear that under the contract price variation could be claimed only in respect of quarterly progress payments. For the quarter during which the work was done, progress payment became due and on that progress payment the price variation was payable, depending upon the change in the material and labour indices. The formula provided in the contract nowhere provides that the 15% interest free payments made in advance (in terms of clause 3.3.1 to the respondents MIL & GE) would also be proportionately revised on the assumption of upward revision of the prices of the equipment, or the consultancy services in subsequent quarters.

58. This formula was arrived at by the parties of their own free will and accord.

Having done so, it did not lie in the mouth of the respondent/claimants to contend that the said formula did not grant them adequate price variation as, upon the application of the formula incorporated in the contract, they did not get price variation on the element of advance payment, or the final payment. This aspect could have been raised by the respondents/contractors, at the time of negotiation of the contract with the appellant. Having consciously agreed to the terms as set out in the contract, which included the formula to be applied for price variation, the respondents could not have chosen the route of arbitration to seek to amend the contractual terms to undo - what they thought, was unfair to them.

59. The reasoning adopted by the Arbitral Tribunal in the impugned award to allow the respondents claim for price variation, by adopting the method of "grossing up" in respect of equipment is found in para 3.9 to 3.13. We consider it appropriate to set out the said reasoning. The same reads as follows:

3.9 Before the Tribunal it was contended on behalf of the Claimants that the correct application of the formula in the case of Equipment was to "gross up" the relevant progress payment in relation to which a price variation was being claimed. The reason for so doing was that as in the case of the equipment contracts 15% of the contract price was paid in advance and 10% was paid at the end, the progress payments only amounted to 75% of the whole. If, therefore, the price variation was treated as referable only to the actual amount of any particular progress payment, the result would be to deprive the parties of that proportion of the price variation which should have related to the prior and posterior payments. So to do would be to ignore the words of the contract which provided that the contract prices were subject to variation, without suggesting that the whole of the Equipment Contract Prices were not so subject, except in so far as the Contract expressly limited the variation to 90% of the whole Contract Price. Further it ignored the express provision in Clause 4.1 and 4.2 in every case that "each payment will be subject to price variation". Lastly, it gave no explanation to the reference in head (a) of the formula to the claim for price variation being based on 100% of the progress payment claimed.

3.10 For the Respondents it was contended that nowhere in the contract provisions was there any reference to "grossing up" in the manner suggested by the Claimants. The reference in head (a) of the formula was intended to ensure that the claim for price variation at any particular progress payment stage was related to the whole of the progress payment then being claimed (that is without any holdback at all) and whatever the fate of the progress payment itself in so far as it might be diminished by holdback, the whole of the price variation upon the whole of that progress payment was then to be chargeable and payable. The contract, it was argued, must be construed strictly on its terms, and nothing should be implied which does not clearly emerge from the language used in the contract. The respondents expressly stated that they rested their entire case for limited price variation upon clause (a) of the price variation formula. They did

nevertheless point out that in other contracts in this project which they drew to our attention price escalation was not applied in respect of (at least) the advance payment portion of the price. The difficulty that the tribunal has with that branch of the respondents argument is that in each of the three cases to which our attention was drawn, there was an express provision to that effect in the contract itself. Thus in the portion of the purchase order placed on M/s. Federal Pioneer (Appendix IV to Mr. Jamwal's statement) Clause 9.1 (a) in respect of fabrication states: "The amount of the contract price subject to escalation with respect to fabrication costs is ninety per cent (90%) of the ex-works price (excluding certain costs) ... The amount of the advance payment shall not be subject to escalation". Similarly the purchase order placed on M/s. ABB (Appendix V to Mr. Jamwal's statement) provided 3.0 Price Variation "(a) The amount of the contract price subject to escalation with respect to fabrication costs is ninety (90%) per cent of the ex-works price (excluding certain costs)..... The amount of the advance payment shall not be subject to variation". Again, in reference to the Dominion Bridge Quebec, the respondents have produced (Appendix A, Item 1) a letter dated 22nd September 1992 which states: "A) 10% Down Payment. As per Clause 12.1(b) of the Special Conditions dated April 1986 for the Spillway Radial and Wheeled Bulkhead Gates, the 10% down payment is not subject to escalation". They have also produced an Instruction to Bidders which states in 12.1(a) "The proportion of the contract price subject to escalation with respect to fabrication costs is sixty five per cent (65%) but not including the amount of the down payment (10%)".

3.11 In approaching the issue of the proper construction of the Price Variation formula, the Tribunal considers that it is their task to construe the words used in this part of the Contract in their setting as a whole. To that end Articles 3 and 4 of Annex B in particular have to be considered. Upon so doing it is expressly clear that from the general words to which reference has already been made in Article 3 that the Contract Prices are subject to price variation. This in ordinary language would normally be taken to mean that the variation provision would apply to the whole Contract Price. Further the provision in relation to each aspect of the equipment contract prices is that "all prices" are subject to variation. More significantly perhaps, the provision relating to the variable elements provides that (to take an example) (a) For the purpose of variation, the proportion of the price representing labour is accepted as an amount equal to 50% thereof and (b) the above amount accepted as representing labour will vary for changes in labour costs. Such variation will be based upon [particular index] - Articles 4.1.1 etc. The natural reading of that provision is that the whole sum which is 50% of the relevant Contract Price will vary for changes in labour costs. There is no suggestion that part only of that amount will vary. On the contrary what is made clear at that stage is that, on the face of it, two parts of the whole, i.e. the amounts representing 50% and 40% will vary for changes in the relevant costs (material and labour). The remaining 10% will not vary.

3.12 The matter is however put beyond doubt by Articles 4.1.1, 4.1.2 and 4.1.3,

each of which clauses provide that each payment is subject to price variation. That express provision, without qualification, imports that the parties agreed that all payments which were to be made in respect of each of the Contract Prices would be subject to price variation. Clause (a) of the formula provides that 100% (one hundred per cent) of the claim for price variation shall be chargeable and payable on a quarterly basis, based on 100% (one hundred per cent) of the progress payment claimed, i.e. without holdback, for the quarter. That suggests that at any stage at which a price variation claim is being made it has to be based on the whole (i.e. 100%) of the progress payment claimed. That is not the same as saying that it is to be limited to the progress payment claimed. The contention put forward by the respondents would be exactly the same if the word "based" were omitted from head (a) of the formula. The consequence of the respondents interpretation is not only that it gives no content to the word "based" in head (a) but that it cannot be reconciled with the commencing words of the relevant clause that each payment will be subject to price variation. If content is to be given to the whole of Article 4.1.1 then the phrase each payment must be reconciled with the formula also contained in Article 4.1.1 that claims for price variation shall be based on 100% of the progress payment claimed. That can clearly be done by aggregating the advance and the final payment, in the case of equipment 25% of the whole, and then applying a grossing up formula so that each progress payment carries with it the additional 25% for the purpose of arriving at the overall price variation.

3.13 It appears to the Tribunal that so to proceed can be seen to be consonant with the general scheme of the payment provisions. If 15% of the Contract Price is to be paid in advance then, given that the Contract Price is to be subject to price variation, it cannot be ultimately determined what that amount which represents 15% of the Contract Price will be until the conclusion of the period and the application of the last variation indices. Similarly, in relation to the 10% which is withheld, the calculation of what variation is appropriate should be made on an ongoing basis. (It would of course have been possible if the formula had in (a) referred to payments and not to progress payments to apply the formula to all payments). Such an approach however would have been less accurate in so far as it would not have resulted in price variation being calculated so close to the event as is the case when the "grossing up" formula is applied. However the language of the formula here, by limiting the payments upon which the price variation is based to the progress payments requires the formula to be applied in relation to these progress payments in such a way that the overall contract prices are appropriately varied. The grossing up method is simply a technique for achieving that result. It should be noted that the mathematical consequence of applying a factor 100/75 to the interim progress payments is effectively to apply the formula to the full contract price. For these reasons the tribunal is of the view that considering the contract as a whole and the price and price variation provisions in particular, the proper interpretation and application thereof requires the whole contract price (less 10%) to be subject to variation and that the

appropriate technique to calculate that variation in accordance with the formulae is by grossing up each interim (progress) payment by a factor of 100/75. Only by so doing is full effect given to the words used in the contract between the parties.

(The words in bold have been emphasized by us)

60. A perusal of para 3.9 of the impugned Award itself would show that the respondents reasoning for claiming adoption of "grossing up" method was that if the price variation was treated as referable only to the actual amount of any particular progress payment, the result would be to deprive the claimants of that proportion of the price variation which should have related to the prior and posterior payments. The aforesaid, itself shows that the respondents admitted the position that the formula prescribed in the contract, if applied, would not grant price variation in respect of the 15% advance payment and 10% end payment.

61. The respondents relied upon - and the tribunal accepted the plea that the formula provided that "each payment will be subject to price variation" (emphasis supplied). Therefore, the advance payment would also be covered. What has been missed out by the respondents and the tribunal is that the expression "each payment" used in the formula has to be read in the context. The expression each payment occurs within the defined formula. Therefore, "each payment" cannot mean each payment under the contract, which includes the advance payment (15%) and the final payment (10%). "Each payment" means-and can only mean, each progress payment as the formula provides for computation of price variation on each "progress payment claimed". Pertinently, the expression "each payment" has not been used in clause 4.2 which uses the expression "All prices". The formula applies to the "progress payment claimed" for each quarter. There is no question of any progress payment being claimed in respect of the advance payment already received in terms of Clause 3.3.1. The price variation claim can be made only in respect of the quarterly progress payments and the extent of variation depends on the change in the price indices. The variation is not a constant percentage. It could vary from quarter to quarter, depending on the fluctuations in the variables used to operate the formula prescribed for computation of price variation. The actual price variation for each quarter would thus depend on the actual quarterly progress payment claimed, and on the variation of indices. The contract does not provide for the variation formula to be applied for computation of price variation in respect of the 15% interest free advance payment. This is precisely for the reason that such price variation is not contemplated by the contract on the advance payment. Advance payment is outside the scope of the formula prescribed for price variation.

62. The use of the expression "All prices for the are subject to variation...." in clauses 4.1 and 4.2 of the contract does not suggest that all components of prices, or parts of prices, or installments in which the prices are paid - which includes the advance payment (15%) and the final payment (10%), would also

necessarily have to be revised or varied. For example, it cannot be said that the prices of the generator core package would not stand varied with the variation of the progress payments. The contract provides the contract price for the Generator Core Package and Turbine Core Package as on the date of the contract. Those are the contract prices. Therefore, any change in the said price on account of price variation in the progress payments, would lead to variation of the price variation. We cannot agree that the contract envisages a variation in the advance payment, or payment which is payable at the end.

63. Reference to other contracts entered into by the appellant, is neither here or there. The Arbitral Tribunal could not have brushed aside the contractual formula on the premise that in other contracts of the appellant NHPC there was an express clause stipulating that the advance payment would not be subject to variation. To us, it is clear that even in the present contract the position was the same and, though, the parties did not set out an express term to that effect in the contract the said conclusion is inescapable on a plain reading of the relevant clauses and the formula as discussed above.

64. Merely because contract prices are subject to variation would not mean that the variation would apply to each installment of the contract price. If that were the intention, the parties would have so provided in the contract and appropriately evolved the formula therefor. Similarly, merely because the contract provides that all prices are subject to variation, it does not mean that each installment-including the advance payment, or the final payment, would be subject to variation. Variation of the progress payments - which constitute the bulk of payment, would also lead to variation of the contract price and the price of each component of the equipment or services to be provided under the Contract. What is most unacceptable to us is the fact that in its endeavour to grant price variation to the respondent/claimants even in respect of the advance payments (15%) and the final payment (10%), the Arbitral Tribunal has sought to apply the factor of 100/75 to the progress payments i.e. raise the same by a factor of 4/3, which is nowhere to be found in the formula prescribed under the contract. Had the contract not contained a formula, and it had merely set out the broad principle for grant of price variation in respect of the contract price, the situation might have been different and the long drawn reasoning of the Tribunal may have been acceptable. In the present case, the contract itself contained the detailed and specific formula which shows that price variation can be claimed only in respect of the quarterly progress payments. All that was needed to be done was to apply the formula by filling in the variables to arrive at the amount of variation that the contractor would be entitled to, in each progress payment. The Arbitral Tribunal could not have, of its own, evolved a new formula for the parties in its desire to do justice according to its own understanding. By doing so, the Arbitral Tribunal has adopted an interpretation that goes contrary to the plain language and meaning of the contractual terms. We cannot agree that by adopting a new formula the Arbitral Tribunal has given effect to the words used in the contract between the parties. We find ourselves at a loss to understand as

to how the Arbitral Tribunal could have proceeded to devise a formula of its own for computation of price variation and tinker with the specifically agreed formula provided in the contract for computation of price variation. The Arbitral Tribunal was bound by the contractual terms and this exercise undertaken by the Arbitral Tribunal is clearly without jurisdiction and constitutes legal misconduct on the part of the Arbitral Tribunal.

65. We are fortified in our view by the decision of the Supreme Court in *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another, wherein it was observed that:

The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract; his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see *Mustill & Boyd's Commercial Arbitration*, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see *Halsbury's Laws of England*, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award.

A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside.

(Emphasis supplied)

66. In *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*, the Supreme Court observed:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as

such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) No award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.

(Emphasis supplied)

67. In the present case, it cannot be said that the Tribunal has merely resorted to interpretation of the contractual terms. After placing its own interpretation to clause 3 and 4, what the Arbitral Tribunal has done is to tamper with the specific formula provided in the contract for computation of price variation. This exercise undertaken by the Tribunal clearly goes beyond the act of interpretation of the contractual terms as, by doing so, the Arbitral Tribunal - which derives its jurisdiction from the contract between the parties, has sought to materially alter the written agreement and introduce in the prescribed formula a multiplication factor which the parties had not provided for. It is clear to us that the Arbitral Tribunal has travelled beyond the contract and, consequently the Award is one without jurisdiction and the aforesaid exercise taken by the Arbitral Tribunal amounts to legal misconduct thereby calling for the Award to be set aside.

68. A similar issue arose before a Division Bench of this Court in Delhi Development Authority Vs. U. Kashyap, . Escalation in material and labour costs was payable to the contractor as per the formula set out in clause 10(CC) of the agreement. However, the Arbitral Tribunal granted escalation to the contractor on the basis of cost indices for building works in Delhi as circulated and adopted by the CPWD. This approach of the Arbitral Tribunal was assailed before the High Court in objections filed u/s 30 and 33 of the Act. To defend this approach of the Arbitral Tribunal, the contractor pleaded that breach of the contract was committed by the employer/DDA by not adhering to the time schedule given therein. Consequently, the contractor argued that it was entitled to claim, by way of compensation, the increase in prices of materials and labour for the period beyond the stipulated date of completion, in addition to what is provided in clause 10(CC) of the agreement. This court placed reliance on the decision of the Supreme Court in Associated Engineering Company (supra) and extracted the following paragraph from that decision:

20. The contention of the Government is that the two formula are totally different from each other as a result of which the arbitrator awarded very much more than what is warranted under the agreed formula. Mr. Madhav Reddy submits that it is true that the Contractor was bound to pay minimum wages according to the relevant statutory provisions. In fact the contract contains a provision making it necessary for the Contractor to conform to all laws, regulations, bye-laws, ordinances, regulations, etc.

But the fact that the Contractor necessarily had to pay enhanced rates of wages did not entitle it to claim any amount from the Government in excess of what had been strictly provided under the contract. A specific formula had been prescribed under Item 35, as seen above, and the function of the umpire was to make an award in accordance with that formula. He had no jurisdiction to alter the formula, which he has done, as seen from the award.

21. It is not disputed on behalf of the Contractor that the formula followed by the arbitrator, as seen from the award under Claim No. II, is different from the formula prescribed under the contract. But Mr. K.R. Chowdhury, one of the counsels appearing for the Contractor, points out that the contract provided for payment of all wages according to the current rates and, Therefore, the arbitrator was well within his jurisdiction to make an award by adopting a formula in keeping with the enhanced rates of wages, and the High Court, he contends, rightly decreed the amounts under that claim in terms of the award.

22. We shall deal with Claim Nos. IV and VII (4) separately. But as regards Claim Nos. III, VI and IX, we are of the view that the High Court was right in stating that the arbitrator acted outside the contract in awarding those claims. For the very same reason we are of the view that the High Court was wrong in coming to the conclusion, which it did, regarding claim no. II. We say so because there is no justification whatsoever for the arbitrator to act outside the contract.

23. These four claims are not payable under the contract. The contract does not postulate - in fact it prohibits - payment of any escalation under Claim No. III for napa-slabs or Claim No. VI for extra lead of water or Claim No. IX for flattening of canal slopes or Claim No. II for escalation in labour charges otherwise than in terms of the formula prescribed by the contract. This conclusion is reached not by construction of the contract but by merely looking at the contract. The umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award under those claims. This is an error going to the root of his jurisdiction: See Jivarajbhai Ujamshi Sheth & others Vs. Chintamanrao Balaji & Others. We are in complete agreement with Mr. Madhav Reddy's submissions on the point.

(Emphasis supplied)

69. Applying the ratio in Associated Engineering Co. (supra), the court held that the Arbitral Tribunal exceeded its jurisdiction in making the award under claim no. 11 by adopting a formula different from that set out in clause 10(CC) of the

agreement.

70. The same issue arose before a Division Bench of this court in Delhi Development Authority v. K.C. Goyal & Co., 2011 II AD (Del.) 116. In this case, the respondent contractor claimed extra rates due to rise in market price of building materials. The same was resisted by the appellant on the ground that the amount for rise in prices is covered by provisions of clause 10(CC) of the contract and rates as per that clause have already been paid. The Arbitral Tribunal, however, proceeded to award certain amount in favour of the contractor by stating that the same is a fair market price. The justification was that the prolongation of the contract beyond the contract period was not on account of the contractor. This award was challenged by the appellant on the ground that the arbitrator misconducted himself by not adhering to the provisions of the contract i.e. clause 10(CC) of the contract and by going beyond the terms of the contract. This court, once again, by placing reliance on Associated Engineering Co. (supra) and several other decisions, held conduct of the Arbitrator in rendering an award beyond the arbitrators jurisdiction, as legal misconduct. The following extract from the decision in K.C. Goyal (supra) is relevant:

10. On the other hand Associated Engineering Co. case (supra) decides that when the Arbitrator is entertaining the claims, he is supposed to take into consideration the provisions contained in the contract dealing with the aspects involved in adjudicating a particular claim and when for payment of a claim, a particular formula is provided in the contract applying some other formula and awarding the claim would amount to legal misconduct. Therefore, both the decisions hold different fields and it is this distinction in the two cases which has to be kept in mind. In fact, ratio of both the cases is same as the following passage from Sudershan Trading Co. case (supra) would demonstrate:

The same principle has been stated in Alopi Parshad & Sons, Ltd. v. Union of India. There this Court held that the award was liable to be set aside because of an error apparent on the face of the Award. An arbitration award might be set aside on the ground of an error on the face of it when the reasons given for the decision, either in the award or in any document incorporated with it, are based upon a legal proposition which is erroneous. But where a specific question is referred, the award is not liable to be set aside on the ground of an error on the face of the award even if the answer to the question involves an erroneous decision on a point of law. But an award which ignores express terms of the contract, is bad

11. Associated Engineer Co. case (supra) is still a good law, would be clear from the recent judgment of the Supreme Court itself in the case of Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, and in the case of Rajasthan State Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises and another 1999 (3) ALR 350 (S.C.). In the first case mentioned above, following Associated Engineering Co. case (supra) the Court held that Award against the terms of contract would amount to misconduct on the part of

Arbitrator and would be illegal. To the same effect is the decision in the second case and interestingly in this case the Court has taken note of the judgments in the case of Sudarshan Trading Co. as well as Associated Engineering Co. case. Para-22 of the judgment starts in the following manner:

It is settled law that the Arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the Court for that limited purpose agreement is required to be considered. For deciding whether the Arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must. It is true that arbitration Clause 74 is very widely worded, therefore, the dispute was required to be referred to the Arbitrator. Hence, the award passed by the Arbitrator cannot be said to be without jurisdiction but, at the same time, it is apparent that he has exceeded his jurisdiction by ignoring the specific stipulations in the agreement which prohibits entertaining of the claims made by the contractor

12. After referring to catena of earlier precedents, in para-42, the legal position is summarised as under:

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 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 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 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. Arbitrator acting beyond his jurisdiction-is a different ground from the error apparent on the fact of the award.

(g) In order to determine whether Arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could arise (sic raise) a

particular claim from the Arbitrator, if there is a specific terms 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 or 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 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 wider arbitration clause such claim amount cannot be awarded as 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. (supra) by relaying upon the following passage from M/s. Alopi Parshad Vs. Union of India (supra), which is to the following effect.

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 event which they did it 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 unanticipated 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.

(ii) 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.

13. Since the present case is squarely covered by the ratio of Associated Engineering Company case (supra) which was applied to by the Division Bench of this Court in DDA Vs. U. Kashyap (supra) interpreting Clause-10 (CC) itself, following this judgment, irresistible conclusion is that the Award rendered by the Arbitrator in respect of Claim No. 9 was erroneous and the Arbitrator committed legal misconduct by going beyond the provisions of Clause-10 (CC). The Award of the Arbitrator and the impugned judgment and decree to this extent,

therefore, has to be set-aside.

(emphasis supplied)

71. One of us (Sanjay Kishan Kaul, J) had the occasion to consider a similar objection to an arbitral award in *Pt. Munshi Ram and Associates (P) Ltd. Vs. Delhi Development Authority*. The principle laid down in *U. Kashyap (supra)* and *K.C. Goyal (supra)* was held to be squarely applicable as the arbitrator in that case had also granted the contractors claim for payment for extra work beyond what was permissible under clause 10(CC). Consequently, the award of the Arbitral Tribunal to that extent was set aside.

72. This Court, in *M/s. Bedi Construction Co. v. Delhi Development Authority* in C.S. (OS) No. 2822/1994 also, held that once the formula in clause 10(CC) forms part of the contract, no other methodology could be adopted for the purpose of calculation of the escalation, to which the contractor would be entitled for material and labour.

73. Merely because it may have appeared to the Arbitral Tribunal-equitable and fair to grant escalation/price variation by adopting a different formula or, different indices, than what is agreed to between the parties expressly in the contract, is no ground for the Arbitral Tribunal to depart from the express agreement between the parties. Once the parties have laid down the formula by which escalation/price variation shall be computed, only that formula can be applied, and it is not open to the Arbitral Tribunal to either vary the formula or apply indices different from those prescribed in the formula contained in the contract. Unfortunately, the learned Single Judge has not examined the objections raised by the appellant in depth. No doubt, the scope of interference with an Arbitral Tribunal is limited. But it does not mean that the Court will not examine in depth the objections raised by the objector falling within that limited scope.

74. In the light of the aforesaid discussion, we have no hesitation in concluding that the entire award is liable to be set aside and accordingly we set aside the same while also setting aside the impugned order dated 18.05.2010 of the learned Single Judge. However, the respondents shall be entitled to receive, if not already received by them, the price variation on the quarterly progress payments, strictly in accordance with the price variation formula without grossing up, for the contract delivery period only, as the appellants have not disputed, and cannot dispute the said entitlement of the respondents GE and MIL. The outstanding amount in this regard, if any, be paid within eight weeks of the receipt of a certified copy of this judgment. If the same is not so paid, the same would carry interest from the date hereof @ 5% per annum (considering that the said amount is payable in Canadian Dollars), till payment.

75. The next question that arises for consideration is the costs to which the appellant should be held entitled. The contract between the parties is a commercial contract. The arbitration in question was a commercial arbitration held under the rules of International Chamber of Commerce (ICC). Three learned

arbitrators constituted the Arbitral Tribunal. The Arbitral Tribunal directed payment of one half of the fee, costs and expenses of the arbitration aggregating to 124,000 USD, namely USD 62,000 by the appellant NHPC. In our view, since the impugned award suffers from serious legal misconduct and the appellant was unjustifiably dragged into arbitration in respect of a claim for price variation which appears to be unjustified, the appellants' costs incurred in arbitration, as well as before the learned Single Judge and this Court should be borne by the respondents equally. Accordingly, we award costs of USD 62,000 and Rs. 2 lacs - which would be reasonable costs for two rounds of litigation in this court, in favour of the appellant against respondent nos. 1 and 2 to be shared equally by them. Costs be paid within four weeks.