

(2009) 04 DEL CK 0568
In the Delhi High Court
Case No : OMP No. 16 of 2003

National Thermal Power Corporation Ltd.	APPELLANT
Vs	
Wig Brothers Builders and Engineers Ltd.	RESPONDENT

Date of Decision : 17-04-2009

Acts Referred:

Arbitration Act, 1940 — Section 11, 11(6), 12, 12(3), 13
Arbitration and Conciliation Act, 1996 — Section 11, 12, 13, 16, 18
Contract Act, 1872 — Section 28, 28(1), 53, 54, 55

Citation : (2009) 2 ARBLR 238 : (2009) 160 DLT 642 : (2009) 4 ILR Delhi 663 : (2010) 8 RCR(Civil) 1777

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : R.P. Bhat and Chirag M. Shroff, for the Appellant; P.V. Kapoor and Jeevesh Nagrath, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—These are objections filed u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") read with Sections 12, 13, 16, 18, 28(3) and 31 of the Act by the petitioner-National Thermal Power Corporation (for short "NTPC") against the Awards of the Arbitral Tribunal dated 13th September, 1999 and 25th June, 2002.

2. The disputes between the parties arose from a lump sum contract for 4 Cooling Towers of reinforced cement concrete 120 Metres high along with RCC basin for collection of cooled water and arrangement of RCC channels and AC Pipes provided horizontally for sprinkling of hot water through nozzles over layers of PVC serrated sheets, for the purpose of cooling of hot water from 43 Degree C. to 32 Degree C. through natural draft created in the towers. However, the supply of hot water and distribution of cold water from the basin was outside the scope of the contract.

3. The contract, inter-alia, provided for foreign collaborators and their design for

structural and thermal attributes of the Cooling Towers, for supply of cement and steel free of cost by NTPC, for variation in the quantity of such cement and steel on certain prescribed consideration and for recovery from the contractor for excess consumption of cement and steel, for price adjustment of materials, labour and fuel linked with price indices, for foreign exchange rate protection and other usual conditions found in building and engineering contracts.

4. A completion schedule was stipulated for making ready the cooling towers. A schedule was also fixed for carrying out the trial operation within a specific period fixed separately for each tower and completion of miscellaneous works was fixed after two weeks thereafter. A Performance Guarantee (hereinafter referred to as the "PG") test was also one of such terms. A provision was made in the contract for Bank Guarantee for 10% of the contract sum for non-recoverable initial advance and 5% progressive payment for the stages of trial run and commissioning. The validity period for the various guarantees was stipulated in the contract. The performance guarantee was to be valid till the expiry of the guarantee period of one year after trial operation and 90 days thereafter. The guarantee for initial advance was to be valid till 90 days after trial operation, and that for progressive payments for trial run and commissioning till after completion of the PG Test. A further provision in the contract provided that the cooling towers were to be taken over by NTPC after completion of all the tests. Provisions were also made for force majeure and extension of time. Levy of liquidated damages for delay in completion as well as in shortfall in achieving the stipulated temperature of 32 Degree C. was also prescribed.

5. The case of the respondent/claimant set up before the Arbitrator was that:

a. The bid of the respondent contractor M/s. Wig Brothers (Builders & Engineers) Limited was accepted by NTPC on 07th November, 1988 for the lump sum of Rs. 13,63,22,750.00. A performance guarantee bond was submitted by the contractor as per the contract requirement valid for a stipulated period of one year after trial operation + 90 days and keeping to the initial prescribed schedule this bond was valid up to 30th June, 1993 as specifically mentioned in the letter of award of the contract.

b. The last of the four cooling towers was handed over to NTPC on 10th July, 1995. Apparently, on 25th July, 1996 the respondent-contractor submitted its pre-final bill for an amount of Rs. 26,05,21,598. NTPC, by its letter dated 9th August, 1996 denied payment of the said bill and that resulted in a dispute between the parties. NTPC once again communicated its refusal to clear the pre-final bill to the Respondent by letter dated 16th August, 1996.

c. The respondent by its letter dated 11th November, 1997 invoked the arbitration clause and since, according to the respondent, no Engineer had been appointed by the petitioner in terms of Clause 3 of the Contract, the respondent called upon the petitioner to appoint its Arbitrator within 60 days from the receipt of the said notice. The respondent also made a request to the President of the

Institute of Engineers to appoint the third Arbitrator in terms of the Arbitration Agreement contained in the Contract. By the said letter the respondent made it clear that the reference of disputes to arbitration was not confined to those contained in pre-final bill.

d. The petitioner by its letter dated 29th December, 1997 informed the respondent that its letter dated 16th August, 1996 was a decision of the Engineer appointed under the Contract and since more than 30 days had lapsed from such date the decision of the Engineer had become final and binding and there was no dispute which could be referred for arbitration in terms of the Contract. The petitioner thus declined to appoint its nominee arbitrator.

e. The respondent by its letter dated 9th January, 1998 disputed the stand taken by the petitioner and once again called upon the petitioner to appoint the arbitrator. By a separate letter dated 9th January, 1998 the respondent appointed Shri A.P. Paracer, Additional Director General (Retd.), CPWD as its nominee arbitrator and once again requested the petitioner and the President, Institution of Engineers to appoint their nominee arbitrators.

f. The President, Institution of Engineers appointed Shri P.P. Dharwadker, Former Chairman and Managing Director, NBCC as the third arbitrator. Since, the petitioner had not appointed its nominee arbitrator, even after the expiry of 150 days, the respondent by its letter dated 31st March, 1998 requested the President of the Institution of Engineers to nominate an arbitrator on behalf of the Petitioner in accordance with the arbitration agreement.

g. The Petitioner by its letter dated 13th April, 1998 claimed, that while it had no objection for the appointment of arbitrator on the request of the respondent as contained in its letter dated 31st March, 1998, it was objecting to the appointment of arbitrator on the ground that there was no arbitrable dispute as the decision of the Engineer had become final.

h. On the request of the respondent, the President of the Institution of Engineers by his letter dated 6th May, 1998 appointed Shri Balbir Singh, Former Director General, CPWD as the nominee arbitrator on behalf of the petitioner.

i. On 10th June, 1998 the petitioner filed an application under Sections 12 and 13 of the Arbitration and Conciliation Act, 1996 ("the Act") before the Arbitral Tribunal challenging its constitution on several grounds. The Arbitral Tribunal rejected the said application on 18th August, 1998. The petitioner challenged the said decision of the Arbitral Tribunal before this Court u/s 34 of the Act. That challenge was also dismissed on 17th September, 2001. A further appeal to the Division Bench of this Court was also dismissed on 18th January, 2002. Thereafter, the Petitioner participated in the proceedings of the Arbitral Tribunal, under protest.

6. It appears that at the 6th hearing of the Arbitral Tribunal held on 3rd February, 1999, the petitioner again questioned the jurisdiction of the Arbitral Tribunal

averring as under:

i. If claims (Part-I) were a dispute, they were first required to be referred to the Engineer and only thereafter the arbitration clause could be invoked. Since there was no dispute regarding claims (Part-I) and arbitration was never sought on these claims, there could be no reference for arbitration. In the absence of any reference the Tribunal had no jurisdiction to adjudicate in respect of these claims.

ii. The reference commenced only on 11th November, 1997 and this was clear from the Claimants' letter dated 11th November, 1997 invoking arbitration clause in respect of disputes resulting from the non-acceptance of the pre-final bill by the NTPC. This reference made no mention of release of Bank Guarantees and consequently claims were beyond the jurisdiction of the Tribunal.

iii) The issues regarding release of Bank Guarantees to be adjudicated upon by the Tribunal are the same as those pending before the Court. The matter was, therefore, sub-judice and the Tribunal had no authority to proceed with the same.

7. By its order dated 13th September, 1999 the Arbitral Tribunal rejected the said objections.

8. On 25th June, 2002 the Arbitral Tribunal rendered a unanimous Award awarding the Respondent a sum of Rs. 4,75,41,411/-. The Arbitral Tribunal observed that in case the net amount awarded is paid within 30 days of the Award no future interest would be payable but if the petitioner failed to do so, the net amount awarded shall carry an interest of 18% per annum up to the date of actual payment by the petitioner. The Arbitral Tribunal awarded a sum of Rs. 6,36,450/- in favour of the Petitioner. However, having regard to the fact that the Petitioner had already taken a credit of Rs. 3,76,950/- in the final bill and the fact that the Arbitral Tribunal reduced the final bill by a sum of Rs. 2,00,000/- only a sum of Rs. 59,500/- was awarded to the petitioner.

9. The petitioner questioned the said award u/s 34 of the Act on several grounds. The award has been challenged separately under Sections 12, 13, 16, 18, 28(3) and 31 of the Act. However, finally the petitioner's Senior counsel, Sh. R.P. Bhat raised the following as the main grounds of challenge:

a. The appointment and constitution of the Arbitral Tribunal was illegal as it was not in accordance with the agreement between the parties;

b. The PG Test was not done by the respondent which entitled the petitioner to deduct a sum of Rs. 65,00,000/-. It was immaterial as to why the PG Test was not done. The conclusion of the Arbitral Tribunal that an adjustment of Rs. 6,00,000/- is to be given for non-conductance of the PG Test is without any basis;

c. The Arbitral Tribunal has awarded claims forming part of the pre-final bill even though some of them had not been included and claimed in the final bill; and

d. In the meetings held between the parties on 10th September, 1993, 13th September, 1993 and 28th September, 1993, certain disputes had been settled

and the parties had agreed that no claim would be made by either of them in respect of such disputes. Despite this the respondent made a claim in respect of those disputes that had been settled and the Arbitral Tribunal has wrongly adjudicated and allowed such claims of the respondent.

10. In proceedings to adjudicate the challenge to the award u/s 34, the Court has to bear in mind that it does not sit as an appeal court that has the jurisdiction to revisit the evidence and the arguments advanced before the arbitrator and then substitute its own views with those of the arbitrators. The Court will not set aside a decision of an Arbitral Tribunal merely for the reason that had it heard the matter in the first instance it would have come to a different conclusion or that the view it would have taken could have been a better view. So long as the view of the Arbitral Tribunal is a plausible view, the court will not interfere with the Award merely because it feels that the view of the court may have been different than the one taken by the Arbitral Tribunal. The jurisdiction of this Court is confined to the four corners of the Arbitration Act, in particular the provisions of Section 34, for determining whether an Arbitration Award is liable to be set aside or not. In this respect reference may be made, inter alia to the law laid down in the following decisions: - (i) Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, (ii) Delhi Development Authority Vs. Sahdev Brothers and Another, (iii) 2006 (1) AD Delhi 431 - [Union of India v. Suchita Steels (India)]; (iv) 2004 (8) AD Delhi 1 - [Devika Mehra v. Ameeta Mehra].

11. It is true that an Arbitral Award that is opposed to the public policy of India will be liable to be set aside as held by the Hon'ble Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . Relying upon the said judgment of the Supreme Court, a Division Bench of this Court has in the case of G. I. Chaudhary v. Subhash Chandra Kathuria delivered in FAO(OS) No. 1 of 2004 held that:

In our view, the pivotal principle laid down by the Hon'ble Supreme Court ----- while defining the scope for interference with awards on the grounds of public policy is that the award can be set aside if it is patently illegal but the illegality must go to the root of the matter and if the illegalities are of trivial nature it cannot be held that the award is against public policy. It was further held the award can also be set aside if it was so unfair and unreasonable so as to shock the conscience of the Court.

12. This Court, therefore, is required to assess the challenge made by the petitioner on the touchstone of the legal position enumerated above.

13. The case as set up by the petitioner with respect to challenge under Sections 11 and 16 is as under:

i. The challenge to the Award under Sections 11 and 16 is founded on the ground that since the conditions precedent for the appointment of arbitrators had not been fulfilled, the Institution of Engineers did not have the power or authority under the Contract to proceed with the appointment of any arbitrator let alone

the nominee arbitrator on behalf of the Petitioner as also the third arbitrator. According to the petitioner, in order that a dispute could be referred to arbitration, the Contract contemplated that at first the dispute would have to be referred to an "Engineer" in terms of Clause 26 of the Contract. That once the Engineer rendered his decision it would become final and binding unless it was questioned by the party aggrieved by carrying the dispute to arbitration in terms of Clause 27 of the Contract. In substance the petitioner questions the award on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement between the parties.

ii. In support of its contentions the petitioner submitted that in this case the respondent had lodged its claim with the Engineer that was rejected by the Engineer by his letter dated 16th August, 1996. The said decision of the Engineer became final and binding between the parties since, the respondent did not initiate arbitration within the period of 30 days contemplated by Clause 27 of the Contract. That once the period of 30 days stipulated in Clause 27 of the contract had expired, the respondent lost its right to seek reference of the dispute to arbitration. According to the petitioner, once the stipulated period had expired there remained no arbitrable dispute between the parties that could be referred to arbitration. That in these circumstances when the respondent itself had lost the right to commence arbitration, the Institution of Engineers could not proceed to appoint arbitrators at the behest of the respondent/claimant.

iii. Clauses 26 and 27 of the Contract in question read as under:

26. SETTLEMENT OF DISPUTE

26.1 Except as otherwise specifically provided in the Contract all disputes concerning questions of fact arising under the Contract in the first instance shall be decided by the engineer, whose decision shall be final to the parties hereto.

26.2 Any dispute or difference including those considered as such by only one of the parties arising out of or in connection with the Contract shall be to the extent possible settled amicably between the parties.

26.3 If amicable settlement cannot be reached then all disputed issues shall be settled by arbitration as provided in Clause 27 below.

27. ARBITRATION

27.1 If any dispute or difference of any kind whatsoever shall arise between the Owner and the contractor, arising out of the contract for the performance of the Works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written note of his decision to the owner and the contractor.

27.2 Save as hereinafter provided such decision in respect of every matter so

referred shall be final and binding upon the parties until the completion of the entire works under the contract and shall forthwith be given effect to by the contractor who shall comply with all such decisions with all due diligence, whether he or the owner requires arbitration as hereinafter provided or not.

27.3 If after the Engineer has given written notice of his decision to the parties, no claim to arbitration has been communicated to him by either party within thirty (30) days from the receipt of such notice, the said decision shall become final and binding on the parties.

27.4 In the event of the Engineer failing to notify his decision as aforesaid within thirty (30) days after being requested as aforesaid, or in the event of either the owner or the contractor being dissatisfied with any such decision, or within thirty (30) days after the expiry of the first mentioned period of thirty (30) days, as the case may be, either party may require that the matters in dispute be referred to arbitration as hereinafter provided.

27.5 all disputes or differences in respect of which the decision, if any of the Engineer has not become final or binding as aforesaid, shall be settled by arbitration in the manner hereinafter provided.

27.6.1 In the event of the Contractor being an Indian party, that is to say a citizen and/or a permanent resident of India, a firm or a company duly registered or incorporated in India, the arbitration shall be conducted by three arbitrators one each to be nominated by the contractor and the owner and the third to be named by the President of the Institution of Engineers, India. If either of the parties fails to appoint its arbitrator within 60 (sixty) days after receipt of a notice from the other party invoking the Arbitration clause, the President of the Institution of Engineers, India shall have the power at the request of either of the parties, to appoint the arbitrator. A certified copy of the order of the said President making such an appointment shall be furnished to both the parties.

27.6.2 The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The venue of arbitration shall be New Delhi, India.

27.7.

27.9 The arbitrator shall have full powers to review and/or revise any decision, opinion, directions, certification or valuation of the Engineer in consonance with the Contract, and neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments put before the Engineer for the purposes of obtaining the said decision.

iv. In the alternative the petitioner further submitted that, if, as per the case set up by the respondent, the petitioner had not appointed an Engineer in terms of Clause 3 of the contract, it was incumbent upon them to first call upon the petitioner to appoint the Engineer and thereafter refer the dispute to him. That in the absence of the respondent having followed that procedure, the dispute could

not be referred to arbitration directly.

14. In response to this plea, counsel for the respondent firstly submitted that the contention of the petitioner that the respondent had made a claim before the engineer is factually incorrect because the petitioner had never appointed an Engineer in accordance with the contract and no such contractual entity existed in fact. According to the respondent, it had submitted its pre-final bill to the petitioner (and not to the Engineer) on 25th July, 1996 and it was that pre-final bill that was rejected by the petitioner by its letter of 9th August, 1996 as also by the letter of 16th August, 1996. The respondent further submitted that if the petitioner itself had failed and/or refused to appoint an Engineer in terms of the Contract, it was no part of the respondent's duty to persuade the petitioner to appoint one so that the respondent could then refer their dispute to him. The respondent submitted that since there was no Engineer nominated by the petitioner, the respondent was well within its right within the contract to refer their dispute directly to the arbitrators.

15. A perusal of the letter of 9th August, 1996 shows that it is a letter written by the Petitioner's officer, one Mr. A.K. Saxena, Manager (Township) which simply says "On our scrutiny, it has been observed that the bill in question is not tenable as per contract".

16. There is, however, a second letter of 16th August, 1996 that the petitioner claims was the decision of the Engineer under Clause 26 of the Contract. It is noteworthy that the letter of 16th August, 1996, though signed by a different person, is in fact a repetition of the letter of 9th August, 1996.

17. The learned Counsel for the respondent submitted that under no circumstance could the letter dated 16th August, 1996 be regarded as a decision of the Engineer for the following reasons:

a. No engineer in terms of Clause 3 of the Contract had ever been appointed in writing and no intimation of such appointment had ever been given to the respondent;

b. The letter dated 16th August, 1996 was nothing but a mere reproduction of the petitioner's letter dated 9th August, 1996 which contained neither any discussion nor any reasons as to why the claimant's pre-final was being rejected as "not tenable";

c. The letter dated 16th August, 1996, gave no indication whatsoever that it was a decision of the Engineer. The gentleman who signed the letter, one Mr. Nikhil Kumar, signed it in his capacity as "MGR. CCD/INF" and the letter is written on the petitioner's letterhead. The expression "Engineer" is significantly absent from the said letter.

d. That in order for the Engineer to render his decision, the dispute should have been referred to him to enable him to invite respective submissions of the parties and apply his mind thereto. Since, no reference of any dispute had been made to

the Engineer (since none had been appointed), the plea of the said letter dated 16th August, 1996 being his decision cannot be accepted.

e. That in fact even the petitioner had admitted that the letters dated 9th August, 1996 and 16th August, 1996 were really the decisions of the petitioner and not of the Engineer. In this connection the respondent placed reliance on the petitioner's letter dated 9th January, 1998 wherein the petitioner had stated, "Regarding your pre-final bill amounting the same had already been examined/checked by us. On our scrutiny it was found that the bill in question is not tenable and the same was to be conveyed to M/s Wig Bros vide our letter ref. No. 08/NCPP/TW/853 dt.9.8.96 and 08/NCPP/INF/10761 dt. 16.8.96.

18. The counsel for the respondent further contended that since no Engineer had ever been appointed by the Petitioner, the respondent had no option but to initiate arbitration directly. The respondent submitted that in these circumstances the limitation of 30 days provided by Clause 27 of the contract was of no consequence inasmuch as there being no decision of the Engineer, there was no starting point for such a limitation. In the alternative, the learned Counsel further contended that limitations such as the one provided in Clause 27 of the Contract would be void in terms of Section 28(b) of the Contract Act. In this regard the respondent placed reliance on two judgments of this Court i.e Hindustan Construction Corporation Vs. Delhi Development Authority, and M /s. Naresh Kumar Gupta v. The Vice Chairman/Engineer Member DDA and Ors. - reported as - 2003 (2) AD Delhi 628.

19. In the circumstances, the respondent submitted that the refusal of the petitioner to appoint an arbitrator was contrary to the procedure agreed to in the contract and the Institution of Engineers was well within its authority not only to appoint the nominee arbitrator on behalf of the petitioner (since, despite opportunity they failed to appoint one) but also to appoint the third arbitrator. Thus, the respondent submitted that the composition of the Arbitral Tribunal was entirely in accordance with the agreed procedure and the Institution of Engineers committed no error as averred by the petitioner.

20. The Arbitral Tribunal held that the petitioner produced no evidence to establish that they had appointed an Engineer in writing under Clause 3 of the Contract. Since there was no Engineer formally appointed under Clause 3.4 of the Contract there was no question of referring disputes to the Engineer. The Arbitral Tribunal was also of the view that the letter dated 16th August, 1996 was a rejection of the respondent's bill by the petitioner itself and could not be termed as the Engineer's decision on the disputes. That in the absence of an existence of an Engineer in terms of the Contract and there being no Engineer's decision, the rejection by the petitioner by its letter dated 16th August, 1996 had no relevance for reckoning any limitation period for invoking arbitration. This in my view is a finding of fact not amenable to challenge u/s 34. Even otherwise I am satisfied that the conclusions of the arbitral tribunal are correct. In fact, the counsel for the petitioner was unable to point out any order appointing the

Engineer contemplated by Clause 27. All that is pointed out are two letters dated 9th and 16th August, 1996 and these letters did not even claim to be on behalf of the Engineer and thus, it could not be said that any Engineer as per clause had been appointed by the petitioner. The only reference to an Engineer is in the letter dated 29th December, 2007 averring for the first time that the letter dated 16th August, 1996 was, in fact, an Engineer's letter as per clauses 26 and 27. Significantly, this was well after the invocation of arbitration by the respondent on 11th November, 2007 and thus, is of no avail to the petitioner.

21. The Arbitral Tribunal was further of the view that even assuming that the letter dated 16th August 1996 constituted a decision of the Engineer, the limitation of 30 days imposed by Clause 27 of the contract was void in view of Section 28 of the Contract Act.

22. In my opinion the petitioner's challenge to the award under Sections 11 and 16 of the Act must fail. I find no infirmity with the reasoning of the Arbitral Tribunal on this account. In my opinion, in view of the clear finding of fact that the petitioner never appointed any Engineer in terms of Clause 3.4 of the Contract, the question of the letter dated 16th August, 1996 being regarded as a decision of the Engineer under Clause 26 of the Contract cannot and does not arise. The fact that there was no Engineer also supports the respondent's contention that no dispute was ever referred to the Engineer for his decision. Facts on record in fact clearly reveal that the respondent had only submitted its pre-final bill (as distinct from submission of a claim) to the petitioner which was rejected by the petitioner twice i.e. once by the letter of 9th August, 1996 and then by its letter dated 16th August, 1996. The process of decision making, to say the least, involves some inter-action between the decision-making authority and the parties to the dispute. In the present case, neither was the respondent ever invited to make a claim and nor did it submit any to the non-existent Engineer and nor was there any interaction between the petitioner, the respondent and the alleged Engineer. I also agree with the view of the Arbitral Tribunal that the stipulation of 30 days contained in Clause 26 of the contract was contrary to S.28(1) of the Indian Contract Act.

23. That being the case, the respondent had no choice but to directly take its dispute to arbitration. In these circumstances, the limitation of 30 days provided by Clause 27 cannot be reckoned from the letter dated 16th August, 1996. While I am in respectful agreement with the judgments of this Court cited by the learned Counsel for the respondent namely *Hindustan Construction Corporation Vs. Delhi Development Authority*, and *Naresh Kumar Gupta v. The Vice Chairman/ Engineer Member DDA and Ors.* - reported as - 2003 (2) AD Delhi 628, I am of the view that as no Engineer contemplated by Clause 26 had been appointed, it is unnecessary to consider this finding or the applicability of the above decisions.

24. However, the fact of the matter is that there was no Engineer appointed by the petitioner and therefore, the question of first inviting his decision and then taking the dispute to arbitration did not arise.

25. Consequently, where an arbitration clause contemplates that a dispute should first be referred to an Engineer for his decision, and it is only thereafter, it can be carried to arbitration, what is the recourse open to a contractor for resolution of its disputes if the owner does not appoint an Engineer which it is obliged to do under the Contract? This question came up for decision of this Court in the case of *Petron Civil Engineering Limited v. DLF Industries and Ors.* reported in 2000 (II) RAJ 438 (Del.) in which this Court held:

if it's the contention of the respondents that the matter had to be first referred to the "Engineer" for decision, it was obligatory on their part to have such a person continue to be appointed so as to have the matter referred to him for decision. That having not been done, there was no need of the matter being first referred to a person who was not even in existence at the relevant time for his decision.

...because there was no "Engineer-in-charge" or "Engineer" available at site to whom the matter could be referred for decision, the disputes are required to be referred to an arbitrator...

26. I am in respectful agreement with the view expressed in the said case. This case also supports the further proposition that it was not the duty or the obligation of the respondent to have written to the petitioner to appoint an Engineer. If, as the respondents contend, that the dispute had to be first referred to an Engineer, it was obligatory on the petitioner's part to have appointed such a person. The petitioner was also required to, but did not, communicate any such appointment to the respondent prior to 29th December, 2007. That not having been done there was no need for the dispute to be first referred to a non-existent entity. I am also of the opinion that one party to an arbitration agreement cannot by his own act or omission prevent the other from having its disputes resolved by arbitration. The fact is that the parties had entered into an arbitration agreement that contemplated one step to be resorted by the parties before carrying the dispute to arbitration. That step was that the Engineer (to be appointed by the petitioner) would first try to resolve the disputes between the parties. Now, if the petitioner fails/refuses or neglects to appoint an Engineer it cannot be heard to contend that the arbitration agreement itself is frustrated and that the respondent cannot resort to arbitration directly. The intention of the parties was to have their disputes resolved eventually by arbitration. In the absence of the availability of the Engineer, the rest of the agreement must be given effect to, as that would be consistent with the intention of the parties. This interpretation is in accordance with the well accepted principle of interpretation of documents that the intention of the parties, to the extent possible, must be given effect to and each and every term of the contract must be implemented. The contention of the petitioner would mean that they by their own act would render the whole of Clause 27 of the contract nugatory and meaningless. Such a contention is completely unacceptable. The intention of the parties was clearly to seek the resolution of disputes by arbitration though through the route (as per

Clause 26) of the Engineer. However, the non-appointment of an Engineer by the petitioner could in no manner undo the intent in the agreement to resolve disputes by arbitration.

27. I may also notice that the contention of the petitioner that if there was no Engineer appointed by the petitioner it was incumbent on the Respondent to have one appointed by the Petitioner, is a self contradictory plea inasmuch their stand and the sheet anchor of their challenge is that there was an Engineer and that the 16th August 1995 letter was a decision of the Engineer. It is apparent that in its desire to prevent the Respondent from making its claim the petitioner came up with the plea of treating the 16th August 1995 letter as a "decision" of the "Engineer", even though it wasn't one, and thereafter, faced with the situation that they had actually not appointed an Engineer in terms of Clause 3 of the Contract, the Petitioner, as an after thought, came up with the plea that if such was the case then, the Respondent ought to have requested for the appointment of an Engineer. The issue as to whether an Engineer had been appointed or not is a question of fact and not one of law. The Arbitral Tribunal has given a categorical finding of fact that no Engineer had been appointed. It is not open to this Court to reappraise that finding of fact. I, therefore, reiterate my finding that in such circumstances, reference of the dispute directly to arbitration was perfectly valid and legal and I am in complete agreement with the findings of the Arbitral Tribunal on this issue.

28. In response to the contention of the Petitioner that since it had taken a stand before the Institution of Engineers that there was no arbitrable dispute, they had no authority to appoint any arbitrator, leave alone two (one as the presiding arbitrator and the other as the Petitioner's nominee arbitrator), learned Counsel for the respondent contended as follows:

a. The arbitration agreement contained the entire mechanism for the appointment of the arbitrators. One arbitrator each was to be appointed by the Petitioner and the Respondent and the third/presiding arbitrator was to be appointed by the President, Institution of Engineers. In the event of either the Petitioner or the respondent failing to appoint its nominee arbitrator, within 60 days from the date of the request by the other part, the arbitration agreement itself provided that the nominee arbitrator on behalf of such defaulting party was also to be appointed by the President, Institution of Engineers;

b. The President, Institution of Engineers was only an appointing authority. He had only to appoint the arbitrators in terms of the arbitration agreement and had no further role to play. The Petitioner, despite the Respondent's request dated 11th November, 1997, did not appoint the arbitrator within 60 days and till as late as 31st March, 1998. Therefore, in terms of the arbitration agreement, the Petitioner had lost its right to appoint its nominee arbitrator. Following the procedure prescribed in the arbitration agreement, the Respondent by its letter dated 31st March, 1998 requested the President, Institution of Engineers to appoint the 2nd Arbitrator on behalf of the petitioner. The petitioner had also

admitted in its letter dated 11/13th April, 1998 that the President, Institution of Engineers had the right to appoint the 2nd Arbitrator on behalf of the Petitioner. The President, Institution of Engineers had to appoint the 3rd or the presiding arbitrator and the arbitrator on behalf of the party who had failed to appoint its arbitrator. It was not for him to decide the question of the existence of the disputes. The existence or otherwise maintainability of the disputes was to be decided by the Arbitral Tribunal u/s 16 of the Arbitration Act;

c. That since the arbitration agreement itself provided a complete mechanism for the appointment of the arbitrators; there was no need for the Respondent to approach the Court u/s 11 of the Arbitration & Conciliation Act, 1996 for such appointments. He relied upon Section 11(6) of the Arbitration Act in support of his plea.

29. Section 11(6) of the Arbitration Act provides, thus:

(6) Where, under an appointment procedure agreed upon by the parties,-

- a. A party fails to act as required under that procedure; or
- b. The parties, or the two appointment arbitrators, fail to reach an agreement expected of them under that procedure; or
- c. A person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

30. In the present case, the arbitration agreement provided that in the event of either party, i.e. the Petitioner or the Respondent, failing to appoint its nominee arbitrator within 60 days from being called upon to do so, by the other party, the nominee arbitrator on behalf of such party shall be appointed by the President, Institution of Engineers. The Petitioner also admits this. The Petitioner, in its letter dated 11/13th April, 1998 admits that the President, Institution of Engineers could appoint the arbitrator as requested by the Respondent, in its letter dated 31st March 1998 but it could not do so as there were no disputes. The Petitioner thus did not object to the power but only objected to the exercise thereof. The Respondent could have approached this Court u/s 11 of the Arbitration Act only, if the President, Institution of Engineers failed to appoint the arbitrator. Since, the President, Institution of Engineers appointed the 3rd Arbitrator as also the nominee arbitrator on behalf of the Petitioner, in terms of the arbitration agreement, the occasion for the Respondent to approach this Court did not arise. In fact, the Respondent could not have approached this Court u/s 11 of the Arbitration Act unless it had requested the President, Institution of Engineers to appoint the arbitrator, and such request had been declined or not acted upon.

31. The President, Institution of Engineers was only an appointing authority. He

was not vested with any power to adjudicate the existence of the disputes. In the plain language of the arbitration agreement, the occasion for him to exercise the power of appointing the 3rd arbitrator was a request from either party; and for the 2nd Arbitrator it was the failure on the part of either party to appoint its nominee arbitrator within 60 days from being called upon by the other party to appoint its arbitrator. He appointed the 3rd Arbitrator on the request of the Respondent and, since the petitioner failed to appoint its nominee arbitrator within 60 days from being called upon to do so by the Respondent, he appointed the nominee arbitrator on behalf of the Petitioner also. It is settled law, which needs no reiteration that, an appointing authority, which is not a Court, is not to perform any adjudicatory functions. It has but one role and that is to make the appointment and all contentious issues, including those in respect of the existence of disputes, have to be decided by the Arbitral Tribunal u/s 16 of the Arbitration Act. Therefore, the contention of the Petitioner that the Institution of Engineers ought not to have appointed the arbitrators is rejected. The view taken by the Arbitral Tribunal in their order dated 18th August, 1998 that the President, Institution of Engineers was not required to consider the merits of the respective claims at the time of appointing the arbitrators and that the arbitrators were appointed in accordance with the arbitration agreement, is in my opinion the correct view and requires no interference from this Court.

32. The appointment of the Arbitral Tribunal was thus legal, valid and in terms of the agreement between the parties.

33. The learned senior counsel Mr. R.P. Bhat on behalf of the petitioner, has contended that in terms of Section 12 of the Arbitration Act when the Arbitrators were approached for their appointment, they were required to disclose in writing that no circumstances existed that were likely to give rise to justifiable doubts as to their independence or impartiality. That since, the arbitrators did not make any such declaration, the Award deserves to be set-aside under Sections 12 and 13 of the Arbitration Act. He further submits that the Arbitrators acted with a bias against the petitioner as it had challenged the constitution of the Arbitral Tribunal. It is submitted by Mr. Bhat that the Arbitral Tribunal, since it directed the release of the Bank Guarantees, acted with malice towards the petitioner and the proceedings, if perused, would show that the Arbitral Tribunal acted with bias against the petitioner and the petitioner was not given a fair hearing and treatment. According to the petitioner it was meted out unjust, and improper treatment and that the bias of the Arbitral Tribunal against it can be inferred from the fact that as against the claims of the Petitioner amounting to Rs. 44 crores only a sum of Rs. 59,000/- was awarded in its favour. It is also submitted that the proceedings if perused do not reflect the correct state of affairs as an unfair advantage was given to the respondent.

34. The petitioner has also questioned the submission of statement of claim by the respondent in two parts. It is also submitted on behalf of the petitioner that the arbitral tribunal proceeded on the basis that the claims of the respondent

nomenclature as "Part-I Undisputed Claims" were undisputed, which showed legal bias on their part. The whole approach, according to the petitioner, of the Arbitral Tribunal was erroneous in law, patently illegal and contrary to well known principles in law. The Arbitral Tribunal, as submitted by Mr. Bhat Ld. Senior Counsel, did not follow any set procedures and recorded only those facts, which were convenient to the respondent or to them and deliberately omitted the submissions, statements and contentions of the petitioner. This, according to him has resulted in gross miscarriage of justice.

35. Mr. P.V. Kapur, learned Senior Counsel, on behalf of the respondent has submitted that the respondent had filed its statement of facts/claims and for the sake of convenience, the respondent had divided the statement of facts into two parts i.e. Part-I and Part-II, and filed them separately. The basis for dividing the statements of facts/the claims into two parts was as follows:

(i) Those claims payment for which was to be made by the petitioner to the respondent strictly in terms of the contract for the work done by the respondent and accepted by the petitioner without any dispute were nomenclatured as Part-I of the statement of facts or undisputed claims, as according to the respondent there should not have been any dispute about the said claims and which also included the bank guarantees;

(ii) Part-II of the statement of facts/claim consisted of those claims of the respondent in respect of extra items/work etc. that the respondent had to carry out for the completion of the contract and the loss/damage that the respondent had to suffer on account of non-cooperation by the petitioner, the delay caused by the petitioner due to such non-cooperation and the breaches committed by the petitioner; and

(iii) Since, the respondent was praying for the passing of an interim award in respect of the claims which were the subject matter of Part-I, it wanted that the claims in Part-I, should be adjudicated first and therefore the same were submitted in two parts. The Arbitral Tribunal, however, did not pass separate awards but it passed a composite award in respect of both Part-I and Part-II claims.

36. The respondent had by its letter dated 31st August, 1998 submitted the statement of facts in respect of Part I of its claims and on 26th October, 1998 the respondent submitted the statement of facts in respect of Part II of its claim. Reply was filed by the petitioner on 30th December, 1998, separately to Part I and Part II. Therefore, when the petitioner filed its reply both Part I and Part II of the statement of facts had already been filed by the respondent.

37. Mr. P.V. Kapur, the learned Counsel for the respondent further submitted as under:

a. That there was/is no prohibition in law in submitting the statement of claim in two parts and none has been averred by the petitioner. Furthermore, in terms of

Section 19(3) of the Arbitration Act, the Arbitral Tribunal was at liberty to conduct the proceedings in such manner as it deemed appropriate, without being bound by strict rules of procedure. Neither before the Arbitral Tribunal nor before this Hon^{ble} Court, did the petitioner ever allege that any prejudice was caused to it on account of submission of the claim in two parts by the respondent. Further, the allegation of the petitioner that the Arbitral Tribunal considered those claims of the respondent in part-I, nomenclatured as "undisputed" as undisputed and proceeded to pass an award as if the same were undisputed is totally misconceived, because the Arbitral Tribunal has passed a reasoned Award in respect of all the claims, including those which were filed as part-I, after considering the evidence and hearing the parties.

b. That an Arbitral award can be challenged under Sections 12 and 13 of the Arbitration Act only if such a challenge had first been made before the Arbitral Tribunal. He submits that thus the petitioner became aware of the constitution of the Arbitral Tribunal on 6th May, 1998. The petitioner had 15 days, in terms of Section 13(2) of the Arbitration Act to challenge the constitution of the Arbitral Tribunal but the petitioner filed the application u/s 12 of the Arbitration Act only on 10th June, 1998 i.e. after 35 days. He submits that there was a waiver by the petitioner u/s 4 of the Arbitration Act, of its right to raise a challenge u/s 12 of the Arbitration Act and further, in view of Section 13(2) of the Arbitration Act, the petitioner could not have challenged the constitution of the Arbitral Tribunal after the expiry of 15 days after becoming aware of its constitution. The Arbitral Award, according to him, cannot therefore be challenged u/s 12 of the Arbitration Act.

c. That besides making allegations the petitioner has not set out any circumstances by which it can be shown that the Arbitral tribunal acted in a biased manner. He submits that not all claims of the respondent were allowed and not all claims of the petitioner were rejected, and merely because the claims of the respondent were allowed and those of the petitioner rejected does not by itself constitute bias or is indicative thereof. He further submits that the submission of the petitioner that the arbitrators when they were approached, were required to disclose in writing that there are no circumstances which are likely to give rise to justifiable doubts as to their independence is contrary to the plain language of Section 12 of the Arbitration Act. According to him, a disclosure is required to be made or given by the Arbitral Tribunal only when there exist grounds, which can give rise to justifiable doubts about the independence or impartiality of the arbitrators. In other words, if no such grounds exist no disclosure is required.

d. That a challenge u/s 12 of the Arbitration Act can be made only on the grounds mentioned in the said section and on no other grounds. This is clear from the language of Section 12(3) of the Arbitration Act. The petitioner, according to him, in its belated and time barred application u/s 12 of the Arbitration Act, raised the following grounds:

- a. The manner that the Arbitral Tribunal has been constituted gives rise to justifiable doubts about its impartiality;
- b. None of the arbitrators had disclosed in writing the requisite circumstances as to their independence and impartiality.
- c. The composition of the Arbitral Tribunal and the procedure followed in its composition is not in accordance with the terms of the agreement between the parties. That these are not grounds on which the composition of the Arbitral Tribunal can be questioned u/s 12(3) of the Arbitration Act. Therefore, he submits that the application made by the petitioner u/s 12 of the Arbitration Act, was rightly rejected by the Arbitral Tribunal, by its order dated 18th August, 1998. He further submits, that the petitioner before this Court cannot urge the grounds which had not been first raised before the Arbitral Tribunal.

38. The relevant sections of the Arbitration Act are as under:

4. Waiver of right to object.-A party who knows that-

- (a) any provision of this Part from which the parties may derogate, or
- (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

12. Grounds for challenge.-(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in Sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

- (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or
- (b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13. Challenge procedure.-(1) Subject to Sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in Sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under Sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under subsection (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under Sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under Sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

39. In my view, the petitioner became aware of the constitution of the arbitral tribunal on 6th May 1998 or soon thereafter, but in any event before 19th May 1998 when the Petitioner wrote to the President, Institution of Engineers stating that the appointment of all the three arbitrators was illegal and incorrect. The petitioner sent a letter dated 10th June 1998 to the Arbitral Tribunal, which the petitioner has stated were the objections under Sections 12 and 13 of the Arbitration Act. Clearly, the said objections were filed after the expiry of more than 15 days, from the date when the petitioner became aware of the constitution of the Arbitral Tribunal. Since, the petitioner had not filed the objections within 15 days from the date of becoming aware of the constitution of the Arbitral Tribunal, the petitioner had in terms of Section 4 of the Arbitration Act waived its right to file the same.

40. I am also unable to agree with the submission of Mr. Bhat that when the arbitrators were appointed they had to disclose in writing that no grounds exist that would give rise to justifiable doubts about their independence or impartiality. Section 12(1) of the Arbitration Act provides that disclosure has to be given by the arbitrators only if there exist grounds which would give rise to justifiable doubts about his independence or impartiality. The Arbitration Act does not provide that when no such ground exists, the arbitrator has to give a written declaration in the negative that no such grounds exist. The interpretation suggested by Mr. Bhat would amount to rewriting Section 12 and cannot be accepted.

41. Section 12(3) of the Arbitration Act sets out the grounds on which a challenge can be made to the arbitrator or the Arbitral Tribunal. u/s 12(3) of the

Arbitration Act, a challenge can be made only if one or both of the two grounds set out in the said section has been fulfilled. In the application filed by the petitioner, before the Arbitral Tribunal, under Sections 12 and 13 of the Arbitration Act, the grounds raised by the petitioner were that it had justifiable doubts about the independence of the Arbitral Tribunal in view of the manner in which it was constituted. The words "justifiable doubts as to the independence or impartiality" in themselves do not confer any right. A mere reproduction of the said words does not give rise to any justifiable doubts about the independence or impartiality of the Arbitral Tribunal, but such bias or partiality has to be shown from the records with reference to specific instances. This Court is unable to comprehend as to how can the manner, in which the arbitral tribunal had been constituted, in itself gave rise to any justifiable doubts about the independence and impartiality of the arbitral tribunal. None of the grounds raised by the petitioner in its application under Sections 12 and 13 of the Arbitration Act, were permissible in view of the phraseology of Section 12(3) of the Arbitration Act and the said application was therefore, rightly rejected by the Arbitral Tribunal.

42. It was further submitted on behalf of the respondent that the grounds of challenge raised by the petitioner in the present petition, under Sections 12 and 13, were not raised by the petitioner before the Arbitral Tribunal and the same cannot therefore, be entertained by this Court. I am of the view that the petitioner had to first raise its objections before the Arbitral Tribunal in a timely fashion and if the Arbitral Tribunal rejects its submissions, the petitioner at the stage of challenging the Arbitral Award, if it so chooses, could also raise the grounds that it had raised before the Arbitral Tribunal u/s 12 of the Arbitration Act. However, if the petitioner did not or failed to raise an objection before the Arbitral Tribunal, then in view of Section 4 of the Arbitration Act, the petitioner is deemed to have waived such objection and it cannot, at the time of filing a petition u/s 34 of the Arbitration Act, raise the same. All the objections raised by the petitioner for the first time in the present petition, deserve to be rejected on this ground alone. Even otherwise, I am unable to agree with the submission of Mr. Bhat that since, the claims of the respondent have been allowed and those of the petitioner have been rejected and the bank guarantees were directed to be released the bias entertained by the Arbitral Tribunal was evident. If the submission of Mr. Bhat is accepted, every arbitral proceeding and award will become illegal and void on the ground of bias as in the final decision the claims and contentions of one party are accepted and those of the other party are rejected. Under no circumstances can the rejection of the claims or allowing the claims of the other party by itself lead to an inference of bias or partiality. Before an award is set-aside on the ground of bias or impartiality on the part of the Arbitral Tribunal, the party alleging the same has to show and prove the circumstances and facts that clearly demonstrate such bias. Arbitral Awards cannot be interfered with lightly on the mere allegation of bias or partiality. In the present case, besides vague allegations, no such specific instance has been set out or indeed proved. The respondent had stated that in the arbitration

proceedings spread over a period of 4 years the Arbitral Tribunal held 66 hearings out of which 39 hearings were dedicated exclusively for the submissions and arguments of the petitioner. There is no denial of this plea by the petitioner. This in itself shows that more than 50% time was taken by the petitioner and the petitioner therefore cannot complain of denial of a fair opportunity and hearing. The submission that the petitioner was not given a fair and proper hearing and that its submissions and contentions were not recorded is also without any merit. No specific instances has been given, in the petitioner, as to which submission of the petitioner was not noted and in which manner the Arbitral Tribunal acted in a partial manner towards the respondent. Even during arguments my attention was not drawn to any instance or fact, on the record, that would show that the Arbitral Tribunal was not independent or that it acted in a partial manner towards the respondent with bias against the petitioner.

43. The contention of the petitioner that the award is vitiated on the ground of bias is therefore, rejected.

44. As to the submission of Mr. Bhat regarding the award being vitiated on the ground of submission of statement of claim in two parts, my view is that the said contention also has no merit and deserves to be rejected for the reasons stated hereinafter.

45. Section 19 of the Arbitration Act, provides, thus:

19. Determination of rules of procedure.-(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (V of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in Sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under Sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

46. A reading of Sub-section (3) of Section 19 shows that the legislature has left it to the Arbitral Tribunal to conduct the proceedings in the manner it considers appropriate, if there is no agreement to the contrary between the parties. The petitioner has not been able to draw my attention to any agreement between the parties in respect of the procedure for the conductance of the proceedings by the Arbitral Tribunal. Thus, the Arbitral Tribunal was free to conduct the proceedings in the manner it considered appropriate and fair.

47. Even though, the respondent had filed its statement of claim in two parts and had nomenclatured part-I of the statement of claim as "undisputed", the Arbitral Tribunal did not pass the award in respect of the said claims without going into

the merits of the same. The petitioner, has not shown any claim which has been allowed by the Arbitral Tribunal on the basis that it is in part-I and is nomenclature as "undisputed" and therefore, deserves to be allowed. The Arbitral Tribunal has passed a composite award on merits.

48. It is not for this Court to decide the procedure that should have been adopted by the Arbitral Tribunal, when the legislature has itself deemed it fit to leave that to the discretion of the Arbitral Tribunal. Further, I am of the view that no prejudice or injustice has been caused to the petitioner on account of filing of the statement of claim in two parts, by the respondent. The Petitioner had filed its reply when both Part-I and Part-II of the statement of facts had already been filed by the respondent before the Arbitral Tribunal, and the pleas in the reply have been dealt with by the Arbitral Tribunal in the Awards. It is found by the Arbitral Tribunal that there a dispute between the parties in respect of the claims made by the respondent in part-I of its claims. The Arbitral Tribunal noted that the claims which are nomenclatured as "Undisputed" and had been filed as part-I were a part of the pre-final bill submitted by the respondent herein, but were not admitted by the petitioner resulting in disputes. Thus, the Arbitral Tribunal clearly considered and proceeded on the basis that there was a dispute between the parties even in respect of part-I of the statement of claim was nomenclatured as "Undisputed". I am consequently unable to agree with the submission of Mr. Bhat that since part-I of the statement of claim was nomenclatured as "Undisputed" the Arbitral Tribunal assumed ipso facto that there existed no dispute between the parties in respect of the same and proceeded to pass the award in respect of the same as it was undisputed and admitted by the petitioner. Therefore, this objection of the petitioner does not merit any interference in the award.

49. I, therefore, have no hesitation in rejecting the grounds raised by the petitioner under Sections 12 and 13 of the Arbitration Act and uphold the decision of the Arbitral Tribunal dismissing the petitioner's application u/s 12 and 13 of the Arbitration Act.

50. The grounds raised by the petitioner u/s 16 of the Arbitration Act are a rehash of those raised by it u/s 11 of the Arbitration Act namely, that the decision of the "Engineer" had become final and binding as the respondent had not invoked arbitration with 30 days from the date of such decision and therefore, there was no question or the appointment of the arbitrators or the constitution of the Arbitral Tribunal; and if no "Engineer" was appointed the arbitration proceedings could not have been initiated, the decision of the "Engineer" being condition precedent to the invocation of arbitration. I have already held that the arbitration proceedings had been correctly invoked and the appointment and composition of the Arbitral Tribunal was legal, valid and in terms of the agreement between the parties. The order dated 18th August, 1998 passed by the Arbitral Tribunal does not therefore suffer from any illegality or infirmity. The view taken by the Arbitral Tribunal is consequently justified and I affirm the reasoning of the order dated 18th August, 1998. The grounds raised

by the petitioner u/s 16 of the Arbitration Act are thus, without any merit and are therefore, rejected.

51. It is submitted by Mr. R.P. Bhat, learned Senior Counsel on behalf of the petitioner relying on Section 18 of the Act, that the parties were not treated equally. He submits that the Arbitral Tribunal; did not follow the principles of natural justice; showed bias towards the respondents; and that they did not act impartially. He further submits that the conduct of the nominee arbitrator of the Respondent shows that he acted as a convenor only in the interests of the respondent. The representatives of the petitioner, he submits, were abused, insulted and given unfair treatment. The minutes of the meetings were not correctly recorded and only those factors which were convenient to the arbitrators or to the respondent were recorded. He further submits that the Arbitral Tribunal also did not take cognizance of the documents that were produced. Many other similar allegations have been made on behalf of the petitioner to buttress its stand that the awards are vitiated and should therefore, be set aside. These pleas were disputed by Shri Kapur as being unsubstantiated and vague.

52. General allegations, in my view, without any specific instances, have been made by the petitioner. No particulars have been given as to how the Arbitral Tribunal did not follow the principles of natural justice, in what manner was the Arbitral Tribunal biased towards the respondents and which specific instance would demonstrate such bias. The petitioner has also not specified or brought to the notice of this Court as to which minutes of the meeting were incorrectly recorded or which document was produced but was ignored by the Arbitral Tribunal. In my view, arbitral awards cannot be open to challenge merely on the basis of such general and bald allegations. To permit a party to assail awards on such general allegations, would result in a situation where every unsuccessful party would question the award by raising such sweeping allegations without furnishing particulars and then leave it to this Court to investigate the same. An arbitral award can be questioned only on the grounds mentioned in the Arbitration Act. These grounds have to be specifically set out and pleaded. Merely making a general statement like "documents were not considered by the arbitral tribunal" is not a ground on which an arbitral award should be set aside by the court. A party making such allegations has to show, from the records, that what was the document, when was it filed, what was its relevance, what would be the impact of the document had it been considered and how the non-consideration of the said document has rendered the award patently illegal. This not having been done, the objection raised by the petitioner u/s 18 of the Act is accordingly bereft of any merit and is accordingly, rejected.

53. Mr. Bhat, learned Sr. counsel further urged on behalf of the petitioner citing S.28(3) of the Act that an arbitral tribunal, being the creature of the contract, cannot declare any of the provisions of the contract as null and void and they have to act as per the terms of the contract.

Mr. Kapur relied upon Section 16(1)(b) of the Arbitration Act, which provides that:
16(1) (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause

Relying upon the said provision, Mr. Kapur for the respondent submitted that the arbitral tribunal has the power to declare/decide whether the contract or any part thereof is null and/or void. Therefore, the Arbitral Tribunal has not acted without jurisdiction or contrary to law. In my view there is merit in the plea of Mr. Kapur as S.16 makes it clear since the contract itself could be declared null and void, it was clearly open to the Arbitral Tribunal to declare a part of the contract to be null and void.

54. He further submitted that the arbitral tribunal could not have assumed jurisdiction and that the arbitral tribunal has committed a grave error by holding that Clause 26 of the contract, to the extent that it provides that if arbitration is not initiated within 30 days from the date of the decision of the Engineer, the party shall lose its right to initiate arbitration, was null and void. According to him, the arbitral tribunal has decided the dispute de-hors the terms of the contract.

55. The petitioner's counsel further urged that it was not open to the Arbitral Tribunal to speculate and arrive at a finding that the performance guarantee tests are deemed to have been performed, when they were not and it was immaterial as to why they were not done. The Arbitral Tribunal could not have come to the conclusion that conductance of the performance guarantee tests (PG tests) was neither possible, nor technically dependable and making the price adjustment was the only way to sort out the matter instead of keeping it pending indefinitely. This, he submits was not within the jurisdiction of the arbitral tribunal. Further, that no expert opinion was also taken on this issue. If any expert's opinion had been taken it would have been demonstrated that the PG Tests could have been performed at any time. It is submitted that even a minor deviation in specifications would result in a serious calamity. That since the respondent did not perform the PG tests that entitled the petitioner to deduct a sum of Rs. 65,00,000/- in terms of the contract, it was immaterial as to why the PG Test was not done. The conclusion of the Arbitral Tribunal that an adjustment of Rs. 6,00,000/- is to be given for non-conductance of the PG Test is without any basis. Even the price adjustment for not conducting the PG tests was done without asking anything from the petitioner and on the basis of the rebate given by the respondent, which was never agreed to by the petitioner. The price adjustment of Rs. 6,00,000/- given by the respondent was erroneous and without any basis. It had never been agreed to by the Petitioner and even then the Arbitral Tribunal accepted the said price adjustment as correct, even though the contract provided that 5% of the contract value i.e. Rs. 65,00,000/- was to be deducted from the payments to be made to the respondent for the non-conductance of the PG tests. This deduction being contractual could not have been denied to the petitioner but the Arbitral Tribunal did not consider this aspect

at all. According to him, the Arbitral Tribunal was obsessed with the fact that the trial operations had been completed and the cooling towers were commissioned and were functioning. The fact that the cooling tower had been commissioned and were functioning would not exonerate the respondent from its obligation of conducting the PG Tests and if the petitioner was not co-operating in the conductance of the PG test, the remedy lay elsewhere.

56. That insofar as the issue of PG Tests is concerned, the allegation of the petitioner that no expert evidence was led or no expert evidence was led or no expert opinion was taken is totally misconceived as the arbitrators were themselves experts in the field of construction. Nothing precluded the petitioner from leading expert evidence or citing an expert opinion but it chose not to do so. Therefore, at this stage the petitioner cannot raise an objection on this ground. Further, it is not obligatory for the Arbitral Tribunal to call for expert evidence and particularly in the present case where the Arbitrators were themselves experts in the field. That Clause 14, particularly Clause 14.3 of the General Terms & Conditions of the contract provided for the conductance of P&G Tests. In terms of Clause 14.3, the PG tests were to be commenced within 2 months from the date of successful completion of trial operations and any extension of time beyond the two months could only be by mutual consent of both the parties. The PG tests were required to be commenced within two months from the successful completion of trial operation, because the guaranteed performance was to be seen at the time of commissioning of the cooling towers, and not after prolonged commercial use as, after the cooling towers are put to commercial use, their performance would depend upon a number of factors including clogging of air passages due to dust & dust particles and formation of fungus and algae in the passages and proper maintenance, upkeep, use etc. The German collaborators of the respondent i.e. M/s. Heitkamp, with whom the respondent had collaborated with the structural design and construction for the cooling towers, and M/s. Balcke Durr, with whom the respondent had collaborated for thermal design, were jointly responsible for the performance guarantee. The PVC fill (a component used in the construction of cooling towers through which hot water passes from top to bottom and air passes from bottom to top) was to be procured by the respondent on the approval of M/s. Balcke Durr. M/s. Balcke Durr had approved a German company M/s. Munters Euroform for manufacturing and supply of PVC fill. M/s. Munters Euroform supplied PVC fill for two cooling towers. However, subsequently, the petitioner directed that the respondent should procure PVC fill manufactured by an Indian company i.e. M/s. Munters India Ltd. Since, the PVC fill was being procured from India, M/s. Balcke Durr, refused to come for and perform the PG Tests. The petitioner then approved M/s. Stup Consultants for carrying out the PG tests. However, when the engineers and scientists of M/s. Stup Consultants reached the site to conduct the PG Tests, the petitioner did not permit them to perform the PG tests on the ground that the thermometers were not calibrated. The petitioner was requested by the representatives of the respondent and M/s.

Stup Consultants (who had come all the way from Bombay) that they should be permitted to carry out the tests and note the results, subject to the calibration of the thermometers by the petitioner, which could be done later. However, the petitioner did not permit them to conduct the tests, though in terms of Clause 14.3.3 of the General Conditions of contract, the tests were to be conducted with the instrumentation and equipment available subject to them being calibrated by the Engineer. Thus, the petitioner acted contrary to the terms of the contract. The respondent then requested the petitioner that they (the respondent) should be permitted to carry out the tests in order to record/check the performance of the cooling towers and even this request also, though acceptable as per British Standard (BS) 4485, was declined by the petitioner. Existing input and output parameters i.e. the temperature of the water at the time of entering and exiting from the cooling towers, including the load of the unit connected with the cooling tower was also neither made available to the petitioner or produced by the petitioner before the Arbitral Tribunal and the petitioner also did not permit the respondent or its consultant to note the same. M/s. Stup consultants had informed the respondent, that the petitioner had prevented them from carrying out the tests due to some extraneous reasons. The PG tests could have been done only with the cooperation of the petitioner upon the petitioner making the cooling towers available. For making the cooling towers available for the PG tests the petitioner would have had to shut down the plant. Further the tests could have been carried out only in ambient weather i.e. when the humidity, temperature etc. was within the prescribed parameters. The petitioner did not make the towers available for conducting the PG tests, this it did not do, as it did not want to shut down the operations of the plant, which by that time were in full commercial use. The conducting of PG tests was a contract based on reciprocal promises inasmuch as that at first the petitioner was to make the cooling towers available for the tests and thereafter the tests were to be conducted. Since, the petitioner did not make the towers available for the tests, in terms of Section 54 of the Indian Contract Act, the respondent was not bound to conduct the PG tests. That in view of the above facts it is clear that the petitioner had prevented the respondent from performing the PG tests and therefore, in terms of Section 53 of the Indian Contract Act, the respondent was not bound to perform the PG tests. It is submitted that had the petitioner been serious about conducting the PG tests, it would not have prevented the tests from being conducted and would have permitted the respondent and M/s. Stup Consultants to carry out the tests and could have calibrated the equipment later. In fact, the petitioner was never serious about getting the PG tests done, the non-conducting of the PG tests was being used by the petitioner as a ploy to delay making payments to respondents. Though Clause 19.00 of the General Conditions of Contract provides that in case, the respondent failed to complete any part of the work then, the petitioner was free to get the same completed by engaging the services of any other contractor and the expenses incurred by the petitioner towards the same would be deducted from the amount payable by the petitioner to the respondent, under the contract, the petitioner did not get the said tests conducted by any other

agency also. This he submits clearly, shows that the petitioner itself was not serious about and did not want the PG tests to be conducted, as it would entail the shutting down of the plant which was in full commercial use. That the petitioner had by its letter dated 26th August, 1996 requested M/s. Fluid Control Research Institute, to do the PG tests and had also informed them that the cooling towers had been operating at a plant load factor of 95.25% and that all four cooling towers were in continuous operations. However, the petitioner had not submitted the report of the tests done by the said M/s. Fluid Control Research Institute. The only inference that could be drawn from the conduct of the petitioner is that either the tests were successful or the petitioner was not serious about them as the same were not mandatory.

57. Mr. Bhat further submitted that the Arbitral Tribunal did not address the real, genuine issues arising from the contract and travelled much beyond the provisions of the contract. The arbitral tribunal directed the bank guarantees to become inoperative on the date of the award and directed their release, which was a breach of the order passed by this Court in pending proceedings. The Arbitral Tribunal could not have passed an award in respect of the bank guarantees when the suit in respect of the same was pending before this Court.

58. It was submitted by Shri Kapur that the respondent had invoked arbitration by its letter dated 11th November, 1997 wherein, it was clearly stated that:

May it kindly be noted that the pre-final bill referred to above does not in any way restrict or limit the scope of reference to the arbitration. Claims preferred in the pre-final bill as augmented, amended/modified till the time of submission of the statement of case by either party to the arbitration shall comprise the reference to arbitration.

The reference to arbitration was, therefore, neither limited nor confined to the pre-final bill only. The bank guarantees had been given by the respondent to the petitioner, under the contract which contained an arbitration agreement. The arbitration proceedings had been initiated by invoking the said arbitration agreement. Since, the dispute between the parties in respect of the bank guarantees was a dispute under the said contract, the same was an arbitrable dispute and had been rightly referred to arbitration. The Arbitral Tribunal had by its order dated 13th September, 1999 held that the dispute with respect to bank guarantees was a dispute under the said contract, the same was an arbitrable dispute and had been rightly referred to arbitration. The Arbitral Tribunal by its order dated 13th September, 1999 held that the dispute with respect to bank guarantees was an arbitrable dispute, and as per Section 8(3) of the Act, even if the suit was pending, the Arbitral Tribunal was competent to pass an award in respect of the dispute pertaining to the bank guarantees. The dispute in respect of bank guarantees was rightly and legally referred to arbitration by the respondent. The respondent had given the bank guarantees to the petitioner in terms of the contract between the parties. The petitioner by its letter dated 20th June 1996, called upon the bank, which had given the said guarantees to either

extend the same or to encash the same. Due to this conditional invocation, the respondent filed a suit bearing No. 1736 of 1996 before this Court, praying therein, inter-alia for declaration and injunction that the petitioner could not invoke the said bank guarantees. In the said suit the petitioner had filed its written statement, taking a preliminary objection, as under:

10. It is respectfully, submitted that the plaintiff itself has admitted in paragraph 12 of the plaint that the contract between the parties in terms of Clause 27 of the general Terms and Conditions of the Contract provides for the settlement of the disputes by arbitration and since the subject matter of the present suit, as admitted by the plaintiff in paragraph 9 is the bank guarantee, the plaintiff cannot seek the adjudication of disputes and differences which are to be resolved as per the arbitration clause, mentioned in the contract entered into between the plaintiff and defendant No. 2. The disputes and differences which are required to be adjudicated as per Clause 27 of the General Terms & Conditions of the contract have to be referred to the arbitration and the same cannot be the subject matter of the present suit.

Thus, the petitioner had itself admitted in the said suit, before this Court, that the dispute in respect of the bank guarantees was an arbitrable dispute. In the said suit, the respondent had filed an application bearing I.A. No. 6419 of 1999, praying therein, inter-alia, that this Court should direct/clarify that the disputes and issues concerning the bank guarantees in the suit and those raised concerning the bank guarantees by the respondent before the arbitral tribunal can be adjudicated by the arbitral tribunal in the pending arbitration proceedings. On the said application, this Court by its order dated 23rd July, 2001 after noting that the Arbitral Tribunal had already been constituted and the proceedings before it are halfway through, dismissed the said application with the observation that the respondent was at liberty to initiate any action under the Arbitration Act, as and when the same becomes available to it. Thus, clearly u/s 8(3) of the Act, the Arbitral Tribunal was free to pass an award in respect of the dispute regarding the bank guarantees. That since, the dispute in respect of release of bank guarantees was an arbitrable dispute the Arbitral Tribunal rightly adjudicated upon the same and declared that the bank guarantees should be released. After the passing of the Arbitral Award dated 25th June, 2002, the respondent filed an application in the said suit, seeking permission of this Court to withdraw the same. This Court, by its order dated 23rd August, 2002 permitted the respondent to withdraw the said bank guarantees. The petitioner had filed a written statement in the said suit admitting that the subject matter of the present suit i.e. the bank guarantees had to be resolved by arbitration in accordance with Clause 27 of the contract and also sought reference of the disputes to arbitration.

I am of the view that in the said suit the respondent filed an application to clearly pray that the dispute in respect of bank guarantees can be adjudicated by the arbitral tribunal in the pending arbitration proceedings. This Court by its order

dated 23.7.2001 noted that the Arbitral Tribunal had already been constituted and the proceedings before it had started and gave liberty to the respondent to initiate any action available under the Act, and with these observations and liberty dismissed the said application. The suit was withdrawn on the passing of the Awards. There was, thus, no restriction on or order of the court by which the Arbitral Tribunal was precluded from adjudicating and deciding the dispute in respect of the bank guarantees. Since, the bank guarantees were given under the contract, which contained an arbitration agreement that applied, even as per the petitioner, to the bank guarantees, there is no error of jurisdiction in adjudication of disputes in respect of the Bank Guarantees by the Arbitral Tribunal.

59. Mr. Kapur also submitted as under:

(a) To buttress the plea that the PG tests were not mandatory the respondent relied upon the minutes of meetings dated 10th September, 1993, 13th September, 1993 and 28th September, 1993, wherein the petitioner had agreed that in case of non-conductance of PG tests, it would accept a rebate of approximately Rs. 1,50,000/- per tower. The petitioner had agreed for non-conductance of the PG tests for 3 cooling towers because it was fully satisfied with the performance of the cooling tower already handed over, of which along the PG test was to be conducted. However, the petitioner did not permit PG tests on even one tower.

(b) That all the four cooling towers have admittedly been taken over by the petitioner. The dates of completion of the cooling towers are as under:

Cooling tower No. 1 22.04.1992

Cooling tower No. 2 26.12.1993

Cooling tower No. 3 20.10.1994

Cooling tower No. 4 10.07.1995

As per Clause 14.3.1 of the General Technical Conditions of Contract the PG tests were to commence within two months from the completion of the trial operations. Trial operations as per the contract were to conclude on the 14th day of continuous operations of the cooling towers, after the same had been handed over to the petitioner. The last cooling tower was handed over to the petitioner on 10th July, 1995 and that the trial operation had been conducted. Therefore, the last date for commencing the PG tests for the last cooling tower was 23rd September, 1995. This was not done, as the petitioner did not permit the respondent and in fact, prevented the respondent from conducting the PG tests. He submits that therefore, the obligation of the respondent to conduct the PG tests stood discharged/waived. Thereafter, the said PG tests became incapable of being performed as considerable time, much in excess of the time stipulated in the contract had passed and the said tests had not been commenced. The only option was to do the price adjustment for the PG tests, the cost for which was

not set out in the contract, it being a lumpsum contract.

(c) That till date, NTPC has not alleged that the cooling towers have not been performing as guaranteed. Even in the petition there is not a single averment by the petitioner that the performance of the cooling towers is unsatisfactory or below the guaranteed parameters. On the contrary, in the press release dated 11th February, 1998 the petitioner has stated that the power plant recorded a plant load factor of 100.55% and that the plant also clocked a record monthly generation of 628.42 million units. Thus, the cooling towers were performing as guaranteed. The fact that the petitioner took over the cooling towers, commissioned them for commercial operations, has been using the same for commercial operations for the past 12-15 years, without carrying out the PG tests; shows that the said tests were not mandatory, because if the PG Tests were mandatory then the petitioner would not have put the cooling towers to commercial use for the past 12-15 years.

(d) That the finding of the Arbitral Tribunal that P&G tests cannot be performed and therefore the petitioner was entitled to price adjustment for the same is unexceptionable. The Arbitral Tribunal has rightly held that the matter cannot be kept pending indeterminably and the only resolution would be price adjustment. The petitioner cannot be permitted to benefit from its own wrong by on the one hand preventing the respondent from performing its part of the contract and on the other hand refusing to make payments of the amount due to the respondent on the ground of such alleged nonperformance.

The petitioner could not have demanded performance by the respondent of an obligation, which the petitioner had itself prevented the respondent from performing and/or which the petitioner had because of its breach rendered incapable of being performed and/or which the petitioner had waived by its conduct.

(e) In respect of the claim of the petitioner that the price adjusted of Rs. 6,00,000/- for non-conductance of the PG Tests, as accepted by the Arbitral Tribunal, was incorrect and not agreed by the petitioner and that the petition was entitled to a price adjustment of an amount equivalent to 5% of the contract value i.e. Rs. 65,00,000/-, it was urged that this is not a ground taken by the petitioner in the petition. It is not even a ground in the petition that the petitioner was entitled to a deduction of Rs. 65,00,000/- for the nonconductance of the PG Tests. Furthermore, this was also not pleaded by the petitioner either in the reply filed by it before the Arbitral Tribunal or in the counter-claim raised by it.

(f) That the petitioner cannot be permitted to raise this ground for the first time during oral arguments. In support of this submission, the following judgments have been relied upon:

B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others,

38. Before we embark upon the respective contentions made before us on the said issue, we may notice that although the point was urged during the hearing before the High Court, the first respondent in its writ application did not raise any plea in that behalf. The High Court was not correct in allowing the first respondent to raise the said contention...(See Chimajirao Kanhojirao Shirke and Another Vs. Oriental Fire and General Insurance Co. Ltd., , at page 625

Delhi Jal Board Vs. Vijay Kumar Goel and Another,

2. Learned Counsel for the petitioner seeks to urge, rightly so, that the objections as framed do not incorporate specifically the plea regarding the interpretation of escalation Clause 10CC. The grounds which have been taken are all on the issue of re-appreciation of evidence, which cannot be gone into in these proceedings. The only other ground is that the Award is contrary to the terms of the Agreement. In this behalf, learned Counsel for the petitioner states that this plea should be considered as the plea in respect of interpretation of escalation Clause 10CC. In my considered view, this is not possible. If there was a plea to be taken by the petitioner impugning the Award dated 10.03.2005 on the issue of the interpretation of escalation Clause 10CC, the plea ought to have been taken specifically.

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14. ...He submitted that the parties are bound by their own pleadings which are to be read as a whole and at a later stage of the proceedings, the parties cannot be allowed to travel beyond what was pleaded by them. In support of his submission, he has sought support from a number of decisions of the Apex Court in the case of U dhav Singh v. Madhav Rao Scindia (1997) 1 SCC 511; Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, and the Constitution Bench judgment in the case of B hagwati Prasad v. Chandrumal laying down a general principle of law that no party should be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of the case set up by it and that the object and the purpose of pleading is to enable the adversary to know the case it has to meet. It has been further held that pleadings has to be construed as it stands without addition or subtraction of words/or change of its apparent grammatical senses. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleadings taken as a whole.

(g) On this ground alone, the claim of the petitioner deserves to be rejected. That even otherwise, on merits, there is no provision in the entire contract that 5% of the contract amount was to be adjusted/deducted by the petitioner in case of nonconductance of the PG test by the respondent. This plea of the petitioner is not borne out from any terms of the contract. The contract was a lump-sum contract and the payments to be made by the petitioner to the respondent were set out in the contract itself. The contract was not an item-rate contract and therefore, no particular amount was assigned for conductance of the PG Tests.

The manner in which the payments were to be made in a phased manner i.e. the entire payment to be made by the petitioner to the respondent was divided into instalments and the instalments were to be paid on the achievement of milestones. The instalment amounts were not in respect of the work done only for the milestone achieved but were for the entire contract e.g. the payments to be made at the time of completion of the PG test were not towards the cost of PG test but was also for the other work already done. The cost of conducting the P&G tests was inbuilt in the entire amount to be paid by the petitioner to the respondent. That the total contract value was Rs. 13,63,22,750/- (rupees thirteen crores sixty three lakhs twenty two thousand seven hundred and fifty only). As per Clause 13.02.01 (f), of Annexure-III to the letter of award dated 7th December, 1988 out of the total of sum Rs. 4,57,68,450/- (rupees four crores fifty seven lakhs sixty eight thousand four hundred and fifty only) to be paid by the petitioner to the respondent towards "Ex-works FOB price of equipment", 5% (five per cent) of the said amount was to be paid after the completion of the Performance & Guarantee tests. Further as per Clause 13.02.03 (d), of Annexure-III to the letter of award dated 7th December, 1988, out of the total of sum Rs. 16,14,550/- (rupees sixteen lakhs fourteen thousand five hundred and fifty only) to be paid by the petitioner to the respondent towards "Erection price component", 5% (five per cent) of the said amount was to be paid after the completion of the PG tests and as per Clause 13.03.00 (b) (xiv), of Annexure-III to the letter of award dated 7th December, 1988, out of the total of sum Rs. 8,33,49,000/- (rupees eight crores thirty three lakhs and forty nine thousand only) to be paid by the petitioner to the respondent towards Civil and Structural portion, 5% (five per cent) of the said amount was to be paid after the completion of the PG tests. The petitioner had no right, contractual or otherwise, to deduct 5% of the total contract value towards the cost of non-conductance of PG tests. In the meetings that had taken place between the representatives of the petitioner and the respondent on 10th September, 1993, 13th September, 1993 and 28th September, 1993 it had been clearly agreed that for non-conductance of PG tests for 3 cooling towers the petitioner would accept a rebate of Rs. 4,45,500/-. Had the tests been mandatory, then the petitioner would not have agreed to the non-conductance of the PG tests for 3 cooling towers. Since, it was the petitioner, who had prevented the respondent from conducting the PG tests, the only way to resolve the issue was price adjustment which was done as per the agreement arrived at between the parties and recorded in the minutes of meetings dated 10th September, 1993, 13th September, 1993 and 28th September, 1993. Since the PG test for all four towers could not be conducted, applying the same rate of rebate i.e. approximately Rs. 1,50,000/- for one cooling tower, the respondent deducted a sum of Rs 6,00,000/- from their bill. This rebate was given keeping in mind that M/s. Stup Consultants, the consultants engaged by the respondent to carry out the PG tests had informed the respondent that they would charge a similar amount for conducting the PG tests. The arbitral tribunal accepted this adjustment as it was on the basis of the agreement between the petitioner and the respondent. The

allegation of the petitioner that 5% of the contract price i.e. Rs. 65,00,000/- was to be deducted due to non-conductance of PG Test is de-hors and contrary to the contract. 60. As to Mr. Bhat's submission that the Tribunal ought to have called for expert opinion on the issue of performance of P.G. Tests, I am of the view that the Arbitrators were themselves experts in the field or at least had technical knowledge. It was not for the Arbitral Tribunal to call for expert evidence when, in their opinion, they did not require it. However, if the parties wanted to lead expert evidence it was for the parties to lead the evidence and not for the Arbitral Tribunal to secure it for the parties. It is not the case of the petitioner that it applied to the Arbitral Tribunal for being permitted to lead expert evidence but was denied such a request. The claim of the petitioner that no expert evidence was called for by the Arbitral Tribunal and therefore, the Arbitral Award is vitiated, is in my view without any merit particularly where the petitioner itself did not bring any expert's evidence on record.

61. The PG Test was not done. So far the parties have no dispute. The real controversy between the parties is in respect of the consequence of non-conductance of PG Tests and as to the amount of price adjustment. The petitioner claims that PG Tests ought to have been done, being mandatory, and if they were not done then the petitioner were entitled to a deduction of Rs. 65,00,000/- and not Rs. 6,00,000/- as has been given by the Arbitral Tribunal.

62. At the outset the respondent has raised an objection to the claim of the petitioner of its entitlement to deduct a sum of Rs. 65,00,000/- as the same was not a part of the pleading before the Arbitral Tribunal and is not even a ground in the present petition. Since the petitioner did not raise this claim before the Arbitral Tribunal it cannot raise it now for the first time before this Court in its challenge to the Arbitral Award. The Hon''ble Supreme Court in the case of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors. and this Court in the case of Delhi Jal Board v. Vijay Kumar Goel and in the case of NTPC v. SAG have taken the same view. However, de hors the above plea even on merits I do not agree with the submission of the petitioner.

63. The cooling towers were taken over by the petitioner on the following dates:

Cooling tower No. 1 22.04.1992

Cooling tower No. 2 26.12.1993

Cooling tower No. 3 20.10.1994

Cooling tower No. 4 10.07.1995

64. It is also not in dispute that the petitioner has been using the cooling towers continuously and has not got the PG Tests carried out by itself or through any other entity. The petitioner has been using the cooling towers continuously and without any complaint. Neither before the Arbitral Tribunal nor before this Court, the petitioner has been able to point out any deficiency in performance of the Cooling Towers. During the course of arguments a question was put to the

counsel for the petitioner that if the tests were mandatory and non-conductance thereof, as submitted by it, could result in a calamity, why were the cooling towers put into operation and not only that, have been used continuously for the past almost 12 years. No reply was given to this query.

65. The petitioner could have got the PG Test conducted on its own, which was also not done. The petitioner has given no reason for the not conducting of the P.G. Test on its own. Furthermore, in terms of Clause 14.3 of the contract the PG Tests were to be commenced within 2 months from the date of successful completion of trial operations and any extension of time beyond the two months could only be by mutual consent of both the parties. This was also not done by the petitioner as no consent was obtained from the respondent. The submission of the petitioner that the PG Tests were mandatory is also contrary to the minutes of the meetings dated 10.09.1993, 13.09.1993 and 28.09.1993, in which the petitioner had agreed that in case of non-conductance of PG Tests it would accept a rebate. The only question that therefore arises for consideration is whether the petitioner was entitled to a rebate of Rs. 65,00,000/- as claimed by it or of Rs. 6,00,000/- as given by the Arbitral Tribunal. The petitioner claimed a rebate of Rs. 65,00,000/- on the ground that in terms of the contract the price of the PG Tests was Rs. 65,00,000/- and on non-completion thereof the petitioner was entitled to a rebate of that amount without any doubt or deduction and it was not open to the Arbitral Tribunal to reduce that amount. No such clause in the contract has been brought to the notice of this Court. The contract was a lump sum contract. Since, it was not an item rate contract no particular price was fixed for a particular job. This, being the admitted case the petitioner cannot claim that the price for PG Tests was Rs. 65,00,000/- and that it was entitled to a rebate/deduction of that amount. In terms of the contract the payments were to be made by the petitioner to the respondent in instalments linked with the progress of the work. Release of payment was on completion of a specified activity but the payment itself was not for that particular activity. Therefore, merely because a sum of Rs. 65,00,000/- was to be released on the completion of the PG Tests does not mean and the petitioner has been unable to show, that the said amount was for PG Tests only.

66. It is an admitted case of the parties that the only thing that remained was the conductance of the PG Test and all other obligations had been performed. Thus, can it be said that because the PG Tests had not been performed the respondent would not be made payment for other works done by it merely because payment of such work was linked with the completion of the PG Tests. I do not think so. This is not a part of the contract. The petitioner could not have refused to make payments in respect of work that was done by the respondent and accepted by the petitioner on the ground of nonconductance of PG Tests. The only rebate/deduction the petitioner was entitled to was the price/cost of conductance of PG Test. The petitioner has not brought to the notice of this Court any evidence filed by the petitioner before the Arbitral Tribunal as to actual conduct or the cost of PG Test. In the minutes of the meetings dated 10.09.1993,

1309.1993 and 28.09.1993, the petitioner had accepted a rebate of Rs. 4,45,000/- for nonconductance of PG Tests for 3 cooling towers. The Respondent at the same calculation of approximately Rs. 1,50,000/- per cooling towers, gave a price adjustment/rebate of Rs. 6,00,000/- for non-conductance of PG Tests for 4 cooling towers. The Arbitral Tribunal accepted this. The factual conclusion arrived at by the Arbitral Tribunal on the basis of the minutes of the meeting dated 10.9.1993, 13.9.1993 and 28.9.1993 does not suffer from any perversity and consequently does not merit any interference from this Court.

67. It is submitted by Mr. R.P. Bhat, learned senior counsel on behalf of the petitioner, that the arbitral tribunal had wrongly directed the petitioner to pay to the respondent Exchange Rate Variation (ERV) when the respondent makes payment to its foreign collaborators. He submits that the requirement of payment of foreign exchange arises only when the liability is incurred and payment is made. In the present case, he submits no liability arose and therefore the question of exchange rate variation awarded cannot arise.

68. Mr. P.V. Kapur, learned senior counsel for the respondent has submitted that no amount has been awarded for ERV. Therefore, the very premise of the petitioner's objection is erroneous. He submits, that the liability to pay ERV has not been denied by the petitioner. By the award the petitioner has only been directed to pay the ERV if and when the respondent makes the payment to the foreign collaborator. So if the respondent does not pay its foreign collaborator the petitioner does not have to pay any amount to the respondent. He further submits that since the petitioner had refused to pay to the respondent the sum due and payable to it under the contract, the respondent was prevented from making the payments to its foreign collaborators i.e. Heithkamp and Balke Durr, Germany under the agreements that the respondent had with them. He submits that the petitioner also admits in Ground AI of the petition, that its liability to pay the ERV will arise when payment has been made to the foreign collaborator. Thus, the liability to pay ERV is not denied by the petitioner.

69. I have considered the above plea. The Award does not direct the petitioner to make the payment of the ERV to the respondent without the respondent having made any payment to its foreign collaborators. The Award in respect of ERV is only declaratory. There is no prohibition in the Arbitration Act, prohibiting the Arbitral Tribunal from making a declaratory award. It is also not the petitioner's case that under the contract ERV was not permissible or contemplated and has yet been granted by the Arbitral Tribunal. It is admitted by the petitioner that ERV shall be payable to the respondent only when the respondent actually makes the payment to the foreign collaborator. This is what the Arbitral Tribunal has directed. The objection of the petitioner is thus misconceived and does not warrant any interference in the Awards.

70. It is then submitted by Mr. R.P. Bhat, learned senior counsel, that the Arbitral Tribunal has awarded interest @ 18% on delayed payment and future interest @ 18% on the awarded amounts, from the date of the award till the date of its

implementation. His objection to the grant of interest is three fold (a) the awarded amount is huge and therefore no interest should have been granted (b) there was no stipulation in the contract for grant of interest and therefore the Arbitral Tribunal could not have awarded any amount of interest and (c) for the period prior to the date when the findings are rendered that the claimant is entitled to the amounts awarded, no interest is payable.

71. Mr. Kapur, the learned senior counsel for the respondent relies upon Section 31 sub sections (7)(a) and (b) to support the grant of interest. He submits that the Arbitral Tribunal, notwithstanding that there is no provision in the contract for grant of interest, has the power to grant interest on the amounts claimed from the date when the cause of action arose till the date of the award and also on the award from the date of the award till the date of payment. It is only when there is contract to the contrary, he submits, that the Arbitral Tribunal cannot award interest. In the present case there is no contract to the contrary. Awarding interest on the amounts claimed, he submits, is the discretion of the Arbitral Tribunal. However, the Arbitration Act provides that an award once made shall carry interest @ 18% p.a., unless otherwise directed by the arbitrators. According to him, even if the Arbitral Tribunal does not grant any interest on the awarded amount, yet by virtue of Section 31(7)(b) of the Arbitration Act, the award shall carry interest @ 18% p.a. from the date of the award till its payment. Insofar as the interest on the awarded amounts is concerned, he submits that the respondent had been denied the use of its money and the interest is in no manner excessive.

72. Section 31 Sub-sections (7)(a) and (b) of the Arbitration Act read thus:

Section 31. Form and contents of arbitral award (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

73. A perusal of the above provision demonstrates that there is no merit in the petitioner's plea that interest could not have been granted as there was no contractual prohibition from doing so. The objections of the petitioner in respect of quantum of interest, in my view, however, deserve consideration. Even though on awards not specifying interest, 18% interest is statutorily payable, yet this cannot uniformly apply in respect of all awards. Since the current rate of interest is lower, I am of the view that Mr. Bhat's plea is justified and the interest granted by the Arbitrators should be reduced from 18% to 12%.

74. Mr. Bhat, learned senior counsel for the petitioner has next submitted that

while the arbitration proceedings were going on the respondent submitted a final bill. The effect of submission of final bill was that the pre-final bill and all claims made thereunder stood abandoned and therefore, the Arbitral Tribunal could not have adjudicated upon them. The Arbitral Tribunal according to him has acted illegally and without jurisdiction by adjudicating claims that formed part of the pre-final bill.

75. Mr. P.V. Kapur, learned senior counsel appearing for the respondent has submitted that this objection has been raised for the first time during arguments. He further submits that the petitioner has sought to create confusion and that two bills were never propounded. According to him this objection is contrary to the pleadings of the petitioner in the petition inasmuch as in paragraph No. 3 of the petition the petitioner had admitted that all the disputes arose from the "pre-final bill" dated 25.07.1996 and that no final bill was ever raised. He submits that at the time of arguments only in order to create confusion and to mislead this Court, a baseless allegation was raised by the petitioner, contrary to its own pleadings, that a "pre-final bill" and a "final bill" was raised by the respondent and that since the claims in the "pre-final bill" were given up in the "final bill" yet the Arbitral Tribunal adjudicated the claims which were subject matter of the "pre-final bill".

76. Mr. Kapur submits that the respondent had submitted its pre-final bill on 25.7.1996 which was rejected by the petitioner on 09.08.1996 and 16.8.1996. The said bill was in fact the final bill regardless of its nomenclature, as the respondent raised no other bill. During the arbitration proceedings, the respondent had filed its statement of Facts/claims in two parts. With each part a statement giving the summary of the claims included in that particular part was also filed. In other words according to him the bill dated 25.07.1996, only for the purposes of making a summary of the claims, was divided into two parts and part-I thereof was filed with Part-I of the Statement of Facts/Claim nomenclatured as "final bill" and the other part was filed with Part-II of the Statement of Facts/claims. He submits that there was no abandonment of any claim under the "prefinal bill" dated 25.07.1996.

77. The petitioner has not raised this objection in the petition and therefore, I am not inclined to entertain the same. No ground taken orally or in written submission deserves to be considered unless the same forms a part of the pleadings. A party who wishes to put forth a ground that is not a party of the pleadings must first amend its pleadings by taking permission of the Court and bringing to the notice of the Court the additional grounds sought to be urged by it. It is for the Court to permit such amendment or not and also to consider if such an amendment is permissible at all. If such amendment is permitted the other party shall also get a change to respond to the additional pleas sought to be raised. Pleadings therefore have to be drafted carefully and cannot be merely by oral arguments or written submissions without the other side getting a proper opportunity to plead their case. Consequently, this plea cannot be entertained

and in any case is without merit as it is evident that the bill dated 25th July, 1996 was split into two only for the sake of convenience and can in no manner said to be two distinct prefinal and final bills.

78. The petitioner has also assailed the awards on the ground that the Arbitral Tribunal has awarded claims in favour of the respondent which had been settled in the meetings held between the parties on 10.09.1993, 13.09.1993 and 28.09.1993. Since the claims had been settled, there was no dispute between the parties in respect of the same and they could not have been a subject matter of arbitration.

79. It is only a dispute that can be referred to arbitration, and if a claim has been fully and finally settled it certainly cannot be a dispute so as to be referred to arbitration. The petitioner has been unable to demonstrate to this Court any claim which was settled in the said meetings but was yet decided by the Arbitral Tribunal. In fact, the Arbitral Tribunal has already held in the Awards that the Extras and additional works claimed by the respondent were not raised during the said meetings. The claims which were not settled in the said meetings were not precluded from being referred to arbitration. The objection of the petitioner is accordingly rejected.

80. The petitioner has also questioned the awards on the ground that the respondent was to provide two butterfly valves to the petitioner at no extra cost to it and that the contractual cost of each butterfly valve was Rs. 2,00,000/-. The petitioner has claimed that the respondent did not provide the butterfly valves. Consequently, the petitioner purchased one out of the two butterfly valves at a cost of Rs. 2,60,000/- and that for the non-supply of the other butterfly valve the petitioner has claimed a sum of Rs. 14.10 lakhs being the cost of the same at the time of filing the present petition.

81. I have considered the finding of the Arbitral Tribunal in respect of this claim of the petitioner. The Arbitral Tribunal has held as under:

NTPC have claimed a sum of Rs. 6,30,000/- for two butterfly valves stated to have been not supplied by the Claimants. An amount of Rs. 60,000/- as increase in cost of Butterfly valves has also been claimed separately. Since, the N.T.P.C. have not furnished any proof of actual purchase of Butterfly valves (at the risk and cost of the claimants) and the higher price involved, this Tribunal accepts only Rs. 2,00,000/- as cost of each valve provided in the contract. Since the cost of one valve i.e. Rs. 2 lakhs has already been deducted in the final bill submitted by the Claimants, the Tribunal awards only Rs. 2 lakhs to be paid to the respondents by the Claimants for the second valve.

82. The petitioner could not have claimed any amount, in excess of the contractual amount, without furnishing proof thereof. Furthermore, the petitioner has in the present petition claimed Rs. 14.10 lakhs as the cost of spare. While affirming the finding of the Arbitral Tribunal that only one valve was to be paid for by the respondent, I am unable to accept the valuation of Rs. 2 lakhs put by

the Tribunal for the said single butterfly valve. By its own calculation of Rs. 6,30,000/- for the 2 valves, the price of the valve ought to have been Rs. 3,15,000/-. Even on this amount the respondent was liable to pay the increase of Rs. 30,000/- each per valve claimed by the petitioner. In my view, for a latter purchase an increase of Rs. 30,000/- was reasonable. Consequently the amount payable by the respondent towards the cost of one butterfly is enhanced from Rs. 2 lakhs to Rs. 3,45,000/-. The increase of Rs. 30,000/- only per valve which was eminently reasonable had to be added to the price of Rs. 3,15,000/- for the purchase of one butterfly valve to be accounted for by the respondent.

83. The Petitioner has assailed the Awards on the ground that petitioner's claims for excess consumption of cement and steel by the Respondent was wrongly rejected whereas the claim of the respondent for extra item was wrongly allowed by the Arbitral tribunal, the petitioners claim for liquidated damages was wrongly rejected while that of the respondent was allowed, the claims of the petitioner for advances paid to the respondent ought to have been considered and allowed but was wrongly rejected and more generally that the claims of the petitioner were wrongly rejected and those of the respondent wrongly allowed.

84. It is submitted by the respondent that the contract did not include the structural designs and drawings at the time it was concluded. The tender quantities of cement and steel were on the basis of the design of a foreign collaborator based on international standards. He submits that after the tender had been submitted a meeting took place on 03.11.1988 in which the petitioner requested that the designs, specifications etc. should be changed from international standards to Indian Standards. Accordingly, it was agreed that the offer given by the respondent was in compliance with the specifications and requirements of Indian Standards except for the technical deviations/variations agreed and discussed in the said meeting. Further, due to non-availability of design sections of the sections of steel had to be changed. Thus, clearly the petitioner had to bear the cost of excess steel as steel, being a free issue item under the contract.

85. It was further submitted that soil characteristics and its bearing capacity at the site were markedly different from those projected by the petitioner in the tender document. This resulted in the change in design of the basin slab, basin foundation, piles and the like. These factors he submitted, were directly attributable to the petitioner, resulted in the increase of cement and steel consumption.

86. It was also contended by the respondent that there was no dispute that all the quantities of steel and cement issued by the petitioner to the respondent was used in the cooling towers and that there was no pilferage or theft. He submitted that the lumpsum cost/charges quoted in the tender were based on quantities of cement and steel to be used as, given in the tender document. However, since the quantity of cement and steel actually used in the contract was increased due to the change in designs by petitioner and due to the wrong information given by

the petitioner in the tender document, the respondent had also to incur additional labour expenses. It is pertinent to mention that the petitioner was aware that the respondent was not doing the work gratuitously, despite this the work was accepted by the petitioner and the petitioner is enjoying the benefit of the said work. Therefore, in terms of Section 70 of the Indian Contract Act, the Respondent was entitled to compensation for the work done by it and which was rightly awarded by the Arbitral Tribunal as per the law enunciated by the Hon''ble Supreme court of India in its decision in the case of V.R. Subramanyam Vs. B. Thayappa and Others, , that:

5. Counsel for the appellant submitted that as in the view of the High Court the respondent failed to prove the oral agreement pleaded by him, the suit should have been dismissed, and they should not have awarded compensation quantum merit which was not claimed. It was urged that the respondent must succeed or fail on the case pleaded by him, and not on a cause of action not pleaded. In our view, there is no substance in this contention. As we have already observed, in respect of the additional work done by the respondent, both the parties set up conflicting oral agreements. These were not accepted by the High Court. If a party to a contract has rendered service to the other not intending to do so gratuitously and the other person has obtained some benefit, the former is entitled to compensation for the value of the services rendered by him. Evidently, the respondent made additional constructions to the building and they were not done gratuitously. He was therefore entitled to receive compensation for the work done which was not covered by the agreement. The respondent claimed under an oral agreement compensation at prevailing market rates for work done by him : even if he failed to prove an express agreement in that behalf, the court may still award him compensation u/s 70 of the Contract Act. By awarding a decree for compensation under the Statute and not under the oral contract pleaded, there was in the circumstances of this case no substantial departure from the claim made by the respondent.

87. I have considered the rival submission and the Awards. The Arbitral Tribunal has held, and in my view, rightly that once it stood admitted by the petitioner that the material issued by it was used for its project and that there was no theft or pilferage, the petitioner could not make any claim against the respondent for excess consumption or deny the claim of the respondent for additional works which were necessitated due to site conditions and the, change in design.

88. The petitioner has not questioned the conclusion of the Arbitral Tribunal that there was change in designs and specifications and that the site conditions were different. Once deviation from the tender document as originally stipulated is undisputed, the resultant change in the consumption and the claim therefore cannot also be disputed. Further, the respondent if it had to do additional work, was entitled to, and rightly awarded for the additional work. These objections raised by the petitioner therefore do not merit any interference in the Award and are accordingly rejected.

89. The objection raised by the petitioner's counsel Sh. Bhat is that the advances were not adjusted has been considered by the Arbitral Tribunal in the Awards and they have held that the amount claims by the petitioner for recovery of advances had been adjusted in the "pre-final bill". The petitioner has, however, not set out as to which of the amounts due to it under its claim for recovery of advances had not been adjusted and were therefore, recoverable. The claim made by the petitioner is general and sweeping without any particulars or details. The objection by the petitioner is therefore rejected.

90. The objections raised by the petitioner with respect to the award of liquidated damages, are the following (a) the Arbitral Tribunal used Hudson's formula which it should not have done; (b) the Arbitral Tribunal came to the conclusion that 50% delay was attributable to the Respondent and yet awarded liquidated damages in favour of the Respondent; and (c) the claim of the petitioner for liquidated damages was rejected.

91. At the outset the respondent's counsel points out that this is not a ground taken by the petitioner in the petition and the respondent has therefore, had not opportunity to deal with the same. This is a good reason by itself to reject this objection. However, since I have heard both the senior counsel on this plea I am dealing with the issue on merits as well.

92. In the case of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, cited by the respondent, the Hon''ble Supreme Court after taking note of the various formulae available for calculating damages, including the Hudson formula, has held as under:

106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.

107. If the learned arbitrator, therefore applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court

93. The Arbitral Tribunal in the present case comprised of Engineers, two of whom were appointed by the President, Institution of Engineers. Their decision to apply the Hudson Formula for calculating the damages and expenses cannot be faulted merely because they choose to apply the said formula. This objection of the petitioner thus has no merit and is therefore, rejected.

94. The Respondent had made claim of Rs. 445.50 lakhs on account of losses and damages suffered by it (respondent) due to prolongation of completion period and the petitioner had made a claim of Rs. 65.05 lakhs on account of liquidated damages for delay attributable to the respondent.

95. In the award the Arbitral Tribunal has held that it was respondent's case that

time and again extension was granted by the petitioner, agreeing that no liquidated damages would be charged till the extended period, showed that delay was occasioned because of reasons attributable to the petitioner. The Arbitral Tribunal also notes that despite being called upon to do so, the petitioner did not furnish any tabulated statement setting out the delays caused by the respondent. The Arbitral Tribunal further held that there was a force majeure clause in the contract and any delay caused due to force majeure had to be excluded. In the view of the refusal by the petitioner to submit the tabulation, the Arbitral Tribunal rightly drew an adverse inference against it and held that the petitioner was responsible for 50% of the delay. Therefore, the Arbitral Tribunal, by applying the Hudson Formula, calculated only 50% of the amount which would otherwise have been payable. Thus, the Arbitral Tribunal directed the petitioner to pay only 50% of the amount of losses and damages suffered by the respondent on account of the prolongation of the work. The objection raised by the petitioner, namely that the Arbitral Tribunal despite holding that the respondent was liable for 50% of the delay granted the entire claim, is therefore, clearly misconceived and is rejected.

96. The third objection raised by the petitioner is in respect of the rejection of its claim of liquidated damages, in view of the fact that liquidated damages have been provided for in the contract and the Arbitral Tribunal having come to the conclusion that the petitioner was liable for only 50% of the delays. At first blush, this argument seems attractive. However, on consideration it appears that this objection is also without merit.

97. The Arbitral Tribunal has declined the petitioner's claim for liquidated damages *inter alia*, for the following reasons:

- a. Failure on the part of the petitioner to give notice to the respondent, of its (petitioner's) intention to claim compensation for delay when possession of cooling towers was taken by the petitioner, which disentitled the petitioner to claim compensation in terms of Section 55 of the Indian Contract Act, 1872;
- b. Refusal by the petitioner to furnish any details in respect of its claim for liquidated damages;
- c. Non-production of any evidence by the petitioner to show any damage suffered by it on account of alleged delay on the part of the respondent; and
- d. Cooling Tower No. 1 even though it was completed in April 1992 was not commissioned till November/December 1992, showed that no loss or damage was suffered by the petitioner.

98. I have considered the reasons given by the Arbitral Tribunal for rejecting the petitioner's claim for liquidated damages, which are germane and relevant, and I do not find any illegality or infirmity in the same. The Arbitral Tribunal, has rightly rejected the petitioner's claim for liquidated damages. I am also fortified in my view because even before this Court, no ground has been made out by the

petitioner that it was entitled to liquidated damages because the Arbitral Tribunal had in a patently illegal manner rejected the same.

99. The petitioner has raised several other objections in its petition, however the said objections are completely lacking in particulars and the counsel for the petitioner at the time of bearing did not seriously urge the other objections.

100. Arbitration proceedings and Arbitral Awards are not a prelude to court proceedings by way of appeals against the award. Arbitration proceedings are a separate/alternative forum selected by the parties for expeditious redressal of their disputes because of the finality attached to such decisions. Courts in all jurisdictions have made efforts to uphold such finality rather than to upset it. The Parliament of India by enacting the Arbitration & Conciliation Act, 1996 and also the Courts of India in various judgments have time and again recognized such finality and have encouraged it. This Court in the case of *Gian Chand Totu* (supra) has held that the illegality attached to the award warranting interference from the Court u/s 34 of the Act should not be of trivial nature but should be patently illegal going to the root of the matter and must shock the judicial conscience of the Court.

101. In the present case, the petitioner has not been able to set out any ground on merits on which the Arbitral award merits interference from this Court except in the case of the butterfly valve and the award is modified and respondent held liable to pay Rs. 3,45,000/- instead of Rs. 2,00,000/- ordered by the Arbitral Tribunal on this claim. This amount of Rs. 3,45,000/- instead of Rs. 2,00,000/- shall be adjusted from the amount payable by the petitioner to the respondent. However, I also allow the plea of the learned Counsel for the petitioner Shri Bhat that in light of the current interest rates levy of 18% interest per annum was excessive and consequently reduce the rate of interest awarded by the Arbitral Tribunal to 12% uniformly. The present petition is accordingly dismissed with the above modifications with costs of Rs. 20,000/- in favour of the respondent.