
(2014) 05 MEG CK 0001

In the Meghalaya High Court

Case No : Miscellaneous Appeal (First) No. 1/2011

North Eastern Electric Power Corporation Limited	APPELLANT
Vs	
Gammon India Ltd.	RESPONDENT

Date of Decision : 19-05-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 16(6), 21, 24, 28
Constitution of India, 1950 — Article 311(2)

Citation : (2014) 05 MEG CK 0001

Hon'ble Judges : Prafulla C. Pant, C.J;T. Nandakumar Singh, J

Bench : Division Bench

Judgement

T. Nandakumar Singh, J.—This appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 is directed against the judgment and order dated 29.11.2010 passed by the learned Additional Deputy Commissioner/District Judge, Shillong in Arbitration Case No. 1(T)/2008 for refusing to set aside the Arbitration Award dated 21.04.2008 passed by the Arbitral Tribunal.

2. Heard Mr. V.K. Jindal, learned senior counsel assisted by Mr. S. Dey, learned counsel for the appellant-North Eastern Electric Power Corporation Limited (for short "NEEPCO") and Mr. S. Sen, learned counsel for the respondent No. 1-M/s Gammon India Ltd.

3. Factual Matrix:- The appellant-NEEPCO is a Govt. of India Enterprise duly registered under the Indian Companies Act, 1956 having its registered Head Office at "Brookland Compound", Lower New Colony, Shillong-793003 in the District of East Khasi Hills, Meghalaya. The respondent No. 1 namely M/s Gammon India Limited is a firm of design and construction Engineers/Contractor, registered as a Public Limited Company under the Companies Act, 1956 having its registered Head Office at Gammon House, Veer Savarkar Marg, Prabhadevi, Mumbai-400025. The River Ranganadi is one of the Northern Tributaries of Brahmaputra River and it originates from near the border of Subansiri and Kameng District in Arunachal Pradesh. The appellant-NEEPCO decided to harness

the potential of the Ranganadi River by constructing two Dams, one at Yazali, 51 Km from Kimin or Kimin Ziro Road and other at 41 Km on the same road. The upper dam at Yazali was to be a Storage Dam and while the lower dam was to be a Diversion Dam. The total potential of the scheme is proposed to be developed into two stages. Stage-I, it was proposed to construct the Diversion Dam, Tunnel and the main Power House at Dikrong. The construction of the Storage Dam and associated dam site Power House was proposed to be taken up under Stage-II. After floating the tender for the said work for construction of composite Diversion Dam (Concrete Rock Filled) for Ranganadi Hydro Electric Project at Yazali in Arunachal Pradesh, which includes the construction of Up Stream and Down Stream Coffor Dams, the bids submitted by the contractors had been considered and; the bid submitted by the respondent No. 1-M/s Gammon India Ltd. had been accepted. The detailed work order dated 19.09.1995 was issued by the appellant-NEEPCO vide No. NEEPCO/CE(C)/CONT/RHEP-10/89-90/PT-IV/1255 dated 19.09.1995 for the said contract work to the respondent No. 1-M/s Gammon India Ltd. Under Para 8 of the work order dated 19.09.1995, the payment for U/S and D/S Coffor Dams shall be in such a manner that the quantities of work shall be measured and paid for on pro-rata basis. For easy reference, Para 8 of the work order dated 19.09.1995 is quoted hereunder:-

"8. PAYMENT SCHEDULE FOR U/S & D/S COFFER DAMS:

For release of payment break up of the Lump sum quoted amount against item Nos. 1(a) & 1(b) of the B.O.Q. shall be as under:-

Quantities of work done for (ii) & (iii) above shall be measured and paid for on pro-rata basis.

All cost towards departmental Materials issued and utilized in the work shall be recovered in full against R/A payments of (i) & (ii) above."

4. On 02.02.1996, the appellant-NEEPCO, who had issued the work order dated 19.09.1995 in favour of the respondent No. 1-M/s Gammon India Ltd., entered into a Contract Agreement with respondent No. 1-M/s Gammon India Ltd. to carry out the said contract work and there is an Arbitration Clause being Clause 66 in the Contract Agreement. Under the said Arbitration Clause 66, if the contractor is dissatisfied with the final decision of the Chief Engineer or the appellant-NEEPCO on the protest or objection made by the contractor (respondent No. 1-M/s Gammon India Ltd.) in accordance with the procedure prescribed in Clause 66.1(b), the contractor may within 15 days after receiving notice of such decision, give notice in writing to the Chief Engineer requiring that the matter be submitted to arbitration and furnishing detailed particulars of that dispute or difference specifying clearly the point of issue. The arbitration shall be effected by an Arbitration Board consisting of two members. One selected by the Corporation (appellant-NEEPCO) and the other by the respondent No. 1-M/s Gammon India Ltd. The two arbitrators may appoint the third and Presiding Arbitrator. Clause 66 of the Agreement dated 02.02.1996 is quoted hereunder:-

"Clause 66

66.1 (a) The agreement authority for this Contract is the North Eastern Electric Power Corporation and is represented by Chief Engineer, as far as this contract is concerned. The Chief Engineer, is represented at site of work by Superintending Engineers, Executive Engineers, Sub-Divisional Officer, Assistant Engineers, Junior Engineers and other subordinate staff. These officers at site are delegated with certain powers regarding execution measurement and payment of works. The commitments made by these officers at site and the Chief Engineer, are based on interpretation of agreement made by them. It may sometimes happen that the Corporation/Chief Engineer does not agree with the views of its/his subordinate officers and may have an entirely different view as far as the interpretation of a clause in this agreement is concerned. In such cases, the Corporation/Chief Engineer, shall have the full right to revoke the decisions made by each/his subordinate officers and direct adjustments in payments based on the final decisions of Corporation/Chief Engineer, such decisions of the Corporation/Chief Engineer, shall be communicated to the contractor under the title "Decisions revoked by Chief Engineer/Corporation" and shall be binding on the contractor.

(b) Subject to the above stipulations, if the contractor considers any record or rulings of the Corporation/Chief Engineer, or its/his Subordinated so authorized in respect of any of the provisions, of this Contract to be not in accordance with provisions of this agreement or considers any work demanded of him by the Engineer-in-Charge, to be outside the requirements of the contract, he shall immediately upon such record of ruling being made or such work being demanded, ask in writing for written instructions or decisions on receipt, whereof he shall proceed without delay to conform to the record or to perform the work demanded, and within 15 days after the date of receipt of written instructions or decisions he may file a written protest with the Chief Engineer, stating clearly and in detail the basis of his objection. Except for such protests or objections; as are made on record in the manner herein specified, and within the time limit stated, the records rulings, instructions or decisions of the Corporation or Chief Engineer, shall be final and conclusive. Instructions and/or decisions of the Chief Engineer contained in letters transmitting drawings to the Contractors shall be considered as written instructions or decision, subject to protest or objections as herein provided.

(c) If the contractor is dissatisfied with the final decision of the Chief Engineer, or Corporation on the protest or objection made by the Contractor in accordance with the procedure prescribed in Clause 66.1(b), the Contractor may within 15 days after receiving notice of such decision, give notice in writing to the Chief Engineer, requiring that the matter be submitted to arbitration and furnishing detailed particulars of this dispute or difference specifying clearly the point of issue. If the Contractor fails to give such notice to the Chief Engineer within the period of 15 days as stipulated above, the decisions of the Chief Engineer, shall

be final and conclusive and binding on the Contractor. Thereafter such issues shall not be subjected to arbitration.

(d) Arbitration shall be effected by an arbitration Board consisting of two members. One selected by the Corporation and the other by the Contractor. The provisions of the Indian Arbitration Act, 1940 and the rules there under shall apply for appointment of Umpire and all matters relating to the arbitration proceedings.

(e) No arbitration proceedings shall be commenced without settling the specific terms of reference.

(f) The cost of such arbitration shall be borne by the parties or party as decided by the Arbitration Board.

(g) If work under the Contract has not been completed when a dispute is referred to arbitration, the work shall continue during the arbitration proceedings, if this reasonably possible, and no payment due to the Contractor shall be withheld on account of arbitration proceedings unless authorized or required by the Arbitration Board."

5. On 07.12.2000, the Senior Manager (C)-IV, RHEP under his letter dated 07.12.2000 informed the General Manager (P) M/s Gammon India Ltd., that the contract agreement clearly stipulates for payment on the basis of measurements. Therefore, the payment is to be restricted to the actual quantities executed and excess payment, if any, is to be recovered from the respondent No. 1-M/s Gammon India Ltd. The Finance Department of the Corporation i.e. appellant-NEEPCO examined the observation raised by the internal audit detecting an excess payment of Rs. 2.61 crores. The said letter dated 07.12.2000 reads as follows:-

"NORTH EASTERN ELECTRIC POWER CORPORATION LTD. (A GOVT. OF INDIA ENTERPRISE) Ranganadi Hydro Electric Project P.O. Ranganadi Project Dist : Subansiri Pin-791121 (Via-Kimin)

RHEP/SR.M(C)-IV/T-53(Vol-VII)/2000-01/726 Date:7/12/2000.

To,

The General Manager (P), M/s Gammon India Ltd., Camp: Diversion Dam Site, RHEP, Yazali (A.P.)

SUB:- PAYMENT TOWARDS CONSTRUCTION OF COFFER DAMS IN RANGANADI H.E. PROJECT.

Dear Sir,

As intimated by the Corporate Purchase Wing of NEEPCO, though the work for Up-Stream & Down Stream Coffe Dams have been quoted on Lump sum basis, the contract clearly stipulates for payment on the basis of measurements. Therefore, the payment is to be restricted to the actual quantities executed &

excess payment, if any, has to be recovered from you. The above aspect has been examined by the Corporate Finance of the Department in the light of the observation raised by the Internal Audit detecting the excess payment of Rs. 2.61 crores on the above regards.

This is for your information & necessary action please.

Yours faithfully, Sd/- (U.K. BORAH) Sr. Manager (C)-IV, RHEP

Memo No. RHEP/SR.M(C)-IV/T-53(Vol-VII)/2000-01/727-28/Dt.7/12/2000.

Copy to:

1. The General Manager (C), RHEP for favour of information. This is done as instructed by him vide note under U.O. No. 1996 dtd.5/12/2000.
2. The Dy. Manager (C), Dam & Spillway Division, RHEP, for information & necessary action in enclosing a copy of the note of the G.M.(C), RHEP, under U.O. No. 1996 dtd.5/12/2000 with a copy of the note of the Sr. Manager(F), Corporate Finance under U.O. No. 1532-37 dtd.29/11/2000.

Sr. Manager (C)-IV, RHEP"

6. There were correspondences between the appellant-NEEPCO and the respondent No. 1-M/s Gammon India Ltd. regarding the said alleged excess payment of Rs. 2.61 crores made by the appellant-NEEPCO to the respondent No. 1-M/s Gammon India Ltd. Only on 22.09.2003, the appellant-NEEPCO finally reiterated the decision of the Senior Manager (C)-IV, RHEP intimated under his letter dated 07.12.2000 that there had been excess payment of Rs. 2.61 crores and also that the final decision of the Corporation (appellant-NEEPCO) is to restrict the payment for the work of Coffor Dams to actual quantity executed and measured and not on the basis of lump sum amount under the letter of the General Manager (C), C&P. The said letter dated 22.09.2003 reads as follows:-

"NORTH EASTERN ELECTRIC POWER CORPORATION LTD. OFFICE OF THE EXECUTIVE DIRECTOR CONTRACTS & PROCUREMENT LOWER NEW COLONY, SHILLONG-793003.

NO.NEEPCO/QP/C&P/F/C/RHEP/124/1637 Dtd.22/09/03.

To,

M/s Gammon India Ltd., Veer Savarkar Marg, P.B. No. 9129, Prabhadevi, Mumbai-25

Kind Attention: Shri.R.D. Varangaonkar, Sr. Vice President.

Sub: Construction of Coffor Dam related to the concrete Diversion Dam, RHEP.

Ref: Your letter No. CM/G/342 dtd.11/07/03.

Sir,

Kindly refer to your above mentioned letter under reference.

The subject matter has been reviewed once again and decided that the payment should be restricted to actual quantity executed and measured and not on the basis of lump sum amount as shown in the Work Order.

This letter may be treated as Final Decision of the Corporation.

This is for your information please.

Yours faithfully, Sd/- General Manager (C), C&P, NEEPCO Ltd., Shillong-03."

7. The respondent No. 1-M/s Gammon India Limited issued Notice for arbitration under the letter of the Senior Vice President (Works Survey) of the respondent No. 1-M/s Gammon India Limited dated 01.10.2003 to the General Manager (C), C&P of the appellant-NEEPCO, which reads as follows:-

"Ref: WSS/G/559

Date: 1-10-2003

To,

The General Manager (C) C&P North Eastern Electric Power Corporation Ltd.
Lower New Colony Shillong- 793003

Dear Sir,

Job: Ranganadi Dam

Sub: Balance Payment for Cofferdams - Notice under Clause 66.1 (a)

1.0 This bears reference to your letter No. NEEPCO/QP/C&P/F/C/RHEP/124/1637 dated 22-9-2003 received by us on 1-10-2003. The letter under reference inter alia states that the final decision of the corporation is to restrict the payment for the work of the Cofferdam to actual quantity executed and measured and not on the basis of lumpsum amount as shown in work order.

2.0 The aforesaid decision being not in consonance with the contract provisions the same is not acceptable to us as already informed to NEEPCO under various letters such as:-

- (1) CM:G:296 dated 7-6-2002 addressed to the CMD and copy endorsed to you.
- (2) CM:G:703 dated 16-10-2002 addressed to Dir(Tech) and copy endorsed to you.
- (3) CM:G:318 dated 27-6-2003 addressed to Sr. Manager (C), Ranganadi HE Project and copy endorsed to you.
- (4) CM:G:342 dated 11-7-2003 addressed to you.

3.0. It could be noted that in respect of this issue, intractable dispute has occurred and has also come to stay. We therefore hereby as per requirements of

the provisions contained in Clause 661(a) vide section H Page 73 of the Contract Agreement give you notice for referring the said dispute along with other disputes as and when they occur to arbitration for adjudication thereof.

4.0. As regards detailed particulars of the dispute and difference and the point of issue our letters mentioned in para 2 supra may please be referred to.

Thanking You,

Yours faithfully For Gammon India Limited, Sd/- (D.I. Desai) Sr. Vice President (Works Survey)

Copy to:-

- 1) The Director (Tech) Neepeco Limited Shillong.
2. The Executive Engineer (O&M) Neepeco Limited, Guwahati.
- 3) The General Manager, Neepeco Limited, Ranganadi HE Project PO Ranganadi Project District Lower Subansiri, Arunachal Pradesh-791 121

Cc: Mr. RAB

Cc: CM (Mr. RDV)

Cc: Site

Cc: WSS/ARB File

Cc: Yellow copy file."

8. On 19.05.2004, Shri. A.K. Dam, General Manager (C), Monitoring of the appellant-NEEPCO was appointed as Arbitrator on behalf of the appellant-NEEPCO. On 31.05.2004, the respondent No. 1-M/s Gammon India Ltd. objected to the appointment of Shri. A.K. Dam, as an Arbitrator. On 02.02.2005, the appellant-NEEPCO appointed Shri. S.N. Phukan, formerly CMD, NEEPCO as its Arbitrator for the disputes arisen out of the Contract Agreement and the respondent No. 1-M/s Gammon India Ltd. also agreed to the appointment of Shri. S.N. Phukan, as an Arbitrator of the appellant-NEEPCO. The said letter dated 02.02.2005 of the appellant-NEEPCO reads as follows:-

"North Eastern Electric Power Corporation Ltd. (A Government of India Enterprise) Lower New Colony:Shillong-3.

No. PERS/28/A-17/577

Dated 2-2-2005/03.02.2005

To,

M/s Gammon India Ltd., Gammon House, Veer Savarkar Prabha Devi, Mumbai-400 025 Fax No. 91-2I-243000221/24300529

Sub: Appointment of Arbitrator for and on behalf of NEEPCO.

Ref: (i) Your letter No. WSS/G/559 dated 1-10-2003

(ii) Our letter No. NEEPCO/QP/C&P/F/C/RHEP/331/2004-05/382 dated 19-05-04.

(ii) Your letter No. WSS/G/394 dated 31st May, 2004.

Sir,

With reference to your letters under reference, I am to inform you that the Competent Authority of NEEPCO has appointed Shri. S.N. Phukan, Formerly CMD NEEPCO, "VISHRAM" 5 - Damodardev Path, Hatigarh Chariali, Zoo Narangi Road, Guwahati-781024, Assam, as its Arbitrator for the disputes arisen out of Contract Agreement No. NEEPCO/CE (C)/CONT/RHEP/03/1995-96 dated 2-2-1996 in connection with "Construction of Coffor Dams of Ranganadi Hydro Electric Project, Yazali".

The consent letter dated 18th January 2005 of Shri. S.N. Phukan, to act as an Arbitrator is enclosed herewith for your ready reference.

Enclo: As above.

Yours sincerely, Sd/- (P.K. Deka) Executive Director (C&P)

S.N. Phukan, Formerly CMD NEEPCO Govt. of India "VISHRAM" 5 Damodardev Path, Hatigarh, Chariali, Zoo Narangi Road Guwahati-781024, Assam, India. Telephone: (0361)2410406 E-mail: Arbitration & Engineering Consultant

January 18, 2005.

The Executive Director, Contracts & Procurement, NEEPCO Limited, Lower New Colony, P.O. Box No. 79, Shillong-793003.

Dear Sir,

With reference to your letter No. NEEPCO-PERS/28/A-17/2017 dated 10/01/2005, I am happy to give my consent to act as an Arbitrator in joint arbitration proceedings relating to differences between NEEPCO and Gammon India Limited in a contract for the Ranganadi H.E. Project.

Please let me have the further details in due course.

Yours faithfully, Sd/- (Shri. S.N. Phukan)"

9. On 15.02.2005, the respondent No. 1-M/s Gammon India Ltd. appointed Shri. Tathagata Roy (Former Chief Engineer, Metro Railway, Kolkata) as their Arbitrator and further suggested to the appellant-NEEPCO that both the Arbitrators i.e. Shri. S.N. Phukan and Shri. Tathagata Roy may appoint the third and Presiding Arbitrator as per the provisions contained in the Arbitration and Conciliation Act, 1996. The said letter dated 15.02.2005 reads as follows:-

"Ref: WSS/G/117

Date: 15-2-2005

To,

The Executive Director (C&P), North Eastern Electric Power Corporation Ltd.
Lower New Colony, Shillong-793003.

Kind Attn; Mr P.K. Deka.

Dear Sir,

Sub: Construction of Coffor Dams for the Ranganadi H.E. Project, Yazali, Arunachal Pradesh vide Agreement No. NEEPCO/CE(C)/CONT/RHEP/03/1996-96 dated 2-2-1996-Appointment of Arbitrator.

1.0. This bears reference to your letter No. PERS/28/A-17/577 dated 3-2-2005 on the subject matter. We have noted from your letter under reference that Shri. S.N. Phukan, Formerly CMD, NEEPCO, and residing at "VISHRAM" 5. Damodardev Path, Hatigarh Chariali, Zoo Narangi Road, Guwahati-781 024, Assam, has been appointed as an Arbitrator for and on behalf of NEEPCO Limited for adjudication of disputes in connection with "Construction of Coffor Dams of Ranganadi Hydro Electric Project, Yazali, Arunachal Pradesh".

2.0. We on our part hereby appoint Shri. Tathagata Roy (Former Chief Engineer, Metro Railway, Kolkata) P-70, Lake Road, Kolkata-700 029, as our nominee Arbitrator to adjudicate the disputes which have arisen out of Contract Agreement mentioned in the subject. The disputes to be referred to the Arbitral Tribunal are mentioned in the enclosed Appendix-A.

3.0. It is also suggested that any other disputes in respect of the subject work which may arise hereafter shall also be referred to the Arbitral Tribunal consisting of Shri. S.N. Phukan, Shri. Tathagata Roy and the third and the Presiding Arbitrator to be appointed by both of them as per provisions contained in Arbitration and Conciliation Act 1996.

Thanking you and assuring our best attention.

Cc: Mr. R.A. Bhansali

Cc: Mr. MSB/Mr. RDV (CMS) - for information

Enclosure to letter Ref. No. WSS/G/117 dated 15-2-2005

Appendix - A Job: Ranganadi Dam

Sub: List of Disputes/Differences to be referred to Arbitration.

Sd/- (D.I. Desai) Sr. Vice President (Works Survey)"

10. Both the Arbitrators Shri. S.N. Phukan and Shri. Tathagata decided to appoint Shri. Pranab Kumar Biswas, Retired Chief Engineer, North Eastern Electric Power Corporation Ltd. as the Third and Presiding Arbitrator under their letter dated 21.03.2006 and also the said letter indicates that both the appellant-NEEPCO and the respondent No. 1-M/s Gammon India Ltd. would abide by the Arbitrator's

decision. The appointment of the Third and Presiding Arbitrator Shri. Pranab Kumar Biswas, Retired Chief Engineer, North Eastern Electric Power Corporation Ltd. (appellant) had been readily accepted by the appellant-NEEPCO. For easy reference, the said letter dated 21.03.2006 is quoted hereunder:-

"From,

Shri. S.N. Phukan, (Formerly CMD-NEEPCO) "VISHRAM" 5 Damodardev Path, Hatigarh Chariali, Zoo Narangi Road, Guwahati 781024.

Shri. Tathagata Roy, (Former Chief Engineer, Metro Railway), Flat I/C P-70 Lake Road, Kolkata 700029

Dated March 21, 2006.

M/s Gammon India Ltd. (Attn: Shri.D.I. Desai, Sr Vice President (Works Survey), GAMMON HOUSE, Veer Savarkar Marg, P.O. Box No. 9129, Prabhadevi, Mumbai 400025.

M/s North Eastern Electric Power Corporation Ltd. (Attn: Executive Director (C&P) Lower New Colony, Shillong 793003, Meghalaya.

Sub: Construction of Coffor Dams for the Ranganadi.

H.E. Project, Yazali, Arunachal Pradesh vide Agreement No. NEEPCO/CE(C)/CONT/RHEP/03/1996-96 dated 2.2.1996 - Appointment of Arbitrator.

Dear Sirs,

As notified to you through our letter dated 6/14 March 2005, we had met on 21st March 2005 at 10:30 AM in the Chamber of Shri. Tathagata Roy at Flat I/C, P-70, Lake Road, Kolkata 700029 in order to fix our Third and Presiding Arbitrator Shri. S.P. Mullick, Coordinator, North Eastern Electric Power Corporation Ltd. was present Shri. R.N. Chatterjee on behalf of Gammon India intimated over telephone that it would not be possible for them to be present, but that they would abide by the arbitrator's decision.

We have discussed the matter between ourselves and have decided to appoint Shri. Pranab Kumar Biswas, Retired Chief Engineer, North Eastern Electric Power Corporation Ltd. as the Third and Presiding Arbitrator in the matter.

The dates of further sittings will be informed to the parties in due course.

Yours faithfully, Sd/- (Tathagatta Roy) Sd/- (S.N. Phukan)

Copy to: Shri. P.K. Biswas, Guwahati."

11. The First sitting of the Arbitral Board i.e. the Arbitral Tribunal was held on 12.05.2005; and in that First sitting, the Arbitrators had settled the specific terms of reference as mentioned in paragraph 2.5.3. vide paragraph 2.7. of the proceedings, which reads as follows:-

"2.7. After the Arbitrators have settled the specific terms of reference as mentioned in paragraph 2.5.3. The parties may file Rejoinders and Sur-rejoinders to the pleading if they so choose. Sittings however will commence as soon as the pleadings have been received."

The copy of the proceedings of the First Arbitration Sitting held on 12.05.2005 is available at Annexure-26 to the present Memo of appeal. It would be pertinent to mention that in the proceedings of the First sitting of the Arbitral Tribunal dated 12.05.2005 after deliberation of the opinion of the parties, it had been mentioned that "there are no circumstances which are likely to give rise to justifiable doubts as to their independence or impartially".

12. The Gist of the four claims of the respondent No. 1-M/s Gammon India Limited is that:-

13. The appellant-NEEPCO filed the statement of defence along with counterclaims. The Gist of the statement of defence and counterclaims made by the appellant-NEEPCO, reads as follows:-

"7. That NEEPCO states that as per NIT dated 12-5-1993, Pre-Bid Discussions dated 14-10-1993, 20-01-1994, the Contractor was required to submit the Dimension Speciation, Quantities and Schedule of payment both for construction of U/S and D/S Coffor Dams. In pursuance to the aforesaid requirement the Contractor while making bid vide their letter No. P/7259 dated 24-3-1994 submitted the Dimension, quantity specification and Schedule of payment and taken the same into consideration for making the bid both for U/S and D/S Coffor Dams which is as hereunder:-

(a) Dimension of U/S and D/S Coffor Dams:-

(b) Quantities Projected by M/s GIL for construction of both U/S and D/S Coffor Dams:-

(c) Schedule of Payment for U/S and D/S Coffor Dams

Quantities of work done for (ii) & (iii) above shall be measured & paid for on pro-rata basis.

8. That the Appellant further states that despites the caution made vide letter dated 8-1-1996, 9-1-1996, 29-1-1996 the Contractor time and again changed the Dimension and Specification of both the U/S and D/S Coffor Dams, which has resulted into the less quantity and the related position is explained as hereunder:-

(a) Changed dimension of U/S and D/S Coffor Dam vide letter No. TMG 423 dated 4-12-1995 drawing No. 648/2 (See Exhibit R-I)

(b) Changed dimension of U/S and D/S Coffor Dam vide letter No. TMG 12 dated 8-1-1996 (See Exhibit R-II)

It is also admitted position that M/s GIL vide aforesaid letter dated 8-1-1996

again considerably reduced the height of the D/S Cofferdam by 6.5m restricting the top level at EL 532.5m in place of entire proposed top level at EL 539.0m.

(c) Changed dimension of U/S and D/S Cofferdam vide letter No. TMG 01 dated 2-1-1996 (See Exhibit R-III)

It is also the admitted position that during the course of excavation, the above specification of U/S Cofferdam was further modified by M/s GIL and they unilaterally decided to construct the U/S Cofferdam after excavating approximately 2.0m depth of the river bed and then to grout the river bed material instead of excavating upto depth of about 12.5m in the river bed.

(d) Actual quantities executed by M/s GIL for construction of both U/S and D/S Cofferdam due to change in dimension.

It is also the admitted position that as per clause 46.1 and 46.3 of Section H, Vol.I of the Contract Agreement, the executed quantities were measured and entered in the measurement book (See Exhibit R-VI) and the same were found as hereunder:-

(e) Difference in quantities projected and quantities executed both for U/S and D/S coffer dams:

The NEEPCO states that there was a difference in quantities which was projected at the time of making the bid and the quantities which was actually executed for the construction of U/S and D/S coffer dam and the same was as hereunder:-

14. The appellant-NEEPCO without demur, knowing quite well the specific terms of reference, participated in the proceedings of the Arbitral Tribunal. On the 22nd and 23rd Sitzings of the Arbitral Tribunal, there were recast of the terms of reference in addition to one reference. The recast of the terms of reference on the request of the appellant-NEEPCO, did not mean that there were no settlements of the terms of reference before the 22nd Siting of the Arbitral Tribunal. Para No. 2 of the 22nd and 23rd Sitzings of the Arbitral Tribunal held on 16th and 17th February, 2008 reads as follows:-

"***** ***** *****

2. Mr. Jindal suggest a further issue in addition to the ones framed and minuted, namely

"What is the correct interpretation of Clause 8?"

Upon Mr. Sen agreeing to this, this was made an additional issue. Accordingly, the issues, as finally framed, stand as follows:

"1. What is the correct interpretation of Clause 8?

2. Are the Claimants entitled to their claims, and if yes, then to what extent?

3. Are the Respondents entitled to their Counter-Claims, and if yes, then to what

extent?

4. To what relief or reliefs are the parties entitled."

15. On 19.12.2005, the appellant-NEEPCO filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 for deciding the objection of jurisdiction as a preliminary issue. An application under Section 16 of the Arbitration and Conciliation Act, 1996 is to be filed within the four corners of Section 16 of the Arbitration and Conciliation Act, 1996. The grounds on which the application under Section 16 of the Arbitration and Conciliation Act, 1996 is to be filed are clearly mentioned in Section 16 of the Arbitration and Conciliation Act, 1996 itself. For easy reference, Section 16 of the Arbitration and Conciliation Act, 1996 is quoted hereunder:-

"JURISDICTION OF ARBITRAL TRIBUNALS

16. Competence of arbitral tribunal to rule on its jurisdiction.--

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

16. The application under Section 16 of the Arbitration and Conciliation Act, 1996 filed by the appellant-NEEPCO before the Arbitral Tribunal, did not clearly spell out under which of the grounds mentioned in Section 16 of the Arbitration and Conciliation Act, 1996 was filed; it appears that one of the grounds for objection

of jurisdiction of the Arbitral Tribunal is that the Arbitral proceedings are barred by the limitation inasmuch as, the respondent No. 1-M/s Gammon India Ltd. invoked the arbitration clause on 01.10.2003 after seven years of time from the date of the cause of action and the cause of action arose on 17.12.2000, when the appellant-NEEPCO communicated the decision to recover the amount of Rs. 2.61 crores to the respondent No. 1-M/s Gammon India Ltd. and the period of limitation would be only three years as specified under the Limitation Act, 1963 from the date the cause of action arose. Under Section 21 of the Arbitration and Conciliation Act, 1996, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. In the present case, the respondent No. 1-M/s Gammon India Ltd. after receiving the final decision of the appellant-NEEPCO under the letter dated 22.09.2003, for recovery of excess payment of Rs. 2,61,38,329.00/- (Rupees two crores sixty one lakhs thirty eight thousand three hundred twenty nine) only issued Notice for appointment of the Arbitrator under letter dated 01.10.2003 under Clause 66.1 of the said Contract Agreement. The Arbitral Tribunal vide judgment and order dated 30.05.2006 dismissed the application under Section 16 of the Arbitration and Conciliation Act, 1996 dated 19.12.2005 filed by the appellant-NEEPCO; and some of the reasons for dismissing the application under Section 16 of the Arbitration and Conciliation Act, 1996 in the judgment and order dated 30.05.2006 are that the language of the letter dated 22.09.2003 of the appellant's-NEEPCO clearly shows that there had been a review of the claimant's contention and finally decided to recover the excess payment. That being the final decision of the appellant-NEEPCO, the respondent No. 1-M/s Gammon India Ltd. within 15 days period mentioned in the Contract Agreement demanded for arbitration under the letter of the respondent's No. 1-M/s Gammon India Ltd. dated 01.10.2003 and also the terms of reference had been settled in the First Sitting of the Arbitral Tribunal and only later on, on the request of the appellant-NEEPCO, there was recast of the terms of reference and the recast of the terms of reference did not mean that there was no settlement of the terms of reference. The relevant portions of the said judgment and order dated 30.05.2006 passed by the Arbitral Tribunal i.e. Paras 17, 18, 19, 20, 21, & 22, which read as follows:-

"17. In paragraph 11 and 12 the respondents have stated that no arbitration proceedings shall be commenced without settling the specific terms of reference. However, the respondents have not put forth any contention or prayer based on this clause and have stated that these are required to be settled before the arbitration proceedings can be commenced. The claimants in reply have stated in paragraph 12 of their counter application that the terms of reference are deemed to have been settled when the respondents appointed their nominee Arbitrator through a letter dated 19.05.2004 (Exhibit C.12) in response to Claimant's letter dated 01.10.2003 (Exhibit C.13). The Tribunal is inclined to agree with the submission of the Claimants. It is obvious to us that both parties have

acquiesced in the formation of this Tribunal and therefore have, in fact clothed the Tribunal with the power to settle the terms of reference in consultation with the parties, more or less in the same manner as the Framing and Settlement of Issues in a suit. However, as a matter of abundant caution this Tribunal has also observed vide paragraph 2.5.3 of the minutes of the first sitting held on 12 May 2005 that the parties shall clearly state the disputes on which they seek arbitration in their statement of Claims, Defence or Counter-claims as the case may be. Upon receipt of such pleadings the Arbitrators shall decide which of the disputes they shall arbitrate upon and the disputes so decided shall continue the specific terms of reference as referred to in Clause 66 (e) of the Arbitration Agreement.

18. We now proceed to answer the questions set for ourselves in the foregoing paragraphs. We observe that while in paragraph 7 of the Respondents have contended that the contractor did not lodge any protest with the Engineer-in-Charge within the stipulated period of 15 days from 01.02.1996, in paragraph 8 they have considered starting point of the 15 days for invocation of the Arbitration Agreement under clause 66(c) of the Arbitration Agreement to be 07.12.2000. Therefore it is not as if the Respondents are contending that the Arbitrators lack jurisdiction because the Claimants did not seek arbitration within 15 days of 01.02.1996 but because the Claimants did not seek arbitration within 15 days of 07.12.2000. Furthermore, the Annexure-II to the Application of the Respondents contains nothing from which it can be concluded that there is a final decision of the Corporation or the Chief Engineer embedded in it or, for that matter, any decision at all. There is therefore no question of any decision becoming final, binding and conclusive. That being so, we answer the question in negative; that is to say, we hold that the disputes referred to in this arbitration did NOT arise on 01.02.1996.

19. In respect of the second question, that is to say, whether or not the letter dated 07.12.2000 by the Senior Manager of the Respondents constitutes a final decision of the Engineer or the Corporation referred to in the first sentence of clause 66.1(c), Ld. Counsel for the Respondents has strenuously contended that the letter dated 07.12.2000 at C.22 was indeed the decision from which the time of 15 days for invoking the arbitration is to run. He has contended that the Claimants have not been able to seek arbitration within this prescribed 15 days and therefore this Tribunal has no jurisdiction. He also contended that the letter dated 22.09.2003 in Exhibit C.14 was merely a repetition of the decision already taken and conveyed by the Corporation on 07.12.2000 vide Exhibit C.22. In this regard upon looking at the word of the first sentence of clause 66.1(c), we find it difficult to accept the Respondents' contention. This sentence speaks of the time beginning to run from the "final decision of the Chief Engineer or the Corporation" on the protest or objection made by the contractor in accordance with the procedure prescribed in paragraph 66.1(b). On going through the correspondence, we find that the Senior Manager of the Respondents in their letter dated 07.12.2000 had stated that the contract stipulates for payment on

the basis of measurements and therefore payment is to be restricted to the actual quantities executed. While this constitutes a decision by an authorized Officer of the Respondents, it cannot be taken as a decision of the Chief Engineer or the Corporation. This decision therefore, in all probability, constitutes a "ruling" by the Subordinate duly authorized by the Chief Engineer. In reply to this the Claimants have stated that in their letter dated 22.12.2000 (C.21), within 15 days of the receipt of the letter dated 07.12.2000, that the Claimants "strongly opposed the view of the department and do not accept any decision for deduction in payment of Coffor Dam." The Respondents disposed of the objection of the Claimants through their letter dated 22.09.2003 (C.14) wherein the Respondents have themselves stated that this letter was the final decision of the Corporation. Furthermore, the use of the words "the subject matter has been reviewed once again" suggests that there has been a fresh application of mind by the Respondents, and therefore the letter at C-14 cannot be a mere repetition. Therefore the period of 15 days can run only from the date of this letter dated 22.09.2003 and not from earlier date, as no "final decision" was taken on any earlier date according to the Respondents themselves.

20. In reply to the next question we have to say that the language of the letter dated 22.09.2003 at C-14 clearly showed that there had been a review of the Claimant's contentions. It cannot therefore be said that the letter dated 22.09.2003 was merely a repetition of the decision already taken and conveyed by the Corporation on 07.12.2000. Firstly, the decision conveyed on 07.12.2000 (C.22) was not a decision of the Corporation, and secondly, there having been a review subsequently as stated in C.14, the decision in C-22 could not have been the final decision. Therefore we answer this question in the negative, that is to say, we hold that the letter dated 22.09.2003 at Exhibit C-14 was the final decision of the Respondent Corporation.

21. That being so, and in view of the fact that the arbitration was demanded by the Claimants through their letter dated 01.10.2003 at C-13 within 15 days of the letter at C-14, the Claimants' demand for arbitration was indeed made within time and therefore this Tribunal does indeed have the power to adjudicate upon the disputes.

22. We find nothing on admitted facts on which we can conclude that the claim Nos. 1 and 2 are barred by limitation. We therefore decide this question in the negative, that is to say, we hold that the claims are not barred by limitation."

17. The Arbitral Tribunal made the award on 21.04.2008 with reasons and concluding portions of the award read as follows:-

"CLAIM-WISE SUMMARY OF AWARD

Claim No. 1: Refund/Payment of recovered/unpaid amount in respect of Lump sum item Nos. 1(a) and 1 (b) of the Bill of quantities

(Rupees two crore seventy five lakhs and fourteen thousand and thirty one only)

Claim No. 2: Refund/Payment of recovered/unpaid amount of price variation in respect of cofferdams sum items Nos. 1(a) and 1 (b) of the Bill of Quantities

Claim No. 3. Interest @ 18% p.a. on awarded amount

Awarded Past Interest @ 10% (Ten per cent per annum simple interest) on awarded amount from 22 September 2003 till 11 May 2005
Awarded Pendente Lite Interest @ 10% (Ten per cent per annum simple interest) on awarded amount from 12 May 2005 till 21 April 2008.

Claim No. 4: Costs

Parties to bear their own costs.

Counterclaim No. 1: Excess amount spent in dewatering

Counterclaim No. 2: Balance excess payment made on u/s and d/s cofferdams

Counterclaim No. 3: Escalatic (sic) amount on Rs. 32,36,975.00 as price variation

Counterclaim No. 4: Interest @18% p.a. on awarded amount

The parties shall bear their own costs."

18. The appellant-NEEPCO filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside of the award dated 21.04.2008 in the Court of the Additional Deputy Commissioner, Khasi Hills District, Shillong. The grounds for setting aside of the award dated 21.04.2008 should be on the basis of the grounds alone mentioned in Section 34 of the Arbitration and Conciliation Act, 1996 itself. The relevant portions of Section 34 of the Arbitration and Conciliation Act, 1996 is quoted hereunder:-

"RECOURSE AGAINST ARBITRAL AWARD

34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling

within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

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

Explanation.--Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

The said application under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant-NEEPCO, did not clearly mention which of the grounds in Section 34 of the Arbitration and Conciliation Act, 1996 had been taken for setting aside of the award dated 21.04.2008. No doubt, the application is very big but clumsy. The application contents only the facts of the applicant/appellant-NEEPCO" case and the counterclaims and drafted as if a memo of first appeal for challenging the judgment and decree on the grounds for not properly appreciating the evidence by the trial court in passing the judgment. The learned Additional Deputy Commissioner, Khasi Hills District, Shillong passed the impugned judgment and order dated 29.11.2010 for dismissing the application under Section 34 of the Arbitration and Conciliation Act, 1996; and being aggrieved, the appellant-NEEPCO filed the present appeal.

19. The grounds for filing the appeal, even though, it is not clear in the present memo of appeal, which we gather from the memo of appeal and also from the submission of Mr. V.K. Jindal, learned senior counsel appearing for the appellant-NEEPCO are that: (i) all the grounds for filing the application under Section 16 of the Arbitration and Conciliation Act, 1996 for objecting jurisdiction and proceedings of the Arbitral Tribunal can be taken in an appeal under Section 37(1) (b) of the Arbitration and Conciliation Act, 1996 and the grounds in the memo of appeal cannot be circumscribed by Section 34 of the Arbitration and Conciliation Act, 1996; (ii) the Arbitral proceedings are barred by limitation; (iii) there is a patent error in the arbitral award dated 21.04.2008 and; (iv) the arbitral award is in conflict with the public policy of India. Mr. V.K. Jindal, learned senior counsel appearing for the appellant-NEEPCO at the very opening of his submission,

forcefully urged that there cannot be two remedies against the judgment and order of the Arbitral Tribunal passed on an application under Section 16 of the Arbitration and Conciliation Act, 1996 i.e. appeal under Section 37 of the Arbitration and Conciliation Act, 1996 and another under Section 34 of the Arbitration and Conciliation Act, 1996. Before considering this submission, we may require to look into Section 16(6) a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34 and Section 37(2)(a) of the Arbitration and Conciliation Act, 1996; an appeal shall also lie to a Court from an order granting of the Arbitral Tribunal accepting the plea referred to in Sub-Section (2) or Sub-Section (3) of Section 16 of the Arbitration and Conciliation Act, 1996. Before opening our decision in this point, we remember often quoted observations of the Apex Court "when the legislature has spoken, the Judges cannot afford to be wiser" in *Shri Mandir Sita Ramji Vs. Lt. Governor of Delhi and Others*, . The purpose and intention for enacting the Arbitration and Conciliation Act, 1996 is to minimize the interference of the Court to the arbitral proceedings so as to enable the Arbitral Tribunal to continue its proceedings in settlement of the disputes by passing an award. The object of the Arbitration and Conciliation Act, 1996 reads as follows:-

"Object of the Act

Main objective of the Act is to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration and to minimize the supervisory role of courts in the arbitral process and to permit an arbitral Tribunal to use mediation, conciliation or other procedures during the arbitral proceedings in settlement of disputes, etc.; *Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Limited*, ."

20. Two situations may arise on the application under Section 16 of the Arbitration and Conciliation Act, 1996 i.e. (i) accepting the application under Section 16 of the Arbitration and Conciliation Act, 1996 resulting to disposal of the arbitral proceedings on the findings that the Arbitral Tribunal does not have the jurisdiction or the Arbitral Tribunal is exceeding the scope of its authority and (ii) rejecting the application under Section 16 of the Arbitration and Conciliation Act, 1996 on the findings that the Arbitral Tribunal does have the jurisdiction for arbitral proceedings and the proceedings of the arbitral proceedings will result to passing the award. In the event of passing the award, the aggrieved party has the remedy under Section 34 of the Arbitration and Conciliation Act, 1996 as provided under Section 16(6) of the Arbitration and Conciliation Act, 1996. But in the case of closing the arbitral proceedings by accepting the application under Section 16 of the Arbitration and Conciliation Act, 1996, the aggrieved party should have the remedy, the remedy is under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996. Regarding this settled position of law, we may refer to the decision of the Apex Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others*, that:

"Vis-a-vis grounds for setting aside the award

51. After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the arbitrator would be the subject-matter of challenge under Section 34 of the Act. In the event the arbitrator opined that he had no jurisdiction in relation thereto an appeal there against was provided for under Section 37 of the Act."

21. It is no doubt, well settled that it is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, section by section and word by word. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity, or in-consistency therein not otherwise. An effort should be made to give effect to all part of the statute and unless absolutely necessary, no part thereof shall be rendered superfluous or redundant. True meaning of a provision of law is to be determined on the basis of what it provides by its clear language, with due regard to the scheme of law (Reference may be made to Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, .

22. The Apex Court in Kunal Singh Vs. Union of India (UOI) and Another, held that in the definition clause, if two distinct definitions are given defining word or expression in the same enactment, they must be understood accordingly in terms of the definition. The Apex Court in Union of India and Another Vs. Tulsiram Patel and Others, had discussed "the Maxim - "Espressum facit cessare tacitum" while interpreting a statute and held that it is in the nature of constitutional prohibitory, injunction restraining the disciplinary authority from holding an enquiry under Article 311(2) or from giving any kind of opportunity to the concerned government servant. There is, thus, no scope for introducing in the second proviso some kind of enquiry or opportunity by a process of interference or implication. The Maxim "Espressum facit cessare tacitum" (when there is expression mentioned of certain things, then anything not mentioned is excluded). The ratio laid down in Union of India and Anr. Vs. Tulsiram Patel, etc. (Supra) is followed by this court (D/B) in Apangshu Mohan Lodh and Others Vs. State of Tripura and Others, which had been upheld by the Apex Court.

23. It is cardinal rule of construction that no word should be construed redundant or superfluous in interpreting the provision of statue or rule (Ref: Dinesh Chandra Sangma Vs. State of Assam and Others, . The Apex Court in State of Maharashtra and Others Vs. Santosh Shankar Acharya, held that it is too well known principle of construction of statute that the legislature engrafted every part of the statute for a purpose. The legislative intention is that every part of the statute should be given effect. Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the

legislature will not be accepted except for compelling reasons.

24. The Apex Court in Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, held that it is the basic principle of construction of statute that statutory enactment must ordinarily be construed according to their plain meaning and no words should be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.

25. It is fairly well settled principles of interpretation of statute that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. The Court cannot add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court would not go to its aid to correct the legislature's defective phrasing of an Act. Para-13 of the SCC in Dadi Jagannadham Vs. Jammulu Ramulu and Others, read as follows:

"13. We have considered the submissions made by the parties. The settled principles of interpretation are that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot add the legislature's defective phrasing of an Act, or add or mend, and by construction, make up deficiency which are not there."

26. Keeping in view of the decisions of the Apex Court in the aforementioned paras as well as the well settled principle of interpretation of statute, we are unable to accept the submission of Mr. V.K. Jindal, learned senior counsel appearing for the appellant-NEEPCO that the grounds for setting aside of the award dated 21.04.2008 under Section 34 of the Arbitration and Conciliation Act, 1996 should also include the grounds mentioned in Section 16 of the Arbitration and Conciliation Act, 1996 in the case of rejecting the application under Section 16 of the Arbitration and Conciliation Act, 1996 and should also the grounds for the appeal filed under Section 37(1) of the Arbitration and Conciliation Act, 1996. We reiterated that reply to the said submission of learned senior counsel would be Sub-Section (6) of Section 16 of the Arbitration and Conciliation Act, 1996. Regarding the limitation, the Arbitral Tribunal in its judgment and order dated 30.05.2006 had given cogent reasons for coming to the findings that the arbitral proceedings are not barred by limitation. We read and re-read the said reasons mentioned in the judgment and order dated 30.05.2006 and also the Contract Agreement dated 02.02.1996 as well as the letter of the appellant-NEEPCO dated

22.09.2003 for intimating the final decision for recovery of the excess payment to the respondent No. 1-M/s Gammon India Ltd., Notice for arbitration dated 01.10.2003, award dated 24.01.2008, proceedings of the First sitting of the Arbitral Tribunal dated 12.05.2005 and the proceedings of the 22nd and 23rd Sittings of the Arbitral Tribunal, but we utterly failed to convince ourselves to interfere with the said findings of the Tribunal that the Tribunal proceedings are not barred by limitation.

27. We, now, take up the submission of Mr. V.K. Jindal, learned senior counsel appearing for the appellant-NEEPCO that there is a patent error in the impugned award dated 21.04.2008. His submission for patent error is based on mis-appreciation of evidence by the Arbitral Tribunal in passing the impugned award dated 21.04.2008. For a patent error in the award, it is so simple that one may not require to digest and re-appreciate the whole evidence and it should be so apparent in the impugned judgment and award. The meaning of "patent error" is discussed by the Apex Court in *Surya Dev Rai Vs. Ram Chander Rai and Others*, held that:-

"20. Authority in abundance is available for the proposition that an error apparent on face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an error apparent on the face of the record was well set out in *Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale*, . It was held that the alleged error should be self-evident. An error which needs to be established by lengthy and complicated arguments or an error in a long-drawn process of reasoning on points where there may conceivably be two opinions cannot be called a patent error. In a writ of certiorari the High Court may quash the proceedings of the tribunal, authority or court but may not substitute its own findings or directions in lieu of one given in the proceedings forming the subject-matter of certiorari.

38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character....."

28. The Apex Court in J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, held that:

"27. Interpreting the said provisions, this Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., held that a court can set aside an award under section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

29. The Primary duty of the Court is to enforce a promise. Para 73 of the SCC of the decision of the Apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., held that:

"73. It is to be reiterated that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the basis of the civilized society and also the jurisdiction of the arbitrators. Hence, this part of the award passed by the Arbitral Tribunal granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act."

30. It is fairly well settled law that the High Courts do not sit in appeal over the award of the Tribunal and do not interfere with the award by re-appreciating the evidence. But the High Courts interfere only when the award is perverse inasmuch as, it is not based on any evidence, but the Courts are not concerned with the quantum of evidence required. Regarding this point, we may refer to the decisions of the Apex Court in (i) State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd., (ii) Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd., (iii) Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Commission of India, and (iv) McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, .

Paras 55 and 72 of the SCC in Ferro Concrete Construction Private Limited case (Supra) read as follows:-

"55. While the quantum of evidence required to accept a claim, may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no

evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.

72. Counterclaims 1, 2 and 4 have been considered by the arbitrator and rejected by the arbitrator on the ground that the delay/breaches were on the part of the appellant and therefore, the question of claiming these amounts does not arise. Rejection of Counterclaim 5 is consequential. As noticed above, the court does not sit in appeal over the award of the arbitrator and cannot re-appreciate the evidence to arrive at a different conclusion. The award on these items does not attract any of the grounds on which the award could be set aside. Therefore, rejection of these claims is also not open to interference."

Para 18 (vi) (vii) of the SCC in Gupta Brother Steel Tubes Limited case (Supra) reads as follows:-

"18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarized thus:

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

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

Paras 42 and 43 of the SCC in Oil And Natural Gas Corporation Limited case (Supra) read as follows:-

"42. Can the findings and the award in the present case be described as perverse? This Court has already laid down as to which finding would be called perverse. It is a finding which is not only against the weight of evidence but altogether against the evidence. This Court has held in M/s. Triveni Rubber and Plastics Vs. Collector of Central Excise, Cochin, that a perverse finding is one which based on no evidence or one that no reasonable person would have arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse. The legal position in this behalf has been recently reiterated in Arulvelu and Another Vs. State represented by the Public Prosecutor and Another, .

43. In the present case, the findings and award of the umpire are rendered after considering the material on record and giving due weightage to all the terms of the contract. Calling the same to be perverse is highly unfair to the umpire. The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the

highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Manufacturing Corporation Vs. Central Warehousing Corporation*, the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

31. The Apex Court in *Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran*, held that:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had traveled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator"

32. What would constitute "public policy" in the given case should be clearly indicated in the pleadings of the parties and the materials brought on record. Mr. V.K. Jindal, learned senior counsel in spite of repeated queries what is the public policy involved in the present case and also what are the pleadings in support of the public policy in the memo of appeal as well as the application under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant-NEEPCO and also what are the materials brought on record, he could not give the clear answer and his only reply is that there is an illegality in the impugned award dated 21.04.2008 and the illegal award dated 21.04.2008 is in conflict with the public policy of India. The pleadings of the parties regarding the "public policy" had been discussed and held by the Apex Court in *McDermott International INC* case (*Supra*) that:

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

61. In *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, , this Court observed: (SCC pp. 727-28, para 31)

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the

concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case: Renusagar Power Co. Ltd. Vs. General Electric Co., it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

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

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

33. The meaning of "public policy" in Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 had also been considered and discussed by the Apex Court in (i) Oil & Natural Gas Corporation Ltd. case (Supra) (ii) Mc Dermott International INC case (Supra) (iii) Sumitomo Heavy Industries Limited case (Supra) and (iv) Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, of the SCC in Oil & Natural Gas Corporation Ltd. case (Supra) read as follows:-

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

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

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

74. In the result, it is held that:

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:-

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal."

34. The ratio laid down in Oil & Natural Gas Corporation Ltd. Case (Supra) followed in Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, of the SCC in Hindustan Zinc Ltd. case (Supra) read as follows:-

"12. The said judgment of the High Court is challenged in this appeal. Having accepted the decision of the trial court and paid the amount due as per the said decision, the only ground urged in this appeal is that for calculating the price escalation, the difference should be with reference to base price of the washery coal used and not with reference to base price of a lower quality of washery coal.

13. This Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and it affects the right of the parties, open to interference by the court under Section 34(2) of the Act. This Court observed: (SCC pp. 718 & 727-28, paras 13 & 31)

"13. The question, therefore, which requires consideration is - whether the award could be set aside, if the arbitral tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties? Under sub-section (1)(a) of Section 28 there is a mandate to the arbitral tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be -

whether such award could be set aside? Similarly, under sub-section (3), arbitral tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the arbitral tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the arbitral tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

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

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

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

35. The ratio laid down in *Oil & Natural Gas Corporation Ltd. Case (Supra)* and *Hindustan Zinc Ltd. case (Supra)* are again followed in *Delhi Development Authority case (Supra)*. Para 21 of the SCC in *Delhi Development Authority case (Supra)* reads as follows:-

"21. From the above decisions, the following principles emerge:

(a) An Award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal, or

(v) prejudicial to the rights of the parties;

is open to interference by the Court under Section 34(2) of the Act.

(b) Award could be set aside if it is contrary to:

(a) fundamental policy of Indian Law; or

(b) the interest of India; or

(c) justice or morality;

(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the Arbitrator as well as the Division Bench of the High Court were justified in granting the Award in respect of Claims 1 to 3 and additional Claim 1 to 3 of the claimant or the appellant-DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

36. We have given our decision in the foregoing paras that there is no patent error in the award dated 21.04.2008. The "public policy" as ground projected in the present appeal for interfering with the impugned award dated 21.04.2008 as well as the judgment and order dated 30.05.2006, according to our considered view, are not acceptable for the reasons discussed in the foregoing paras. In the result, the appeal is devoid of merit and accordingly dismissed.

37. The parties are directed to bear their own costs.