
(2011) 07 MAD CK 0201
In the Madras High Court
Case No : O.P. No. 812 of 2010

The Union of India (UOI)

APPELLANT

Vs

M. Senthilkumar and K.M. Natarajan Arbitrator

RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 34
Contract Act, 1872 — Section 53, 55, 56

Citation : (2011) 07 MAD CK 0201

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Advocate : R. Thiagarajan, for V. Haribabu, for the Appellant; Nalini Chidambaram, S.C. for S. Amalraj Penkilapatti, for the Respondent

Final Decision : Allowed

Judgement

Vinod K. Sharma, J.—This order shall dispose of O.P. Nos. 812 and 813 of 2010 as the common question of law and facts involved are involved in these above Original petitions. For the sake brevity, the facts have been taken from O.P. No. 812 of 2010.

2. The Petitioners herein filed these Original petitions u/s 34 of the Arbitration & Conciliation Act challenging the Awards dated 20.04.2008 passed by the sole Arbitrator Mr. Justice K.M. Natarajan.

3. In response to the tender notice issued by the Petitioner, the first Respondent applied for the Track Ballast contract work "MAS-DGR Sections-Collections and supply of 50 mm size machine crushed stone Ballast at TADA Depot for SSE/ P.way/SPE and SPE sections including loading and unloading from BKH wagons for making up deficiency in ADEN-SPE and ADEN-SPE sub division"

4. The tender submitted by the Respondent was accepted by the Railway vide letter of acceptance No. M/W.496/East/ 5181 dated 26.5.2005. The period for completion of contract work was 11 months commencing from the date of letter

of acceptance, and the work was to be completed on or before 25.04.2006. The total value of the contract was Rs. 2,77,95,000/-(Rupees two crores seventy seven lakhs ninety five thousand only) and the quantity of ballast for collection to be loaded and unloaded was 50,000 cum. An agreement No. 101/East/MAS dated 3.8.2005 was executed between the parties. The Respondent was to commence work within 14 days of the letter of acceptance.

5. It is admitted case of the parties that the contract was not completed, and the Respondent was able to execute 33.39% of the contract work till the expiry of stipulated period. It was one of the conditions of the contract that minimum 3 samples of ballast analysis was to be taken for measurement on any particular date even if the numbers of stacks to be measured were less than three.

6. It was also stipulated in the agreement that the supply of the first 100 cum, the tests for size gradation, Abrasion Value, Impact Value and water Absorption was to be carried out by the Railway and further supply was to be accepted only after this ballast satisfies the specifications for these tests. The Railway reserved the right to terminate the contract as per general conditions of the contract if the ballast supply failed to conform to any of the specifications.

7. It was also stipulated in the contract that no price variation shall be payable under the contract price/rate quoted by the Contractor, and would remain firm over the entire period of contract including extended period. The period for collection of quantities for loading and unloading was fixed at 30 days from the receipt of the permission for loading/unloading and the delay was to carry penalty of Rs. 5/- per cum for the shortfall in loading and unloading.

8. It was also one of the conditions that entire quantity of ballast was to be supplied within completion period including monsoon. Clause 17 of the General conditions of the contract reads as under:

17 Force Majeure Clause: if at any, during the continuance of this contract, the performance in whole or in part by either party of any obligation under this contract shall be prevented or delayed by reason of any war, hostility, acts of public enemy, civil commotion, sabotage, serious loss or damage by fire, explosions, epidemics, strikes, lockouts or acts of God (hereinafter referred to as "events") provided, notice of the happening of any such event is given by either party to the other within fifteen (15) days from the date of occurrence thereof, neither party shall by reason of such event, be entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non-performance or delay in performance, and works under the contract shall be resumed as soon as practicable after such event has come to an end or ceased to exist, and the decision of the Engineer as to whether the works have been so resumed or not shall be final and conclusive, provided further that if the performance in whole or in part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding ninety (90) days, either party may at its option terminate the contract by giving notice to the other

party.

17-A Subject to any requirement in the contract as to completion of any portion or portions of the works before completion of the whole, the Contractor shall fully and finally complete the whole of the works comprised in the contract (with such modifications as may be directed under conditions of this contract) by the date entered in the contract or extended date in terms of the following clauses:

(i)Extension due to modification:- If any modifications have been ordered which in the opinion of the Engineer have materially increased the magnitude of the work, then such extension of the contracted date of completion may be granted as shall appear to the Engineer to be reasonable in the circumstances, provided moreover that the Contractor shall be responsible for requesting such extension of the date as may be considered necessary as soon as the cause thereof shall arise and in any case not less than one month before the expiry of the date fixed for completion of the works.

(ii)Extension for delay not due to Railway/ Contractor:- If in the opinion of the Engineer the progress of work has any time been delayed by any act or neglect of Railway's employees or by other contractor employed by the Railway under Sub-clause (4) of Clause 20 of these conditions or in executing the work not forming part of the contract but on which Contractor's performance necessarily depends or by reason of proceedings taken or threatened by or dispute with adjoining or to neighboring owners or public authority arising otherwise through the Contractor's own default etc. or by the delay authorised by the Engineer pending arbitration or in consequences of the Contractor not having received in due time necessary instructions from the Railway for which he shall have specifically applied in writing to the Engineer or his authorised representative then upon happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer within 15 days of such happening but shall nevertheless make constantly his best endeavours to bring down or make good the delay and shall do all that may be reasonably required of him to the satisfaction of the Engineer to proceed with the works. The Contractor may also indicate the period for which the work is likely to be delayed and shall be bound to ask for necessary extension of time. The Engineer on receipt of such request from the Contractor shall consider the same and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the type and quantum of work affected thereby. No other compensation shall be payable for works so carried forward to the extended period of time, the same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.

(iii)Extension of time for delay due to Railway:- In the event of any failure or delay by the Railway to hand over the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any

other delay caused by the Railway due to any other cause due whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefor but in any case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.

17-B Extension of time for delay due to Contractor:- The time for the execution of the work or part of the works specified in the contract documents shall be deemed to be the essence of the contract and the works must be completed not later than the date(s) as specified in the contract. If the Contractor fails to complete the works within the time as specified in the contract for the reasons other than the reasons specified in clauses 17 and 17A, the Railway may, if satisfied that the works can be completed by the Contractor within reasonable short time thereafter, allow the Contractor such further extension of time (Proforma at Annexure I) as the Engineer may decide. On such extension, the Railway will be entitled without prejudice to any other right and remedy available on that behalf, to recover from the Contractor as agreed damages and not by way of penalty, a sum equivalent to 1/2 of 1% of the contract value of the works for each week or part of the week. For the purpose of this clause, the contract value of the works shall be taken as value of work as per contract agreement including any supplementary work order/contract agreement issued. Provided also, that the total amount of liquidated damages under this condition, shall not exceed the under noted percentage value or of the total value of the item or groups of items of work for which a separate distinct completion period is specified in the contract.

(i) For contract value - 10% of the total value of the up to Rs. 2 lakhs contract.

(ii) For contracts valued-10% of the first 2 lakhs and above Rs. 2 lakhs 5% of the balance

Provided further, that if the Railway is not satisfied that the works can be completed by the Contractor and in the event of failure on the part of the Contractor to complete the work within further extension of time allowed as aforesaid, the Railway shall be entitled, without prejudice to any other right or remedy available in that behalf, to appropriate the contractor's security deposit and rescind the contract under Clause 62 of these conditions, whether or not actual damage is caused by such default.

9. Clause 61 of the General conditions of the contract gives right to the Railway to determine the contract. Clause 61 of the contract reads as under:

61.1)Right of Railway to determine the contract:- The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatsoever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such

determination and the reasons therefore shall be conclusive evidence thereof.

(2) Payment on determination of contract by Railway:- Should the contract be determined under sub clause (1) of this clause and the Contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the works, the Railways shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Engineer. The Railway's decision on the necessity and propriety of such expenditure shall be final and conclusive.

(3) The Contractor shall have no claim to any payment of compensation or otherwise, howsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract.

62 Determination of contract owing to default of Contractor:

(1) If the Contractor should

(i) becomes bankrupt or insolvent, or

(ii) make an arrangement with or assignment in favour of his creditors or agree to carry out the contract under a Committee of Inspection of his creditors, or

(iii) being a Company or Corporation, go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or

(iv) have an execution levied on his goods or property on the works, or

(v) assign the contract or any part thereof otherwise than as provided in Clause 7 of these conditions or

(vi) abandon the contract, or

(vii) persistently disregard the instructions of the Engineer, or contravene any provision of the contract, or

(viii) fail to adhere to the agreed programme of work by a margin of 10% of the stipulated period, or

(ix) fail to remove materials from the site or to pull down and replace work after receiving from the Engineer notice to the effect that the said materials or works have been condemned or rejected under Clause 25 and 27 of these conditions, or

(x) fail to take steps to employ competent or additional staff and labour as required under Clause 26 of these conditions, or

(xi) fail to afford the Engineer's representative proper facilities for inspecting the works or any part thereof as required under Clause 28 of these conditions, or

(xii) promise, offer or give any bribe, commission, gift or advantage either himself or through his partner, agent or servant to any officer or employee of the Railway or to any person on his or on their behalf in relation to the execution of

this or any other contract with the Railway.

(xiii) (A) At any time after the tender relating to the contract has been signed and submitted by the Contractor, being a partnership firm admit as one of its partners or employ under it or being an incorporated company elect or nominate or allow to act as one of its directors or employ under it in any capacity whatsoever any retired engineer of the gazetted rank or any other retired gazetted officer working before his retirement, whether in the executive or administrative capacity, or whether holding any pensionable post or not, in the Engineering Department of any of the Railways for the time being owned and administered by the President of India before the expiry of two years from the date of retirement from the said service of such engineer or officer unless such engineer or officer has obtained permission from the President of India or any officer duly authorised by him in this behalf to become a partner or a director or to take employment under the Contractor as the case may be, or

(B) Fail to give at the time of submitting the said tender:

(a) the correct information as to the date of retirement of such retired engineer or retired officer from the said service, or as to whether any such retired engineer or retired officer was under the employment of the Contractor at the time of submitting the said tender, or

(b) the contract information as to such engineers or officers obtaining permission to take employment under the Contractor, or

(c) being partnership firm, the correct information as to whether any of its partners was such a retired engineer or a retired officer, or

(d) being an incorporated company, correct information as to whether any of its directors was such a retired engineer or a retired officer, or

(e) being such a retired engineer or retired officer suppress and not disclose at the time of submitting the said tender the fact of his being such a retired engineer or a retired officer or make at the time of submitting the said tender a wrong statement in relation to his obtaining permission to take the contract or if the Contractor be a partnership firm or an incorporated company to be a partner or director of such firm or company as the case may be or to seek employment under the Contractor, then and in any of the said cases, the Engineer on behalf of the Railway may serve the Contractor with a notice (Proforma at Annexure III) in writing to that effect and if the Contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry on the work or comply with such directions as aforesaid to the entire satisfaction of the Engineer, the Railway shall be entitled after giving 48 hours notice (Proforma at Annexure IV) in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts (as may be specified in such notice) and adopt either or both of the following courses:

(x) to carry out the whole or part of the work from which the Contractor has been removed by the employment of the required labour and materials, the cost of which shall include lead, lift, freight, supervision and all incidental charges

(y) to measure up the whole or part of the work from which the Contractor has been removed and to get it completed by another Contractor, the manner and method in which such work is completed shall be in the entire discretion of the Engineer whose decision shall be final: and in both the cases (x) and (y) mentioned above, the Railway shall be entitled (i) to forfeit the whole or such portion of the Security Deposit as it may consider fit, and (ii) to recover from the Contractor the cost of carrying out the work in excess of the sum which would have been payable according to the certificate of the Engineer to the Contractor if the works had been carried out by the Contractor under the terms of the contract, such certificate being final and binding upon the Contractor. Provided, however, that such recovery shall be made only when the cost incurred in excess is more than the Security Deposit proposed to be forfeited and shall be limited to the amount by which the cost incurred in excess the Security Deposit proposed to be forfeited. The amounts thus to be forfeited or recovered may be deducted from any moneys then due or which at any time thereafter may become due to the Contractor by the Railway under this or any other contract or otherwise. Provided always that in any case any of the powers conferred upon the Railway by Sub-clause (1) of Clause 62 hereof shall have become exercisable and the same shall not be exercised, the non exercise thereof shall not constitute a waiver of any of the conditions thereof and such powers shall notwithstanding be exercisable in the event of any future case of default by the Contractor for which his liability for past and future shall remain unaffected.

(2) Right of Railway after rescission of contract owing to default of Contractor:- In the event of any or several of the courses, referred to in Sub-clause (1) of this clause, being adopted-

(a) the Contractor shall have to claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any commitments or made any advances on account of or with a view to the execution of the works or the performance of the contract and Contractor shall not be entitled to recover or be paid any sum for any work thereto for actually performed under the contract, unless and until the Engineer shall have certified the performance of such work and the value payable in respect thereof and the Contractor shall only be entitled to be paid the value so certified;

(b) the Engineer or the Engineer's representative shall be entitled to take possession of any materials, tools, implements, machinery and buildings on the works on the property on which these are being or ought to have been executed, and to retain and employ the same in the further execution of the works or any part thereof until the completion of the works without the Contractor being entitled to any compensation for the use and employment thereof or for wear and tear or destruction thereof;

(c) the Engineer shall as soon as may be practicable after removal of the Contractor fix and determine ex-parte or by or after reference to the parties or after such investigation or enquiries as he may consider fit to make or institute and shall certify what amount (if any) had at the time of rescission of the contract been reasonably earned or would reasonably accrue to the contractor in respect of the work then actually done by him under the contract and what was the value of any unused, or partially used materials, any constructional plant and any temporary works upon the site.

(d) the Railway shall not be liable to pay to the Contractor any moneys on account of the contract until the expiration of the period of maintenance and thereafter until the costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the Railway have been ascertained and the amount thereof certified by the Engineer. The Contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify would have been due to him upon due completion by him after deducting the said amount; but if such amount shall exceed the sum which would have been payable to the Contractor, then the Contractor shall upon demand pay to the Railway the amount of such excess and it shall be deemed a debt due by the Contractor to the Railway and shall be recoverable accordingly.

10. Clause 64.5 of the Contract reads as under:

Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

11. On 12.05.2006, a letter was addressed to the 16Petitioner by the Respondent for short closer (foreclosure of contract)or in the alternative to refer the disputes/ claims to arbitration. The claim raised in the notice read as under:

No

Description of Claims

Amount

1.

Declaration that the Contract expired and
lapsed on 25/04/2006 and that the Railway
cannot initiate any penal proceedings including
under Clause 28 of the Special Conditions of
Contract or under Clause 62 of the GCC

2.

Damages for the "under-utilisation and Idling of

contractor's Establishment and Overheads

[@10% of the value of the unfinished works]

Rs.18,00,000/-

3.

Damages for the wasteful expense suffered due to the "under-utilisation and Idling of the contractor's labour

Rs.6,00,000/-

4.

Damages for the "under-utilisation and Idling of the contractor's Lorries, Pay-loader, Crusher and Quarry etc.

Rs.26,00,000/-

5.

Damages for the loss of the anticipated profits suffered by the contractor because of being partially prevented from executing the works by the Railway's defaults [@10% of the value of the unfinished works]

Rs.15,00,000/-

6.

Damages for the loss of opportunity and Turnover suffered by the contractor to the Railway's defaults

Rs.10,00,000/-

7.

Balance Payment for the work done and the payment of the Security Deposit, EMD, etc.

Rs.12,00,000/-

8.

Damages towards unlawful retention and nonpayment
of the above claim amounts [pendentelite
interest from 25/4/2006 till date of Award
and for post award]

To be quantified

9.

Costs

To be quantified

Total

Rs.87,00,000/-

12. Vide letter dated 02.06.2006, the Respondent was informed that his request was not accepted. The Respondent thereafter approached the Hon''ble Chief Justice for appointment of Arbitrator to adjudicate the claim raised by the Respondent.

13. Vide order dated 24.03.2007, the Hon''ble Mr. Justice K.M. Natarajan, Retired Judge of this Court was appointed as sole Arbitrator to adjudicate the dispute arising out of agreement dt.03.08.2005.

14. The Respondent vide claim petition alleged following defaults which resulted in failure of the contract.

[A] The non-completion of the Ballast Depot by another Agency:

The Tada depot meant was supposed to be revamped by the Railway to facilitate Ballast Collection and the Railway appointed another agency namely Mr. V. Niranjan Reddy [vide LOA No: M/W 496/E/5232 dated 3/6/2005] to revamp the existing Ballast Depot and for forming/Constructing a new Depot in the adjoining area.

The claimant had to collect the Agreement quantity of 50,000 Cum of Ballast in both the existing old ballast Depot and the proposed new Depot. The other agency had only around the first week of November 2005 completed the formation of the proposed New Depot. The Railways could furnish the mandatory "Ground Level Certificate" only for a mere portion of the New Depot to the claimant only during March 2006 i.e. when contract was about to expire.

[B] The Railway''s inability to furnish in Time the mandatory requisite "Ground Clearance Certificate":

The Railways could not grant sufficient space by furnishing the "Ground Clearance Certificate" for the majority of the areas in the then only existing "old Tada Ballast Depot" because it was also belatedly revamped and the "Ground

Level Certificate" for commencing ballast collection was issued only for a part of the Old depot on 7/6/2005 and the "Ground Level Certificates" were issued belatedly that too in a piecemeal manner for remaining area in the "Old Depot" culminating in the last certificate being issued on 3/1/2006. Hence, the Railway's failure to provide a hurdle free site for Ballast collection greatly hampered the claimant's intended programme of works.

[C] The Railway's failure to provide the BKH Wagons in time:

The loading capacity of the Claimant's Loaders [that the claimant had mobilised exclusively for this contract works at the hire charge of Rs. 3000/- per day] is about 35 to 40 BKH wagons per every day. The Railway failed to ensure the placement and the movement of adequate BKH wagons required for the disposal of the said ballast resulting in the claimant's establishment and manpower idling and under utilised. The Railway's failure in providing the BKH wagons resulted in the work of loading of even about 4000 Cum of Ballast being prolonged for a period of 35 days instead of the usual 5 days time required for such meagre quantities.

[D] The regular Stop Collection Orders issued Railway Officers:

When the claimant was geared for executing large quantities of ballast collection, the concerned Railway officers considering the pressing requirement of the administration's needs and their inability to issue the required "ground clearance certificate" for further areas in the said OLD Depot issued "stop collection" orders to allegedly make the claimant concentrate exclusively on loading works. The Railway's refusal to permit "ballast collection" to be executed as a "parallel activity" simultaneously with loading works, further disrupted the claimant's entire planned "collection schedule" The Railway ought to have permitted the claimant to simultaneously proceed with Ballast Collection works along with loading works, without issuing any "stop collection" orders, thereby the claimant could have shown unbridled progress in Ballast Collection works.

[E] The unprecedented heavy monsoon rains between 22/10/2005 to 30/10/2005 and 05/11/2005 to 12/11/2005:

The unprecedented rains in the above period inundated all quarries in the surrounding areas and filled them to their very brim [turning them into mini lakes]. The quarries also suffered landslides that further complicated the damage, Furthermore, all the approach roads and bridges are severely damaged rendering any Traffic, leave alone heavily laden Ballast Lorries to the Tada Depot impossible.

The Claimant's own Crusher [namely M/s. Rajeshwari Stone Crushers] suffered severely and the Earthwork Ramp used for conveying boulders to the crushing machine had also collapsed and all the main machines like the conveyor belts, vibrator and crusher motors were greatly damaged requiring large scale repairs. The concerned field level Railway officers are personally well acquainted with the

unprecedented damage caused by the monsoon rains that had also completely inundated the TADA Depot and made it utterly unapproachable. The Railway's intra-officer letter dt.7/12/2005 from ADEN to DEN also records the said of unprecedented damage to the entire area due to the monsoon.

[F] The vexatious levy of penalties on the ground of alleged shortfall in Ballast Collection for the first quarter:

The Railways all of a sudden levied penalty for the alleged shortfall in Ballast Collection for the first quarter period and recovered about Rs. 49,800/-from the claimant's bills. The Arbitrator must kindly appreciate that out of the above first quarter period a total period of 52 days were wasted on account of the Railways. No Ballast Collection was possible for the period of 52 days and only on the remaining days of "Ballast Collection" was possible in the limited space provided to us in the Tada Depot.

[G] The Railway's delay in completing & communicating "Test Results":

The Claimant was disheartened by the Railway's inordinate delay in conducting the ballast tests for every 2000 cum of ballast collected. The railway took more about 15 days [from date of collecting Ballast samples] for completing the Tests and communicating the "Results" with instructions to proceed with further collection. The delay in completing and communicating the "Test Results" by the Railways had greatly delayed the progress of the ballast collection inspite of the claimant's religious commitment to earn the all round appreciation of all the Railways with both the quality and pace of its "ballast collection" works. The very contract period is only 11 months and total quantity of ballast required to be collected is 50,000 Cum and the Testing is required for every 2000 cum. So the total number of Tests required for 50,000 Cum is 25. Since the Railway Administration took approximately 15 days for completing every single Test and communicating the test results to enable further collection, the total time period that the railway may consume for completing the total required 25 Tests will be about 375 days [12.5 months] which is more than the 11 months period stipulated for completion of the entire work. Hence, the claimant only in vain requested the Railway's field level officers to speed up the testing process early.

15. On the basis of default referred to above, the Respondent raised the following claims before the Arbitrator.

No.

Description of Claims

Amount

1.

Declaration that the Contract expired and
lapsed on 25/04/2006 and that the Railway

cannot initiate any penal proceedings including under Clause 28 of the Special Conditions of Contract or under Clause 62 of the GCC and a direction to the Railways to make the payment of Final Bill of Rs.40,368/- and Security Deposit Rs.9,94,618/- and refund of the penalty amount of Rs.49,800/-
Rs.10,84,787/-

2.

Damages for the "under-utilisation and Idling of contractor's Establishment and Overheads [@10% of the value of the unfinished works]
Rs.18,30,000/-

3.

Damages for the wasteful expense suffered due to the "under-utilisation and Idling of the contractor's labour
Rs.58,45,280/-

4.

Damages for the "under-utilisation and Idling of the contractor's Lorries, JCB and L&T Loaders, Crusher and Quarry etc.
Rs.92,58,200/-

5.

Damages for loss of anticipated profits suffered by the contractor because of being partially prevented from executing the works by the Railway's defaults [@10% of the

value of the unfinished works]

Rs.18,30,000/-

6.

Damages for loss of opportunity and

Turnover suffered by the contractor to the

Railway"s defaults

Rs.10,00,000/-

7.

Damages for loss of opportunity and

Turnover suffered by the contractor to the

Railway"s defaults

To be quantified

8.

Costs

To be quantified

Total

Rs.2,08,48,267/-

The reading of the claims shows that these were not as per claim raised in the notice or application moved u/s 11 of the Arbitration & Conciliation Act.

16. Counter was filed to the claim petition wherein claim raised were disputed, being vague and based on presumption and assumptions. It was pleaded that claim raised were exorbitant without any basis.

17. Specific stand was taken that the Respondent was bound by the terms and conditions of the contract, special conditions and the general conditions of the contract. Therefore, he was estopped from raising any claim. The fact of Respondent having invested huge amount to mobilize a massive establishment, the requisite machinery and a long labour strength for execution of the work was specifically denied. The stand was taken that the Contractor has failed to collect the ballast for want of required resources.

18. It was also pleaded that "Ground level certificate" was issued to the Contractor as and when required by the Contractor without any delay. The fact that Depot was not available for collection of ballast was also denied.

19. It was also the case set up by the Respondent that unprecedented rainfall as per the records available was between 21.10.2005 to 30.10.2005 and

05.11.2005 to 12.11.2005.

20. It was also pleaded that sample test results were communicated to the Respondent within three days and there was no delay on the part of the Railways. In short, all the allegations with regard to default alleged against the Respondent were specifically denied.

21. The learned Arbitrator did not reproduce the pleadings of the parties. However, on the basis of pleadings, framed the following issues:

Issue No. 1: Whether the claimant is entitled for the declaration that the Railways cannot initiate any penal proceedings including under Clause 28 of the SCC or under Clause 62 of GCC ?

Issue No. 2: Whether the claimant is entitled for the payment for the works done and payment of Security Deposit, Earnest Money Deposit etc., if so how much ?

Issue No. 3: Whether the claimant is entitled for the damages for the "under utilisation" and idling of Establishment and overheads, if so how much ?

Issue No. 4: Whether the claimant is entitled for the damages fore the wasteful expenses incurred due to the "under utilisation" and idling of labour, if so how much ?

Issue No. 5: Whether the claimant is entitled for the damages for the "under utilisation and idling of lorries, pay loaders etc., if so how much ?

Issue No. 6: Whether the claimant is entitled for the damages for the loss of anticipated profits, if so how much ?

Issue No. 7: Whether the claimant is entitled to damages for the loss of opportunity and turn over, if so how much ?

Issue No. 8: Whether the claimant is entitled to damages for the unlawful retention and non-payment of claim amount, if so how much ?

Issue No. 9: Whether there is a valid agreement between the parties and whether the Hon"ble Tribunal has jurisdiction to decide the claims ?

Issue No. 10: Whether the Respondents are entitled to their counter claims, if so how much ?

Issue No. 11: Whether the parties are entitled to interest, if so how much ?

Issue No. 12: To what other reliefs the parties are entitled to ?

22. Issue No. 9 was decided against the Petitioner by giving good reason which does not call for any interference, nor any argument were advanced against in this finding.

23. The following admitted facts are noticed even at the sake of repetition. The Petitioner called for tender for "MAS-GDR Section-Collection and Supply of 50

mm size machine crushed stone ballast at TADA Depot - including loading into BKH wagons and unloading from BKH wagons in SSE/P.way/PON & SPE Sections for making up deficiency".

24. The tender submitted by the Respondent was accepted and contract was awarded in favour of the Respondent vide letter No. M/W.496/East/5181 dated 26.5.2005. The agreement thereafter entered into between the parties vide agreement No. 101/E/MAS/2005 dated 3.8.2005 with the Respondent.

25. As per the agreement, the time for completion of work was 11 months from the date of letter of acceptance meaning thereby, the contract was to be completed on or before 25.04.2006. The total value of the contract was Rs. 2,77,95,000/- (Rupees two crores seventy seven lakhs ninety five thousand only). The quantity of the ballast per collection loading and unloading was 55,000 CUM.

26. The Respondent vide letter dt.12.05.2006 raised a demand for short closure (foreclosure of contract) or in the alternative to refer all the disputes/claims to arbitration.

27. In the letter, it was mentioned by the Respondent that the currency of the contract had already expired on 25.04.2006 and that the progress of the contract works were hampered by the various latches and breaches of contract, committed by the Railway which prevented the works from progressing as expected. It was also stated in the letter that as against the agreed quantity of 50,000 Cum of Ballast, the Respondent could collect only about 17,591 Cum. The defaults alleged against the Petitioner were as under:

- (a) The non-completion of the Ballast Depot by an other Agency
- (b) The Railway's inability to furnish in time the mandatory requisite "Ground Clearance Certificate"
- (c) The Railway's failure to provide the BKH Wagons in time
- (d) The regular Stop Collection orders issued Railway officers
- (e) The unprecedented heavy monsoon rains between 22/10/2005 to 30/10/2005 and 05/11/2005 to 12/12/2005
- (f) The vexatious levy of penalties on the ground of alleged shortfall in Ballast Collection for the first quarters
- (g) The Railway's inordinate delay in completing and communicating the Test Results
- (h) The abnormal and unprecedented increase in the cost of Ballast.

28. On the basis of the defaults referred to above, it was claimed that in view of Sections 55 & 56 of Indian Contracts Act, 1872, the contract stood frustrated and the Respondent was not liable to perform the contract. It was in the alternative, that a request was made to refer the dispute to arbitration as per Clause 64 of the GCC.

The reference was claimed with regard to following claims:

No

Description of Claims

Amount

1.

Declaration that the Contract expired and lapsed on 25/04/2006 and that the Railway cannot initiate any penal proceedings including under Clause 28 of the Special Conditions of Contract or under Clause 62 of the GCC

2.

Damages for the "under-utilisation and Idling of contractor"s Establishment and Overheads [@10% of the value of the unfinished works]

Rs.18,00,000/-

3.

Damages for the wasteful expense suffered due to the "under-utilisation and Idling of the contractor"s labour

Rs.6,00,000/-

4.

Damages for the "under-utilisation and Idling of the contractor"s Lorries, Payloader, Crusher and Quarry etc.

Rs.26,00,000/-

5.

Damages for the loss of the anticipated profits suffered by the contractor because

of being partially presented from
executing the works by the Railway's
defaults [@10% of the value of the
unfinished works]

Rs.15,00,000/-

6.

Damages for the loss of opportunity and
Turnover suffered by the contractor to the
Railway's defaults

Rs.10,00,000/-

7.

Balance Payment for the work done and
the payment of the Security Deposit,
EMD, etc.

Rs.12,00,000/-

8.

Damages towards unlawful retention and
non-payment of the above claim amounts
[pendente-lite interest from 25/4/2006 till
date of Award and for post award]

To be quantified

9.

Costs

To be quantified

Total

Rs.87,00,000/-

29. The letter written by the Respondent was replied on 2.6.2006 wherein the factum of non completion of ballast depot by other agency was denied. It was specifically pointed out that at any point of time, area offered was not completed and collection was not stopped for want of space.

30. It was also reiterated that it was not the duty of the Railways to provide

service roads. It was also denied that mandatory requisite of ground level certificate was not issued in time. It was stated that "Ground clearance certificates" were required to be given progressively and furthermore, that this had not obstructed collection.

31. It was also pointed out that collection was only 2076 cum against the requirement of 13000 cum as per the terms of the agreement. The assertion that as per the contract, BKH wagons were not provided in time was also denied. The allegations of stop collection order was also denied and it was alleged that sufficient area was available for collection.

32. As regards the allegation of unprecedented monsoon rain, reply submitted was that this could be considered to the extent genuine under "force majeure". The allegation of penalty being vexatious was also denied. It was also mentioned that on the request of the Contractor, the penalties were waived.

33. The allegation that inordinate delay in completing and communicating test result was replied by referring different clauses of agreement with regard to testing of ballast.

34. Finally, it was stated that no attempt was made by the Respondent to complete the work and the allegations were leveled after the expiry of the contract period.

35. It was specifically mentioned that allegations leveled could be considered under para 17 of "force majeure" clause. As regards allegation of price rise, it was specifically pointed out that there is no price variation clause as per para 25 of the GCC. Therefore, increase in price could not be considered a ground for foreclosure. The allegations to some claims fall under accepted clause, thus the request for foreclosure was rejected.

36. The Respondent was also requested to submit his plan for completion of ballast work and process for completion of work early. Thereafter, vide letter dated 29.8.2006 the Respondent was informed that his request for arbitration was under consideration and the list of officers would be sent to the Respondent to choose an Arbitrator.

37. On 04.08.2006, the Respondent filed O.P. No. 582 of 2006 with the prayer to appoint an Arbitrator to refer the dispute arising out of agreement dated 03.08.2005. In the petition u/s 11(4) of the Arbitration and Conciliation Act, 1996, again claim raised was same as referred to above.

38. The petition was opposed by the Respondent by pointing out that the Respondent have completed only 33.99% of the work. It was also pointed out that after the reply was submitted to letter dated 12.05.2006, the Respondent had not made any demand for appointment of Arbitrator.

39. This Court vide order dated 24.03.2007 without considering the respective stand of the parties, passed the following operative order appointing Mr. Justice

K.M. Natarajan, Retired Judge of this Court as sole Arbitrator.

It is ordered as follows:

1 That the Hon"ble Mr. Justice K.M. Natarajan, Judge (Retired), High Court, Madras residing at No. 136,(117/ 1), L.B. Road, Kamaraj Nagar, Thiruvan-miyur, Chennai 600 041, be and is hereby appointed as sole arbitrator, to arbitrate upon the disputes between the parties to the agreement in Agt. No. 101/E/ MAS/2005 dated 03.08.2005.

2 That the learned Arbitrator appointed herein, shall enter upon the arbitration, issue notice to both the parties hereto and pass an award in accordance with the provisions of the Arbitration & Conciliation Act, 1996.

3 That the fees of the learned Arbitrator appointed herein, shall be fixed in terms of the circular of the court dated 20.03.2006.

40. This order was passed in view of the law laid down by the Hon"ble Supreme Court in the case of Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., treating to be an administrative order. However, subsequently, the Constitution Bench of the Hon"ble Supreme court in SBP Ltd. v. Patel Engineering Ltd. (2005) 8 SCC 618 has held that order u/s 11 of the Act is a judicial order and not administrative order.

41. The Hon"ble Arbitrator entered reference by issuing notice to both parties, wherein the statement of claim was filed by the Respondent and the Petitioners filed reply and counter claim. The learned Arbitrator on the pleadings submitted by the parties, framed the issues referred above, for consideration.

42. The learned Arbitrator took up the Issue No. 9 and decided in favour of the Respondent. Prima facie appointment of an Arbitrator is not in terms of the agreement entered into between the parties which reads as under:

64(3)(a)(i) Appointment of Arbitration Tribunal:

In cases where the total value of all claims in question added together does not exceed Rs. 10,00,000/-(Rupees ten lakhs only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by the Railway.

64(3)(a)(ii) In cases not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three gazetted Railway officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of gazetted Railway officers of one or more departments, of the Railway to the contractor who will be asked to suggest to the General Manager upto 2 names out of the panel for appointment as the Contractor's nominee. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from

the panel or from outside the panel, duly indicating the "presiding arbitrator" from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officer in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.

64(3)(a)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new Arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).

64(3)(a)(iv) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay.

64(3)(a)(v) While appointing arbitrator(s) under Sub-clause (i),(ii) and (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64(3)(b)(i) The arbitral award shall state item wise, the sum and reasons upon which it is based.

64(3)(b)(ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award and interpretation of a specific point of award to Tribunal within 30 days of receipt of the award.

64(3)(b)(iii) A party may apply to Tribunal within 30 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

64.4 In case of the Tribunal, comprising of three members, any ruling or award shall be made by a majority of members of the Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

64.5 Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

64.6 The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s) as per the rate fixed by the Railway Administration from time to time.

64.7 Subject to the provisions of the aforesaid, Arbitration and Conciliation Act, 1996 and the rules there under and any statutory modification thereof shall apply to the arbitration proceedings under this clause.

43. However, the learned Arbitrator was right in deciding this issue against the Petitioners in view of the judgment of the Hon'ble Supreme Court in SBP Ltd. v. Patel Engineering Ltd. (2005) 8 SCC 618.

44. The learned Arbitrator thereafter took up the Issue No. 1, 2 and 10 together and recorded that the main question involved in these issues was regarding the validity/invalidity of the Railway's termination of the contract under the claimant's "Risk and cost".

45. Thereafter, by recording the arguments of the learned Counsel for the Respondent that termination at "risk and cost of Respondent was passed, when the contract was no longer in existence and had long expired, and that Railways had failed to serve the mandatory pre-termination notices in violation of Clause 62 of the Railway's GCC, non finalisation of tender within six months from the date of the termination order and by taking note of the fact that the project/contract having failed exclusively due to Railway's contractual default, shortcomings and mismanagement of the contract, held that Railways cannot initiate any penal proceedings including under Clause 28 of the Special conditions of the Contract or under Clause 62 of the General conditions of the Contract.

46. This finding on the face of it perverse and not sustainable in law. The question of termination of the contract was not the subject matter of reference, as the Contractor had sought foreclosure or in the alternative claimed damages under the heads reproduced hereinabove.

47. The petition was filed on 4.8.2006 where the order of termination was passed on 04.01.2007 which was hit by lis pendente and in any case, as per the terms of the Contract reference was to relate back to the date of demand for arbitration.

48. The learned Arbitrator also failed to notice that the Respondent was estopped by the conduct to challenge the termination of the contract, as he not only participated, but was also successful bidder in Railway subsequent contract at "Risk and cost" for the balance work, under this contract. The Respondent having participated in subsequent "Risk & cost" contract, therefore, was entitled to challenge the termination of contract.

49. The finding of Issue No. 1 by the learned Arbitrator suffers from perversity being beyond the scope of reference.

50. In view of the finding recorded in Issue No. 1 holding that the Respondent had not committed any breach of contract, the Hon"ble Arbitrator answered Issue No. 2 also in favour of the claimant and held that the Respondent was entitled to a sum of Rs. 10,84,787/-(Rupees ten lakhs eighty four thousand seven hundred and eighty seven only) towards final bill, security deposit and refund of penalty.

51. The reasons for recording this finding as given in the award is that the Respondent was able to prove the non completion of ballast depot by Railways or other agencies. The Railway"s inability to furnish mandatory requisite "Ground Clearance certificate" which hampered the claimant"s intended programme of work due to lack of sufficient space and thus, the Respondent could not work and furthermore, Railways failed to provide adequate BKH wagons in time. It was also recorded by the Hon"ble Arbitrator that because of rejection of request of the Respondent to carry on the preliminary activity, the contract could not be completed within time stipulated. The Hon"ble Arbitrator also held that the delay had occurred also due to unprecedented monsoon. The stand of the Respondent that plea of unprecedented monsoon would falls under "force majeure" clause and was rejected without assigning any reason.

52. The Hon"ble Arbitrator also took note of the fact that the Petitioner had delayed completing and communicating the test results and accordingly allowed the claim No. 2 and awarded a sum of Rs. 10,84,787/-(Rupees ten lakhs eighty four thousand seven hundred and eighty seven only) while the counter claim was rejected.

53. Mr. R. Thiagarajan, learned Senior counsel appearing on behalf of the Petitioners vehemently contended that the finding recorded by the learned Arbitrator cannot be sustained in law as they go contrary to the terms of the agreement.

54. In support of this contention, the learned Senior counsel referred to Clause 17 of GCC reproduced hereinabove.

55. The learned Senior counsel for the Petitioners made special reference to Clause 17(iii) to contend that such failure or delay was in no way to affect or vitiate the Contract or alter the character thereof or entitle the Contractor to claim damages or compensation.

56. The contention of the learned Senior counsel for the Petitioners was that, even if the finding recorded by the learned Arbitrator is not controverted and accepted, still as per the terms and conditions of the contract, it was not open to the Contractor to claim any damages or claim foreclosure of the contract as this could be only a ground for extension of time to complete the contracted work without imposing any penalty, etc., but certainly no damages could be claimed.

The award therefore was said to be against agreed terms of contract, which were binding on the Arbitrator.

57. It was also the contention of the learned Counsel for the Petitioners that the learned Arbitrator proceeded on wrong presumption, to consider the validity of the termination of the contract whereas question to be determined was as to whether as per Section 53 of the Contract, it was open to the Contractor to get the Contract declared as void due to non performance of the obligations of the Railway and claim damages.

58. The argument of the learned Senior counsel for the Petitioners was that in view of the special clause permitting extension of time, merely because of certain delay, the contract could not be declared to be void and furthermore, the fact that the extension of time could be granted, would lead to the conclusion that the time was not essence of the Contract.

59. Mrs. Nalini Chidambaram, learned Senior counsel for the Respondent on the other hand contended that the irregularities attributed to the Respondent did not come under Clause 17(iii) of the contract and in any case all the irregularities were not covered and therefore, it was open to the Respondent to claim damages as the work was delayed due to the lapses on the part of the Petitioner.

60. It was further contention of the learned Senior counsel for the Respondent that the collection of ballast was stopped by the Railway by passing specific order, therefore it is not open to the Petitioners now to challenge the award, as it is not open to this Court to interfere with the findings recorded by the learned Arbitrator unless shown to be perverse.

61. The contention of the learned Senior counsel for the Respondent was that the findings recorded by the learned Arbitrator are based on the oral and documentary evidence and cannot therefore, be said to be perverse. In support of the contention, the learned Senior counsel for the Respondent placed reliance on the judgment of the Hon''ble Supreme Court in the case of Ravindra and Associates Vs. Union of India (UOI), wherein the Hon''ble Supreme Court was pleased to laid down that the finding of fact given by the Arbitrator relating to escalation of prices of material cannot be interfered with u/s 34 of the Arbitration & Conciliation Act.

62. The learned Senior counsel also placed reliance on the judgment of the Hon''ble Supreme court in the case of Madnani Construction Corporation (P) Ltd. Vs. Union of India (UOI) and Others, to contend that in the absence of finding of Arbitrator being perverse, the High Court cannot set aside the award.

63. The reliance was thereafter placed on the judgment of the Hon''ble Supreme Court in the case of U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd., to contend that even if two views are possible, then the view taken by the Arbitrator shall prevail.

64. The learned Senior counsel for the Respondent thereafter placed reliance on

the judgment of the Hon''ble Supreme court in the case of State of U.P. Vs. Allied Constructions, to contend that when Arbitrator came to the conclusion on proved facts and passed a speaking order, therefore, no interference is called for.

65. The learned Senior counsel for the Respondent also placed reliance on the judgment of the Hon''ble Supreme Court in the case of M/s. J.G. Engineers Pvt. Ltd. v. Union of India and Anr. [Civil Appeal No. 3349 of 2005 decided on 28.04.2011] to support the contention that the finding of fact recorded by the Arbitrator is final.

66 The learned Senior counsel for the Respondent thereafter placed reliance on the judgment of the Hon''ble Supreme Court in the case of M/s. Hind Builders Vs. Union of India, to contend that when the Arbitrator did not overlook any terms of the contract and on interpretation of clause, two view are possible, then it cannot be said to be perverse and no interference is called for with such an award.

67. Reliance thereafter placed on the judgment of the Hon''ble Supreme Court in the case of M.P. Housing Board v. Progressive Writers & Publishers 2009 (2) CTC 843 to contend that the court in exercise of power u/s 34 of the Arbitration & Conciliation Act, does not sit in appeal over the award passed by the learned Arbitrator and it is not open to the Court to re-appraise the evidence for finding out that conclusion drawn from some facts by the Arbitrator is erroneous.

68. The learned Counsel for the Respondent also placed reliance on the judgment of the Hon''ble Supreme Court in the case of Bhagawati oxygen Ltd. v. Hindustan Copper Ltd. (2005) 6 SCC 462 to contend that it is not open to the Court to re-appraise evidence to alleged misconduct against the Arbitrator.

69. The contention of the learned Senior counsel for the Respondent is that it is not open to this Court now, to re-appraise the evidence to give finding contrary to one recorded by the Hon''ble Arbitrator.

70. In addition, the learned Senior counsel for the Respondent also cited the judgment of the Hon''ble Supreme Court in the case of Ambica Construction Vs. Union of India (UOI), , Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, and the judgment of the Karnataka High Court in the case of Union of India (UOI) Vs. Ravi Construction Company, .

71. Mr. R. Thiagarajan, learned Senior counsel appearing on behalf of the Petitioners, on the other hand placed reliance on the judgment of the Hon''ble Supreme Court in the case of Bharat Coking Coal Ltd. Vs. L.K. Ahuja, to contend that in this case the learned Arbitrator arrived at findings which are contrary to the terms of the agreement and therefore, it is open to this Court in exercise of power u/s 34 of the Act to set aside the award, because of finding contrary to the terms of the contract would be perverse, and liable to be set aside.

72. Para 23, 24 of the judgment referred to above, reads as under:

23 Claim No. 8 has been rejected by the arbitrator. Now we proceed to consider claim No. 9 for loss arising out of turnover due to prolongation of work. The claim made under this head is in a sum of Rs. 10 lakhs. The arbitrator rightly held that on account of escalation in wage and prices of materials compensation was obtained and, therefore, there is not much justification in asking compensation for loss of profits on account of prolongation of works. However, he came to the conclusion that a sum of Rs. 6,00,000/-would be appropriate compensation in a matter of this nature being 15% of the total profit over the amount that has been agreed to be paid. While a sum of Rs. 12,00,000/-would be the appropriate entitlement, he held that a sum of Rs. 6,00,000/-would be appropriate. He also awarded interest on the amounts payable at 15% per annum.

24 Here when claim for escalation of wages bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "Loss of Profit". It is not unusual for the contractors to claim loss of profit arising out of diminution in turn over on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunleyn (B) & Co. Ltd. v. Cunard White Star Ltd.* [1940] 1 K.B. 740, by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6,00,000/-awarded to the claimant.

73. The learned Senior counsel for the Petitioners thereafter placed reliance on the judgment of the Hon"ble Supreme Court in the case of *State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd.*, to contend that when the claims are entertained by overlooking the agreement between the parties, it amounts to legal misconduct on the part of the Arbitrator and therefore, award passed by the learned Arbitrator cannot be sustained. It was contended that the damages have been awarded without any material. The Hon"ble Supreme Court in the case referred to above, was pleased to laid down as under:

52. We may also refer to another aspect. A sum of Rs. 12,072/-per day was claimed as damages by the contractor in a two line calculation without any supporting evidence or document. As noticed above, the claim was on the basis that the contractor would have manufactured 15 pipes per day of the value of Rs. 1,20,000/-and that the profit and overhead element out of it would have been 15% or Rs. 18,000/-per day. By taking the working days as 306 in a year and deducting 20% of labour component, the loss of profit per day was calculated to be Rs. 12,072/-per day. There is no evidence to show that the contractor was at

any point of time manufacturing 15 pipes a day of the value of Rs. 8000/-each or that he would have made a profit of 15% on the cost thereof. The claim is made on the ground that it is disabled from manufacturing that many number of pipes elsewhere.

53. There is no evidence that it had other contracts where it was required to manufacture that number of pipes or that it could not manufacture the required pipes for want of plant and machinery. Nor is there any evidence as to the value of the plant and machinery that had been mortgaged to the employer and what would be the cost of an alternative plant with a capacity to manufacture 15 pipes per day. If the plant and machinery was of the value of say Rs. 25 lakhs, or if the contractor could install another similar plant at a cost of Rs. 25 lakhs, then the loss at best would be interest on Rs. 25 lakhs and not anything more.

54. In fact even though there is no evidence, while making claim Nos. 36 and 37 the contractor has given value of the plant and machinery as Rs. 36,84,161/-. Even assuming the said figure to be true, at best the blocked up investment was only Rs. 36,84,161/-and the loss would be around 1% thereon per month by way of interest which would be Rs. 36,841/-per month. What is more strange is nowhere in the award the arbitrator considers the validity of the claim of Rs. 12072 per day nor accepts the said claim as valid or correct. In a reasoned award if the claim of a contractor is equated to proof of the claim, then it is obviously a legal misconduct and an error apparent on the face of the award.

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.

74. On consideration, I find force in the contention raised by the learned Senior counsel for the Petitioners.

75. The Hon''ble Arbitrator was impressed by the fact that the Respondent was able to prove that the allegations against the Petitioners, to show that the delay in execution of the contract, but the Hon''ble Arbitrator completely ignored the terms of the agreement executed between the parties which had the provision for extension of time without imposing any penalty. The lapses even if taken to be proved, could not be a ground for the Respondent to abandon the contract.

76. The Hon''ble Arbitrator also failed to note that in pursuance to tender, the Respondent competed was granted tender which he accepted. The very approach of the Hon''ble Arbitrator therefore, was perverse on the face of record, as the main question, i.e., actual dispute raised has not been considered. The Hon''ble Arbitrator rather proceeded on the question, "as to whether termination of the contract was valid or invalid", though cancellation and subsequent tender was

accepted by the Respondent, as he admittedly participated in the tender and was declared successful.

77. The Hon''ble Arbitrator did not consider the question in terms of Clause 53 of the Contract to record a finding, whether it was open to the Respondent to get a declaration that award was void which entitle him to claim damages. Thus, the finding of the Hon''ble Arbitrator is perverse and contrary to the reference, which can always be questioned u/s 34 of the Arbitration & Conciliation Act.

78. It may be noticed that the Hon''ble Arbitrator granted interest @ 12% p.a. from the date of demand till the award and 18; p.a. thereafter, by ignoring the specific clause in the agreement which debarred the claim of interest.

79. The finding is contrary to the law laid down by the Hon''ble Supreme Court in the case of Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager (Works), Palghat and Others, on which reliance was placed by the learned Senior counsel for the Petitioners. The Hon''ble Supreme Court has been pleased to laid down that

19. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when cause of action arose to the date of award.

80. The learned Senior counsel for the Respondent also admitted that the finding of the learned Arbitrator on Issue No. 11 cannot be sustained being contrary to the specific terms of the contract.

81. The Hon''ble Arbitrator on Issue No. 3 & 4, held that the claimant was entitled to Rs. 32 lakhs under this claim. In support of the finding, the reliance was placed on the "Hudson Building and Engineering Contracts 11th Edition Vol.1 Para 19-44 at Page 881 which reads as under:

In the case of prevention that is to say where the employer has wrongfully terminated the contract or has committed a fundamental breach justifying the building in treating the contract as it an end, and the later accordingly ceases work, the measure of damages will be the loss of profits which he would have otherwise earned, in the more usual case where the work is partially carried at the time when the contract is repudiated, the builder shall normally be entitled to the value of the work done, assessed at the contract rates, plus his profit on the remaining works.

82. The Hon''ble Arbitrator proceeded to decide that the claimant was also entitled to the claims under different heads, and for that purpose placed reliance on the Building and Engineering Contracts-Law and Practice by Markanda at Pages 906-928 and 1071- 1075 which reads as under:

2.36.1 Overheads: an allowance of 10% would be adequate for the contractors actual expenses on supervisory establishments, charges, travelling expenses, insurance of damages to plants and injury to labour.

2.36.2: We believe that in normal circumstances, an allowance of 10% of the profits cost to the contractor is reasonable. At Page 907, under the head "3.05 Contractors overheads and profit it is stated "the contractors over head cost include (1) Office expenses (ii) Share of head office expenses (iii) Legal expenses (iv) General Establishments, Watch and Ward (v) Local conveyances (vi) Travelling expenses (vii) Social welfare (viii) Salaries of Management and Staff etc. (ix) Publicity etc.

83. This finding on the face of it contrary, as the Building and Engineering Contract -Law and Practice by Markanda dealt with the claims arising for the prolongation of contract, whereas Hudson Building Engineering Contract dealt with the contract which could be completed, i.e. in terms of Section 53 of the Contract Act. The main issue which was referred to the Hon''ble Arbtrator has not been answered.

84. The case in hand was one where admittedly, the Contractor had not completed the work, and had only undertaken 33.99% of the work, therefore, could not claim anything over and above the compensation as quoted in Hudson Building and Engineering Contracts. The finding of the Hon''ble Arbitrator on this count is perverse and therefore cannot be sustainable in law.

85. For the reasons stated, O.P. Nos. 812 and 813 of 2010 are allowed. The awards passed by the learned Arbitrator dated 20.04.2008 in O.P. No. 582 of 2006 and 584 of 2006 are set aside, but with no order as to costs. The Petitioner would be at liberty to seek fresh reference in accordance with law.