M/S. Mascon Multiservices & ... vs Bharat Oman Refineries Ltd on 11 August, 2014

Author: Roshan Dalvi

Bench: Roshan Dalvi

(1) Arbp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Amk

ARBITRATION PETITION NO. 1088 OF 2010

M/s. Mascon Multiservices & Consultants Pvt. Ltd. .. Petition
Vs.
Bharat Oman Refineries Ltd. .. Responde

Mr. Zal T. Andhyarujina and Mr. Ranbeer Singh a/w. Ms. Shubhada Salvi &
Mr. L. A. Munim i/b Rajesh Kothari & Co. for the Petitioner.
Mr. Pradeep Sancheti, Sr. Advocate a/w. Mr. Anirudha Bhalwal, Ms. Hemali

Kurne i/b Vyas & Bhalwal for the Respondent.
ig CORAM : MRS. ROSHAN DALVI, J.

Date of reserving the Judgment : 23 rd
JULY, 2014.

Date of pronouncing the Judgment : 11 th
AUGUST, 2014.

JUDGMENT

1. The parties entered into an agreement on 30.12.1996 under which the petitioner was to provide services for obtaining statutory clearances from various authorities for setting up a Central India Refinery Project by the respondent. The parties agreed to refer the dispute therein to arbitration. The petitioner made 12 separate claims. The learned Arbitrator has rejected each one of the claims under the impugned award dated 5th March, 2010 which has been challenged in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) essentially as being vitiated by bias and upon the Arbitrator not having considered the evidence led before him and it being against the terms of the contract and various specified laws. It would be appropriate to deal initially with each of the claims separately and then with the general aspects of law vitiating awards.

(2) Arbp 1088/10 (J) CLAIMS Claim No.1 : Interest on Security Deposit

2. This is for the payment of interest on the delayed refund of the security deposit to the petitioner by the respondent. The security deposit was to be of 10% of the value of the tender and payable at specified times under Clause 3 of Section 3A and Clause 4 of Section 3B of the Special Conditions of Contract which run thus:

3.0 SECURITY DEPOSIT:

> 3.1 A sum of 10% of the accepted value of the tender shall be deposited by the contractor as security deposit with the Owner. For details refer Item 14 of Conditions of Contract attached.

Security Deposit will be released after successful completion of defects liability period of one year after completion of works.

4.0 SECURITY DEPOSIT:

> 4.1 A sum of 10% of the accepted value of the tender shall be deposited by the person/persons (hereafter called the Contractor) as security deposit with the Owner. For details refer Item 14 of Conditions of Contract attached.

Security Deposit will be released soon after completion of work in all respects as per scope of work and terms and conditions and after payment/passing of final bill by BORL.

3. There is a dichotomy when the security deposit is repayable.

Under Clause 3.1 the security deposit had to be released after the successful completion of the defects liability period of one year after the completion of work. The work was completed on 11.08.1999. The petitioner would contend that the security deposit became refundable on 10.08.2000. It was refunded on 10.10.2001. The petitioner claims interest on the wrongful withholding of the security deposit from 11.08.2000 to (3) Arbp 1088/10 (J) 10.10.2001, a period of

14 months.

Under Clause 4.1 the security deposit had to be released immediately after the completion of work and after the payment of the final bill. It is argued on behalf of the petitioner that the security deposit is, therefore, not payable after the defects liability period is over but immediately after the contract is completed. This contention is not wholly correct. Clause 4.1 requires release of security deposit not only upon completion of the work but upon passing of the final bill. The security deposit is released by the respondent along with the payment of the final bill on 10.10.2001.

4. Besides the petitioner had not completed the work entirely.

The contract was terminated. The respondent contended that the petitioner offered to do certain jobs being the work left undone which fell within the scope of its work in the defect liability period. The respondent would claim that this aspect would show that the petitioner had sought more time to complete the job.

5. Item No.14 of the Conditions of Contract consisted of 2 components being 7.5% to be recovered in installments through deduction @ 10% on each running bill of the petitioner and 2.5% which was given as bank guarantee under Clause 14.1 relating to security deposit in the agreement between the parties.

6. Under Clause 14.4 no interest was to be payable under security deposit.

7. The respondent would contend that Clause 14.4 implied that there would be no payment of interest on the security deposit at any time.

(4) Arbp 1088/10 (J) The petitioner would contend that non payment of interest was to be for the period of deposit and if that period was exceeded by the deposit not being refunded as per the terms of the contract at the end of the contract, interest would be chargeable upon the amount of security deposit withheld by the respondent under the general law. If that is so, on which date the security deposit became payable and was not paid so that the deposit would start earning interest which was not, until then, payable would have to be shown by the petitioner and interest thereafter would have to be demanded by the petitioner.

8. It is argued on behalf of the petitioner that the petitioner was deprived of the use of its own money from 10.08.2000 till 10.10.2001 and was entitled to be compensated for the deprivation under the general law. The petitioner has relied upon the judgment in the case of Secretary, Irrigation Department, Government of Orissa & Ors. Vs. G. C. Roy AIR 1992 SC 732 in para 43 of which the claim for granting interest pendente lite is considered. The petitioner's claim is not for interest pendente lite or under Section 34 of the CPC. However the judgment considered the case where an agreement does not proceed for the grant of interest and also does not prohibit the grant. It has been held that in such cases when a person is deprived of the use of money to which he is legitimately entitled, he has the right of interest, compensation or damages. In this case the fact that no interest was otherwise payable is set out in Clause 14.4 of the Contract.

9. There has been no provision for payment of interest for withholding the security amount. After the completion or termination of the contract the petitioner has claimed interest in the form of damages for wrongful withholding of a security deposit, albeit in the form of bank (5) Arbp 1088/10 (J) guarantee.

10. Mr. Sancheti relied upon the judgment in the case of Union of India Vs. Krafters Engineering and Leasing Pvt. Ltd., (2011) 7 Supreme Court Cases 279. It relates to a bar under the contract against payment for interest upon the earnest money or security deposit.

11. It would have to be seen whether the interest can be granted under the Interest Act for the security deposit wrongfully withheld for a period of time. That would be under the Interest Act, 1978. No demand for any specific rate of interest from a specific date is made. The petitioner's case would not fall under that legislation.

12. The petitioner has relied upon Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 (the Act) which runs thus:

> 31. Form and contents of arbitral award.- (1)....
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> (2) .....
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> (3) .....
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> (4) .....
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> (5) .....
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> (6) .....
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> (7)(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
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> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

Under the aforesaid provision when a money award is passed, award (6) Arbp 1088/10 (J) of interest at a reasonable rate until then may be made.

13. The section relates to a money award being passed upon any claim. Upon such money award reasonable interest has to be granted. In this case the security deposit has been refunded, though

belatedly. The award is, therefore, not for the refund of security deposit of any amount.

Interest which chargeable is, therefore, not upon an award for payment of money which is contemplated under the aforesaid sub-section. Interest which is claimed for the period during which the security deposit though having become refundable was not refunded cannot be claimed under Section 31(7)(a).

14. The learned Arbitrator has rejected the claim of interest on the security deposit on the ground that there is no provision in the contract for payment of interest nor any notice was received in respect of the same. This notice is the one contemplated under Section 3(1)(b) of the Interest Act, 1978 in respect of the date of refund of security deposit. The learned Arbitrator has also considered that the security deposit was refunded before the last bank guarantee extended by the petitioner expired on 31.12.2001. As to the claim on the facts of the case between the parties for the security deposit, the learned Arbitrator has considered that the petitioner itself sought time to rectify/complete the job as shown in the aforesaid letter. The learned Arbitrator concluded that consequently the due date of the refund of the security deposit amount would automatically get extended. It is argued on behalf of the petitioner that this finding has been made without considering the material on record because the petitioner never sought time to rectify defects in the job of the petitioner alleged by the respondent; the petitioner only sought time for the work it was enjoined to do under the contract during the defect liability period.

(7) Arbp 1088/10 (J) Counsel on behalf of the petitioner would have the Court go through various correspondence on what was the extra work which the petitioner was called upon to do outside the terms of the contract and in the defect liability period which would not extend the time for refund of security deposit whether those new jobs were done or not done by the petitioner. This cannot be gone into by this Court in a petition under Section 34 of the Act when the petitioner admittedly sought time to do same work which evidence has been considered.

15. The learned Arbitrator has considered the law relating to the claim, the extent of the bank guarantee given for the security deposit and the terms of the contract. Hence the petitioner has not shown a legitimate legal right to claim interest on the security deposit and the rejection of its claim by the Arbitrator cannot be interfered with.

Claim No.2 : Payment for ROU and ROW

16. The petitioner has submitted 18 running bills, the 18 th bill dated 09.09.1999 being the final bill after the termination of the contract by the respondent on 11.08.1999 for Rs.15.98 Cr. against which a payment of Rs.8.39 Cr. has been made leaving a balance of Rs.7.58 Cr. outstanding. The claim relates to the Right of Use (ROU) and the Right of Way (ROW) in private and public lands respectively through which the cross country crude pipeline for the Central India Refineries Project of the respondent runs. The petitioner was to obtain statutory clearances for the laying of the pipeline through private and public land. The petitioner was required to make various applications to various authorities as required at different places throughout the length of the pipeline.

(8) Arbp 1088/10 (J)

17. Item No.2.0 in Section 3A of the Special Conditions of Contract lays down the mode of the payment of ROU acquisition. This was to be as per Section VI of the General Conditions of Contract. This is specified in Annexure-1 to the Contract being the Schedule of Rates for the ROU acquisition. The ROU was to be upto 30 meters wide strip of land for 103000 meters of land. The unit of payment was to be per running meter @ Rs.250/- per unit. Hence the total payment payable under the Contract agreed upon by the parties as specified in the Contract was Rs.7.52 Cr. for the ROU. The quantity specified in the annexure was 301000 which is accepted to be running meters. There is no dispute with regard to the payment for ROU under Claim No.2.

18. Annexure-1 also provide the Schedule of Rates for the statutory approvals. This was in respect of ROW which was claimed through various government lands.

Item No.1 of the Schedule of Rates requires approvals in respect of various crossings. The approvals would be required from whichever ministry that was relevant. The schedule specified that each crossing may involve obtaining approvals of a number of authorities. The crossings contemplated in the schedule showing the description of the work were of 10 types- A to J being Railway Crossings, National Highways, State Highways, District/Village Roads, River Crossings, Canals/sub canals, Creeks/Nallas, Protected/Reserved and other Forests, Social Forestry and other miscellaneous crossings. The estimated quantity of the crossings are shown against each of the aforesaid specified crossings. The rate of payment was to be Rs.50,000/- or Rs.30,000/- per crossing. Consequently the amount (which is quantity multiplied by rate) is also specified in the annexures to the Schedule of Rates.

(9) Arbp 1088/10 (J)

19. This schedule would show that there were several estimated crossings of specified types for which approvals from all the relevant authorities was to be obtained. For each of the crossings the amount is specified. Hence the amount is dependent upon the crossings quantified in the Schedule of Rates. It would not matter how many approvals were to be obtained from various authorities per crossing. The amount payable to the petitioner was per crossing and not per approval. This is amplified in the description of Item No.1 of the Schedule of Rates relating to crossings by the term "..... preliminary NOC and statutory approvals/clearance etc. from the respective authorities". It has been explained to the Court and it may be clarified that in the case of a single crossing more than one approval may be required. However the schedule would show that the petitioner would be entitled to be paid for the specified numbers of crossings. For example a nalla may run through a Railway Crossing as also a Forest. The permission of the relevant Railway Authority as also the Forest Conservator would have to be obtained for that one crossing requiring two approvals. The petitioner would be paid Rs.50,000/- or Rs.30,000/- as specified in the rates as shown in the rate column in the Schedule of Rates upon obtaining both approvals.

20. Mr. Sancheti on behalf of the respondent has drawn the Court's attention to Clause 2.2 of the Contract setting out the authorities who would grant approvals for several of the approvals to be

obtained. He has shown that for road crossings the relevant authority is a Public Works Department and hence all the approvals of the Collector showing the road (Rasta) would relate not to Item No.1 D and is not payable thereunder but approval obtained from only one authority under Item No.2.

21. Similarly Mr. Sancheti has shown that the Municipal (10) Arbp 1088/10 (J) Corporation is the concerned authority for the crossing of roads, drainage etc. within the municipal boundary limit. Those special permissions would be under Item No.1 alone.

22. Item No.2 of the Schedule of Rates relating to the ROW was for approvals of various authorities other than for the crossings specified in Item No.1. The petitioner was to be paid "per approval, per district, per authority". The authorities from whom the approvals were required were also specified in the description to Item No.2 in the Schedule of Rates. The estimated quantity of approvals required from all or some of such authorities was specified to be 475. The rate at which the petitioner was to be paid was Rs.50,000/- per approval per district, per authority. The amount payable was specified to be Rs.2.37 Cr.

23. Item No.1, therefore, dealt with the approvals required for the various crossings. Item No.2 dealt with the approvals required for other than the crossings. Both the approvals were payable at the rate of Rs.50,000/- per crossing and some at the rate of Rs.30,000/- per crossing and per approval, per authority, per district. It appears that the pipeline ran through 9 districts. The respondent would contend and the learned Arbitrator has held that the petitioner would be paid Rs.50,000/- per district. For 9 districts the petitioner has been awarded Rs.4.5 lacs instead of Rs.2.37 Cr. specified in the Item No.2 of the Schedule of Rates for 475 approvals estimated or contemplated by the parties and forming a part of the money contract. The nallas shown in the various approvals of the Collector are the nallas en route the pipeline which would fall under Item No.2 and being the various approvals obtained from but one authority being the Collector, the petitioner would be entitled to one such payment per district.

(11) Arbp 1088/10 (J)

24. It may be mentioned that this is the most substantial part of the claim of the petitioner. The main contract was for making applications for various approvals. Mr. Andhyarujina contended that the payment depended upon the number of approvals obtained.

The emphasis about the requirement of a number of approvals, albeit of one authority in each district in Item No.2 is shown from the Clause 5.0 of Section 3B of the Special Conditions of Contract which runs thus:

> 5.0 Number of approvals indicated in Scope of Work are approximate and contractor shall be paid according to the actual approvals obtained as certified by engineer-in-charge.

This clause is the provision for ROW which is essentially based on government approvals.

Mr. Andhyarujina contended that if the petitioner was to be paid Rs.4.5 lacs for all the approvals of various authorities to be obtained in a given district, the contract would not have specified 475 as the quantity and Rs.2.37 Cr. as the amount in the Schedule of Rates. Mr. Sancheti argued that there are various authorities shown in Item No.2 of the Schedule of Rates. If the petitioner obtained approvals of many authorities in a single district, he would be paid for the number of approvals of each authority obtained in a single district. If the petitioner obtained various approvals, but of only one authority, in each district (as it has), the petitioner would be entitled to only one payment for such authority (in this case the Collector) of each district. That having been done, the petitioner has been granted one payment for each of the 9 districts as per the contract rate of Rs.50,000/- per approval, per authority per district X 9 and paid Rs.4.50 lacs.

(12) Arbp 1088/10 (J)

25. The meaning and interpretation of the expression "per authority, per approval, per district" has to be understood from the contract itself. Each of these 3 terms must be given effect. Hence payment has to be made for each approval of each authority in each district. Of course, these must be the approvals which are actually necessitated and cannot be mischievously broken up to create more than one approval for a single unit of land in a given district considering that it would be en route the pipeline.

26. We are required to consider the case of many approvals but of a single authority in each district. If the argument of Mr. Sancheti was to be accepted, the emphasis upon the words "per approval" would be diluted. If that one authority has given or could have given but one approval for the length of the pipeline in that district, one approval would suffice. If that could not be so, various approvals would have to be obtained. This would merit separate payments per approval (for each approval) because obtaining various approvals as necessitated would require work to that extent to be expended. It is, therefore, that the parties set out the approximate number of approvals required in Item No.2 of the Schedule of Rates. Hence various approvals obtained as required in each and every district (without exception) through which the pipeline ran would have to be paid. If the various approvals are of various authorities, for each of the approvals of each of the authorities in each of the districts the payment would have to be made. This would be the only meaningful interpretation of the expression "per district" without ignoring "per approval".

27. The petitioner was not to be paid only when the final approval was in fact obtained. The petitioner was entitled to be paid installments as (13) Arbp 1088/10 (J) set out in Clause 3.1 of the Contract. The petitioner was to charge the rates under Clause 3.1 of Section 3B which runs thus:

> 3.1 Statutory Clearances 20% of total quoted fee is payable on completion of collection of data and submission of application to all concerned authorities.

60% of fee is payable against receipt of approval/permission from concerned authorities for each item.

10% is payable on completion all activities and issue of certificates from contractor that all clearances required for Cross Country Crude Pipeline have been obtained.

The remaining 10% is payable after completion of 1 year defect liability period.

This clause would show the amount claimable by the petitioner from time to time. It would claim the first 20% of the amount so soon as the petitioner collected the data and submitted the applications to the respective concerned authorities. If the petitioner was to be paid for one approval in one district, it could not be paid for many applications. The petitioner has made a number of applications for Item Nos.1 & 2 of the Schedule of Rates and the respondent has signed a number of applications. The petitioner would, therefore, be entitled to Rs.10,000/- per such application made. If the petitioner was entitled to be paid the 1 st installment of Rs.10,000/- for each of the applications made, how could it not be paid for each of the corresponding approvals obtained upon these applications?

It is argued on behalf of the respondent that the bill of the petitioner has itself shown several applications not signed by the respondent and several applications cancelled. The petitioner would not be entitled to any amount on such applications which are disputed by the respondent. The computation would have been required to be done in arbitration. It has been the case of the respondent that the petitioner has claimed not as per (14) Arbp 1088/10 (J) the approvals and the district but upon the number of applications. The petitioner would, of course, not be entitled to be paid on such basis. If the number of applications made are more than the approvals required in each district, the applications would not matter.

28. The petitioner would be entitled to further 60% of the total amount of Rs.50,000/- upon obtaining approval/permission from the authorities for each item being item Nos.1 & 2 of ROW. Hence in the later bills for each approval obtained, the petitioner would claim Rs.30,000/-. It would be anomalous to contend that the petitioner would be entitled to be paid for a number of applications made but for just one approval in each district unless, of course, one application and one approval for the length of the pipeline in each district would suffice.

29. It would, therefore, have to be seen how the petitioner has submitted its final bill which remained partly unpaid upon the disputes of the respondent. The bill shows the description of the item for ROW as stated in the Schedule of Rates. It further shows the tender quantity also precisely as per the quantity mentioned in the Schedule of Rates. This would be the approximate quantity as specified in the Schedule. The quantity shown in the bill shows the quantity upto previous bill, the quantity since previous bill and the total upto date. It is argued on behalf of the petitioner that the quantity upto previous bill shows the quantity that was sanctioned in the previous bill. It is argued on behalf of the respondent that this column shows the quantity charged by the petitioner upto the previous bill. Mr. Sancheti would argue that the petitioner has grossly exaggerated the quantity since the previous bill in the final bill. Mr. Andhyarujina argued that the column of quantity of the previous bill shows a low amount because the higher amounts per approvals obtained were (15) Arbp 1088/10 (J) rejected though demanded in the previous bill and only the quantities accepted and paid are shown as quantities "paid" upto previous bill as the bills were running bills and the

petitioner would claim all the unpaid amounts in the final bill.

30. The petitioner has charged 20% of the amount chargeable which forms the first part of the payment for statutory clearance under Clause 3.1 of Section 3B cited above showing the charge until completion of data and submission of applications to all the concerned authorities.

This is followed by 60% charged for the approvals obtained and further 10% and 10% for completion of activities (which would be upto 11.08.1999) and after 1 year defect liability period (though the period would expire one year after 11.08.1999).

31. Under Item No.2 of the bill which relates to the approvals to be obtained for other than the crossings, the petitioner has similarly sought amounts for the approvals upto previous bill, since the previous bills and the total number of approvals. The petitioner would be entitled to be charged for the precise number of approvals obtained from each authority in each district where the pipeline ran and the ROW was claimed. Of course, the petitioner would have to show why only one approval of the Collector would not suffice for the entire length of the pipeline running through one district.

32. The Arbitrator alone would have to decide the actual computation of the amount claimed under the 18 th final bill of the petitioner. It would be for the petitioner to show the precise number of approvals obtained from the various authorities for other than the crossings. That arithmetical calculation cannot be done by the Court.

(16) Arbp 1088/10 (J)

33. The claim under Item No.2 was made by the petitioner upon the applications made by it in that behalf. The petitioner has produced the list showing the approvals granted in respect of various survey numbers upon the applications made. These show 269 approvals granted for one or more survey numbers. The petitioner's claim is based upon one or more survey numbers totalling 778 survey numbers. The petitioner claims sum of Rs.50,000/- for 778 such survey numbers. The petitioner has shown a list of other approvals for government lands showing inter alia the villages as also the districts and the survey numbers for the ROW claimed under each file bearing a separate number. It would be for the petitioner to show in arbitration the precise number of approvals stated to have been obtained in various villages and tehasils of each district. The total number of approvals obtained are shown to be 778. The petitioner would have had to actually show 778 approvals of the authorities and, of course, the fact that all of those were necessitated. The listing of the petitioner only shows the number of survey numbers involved totalling to 778. The petitioner cannot be paid on the basis of survey numbers because that is not the part of the contract. The petitioner would not be entitled to claim for more than one survey number merely because the pipe ran through more than one survey number since the contract between the parties is based upon the number of crossings and the number of approvals and not survey numbers.

34. However if the petitioner has had to obtain separate approvals for each survey number from the same authority or from separate authorities, the petitioner would have to be paid for such approvals as per the rates mentioned in the Schedule of Rates.

35. Under the contract between the parties the petitioner can (17) Arbp 1088/10 (J) claim for Item No.1 which are specific approvals for each crossing (per crossing) and not for applications made or the survey numbers of the land in respect of which the application is made. The petitioner can claim for Item No.2 which are general approvals in each district (per approval, per authority, per district). These are items other than crossings. The petitioner must, therefore, show which approval would fall under which item in respect of its claim.

36. The petitioner never produced any approvals (except two by way of illustration) before the learned Arbitrator. The petitioner was required to obtain approvals for each crossing under Item No.1. The petitioner has produced a few approvals for the perusal of the Court showing that the petitioner's claim would fall under Item Nos.1 D & G as they relate to village roads and nallas. The contract shows the estimated quantity of those crossings to be 237 and 541 for which the petitioner was to be paid Rs.71 lacs and Rs.1.62 Cr. respectively as the estimated amount upon the rate of Rs.30,000/- per crossing for the village roads and nallas.

If the village roads and nallas are not crossings but approvals are required to be obtained in respect of those village roads and nallas (which are other than crossings in Item No.1), the petitioner would require to obtain the approvals of one or more of the authorities in the district through which the pipeline was to run under Item No.2. This would be the general approval upon application made in that behalf and required to be paid by installments as set out in Clause 3.1 of the Contract. Since the petitioner has not produced 269 approvals stated to have been obtained by the petitioner, the learned Arbitrator could not have considered them. Consequently the entire claim of the petitioner that there were 269 approvals cannot be seen. This Court cannot go into the evidence not produced before the Arbitrator. It was for the petitioner to show that the (18) Arbp 1088/10 (J) approvals for the roads and nallas (Rasta and Nalla) are with regard to the crossings and not the approval for the various survey numbers en route the pipeline.

37. The petitioner has obtained all the approvals only from the Collector of the respective districts. The pipeline runs through 9 districts.

9 Collectors have, therefore, given their approvals in respect of various matters including village roads and nallas which are not crossings. Hence the petitioner claims to be paid in its final 18th RA bill for as many approvals obtained by it as shown in the list showing applications made for Item No.2 shown as other "authorities; government land".

38. It would, therefore, have to be seen what the parties contemplated by the number 475 as the quantity to entitle the petitioner to Rs.2.37 Cr @ Rs.50,000/- per approval per authority in a given district en route of the pipeline for other than the crossings in Item No.1 given that a number of applications are made by the petitioner and signed also by the respondent. This exercise is not seen to have been undertaken. Approximately 475 contemplated applications seem to have been wholly ignored.

39. The petitioner has also claimed the last stage payment for ROU & ROW.

Clause 6.0 in the contract shows the mode of payment about ROU acquisition. Under that clause the last 5% is payable on completion of all activities and issue of certificate by the ROU acquisition contractor that all jobs have been completed for ROU acquisition for the pipeline. The petitioner is the ROU acquisition contractor. Hence when all the activities of the petitioner are concluded, the petitioner would issue the certificate.

(19) Arbp 1088/10 (J) Such certificate is issued. The petitioner claims to be entitled to the last payment of 5% of the amount which came to be retained in respect of the ROU. The respondent claims that this amount would be released if no claims certificate is given by the petitioner as demanded by the respondent in its letter dated 17.06.2000. That however is not in terms of Clause 6.0 of the Contract. The petitioner would not be held not entitled to claim the last of the payments of the ROU only because he has made other claims.

40. The claim for the last stage payment under Item Nos.1 & 2 for the ROW is governed under Clause 3.1. The last payment of 10% is payable after completion of one year defect liability period. That period has long since expired. The payment is not made as per the statement supplied in the letter dated 17.06.2000.

41. The learned Arbitrator has rejected the entire claim of the petitioner on the ground that it is an afterthought and made subsequent to termination of the contract by the respondent. This is in view of the quantity upto previous bill having been shown to be 9 (for 9 districts) since the 4th RA bill dated 04.10.1996. The petitioner, of course, would be entitled to claim for as much of the work done upto the date of termination of the contract even if the claim was made subsequent to termination.

42. The learned Arbitrator has considered the claim for the ROW under the afore-stated Clauses 1 & 2 of the Contract under Claim No.2 in the award. He has considered the separate items for which the claims are payable under both the items for crossings as also for government land. He has observed that the claim is raised by the petitioner not on the basis of approvals but on the basis of number of applications which are actually for separate survey numbers. He has considered the denial of the respondent (20) Arbp 1088/10 (J) for all the claims under various bills of the petitioner. He has concluded that the contract relates to approvals and not the number of applications.

This would show the mind of the learned Arbitrator considering the importance of approvals as against applications. He has even seen the difference between 269 approvals and the claim for 778 approvals based upon separate survey numbers. The petitioner is seen to have bifurcated its claim in a number of parts dependent upon the survey numbers when the unit of payment is per approval, per district, per authority and not per application or per survey number. This argument has been correctly considered by the learned Arbitrator. The learned Arbitrator has concluded in that indeed the petitioner has not established that the approvals which are obtained by the petitioner are for the nallas which can be termed as crossings and which would fall under Item No.1. Indeed since the petitioner has admittedly not produced the approvals at all, it would not be able to establish the approval claimed to have been obtained and it is correctly observed not to have established that those approvals are for nallas contemplated in Item No.1. The learned Arbitrator has further observed that the claim was made also for applications which are cancelled and the applications

which were not signed by the respondent on which also he cannot be faulted.

43. Consequently the learned Arbitrator has otherwise acted within his jurisdiction upon the material on record having considered the contentions of the petitioner as also the respondent.

44. It would also have to be seen whether the learned Arbitrator acted as per the terms of the contract. Indeed only the quantity numbers mentioned in Item No.2 of the Schedule of Rates is not accounted for in the award. The petitioner's applications signed by the respondent, which were (21) Arbp 1088/10 (J) in hundreds, would itself show that what was contemplated in quantity were for many applications and various authorities for obtaining various approvals in a given district. To that extent the Award of rejection falls foul. The approximate estimated quantity in a contract cannot be ignored. The difference between the estimated quantity of approvals for payment to be considered per approval, per authority, per district and the approvals allowed is too large to be bypassed. The respondent would require to explain the estimated quantity. The petitioner would require to show the actual number of approvals legitimately required and obtained for nallas & rasta which are crossings under Item No.1 and for land en route the pipeline under Item No.2. The Award has not considered whether the last stage payment for ROU and ROW claimed by the petitioner is acceptable or why it is rejected. This would fall under Claim No.2. Hence the rejection of Claim No.2 in its entirety without considering these 2 aspects would have to be and is set aside.

Claim No.3 : Compensation for delay/liquidated damages

45. This claim is made under Clause 18 of the Contract which runs thus:

> 18. COMPENSATION FOR DELAY/LIQUIDATED DAMAGES:
>
> The time allowed for carrying out the work as entered in the Contract, shall be strictly observed by the Contractor. The work shall through out the stipulated period of the contract be proceeded with due diligence (time being essence of the Contract) and the contractor shall pay to the Owner as compensation an amount equal to 1% or such an amount as the Engineer-in-Charge (whose decision in writing shall be final), may decide on the amount of the contract value for every week that the work may remain incomplete as per the time schedule subject to a maximum compensation of 10% of the contract value after which period action will be taken by the Engineer-in-Charge under the provisions of the Contract.
>
> (22) Arbp 1088/10 (J) Time is the essence of the contract. The petitioner shall have to pay the compensation at the rate agreed in the clause for the delay in completion of the work. The compensation of 1% was to be paid for every week of delay when the work remained incomplete subject to the maximum compensation of 10%. 10% would, therefore, be charged for 10 weeks of delay. If the delay still further continued the engineer-in-charge may take action.

46. It is contended by the respondent that the work was delayed for more than 10 weeks. The respondent has capped the payment to 10%. That amount has been withheld from the payment made to the petitioner.

47. The petitioner contends that there was no engineer-in-charge.

The respondent contends that the contract would never proceed without an engineer-in-charge at the site. For every aspect of the work the engineer- in-charge would have to be consulted and would be the first adjudicating authority. However, the presence of the engineer-in-charge would be necessitated if action was to be taken against the petitioner. No action has been taken. Much after the period of the contract expired, the contract has been terminated. The termination is not challenged; in fact it is accepted and the petitioner has contended that the contract period was completed on the date of the termination as shall be seen presently.

48. The petitioner's claim of exception to the liquidated damages of Rs.1.26 Cr deducted and appropriated by the respondent from the amount payable under its final RA bill dated 09.09.1999. This has been considered in Clause 3 of the Award. The petitioner claims that time was not made the essence of the contract. The petitioner also contended that the action for liquidated damages should have been initiated by the (23) Arbp 1088/10 (J) engineer-in-charge. It stated that the delay was attributable not to the petitioner, but to facts beyond the control of the petitioner and which were attributable to the respondent and the petitioner also carried out activities beyond the scope of the contract.

49. The petitioner further contended that the respondent never made loss despite the delay as the pipeline was not laid until the date of the arbitration and hence it could not deduct liquidated damages and the percentage could be only determined by the engineer-in-charge.

Consequently the amount was illegally withheld and had to be given to the petitioner.

50. The respondent contended that the date of commencement of work was 10.10.1996. It was to be completed on 09.10.1997. It remained incomplete through 1999 and even 2000. The petitioner did not deny but justified the delay on various grounds. The respondent contended that the delay was 670 days. The petitioner's letter seeking extension of time as also request for waiver were refused. The delay was not due to force majeure. Hence under the terms of the contract the respondent could charge upto to 10% of the contract price. It is only if the delay exceeded 10 weeks, action against the petitioner for causing the delay could be taken by the engineer-in-charge. The respondent claimed that the petitioner failed and neglected to complete the job. Yet the petitioner was paid the amount for whatever work was completed job (though in part) at a later date.

51. There is nothing in the contract to show that the engineer-in- charge must apply for or determine the loss due to the delay. The term liquidated damages itself implied that the extent of damages is fixed and (24) Arbp 1088/10 (J) liquidated by the parties in the written contract.

52. The learned Arbitrator has considered the respective submissions of the parties. He has observed that there is delay of more than 10 weeks. He has observed that out of 670 days over 70 days or 10 weeks are clearly on account of the petitioner itself. Hence liquidated damages could be charged. The learned Arbitrator has further considered that the engineer-in-charge is indispensable to such contract and that all verification would be upon the recommendations of the "site in-charge". It would imply that the person in-charge of the site would be the concerned engineer. The petitioner would take exception to the expression "site in- charge". It would make no difference. The rule of interpretation of the contract would allow the respondent itself to deduct the specified percentage of the liquidated damages. Hence the reasoning of the learned Arbitrator upon the contention taken by the petitioner requires no interference.

53. The petitioner claims that the delay in the work was caused because of extraneous factors. It claims to have proved that the delay is not caused by it upon the letters dated 5 th July, 1997, 27th September, 1997, 28th September, 1997 etc. The petitioner has mentioned various reasons or justifications for the admitted delay in the execution of work of obtaining the approvals of various government authorities. The petitioner has applied for extension of the time limit on the ground that the delay has been caused of specified periods specially the gross delay which is demonstrated in the letter dated 28th September, 1997.

54. The respondent by its letter dated 10.10.1997 accepted the petitioner's application for extension only on account of the Patwari strike.

(25) Arbp 1088/10 (J) The respondent claimed that the other reasons stated by the petitioner are not admissible. In the 18th final bill dated 09.09.1999 the petitioner annexed the time limit extension proposal "as annexure A". It set out 15 major reasons for seeking extension of time. It further annexed a columnar statement showing the period of days of delay on account of various reasons totalling to 285 days.

55. Mr. Andhyarujina relied upon the judgment in the case of Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705 which has been considered by the learned Arbitrator also. The judgment specifically deals with the liquidated damages contemplated and agreed by parties and specified in written contracts which are payable upon breach by delay in completion of contract essentially under Section 74 of the Indian Contract Act, 1872 which runs thus:

> 74. Compensation for breach of contract where penalty stipulated for.- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

This section came to be considered. It may at once be mentioned that the section itself specifies the entitlement of the party complaining of the breach whether or not actual damages or loss was

proved. Loss or damage would have to be proved by the party claiming damages under Section 73 of the Indian Contract Act which runs thus:

> CHAPTER VI OF THE CONSEQUENCES OF BREACH OF CONTRACT (26) Arbp 1088/10 (J)
>
> 73. Compensation for loss or damage caused by breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The distinction between Sections 73 & 74 is that in the latter case the parties themselves quantified the damages. Consequently in such cases the actual losses or damages had not to be proved upon the breach or delay being proved; the quantified damages would be payable.

56. This is what has been held in para 46 of the judgment:

> The party suffering breach is entitled to receive compensation for the loss that arises from the breach. When the parties know that a particular loss is likely to result, they can agree for payment of such compensation.
>
> Hence they need not lead evidence to prove the damages. If this agreed damages is by way of penalty, the Court would grant any reasonable compensation but on a proof of damages. Hence if the amount stipulated is unreasonable, the party claiming the specified amount must prove the loss or damage.
>
> The Court further observed in para 64 of the judgment that if the compensation named in the contract was a penalty, reasonable compensation for the loss suffered would be granted but if the compensation named in the contract is the genuine pre-estimate of the loss that the parties knew they would make upon a breach of the contract, there was no question of proving such loss. The party claiming damages is not required to prove the actual loss but the other is then required to lead evidence for proving that no loss has occurred.
>
> (27) Arbp 1088/10 (J)
>
> 57. The ratio as laid down by the Supreme Court is, therefore, is thus:
>
> Damage or loss has to be proved. The liquidated damage or loss agreed by the parties has not to be proved unless it is in the nature of the penalty. Liquidated damages would have to be granted without proof if the condition for which it is agreed to be granted is satisfied. That would be a particular breach - in this case it is the delay in

> carrying out the work under the contract, time being of the essence, as specified in Clause 18 of the Contract between the parties.
>
> 58.

The aforesaid correspondence of the petitioner itself makes it clear that there was delay of far more than 10 weeks. The learned Arbitrator was, therefore, fully justified in concluding that at least 10 weeks delay is not only shown but accepted by the petitioner. Hence he allowed 10% of the contract value deducted by the respondent.

59. The judgment in the case of Saw Pipes (supra) has been followed in the case of Bharat Sanchar Nigam Ltd. & Anr. Vs. Motorola India Pvt. Ltd. 2008(3) Arb. LR 531 (SC). In that case the contract provided in Clause 15.2 that delay by the supplier in performance of the delivery obligation would render it liable to sanction, forfeiture liquidated damages and/or termination of the contract. In Clause 16.2 it provided that if the supplier failed to deliver the goods and services, the purchaser would be entitled to recover 0.5% of the value of the delayed quantity of goods and services for each week of delay upto 10 weeks and thereafter at a higher rate etc. These clauses came up for consideration under Section 74 of the Indian Contract Act. In para 10 of the judgment the Supreme Court held that quantification of the liquidated damages under Clause 16.2 was (28) Arbp 1088/10 (J) material. It held that:

> It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement.
>
> The Supreme Court observed that under Clause 15.2 the supplier was liable for payment of liquidated damages. Under Clause 16.2 whether the supplier caused any delay in delivery would be seen. Reading Clauses 15 & 16 together, it held that Clause 16.2 will come into operation only after a finding is entered that the supplier caused delay in delivery. Clause 16.2 is, therefore, attracted only after the supplier's liability is fixed for delay in Clause 15.2. Consequently the liability of the supplier is different from the quantification of the amount to be paid upon such liability. It observed thus:
>
> Fixing of liability is primary, while the quantification, which is provided for under Clause 16.2, is secondary to it.
>
> I do not see how this judgment would show that liquidated damages are not payable. Once it is seen that there has been a delay in the performance of the contract which tantamounts to a breach, the damages specified and liquidated by the parties under their own agreement would be payable without any proof of loss.

60. Both the aforesaid judgments are followed in the case of M/s.

J. G. Engineers Pvt. Ltd. Vs. Union of India & Anr. 2011(3) R.A.J. 528 (SC). The Court had to consider the question of breach and the consequent liability upon quantification of damages. Setting

out the aforesaid observations in para 10 of the judgment in the case of Bharat Sanchar Nigam Ltd. & Anr. Vs. Motorola India Pvt. Ltd. 2008(3) Arb. LR 531 (SC) the Court held that quantification of liquidated damages would follow the delay; "there has to be delay in the first place".

(29) Arbp 1088/10 (J)

61. Mr. Andhyarujina relied upon the judgment of this Court in the case of Oil and Natural Gas Corporation Ltd. Vs. Rais Coastal Survey & Consultancy Services Pvt. Ltd. 2005 Law Suit (Bom) 311 to show that the Court interpreted the judgment in the case of Saw Pipes (supra) to hold that if the Court came to conclusion that no loss is likely to occur because of the breach, the Court would disallow compensation and hence in every case where damages are claimed for breach of contract, proof of loss is a condition precedent. This would be the loss under Section 73 of the Indian Contract Act which is distinct from Section 74, both of which came to be considered in the case of Saw Pipes (supra).

62. The case of Saw Pipes (supra) as also the earlier cases of Fateh Chand Vs. Balkishan Dass, 1963 DGLS (soft) 2 : AIR 1963 SC 1405, Maula Bux Vs. Union of India, 1969 DGLS (soft) 286 : AIR 1970 SC 1955 and Union of India Vs. Raman Iron Foundry, 1974 DGLS (soft) 95 : AIR 1974 SC 1265 have been considered by the learned Single Judge of this Court in the case of Oil & Natural Gas Corporation Ltd. Vs. Oil Country Tubular Ltd. 2011(5) Bom.C.R. 198. He concluded that when the contract provided for the payment of liquidated damages upon a breach, the aggrieved party could recover only the actual damages suffered by it and hence would have to prove the actual damages suffered by it and cannot rely merely on the provision for liquidated damages in the contract.

The learned Judge has set out para 46 of the judgment in the case of Saw Pipes (supra) which lays down 2 contingencies:

> (i) When the party suffers by the breach of contract in which case he would be entitled to the loss which arises from the breach, and
>
> (ii) When the parties know that the particular loss would result from a breach, they can agree for payment of specific compensation, in such a case (30) Arbp 1088/10 (J) there is no need to lead evidence for proving damages arising from the breach.

It may be mentioned that the first part would be covered by Section 73 of the Indian Contract Act which deals with compensation for loss or damage caused by the breach of contract. The second contingency would arise under Section 74 of the Indian Contract Act when the parties know of the amount of loss which would be the result of the breach and agree for payment of such loss. When the payment of a specific loss occurred is agreed upon, there is naturally no requirement to prove the loss which is already agreed upon. In such a case the party who suffered the damage must only prove the breach.

63. Therefore, it has been held in Saw Pipes (supra) that when there is no loss which arises from a breach, the specified compensation is not payable. Therefore it is held in Saw Pipes (supra) that the

party who alleges that no loss has been caused by the breach of the contract must prove that fact.

The learned Single Judge of this Court however has held that the burden is always on the parties who claimed compensation to prove actual loss even for reasonable compensation. This is much like the judgment in the case Rais Coastal (supra) in which even after considering the judgment in the case of Saw Pipes (supra) the learned Single Judge held that in every case where damages are claimed for breach of contract, proof of loss is a condition precedent. This goes directly contrary to the judgment in the case of Saw Pipes (supra).

64. It may be mentioned that the claim for damages upon the breach of contract and the claim for compensation where the penalty is stipulated is covered in Chapter VI of the Indian Contract Act, 1872 which (31) Arbp 1088/10 (J) deals with the consequences of breach of contract. Section 73 arises whenever a contract is breached, it is availed of by the party who suffers the breach. It grants compensation for the loss caused by the breach. The compensation is given to the party who suffers it and has to be paid by the party who has breached the contract. The party who suffers, therefore, has to prove that the contract was breached and what damage is suffered by him/her/it. He would be entitled to such damage as would naturally arise in the usual course of things from such breach. It would be what the parties knew to be the result of the breach. Such a party would, therefore, essentially have to prove the extent of loss that was caused by the breach.

65. Hence when damages are not specified in a contract, the damages proved can be claimed under Section 73 of the ICA. Section 74 is in the nature of exception to Section 73. It applies only when the parties specify the amount that would be paid if the contract is breached. If an amount is specified there would be no need to prove that amount; it is known to the parties and it is specified by the parties. Hence when such a contract is breached only the breach has to be shown. The expression "whether or not actual damage or loss is proved" in Section 74 would show that there would be some contingencies in which actual damage or loss may not be proved. That would be only if a sum is specified in the contract as the damage that would be caused. That would be the liquidated damage or the specified damage. Such damage may be in absolute term or may be by way of percentage; in this case as also in the case of Saw Pipes (supra) it was by way of percentage. It was a liquidated damage. It was stipulated under Section 74 of the Indian Contract Act. The actual damage would not have to be proved because whatever be the actual damage, only the stipulated compensation can be granted. If it is in a range such as in this contract from 1% to 10% of the contract price, it must be granted only (32) Arbp 1088/10 (J) within that range. The maximum extent may not be granted. That would be in the discretion of the adjudicating authority. That would be granted without proof of actual damage.

66. It is argued by Mr. Andhyarujina that even if the actual damage is not to be proved, some damage has to be proved. There is no such requirement in the statute. That cannot be added by the Court. If so done it would tantamount to legislation. Mr. Andhyarujina drew the attention of the Court to the judgment of the learned Single Judge in the case of Rais Coastal (supra) to show that the proof of loss has to be made.

Hence even if the actual damage is not shown, some loss has to be shown in every case. The expression "in every case" directly militates against the 2 contingencies specified in Sections 73 and 74 of the Indian Contract Act. The requirement of proof of some loss out of the entire actual damage or loss is outside the bounds of the legislation and would not carry the case of the parties seeking damages much further. By proving some part of the loss the party cannot claim liquidated damages which it would claim only if loss has to be proved. If loss has to be proved, it has to be to the extent of the loss suffered. If the party would prove the loss upon the breach of the contract, it would prove it under Section 73 itself. The very purpose of enacting Section 74 would be lost. Section 74 itself would be rendered otiose. It would mean that whether or not any amount or compensation is stipulated in the contract, the party must prove some loss. The reasoning seems contrary to the statute.

Similarly the expression "the burden is always on the parties who claim compensation to prove actual loss" in the case of Oil Country (supra) which goes even further than the case of Rais Coastal (supra) would be against the specific provision of Section 74 which exempts the requirement of proof in view of the compensation already specified.

(33) Arbp 1088/10 (J)

67. This Court, therefore, would, as it should, go by the specific ruling in the case of Saw Pipes (supra). The learned Arbitrator has also considered appropriately the said ruling basing his reliance upon Section 74 of the Indian Contract Act whilst considering claim No.3.

68. The position in law as laid down in para 65 in the case of Saw Pipes (supra) would run thus:

> .... if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach.

69. This Court is bound by the ultimate ruling of the Supreme Court in the case of Saw Pipes (supra). The parties' case is covered by that ruling. This is notwithstanding the aforesaid two judgments of the two learned Single Judges of this Court.

70. Mr. Andhyarujina would, therefore, argue that even if it is accepted that the petitioner would have to prove that no loss occurred by the breach committed by the petitioner, the petitioner has proved the same.

Mr. Andhyarujina relied upon claim No.3 on account of liquidated damages. The claim in that behalf runs thus:

> .... as on today, the pipeline has not been laid, and therefore, no any loss in any manner whatsoever caused to the respondent, and when no loss is caused to the

> respondent, then in that circumstances, the respondent had no any legal right to deduct any amount towards liquidated damages....
>
> (34) Arbp 1088/10 (J) Mr. Andhyarujina would claim that this position has remained untraversed and is accordingly proved. No oral evidence is, therefore, required to be led. The respondent has denied and disputed the claim of liquidated damages made by the petitioner as alleged in Claim No.3A in para 13.8.3 of its written statement. The respondent has not specifically denied that no loss was suffered by it because the pipeline was not laid even when the arbitration was in progress which was several years after the termination of the contract in 1999.

71. Whereas Mr. Andhyarujina would argue that a general denial of this nature would not constitute denial of the fact of the respondent not having laid the pipeline and also of the fact of respondent not having incurred any loss thereby, Mr. Sancheti would argue that the general denial would encompass these facts and also that the fact that there is no traverse has neither been pleaded before the Arbitrator nor has been considered by the learned Arbitrator and nor is it pleaded in the petition as one of the grounds.

72. The award would show the various claims of the petitioner under Claim Nos.3A & 3B as cited above in Clause 3.1 of the award. It also shows the respondent's reply in Clause 3.2 thereof. This is considered in Clause 3.3 of the award by the learned Arbitrator. The learned Arbitrator has inter alia observed that the petitioner has simply made a statement that the respondent did not suffer any loss and has not led any evidence thereon. Though it is argued on behalf of the petitioner that no further oral evidence was required, it having not been specifically traversed, it is not shown to have been argued as such in the arbitration.

(35) Arbp 1088/10 (J)

73. Mr. Andhyarujina drew my attention to various grounds in the petition relating to the claim made by the petitioner in respect of liquidated damages deducted by the respondent. The petitioner has indeed stated in the petition that no loss was caused to the respondent. The petitioner has relied upon Section 74 of the Indian Contract Act and claimed that in view of no loss no amount can be claimed under Section 74 of the Indian Contract Act. Mr. Andhyarujina claimed that this ground is a compendious way of showing the petitioner's objection. The specific submission that this case has not been traversed or has been left untraversed is not in so many words made in the petition. Mr. Sancheti relied upon the judgment in the case of Shipping Corporation of India Vs. Nissar Export Corporation, AIR 1981 Supreme Court 1212. In that case the plaintiff had not contended in the trial court that his allegations not having been traversed by the defendant should be deemed to have been admitted. The Supreme Court did not permit the plaintiff to raise that contention for the first time in appeal. Indeed even in this petition though the petitioner has claimed no loss was caused to the respondent, the fact that that aspect has not been traversed as neither been agitated by the petitioner in the claim nor in this petition challenging the award. The petitioner has only contended that he did not require to prove the loss suffered by the respondent upon his statement in the claim. In fact, the petitioner has submitted that the learned Arbitrator ought to have ascertained the

veracity of the petitioner's statement from the respondent. This is indeed a tall claim. It is for the parties to prove their respective claims. It is not for the Arbitrator to verify and test the claims. If the claim is proved, it could be granted. A claim could be proved if it is admitted or not denied. A claim would have to be proved by oral or documentary evidence if it is denied. If the petitioner would contend that the denial of the respondent is only general and not specific, the petitioner would require to take up such a contention in the (36) Arbp 1088/10 (J) arbitration as also in the petition challenging the award. Had that contention been taken the respondent may have amended the written statement to show the specific denial of no loss. If then the petitioner had sought to prove that there could have been no loss because the pipeline was not laid until then, the respondent could have shown the expenses and cost incurred in obtaining further approvals not obtained by the petitioner to show the loss. For want of such contentions the aspect has remained at that and the petitioner is seen not to have proved no loss caused to the respondent by its delay.

74. The claim of specific denial is as specified in Order 8 Rule 3 of the CPC. The recourse to CPC is not mandatory arbitration. Indeed in this case the parties merely relied upon documentary evidence contained essentially in the contract and the correspondence.

75. The mere statement of the petitioner that there was no loss proves nothing. The denial of the respondent of that claim would require the petitioner to prove that no loss was occasioned to the respondent despite the petitioner's gross delay by concrete evidence; the mere fact that the pipeline was not laid is no evidence of no loss. The fact that the pipeline was later put shows that despite the non performance of the entire contract within time and thereafter the respondent caused the pipeline to be laid for which it could have incurred further costs.

76. Mr. Andhyarujina would argue that since the time was not of the essence, by virtue of the contract having been extended by both the parties, by the petitioner obtaining approvals and the respondent accepting the approvals obtained by the petitioner, the liquidated damages to the extent of the amount specified in Clause 18 cannot be claimed by the (37) Arbp 1088/10 (J) respondent.

77. The petitioner relies upon section 55 of the Indian Contract Act relating to time being of the essence or not of the essence of the contract. Section 55 runs thus :

55. Effect of failure to perform at fixed time, in contract in which time is essential.-

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential. -

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such

failure.

Effect of acceptance of performance at time other than that agreed upon.-

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.

This section must be first analyzed to see its applicability to the parties in this lis. The section speaks of promisor or promisee. The person who promises to do a thing (make a proposal) is the promisor under Section 2(c) of the ICA. The person accepting the proposal is the promisee. In this case the respondent made an invitation to offer by inviting the bid. The petitioner offered to obtain the approvals (made a proposal/promise).

(38) Arbp 10

The respondent accepted the proposal/promise. The petitioner is the promisor and the respondent is the promisee.

Section 55 speaks of the promises in a contract and the rights and entitlements of the promisor and promisee (the petitioner and the respondent respectively in this case). Section 55 would have to be read accordingly.

78. The petitioner promised to obtain the approvals. What would have to be seen is whether that was within a specified time or not within a specified time. Of course, Clause 18 of the contract for compensation for delay or liquidated damages specifies that time was the essence of this contract. Accordingly under Section 55 as the petitioner promised to obtain the approvals at or before the specified time being one year from the date of the contract (from 11th October, 1996 to 10th October, 1997), the contract would fall within the 1 st part of Section 55. Hence the contract as it stood would, upon failure of the petitioner to obtain the approvals within one year become voidable at the option of the respondent and the respondent would be entitled to avoid the contract by giving notice in that behalf.

79. The respondent thus claimed that time was of the essence. The contract was to be performed within 12 months. The petitioner failed to obtain of the required approvals within the specified time. The part of the contract which was not performed by the approvals which were not obtained could be avoided by the respondent.

This was sought to be done by the notice of termination of the contract. The notice of termination is dated 6 th August, 1999 it calls upon the petitioner to obtain the approvals by 11 th August, 1999 and it seeks to avoid the remainder of the contract which was not performed by the (39) Arbp 1088/10 (J) petitioner. The respondent has, of course, paid the petitioner for the work already done upto 11th August, 1999. The petitioner has accepted the termination (though calling it unlawful) and contended that he completed the contract by 11th August, 1999. The petitioner has not sought to state that he would be entitled to obtain further approvals on any ground. The petitioner has instead submitted his final 18 th RA bill on 9th September, 1999 and made the various claims for which the parties referred the dispute to the arbitration.

80. It is contended on behalf of the petitioner that time was not of the essence of the contract though this aspect was mentioned in the contract. That was because the petitioner was allowed to carry out the promise made by him in the contract for a period of 22 months after the 12 month period of the contract until it was finally terminated. Thus, it is contended, this act has shown the intention of the parties that the time was not of the essence. Consequently the respondent as the promisee would not be entitled to avoid the contract by the failure of the petitioner to perform its promise before the specified time. However, under the 2 nd part of Section 55 the respondent as the promisee would be entitled to compensation from the petitioner as the promisor for the loss occasioned to the respondent by the failure to obtain the necessary approvals by the petitioner. The respondent has claimed the loss as stipulated and specified in Clause 18 of the Contract.

81. Under the 3rd part of Section 55 if the time was of the essence and the respondent as the promisee was entitled to avoid the contract upon the petitioner's failure to perform its promise within the agreed time, if the respondent accepted performance of the promise during the further later period of the agreement, then the respondent cannot claim compensation (40) Arbp 1088/10 (J) for the loss occasioned to the respondent by the non performance of the promise by the petitioner unless when the respondent accepted such late performance the respondent gave notice to the petitioner as the promisor of its intention to claim compensation.

82. The notice that is contemplated is the notice to be given by the respondent to the petitioner that time was of the essence, that the contract was not performed within the specified time because of which the respondent suffered loss and for which it would claim compensation.

83. Hence upon paraphrasing Section 55 it becomes clear that when time is of the essence, the contract can be avoided upon breach of performance within that time. When time is not of the essence the contract cannot be avoided for any breach within that time, but compensation is payable for the loss caused to the promisee. If time is of the essence and the contract is breached by the promisor within that time but the promisee allows the promisor to perform it outside that time then compensation could be claimed only upon notice in that behalf. The notice contemplated is to inform the promisor that he has not performed the contract within a specified time and that if he does not perform within any further time granted the promisee would claim compensation.

84. It is contended by Mr. Andhyarujina on behalf of petitioner that the time was not of the essence of the contract, Clause 18 notwithstanding. He argued that even if it was and the contract was to be

completed within 12 months, the respondent continued to accept the approvals obtained by the petitioner and in fact called upon the petitioner to obtain further approvals and do further acts. Hence, he argued that, even if time was of the essence, the contract was allowed to be performed (41) Arbp 1088/10 (J) without insisting that the time was of the essence. However, the respondent has given notice on 6th August, 1999 and called upon the petitioner to perform the remainder of the contract by 11 th August, 1999.

It is not that the petitioner had obtained all the necessary remaining approvals within that period. It is not that the respondent has sought to enforce such a promise. It is only that the respondent has given notice contemplated in the 3rd part of the section 55 of the ICA.

85. Mr. Andhyarujina relied upon the judgment in the case of M/s. Hind Construction Contractors Vs. State of Maharashtra, AIR 1979 Supreme Court 720 in that behalf. The judgment considers how time could be taken to be the essence of a given contract. It is held that it is the question of the intention of the parties to be gathered from the terms of the contract. Even if time is shown to be of the essence in the written contract if there are other stipulations in the contract such as fine or penalty per day or per week when the work remains unfinished it would exclude the inference that time was fundamental to the contract and so of the essence of the contract.

In that case the contract was for the construction of an aqueduct.

The period of the contract was for 12 months. The Court had to see whether the 12 month period so specified was of the essence of the contract. If it was not of the essence, as it would be in construction contracts, the Court had to see whether the contract had to be completed within a reasonable time.

Referring to Halsbury's Laws of England, 4th Edn. Vol.4 paragraph 1179, the Court accepted that when time was of the essence, the breach would entitle the party aggrieved to repudiation. When a sum is payable for each week the work remains incomplete after the fixed date, the parties must be taken to have contemplated a postponement of the completion. In (42) Arbp 1088/10 (J) that case by reason of waiver the time which was fixed would cease to be applicable. The employer may by notice fix a reasonable time and if the contract was still not performed may dismiss the contractor.

Paragraph 8 of the judgment further holds that the contract may exclude an inference of the completion of the contract by a particular date. Hence if the contract includes clauses for extension of time of payment by fine or penalty per day or per week of the work remaining unfinished it would mean that time was not of the essence.

It cannot be seen how even if the time was not of the essence compensation cannot be claimed by the promisee (the respondent herein) upon notice being given.

The judgment does not hold that if time is not of the essence no compensation can be claimed. In fact under the 3rd part of Section 55 even after the extended period of time, compensation can be claimed once notice is given.

86. The judgment in the case of Hind (Supra) has been followed in the case of McDermott International Inc. Vs. Burn Standar Co. Ltd & Ors., 2006 Arb W L J 625 (SC) with regard to the aspect of time being of the essence. In paragraph 89 of the judgment the case of Arosan Enterprises Ltd. Vs. Union of India & Anr., SCC 449 : 1999 Arb W L J 732 (SC) has been cited showing that the extension of the contract for giving a go-by to the stipulation as regards the time would require a future specified date for delivery or abandonment of the contract.

It is argued on behalf of the petitioner that 5 days time given by the respondent is not reasonable. That would have been so if the petitioner was not paid for the approvals obtained by the petitioner during the extended period or at least from the date of the notice. That is not the case. The petitioner has been paid for the approvals obtained until 11 th (43) Arbp 1088/10 (J) August, 1999 i.e. after the petitioner had received the notice and also till the 5 day period of time expired. The petitioner obtained various approvals and charged the respondent for the same as per the terms of the contract (which has been considered hereinabove). The award does not show that the contention as to unreasonableness of the time granted after extension of the contract was argued by the petitioner.

Section 55 of the ICA would show that the respondent would only be entitled to avoid the contract if the time was of the essence and that was so claimed by the respondent. The respondent was nevertheless entitled for compensation for the loss caused to the respondent by the failure to perform within time. If time was of the essence and the respondent accepted the performance outside the time period (as has been done in this case) the respondent would nonetheless be entitled to compensation from the petitioner for the loss occasioned by the failure to perform within the time agreed but only upon notice. The notice has been given. The respondent can, therefore, claim the compensation for the loss. Since the extent of the compensation is specified, the respondent can claim compensation only to that extent, without more and without further proof of loss. This having been done, the petitioner has been rightly held not entitled to be paid what had been withheld by the respondent. That part of the award deserves being upheld.

Claim No.4 : Entries in the revenue record upon ROU permission for private lands

87. It is the claim of the petitioner in Annexure C to the final bill that the petitioner was not required under the specific terms of the contract to get entered the respondent's name in the various revenue records but the respondent called upon the petitioner to do so. The petitioner claimed (44) Arbp 1088/10 (J) that it would charge the respondent for such claim. The respondent claimed that that was a part of the contract. The relevant part of the contract is shown in the Schedule of Rates titled ROU acquisition. Item No.1 of Schedule of Rates relating to ROU acquisition runs thus:

> To carry out co-ordination, liaison, follow-up and obtain ROU upto 30 meters wide strip excluding cost of compensation, completion of all land acquisition, activities including manpower, vehicle deployment, survey equipment etc. and carrying out of all activities though specifically not mentioned here but required to be done for completion of ROU acquisition as per Pipeline Act.

88. It is argued on behalf of the petitioner that these permissions would, therefore, have to be as per the agreement in terms of the Pipeline Act (The Petroleum Minerals and Pipelines (Acquisition of Right of User in Land) Act, 1962). The work was akin to acquisition of lands as per the Land Acquisition Act, 1882. The scope of work has been shown in Clause 3.0 of Section 2A of the Contract.

Clause 3.0 shows the contractor's scope of work for ROU acquisition activities.

Clause 3.1 enumerates the activities/steps involved. These are preliminary scrutiny, verification of land records, publication of notification, filing of objections, personal hearing of objections, issue of notification, hearing of private parties, declaration of award, grant of compensation to land owners and issue of certificates in that behalf.

Clause 3.1 does not expressly specify that after the land is acquired thus and so certified the revenue records would have to be altered to show the name of the respondent.

However Clause 3.2 specifies that the activities/steps include jobs required to be completed directly or indirectly for completion of acquisition activities as per the Pipelines Act, though specifically not mentioned in the (45) Arbp 1088/10 (J) scope of the work.

Under Clause 4.1 revenue charges, statutory fees, compensation charges etc. were payable by the respondent. Other expenditure in connection with ROU acquisition was to be borne by the petitioner. The necessary formalities and paper work was also to be done by the petitioner. This was to be as per the PP Act or the guidelines of the authorities or the respondent. It has to be seen whether the expenditure to be borne for entering the respondent's name in the revenue record would be "other expenditure in connection with" the ROU acquisition. Once it is seen that the necessary entries must be made in the government records as a condition subsequent to the acquisition for completing the acquisition activities, the expenditure incurred for that purpose would fall within the term "all other expenditure in connection with" the ROU acquisition.

Clause 4.7 of the Contract also specifies that all infrastructural and administrative facilities would be provided by the contractor thought not specifically mentioned in the bid.

Clause 4.8 amplifies this provision. It states that the scope of the work of the contractor includes all activities required to be done not only directly but also indirectly and includes the associated expenditure/ costs involved inter alia in item 4.1 which would in turn include the expenditure in connection with the ROU acquisition.

89. Mr. Andhyarujina argued that the petitioner's work was only to obtain the ROU acquisition in terms of the Pipeline Act and not to deal with the title of the respondent. Mr. Sancheti argued that the acquisition would require the clearance of the title which can be reflected only in the government records and would, therefore, be included in the work of acquisition in the contract.

(46) Arbp 1088/10 (J)

90. The provision with regard to entering the name of the respondent in the government records is not a part of the acquisition under the PP Act. However any acquiring body would require, as a necessary condition subsequent to the acquisition, the government record showing its right. The pipeline is laid under the land. Mr. Sancheti stated that though the private owners would continue to have title in respect of the land, the fact of the pipeline being laid underneath the land would be required to be shown as a necessary incident of the land in case of any transfer for the knowledge of the subsequent transferee. Consequently even if the petitioner had not carried out any work in respect of the recording of the entries in the Khasaras with regard to the pipeline, the respondent itself would have had to do this within a reasonable time of acquisition and before third party rights could be created by the owners of the land through which the pipeline ran. Mr. Sancheti drew attention of the Court to the fact that in the government records (i.e. in Maharashtra) the other rights (brj gDd) are mentioned in the 7/12 extract. The entries were required to be made in that behalf. The purpose would be the information to all concerned in future about what the land contained within it.

91. It would seem that the work in this behalf is rather huge. The petitioner would be entitled to payment in respect thereof at least in terms of quantum meruit if not otherwise provided in the contract. Mr. Sancheti, therefore, showed how it was provided under the aforesaid clauses of the contract that all such work would have to be done. Indeed the payment to be made to the petitioner under the contract also runs in crores of rupees.

92. It would, therefore, have to be seen whether the terms of the contract notified the petitioner so as to include that in his bid. Clause 43

(ii) under the chapter of certificates and payment in Section VI with regard (47) Arbp 1088/10 (J) to the Schedule of Rates and payment shows this aspect. The Schedule of Rates showed the ambit of the work under the contract, the number of approvals required and called upon the petitioner to make his bid in that regard.

Clause 43(ii) shows that the petitioner as the contractor would be taken to have known the nature, scope, magnitude and the expenditure of the work and materials required under the contract though the contract document may not fully and precisely furnish them. The petitioner has been specifically notified to make such provision in the Schedule of Rates as he may consider necessary to cover the costs of all such items of work which are reasonable and necessary to complete the works. Further the clause shows that the generality of the provision would not be deemed to limit what is not expressly stated as the work that the contractor shall do or perform without addition of payment and without extra charges and that all such work would be taken to be covered by the Schedule of Rates.

93. The petitioner claimed extra payment for the work of updating the revenue records as per Clause 47 of the Contract. Clause 47 runs thus:

NOTICE OF CLAIMS FOR ADDITIONAL PAYMENT :

> Should the contractor consider that he is entitled to any extra payment or compensation or to make any claims whatsoever in respect of the works, he shall forthwith give notice in writing to the Engineer-in-Charge that he claims extra payment and/or compensation. Such notice shall be given to the Engineer-in-Charge within two days from the ordering of any work of happening of any event upon which the contractor bases such claims and such notice shall contain full particulars of the nature of such claim with full details and amount claimed. Failure on part of the contractor to put forward any claim with the necessary particulars as above within the time above shall be an absolute waiver thereof. No omissions by the Owner to reject any such claim and no delay in (48) Arbp 1088/10 (J) dealing therewith shall be waiver by the Owner of any rights in respect thereof.

94. Under Clause 47 of the Contract the petitioner had to give notice of carrying out any work for which he would claim extra payment or compensation within 2 days of the work being carried out to the engineer- in-charge, failing which the claim would be taken to be waived under Clause 29.2 of the Contract though failure by the owner or the contractor to enforce performance of the terms would not constitute a waiver.

95. The petitioner has informed the respondent of the work in this behalf by its letter dated 18.07.1998. The letter shows that the ROU was to be recorded in Khasras of 253 villages in about 6000 survey numbers which was a tremendous job instructed to be carried out though not within the terms of the contract. The letter shows that the work was in progress and has been completed in 3 tehsils. The petitioner has at that juncture claimed an expenditure of Rs.5000/-per km of the length of the pipeline route which was in Madhya Pradesh.

96. Clause 47 relates to the additional payment of compensation sought by the contractor. In such a case the contractor is required to give notice in writing to the engineer-in-charge. The notice has to be given within two days from the date the work is ordered or when any event happens. If that is not made the claim for extra payment for compensation would be taken to be waived. Mr. Sancheti would argue that this is a specific clause for making extra payment. That would be the payment over and above the payment specified in the bid of the contractor. He argued that this kind of clause in contracts with government bodies would assume specific purpose and significance. It would put the government to notice of any claim which is sought to be made before it is made. It could result in (49) Arbp 1088/10 (J) proper supervision of the work for which the extra claim is made, so that the government has knowledge of the precise extra work which could be supervised upon a notice given. Mr. Sancheti argued that in such contract it cannot be that the contractor completes the entire work unknown to the government and than claims the amount for the work which cannot be inspected or investigated or supervised. He also argued that such a clause of contractual waiver should be construed strictly.

97. Clause 29.2 relates to non waiver of defaults (which is not waiver of claims for extra payment of compensation). Under that clause failure of the contractor to enforce the performance of the contract or exercise the right would not constitute waiver. The clause does not show what is the part of the contract of which performance is sought or any specific right which is sought to be exercised.

It is, therefore, a general clause relating to performance and exercise of right. The sub-title shows that it relates to defaults. It would, therefore, be default in performance or default in the right of the contractor. Mr. Andhyarujina rightly stated that there would be a number of trivial breaches and defaults for which there could be a right of enforcement of the contract by both the parties but which may not have been enforced. The mere non enforcement would not constitute waiver and such rights could be enforced under the other provisions of the contract. Both these contentions would show that Clause 29.2 is a general clause. A specific clause would prevail over a general clause for granting rights to the contracting parties. Hence Clause 29.2 cannot be taken to be an exception to Clause 47 because if it were, Clause 47 would be entirely obliterated and this would be aside from the fact that both these clauses operate in different fields; Clause 29.2 for non waiver of defaults and Clause 47 being the claim for additional payment which would be waived if not made according to the strict terms of Clause 47.

(50) Arbp 1088/10 (J)

98. The petitioner's claim is made for the first time in the letter of the petitioner dated 18.07.1998. The letter shows that the ROU/ROW work of the contract was nearing completion. It shows that the right of use of land was to be recorded in the Khasaras of 253 villages in 6000 survey numbers. That work was completed in 2 regions and 3 tehasils. The remainder of the work was in progress. The letter related to the subject of fixation of rates for implementation of ROU/ROW in government records. Reading of the letter shows that the claim was made well after a lot of work in that behalf was done. The amount came to be crystallized by the petitioner. The claim was not made within 2 days or any time thereabouts. Mr. Sancheti rightly argued that it would appear that the claim was made months, or even years, after the work commenced and after the petitioner was instructed to carry out the work which the petitioner claimed was not covered in the contract. Further he argued that merely writing such a letter and relying upon such a letter would not constitute evidence or substantiation of what is stated in the letter. Hence though the petitioner stated that he had done such work, that work is not substantiated by oral or documentary evidence, the petitioner having led no evidence to state that he had indeed got the name of the respondent recorded in the government records in respect of lands through which the pipeline was laid and not even produced the documentary evidence contained in the record of rights itself of the survey numbers of the various regions and tehasils where the entries in the Khasaras were made.

99. Clause 47 would contemplate only extra payment and compensation for the work which is ordered later or which arises upon the happening of any right. The payment for the remainder of the work which would be directly or indirectly as specified in the contract and which would (51) Arbp 1088/10 (J) be reasonable and necessary to be done to complete the contract would have to be included in the Schedule of Rates. Consequently it is for the Court to see what would be such reasonable and necessary work to be carried out upon the acquisition. The document of clear title would show only that the pipeline is running through the land, which aside from the title of the land owner, would be a necessary expedient to the contract.

The test would be that even if it is not carried out by the petitioner, it would have to be carried out by the respondent. The ambit of the contract would, therefore, show that though the main work was

specific in Clause 3.1, the further work which is reasonable and necessary to complete the entire work of acquisition cannot be taken to be excluded. This would be apparent also from Clause 3.2 which immediately follows Clause 3.1 and specifies that the activities(steps) would include the jobs required to be completed directly or indirectly for completion of the ROU activities though specifically not mentioned in the scope of work. Consequently it is seen that the main activities are specified in Clause 3.1. The other indirect activities are included in Clause 3.2. Both are required for the completion of the acquisition activities. Reading this clause along with Clause 43(ii) would show that since the further indirect jobs are also included in the contract, the petitioner was required and specifically notified to include that in the schedule of payment at the time of the bid.

100. Viewed from another angle also it may be stated that the fact that tenders were invited and the petitioner's bid was accepted, the parties would be bound by the offer and the acceptance. The petitioner's bid without the various claims now made would be taken to be grossly overrated. The bids of others which would have been higher may not have been accepted. It would be grossly unjust and unfair to the bidders who were not accepted if the respondent would have to pay much higher than (52) Arbp 1088/10 (J) what was thought to be the expenditure expected to be incurred under the contract. It would be improper if after a particular bid is accepted (which would be essentially dependent upon its quantum) the government corporation is required to incur far greater additional expenditure. Such act cannot be countenanced on the part of government body using public funds.

101. Consequently though it is correct that the petitioner was to be paid and that work could not have been expected to be done gratis, the petitioner was indeed paid as per its own bid for the work that it did to the extent of Rs. 8.57 Cr.

102. The learned Arbitrator has considered each of these contentions. He has concluded that the further amount is not payable because under the terms of the contract and the PP Act it was included.

Hence the conclusion that the petitioner cannot be paid further is a very possible conclusion of the learned Arbitrator based upon reading and interpretation of the aforesaid clauses of the contract which cannot be interfered with in this petition.

103. The learned Arbitrator has observed that the petitioner carried out the activity without raising the claim under Clause 47 and was, therefore, barred from making such a claim. Mr. Andhyarujina would argue that Clause 47 is void under Section 28(b) of the Indian Contract Act, 1872. Section 28 of the ICA runs thus:

> 28. Agreements in restraint of legal proceedings, void. - Every agreement, -
>
> (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal (53) Arbp 1088/10 (J) proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

> (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

It was argued that the amendment to section 28 of the ICA by Act I of 1997 dated 08.01.1997 incorporating clause 'b' in Section 28 would govern the petitioner's case. Mr. Andhyarujina drew a comparison between Section 28(a) and 28(b).

Section 28 (a) applies when the time to enforce a right under a contract is limited.

Section 28 (b) applies when the right of contractual party is extinguished which would restrict him from enforcing his rights under such contract or the other party to the contract is discharged.

Both the aforesaid contracts are void to the extent of the limitation of time and the extinguishment of right or the discharge from liability.

104. Section 28 as it was prior to the amendment of 1997 related to a complete ban on filing legal proceedings or limiting the time of limitation. In contracts where there is no complete ban or limiting the limitation period or suing also there were clauses relating to certain acts having to be done by certain parties to the contracts, failing which the right of that party would be extinguished and the liability of the other party would be discharged. Those kind of clauses which did not limit the limitation to sue were held to be valid in a number of judgments. The legislature sought to bring such transactions also within the purview of Section 28 of the ICA to declare them void. Why that was so done could be ascertained only from the Statement of Objects and Reasons (SOR). It would, therefore, be worthwhile to see SOR showing the gazetted (54) Arbp 1088/10 (J) amendment which came into force from 08.01.1997 under Act I of 1997.

105. The Statement of Objects and Reasons runs thus:

> STATEMENT OF OBJECTS AND REASONS The Law Commission of India has recommended in its 97 th report that section 28 of the Indian Contract Act, 1872 may be amended so that the anomalous situation created by the existing section may be rectified. It has been held by the courts that the said section 28 shall invalidate only a clause in any agreement which restricts any party thereto from enforcing his rights absolutely or which limits the time within which he may enforce his rights. The courts have, however, held that this section shall not come into operation when the contractual term spells out an extinction of the right of a party to sue or spells out the discharge of a party from all liability in respect of the claim. What is thus hit by section 28 is an agreement relinquishing the remedy only i.e. where the time-limit specified in the agreement is shorter than the period of limitation provided by law. A distinction is assumed to exist between remedy and right and this distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. This approach may be sound in theory but, in practice it causes serious hardship and might even be abused.

> 2. It is felt that section 28 of the Indian Contract Act, 1872 should be amended as it harms the interests of the consumer dealing with big corporations and causes serious hardship to those who are economically disadvantaged.
>
> 3. The Bill seeks to achieve the above objects.

106. This would show that there was an anomalous situation created upon the interpretation of Section 28 as it then prevailed. That was under Section 28(a) cited above. The SOR states that it has been held by the Courts that the unamended Section 28 would invalidate only a clause which would restrict the party from absolutely enforcing its rights or from limiting the time to sue. The SOR further states that the Courts have held that this section would not come into operation when any contractual term set out the extinction of right to sue or a discharge of a party from the (55) Arbp 1088/10 (J) liability when sued. The legislature considered that, therefore, only when a remedy was relinquished, the agreement would be hit by Section 28.

This would be on the basis of reasonableness of agreements. However the legislature thought that though this would be sound in theory it caused serious hardship to parties and could be abused specially if they were consumers dealing with large corporations. The legislature, therefore, did the act of power balancing. The law came to be amended. The amended law, therefore, caused all contracts where the remedy was relinquished as also where the right to sue was extinguished or a discharge was claimed.

All the aforesaid 3 types of agreements would be void and, therefore, un-enforceable under the amended law.

107. The law as amended came up for consideration in the case of M/s. Chander Kant & Co. Vs. The Vice Chairman, DDA in Arbitration Petition No. 246 of 2005 by the Division Bench of the Delhi High Court considered this point of law. It considered the law pre and post amendment. That would indeed show the changed legal position and the extinction of the section to contracts extinguishing right and discharging the liability. In that case the period of limitation of 90 days was to be considered. The relevant clause runs thus:

> It is also a term of the contract that if the contractor (s) does/do not make any demand for arbitration in respect of any claim (s) in writing within 90 days of receiving the intimation from the Engineer-in-Charge that the Bill is ready for payment, the claim (s) of the contractor (s) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of all liabilities under the contract in respect of those claims.
>
> It related to the demand for arbitration to be made within 90 days of receiving the intimation of the Engineer-in-Charge in respect of a bill which (56) Arbp 1088/10 (J) was ready for payment. The contractor would be taken to have waived his right to receive the payment thereafter which would be absolutely barred and the corporation would be discharged and released of all the liabilities in respect of those claims. The

> Court considered the legislation as also the precedents prior to the amendment in para 7 of the Judgment. The Court considered the amended law and the precedents after the amendment in para 8 of the judgment. It would be material to see that that law would apply post amendment. The Court has set out 4 specific cases in which clauses showing a period of time during which the right would be extinguished or the liability discharged have been held to be not valid in view of Section 28 (b) of the Contract Act. The Court followed the earlier decision in the case of Explore Computers Pvt. Ltd. Vs. Cals Ltd. 131 (2006) DLT 477 which considered the pre-amendment Supreme Court decision in the case of National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak & Co. 1997 4 SCC 366 and held that the scope of Section 28 was widened and accordingly the distinction carved out by the earlier legal pronouncements was held not good law.

That was a case of bank guarantee. That case set out a period of one month from the expiry of bank guarantee within which the right of the plaintiff to institute any legal proceeding would be extinguished. Hence in a case of a bank guarantee the Court held that such a plea would apply in the face of the amended Section 28 and the defendant could not be discharged from the liability nor could the right of the plaintiff be extinguished by such a clause.

This judgment was followed by another Division Bench of the Delhi High Court in the case of DDA Vs. Pandit Construction Co. MANU/DEL/1714/2012. In that case Clause 25 of the Contract of DDA for appointment of the arbitrator within a period of 90 days from the date the dispute arose came to be considered. The Court considered the (57) Arbp 1088/10 (J) amended Section 28 in para 8 of the judgment holding that in both the instances under the section the contract would be void. In paragraph 11 of the judgment the Court considered the retroactivity of a legislation and referred the case of Chander Kant (Supra).

In that judgment the Court has also referred to the case of National Insurance (Supra) considered in the case of Chander Kant (Supra) and also the case of Continental Construction Ltd. Vs. Food Corporation of India, which shall be considered presently. The Court distinguished these cases in which the cause of action had arisen prior to the amendment and the amendment was not considered.

108. The judgment has been further followed in the case of Avinash Sharam Vs. Municipal Corporation of Delhi, 2007 (4) ARBLR 147 (Delhi) relating to the same clause by the learned Single Judge holding that the amended section deprived the party to the contract (in that case the contractor) of a very valuable right to claim the amount due to him and holding such a contract void.

109. There has been a later Division Bench judgment of the Bombay High Court being the case of M/s. Indusing Bank Ltd. Vs. Union of India & Ors. in Appeal No. 258 of 2008 dated 20 th April, 2011 in which the period of the validity of the bank guarantee was set out. In that case the claim was to be made within 3 months of the validity of the bank guarantee. The claim having not been made, the bank claimed to be relieved and discharged from its liability under the bank guarantee and claimed that nothing was payable to the plaintiff. The learned Single Judge considered the law

under Section 28 and held that the bank guarantee was void as it laid down the period of 90 days during which a legal claim had to be made.

(58) Arbp 1088/10 (J) The Court considered that the bank guarantee was to remain in force until a specific day and any claim under the bank guarantee had to be made within 3 months therefrom. If no demand was made, the claim under the bank guarantee could not be made. The Court observed that the respondent's right to make the claim or demand against the bank under the said bank guarantee was to be perfected only if the claim or demand was lodged before 90 days period.

The Court considered the provision of unamended Section 28 and the judgment of the Supreme Court as also other Courts thereunder. The Court set out the judgment of the Supreme Court in the case of National Insurance (supra) which was also considered by the learned Division Bench of the Delhi High Court to set out and amplify the distinction that was carved out in that judgment pre amendment. Based upon the decision of the Supreme Court in the pre amendment case, the learned Division Bench of the Bombay High Court drew a parallel. The Supreme Court judgment set out the distinction between the right to enforce and the forfeiture or the waiver of rights as also the curtailment of limitation which was held to be not permissible and the extinction of the rights which was permissible and enforceable. The Division Bench of the Bombay High Court, therefore, considered the law before the amendment of 1997 and after the amendment. Having done so it set out the distinction between the right to adopt the remedy (the right to sue) and the restriction of enforcement of an accrued right. After observing that both were declared void, it drew the distinction and held that only the former was void and the latter was not affected by Section 28(b).

It further referred to the decision of the Supreme Court in the case of Food Corporation of India Vs. New India Assurance Co. Ltd. 1999 (3) SCC 324 which was also pre amendment and consequently showed the distinction. Extensively quoting the Supreme Court in the case of Food (59) Arbp 1088/10 (J) Corporation of India (supra) the Division Bench of the Bombay High Court held that such a clause did not affect "the right of the respondents to enforce their rights" by approaching a Court of Law within the normal period of limitation if the respondents assert their right or make a demand or claim with the bank within the period mentioned in the bank guarantee.

Consequently it held that in a case of a bank guarantee the assertion of right must be within the period mentioned though the action in law may be taken as per the law of limitation. Thereupon the Division Bench of the Bombay high Court set aside the judgment of the Single Judge which had held that such a clause was void under Section 28(b) of the Contract Act.

This judgment has not considered the judgment of the Delhi High Court in the case of Chander Kant (Supra) as also Avinash (Supra) and as per incurium to that extent.

110. Consequently it can be seen that Clause 47 thus falls foul of Section 28(b) of the ICA and would be void to the extent it prescribes the time limit of 2 days to give notice for claiming any extra payment.

Consequently the petitioner would be required to give notice but of a reasonable period to inform the respondent why he would need extra payment for any particular work done. Of course, the petitioner would have to prove the actual work done to be able to claim any extra payment.

111. Mr. Andhyarujina drew my attention to the case of National Thermal Power Corporation Ltd. Vs. WIG Brothers Builders & Engineers Ltd., ILR (2009) IV Delhi 663 which was the case of a contract between a government corporation and a private company in which an engineer had to be appointed. The parties had to first refer their dispute to the engineer. The decision of the engineer would become final and binding unless questioned by either party for which an arbitrator was provided.

(60) Arbp 1088/

The engineer was never appointed. The condition precedent was not satisfied. It was held that when the appointment was not made by

government authority which provided for the initial adjudication of the dispute by the engineer, the government undertaking could not take up a contention that the dispute could not be referred directly to an arbitrator and that a party cannot by its own act or omission prevent another from having the dispute resolved by arbitration. Upon the contention that the contract was frustrated, Mr. Andhyarujina would argue that since there was no engineer- in-charge, Clause 47 would not come into effect and the question of giving two days notice to the engineer-in-charge cannot be enforced.

112. The real substance of Clause 47 is in view of the entire contract between the parties which required the petitioner to make a bid upon a tender floated by the respondent to give the all-inclusive price for all the acts to be done directly or indirectly under the contract. Hence if the petitioner considered that an act which the petitioner was called upon by the respondent required any extra payment to be made, notice had to be given. It had to be given to the engineer-in-charge. If not, it had to be given to any other such officer or to the respondent itself. This would enable the respondent to know the kind of work that the petitioner was to do or had done and would be able to inspect it at the time it is done. It was, therefore, for the benefit of both the parties. The petitioner would be able to show the respondent what work it was to embark upon. The respondent would know the work was being done or which was to be done almost when it began. Consequently the petitioner would not be able to make a false claim upon work not done and stated to be done for which it considered that it was entitled to the extra payment and the respondent would not be able to refute the extra payment to be made if the work (61) Arbp 1088/10 (J) entitled the petitioner to such extra payment. Consequently in the absence of the engineer-in-charge the entire Clause 47 relating to claims for additional payment cannot be wiped off.

113. Even its voidability is statutorily only to the extent the contract prescribed a time limit after which the petitioner's right would be extinguished and the respondent's liability would be

discharged - the entire contract is not rendered void even under Section 28 of the ICA.

114. This has been considered in the NTPC case itself to which my attention has been drawn by Mr. Sancheti. In paragraph 26 of the judgment upon holding the obligatory duty of party to the contract in not taking advantage of its own act or omission to claim frustration of the contract, it has been further observed that the remaining intention of the parties must be effectuated. The observation runs thus :

> In the absence of the availability of the Engineer, the rest of the agreement must be given effect to, as that would be consistent with the intention of the parties. This interpretation is in accordance with the well accepted principle of interpretation of documents that the intention of the parties, to the extent possible, must be given effect to and each and every term of the contract must be implemented.

115. In this case also even for want of an engineer-in-charge the remainder of Clause 47 would have to be effectuated. The petitioner would have to give notice to the respondent company. The respondent company would be put to the notice of the intended claim. The notice may not be of two days, but a reasonable notice. The petitioner has, in fact, notified the respondent albeit much after two days in making a claim for extra payment for obtaining the revenue records altered (as also for making the executive summary which shall be considered presently). The (62) Arbp 1088/10 (J) respondent has refuted that claim. The clause is reasonably complied by both parties. Consequently the adjudicating authority would decide whether the petitioner would be entitled to extra payment or not. The petitioner would be entitled to extra payment if the work did not fall within the scope of the contract; it would not be entitled for extra payment if the work was within the scope of the contract. The real determining aspect is, therefore, if the work is within the scope of the contract.

116. Mr. Sancheti also argued that Clause 47 does not limit the time for limitation but is only to give notice. If the petitioner did not give notice, the petitioner would have to otherwise prove how it was entitled to extra payment. If the petitioner gave notice and the work merited extra payment respondent would have to make additional payment.

117. Mr. Sancheti drew my attention to the judgment in the case of State of Madhya Pradesh Vs. Mittal & Company, Dholpur, Rajasthan, MANU/MP/0037/1997. That was also a case of similar contract between state government and a private party. One of the clauses provided a time limit for unforeseen claims under which the claims which were not foreseen by the parties could not be made unless it was made in writing to that engineer-in-charge within one month of the cause for such a claim occurring. It was held that this would exclude claims arising out of the breach of the contract or claims flowing from the terms of the contract.

Such clause was not held hit by the unamended section 28 of the ICA despite the period of one month granted to make the claim in writing in that case.

A similar pre-amendment case of State of Rajasthan Vs. Chandra Mohan Chopra, AIR 1971 Rajasthan 229 (V 58 C 50) which was of a similar contract, such clause was interpreted. In that case

also the chief (63) Arbp 1088/10 (J) engineer was to decide the amount if penalty levied. The Chief engineer did not determine the compensation. It was held that the right to fix the compensation was waived and hence no penalty could be recovered.

Clause 47 could be similarly interpreted despite the amendment to Section 28 of the ICA.

118. It may be mentioned that Mr. Sancheti argued that if the petitioner is entitled to extra payment for having the revenue records altered (or for providing the executive summary of work done, which shall be considered later) it would be upon the fact that it was outside the scope of the contract. In that case the petitioner could not claim any amount within the contract. The petitioner would have to be granted such amounts only by way of quantum meruit. The petitioner would require to litigate to get such claims; they could not be granted in arbitration. The learned arbitrator would have to grant the claim only as per the contract and not claims outside the contract in arbitration. Having seen that the work forms the part of the contract, all those arguments and contentions became purely academic.

119. The arbitrator has held that the respondent showed that the work fell within the contract. No further evidence was required. No further evidence was led. The claim has been considered upon the terms of the contract. Hence the award in this behalf cannot be interfered with.

Claim No.5 : NOC for
revenue forest (chhote bade zad ke jungle)

120. This came to be defined, specified and considered in a judgment of the Supreme Court for permission being required if any kind of construction was to be put up in such forest claimed under Annexure D (64) Arbp 1088/10 (J) to the final bill dated 09.09.1999.

121. The tender was floated for the contract between the parties on 4th October, 1996. The Supreme Court judgment is dated 12 th December, 1996. The contract was entered into by the parties pursuant to the tender on 30th December, 1996 (after the judgment was passed). The parties were yet unaware of the Supreme Court judgment and the requirement of obtaining NOC for what was termed as revenue forests. The parties obtained the inter-governmental letter of the Ministry of Environment and Forests (MEF) on 27th October, 1997, consequent upon which they held meeting inter-alia for considering the requirement of the grant of NOC on 13th November, 1997. The petitioner has for the first time by its letter dated 25th November, 1997 written about its claim, but not of a specified amount. The respondent has by its letter dated 3 rd December, 1997 refuted the claim on the ground that the work was within the scope of the contract. The petitioner has responded to this letter within two days on 5 th December, 1997. Upon the reiteration of the fact that the work was within the scope of the contract by the respondent in its letter dated 8 th

December, 1997, the petitioner (incorrectly) refuted that it could be so because it arose out of the judgment of the Supreme Court judgment dated 12 th December, 1996 which was after the award of the work, but claimed that the petitioner could be paid under Item No.1(I) of the Schedule of Rates and charged for 412 kms at the rate specified for Item No.1 being Rs.30,000/- per km length of the pipeline specified in its letters dated 15 th December, 1997 and 27th January, 1998. Thereafter also further correspondence ensued but which the Court does not require to go into in a petition U/s.34 of the Act.

122. The petitioner raised its claim upon the Supreme Court (65) Arbp 1088/10 (J) judgment dated 12th December, 1997 with regard to the revenue forests for additional payment as work outside the contract. The claim is made that the work is outside the scope of the contract upon the fact that it arose from the Supreme Court judgment passed after the contract was executed. The aforesaid chronology showed that it was not. Of course, the parties came to know about Supreme Court judgment later and had to implement it. The case of the petitioner before learned arbitrator was that he was required to obtain certificate(s) from the Collector. The petitioner claimed that its claim would fall under Item No.1(I) of the Schedule of Rates. The petitioner claimed the amount for obtaining the certificates of the Collector per km of the pipeline which ran through such revenue forests as protected/reserved and other forests or as social forestry (and not per crossing as required under Item No.1). Though it is argued before this Court that the claim was made under the aforesaid provision, the fact remains that the petitioner obtained 9 certificates from the Collectors for the entire running length of the pipeline in the 9 districts through which the pipeline went. This is made clear from the contentions of the petitioner recited in Clause 5.1 of the award. Nevertheless the petitioner did make the claim for 412 running kms and claimed @ Rs.50,000/- per km in the Statement of Claim (in place of Rs.30,000/- claimed earlier in the correspondence) for the 9 certificates obtained by the petitioner.

123. The very certificates would be circumstantial evidence in themselves to show that the claim could not fall under Item No.1 (H) or (I) but had to fall under Item No.II of the Schedule of Rates being the clearance / NOC to be obtained from the authority en route of the pipeline other than a crossing. Consequently, the mode for payment would be per approval, per district, per authority. The authority from which the 9 certificates are obtained is the Collector. The other approvals with regard (66) Arbp 1088/10 (J) to various certificates in the 9 districts through which the pipeline ran are also approved by the same authority, the respective Collectors. As per the case of the respondent, if the petitioner had to obtain and had obtained permissions from any other authority - to wit - the MEF, the petitioner would have been entitled to payment @ Rs.50,000/- for such 9 certificates. The respondent would contend that the petitioner having obtained the permission from the same authority was entitled to payment but once per district. That payment has been made. Hence the respondent rejected the petitioner's claim for additional payment.

124. The contention of the respondent before the learned arbitrator was that obtaining various clearances was within the scope of the contract.

The respondent has specified this in its letter dated 3 rd December, 1997. The petitioner accepted that position and hence obtained Collectors' certificate(s) in March - May, 1998. The petitioner

made its claim for the first time after completion of the entire work and had not claimed it so soon as the respondent directed the petitioner to produce the certificates.

125. Mr. Sancheti on behalf of the respondent drew Court's attention to Clause 2.10 of the contract under which the petitioner as the contractor was enjoined to complete the work of obtaining statutory approvals and clearances and if during the execution of the project some more clearances were warranted, it was the obligation of the petitioner to discharge such responsibilities without extra compensation. Hence the respondent contended that obtaining additional certificate of the Collector for the revenue forest was other clearances which were warranted and hence fell within the scope of the contract. Consequently the respondent claimed in its letter dated 3 rd December, 1997 that for obtaining such certificates no additional payment was warranted.

(67) Arbp 1088/10 (J)

126. The petitioner in fact complied and obtained the required certificate(s) of the Collector in March - May, 1998.

127. The petitioner claimed that it was entitled to additional payment for such work under Clause 47 of the Contract.

128. The petitioner has notified its claim for additional payment to the respondent in the meeting held on 5 th December, 1997 which is Item No.8 in the minutes of the meeting. The item does show a claim made by the petitioner for additional time and payment to be considered by the respondent. It is not a claim specifically made by the petitioner for any specific amount. The claim of the specific amount is made for the first time after termination of the contract under the 18th final bill of the petitioner.

129. The learned arbitrator has considered whilst rejecting claim that the petitioner has not seriously disputed the stand of the respondent that this work is a part of the job which would mean that it would be within the scope of the contract for which the composite rate was agreed.

Indeed the petitioner obtained the certificates between March and May, 1998 itself which would justify the observation of the learned Arbitrator. The additional charges, if any, payable under Clause 47 would follow if the claim is seen to be seen to be such as would entail additional payment to be made upon a reasonable notice in that behalf and proof of the claim.

130. The real reason for the petitioner not being given any extra payment is that the work did not fall under Item No. 1 and the petitioner could not have claimed at the exaggerated rate of Rs.50,000/- per km for 412 kms of the length of the pipeline. The petitioner's claim would fall (68) Arbp 1088/10 (J) under Item No.2 upon the case of the respondent that it was covered in the 9 approvals of the Collectors of the 9 district. Consequently it would have to be considered along with claim No.2 for payment for ROW.

131. The specific case of the respondent under Clause 2.10 of the Contract is not reflected in the reasoning of the learned arbitrator and appears not to have been considered.

132. What could be the reasons that the arbitrator would give has been set out in the judgment in the case of Jagmohan Singh Gujral of India Vs. Satish Ashok Sabnis & Anr., 2004(1) Bom.C R 307 which has been relied upon by Mr. Andhyrujina. It has been held in the judgment that the reasons must be based on the material available to the tribunal. It must reflect the consideration of the relevant material and ignore all irrelevant material. If the material on record is not considered, the findings cannot be stated to be based on sound reasoning and would amount to being perverse and consequently be misconduct.

133. This would stand to reason because the reasoning must show the mind of the adjudicating authority. The reasoning of claim No.5 does not show the consideration of the scope of the contract under Clause 2.10 or the ambit of Clause 47. Further it ignores the later letters of the petitioner claiming that the work was outside the scope of the contract because it arose consequent upon the Supreme Court judgment which was itself delivered after the award of the work (which was erroneously stated). However it considers the petitioner's acceptance of the work as falling within the contract (by not seriously disputing it) as also that it is covered by Item No.2 of the Schedule of Rates.

(69) Arbp 1088/10 (J)

134. The reasoning of the learned arbitrator that the petitioner had "not seriously disputed" the stand of the respondent may, therefore, be a possible view. Indeed neither had the petitioner refused to act to obtain the further certificates nor had the petitioner made a claim of any specific amount for what it considered was the new "job". The actual claim was made only in the final 18th bill dated 09.09.1999. It having been seen to be falling under Item No.2 of the Schedule of Rates would be required to be considered along with Claim No.2 for payments in respect of ROW. The certificates obtained by the petitioner would be required to be seen to consider whether they were "approvals" and of which "authority" to consider them amongst the approvals obtained to be paid "per approval, per authority, per district" being a part of the approximate 475 approvals contemplated by the parties. Hence the award in respect of Claim No.5 is set aside to that extent.

Claim No.6 : Preparation of executive summary

135. The petitioner claims that the respondent directed the petitioner to prepare an executive summary which was outside the terms of the contract much later and after execution of a large part of the contract. The petitioner informed that it would prepare summary at an additional cost. The petitioner claims that this was a massive job relating to 250 villages and was prepared villagewise and then tehsilwise. The petitioner would argue that under Clause 3.15 the progress reports were to be submitted fortnightly and what was called for as an executive summary is in addition to the progress report for which there is no mention in the contract and thus would merit additional payment.

136. The respondent contends that the preparation of the execution (70) Arbp 1088/10 (J) summary is an integral part of the contract itself. It is argued on behalf of the respondent that the summary had to be prepared only for the sake of record and would be impliedly required to be prepared even if not expressly directed. It was for the petitioner itself to prepare such a summary to show the extent of the work done. The respondent relied upon the seminal clause in the contract signed by the parties which governs the payment to be made to the contractor as per the bid offered by the petitioner and accepted by the respondent. The contractor covenanted to execute and complete the work and do all other acts and things in the contract mentioned or described or which are to be implied therefrom or may be reasonably necessary for the completion of the work.

137. The respondent has relied upon and drawn the Court's attention also to Clause 43(ii) which shows that the Schedule of Rates was to be inclusive. That clause states that the contractor shall be deemed to have known the nature, scope, magnitude and extent of the works and materials required, though the contract document may not fully and precisely furnished them. Hence he was to make such provision in the Schedule of Rates as he would consider necessary to govern all the items of work and materials as may be reasonable and necessary to complete the work. Further the clause states that the contractor shall do and perform all the work though not expressly stated in the contract without additional payment or extra charges and that all the charges were governed by the Schedule of Rates. Mr. Sancheti would argue that this specification was precisely to avoid the contingency of the contractor requiring additional payment when jobs specifically required to be done as conditions subsequent would arise. In fact it would stand to reason that when a tender is floated and bid is accepted, the contract would essentially govern all aspects which are reasonable and necessary to complete the work even (71) Arbp 1088/10 (J) though not stated. If for each aspect additional payment is required to be made, the purpose of submitting the bid would be frustrated.

Consequently only the entirely different items of work if given to the contractor would merit additional payment.

138. This aspect is made clear also under Clause 3.2 of the contract relating to the scope of work for ROU acquisition activities. As aforesaid Clause 3.1 shows the main activities/steps which are required. This would show that there would be some ancillary activities or steps also for which provision has been made in Clause 3.2. It is specified that the activities included jobs required to be completed directly or indirectly for the ROU acquisition activities as per the Pipeline Act though not specifically mentioned in the scope of work. If there is any work which is to be done not for completion of ROU activities as per the Pipeline Act but for a completely different purpose, it would necessitate additional payment. Such additional payment could be made under Clause 47.

139. The executive summary has been prepared. The petitioner has given 6 copies of the summary. The petitioner has charged Rs.1 lac for each copy. The learned arbitrator has essentially considered that it forms a part of the contract not meriting additional payment.

140. It is contended on behalf of the petitioner that the approvals obtained and the jobs carried out were to be categorised in a particular manner. It was neither consequential nor necessary to do that job. Yet upon the respondent requiring it, the petitioner had done the job and, hence would merit

additional payment as mentioned in the petitioner's letter dated 4th March, 1999 in which the petitioner has stated that all documentation were handed over to the respondent by July, 1998. The petitioner would claim that the respondent has not commented until (72) Arbp 1088/10 (J) January, 1999 that that work was not as per contract. Consequently the specified summary later required by the respondent would be outside the scope of the contract for which the petitioner would charge Rs.1 lac for per set of documents.

141. The learned Arbitrator has rejected this claim on the ground that the summary is not prepared to the satisfaction of the respondent by the petitioner and that it was a part of the composite job for which the fixed rate was paid by the respondent. The latter reason is in line with all the other such claims and must be accepted upon seeing the relevant clauses of the contract. Consequently the rejection of this claim is proper.

Claim Nos.7 & 8 : Overheads and loss of profits.

142. The petitioner has accepted that the petitioner could not complete the work within stipulated time period and the work was delayed beyond the original period from 10th October, 1997 until 11th August, 1999.

The petitioner has claimed the overheads and loss of profits on account of prolongation of the work by which the petitioner claims to have been put to an extra expenditure as per the details submitted by the petitioner in the last 18th RA bill dated 9th September, 1999. The petitioner has claimed Rs.7.48 Cr of account of overheads and Rs.6.95 Cr on account of loss of profits.

143. It would be material to see the conduct of the petitioner in claiming the extension of the period in the first place. It was for the petitioner to obtain all the approvals within a period of one year. The petitioner had admittedly not obtained all the approvals. The petitioner itself had applied for extension of time from time to time under the (73) Arbp 1088/10 (J) correspondence with the respondent relied upon by the petitioner.

In the letter dated 28th May, 1997 which was within the specified period of the contract the petitioner accepted that it was its responsibility to carry out the activities within the time schedule, but for a certain illness of some one which was beyond its control.

In the letter dated 5th July, 1997 the petitioner has accepted the delay and given several reasons for the delay. The reasons set out by the petitioner showed the action of third parties for which the petitioner claimed no responsibility and sought an extension.

In the letter dated 27th September, 1997 the petitioner has again set out reasons for the delay of ROW cases which are all claimed to be due to acts of third parties.

Again in the letter dated 28th September, 1997 the petitioner has stated that the work was in progress, at an advanced stage and yet not entirely completed and hence would need extension of time limit. The petitioner has set out the specified dates of the delays for specific reasons which are

not attributable to the respondent but to third parties. The petitioner has claimed the extension for further 285 days upon the causes of delay shown. These letters have been written within the contract period for extension of time beyond the contract period.

144. The respondent granted a 45 days extension for the patwari strike which was one of the reasons why the petitioner had asked for extension of time. By its letter dated 17 th March, 1998 the respondent did not grant any further extension.

145. After the contract was terminated on 11 th August, 1999 upon the notice dated 6th August, 1999, the petitioner submitted the last bill on 9th September, 1999. Annexure A to that bill was the proposal for the time (74) Arbp 1088/10 (J) limit extension applied for in the letter dated 27 th September, 1997 justifying an extension for 285 days. The petitioner stated in the Annexure that the work was completed on 11th August, 1999 (which was as per the notice of termination). The petitioner submitted that the delay not due to petitioner was of 902 days which can be sanctioned up to 31 st March, 2000 for which the petitioner claimed that the notice of termination was illegal.

The petitioner set out 15 reasons and specified the days of delay for each of them, none of which is due to the respondent's acts or conduct.

146. Hence the petitioner has claimed overheads and loss of profits on the ground that the contract was extended and the petitioner was allowed to perform the contract after the extended period which resulted in additional expenditure. This is wholly ignoring the fact that because the contract was extended beyond the contract period the petitioner was paid for the services rendered; the petitioner was paid for the approvals obtained by the petitioner not only within the period of the contract of one year but for all the approvals obtained for 34 months that the contract lasted until it was terminated on 11 th August, 1999. Hence it is seen that despite being paid as per the terms of the contract for the additional work done in the additional period which the petitioner took to perform that part of the contract, the petitioner claimed additional expenditure also.

147. This claim is in the nature of damages. The damages are for the overheads incurred and loss of profits. A person who claimed damages must be the party to the contract which has not breached the contract. Damages cannot be claimed by the party in breach. Similarly damages cannot be claimed by the party who has been paid for the work done as per the contractual rate. Further a party can claim damages from the other party who is in breach. The party claiming damages must prove the (75) Arbp 1088/10 (J) damages. The petitioner, therefore, must prove the overheads incurred and the loss of profits consequent upon the respondent's breach. These must be attributable to the respondent. It need hardly be stated that the respondent would not be liable for the loss which is attributable to 3 rd parties or for the petitioner's delay even after paying the petitioner for the work done at the contractual rate. But such is the claim of the petitioner.

148. Mr. Andhyarujina would argue that the time was not the essence of the contract and that even if it was the essence of the contract (per Clause 18) it was allowed to be extended. Once it was allowed to be extended the petitioner would be entitled to compensation for any loss. This would be a complete misreading of the provision of law contained in Section 55 of the ICA cited above in Claim

No.3.

149. Under Section 55 paraphrased above, the petitioner promised to obtain approvals within 12 months of the execution of the contract i.e. on or before 10th October, 1997, the part of the contract for which the approvals were not obtained became voidable at the option of the respondent under the 1st part of Section 55. Instead of avoiding the contract, the respondent accepted further approvals obtained by the petitioner for a further 22 months and paid the petitioner for the work done at the rate of the contract. The respondent gave notice on 6 th August, 2011 to complete the contract by 11th August, 2011 and claimed compensation at the rate specified in the contract (which has been considered under Claim No.3).

150. Rather than claiming compensation for the loss suffered by the respondent by non performance of the terms by the petitioner, the respondent has paid the petitioner for the work already done not only (76) Arbp 1088/10 (J) within the 12 months of the contract but also the later 22 months that the contract remained alive. The respondent's notice of termination was after 34 months of the contract. The petitioner has accepted the termination and submitted its final bill. The petitioner has claimed for all the work done at the contractual rate during the entire period and the respondent has paid for such work as per the contract price, without more.

151. Instead the petitioner would claim that because the time was not of the essence the petitioner would be entitled to compensation by the delay caused (by the petitioner itself !) for overheads incurred by and loss of profits caused to the petitioner. This contention is wholly esoteric. Mr. Sancheti would argue that the reliance upon Section 55 is itself self defeating. If the contract period is extended and time is made not of the essence there is no question of claiming overheads and loss of profits.

152. In any event the petitioner has to prove the damages claimed. The petitioner has made two claims for the overheads in Annexure F to the petitioner's 18th final bill. The first claim is for various equipments being computer with printers, ACs, jeeps, vehicles, furniture, generator, digital document system etc. The 2nd claim is for establishment and employee costs and fees. The petitioner has made its claim on that ground under what is stated to be Hudson's formula. The petitioner claims that that is the accepted formula set out in the case of McDermott (Supra).

Hudson's formula set out in paragraph 111 is as follows :

"Contract head office overhead & profit percentage X Contract sum Contract period X Period of delay

The percentage profit is taken by the petitioner to be 30% in its bill.

(77) Arbp 1088/10 (J) How the petitioner has claimed 30% is not stated or justified. Mr. Sancheti rightly argued that this would be variable from contract to contract. The petitioner has not led

evidence of why 30% is claimed.

153. The claim of loss of profits is computable other than upon the Hudson's formula. This is set out in Annexure 'G' to the final bill of the petitioner. The petitioner has set out why the amount is claimed but not shown how precisely 6.95 Cr is claimed. The petitioner has considered 30% as profit. Why 30% is claimed as profit or not more or less is not shown and not justified either in that bill or in the claim or later in the evidence, if any, oral or documentary. No oral evidence is led. No document is produced in that behalf.

154. The petitioner has claimed damages from the respondent. The petitioner has not shown the loss which was suffered to the petitioner by additional overheads or the loss of profits due to the breach of the respondent. Claim Nos.7 & 8 of the petitioner in arbitration showed that because the work was delayed (for the various reasons shown in the earlier paras), the petitioner incurred extra expenditure and was deprived of its profitability which it considered at 30% and claimed damages.

155. Mr. Sancheti drew the Court's attention to the claim made by the petitioner even in this petition. The claim Nos. 7 & 8 on account of overheads and loss of profits showed that the work was delayed beyond the stipulated period and completed only on 11 th August, 1999. The extended period was due to various breaches of condition of the contract by the respondent. It is also stated that the petitioner was not responsible for the delay but the respondent committed several breaches of contract. The petitioner relied upon Section 55 and 73 of the Indian Contract Act in (78) Arbp 1088/10 (J) that behalf and made the aforesaid claims.

156. Having seen the contract between the parties, the law relating to time being of the essence of the contract, the correspondence made by the petitioner to apply for extension of time giving the reasons for the delay in carrying out contract work within contract period and the claim made by the petitioner, the award would require to be analysed.

157. The learned Arbitrator has set out that the petitioner has alleged breaches committed by the respondent for which the contract has been prolonged and correctly relied upon the legal principle that one who commits wrong must compensate the other side who has been put to loss due to such wrongful act. The learned arbitrator has further considered the case of the respondent that the statement of claim does not hold the respondent responsible for the delay. That case has been brought out only in the written arguments which is contrary to the case in the statement of claim. (It is thereafter been made out in this petition as aforesaid). It was also argued that for the tall claim of 7.5 Cr + 6.95 Cr there is no proof by way of documents. It is observed that the allegations about the delays attributable to the respondent are not proved and that case is contrary to the correspondence. The respondent also claimed that there was no logic in claiming loss of profits for 22 months when the contract was required to be completed in 12 months. How the profit of 30% claimed was also not shown.

158. The learned arbitrator has held that the claim for the extended period could not be allowed, termination was not unlawful, the petitioner has failed to prove with evidence its claim which is of 7.5 Cr + 6.95 Cr, the petitioner has not completed work within contract period for reasons not (79)

Arbp 1088/10 (J) attributable to force majeure or the respondent and hence disallowed the entire claim.

159. Can the learned arbitrator be faulted in coming to the conclusion that nothing is proved by the petitioner and hence nothing can be granted? Indeed, the aforesaid discussion shows the extension applied for by the petitioner for the reasons of third parties' acts or conduct for the delay and the total lack of any evidence to show how 30% of the contract price is taken as the base in the Hudson formula or how the various overheads for the various items in claim No.1 relating to overheads as also in the claim for loss of profits, which is not a part of the Hudson formula, is also proved.

160. Mr. Andhyarujina argued that learned arbitrator did not consider the judgment in the case of McDermott (Supra) which was delivered well after the arguments were heard but before the award was passed. Nevertheless the claim of 30% made as per the Hudson formula has been seen by the arbitrator as devoid of proof. For claiming 30% in the formula Mr. Andhyarujina would claim that the question of law relating to time being the essence of the contract or not was not considered by the arbitrator. Seeing how Section 55 has been applied it becomes clear that it was not applicable to the petitioner's case at all and was not required to be considered in view of the total lack of any evidence and the very basis of making the claim against the party who has not been shown to be in breach and who is the promisee who would itself be entitled to compensation.

161. Mr. Sancheti drew my attention to Clause 2 of the agreement between the parties which shows that the petitioner has inspected the site, (80) Arbp 1088/10 (J) satisfied himself about the quantity, nature and magnitude of the work, made legal and independent enquiries and obtained information as to all the probable and possible situations, delays hindrances or interference to or with the execution and completion of the work to be carried out by the petitioner. This would show the magnitude of the work to be done. The petitioner must anticipate various delays and accordingly put up his bill.

162. Mr. Sancheti also drew my attention to Clause 15 of the contract relating to the time of performance which specifies that the contract shall be commenced within two weeks after the receipt of the letter of the acceptance of the tender and completed in the time schedule of the completion of the work. It is specified that the "contractor should bear in mind that the time would be of the essence of the agreement"

> unless it is extended under Clause 17.

163. Clause 17 deals with extension of time. If the contractor is unavoidably hindered in the execution of the work on any ground, it is required to inform the Engineer-in-charge within 10 days of the hindrance to show reasonable grounds for authorising extension of time. The contract period expired on 10th October, 1997. Had the contract period not been extended by the further 22 months and had the respondent not allowed the petitioner to obtain further sanctions or refused to pay the petitioner for the further approvals obtained, the petitioner could have claimed extension of time upon showing that it was unavoidably hindered in performing the contract. The petitioner was not disallowed to continue the contract after writing its letters showing the reasons for the delay till 6th

August, 1999 after which no further extension was granted. It was not for the petitioner to apply for extension of time upon claiming that the contract could be extended but that the petitioner has not done its work.

(81) Arbp 1088/10 (J) The petitioner has accepted termination despite calling it unlawful and stated that the contract was completed on 11 th August, 1999. The petitioner's claim is not also for extension of time. The petitioner knows well that the time has been very reasonably extended for 22 months after the completion of the period of the contract.

164. The petitioner has also not shown force majeure. Hence clause in that behalf being Clause 16 also would not apply.

165. Further Mr. Sancheti drew my attention to Clauses 43(v) and

(vi) under which the schedule of the rates showing the rate claimed and charged by the petitioner would cover the risk of delay and which cannot be altered under the contract. This is in terms of a just tender. When tenders are invited parties are required to bid. The most attractive rate would be accepted. The petitioner's bid has been accepted. If the bid excludes various aspects relating to damages for overheads or loss of profits etc., the purpose of the bid would be frustrated. If any party has included this, as it should, as covering risk of delay based upon Clause 2 of the contract, by taking into account the magnitude of the work, its bid would have been rejected as less attractive than the petitioner's. After such express contract to include all such eventualities within the contract price, the petitioner cannot be made to rescind therefrom by being granted additional amounts which the petitioner may not have contemplated though the contract required him to do so.

166. Mr. Sancheti would argue that only the respondent would be entitled compensation for delay in Clause 18 (which has been considered for Clause 3A and 3B relating to the liquidated damages). This clause shows the specified damages that would be claimed by the respondent as (82) Arbp 1088/10 (J) the owner and which would be payable by the petitioner as the contractor; it is not the other way round.

167. Consequently considering the claim of the petitioner and despite the arguments for the first time in the written arguments and then in this petition, it is seen that the petitioner has not made out any case for being granted any damages by way of overheads or loss of profits and the entire claim is wholly misconceived and left totally unproved since there is no evidence of proof at all for the precise amount claimed by the petitioner and the petitioner has not shown how termination is unlawful whilst accepting completion of the contract on 11th August, 1999. The conclusion by the learned arbitrator that the claim is not proved and hence cannot be granted cannot be faulted.

Claim No.9A : Physical verification of the crossings and the ROU.

168. The petitioner was to be paid for the various crossings as specified in the Schedule of Rates relating to ROW. The petitioner was to be paid for all the work done for acquisition of the relevant lands under the Pipeline Act for claiming payment for the ROU. The petitioner claimed for separate

approvals with regard to various creeks/nallas, rastas, village roads etc. The respondent considered those claims erroneous and exaggerated. The petitioner submitted various RA bills from time to time.

The respondent passed bills to a certain extent. The respondent claimed that the remainder of the petitioner's claim for various crossings separately shown by the petitioner under the approvals of the Collector of various districts could be granted as claims for nallas, rastas etc. only after physical verification of the crossings. This physical verification was to be done by the representative of the petitioner as also the respondent.

(83) Arbp 1088/10 (J)

169. The petitioner claimed that a lot of work went into such verification for a period of about 20 months at an expense of Rs.60,000/- p.m. In the statement of claim the petitioner claimed Rs.12 lacs for such work. This would be 20 months from the date of the completion of the contract on 11.08.1999.

170. The petitioner claimed for this work in its last bill dated 09.09.1999. The petitioner had claimed for the voluminous work done by the petitioner for 20 months till 11.08.1999, the last day of the contract claiming Rs.50,000/- p.m. towards expenses for equipment and overheads and consequently claiming Rs.10 lacs therein.

171. This claim has been enhanced to Rs.12 lacs in the statement of claim.

172. The petitioner must show when the respondent demanded physical verification of the ROW crossings for the first time. The petitioner has shown the Court 4 letters in this behalf.

The letter dated 11.06.1998 of the petitioner calls for payment to be made under the 5th RA bill as per the number of crossings.

The parties had a meeting on 12.08.1998 in which they decided that the payment for creeks/nallas/village roads could be made only after physical verification of those crossings at the site.

This was set out in the respondent's letter dated 17.08.1998 in which the respondent called upon the petitioner to finalize the programme for physical verification of creeks/nallas/village roads in consultation with the Deputy Manager.

By the letter dated 21.09.1998 the petitioner complained that (84) Arbp 1088/10 (J) despite his readiness the verification even on that date could not be done and was pending because of the respondent. Consequently the petitioner demanded certain adhoc payment.

Under the further letter of the respondent dated 16.02.1999 the respondent again reiterated the physical verification is a must and called upon the petitioner to depute its staff along with their

Deputy Manager to start the physical verification of crossings from 18.02.1999.

These letters relied upon by the petitioner themselves show that the verification was not even commenced until after 16.02.1999.

173. The respondent would contend that this claim is for the work covered under the scope of the contract. That has been specified in the letter dated 16.02.1999 in which the respondent has clarified that inspection of any work is a contractual obligation and consequently the petitioner cannot get any compensation for the crossings claimed by him unless physical verification was done. The petitioner would contend that it was work not within the scope of contract and, therefore, would merit additional payment under Clause 47 referred above.

174. This was the case that the learned Arbitrator had to consider.

He set out the case of the petitioner under claim No.9.

175. The petitioner contended before the Arbitrator that the contract nowhere provided for verification after the entire work is over and that it could not pinpoint under which part of the contract the verification was required. It contended that the PP Act, 1962 pertains to notification only. The respondent contended that the petitioner claimed additional payment for creeks/nallas/roads which were not applicable and hence the verification was required to ascertain and prove the petitioner's claim. The (85) Arbp 1088/10 (J) petitioner agreed to the verification 11 months after the respondent sought verification. Indeed, this exercise was in the nature of proof of work. The petitioner would have to show precisely the places where there were "crossings". It is much like making a report of the work done and taking inspection thereof for the satisfaction of the party to the contract who had to disburse payments upon inspecting the work done.

176. The petitioner did not also provide any particulars of the quantum of the work done. The learned Arbitrator concluded that the petitioner had not provided clear particulars of the claim nor led any evidence to establish the claim and that it was hit by Clause 47 of the agreement, re-enforcing the fact that the petitioner was aware that it was a part of the composite job.

177. The petitioner indeed claimed additional amount for physical verification only much later in the contract. The petitioner claimed 20 months of work done but the correspondence itself showed hardly 6 months of such work, if any. No definite date of the commencement and completion of that work is shown. Arbitrary figures of Rs.50,000/- and Rs.60,000/- p.m. are claimed. The conclusion of the learned Arbitrator that the petitioner has not provided particulars or led any evidence would be enough to reject the claim. This is despite the invocation of Clause 47 which is a purely academic exercise as in other claims.

178. The rejection of the claim, therefore, cannot be interfered with and in fact nothing is shown as to how it could be granted.

Claim No.9B : Compensatory land for afforestation (86) Arbp 1088/10 (J)

179. Alternate land had to be provided where deforestation was done. The petitioner was required to buy suitable land on behalf of the respondent to be handed over to the Forest Department.

180. The petitioner's last 18th RA bill in this behalf makes a claim that the Ministry of Environment and Forests (MEF) was provided 15 hectares of land. The petitioner claimed that that was done upon extra efforts put in by the petitioner. The petitioner's bill showed the market value of the land was estimated to be Rs.15 lacs. The petitioner claimed 20% of the land costs towards its service being Rs.3 lacs.

181. There are no documents showing transfer of 15 hectares of land to the Forest Department. The petitioner could have easily provided such documentary evidence, if any. There is no evidence showing the market value of the land. Claim of Rs.15 lacs is not shown to be for a particular area of the land.

182. The petitioner's claim before the Arbitrator is much the same.

183. The respondent would claim that there has been no basis shown by the petitioner for the value of the land or the percentage of his service charges in making this claim. No documents are produced showing the transfer.

184. Mr. Sancheti on behalf of the respondent drew my attention to Clause 4.7 under which all infrastructural and administrative facilities required for completion of ROU activities were to be provided by the contractor though not mentioned in the bid documents.

(87) Arbp 1088/10 (J) This would, therefore, include the transfer of alternate land for afforestation. Further under Clause 4.8 of the Contract the scope of work of the contractor included all activities required to be done directly or indirectly and also all associated expenses and costs to be incurred by the contractor.

185. Under its letter dated 8th May, 1997 the petitioner has notified the respondent that the approval required for the forest land was got prepared. However it could be passed only if a proposal for afforestation of the land was submitted along with application for the NOC/approval. It could be processed further only after land is allotted to the Forest Department where afforestation could be carried out. The petitioner called upon the respondent to suggest the alternate land. The respondent replied by its letter dated 16.05.1997 that there was no alternate land available and, therefore, the petitioner itself must pursue with the relevant Collector and make application to the Forest Authorities.

186. The fact that the approval itself would not be granted unless such alternate land is transferred to the Forest Department would show that it was a condition precedent to the grant of the approval. The contract of the petitioner required him to obtain the necessary approvals and to do everything for such grant. Consequently the work of the petitioner in obtaining and transferring alternate land to the Forest Department would be a part of the contract as claimed by the respondent.

187. The learned Arbitrator has considered the case of the petitioner that the contract pertains to the issue of the notification under the PP Act and that the requirement of obtaining alternate land for afforestation was not a part of the contract. The respondent contended (88) Arbp 1088/10 (J) that if the claim was not a part of the contract, Clause 47 would be attracted and which has not been followed. The respondent would contend that the petitioner's letter dated 08.05.1997 itself shows that the work for afforestation required was done before the approval could be obtained and consequently the work was included in the scope of work of the contract meriting no extra payment.

188. The learned Arbitrator considered that the petitioner had not provided any evidence for this claim and was aware that it was a part of the composite job. He also claimed that the petitioner had not raised the claim as per the requirement of Clause 47.

189. Once it was seen that the relevant documents and evidence was not produced which would be the document showing the transfer to the extent of the land claimed by the petitioner as also showing the market value of the land, the claim could not be accepted. Hence the rejection of the claim cannot be faulted.

Claim No.10 : Compensation by way of interest for the delayed payment

190. The petitioner's 8th final RA bill shows 3 parts of the claim towards interest and other losses thus:

> (I) The petitioner's claim is for retention money retained by the respondent without reason. This is a reasonable claim of Rs.32,794/- and Rs.3440/- under the 9th RA bill. The petitioner has explained that 15% mobilization advance was paid upon submission of bank guarantee by the petitioner. This was the payment of 15% of the entire contract value under Clause 6.0 of the Contract. The petitioner was to give bank guarantee (89) Arbp 1088/10 (J) which had to be released not upon any RA bill being submitted as claimed by the petitioner but upon Section 6(1) notification of ROU being issued on pro rata basis. The entire claim is based upon the RA bills presumably because some amount of the bank guarantee came to be released pro rata.

A portion of the amount of the bank guarantee was, however, retained by the respondent. It could be released upon further notifications issued under Section 6(1) of the PP Act.

191. The petitioner's claim was for late release of the bank guarantee. The petitioner claims that it was released late upon the dates shown in the 9th RA bill submitted by the petitioner. The petitioner has calculated the dates between the 9th RA bill and the release of the amount and claimed interest for wrongful retention @ 24% p.m.

192. My attention has been drawn to Clause 6.0 which relates to 15% mobilization advance which was to be released after Section 6(1) notification was issued on pro rata basis as mentioned therein.

Consequently the date of the 9 th bill becomes wholly inconsequential to consider.

193. The respondent would claim that the number of days would be erroneous because it was calculated from the wrong date which was irrelevant as per the terms of the contract. The respondent would argue the cost of keeping the bank guarantee alive was far less than 24% and consequently interest claimed @ 24% albeit of a reasonable amount was not grantable.

194. The respondent would also claim that what the petitioner calls the amount released later was released when the further portion of the (90) Arbp 1088/10 (J) bank guarantee came to be repaid after the contract was completed on 13.08.1998.

195. The respondent has contended that the petitioner has not mentioned what amount was claimed as interest and for what period. The respondent claimed that when the bank guarantee was submitted on 13.08.1998 the payment was immediately released. The petitioner must show that the amount retained was liable to be repaid to the petitioner earlier than was repaid. This the petitioner has not shown this in his claim.

(II) The petitioner has claimed interest for the late release of the payment claimed in his RA bills by way of interest and loss suffered by it due to payment withheld for the work already done. The petitioner has submitted a statement of claim for such work done but for which payment was withheld. The claim shows a columnar statement reflecting amounts payable under the bills submitted, amounts actually paid, the difference, the delay for the number of days the amount was withheld and claimed interest @ 24% thereon.

196. For each of these bills which the petitioner submitted but was not paid partly or fully, the petitioner must issue notice under Section 3(1)

(b) of the Interest Act making a demand for charging interest at the rates specified in its notice from the date mentioned in the notice to the date of institution of the proceeding. The petitioner's claim under the RA bills is not for such period.

197. The petitioner claims to have sent the notice to the respondent under its letter dated 29.04.1998. The letter shows the 8th and 9th RA bills dated 08.01.1998 and 23.03.1998 as the subject matter. The petitioner (91) Arbp 1088/10 (J) claims that the payment was not received by it. The letter further shows "moreover the interest @ 24% and other losses for delay in payment will be payable to us". Such a letter cannot be construed as a notice under the Interest Act. The respondent would claim that for a mere statement given by the petitioner in its bill, the particulars of the number of days for which the payments are claimed by way of interest cannot be deciphered and the petitioner has not led any evidence or even explained the statement. The respondent would argue that the RA bills were required to be paid within 1 month of the issue. The 8th RA bill dated 08.01.1998 would be payable by 08.02.1998. The 9th RA bill dated 23.03.1998 would be payable by 23.03.1998. The petitioner has not shown the dates when the amounts were released and the dates from when the interest was claimed in the columnar statement.

198. Upon such a case the learned Arbitrator has considered that the petitioner's case was that it was deprived of its money and, therefore, required to be compensated since there was no bar to the payment of interest under the Contract. The respondent contended before the Arbitrator that the claim did not provide particulars of the amount due but simply took the difference between the amounts claimed and paid. The learned Arbitrator considered that the petitioner had not given notice claiming the interest at a particular rate from a particular date (which would be different for each of the bills). The learned Arbitrator considered that the petitioner has not provided particulars of the claim and led evidence to establish the claim. The columnar statement is rather unintelligible. The petitioner at least should have explained the period during which the claim was made at a particular rate but which has not been done.

(92) Arbp 1088/10 (J) (III) This claim is also for interest and other losses for the delay in payment. The petitioner has shown the dates of the submission of the bills, the due date of the payment of the bill, the actual payment by the respondent and the days of delay in payments. It has claimed interest @ 24% p.a. on the bill amount. This statement indeed shows the period during which the amounts are claimed. The learned Arbitrator would otherwise require to only verify whether the dates of the bill and the payment and the extent of the payment could be made were correct.

199. The respondent however relied upon the provisions of the Interest Act and claimed that no due notice was given to the respondent for such claim of interest. The learned Arbitrator has considered the aspect of the notice required to be given under the Interest Act which the petitioner was unable to show. On that singular aspect the claim could fail.

Rejection of this claim, therefore, cannot be interfered with.

LEGAL ASPECTS Bias

200. The petitioner has claimed that the learned Arbitrator was biased against him, since he was the employee of the respondent. It is settled law that an employee of corporation of the respondent can be an Arbitrator. (See. M/s. Ladli Construction Co. (P) Ltd. Vs. Punjab Police Housing Corpn. Ltd. 2012 AIR SC 1580, Indian Oil Corporation Ltd. Vs. Raja Transport Pvt. Ltd. (2009) 8 SCC 520, Mussafar Shah Vs. MMTC 83 2000 Delhi LT 514 and Saurabh Kalani Vs. Tata Finance Ltd. 2003(3) Arb.LR 345 (Bom) (DB))

201. Hence the petitioner must show special bias in this claim. The (93) Arbp 1088/10 (J) petitioner claims that his arguments were heard between March and May, 2003. Thereafter the argument of the respondent continued and parties filed their respective written arguments. The petitioner made an application on 11.03.2006 that the Arbitrator had to complete the arbitration within 3 years which had transpired since his argument commenced on 24.03.2003. This application of the petitioner was dismissed by the Arbitrator. The challenge to that order in this Court and thereafter in the Supreme Court has also been dismissed. The arbitration proceeded. Though the hearings were completed, the learned Arbitrator could not pronounce the award thanks only to the petitioner. After the SLP in the Supreme Court was disposed of, the petitioner made another application for further arguing the matter. The petitioner made yet another application under Sections 12 & 13 of

the Act alleging bias against the arbitrator. The learned Arbitrator has disposed of both the applications under a common order. My attention has been drawn to the application made by the petitioner. The application suggests how the arguments commenced on 24.03.2003 were completed on 14.05.2003 after which there were oral arguments and written arguments of the respondent including certain adjournments and which were completed after the lapse of 16 months. It alleges that the learned Arbitrator has not acted with the due diligence and hence favoured the respondent. The application also makes a reference to the fact that the Arbitrator become functus officio as claimed in earlier application which was rejected throughout till the Supreme Court order. It mentioned about another award passed by the same Arbitrator against the another contractor and in favour of the respondent. On the ground of bias the learned Arbitrator has held that the application is somewhat like the earlier application and hence has rejected it. It is indeed so. Para 3 as also 5 make this absolutely clear. Further allegations in para 4 are only a fall out of the case upon the allegations (94) Arbp 1088/10 (J) made in paras 3 & 5. The petitioner could not be concerned with another award of the same Arbitrator against another party on totally different facts.

202. Consequently it is seen that the claim of bias made out by the petitioner is frivolous. In fact it is counter-productive. The learned Arbitrator had to adjudicate upon the claim made by the petitioner himself. Even if the learned Arbitrator is held to be biased, another Arbitrator would be from the same corporation. It is in the petitioner's interest to put forward his case and to show on merits that the award is unsustainable. The ruling of the learned Arbitrator cannot be faulted.

Mandate

203. Mr. Andhyarujina contended that the arbitrator did not have the mandate to pass the impugned award. This contention has been taken earlier. It has been rejected by this Court and Supreme Court. Mr. Andhyarujina would argue that this aspect would not make the petitioners contention hit by the provisions of res judicata when the law is amended after the earlier decision as shown in the case of Bharat Oman.

204. Mr. Andhyarujina would argue that the aspect relating to the mandate of the arbitrator can be taken up whilst challenging the award because it is a jurisdictional fact. He has relied upon the judgment in the case of Arun Kumar & Ors. Vs. Union of India & Ors., (2007) 1 Supreme Court Cases 732, in which the jurisdictional fact is explained in paragraphs 74 and 76 as a fact which must exist before the Court, Tribunal or Authority assumes jurisdiction over a particular matter. It is one of existence or non-existence of a fact upon which depends the jurisdiction of (95) Arbp 1088/10 (J) a Court, Tribunal or Authority and its power to act. If the jurisdictional fact did not exist, the Court, Authority or Officer cannot act as no authority can act upon the jurisdiction which it otherwise does not possess. The essence of the jurisdictional fact is a sine qua non or condition precedent for the exercise of power by a Court of limited jurisdiction.

205. The parties gave the arbitrator a time limit to decide. The arbitrator decided outside the time limit. The period for that decision was not extended by consent. The petitioner would rely upon the case of NBCC Ltd. Vs. J G Engineering Pvt. Ltd., (2010) 2 Supreme Court Cases 385 to contend that the court could not extend the time in the absence of consent of the parties. However, in the Division

Bench judgment of this Court followed in the case of M/s. Snehdeep Auto Centre Vs. Hindustan Petroleum Corporation Ltd. in Appeal No.143 of 2012 in Arbitration Petition No.430 of 2008 decided on 16 th April, 2012 and M/s. Mantech Consultants Vs. Bharat Oman Refineries Ltd. in Arbitration Petition No.477 of 2006 dated 2nd September, 2011, the conduct of the parties amounting the clear waiver was considered. The presumption of waiver upon the conduct of the parties was made. It was held that when the conduct of the parties implied to mean that they have consented not to insist upon mandatory time limit, the award cannot be challenged. It was observed that when a party attended a number of meetings after the period expired, it would show a strong indication of waiver. If the party does not take a clear or unambiguous stand also it would tantamount to waiver. The petitioner would contend that his conduct would not tantamount to waiver because he has taken a clear stand that the arbitrator's mandate was over.

206. Mr. Andhyarujina would argue that in the case of Bharat (96) Arbp 1088/10 (J) Oman Refineries Ltd. Vs. Mantech Consultants, 2012(3) Bom C R 754 the Division Bench of this Court held that there can be no waiver after the period in the agreement expired. The arbitrator became functus officio and could not proceed with the award. This court is, however, bound by the decision of the Supreme Court in this case itself and consequently the question of mandate having been considered cannot be reconsidered.

Reasons

207. It is contended by Mr. Andhyarujina that the award is a wholly unreasoned award because the reasons for rejecting each of the claims of the petitioner have not been given and mere conclusions are stated. Mr. Andhyarujina drew a parallel between reasons and conclusions. It is established not only by precedent but by legislation that awards must be reasoned awards. They would show the mind of the arbitrator. This would show lack of caprice much as in judgments of Courts. The award must, therefore, be intelligible as to why a particular claim is accepted or rejected. This proposition is too well settled to be at all refuted. What would constitute a reasoned judgment or award can be seen from various judgments.

208. The requirement of giving reasons have been set out since well prior to the enactment of the 1996 Act as our justice system is based upon the requirement of giving reasoned orders and judgments. In the case of Messers Mahabir Prasad Santosh Kumar Vs. State of UP and Ors., 1970 (1) Supreme Court Case 764 the worthiness of the reasoned judgment of the Tribunal has been set out for the quasi judicial determination. The reasons for the requirement of a reasoned judgment is shown thus :

(97) Arbp 1088/10 (J) It must appear not merely that the authority entrusted with quasi- judicial authority has reached a conclusion on the problem before him :

> it must appear that he has reached a conclusion which is according to law and just, and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution. Satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appeal to the authority.

> Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just.
>
> This judgment has been applied by the Delhi High Court in the context of arbitration which shall be considered presently. The mental process from the dispute to the resolution as observed in this judgment has been also considered in a later case by the Supreme Court which shall be considered presently.

209. Similarly in the case of in the case of S N Mukherjee Vs. Union of India, (1990) 4 Supreme Court Cases 594 the requirement of reasons to be given by an administrative authority governed by public law are stated to be an extension of rule of natural justice. The Court considered that the requirement of recording reasons would :

> (I) guarantee consideration by the authority, (ii) introduce clarity in the decisions ; and (iii) minimise chances of arbitrariness in decision-

making.

210. In the case of McDermott (Supra) what is "reasoned" has been explained from Bachawat's Law of Arbitration and Conciliation, 4 th Edn., pp.855-56 thus :

(98) Arbp 1088/10 (J) ...Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded. The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration In Re, "proper, adequate reasons".

Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons.

The meaning of the word "reason" was explained by the Kerala High Court in the context of a reasoned award....

Reasons are the links between the materials on which certain conclusions are based and the actual conclusions....

A mere statement of reasons does not satisfy the requirements of Section 31(3). Reasons must be based upon the materials submitted before the arbitral tribunal. The tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored....

Statement of reasons is mandatory requirement unless dispensed with by the parties or by a statutory provision.

211. In the case of Jagmohan Singh Gujral Vs. Satish Ashok Sabnis 2004(1) Bom C R 307 the learned Single Judge of this Court considered various precedents and set out the mandatory reasons required under Section 31(3) of the Act. It was held that :

> .... the reasons must be based on the material available to the Tribunal. The Tribunal has to give its reasons. On consideration of the relevant material and ignoring irrelevant material. This would be the relevant test. Findings based on the reasons not considering material on record and / or on appreciation of the evidence which the Court finds to be totally perverse can be said to be not a reasoned award.
>
> The purpose of giving reasons is to enable the Court to know that the (99) Arbp 1088/10 (J) arbitrator has correctly addressed himself to the controversy in issue or has considered the material on record or ignored irrelevant material or applied the correct principles and, therefore, on appreciation of the evidence has given reasons for the findings on the conclusions. This to my mind, would be the requirement of giving reasons. Any other manner of reading the expression to give reasons would defeat the mandate of law as contained in section 31(3) of the Act of 1996.

212. Relying upon the same analogy it was held in the case of Jai Singh Vs. DDA, 2008 LawSuit (Del) 1781 that the arbitrator must indicate his mind and that award cannot be unintelligible. Consequently when the arbitrator has merely stated that the claim is not in accordance with the agreement or in accordance in terms of the contract or that the claim is not established or that no case is made out it tantamounts to not giving reasons as it would be unintelligible. At best such expressions could be conclusions. Therefore, conclusions must be based upon reasons and the conclusions must show how those conclusions have been arrived at.

213. It is held in the case of Jai Singh (Supra) that if that is not done the Court would be compelled to peruse the record and determine whether the conclusions reached by the arbitrator are in accordance with law or not and this is not the scope of the enquiry whilst entertaining challenges and objections to arbitral awards.

214. It may be mentioned that in this case this exercise was undoubtedly required to be undertaken by the Court, thanks to the tenacity and pursuasiveness of Mr. Andhyarujina. The learned Arbitrator has concluded that various claims cannot be entertained because they fell within the scope of the contract. Whereas the petitioner contended that there were additional matters outside the perview of the contract, the respondent pointed out how they were within the terms of the contract by (100) Arbp 1088/10 (J) the aforesaid clauses of the contract which have been reproduced. Though the

learned arbitrator has not referred to those clauses of the contract by which he concluded that the work was within the scope of the contract, going through the contract would make that position clear.

215. In the case of Madhok Construction Co. (P.) Ltd. Vs. Union of India, 71(1998) Delhi Law Times 599, when the arbitrator had dealt with the claims considering documents referring to the details of the claims it was held that the Court cannot reassess the evidence and arrive at contrary finding when the conclusions are supported by the material and evidence on record.

216. In this case the arbitrator has held how various claims stated to merit extra payment were, in fact, within the scope of the contract. Mr. Sancheti having shown the Court the relevant clauses though not cited by the arbitrator, but seen by the Court, the inevitable conclusion would be that his conclusions are supported by the material on record, being the contract itself.

217. What is a reasoned award has been explained by the Delhi High Court in the case of CMDR S.P. Puri Vs. Alankit Assignments Ltd., 2008 (3) Arb L R 465 (Delhi) to which my attention has been drawn by Mr. Sancheti. It is held that what the law requires under Section 31(3) of the Act is that the arbitrator must give reasons and nothing more. The reasons must be clear and indicate the basis of the decision. They must be intelligible and comprehensible and need not necessarily be lengthy and elaborate. They should indicate and provide a link between questions and issues and the conclusions reached. They should indicate the mind of the arbitrator. Hence it is held that arbitrators need not give an elaborate (101) Arbp 1088/10 (J) judgment dealing with each and every ground or reason. They have to consider the entire facts in proper perspective. The arbitrators are men from the trade or relatives and hence must have substantial latitude and flexibility in deciding matters in a just and equitable manner. They need not elaborately discuss all contentions raised by the parties.

218. Similarly in the case of M/s. Ircon International Ltd. Vs. M/s. Arvind Construction Co. Ltd. & Anr., 81(1999) Delhi Law Times 268 it is observed in paragraph 11 that :

> The arbitrator is not expected to write judgment like a Court of law but has only to state as to how he has come to the finding arrived at by him. No particular form is required for giving reasons. The arbitrator is not expected to record at great length the communications exchanged or submissions made by the parties nor he is expected to analyze the law and the authorities. It is sufficient for him to explain what his findings are and how he reached at the conclusions. Sufficiency of reasons is not to be gone into by the Court.
>
> The arbitrator in this case was an expert being a retired Financial Commissioner of the Railway Board and was appointed by the petitioner. He, after hearing the parties, has given his decisions and also recorded reasons. May be, in the opinion of the petitioner, the arbitrator has not analysed the law and has not elaborately discussed the various contentions of the parties, but that in itself, in my opinion, is not sufficient to set aside the award of the arbitrator. The arbitrator having given reasons for arriving at the decision taken in the award, there is no force in the submission of

Mr. Singla that award is liable to be set aside on any alleged ground.

219. In the case of International Airport Authority of India Vs. K D Bali & Anr., 1988 Air 1099 1988 SCR (3) 370, it has been observed, albeit for a reasoned order which was demanded on the preliminary objections by a party challenging the award, that it was not necessary for the arbitrator to record a long reasoned order as "indeed the law does not demand writing such a long order".

(102) Arbp 1088/10 (J)

220. What then would constitute an unreasoned award ?

221. The case of T N Electricity Board Vs. Bridge Tunnel Construction & Ors., (1997) 4 Supreme Court Cases 121 was of a construction contract between a government body and private party.

Various claims under certain clauses of the contract were made for material to be excavated, tunnel excavation etc. The rates payable under the contract were mentioned in the schedule to the contract. The respondent claimed at rates higher than the contract rates. These claims were made after expiry of the contract period. Objections were raised by the government body. The arbitrator without going into details passed the non-speaking award awarding Rs.70.83 lacs in place of Rs.2.10 Cr. The award runs thus:

"I hereby award and direct as follows :

(1) the respondent shall pay the claimant a sum of Rupees seventy lakhs eighty-three thousand seven hundred and ninety-three only (Rs.70,83,793) and release the earnest money deposit and bank guarantees furnished by the claimant in lieu of security deposit, in full settlement of all claims and counter-claims.

The Supreme Court held that the claim of excavation and damages were not considered in a non-speaking award. It was difficult to discern to what extent the claims had been considered admissible and how the inadmissible claims were adjudged. Hence it could not be discerned to what extent the arbitrator had exercised his jurisdiction vis-a-vis the admissible claims and disallowed the non-arbitrable claims. Hence it was not clear whether he exercised his authority beyond his jurisdiction or in abdication thereof. In either case it was held that it would be an error of jurisdiction "the very foundation of his decision". It was observed that in a (103) Arbp 1088/10 (J) non-speaking award the Court cannot go through the reasoning of the award and correct wrong proposition of law or any error in law. It was observed that :

It is not open to the Court to probe the mental process of the arbitrator and speculate, when no reasons have been given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

> Thus such a non-speaking award was held liable to be set aside.

222. In the case of Municipal Corporation of Delhi Vs. M/s.

Jagan Nath Ashok Kumar & Anr., AIR 1987 Supreme Court 2316, it was held and that when the germane and relevant reasons with a rational nexus to the claim were given to hold what arbitrators held, the award could not be challenged as unreasonable.

223. In the case of Ravindra Kumar Gupta & Co. Vs. Union of India, (2010) 1 Supreme Court Cases 409, the observation of the Supreme Court in paragraph 14 would show that there would be no interference with a reasoned award unless there is total perversity in the award or the judgment was based on the wrong proposition of law.

224. Mr. Andhyarujina would argue that the reasonableness of the reasons must also be seen. He would contend that in claim No.4 with regard to the entries in the revenue records required to be obtained by the petitioner, the learned arbitrator made surmises and conjunctures upon his own imagination of what was the position with regard to the record of rights that he knew as a senior executive of the government and the citizen of this country. He contended that the learned arbitrator has only surmised that the names of all the parties who have right, title and interest in the property should be recorded in the revenue record and as such the work of (104) Arbp 1088/10 (J) obtaining such entries was within the scope of the work contractor.

225. Mr. Andhyarujina relied upon the judgments in the case of Dhirajlal Girdharilal Vs. Commissioner of Income Tax, (S) AIR 1955 S C 271 (Vol 42 C N 47) and Ascu Arch Timber Protection Ltd Vs. Commissioner of Central Excise, Calcutta, (2004) 10 Supreme Court Cases 653 in which it has been held that upon the surmises of a Tribunal which was Court of fact arrived at by considering irrelevant material partly upon the conjectures, surmises and suspicions, an issue of law arose to reconsider the decision.

That would be to frame a question of law upon which the Taxation Appeal could be admitted. What Mr. Andhyarujina calls surmises is the fact which merits judicial notice. It is a known fact that the revenue records do reflect the position of fact at site and its incorporation is mandatory. Stating the knowledge of such fact is not a surmise.

226. Mr. Sancheti drew the attention of the Court to the case of Central Bank of India Vs. State of Gujarat & Ors., AIR 1987 Supreme Court 2320 in which relying upon an English judgment in the case of Mediterranean & Eastern Export Co. Ltd. Vs. Fortress Fabrics Ltd. (1948) 2 ALL ER 186 it was observed:

> A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do.

227. It would have to be seen whether in this case sufficient reasons have been given by the learned arbitrator so as to make his award (105) Arbp 1088/10 (J) intelligible and so as to make the Court understand why the claims have been rejected. The reasons to be given, therefore, need not be scientifically made out or articulately enumerated and setting out each of the claims and the contentions. It would, therefore, have to be seen whether by a single reason in respect of each claim a rejection must be upheld, the other contentions of the parties and the considerations of the arbitrator notwithstanding.

228. Upon such parameters the impugned award must be considered for the charge made against arbitrator that he has not given reasons for coming to any of the conclusions that he has. Mr. Andhyarujina took the Court through each of the claims considered by the learned arbitrator in which the entire case of both the parties has been succinctly set out followed by the consideration of the learned arbitrator himself. There are more than one reason shown in most of the claims to conclude why each of them is rejected even if the learned arbitrator has not gone into the specifics of the law cited by the parties with regard to some of the claims. It would have to be seen whether for the conclusions that he has come to the only reasons given by him would suffice. It may be mentioned that if a particular claim has to be rejected for single reason that it cannot be granted, it would matter little why the arbitrator has not given other reasons also for rejecting that claim. In short, therefore, a single apt reason for rejection of each of the claims must suffice.

229. Separate claims may, therefore, be considered for seeing the reasons given by arbitrator thus :

(106) Arbp 1088/10 (J)

Claim Nos.	Particulars of Claim	Reasoning of the Arbitrator	One reason sufficient to disentitle the Petitioner
1(a) 1(b)	Loss caused by the illegal withholding of security deposit	The security deposit had to be adjusted or refunded. It has been refunded. The due date	Security deposit itself was not repayable before it was actually paid. No notice of demand under the Interest Act also given.

		was extended. The petitioner sought to complete the job and sought extension. The security deposit automatically got extended.	
2	Payment for ROW under the Schedule of Rates.	Petitioner has not proved the approvals obtained for nallas/crossings There was no evidence to support 778 approvals. Merely including numbers in the statement of claim does not entitle the petitioner for payment.	The number of approvals claimed to have been obtained are not proved. (The award under this claim is set aside only to reconsider the purport of entire Item No.2 in the Schedule of Rates showing approx 475 approvals.)

3a & 3b		Liquidated damages	There was admittedly a delay of more than 10 weeks contemplated under Clause 18. The amount withheld is the pre-estimated quantity of loss suffered. Reliance upon the general denial of the case of the respondent. ig ONGC Vs. Saw Pipes is made. Petitioner has only stated but not led evidence that the respondent has not suffered any loss.	Upon the application of the principles laid down in Saw Pipes case, the respondent did not have to prove loss caused. The Petitioner had to prove that no loss w caused. That is not proved upon

4	Entries in revenue records	The arbitrator has referred to his own experience relating to recording the names in the revenue records.	The Work falls within the terms of the contract. The work is within the scope of the contract. It is in terms of PP Act. Claim has been not made as per Clause 47.

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5	NOC for revenue forests	The petitioners work is for the job for which composite rate	The work falls under Item 2 of the Schedule of Rates. (It must be reconsidered along with

		has been agreed. Claim No.2)	
		Clause 47 has not been complied.	
6	Preparation of executive summary	It was not prepared to the satisfaction of the respondent. It was a part of the composite job for which the rate fixed has been paid.	It is included in the terms of the Contract.
7	Additional overheads	Termination of the agreement is not unlawful, hence additional overheads cannot be claimed. The petitioner has not led any evidence to	No evidence to prove the extent of the overheads claimed.

		prove any overheads or loss.	
8	Loss of profit.	The petitioner has not been able to complete the work within	No evidence to prove the extent of the loss claimed.

		12 months. That was not on account of force majeure or attributable to respondent. Hence loss of profit has to be borne by the petitioner.	
9A	Physical verification of crossings	The petitioner has not provided clear particulars.	Work is a part of th Contract.

		The petitioner has not led evidence to establish the verification done.	Verification for 20 months as claimed is not proved.
9B	Composite afforestation of land	This was the part of the composite job.	No evidence of transfer of land or market value given.
			Work included in the terms of the Contract.
10	Withholding of retention money and delayed payments.	The petitioner has not given notice claiming interest at a particular rate from a particular date. The petitioner has not led any evidence to prove the particulars given	Extent of the interest claimed is not proved. Statutory notice is not given.

			by the petitioner.		
11	&	Not pressed	----		----

230. Upon the elaborate and detailed arguments of Mr. Andhyarujina it may be seen that several points of law as also questions of fact both have arisen under the aforesaid claims. Each of those detailed contentions have indeed not been considered. The arbitration is with regard to a commercial contract. The arbitrator is not a judicial officer. He is stated to be a retired IAS officer. He is a man from the trade and would see the contract commercially. "The arbitrator is a man of trade." (See. Alankit (Supra)). He has considered the most pertinent contentions to reject the claims. The lack of proof by the petitioner by leading evidence in respect of the 778 approvals claimed upon 269 applications made, copies of which were also not produced would show that such a tall claim hitherto unproved could not be granted, the other questions of law is notwithstanding. Similarly when the petitioner claimed additional payment not under any particular clause of the contract but for what he claimed was additional work done e.g. the claims for updating the revenue records, afforestation, verification of crossings, preparation of executive summary etc. for all of which a composite rate was agreed and was held to have fallen within the terms of the Contract those clauses could not be entertained despite other contentions, however legally erudite, such as the voidability of Clause 47 under Section 28(b) of the ICA. Similarly if the learned arbitrator held that the clause relating to liquidated damages was applicable and no evidence was led to show no loss, the question of law relating to the subtle distinction between Sections 73 & 74 of the ICA or the interpretation and analysis of Section 55 of the ICA relating to time (111) Arbp 1088/10 (J) being the essence of the contract would only follow as consequence and would be secondary. The claims would have to be rejected for the singular reasons stated above, the nuances of the law, notwithstanding. The arbitrator is not expected to analyse such law and authorities (See. M/s. Ircon (Supra)). When the petitioner applied for payment for what he considered was the additional work not within the scope of the contract but only submitted statements without leading evidence to prove the statements, the mere observation that no evidence was led would suffice. Further reasons to be given need not be gone into by probing the mental process of the arbitrator as required in T N Electricity Board (Supra). Of course, the learned arbitrator has not set out the precise clauses of the agreement under which the work done by the petitioner has fallen as a composite job. Yet these conclusions are supported by the material and evidence on record, clauses in the contract itself being shown to Court complying with Madhok (Supra).

231. Consequently it would suffice to state that the reasons given by the learned Arbitrator are sufficient.

Public Policy

232. Mr. Andhyarujina would argue that the award would be against public policy in view of what he stated were its deficiencies.

However, he relied upon in the case of Simplex Concrete Pilies (I.) Ltd. Vs. Union of India, 2010 LawSuit(Del) 4632, in which the contract was held to be void under section 23 of the ICA as being against public policy of India. The case referred to the entitlement to claim damages under section 17 read with section 55 of the ICA in view of it being void under Section 23 of the Contract Act. The reliance upon that judgment is to show which (112) Arbp 1088/10 (J) are void contracts and to claim that the contract between the parties herein would be void at least so far as Clause 47 is concerned. That has not been the plea of the petitioner in the claim or even in this petition. It could not have been adjudicated in arbitration and cannot be considered in this petition.

ORDER

(i) The rejection of all the claims of the petitioner, except Claims Nos.2 & 5 to the extent stated above, are upheld.

(ii) Only Claim Nos. 2 & 5 are set aside to the above extent.

(iii) The arbitration petition with regard to the remaining claims stands dismissed.

(iv) The Court is gratified to note that both Counsel argued different facets of the laws with depth and industry and had able, appropriate and immediate assistance from their junior colleagues.

(ROSHAN DALVI J.)