



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 1018 OF 2019

The Kolhapur Municipal Corporation
Off: Bhavsingiji Road, Post Box No.33,
Kolhapur 416 002.

Through The Commissioner.

...Petitioner

Versus

Fairdeal Construction
Through Proprietor,
K.N.Jyothindran,
R/o. Green Heritage, B 1302,
Plot No.79/80, Sector 20, Kharghar,
Navi Mumbai 410 210.

...Respondent

Mr. S.C.Naidu a/w. Mr. Abhishek T. Ingale i/b. Mr. Abhijit Adagule,
for the Petitioner.

Mr. Akhilesh Dubey a/w. Mr. Vagish Mishra a/w. Mr. Amit Dubey, a/w. Mr. Uttam
Dubey a/w. Mr. Rajuram Kuleriya a/w. Ms. Ritika Gupta a/w Mr. Varad Dubey,
a/w. Mr. Alex D'souza, a/w. Mr. Shubham Sharma a/w. Mr. Aadesh Sawant a/w.
Mr.Subham Mishra a/w. Mr.Sahil Upadhyay a/w. Mr. Shivam Mishra and Mr.Aryan
Yadav i/b. Law Counsellor for Respondent.

CORAM: AARTI SATHE, J.

RESERVED ON: 09 SEPTEMBER 2026
PRONOUNCED ON: 08 OCTOBER 2026

JUDGMENT:

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the Act), challenges the arbitral award dated 1st April 2019, (hereinafter referred to as the “impugned arbitral award”) passed by the learned Sole Arbitrator in the arbitration proceeding filed by the Respondent,

seeking the claims as made in the statement of claim filed before the learned Sole Arbitrator.

2. By way of the impugned arbitral award, the learned Sole Arbitrator awarded a sum of Rs. 24,06,50,119.03/- in favour of the Respondent together with interest thereon at the rate of 18% per annum from 1st January 1997 until the date of the award, and thereafter at the same rate on the sums so awarded until payment or realization thereof.

3. By way of the impugned arbitral award, the learned Sole Arbitrator also awarded costs quantified at Rs. 1,50,00,00,000/- in favour of the Respondent, which costs were directed to be borne and paid by the Petitioner.

4. Briefly, the facts are as follows:-

i. The Petitioner is a civic authority of the city of Kolhapur. At the relevant time, octroi duty was levied on the import of goods within the limits of the Petitioner, and the Petitioner was entitled to levy and collect the said octroi duty. The Respondent was the successful bidder pursuant to a tender floated by the Petitioner for collection of octroi for the period from November 1995 to October 1996.

ii. On 7th September 1995, the Petitioner issued a tender notice inviting offers for appointment as an agent for collection of octroi within the jurisdiction of the Petitioner. The said tender notice *inter alia* contained the tender conditions as well as the terms and conditions of the agreement to be executed with the successful bidder. Pursuant to the said tender notice, the Respondent submitted their bid for

an amount of Rs. 25,09,00,317/-. On 10th October 1995, the Petitioner accepted the said bid and issued a letter of acceptance of even date in favour of the Respondent.

iii. Under the terms and conditions of the tender notice, the Respondent was required to furnish bank guarantees aggregating to Rs. 5,00,00,000/-. The agreement was to commence from 1st November 1995. It is the Petitioner's contention that the Respondent failed to furnish the requisite bank guarantees within the stipulated period.

iv. On 14th November 1995, an agreement was executed between the Petitioner and the Respondent (hereinafter referred to as the "Agreement"), whereby the Respondent was appointed as the octroi agent for collection of octroi on behalf of the Petitioner, in accordance with Rule 35 of Chapter VIII of the Schedule to the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as the BPMC Act) for a period of one year.

v. It is the Petitioner's contention that, under Clause 1 of the Agreement executed between the Petitioner and the Respondent, the Respondent was required to pay a total sum of Rs.25,09,00,317/- for the period of one year towards the collection of octroi. The said amount was to be paid by the Respondent in 50 weekly instalments, each instalment falling due every week on or before Friday.

vi. It is further the contention of the Petitioner that the Respondent was not entitled to seek any deferment or postponement of any instalment falling due, nor was the Respondent entitled to claim any concession in payment on account of any shortfall in collection or for any other reason. According to the Petitioner,

compliance with the aforesaid condition constituted a condition precedent under the Agreement.

vii. On 15th November 1995, the Respondent commenced collection of octroi in accordance with the terms and conditions of the Agreement. However, it is the Petitioner's contention that soon thereafter, the Respondent committed several breaches of the terms and conditions of the Agreement. Despite repeated intimations, notices, and warnings calling upon the Respondent to comply with the terms of the Agreement, the Respondent failed and neglected to do so.

viii. Consequently, on 23rd April 1996, the Petitioner was constrained to terminate the Agreement by issuing a termination notice of even date. On 13th May 1996, the Respondent, through their Advocate, replied to the aforesaid termination notice.

ix. The Respondent further challenged the aforesaid termination notice by filing Writ Petition No. 3335 of 1996 before this Court. The said Writ Petition came to be dismissed by an order dated 1st July 1996. Being aggrieved by the aforesaid order dated 1st July 1996, the Respondent approached the Supreme Court by filing Special Leave Petition (SLP) No. 10717 of 1996. The said SLP came to be dismissed on 6th September 1996, with liberty given to the Respondent to agitate their rights in accordance with law.

x. Thereafter, on 6th December 1996, the Respondent addressed a letter of even date to the Petitioner, demanding appointment of an Arbitrator. Subsequently, the Respondent filed an application under Section 11 of the Act before this Court, seeking appointment of an Arbitrator.

xi. By an order dated 4th September 1998, this Court directed the Commissioner of the Petitioner to adjudicate upon the disputes between the parties. The said order further provided that in the event the decision was rendered against the Respondent, the Petitioner would communicate a list of three officers to the Respondent, from whom the Respondent would select one officer to be appointed as the Sole Arbitrator for adjudication of the disputes between the parties.

xii. On 17th September 1998, the Respondent requested that their letter dated 13th May 1996 be treated as the reference to arbitration, and thereunder raised claims amounting to Rs.46,66,49,091/-. The Respondent thereafter filed their submissions on 19th September 1998 and additional submissions on 28th September 1998.

xiii. On 5th November 1998, the Commissioner of the Petitioner, by an order of even date, upheld the termination of the Agreement and further recorded the statement of the Respondent that they had not collected any amounts from current account holders during the contractual period.

xiv. On 1st January 1999, pursuant to the directions issued by this Court, the Respondent confirmed Dr. Nitin Kare, Collector, Sangli, as the Sole Arbitrator in the present matter (hereinafter referred to as the “erstwhile Sole Arbitrator”).

xv. On 9th March 1999, the Respondent submitted their Statement of Claim before the erstwhile Sole Arbitrator. The Petitioner, in response thereto, filed their Written Statement and Counter-Claim dated 29th April 1999.

xvi. On 29th November 1999, the Petitioner filed an Additional Written Statement before the erstwhile Sole Arbitrator. On 2nd February 2005, the erstwhile Sole Arbitrator directed the Chief Auditor of the Petitioner to settle and reconcile the accounts between the parties. Pursuant thereto, the Chief Auditor submitted his report on 7th June 2005.

xvii. Thereafter, on 23rd November 2005, the erstwhile Sole Arbitrator passed an interim award, holding that a sum of Rs. 2,00,00,000/- was payable by the Petitioner to the Respondent.

xviii. In the interregnum, the erstwhile Sole Arbitrator resigned from the arbitration proceedings. Consequently, a fresh application under Section 11 of the Act was made before this Court, seeking the appointment of a new Arbitrator. Pursuant thereto, Justice S.N. Variava (Retired) came to be appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.

xix. On 1st December 2006, the Respondent filed their Statement of Claim before the learned Sole Arbitrator, seeking an award of Rs. 58,25,86,551/- towards principal, and a sum of Rs. 1,70,50,47,280/- towards interest.

xx. On 9th January 2007, the Respondent filed an Execution Petition, pursuant to which the learned District Judge issued a warrant of attachment dated 9th January 2007.

xxi. The aforesaid warrant of attachment was challenged by the Petitioner by filing Civil Revision Application No. 24 of 2007 before this Court. By an order dated 2nd November 2007, this Court was pleased to set aside the said warrant of attachment. The Respondent thereafter challenged the order dated 2nd November

2007 before the Supreme Court. The said challenge came to be dismissed by the Supreme Court on 13th May 2008.

xxii. On 16th October 2009, the Respondent filed an application before the learned Sole Arbitrator seeking amendment of their Statement of Claim, whereby they sought to enhance/add their claim to Rs. 60,31,28,596/- towards principal and Rs.6,45,38,699/- towards interest. The said application for amendment came to be allowed by the learned Sole Arbitrator on the same date.

xxiii. In response to the aforesaid amendment, the Petitioner filed their Additional Written Statement on 10th October 2010. By the said Additional Written Statement, the Petitioner adopted the Written Statement previously filed before the erstwhile Sole Arbitrator, and *inter alia* contended that no fresh claims could be introduced, as such claims were barred by limitation. It was further contended that the arbitral proceedings were required to be confined to the claims raised by the Respondent in their letter dated 13th May 1996. Thereafter, on 4th March 2013, the Respondent filed a Revised Statement of Claim, claiming an amount of Rs. 4,35,86,95,077/-.

xxiv. The Petitioner filed their Additional Written Statement in response thereto on 26th June 2013. On 11th July 2013, the learned Sole Arbitrator framed the issues arising for determination. The said issues were subsequently amended on 11th July 2014. Thereafter, the parties led evidence before the learned Sole Arbitrator.

xxv. On 13th September 2013, the Respondent was permitted to further amend their Statement of Claim. Pursuant thereto, the Respondent filed the amended Statement of Claim on 21st January 2014, thereby raising their claim to

Rs.4,69,83,96,010/-. Thereafter, in the meeting held on 7th January 2014, the learned Sole Arbitrator clarified that in view of the amended Statement of Claim, the Respondent would not be entitled to rely upon the Statement of Claim filed on 4th March 2013.

xxvi. During the course of the arbitral proceedings, upon considering the rival claims and with the consent of both parties, the learned Sole Arbitrator, by an order dated 12th May 2016, appointed V.S. Dastur & Company, Chartered Accountants, as an expert to examine and verify the various documents produced and relied upon by the parties. The said expert submitted its report before the learned Sole Arbitrator on 19th September 2017.

xxvii. On 25th January 2019, both parties advanced their oral submissions before the learned Sole Arbitrator. The hearing of the matter was thereafter concluded, and both parties also filed their respective written submissions.

xxviii. Upon consideration of the aforesaid claims and the material placed on record, the learned Sole Arbitrator passed the impugned arbitral award dated 1st April 2019. The said impugned arbitral award is the subject-matter of challenge in the present petition.

5. Learned counsel Mr. S.C. Naidu, along with Mr. Abhishek T. Ingale, instructed by Mr. Abhijit Adagule appeared on behalf of the Petitioner, and Mr. Akhilesh Dubey, along with Mr. Vagish Mishra, Mr. Amit Dubey, Mr. Uttam Dubey, Mr. Rajuram Kuleriya, Ms. Ritika Gupta, Mr. Varad Dubey, Mr. Alex D'souza, Mr. Shubham Sharma, Mr. Aadesh Sawant, Mr. Subham Mishra, Mr. Sahil

Upadhyay, Mr. Shivam Mishra, and Mr. Aryan Yadav, instructed by Law Counsellor appeared on behalf of the Respondent.

6. Learned counsel on behalf of the Petitioner has submitted that the jurisdiction of this Court under Section 34 of the Act is limited and circumscribed by the boundaries which are set up in the Act and the provision itself, and reappreciation of evidence or substitution of a possible view is impermissible. However, he has submitted that in the facts of the present case, judicial intervention is mandated, inasmuch as the impugned arbitral award suffers from perversity, patent illegality, and fundamental internal inconsistency, which go to the root of the matter. He has buttressed the above submission by submitting that in the facts of the present case, the impugned arbitral award suffers exactly from the above anomalies and is hence liable to be set aside. His primary contention was in respect of the contradictions in the impugned arbitral award itself, on the ground that although the learned Sole Arbitrator had held that the Respondent was in breach of the Agreement and that the termination of the Agreement was valid, yet the learned Sole Arbitrator had awarded an amount of Rs. 24,06,50,119.03/- to the Respondent, and such a huge award was something which was inconsistent with the fact that once the termination of the Agreement was held to be valid, then it was not possible that such a huge principal amount could have been awarded to the Respondent. He further submitted that when there was a breach by the Respondent themselves, how the learned Sole Arbitrator proceeded to award such a huge amount is a question which calls for interference of this Court under the provisions of Section 34 of the Act. He further submitted that the impugned

arbitral award also has granted pendente lite interest at 18% per annum from 1st January 1997, which is in contradiction to the explicit terms of the Agreement.

7. He further submitted that a number of monetary claims have been granted by the learned Sole Arbitrator on pure conjecture rather than evidence, and further also that the impugned arbitral award disregards the statutory framework under Section 31A of the Act. The impugned arbitral award directing the Petitioner to pay the colossal sum as awarded was, according to him, patently illegal and suffered from irreconcilable internal contradictions. He submitted that the operative relief which the learned Sole Arbitrator had granted was contrary to and irreconcilable with his own specified findings under individual heads of claim, and in view thereof, the same suffers from perversity, jurisdictional errors and patent illegality going to the very root of the matter.

8. He further submitted that the impugned arbitral award had four distinct limbs. The first limb was a monetary award in the sum of Rs. 24,06,50,119.03/-. The second limb was the award of the pendente lite interest on the aforesaid monetary sum from 1st January 1997 till the date of the impugned arbitral award. The third limb was the post-award interest at the rate of 18% per annum on the sum awarded, and the last limb was the award of costs to the sum of Rs. 1,50,00,000/-. His primary thrust was in respect of the interest which had been granted pendente lite to the Respondent. He submitted that the award of interest constitutes an independent and compelling ground for setting aside the component of the impugned arbitral award with respect to pendente lite interest. He submitted that the granting of the interest itself goes to the root of the matter, as the same was

prohibited by the very terms of the Agreement which had been entered into between the parties. He further submitted that the second limb, which is with respect to interest, is the foundational error in the reasoning of the learned Sole Arbitrator in the impugned arbitral award. His submission was that it is not that the Petitioner is seeking that this Court substitute its own view with the view given by the learned Sole Arbitrator, however, the challenge to the impugned arbitral award is primarily in respect of the decision-making process itself, and according to him the conclusion which was reached at by the learned Sole Arbitrator was a conclusion which no reasonable person could have given, and is without application of mind.

9. He further submitted that interest is a matter of entitlement and not discretion. Interest must have its source either in the statute or in the contract. If parties have contractually excluded interest, an arbitrator, deriving his jurisdiction from the contract itself cannot award what the parties have expressly agreed shall not be awarded. He further submitted that the parties to the Agreement in question had by an express contractual stipulation excluded/prohibited the payment of interest. In view thereof, he submitted that the learned Sole Arbitrator could not disregard the bargain between the parties and award interest by invoking general or equitable discretion. An arbitrator derives his jurisdiction from the agreement, and in arbitration proceedings, party autonomy is supreme in so far as deciding the disputes between the parties, including the interest portion. He therefore submitted that when the contract itself is clear and unambiguous, then a claimant shall not be entitled to claim interest, and if the contract contains words of sufficient amplitude

to exclude interest, then notwithstanding any other provision of the contract or applicable law, this contractual prohibition operates against the grant of interest, and the arbitrator cannot circumvent such prohibition by describing the award of interest as discretionary, compensatory, or equitable. He submitted that Clause 24 of the Agreement constituted a complete contractual exclusion of a claim for interest, and that the said clause was clear and unambiguous and provided that the Respondent shall not be entitled to claim interest, and it therefore operated as a bar for grant of interest by the learned Sole Arbitrator. He further submitted that the entitlement to interest cannot be divorced from the contractual bargain between the parties, and once that being the case, the learned Sole Arbitrator could not disregard the stipulation and award interest as though the contractual prohibition did not exist. He further submitted that Section 31(7)(a) of the Act did not confer an unfettered or overriding power on the arbitrator to award interest and disregard the parties' agreement. The statutory power under Section 31(7)(a) operates subject to the contract between the parties, and consequently, any contract which expressly excluded a claimant's entitlement to interest also implied that the arbitrator's discretion was correspondingly excluded. He also submitted that the language employed by the parties in Clause 24 was comprehensive, and the exclusion extended to "any kind of interest" in respect of "any of the claims". He also submitted that the expression "any other provisions" is of particular significance, and it cannot be rendered otiose, as it necessarily comprehends every other statute or legal source by which a claim for interest might otherwise be

asserted, including the statutory discretion of an arbitrator under Section 31(7)(a) of the Act.

10. He further submitted that on a reading of Section 31(7)(a) of the Act, it is clear that the Act expressly uses the term “unless otherwise agreed by the parties”. This term, according to him, is not merely ornamental, and it constitutes a statutory recognition of party autonomy and conditioned the very exercise of the arbitrator’s power to award pre-reference and pendente lite interest. He submitted that where the parties have consciously and unequivocally agreed that no interest shall be payable or claimable, the statutory discretion under Section 31(7)(a) is displaced. The expression “may include” cannot be read in isolation so as to confer upon the arbitrator an overriding power to award interest contrary to the parties’ agreement. The Act gives the parties the first and decisive option. Once the parties have exercised the option, the arbitrator cannot make an award that is contrary to their bargain. He further submitted that one cannot rewrite the provisions of a contract, and that Section 31(7)(a) of the Act does not authorize the arbitrator to rewrite the contract.

11. He further submitted that even in respect of the third limb of the impugned arbitral award, which he sought to challenge, the learned Sole Arbitrator has erroneously applied the rate of 18% per annum as the post-award interest. He submitted that though Section 31(7)(b) prescribes a statutory default rate, and unless the arbitral award directs otherwise, the sum directed to be paid carries interest from the date of the arbitral award until payment at a rate that is 2% higher than the current rate of interest prevalent on the date of the arbitral award. He

submitted that this provision therefore supplies a default rule, while also recognizing the arbitrator's authority to direct a different rate in the arbitral award. He therefore submitted that the payment of the post-award interest at the rate of 18% per annum is accordingly severable and liable to be set aside or modified to that extent, inasmuch as the learned Sole Arbitrator has not given any justifiable or sufficient reasons to adopt an interest rate that is different from that prescribed under 31(7)(b) of the Act, and the same is therefore liable to be interfered with.

12. In so far as the first limb of the impugned arbitral award is concerned, learned Counsel on behalf of the Petitioner submitted that the learned Sole Arbitrator had committed a grave misdirection in law by adopting an approach that was not only erroneous, but one which completely disregarded the material records and contractual terms between the parties. He submitted that in fact there was total inconsistency between the findings of the learned Sole Arbitrator and the operative portion of the impugned arbitral award, rendering the impugned arbitral award unintelligible, and such an approach pervades the entirety of the factual findings, demonstrating a classic instance of perversity, where no reasonable person instructed in law and acting on material before him could have arrived at such a conclusion. Under the provisions of Section 34(2A) of the Act, in an arbitral award that relies on findings grounded in no evidence, ignores vital evidence, or proceeds on a visual perversity of facts, the defect goes to the very root of the matter and hence is liable to be set aside on the ground of patent illegality. He further submitted that there was a mathematical impossibility in so far as the quantum of compensation which was awarded by the learned Sole Arbitrator. He submitted

that it was an admitted position by the Respondent that the claim pertained strictly to a limited contractual duration of five and a half months, spanning from 15th November 1995 to 23rd April 1996. However, the Respondent accepted that the bid amount for total octroi collection for a full 12-month period running from 1st November 1995 to 31st October 1996 was Rs. 25,09,00,317/-. He therefore submitted that despite the Respondent claiming a total collection of just over Rs. 25,00,00,000/-, it was impossible to see as to how the learned Sole Arbitrator had awarded a sum of Rs. 24,06,50,119.03/- for less than half of that timeline. He submitted that this amounted to a windfall, and hence it was a mathematical impossibility to award nearly 96% of the entire year's projected revenue by the Respondent for a period comprising less than 46% of this duration, which was commercially absurd.

13. He further submitted that the tender document issued by the Petitioner in October 1995 for the appointment of an agent to collect octroi for the period from 1st November 1995 to 31st October 1996 set out tender specifications, wherein the minimum offer value was "not less than Rs. 25,09,00,000/-". Accordingly, earnest money deposit had been fixed at Rs. 25,00,000/-, and security deposit at Rs. 5,00,00,000/-. He submitted that the learned Sole Arbitrator ignored the commercial consideration in adjudicating the commercial disputes between the parties by totally disregarding the fixed Minimum Reserve Price (MRP) of Rs. 25,09,00,000/- for the full 12-month period from 1st November 1995 to 31st October 1996 and awarded an amount of Rs. 24,06,50,119.03/-, which was a mathematical error. He also submitted that even assuming an extraordinary surge

or peak in collection rate during this time frame, the contractual baseline established by the Petitioner and accepted by the Respondent itself demonstrated that the total octroi collections for the period of five and a half months could not reasonably or realistically reach Rs. 24,06,50,119.03/-, thereby rendering the valuation assumed by the learned Sole Arbitrator wholly excessive and without basis in terms of the tender specifications. He also submitted that the learned Sole Arbitrator had completely disregarded the MRP stipulated in the tender, and that the MRP constituted the objective and prescribed benchmark for valuation. He submitted that the MRP was not an incidental or irrelevant figure, and that it was a material term of the tender framework, which the learned Sole Arbitrator was bound to take into account. He submitted that this itself showed that the learned Sole Arbitrator had not applied his mind before granting the amount as awarded in the impugned arbitral award.

14. He further submitted that the vice in the impugned arbitral award lay in the very decision-making process itself. He submitted that the learned Sole Arbitrator had failed to demonstrate any rational nexus between the stipulated MRP, the evidence on record, and the amount ultimately awarded. He submitted that an award which ignores a material contractual/tender stipulation and arrives at a figure which is substantially higher than the prescribed benchmark without explaining the basis or methodology for such departure is not a mere alternative view of the evidence, but is a finding unsupported by the contractual framework and the material on record. He submitted that where the conclusion is such that no fair-minded or reasonable person could have arrived at the same on the evidence before

him, the finding becomes perverse and irrational and consequently suffers from patent illegality. He submitted that the learned Sole Arbitrator was entitled to depart from the MRP only upon reasoned and evidence-based determination, and he was not entitled to disregard it altogether and substitute an arbitrary figure unsupported by the tender, the contract, or the evidence. He submitted that the impugned arbitral award was not only merely excessive, but it was also demonstrably unsustainable on the face of the record and suffered from patent illegality. He submitted that the Petitioner under the Right to Information Act (RTI), 2005 had disclosed the gross collections for the periods from 1st November 1992 to 31st October 1993, 1st November 1993 to 31st October 1994, and 1st November 1994 to 31st October 1995, which indicated figures of Rs. 17,78,00,000/-, Rs. 19,45,00,000/-, and Rs. 22,24,00,000/- respectively. Considering the above-mentioned disclosures, he submitted that the impugned arbitral award in the present case is only for a period of five and a half months and has no correlation with the amount of octroi collection for a period of three years, i.e., 12 months prior to the period under consideration. He submitted that the learned Sole Arbitrator has effectively rewritten the terms of the Agreement and has also ignored that the Agreement contemplated that the Respondent was required to pay the agreed tender amount through weekly instalments and comply with the stipulated security and accounting obligations. The Respondent's entitlement after termination could not be enlarged into an amount which was never collected by the Petitioner, and this aspect assumes considerable significance because an arbitrator is the creature of a contract, and their jurisdiction is derived

from the arbitration agreement, and the substantive rights of the parties are derived from the underlying contract. He submitted that the learned Sole Arbitrator could not confer upon one party a benefit which the Agreement itself did not confer, particularly after holding that the termination was contractually valid. He submitted that in the present case, the learned Sole Arbitrator had gone substantially beyond the proved amount of octroi collection and had adopted assumptions regarding the amount of octroi, which could have never been collected. He submitted that though the impugned arbitral award itself records that the claims of the Respondent were on the basis of documents obtained through RTI, as well as on a presumption of what should have been collected, the aforesaid approach was legally impermissible when the result of the impugned arbitral award was Rs. 24,06,50,119.03/-, which from evidence on record could have never been the octroi collections for a period of five and a half months.

15. Learned counsel on behalf of the Petitioner further submitted that the original contract period was from 1st November 1995 to 31st October 1996. The learned Sole Arbitrator himself had recorded a finding that since the Respondent had not been able to furnish a bank guarantee, the period of contract between the parties would only be from the period of 15th November 1995 till 23rd April 1996, when it was legally terminated. The learned Sole Arbitrator himself had said that the Respondent would be entitled to all amounts during the said period. He therefore submitted that considering that this period was undisputed, the learned Sole Arbitrator awarding a sum of Rs. 24,06,50,119.03/- for such a truncated period was itself not justified, and hence this finding was contrary to the evidence

on record. He further submitted that the learned Sole Arbitrator had relied upon Exhibit C-38 in the arbitral proceedings, i.e., the Daily Cash Book which contains daily summaries of octroi collected at all *Nakas*, to come to the conclusion that a sum of Rs. 20,39,31,816.05/- was found to be collected during the contract period. He submitted that Exhibit C-38 in the arbitral proceedings is the computation of collection of octroi for the period 1st November 1995 to 31st October 1996. He also submitted that Exhibit C-38 was a summary for the full contract period, and after examination of the same, it was shown that the net collection had been quantified at Rs. 33,62,17,215.84/-. He submitted that the learned Sole Arbitrator, without applying his mind, had committed a fundamental error going to the root of the impugned arbitral award by relying upon the figures contained in Exhibit- C-38 for a period wholly outside the scope of the Agreement and the dispute referred to arbitration. He sought to bring attention of this Court to Page Nos. 181 to 190 of the Petition, where Exhibit- C-38 of the arbitral proceedings determined the octroi collections for the period from 1st November 1995 to 31st October 1996. He submitted that the computation expressly included the pre-contract period from 1st November 1995 to 14th November 1995, as well as the post-contract period from 24th April 1996 to 31st October 1996. He submitted that after deducting the instalments paid by the Respondent and EMD/bank amounts of Rs. 13,22,85,399.79/- from the total collection of Rs. 33,62,17,215.84/- the expert who had been appointed by the learned Sole Arbitrator arrived at a balance figure of Rs. 20,39,31,816.05. He submitted that it is on this basis that the learned Sole Arbitrator had adopted this very figure in the impugned arbitral award, and after

deducting the amounts paid by the Respondent, a sum of Rs. 20,39,31,816.05/- was found to have been collected. He submitted that the reliance on the aforesaid figure was *ex facie* unsustainable, considering that the amount required to be determined in the present arbitral proceedings was for the octroi collection pertaining only to the contractual period, i.e., from 15th November 1995 to 23rd April 1996. He submitted that the figure of Rs. 20,39,31,816.05/- admittedly represented collections for a substantially larger period, extending from 1st November 1995 to 31st October 1996, and therefore included collections made before the commencement of the Agreement and after its expiry. He submitted that by adopting a figure which indisputably encompasses periods falling outside the Agreement, the learned Sole Arbitrator had failed to confine the adjudication to the subject-matter of reference and had proceeded on a fundamentally erroneous factual premise. He therefore submitted that the impugned arbitral award had not taken into account material that was relevant, the contractual collections, and ignored the essential distinction between the contract period and the non-contract period. He therefore submitted that this was not a mere error of appreciation of evidence or a possible alternative view but was something which struck at the very root of the matter, considering that once Exhibit C-38 of the arbitral proceedings demonstrated that the figure of Rs. 20,39,31,816.05 was for the entire period from 1st November 1995 to 31st October 1996, the adoption of that figure for the truncated period of 14th November 1995 to 23rd April 1996 was manifestly irrational and contrary to the record. The amount awarded on the basis of Exhibit C-38 of the arbitral proceedings is 85% of the monetary sum awarded, and hence

this could not be the conclusion that the learned Sole Arbitrator could have reached at.

16. Learned counsel on behalf of the Petitioner further submitted that the impugned arbitral award is perverse, inasmuch as the finding concerning the alleged collections from current-account holders is based on conjectures and surmises. He has submitted that the learned Sole Arbitrator inferred that 90 out of 111 current-account holders must have imported goods and paid octroi of at least Rs. 10,000/- per month, despite there being no evidence showing quantum or nature of the goods allegedly imported by these persons. He submitted that the learned Sole Arbitrator, on the basis of these presumptions, has inferred that the 90 current-account holders, even on a conservative basis during the contract period, would have paid a sum of Rs. 45,05,000/-. He submitted that such a formula is not evidence, and there is no demonstrated transactional data, no evidence of actual import, no evidence of quantum of goods, no evidence of octroi payable on those goods, and no evidence establishing the period for which such collections allegedly occurred. He submitted that a monetary award cannot be founded upon a speculative mathematical exercise unsupported by primary evidence. He therefore submitted that in the facts of the present case, the finding that 90 out of 111 current-account holders must have imported goods and paid octroi of at least Rs. 10,000/- per month, and hence a collection of 45,05,000/- would have happened is purely on guesswork and without actual proof of imports. He submitted that the learned Sole Arbitrator has erroneously extrapolated collection of Hindustan Petroleum Corporation Limited and general octroi.

17. Learned counsel on behalf of the Petitioner, further by way of a tabular chart which is reproduced below, submitted that the learned Sole Arbitrator has even mathematically awarded a wrong figure, inasmuch as on a cumulative consideration of claim Nos. 1,5,7, and 9 in the arbitral proceedings, the learned Sole Arbitrator expressly determined that the Respondent was entitled to an aggregate sum of only Rs 14,13,42,649.50/-. However, while passing the impugned arbitral award, an amount of Rs. 24,6,50,119.03/- was awarded, and it is the submission of learned counsel on behalf of the Petitioner that the excess of almost Rs. 10,00,00,000/- has not been substantiated by the learned Sole Arbitrator, and he has not explained how such a huge figure has been arrived at. He further submitted that in paragraph No. 67 of the impugned arbitral award itself the learned Sole Arbitrator had already awarded a figure of Rs. 12,34,16,894.25/-, and over and above that the learned Sole Arbitrator while awarding the final figure of Rs. 24,06,50,119.03/- has failed to subtract the earlier figure as mandated in paragraph No. 67 and has awarded a double-dipping windfall to the Respondent. He submitted that this very inconsistency goes to the very root of the matter, and hence the impugned arbitral award needs to be set aside.

Claim No.	Relevant Findings in Award	Amount Awarded
Claim No. 1		Rs. 12,34,16,894.25
Claim Nos. 5 & 9	Para 67, Pages 113-114	Rs. 1,67,26,496.25
Claim No.2	Para-68, Pg-114	Included in Claim No.5
Claim No.4	Paras-70-71, Pgs-114-115	Rejected
Claim No.6	Paras-72-73, Pgs-115-116	Rejected
Claim No. 7	Para 74 @ Page 117	Rs. 11,99,259.00

Claim No.8	Paras-75 & 76, Pgs-117-118	Rejected
Claim No.10	Para-79, Pg-118	Rejected
Claim No.11	Para-80, Pg-119	Rejected
Claim No. 12	Para-81, Pg-119	Included in Claim No.5
AMOUNT AWARDED		Rs. 14,13,42,649.50

18. He also submitted that it was the Respondent's own admission, which was recorded in the order of this Court order dated 15th October 2019, that the Respondent was entitled to Rs. 4,51,49,151.90/-, whereas the Petitioner had contended that the Respondent was entitled to only Rs. 2,05,92,175/-. He therefore submitted that this entitlement was stated with mathematical precision, and the said figure could not be ignored while testing as to how the learned Sole Arbitrator had come to the conclusion that the Respondent was entitled to Rs. 14,13,42,649.50/- and the ultimate award which was of the figure of Rs. 24,06,50,119.03/-. He therefore submitted that such an extraordinary divergence in the figures requires an explanation which had to be given by the learned Sole Arbitrator, and the same has not been done in the facts of the present case.

19. He also submitted that the costs of Rs. 1,50,00,000/- were *ex facie* arbitrary, disproportionate, and contrary to the principles governing the grant of cost. He also submitted that the costs have been awarded without demonstrating how such an amount bears any nexus to the conduct of the parties or the nature of the arbitral proceedings, and neither have the costs been granted according to the

guidelines prescribed under Section 31A of the Act. He has sought to place reliance on the decision of Sanjeev Kumar Jain v Raghubir Saran Charitable Trust & Ors.¹ to contend that costs are not intended to operate as punishment against the unsuccessful party, but are compensatory in nature, and are awarded to indemnify a successful litigant for expenses reasonably and necessarily incurred in prosecuting or defending the necessary proceedings. He submitted that even where realistic costs are awarded, such costs must be reasonable, proportionate, and founded upon rational assessment, and costs which are mechanical and excessive or unsupported by law or are unsustainable. He also sought to place reliance on the following decisions, which will be discussed later, to support all the arguments which have been recorded aforesaid to support his claim that the impugned arbitral award is manifestly illegal and requires interference under Section 34 of the Act:-

- i. Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat²
- ii. Union of India v. Bright Power Projects (India) Pvt. Ltd.³
- iii. Garg Builders v. Bharat Heavy Electricals Limited⁴
- iv. State of Haryana v. Jai Durgaa Finvest Pvt. Ltd.⁵

20. Learned counsel on behalf of the Petitioner therefore summarized that the impugned arbitral award suffered from the following fundamental defects:-

1 (2012) 1 SCC 455

2 (2010) 8 SCC 767

3 (2015) 9 SCC 695

4 (2022) 11 SCC 697

5 2026 SCC OnLine SC 1323

- i. The learned Sole Arbitrator found the termination to be lawful but nevertheless awarded damages flowing from the alleged continuation of the contract.
- ii. The Respondent's own breaches were established by the learned Sole Arbitrator.
- iii. The quantum was arrived at substantially on assumptions regarding what allegedly could have been collected.
- iv. The learned Sole Arbitrator relied upon documents covering periods beyond the date of termination.
- v. Vital financial and audit material showing substantially lower annual collections was not properly reconciled.
- vi. An amount was attributed to current-account holders without evidence of actual imports or octroi liability.
- vii. The expert's figures were adopted despite the Petitioner's specific challenge to their correctness.
- viii. The learned Sole Arbitrator failed to properly account for the Respondent's own collections and the Petitioner's losses.
- ix. Claims introduced after a substantial lapse of time were entertained despite the limitation objection.
- x. Interest was awarded despite an express contractual prohibition.

21. *Per contra*, learned counsel on behalf of the Respondent submitted that the impugned arbitral award has been passed after due consideration of the evidence and the facts on record, and hence does not need to be interfered with. He submitted that the mandate of Section 34 of the Act was very limited, and no arithmetical/mathematical errors can be reviewed and a plausible view that an arbitrator has arrived at to award the figure cannot be substituted by the Court under Section 34 of the Act. He sought to bring the attention of this Court to various clauses in the Agreement to contend that the amounts which the Respondent sought to claim were primarily moneys which the Petitioner owed to the Respondent, and Clause 24 of the Agreement was only a general clause which only barred the Respondent from claiming interest (as per the Interest Act, 1978 or any other provisions), and that interest claim included interest on statutory rights and not on money which was payable by the Petitioner to the Respondent. He further submitted that the impugned arbitral award does not award damages to the Respondent, however, it has awarded the rightful refunds of the Respondent. He submitted that the impugned arbitral award, which was for a figure of Rs. 24,06,50,119.03/- was granted by the learned Sole Arbitrator after appointing the expert under Section 26 of the Act to check accounts, and the said expert was cross-examined by the Petitioner, and hence no fault could be found with the grant of sum of Rs. 24,06,50,119.03/- along with interest at the rate of 18% per annum from 1st January 1997 till date of the impugned arbitral award by the learned Sole Arbitrator. He further submitted that in fact, there were no documents which were submitted by the Petitioner at the time of arbitral proceedings, and the only

documents produced by the Petitioner were Exhibits R-69, C-38, C-107A, C-107B, and C-107C, where only a part of the collection of octroi during the contract period was reflected. He further submitted that the Petitioner and the Respondent were directed to submit their statements to come to the exact figure regarding the octroi collection during the contract period, and thereafter the expert on the basis of appreciation of these documents came to the figure of octroi collections. He also submitted that the Petitioner had not produced all the documents before the learned Sole Arbitrator, and hence the learned Sole Arbitrator had rightly come to the conclusion regarding the amount which was payable by the Petitioner to the Respondent.

22. He further submitted that the interpretation as sought to be placed by the Petitioner on Clause 24 of the Agreement that the same bars the grant of interest was incorrect and would not apply to the refund of the amount which the Petitioner was bound to pay to the Respondent. He further submitted that even on a reading of the impugned arbitral award it was clear that the learned Sole Arbitrator had arrived at the figure of Rs. 24,06,50,119.03/- on an appreciation of the limited evidence which was available before the learned Sole Arbitrator. He further submitted that the entire calculation was arrived at after considering the documentary evidence and in respect of the contract period being 1st November 1995 to 31st October 1996, and the learned Sole Arbitrator himself had come to a finding that till the date of termination of the Agreement, i.e., on 23rd April 1996, the Respondent had collected the amount of Rs. 22,39,23,622.74/- for a period of five and a half months. He further submitted that the learned Sole Arbitrator has

correctly come to the figure of Rs. 24,06,50,119.03/- in paragraph No. 67 of the impugned arbitral award, and on account of the fact that the Petitioner did not submit all the books and documents before the learned Sole Arbitrator, and which were subsequently procured by the Respondent under RTI, the figures as reached at by the learned Sole Arbitrator were correct figures on the basis of appreciation of evidence. He theretofore submitted that there was no windfall, as the Petitioner was seeking to suggest, and it is an incorrect submission, inasmuch as the learned Sole Arbitrator has, on a perusal of the limited books and documents which were submitted to him, come to the aforesaid figure.

23. Even in respect of the current-account holders it is submitted by learned counsel on behalf of the Respondent that the learned Sole Arbitrator has given a reasoned finding to arrive at a figure of Rs. 45,05,000/- on the basis that each current-account holder was, on a very conservative basis, importing goods and paying octroi of at least Rs. 10,000/- per month.

24. He further submitted that the Petitioner's submission that the bid amount for a full 12-month period running from 1st November 1995 to 31st October 1996 itself was Rs. 25,09,00,319/-, and an amount of Rs. 24,06,50,119.03/- could not be awarded by the learned Sole Arbitrator, and that the bid amount was a benchmark that the learned Sole Arbitrator was bound to apply was an erroneous submission, inasmuch as the bid amount was not an estimate of collection, however, it was the price that the Respondent was bound to pay to the Petitioner in respect of the octroi which it collected. He further submitted that the said amount could not be taken into consideration for the Petitioner to contend that the learned Sole

Arbitrator awarded a higher amount to the Respondent. He further submitted that the learned Sole Arbitrator had come to a correct finding on the basis of the evidence which was produced before him.

25. He also submitted that the order dated 15th October 2019 passed by this Court, wherein the Respondent had admitted their entitlement of Rs. 4,51,49,151.90/-, was only in respect of an order under section 36(3) of the Act subject to a deposit of Rs. 3,00,00,000/- by the Petitioner. He submitted that nothing turns on the aforesaid order to quantify the ultimate figure in the impugned arbitral award, inasmuch as the same was only in respect of stay proceedings. It did not amount to a final adjudication of the Respondent's monetary entitlement, and neither has the Respondent resiled from the award.

26. He also submitted that no interference can be called for under the provisions of Section 34 of the Act, inasmuch as the entire evidence could not be reopened in Section 34 proceedings, and more so when the learned Sole Arbitrator went through all exhibits and an expert was appointed by consent of the parties, whose report the Petitioner tested in cross-examination. He therefore submitted that the impugned arbitral award could not be set aside on a reappraisal of the evidence. He also submitted that Clause 24 of the Agreement, if read in its correct context, did not bar any interest which was payable, and hence the learned Sole Arbitrator was well within his power to grant pendente lite interest, as done in the facts of the present case. He submitted that there was no bar under Section 34 of the Act to award the said interest. He further submitted that Section 31(7)(a), as it stood, gave the learned Sole Arbitrator the power to award interest from the cause

of action till the date of the arbitral award, unless otherwise agreed by the parties, and that Section 31(7)(b) provided 18% interest from the date of the arbitral award to payment, unless the award otherwise directs. He submitted that Clause 24 of the Agreement did not bar interest on refund, as the refund was not a claim, and interest was payable on delayed payments, which was not specifically barred under Clause 24 of the Agreement. In view thereof, he submitted that there was no bar which was contemplated under Clause 24 of the Agreement. He submitted that under Section 31(7)(a) of the Act, the power conferred therein is lost only where the parties have "otherwise agreed", i.e., agreed that interest is not payable on the money in question. Clause 24 of the Agreement is not such an agreement for money received, inasmuch as it names no fund, no period, and no circumstance, however, it speaks of statutory interest on the agent's claims, and the specific clauses of the Agreement like Clauses 12(iv), 14, 25, 26, and 27(b) show that where the parties meant to exclude interest on a fund, they have said so. He further submitted that under Section 28(3) of the Act, the arbitrator decides "in accordance with the terms of the contract", and the same has been done in the facts of the present case, as the learned Sole Arbitrator held Clause 24 of the Agreement inapplicable to money of this character. He contended that this construction stands, unless it is "not even a possible view".

27. Learned counsel on behalf of the Respondent also submitted that the costs have been rightly granted by the learned Sole Arbitrator of Rs. 1,50,00,000/-, inasmuch as the Respondent had quantified legal expenses as Rs. 28,50,000/- and also the costs of arbitration, and on the basis thereof the learned Sole Arbitrator

fixed Rs. 1,50,00,000/- towards costs, a sum which either party has spent in an arbitral proceeding which ran from 1998 to 2019 before a retired judge of a Supreme Court with an expert Chartered Accountant appointed by consent. He submitted that the costs of arbitration under the Explanation to Section 31(8) include the fees and expenses of the arbitrator and of the expert which are not “legal expenses” and were not within Claim No. 13 in the arbitral proceedings. He submitted that on the basis of the amount spent by the Petitioner themselves of approximately Rs. 1,62,00,000/- it could not be contended that costs awarded to the Respondent was an unreal figure.

28. Learned counsel on behalf of the Respondent also sought to place reliance on the following decisions to further advance his contentions, and which shall be dealt with later in the judgement:-

- i. ONGC Ltd. v. G & T Beckfield Drilling Services (P) Ltd.⁶
- ii. Reliance Cellulose Products Ltd. v. ONGC Ltd.⁷
- iii. Ferro Concrete Construction (India) (P) Ltd. v. State of Rajasthan⁸
- iv. OPG Power Generation (P) Ltd. v. Enexio Power Cooling Solutions (India) (P) Ltd.⁹

ANALYSIS AND FINDINGS

29. I have considered the rival submissions and perused the papers and proceedings and the impugned arbitral award with the assistance of the learned

6 2025 SCC OnLine SC 1888

7 (2018) 9 SCC 266

8 2025 SCC OnLine SC 708

9 (2025) 2 SCC 417

counsel on behalf of the parties, and I proceed to decide the present petition. At the very outset, as has been reiterated by the Supreme Court and this Court in various decisions that the mandate of Section 34 of the Act is circumscribed by the limitation as set out in the Act itself. It allows interference in arbitral awards in only exceptional circumstances, and keeping in mind these exceptional circumstances, this Court is of the view that the impugned arbitral award needs to be tested on the aforesaid contours.

30. At the outset, learned counsel on behalf of the Petitioner, has sought to challenge this award under Section 34(2A) of the Act on the ground of patent illegality, inasmuch as it is the contention of the Petitioner that the impugned arbitral award has been rendered in such a manner that no reasonable person could have come to such a conclusion, and the conclusions reached at are such that they are *ex facie* perverse and would shock the conscience of the Court, insofar as the grant of pendente lite interest at the rate of 18% per annum from 1st January 1997 till the date of the impugned arbitral award. I am therefore of the view that before setting out on the path of deciding the correctness of the impugned arbitral award, it would be important to bifurcate the claims of the impugned arbitral award into four limbs, as sought to be challenged even by the Petitioner. The following are the limbs:-

- i. The first limb is the monetary award in the sum of Rs. 24,06,50,119.03/-.
- ii. The second limb is the award of the pendente lite interest on the aforesaid monetary sum from 1st January 1997 till the date of the impugned arbitral award.
- iii. The third limb is the post-award interest at the rate of 18% per annum on

the sum awarded through the impugned arbitral award.

iv. The fourth limb is the award of costs to the sum of Rs. 1,50,00,000/- to the Respondent.

31. I proceed to decide the present petition on the basis of the aforesaid four limbs. Insofar as the first limb of the impugned arbitral award of the monetary award of Rs. 24,06,50,119.03/- is concerned, I am of the view that no case for interference can be made in the present proceedings under Section 34 of the Act. I come to this conclusion on the ground that the said amount has been awarded by the learned Sole Arbitrator after a thorough investigation into the facts and figures as presented before it by the rival parties. The exercise of coming to a figure to award a particular amount is within the scope of the learned Sole Arbitrator, and this Court is of the view that by substituting its own opinion or by reappreciating the evidence which has been marshalled at the time of arbitral proceedings, it would amount to reappreciating evidence, which is against the mandate of proceedings under Section 34 of the Act. I am further of the view that the impugned arbitral award, in fact, by awarding the monetary sum of Rs. 24,06,50,119.03/-, has had the benefit of an expert, i.e., V.S. Dastur & Company, Chartered Accountants, who were appointed by consent for the specific purpose of examining the accounts of the parties.

32. The dispute in the present facts is primarily with respect to the Agreement for collection of octroi by the Respondent on behalf of the Petitioner, on which collection the Respondent was to earn a commission, and as per the terms of the Agreement was to pay the collected octroi amount to the Petitioner. It is this very

collection of octroi which was the issue which was needed to be decided by the learned Sole Arbitrator, and the same has been done by the learned Sole Arbitrator by relying on expert evidence and also on the basis of the records produced by both the parties. Once this exercise had been conducted by the learned Sole Arbitrator, then the Petitioner's contention of hair-splitting the amount awarded to the Respondent and seeking interference of this Court under Section 34 of the Act would amount to substituting this Court's view instead of what has been held by the learned Sole Arbitrator. It is a settled principle of law that an arbitrator is the master of facts and evidence, and once that being the case this Court is of the view that nothing more can be read into the impugned arbitral award to dislodge it of the monetary claim which the learned Sole Arbitrator had awarded in the facts of the present case. I am therefore of the view that the submission as made by learned counsel on behalf of the Petitioner that the award suffers from mathematical errors and hence is patently perverse is a submission which ought to be rejected.

33. I am further of the view that even though the learned Sole Arbitrator held that the termination of the Agreement by the Petitioner was valid, yet it was well within the powers of the learned Sole Arbitrator to award the monetary claim as per the amount of octroi which was collected for the period from 15th November 1995 to 23rd April 1996 on the basis of documents which were placed on record before the him. The contention of the Petitioner that the amount of Rs. 24,06,50,119.03/- is a windfall and commercially absurd figure which has been awarded by the learned Sole Arbitrator, inasmuch as the same takes into consideration the full 12 month period running from 1st November 1995 to 31st

October 1996 cannot be an argument which can be sustained in view of the clear findings of the learned Sole Arbitrator. The Petitioner has sought to contend that the bid amount for the total octroi collection was only Rs. 25,09,00,319/-, and hence to have an award of Rs. 24,06,50,119.03/- was something which the learned Sole Arbitrator could not have done. The bid amount could not be made a benchmark to arrive at the monetary claim as awarded by the Learned Sole Arbitrator, inasmuch as that was the minimum amount which the Respondent was liable to pay the Petitioner. This is an argument which deserves to be rejected, because the bid amount cannot be equated to the actual collection of the octroi, even for the truncated period of the Agreement. The learned Sole Arbitrator has come to the figure of Rs. 24,06,50,119.03/- on the basis of the evidence before it, and particularly Exhibit C-38, which was produced by the Petitioner themselves, and which was verified by the expert, which to my mind cannot be found fault with. In fact, the learned Sole Arbitrator on several occasions had asked for documents from the Petitioner, however, the same were not submitted by the Petitioner, and therefore, the learned Sole Arbitrator, on the basis of the limited documents before him, came to the conclusion that the aforesaid amount of Rs. 24,06,50,119.03/- was payable by the Petitioner to the Respondent. A perusal of the impugned arbitral award would reflect that the learned Sole Arbitrator has worked out this aforesaid amount by examining the statements produced by the rival parties and has also categorically recorded that the Respondent was entitled to the moneys under the Agreement, inasmuch as the Petitioner had encashed the Bank Guarantee and the Security deposit provided by the Respondent and had

recovered all that the Petitioner had to recover from the Respondent. In fact, the Petitioner had recovered the same with interest at the rate of 24% per annum. The learned Sole Arbitrator while awarding the aforesaid amount has placed particular reliance on the following documents:-

- i. Exhibit R-18 of the arbitral proceedings, which was the report of the Chief Auditor of the Petitioner given to the erstwhile Sole Arbitrator
- ii. Exhibit R-19 of the arbitral proceedings, which pertained to collection of octroi on jaggery imported into Kohlapur from 1st November 1995 to 23rd April 1996
- iii. Exhibit R-21 of the arbitral proceedings, pertaining to motor memos which were included in Exhibit C-38
- iv. Exhibit R-24 of the arbitral proceedings, which was a letter dated 12th June 2010 from State Trading Corporation to the Chief Octroi Officer of the Petitioner stating that an amount of Rs. 25,30,185,.87/- had been paid as octroi during the period from April 1995 to April 1996
- v. Exhibit R-69 of the arbitral proceedings, which is a book containing details of few import bills/collections from current-account holders between the period from 23rd April 1996 to 31st October 1996
- vi. Exhibit C-57 of the arbitral proceedings, which showed collections from current-account holders from 23rd April 1996 to 31st October 1996
- vii. Exhibit C-107A, B, and C of the arbitral proceedings, which pertain to current accounts of petroleum companies, i.e., HPCL, Bharat Petroleum Corporation Limited (BPCL), and Indian Oil Corporation Limited (IOCL)

viii. Exhibit C-38 of the arbitral proceedings, which is the daily cash book containing daily summary of octroi collected at all Nakas.

34. All the aforesaid exhibits have been examined by the expert V.S. Dastur & Company, Chartered Accountants, and the figure of Rs. 24,06,50,119.03/- has been awarded by the learned Sole Arbitrator to the Respondent. This to my mind is a copious exercise which the learned Sole Arbitrator has done in the facts of the present case, and hence the arguments on behalf of Petitioner that this was a mathematical impossibility ought to be rejected, inasmuch as all these amounts have not been awarded by the learned Sole Arbitrator on the basis of his opinion but on the basis of evidence provided by the expert, i.e., V.S. Dastur & Company, Chartered Accountants, who was appointed by consent and who had examined the figures which now cannot be sought to be reopened in the present case. I am of the view that by doing so this Court would undertake a fact-finding exercise, which is not something which can be countenanced in the facts of the present case. I am further of the view that if the Petitioner indeed had found arithmetical/mathematical errors on the face of the impugned arbitral award, then resort could have been taken to the provisions of Section 33 of the Act, and the same cannot be challenged by way of a petition under Section 34 of the Act, which has limited parameters within which the Court can interfere. The relevant findings of the learned Sole Arbitrator on the aforesaid issue are reproduce hereinbelow-

35. Thus from the above Exhibits, it can be seen that Respondent has, during the Contract Period, collected the following Octroi. Exhibit R-18 shows that Rs. 1,64,40,090/- is collected and payable to Claimant; Rs. 11,99,259/- is payable to Claimant for Jaggery imported into Kohlapur; Rs. 20,59,593 has been paid to Respondent by State Trading Corporation during the Contract period; Rs. 586 is found to have been collected under Exhibit R-69; Rs. 20,39,31,816.05/- is shown as having been collected in Exhibit C-38. As explained above this sum of Rs.

20,39,31,816.05/- is after deducting the refunds and payments made by Claimant (either instalments paid or EMD and/or Bank Guarantees encashed). Under Exhibit C-107A a sum of Rs. 28,37,77.00/- is found to have been collected for only half the month of November 1995. Thus a total sum of Rs. 22,39,23,622.74 has been collected by Respondent during the Contract Period. This is what emerges on the basis of records, of the Respondent, available before this Tribunal. This is the amount which should have been accounted for by Respondent and paid to Claimant on termination in 1996 or soon after the termination in April 1996.

36. The Supreme Court has in the case of Gopal Krishnaji Ketkar vs Mahomed Haji Latif reported in AIR (1968) S. C. 1413 held as follows:

"Mr. Gokhale, however, argued, that it was no part of the appellants' duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In *Murugesam Pillai v Manichavasaka Pandara* (1) Lord Shaw observed as follows:

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to, the, Courts the best material for its decision. With regard to (1) 44 I.A.98, at P. 103 third parties, this may be right enough-they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordships' opinion an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

This passage was sighted with approval by this Court in a recent decision - *Biltu Ram & Ors Vs Jainandan Prasad & Ors.* (1). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Bilas Kunwar v. Desarai Ranjit Singh & Ors.* (2)

"But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails to do so, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents."

But Shah, J., speaking for the Court, stated: "The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with illustration."

The Respondent had all relevant records. Claimant had fairly disclosed, at the Meeting held on 18th January 2016, how much Octroi he had collected. Of course this was on a Query by the Tribunal. The Respondent would know and their records would show how much the Respondent had collected during the Contract Period. It was the duty of the Respondent to produce all the records, first before the previous Arbitrator and in any case before this Tribunal. The Respondent has not done so. It cannot be said that, when this Arbitration started, leave aside during the time when the Arbitration was before the previous Arbitrator, the records were not available. The only conclusion that can be drawn from Respondent not producing relevant records is that, were the same to be produced they would falsify Respondents' statement/stand that, during the Contract Period they had not collected any Octroi from Current Account Holders. Most of the records now available before the Tribunal have been obtained by Claimant through RTI inquiries. These records falsify Respondents' statement/stand. Thus the inference, why records were not produced, is reinforced. Under the Contract after payment of weekly deposits, all other collections were to be Claimants profit. Respondent have collected/recovered amounts which were to be paid by Claimant with interest at 24% p.a. Thus now any amount shown to have been collected by Respondent, during the Contract Period, would have to be handed over to Claimant. By the ruse of not producing relevant records the Respondent cannot be allowed to deprive Claimant of the amounts due to him. An Adverse inference will thus have to be drawn against the Respondent. The Adverse inference has to be that, if the records had been produced they would have shown that the Respondent has collected, during the Contract Period, not just what is disclosed by the few Exhibits but more. Before the Tribunal sets out what it infers are the collections, it must be mentioned that it was submitted that Exhibit C-38 contains all collections and therefore there would be no more collections. Exhibit C-38 should have contained all collections but it is seen that many of the entries in the other Exhibits, before this Tribunal, are not contained in Exhibit C-38. The Expert has removed all duplicate entries whilst submitting his Report. Expert has found that sums have been collected, under various Exhibits, even after he has removed the duplicate entries. No explanation could be given, even though asked, why and how so many entries are missing from Exhibit C-38. It is thus clear that apart from the entries in Exhibit C-38 and the other Exhibits there are other collections. As the records have been kept back an Adverse Inference is drawn that the following Octroi, which should have been, in the normal course collected, has in fact been collected:

37. Initially Claimant was given a list of 69 Current Account Holders (Exhibit C-11). Thereafter pursuant to a RTI inquiry Claimant was informed that there were 111 Current Account Holders (Exhibit C-11A). Claimant has also extracted names of Current Account Holders from the Chief Auditors Report (Exhibit R-18). Claimant has thus presented to the Tribunal names of 140 parties. This includes the Petroleum Companies, State Trading Corporation and Transport Corporation of India. However as Exhibit C-11A, i.e. the list disclosed by Respondent pursuant to RTI inquiry, shows that there are 111 Current Account Holders, for the present exercise the Tribunal is considering that there were only 111 Current Account Holders. Of course apart from these there are the State Trading Corporation and Petroleum Companies like HPL, BPCL, IOCL etc who are dealt with separately. In regard to the 111 Current Account Holders it must be recorded that in view of this Tribunal a person would be a Current Account Holder only if he/she/it is regularly importing goods and does not want the hassle of having to complete the formalities, including payment of Octroi, every time. There is no evidence/proof that many/some Current Account Holders were not importing goods regularly. Thus it will have to be presumed that each Current Account Holder was, on a very very

conservative basis, importing goods and paying Octroi of, at least, Rs. 10000/- per month. From the names appearing in the list Exhibit C-11A it is found that approximately 90 names are not to be found in any of the Exhibits on record. Claimant has very obligingly worked out and shown how many names are missing from the Exhibits. Thus the collection from these 90 parties has not been disclosed by Respondent. Other names appear in one or the other of the Exhibits. It must be mentioned that amounts shown in the Exhibits against these names are not for the entire Contract Period. By this is meant that it is not known how much is collected in the missing part of the Contract Period. But for purposes of this exercise the Tribunal is ignoring this (except for the Petroleum Companies and Government Corporations) and only taking the missing 90 names into account. On this basis for the Contract period of 5 and ½ months Respondent would/should have collected, as stated on a very very conservative basis, from 90 Current Account Holders, the minimum sum of Rs. 45,05,000/-. Thus it is inferred that a sum of Rs. 45,05,000/- has been collected from these 90 Current Account Holders. This should have been paid to Claimant by the Respondent on termination in 1996 or soon thereafter in 1996. At this stage it must be mentioned that Claimant has made serious allegations of corruption in the Respondent and of collusion between officers of Respondent and Current Account Holders. The Tribunal has not gone into these allegations as it does not need to. But if Respondent claims that the amount of Rs. 45,05,000/- or any part thereof has not been collected, even though admittedly there are 110 Current Account Holders, then one of the possible explanations is that this amount, which should have come to Respondent, has been allowed to be not paid/siphoned away. For this Claimant cannot be blamed and cannot be made to suffer. Claimant must get what is due to him. If necessary Respondent can/must such take action, as it deems necessary. Action must be taken against the Current Account Holders and the concerned Officers also.

38. Apart from the above the records show:

a) Exhibit C-107A shows that from HPCL the half monthly collection was Rs. 6,11,815/-. Thus for the remaining five months the collection should/would be Rs. 30,59,075/-;

b) Exhibit C-107B shows that from May to October (6 months) the collection from IOCL was Rs. 71,39,403/-. The monthly collection was thus Rs. 11,89,900.50/-. For the Contract Period of 5½ month it would be Rs. 65,44,452.75/-;

c) Exhibit C-107C shows that from 24* April 1996 till October 1996 the collection has been Rs. 28,55,965.67/-. For a few days in December 1995 a collection of Rs. 8501.02 has been shown. Thus very conveniently the Contract Period is left out. If the six months collection is Rs. 28,55,965.67 the monthly collection would be Rs. 4,75,994.28/- and for the Contract Period of 5½ months the collection would be Rs. 26,17,968.54/-.

39. The result of the above discussion is that it is held that the Respondent have collected, during the Contract Period, the sums of:

(a) Rs. 22,39,23,622.74 (as disclosed from various Exhibits before this Tribunal);

(b) Rs. 45,05,000/- inferred to be collected from 90 Current Account Holders whose names are not shown in any of the Exhibits before this Tribunal;

(c) Rs. 30,59,075/- presumed to be collected, during the Contract Period, on the

basis of Exhibit C-107A;

- (d) Rs. 65,44,452.75 presumed to be collected, during the Contract Period, on the basis of Exhibit C-107B;
- (e) Rs. 26,17,968.54 presumed to be collected, during the Contract Period, on the basis of Exhibit C-107C

Thus on a very very conservative basis the Respondent has collected, during Contract period, a minimum sum of Rs. 24,06,50,119.03/-.

In the above calculation the Tribunal is not taking into account collections, during the Contract Period, from parties who are not Current Account Holders because the Tribunal has no basis for calculating this or knowing who those parties are.

I am therefore of the view that in respect of the first limb, the impugned arbitral award does not suffer from any patent illegality, and is not perverse or arbitrary, and does not require any interference by this Court.

35. My view is fortified by the decision of the Supreme Court in Associate Builders v. DDA¹⁰, which was also considered by the Supreme Court in Ssangyong Engg. & Construction Co. Ltd. v. NHAI¹¹ when dealing with patent illegality under Section 34(2A) of the Act. The Court in Ssangyong (supra) had held that in order to constitute a ground for setting aside an arbitral award, the illegality must *prima facie* go to the root of the matter without requiring reappraisal of evidence by the Court and not amount to a mere erroneous application of the law. The Court had relied on Associate Builders (supra) to hold that an arbitral award can be set aside if the Arbitral Tribunal contravenes Section 31(3) of the Act and provides no reasons for an award, and if the Arbitral Tribunal wanders outside the scope of the contract, committing an error of jurisdiction. The Court further held that an arbitral award can be set aside on the ground of patent illegality if the

10 (2015) 3 SCC 49

11 (2019) 15 SCC 131

findings of the Arbitral Tribunal are based on no evidence, or ignore vital evidence, or is based on documents taken behind the back of the parties. The relevant paragraphs of the decisions in Ssangyong (supra) and Associate Builders (supra) are reproduced below:-

Ssangyong Engg. & Construction Co. Ltd. v. NHAI

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

38. Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

39. To elucidate, para 42.1 of Associate Builders, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

(Emphasis supplied)

Associate Builders v. DDA

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is

important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, it was held : (SCC p. 317, para 7)

"7.... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In *Kuldeep Singh v. Commr. of Police*, it was held : (SCC p. 14, para 10)

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

...

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute.—(1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In *McDermott International Inc. v. Burn Standard Co. Ltd.*, this Court held as under : (SCC pp. 225-26, paras 112-13)

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure*

Helium India (P) Ltd. v. Oil and Natural Gas Commission and D.D. Sharma v. Union of India.]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

(emphasis supplied)

36. Coming to the second limb of the impugned arbitral award in respect of pendente lite interest on the aforesaid monetary claim from 1st January 1997 till the date of impugned arbitral award, it would be relevant to reproduce Clause 24 of the Agreement, as much hinges upon the interpretation of the aforesaid clause before granting interest. Clause 24 of the Agreement reads as follows: -

24) The Agent/s shall not be entitled to claim any kind of interest on any of his claims as per the interest act or any other provisions.

37. A plain reading of the aforesaid clause makes it clear that the parties to the Agreement had agreed that the Respondent would not be entitled to claim any interest on any of their claims as per the Interest Act, 1978 or any other provisions. The parties were therefore bound by the terms of this contract and hence could not take a position which ran to the contrary. It would be also relevant to reproduce the provisions of Section 31(7) of the Act as it stood at the relevant point of time to determine the issue:-

31. Form and contents of arbitral award-

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

[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

On a reading of Section 31(7) of the Act, it is clear that clause (7)(a) of Section 31 clearly stipulates that insofar as an arbitral award, the arbitrator may include in the sum of the arbitral award interest at a reasonable rate, unless otherwise agreed by the parties. The provision therefore bars the arbitrator from awarding interest where parties contract not to pay the interest amount. Once the contract itself bars the parties from charging interest, then as per provisions of section 31(7)(a) of the Act, awarding pendente lite interest in the facts of the present case would not be warranted. It would be very relevant therefore to examine the language of the clause wherein the parties have chosen not to grant interest. In the facts of the present case, Clause 24 of the Agreement, which is reproduced above, specifically provides that the parties would not be entitled for any interest in respect of their claims under the Interest Act, 1978 or under any other provisions. This to my mind is a bar on the learned Sole Arbitrator to award pendente lite interest. The learned Sole Arbitrator has made scathing remarks against the conduct of the Petitioner before granting interest and has upheld the decisions rendered in Union of India v. N.K. Garg & Co. (supra). The learned Sole Arbitrator has also placed reliance on the case of Raveechee & Co. v. Union of India¹², wherein the Supreme Court has held that a clause prohibiting interest does prevent an arbitrator from granting pendente lite interest and post-award interest where facts justify the same. The relevant paragraph of the impugned arbitral award is reproduced below:-

12 (2018) 7 SCC 664

84. I have heard the parties. It is correct that the Supreme Court has held that if there is a prohibition in Contract, against grant of interest, the Arbitrator must not grant interest. This would be the position in a normal case where a claim of a party is not settled for some time due to a genuine belief that the claim is not genuine or payable. But a provision that no interest is payable would be most unfair in a case like this where a party has intentionally withheld information, withheld documents and failed in its duty to take accounts and thus wilfully deprived the other side of monies lawfully due to it for so many years. As we have seen the Respondent have withheld monies due to the Claimant. The Respondent should have given the monies to Claimant in 1996. The Respondent knowingly makes a false statement before their own Commissioner to the effect that they have not collected any amounts from Current Account Holders. Acting on this false statement the Commissioner decides against the Claimant. The Arbitration then takes place before the previous Arbitrator. Even at this stage the Respondent falsely claim that during the Contract Period they have not collected any monies from Current Account Holders. The previous Arbitrator has accounts taken. On the basis of accounts the previous Arbitrator awards an interim sum in favour of the Claimant. Facts now before this Tribunal show that Respondent have no defence in respect of this sum Awarded by the previous Arbitrator. The Respondent instead of honouring the decision of the previous Arbitrator challenged his decision and made allegations against him. The previous Arbitrator therefore recused himself. The Claimant then has to get this Tribunal appointed. Proceedings before this Tribunal have dragged on from 1998 till date. Before this Tribunal the Respondent have not produced all the relevant documents and have persisted in their false stand that during the Contract Period they have not collected any amounts from Current Account Holders. Claimant has had to get records of Respondent produced and information obtained through RTI inquiry. The records show, as indicated above, that during the Contract Period the Respondent has collected large amounts. Even though the termination may have been valid, it was the duty of Respondent to immediately take accounts and hand over to the Claimant all amounts collected (over and above what was payable by Claimant). This was not done. Instead efforts have been made to deny Claimant his dues by all means possible. Under these circumstances it would be most unfair if Claimant were to be deprived of interest on the amounts due to him. This Tribunal is, under these circumstances, inclined to accept the Judgment of the Delhi High Court and hold that Clause 24 is violative of the provisions of Section 23 of the Indian Contract Act. On the facts of this case Clause 24 would be fraudulent and would imply and involve an injury to the Claimant in as much as it would result in Claimant being deprived, not just of the monies but also the fruits of monies which rightfully belong to him. It would result in a dishonest party like the Respondent getting benefit of its dishonesty. It would therefore be against Public Policy. In any case in the case of *M/s. Raveechee and Co. vs. Union of India* the Supreme Court has held that such a Clause does not prevent an Arbitrator from granting pendente lite and post Award interest where the facts so justify. The amounts found to have been collected by Respondent should have been paid over to Claimant in 1996 i.e. soon after termination. They have not been paid till date. On small delay by Claimant, in paying the weekly instalments Respondent charged 24% p.a. interest. The facts in this case fully justify an award of interest. Claimant has prayed for interest at 24%p.a. The Arbitration and Conciliation Act, 1996 provides for interest at 18%p.a. In my view this is the rate which must be applied. Accordingly I hold that the sum of Rs. 24,06,50,119.03/, which has been-Awarded in favour of the Claimant, will bear interest at the rate of 18% p.a. from 1st January 1997 till date of Award and the sum Awarded will bear further interest at 18% pa. from the date of the Award till payment and realisation thereof. There will be an Award accordingly.

38. I am not in agreement with the approach of the learned Sole Arbitrator in respect of the aforesaid findings, particularly on reading the language of Clause 24 of the Agreement. This particularly in view of the fact that the provisions of the Act are a departure from the provisions of the Arbitration Act, 1940, which did allow the arbitrator to provide pendente lite interest unless expressly provided in the agreement/contract. However, the said principle has been statutorily recognized in view of the words “Unless otherwise agreed by the parties” incorporated in Section 31(7)(a) of the Act. Therefore, once the contract entered between the parties bars charging of interest, taking any other view would be doing violence to the provisions of section 31(7)(a) of the Act. My view is supported by the recent decision of the Supreme Court in North Eastern Electric Power Corpn. Limited (NEEPCO) v. Astra Construction (P) Ltd.¹³ and the decisions rendered in Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat (supra), Union of India v. Bright Power Projects (India) Pvt. Ltd. (supra), Garg Builders v. Bharat Heavy Electricals Limited (supra), and State of Haryana v. Jai Durgaa Finvest Pvt. Ltd (supra) relied upon by the Petitioner.

39. The decision of the Supreme Court in Sree Kamatchi Amman Constructions v. Railways (supra), upon which reliance has been placed by the Petitioner to contend that the learned Sole Arbitrator could not have granted pendente lite interest to the Respondent is apposite to the facts of the present case, inasmuch as in the aforesaid case the Arbitral Tribunal had rejected the

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claims of the Appellant-Contractor regarding pre-reference and pendente lite interest, having regard to the bar contained in the relevant clause of the agreement entered into between the Appellant-Contractor and the Respondent, which specifically stated that “No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract”. The same was upheld by the learned Single Judge of the Madras High Court and the Division Bench upon a further appeal by the Appellant-Contractor. The Appellant-Contractor had thereafter preferred the dispute before the Supreme Court, wherein it was held that since the amount awarded to the Appellant-Contractor through the arbitral award was an amount payable to them under the contract entered into between the two parties, no pre-reference or pendente lite interest could be awarded to the Appellant-Contractor. The Court had further held that the Arbitral Tribunal was justified in not awarding pendente lite interest to the Appellant-Contractor, as Section 37(1) of the Act, by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award. The Court had further, placing reliance on the decision rendered in Sayed Ahmed & Co. v. State of U.P.¹⁴ clarified that the decisions rendered under the Arbitration Act,

14 (2009) 12 SCC 26

1940 may not be of assistance to decide the validity of grant of interest under the Act, as it did not contain a provision similar to Section 31(7) of the Act.

Relevant paragraphs of the decision of the Supreme Court in Sree Kamatchi

Amman Constructions v. Railways (supra) are reproduced hereinbelow:-

10. The two claims on which amounts are awarded are with reference to Claim 4 relating to erroneous billing and Claim 6 relating to security deposit. Clause 16(2) in terms specifically bars payment of interest on security deposit. Insofar as Claim 4 is concerned, the question is whether the amount awarded is an "amount payable to the contractor under the contract".

11. The learned counsel for the appellant made a faint attempt to contend that the award relating to Claim 4 was not in regard to an amount payable to the contractor under the contract. This contention has absolutely no merit as the award itself categorically recorded a finding that under Item 19 "the actual quantity executed by the claimant at the orders of the respondent very much becomes a part and parcel of the original agreement quantity". What was awarded for the "rate per metre of rails to be led to SLY yard and stacked vide agreement schedule Item 19" was the rate of Rs. 225 per metre. Thus Claim 4 related to a work executed by the contractor as a part and parcel of the work contemplated under the agreement. Payment directed by the Arbitral Tribunal for such work was also in accordance with the agreement schedule Item 19. Therefore, it is evident that the amount awarded in regard to Claim 4 was an amount payable to the contractor under the contract. Consequently, no interest could be paid thereon having regard to the bar under Clause 16(2) of the general conditions of contract.

...

18. At the outset it should be noticed that Engineers-De-Space-Age- and Madnani- arose under the old Arbitration Act, 1940 which did not contain a provision similar to Section 31(7) of the new Act. This Court, in Sayeed Ahmed held that the decisions rendered under the old Act may not be of assistance to decide the validity of grant of interest under the new Act. The logic in Engineers-De-Space-Age was that while the contract governed the interest from the date of cause of action to date of reference, the arbitrator had the discretion to decide the rate of interest from the date of reference to date of award and he was not bound by any prohibition regarding interest contained in the contract, insofar as pendente lite period is concerned. This Court in Sayeed Ahmed- held that the decision in Engineers-De-Space-Age would not apply to cases arising under the new Act. We extract below, the relevant portion from Sayeed Ahmed: (SCC p. 36, paras 23-24)

"23. The observation in Engineers-De-Space-Age- that the term of the contract merely prohibits the department/employer from paying interest to the contractor for delayed payment but once the matter goes to the arbitrator, the discretion of the arbitrator is not in any manner stifled by the terms of the contract and the arbitrator will be entitled to consider and grant the interest pendente lite, cannot be used to support an outlandish argument that bar on the Government or department paying interest is not a bar on the arbitrator awarding interest. Whether the provision in the contract bars the employer from entertaining any claim for interest or bars the contractor from making any claim for interest, it

amounts to a clear prohibition regarding interest. The provision need not contain another bar prohibiting the arbitrator from awarding interest. The observations made in the context of interest pendente lite cannot be used out of contract

24. The learned counsel for the appellant next contended on the basis of the above observations in *Engineers-De-Space-Age*, that even if Clause G 1.09 is held to bar interest in the pre-reference period, it should be held not to apply to the pendente lite period, that is, from 14-3-1997 to 31-7-2001. He contended that the award of interest during the pendency of the reference was within the discretion of the arbitrator and therefore, the award of interest for that period could not have been interfered with by the High Court. In view of the Constitution Bench decisions in *G.C. Roy* and *N.C. Budharaj* rendered before and after the decision in *Engineers-De-Space-Age*, it is doubtful whether the observation in *Engineers-De-Space-Age* in a case arising under the Arbitration Act, 1940 that the arbitrator could award interest pendente lite, ignoring the express bar in the contract, is good law. But that need not be considered further as this is a case under the new Act where there is a specific provision regarding award of interest by the arbitrator."

The same reasoning applies to the decision in *Madnani* also as that also relates to a case under the old Act and did not independently consider the issue but merely relied upon the decision in *Engineers-De-Space-Age*.

19. Section 37(1)[Sic Section 31(7)] of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award

20. We are of the view that the decisions in *Engineers-De-Space-Age* and *Madnani* are inapplicable for yet another reason. In *Engineers-De-Space-Age* and *Madnani* the arbitrator had awarded interest for the pendente lite period. This Court upheld the award of such interest under the old Act on the ground that the arbitrator had the discretion to decide whether interest should be awarded or not during the pendente lite period and he was not bound by the contractual terms insofar as the interest for the pendente lite period. But in the instant case the Arbitral Tribunal has refused to award interest for the pendente lite period. Where the Arbitral Tribunal has exercised its discretion and refused award of interest for the period pendente lite, even if the principles in those two cases were applicable, the award of the arbitrator could not be interfered with. On this ground also the decisions in *Engineers-De-Space-Age* and *Madnani* are inapplicable. Be that as it may.

(emphasis supplied)

40. I am further in agreement with the reliance of the Petitioner on the decision of the Supreme Court in the case of **Union of India v. Bright Power Projects (India) Pvt. Ltd.** (supra). In the aforesaid case, the relevant clause of

the contract entered into between the parties stipulated that “No interest will be payable upon the earnest money and the security deposit or amounts payable to the contractor under the contract”, and upon disputes arising between the parties, the same was referred to arbitration, wherein the Arbitral Tribunal passed an award in favour of the Respondent-Contractor granting interest from the date of reference till the date of the arbitral award. The arbitral award was challenged by the Appellant therein before this Court, and the learned Single Judge had dismissed the petition filed by the Appellant, and upon appeal the Division Bench had also dismissed the same. The dismissal was thereafter challenged before the Supreme Court, which held that when parties to the contract had agreed to the fact that interest would not be awarded on the amount payable to the contractor under the contract, they were bound by their understanding, and once the Respondent-Contractor agreed that they would not claim any interest on the amount to be paid under the contract, they could not have claimed interest either before a civil court or before an Arbitral Tribunal. The Court held that the Arbitral Tribunal had erred in awarding interest to the Respondent-Contractor by relying on a decision of the Supreme Court which pertained to a different period, i.e., when the Arbitration Act, 1940 was in force. The Court therefore held that pendente lite interest could not have been granted to the Respondent-Contractor. Relevant paragraphs of the aforesaid decision are reproduced below:-

10. Thus, it had been specifically understood between the parties that no interest was to be paid on the earnest money, security deposit and the amount

payable to the contractor under the contract. So far as payment of interest on government securities, which had been deposited by the respondent contractor with the appellant is concerned, it was specifically stated that the said amount was to be returned to the contractor along with interest accrued thereon, but so far as payment of interest on the amount payable to the contractor under the contract was concerned, there was a specific term that no interest was to be paid thereon.

11. When parties to the contract had agreed to the fact that interest would not be awarded on the amount payable to the contractor under the contract, in our opinion, they were bound by their understanding. Having once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an Arbitral Tribunal.

12. Section 31(7) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") is clear to the effect that unless otherwise agreed by the parties, the Arbitral Tribunal can award interest at reasonable rate for a period commencing from that date when the cause of action arises till the date of the award. Section 31(7) of the Act, reads as under

"31. (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."

13. Section 31(7) of the Act, by using the words "unless otherwise agreed by the parties", categorically specifies that the arbitrator is bound by the terms of the contract so far as award of interest from the date of cause of action to date of the award is concerned. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest.

...

15. The Arbitral Tribunal had mainly relied upon the judgment delivered by this Court in G.C. Roy case. In the said case, the situation was different. The contract between the parties did not contain any condition that interest would not be paid. In para 44 of the said judgment, it has been observed as under: (SCC pp. 533-34)

"44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf: Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

16. Relying upon the aforesaid judgment delivered by this Court, the Arbitral Tribunal thought it proper to award interest on the amount payable to the contractor for the period commencing from the date on which the reference was entered upon till the date of the award. The Tribunal, however, failed to consider the provisions of Section 31(7) of the Act and Clause 13(3) of the

contract before awarding interest in the present case.

17. It is also pertinent to note that G.C. Roy case² had been decided on 12-12-1991 on the basis of the provisions of the Arbitration Act, 1940, which was not operative at the time when the dispute on hand was decided by the Arbitral Tribunal.

18. Section 31(7)(a) of the Act ought to have been read and interpreted by the Arbitral Tribunal before taking any decision with regard to awarding interest. The said section, which has been reproduced hereinabove, gives more respect to the agreement entered into between the parties. If the parties to the agreement agree not to pay interest to each other, the Arbitral Tribunal has no right to award interest pendente lite.

(emphasis supplied)

41. The decision of the Supreme Court in the case of Garg Builders v. Bharat Heavy Electricals Limited (supra) is also apposite to the facts of the present case. The dispute between the two parties in the aforesaid case had been referred to arbitration, and the Arbitrator had passed an award in favour of the Appellant therein granting interest pendente lite from the date of filing the claim petition till the realization of the award amount. The Respondent-BHEL had thereafter challenged the arbitral award before the Delhi High Court, wherein the learned Single Judge had set aside the arbitral award with respect to pendente lite interest, and the decision of the learned Single Judge was upheld by the Division Bench upon appeal. The Appellant had therefore challenged the order of the Division Bench before the Supreme Court, wherein it was held that if the contract between the parties contains a specific clause which expressly bars payment of interest, then it is not open for the arbitrator to grant pendente lite interest. The Court further held that that interest payments are governed in general by the Interest Act, 1978 in addition to the specific statutes that govern an impugned matter, and that the provisions of Section 3(3) of the Interest Act, 1978 explicitly allow the parties

to waive their claim to an interest by virtue of an agreement, considering that Section 3(3)(a)(ii) of the Interest Act, 1978 states that the statute will not apply to situations where the payment of interest is barred by virtue of an express agreement. The Court further held that the relevant clause which barred the payment of interest to the Appellant was not *ultra vires* Section 28 of the Indian Contract Act, 1872. The Court also recognized that decisions rendered in relation to the Arbitration Act, 1940 have no application in matters governed by the Act. Relevant paragraphs of the aforesaid decision are reproduced below:-

10. We have carefully considered the submissions of the learned counsel for both the parties made at the Bar. The law relating to award of pendente lite interest by arbitrator under the 1996 Act is no longer *res integra*. The provisions of the 1996 Act give paramount importance to the contract entered into between the parties and categorically restricts the power of an arbitrator to award pre-reference and pendente lite interest when the parties themselves have agreed to the contrary.

...

12. It is clear from the above provision that if the contract prohibits pre-reference and pendente lite interest, the arbitrator cannot award interest for the said period. In the present case, clause barring interest is very clear and categorical. It uses the expression "any moneys due to the contractor" by the employer which includes the amount awarded by the arbitrator.

...

17. Therefore, if the contract contains a specific clause which expressly bars payment of interest, then it is not open for the arbitrator to grant pendente lite interest. The judgment on which reliance was placed by the learned counsel for the appellant in *Ambica Construction* has no application to the instant case because *Ambica Construction* was decided under the Arbitration Act, 1940 whereas the instant case falls under the 1996 Act. This has been clarified in *Chittaranjan Maity* as under : (*Chittaranjan Maity* case, SCC p. 616, para 16)

"16. Relying on a decision of this Court in *Ambica Construction v. Union of India*⁵, the learned Senior Counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the arbitrator was justified in awarding the pendente lite interest. However, it is not clear from *Ambica Construction* 5 as to whether it was decided under the Arbitration Act, 1940 (for short "the 1940 Act") or under the 1996 Act. It has relied on a judgment of the Constitution Bench in *Irrigation Deptt., State of Orissa v. G.C. Roy*. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the arbitrator from awarding interest for the pre-reference, pendente lite or post-award period, whereas the 1996 Act contains a specific provision which says that if the

agreement prohibits award of interest for the pre-award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the arbitrator cannot award interest for the said period. Therefore, the decision in Ambica Construction cannot be made applicable to the instant case."

18. The decision in Raveechee & Co. relied on by the learned counsel for the appellant is again under the Arbitration Act, 1940 which has no application to the facts of the present case.

19. Having regard to the above, we are of the view that the High Court was justified in rejecting the claim of the appellant seeking pendente lite interest on the award amount

20. This takes us to the next question as to whether Clause 17 of the contract is ultra vires in terms of Section 28 of the Contract Act, 1872. According to Section 28, a contract is void to the extent it restricts absolutely a party from enforcing his rights by usual proceedings in ordinary courts or if it limits the time within which he may enforce his rights. Exception 1 to this section contains a rule that a contract by which two or more persons agree that any dispute which has arisen or which may arise between them in respect of any subject or class of subjects shall be referred to arbitration is not illegal. The question, therefore, is whether the contracts barring payment of interest extinguish the rights of the parties. Exception 1 to Section 28 reads as under:

"Exception 1 : Saving of contract to refer to arbitration dispute that may arise.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

21. Exception 1 to Section 28 saves contracts where the right to move the court for appropriate relief is restricted but where the parties have agreed to resolve their dispute through arbitration. Thus, a lawful agreement to refer the matter to arbitration can be made a condition precedent before going to courts and it does not violate Section 28. No cause of action then accrues until the arbitrator has made the award and the only amount awarded in such arbitration is recoverable in respect of the dispute so referred. Section 31(7)(a) of the 1996 Act which allows parties to waive any claim to interest including pendente lite and the power of the arbitrator to grant interest is subject to the agreement of the parties.

22. It is pertinent to note that interest payments are governed in general by the Interest Act, 1978 in addition to the specific statutes that govern an impugned matter. Section 2(a) of the Interest Act defines a "Court" which includes both a tribunal and an arbitrator. In turn, Section 3 allows a "Court" to grant interest at prevailing interest rates in various cases. The provisions of Section 3(3) of the Interest Act, 1978 explicitly allow the parties to waive their claim to an interest by virtue of an agreement. Section 3(3)(a)(ii) states that the Interest Act will not apply to situations where the payment of interest is "barred by virtue of an express agreement".

23. Thus, when there is an express statutory permission for the parties to contract out of receiving interest and they have done so without any vitiation of free consent, it is not open for the arbitrator to grant pendente lite interest. We are of the considered opinion that Clause 17 of the contract is not ultra vires in terms of Section 28 of the Contract Act, 1872.

(emphasis supplied)

42. I am further in agreement with the reliance of the learned counsel for the Petitioner on the decision rendered in State of Haryana v. Jai Durgaa Finvest Pvt. Ltd. (supra), inasmuch as though the same does not relate to arbitral proceedings, the same has been rendered in the context of the an agreement which bars the payment of interest. In the aforesaid case, the relevant clause on the agreement executed between the parties stipulated that the security deposited by the Respondent-Contractor would not carry interest, and the same had to be refunded to them within a period of three months. When the contract was subsequently terminated by the Appellant and the security amount was forfeited by the Appellant, the matter was referred before the Appellate Authority, which directed that the security amount could be adjusted against the outstanding contract money and interest. Subsequently a notice was issued by the Appellant for depositing the aforesaid amount, which was challenged by the Respondent-Contractor before the Punjab and Haryana High Court through a writ petition, while also challenging the legality of the contract clause which barred interest. The petition was partly allowed, and upon a SLP being filed before the Supreme Court, the matter was remanded back to the High court for re-examination. The learned Single Judge in this instance held that the clause barring interest was unsustainable in law, and the same was held by the Division Bench in appeal. Thereafter, a Review Petition was filed by the Appellant in this regard, which was dismissed, and this dismissal was challenged before the Supreme Court. The Court held that courts cannot re-write terms of a contract, however reasonable, and that the

relevant clause barring interest could not be considered to be in opposition to public policy, and that once the parties had voluntarily accepted a contract they could not turn around and assail the same as oppressive after major part of the contract period had gotten over. The Court however held that since the Appellant was obligated to refund the security amount within three months, which it failed to do, the Respondent-Contractor was entitled to interest after the expiry of the period of 3 months from the determination of the contract.

Relevant paragraphs of the aforesaid decision are reproduced below:-

23. It is well settled that in matters of contract between the parties the function of a Court is to interpret and enforce the terms as has been agreed between parties. The Court will not re-write the terms howsoever reasonable the substituted term may appear to be. In matters of commercial contracts where the parties stand on equal footing and have committed to certain unambiguous terms, the language of the contract is to be clearly looked into and parties are bound by the same. Once the parties with their eyes open without any protest whatsoever and with free will accept certain terms of a contract they cannot afterwards be permitted to go back on the same merely because at a later point of time the stipulation proves to be onerous. The agreed forfeiture/security stipulation is to be enforced according to the terms of the contract as held in *National Highways Authority of India v. Ganga Enterprises*, and *Shri Hanuman Cotton Mills v. Tata Aircraft Limited*.

...

25. The Respondent was fully aware of the statutory Rules and Form as per the terms of which there are certain conditions to be fulfilled and failure thereof will entail certain consequences Likewise, the Respondent was also aware that the security deposited will not carry any interest and it will be refunded within three months from the date of the expiry of the contract or sooner determination of the contract. The Respondent had at least two opportunities of perusing the terms and conditions. Despite knowing the existence of the clause, the Respondent applied for the bid and became a successful bidder. Secondly when the Respondent signed the contract/agreement on 30.11.1998 as prescribed under Form-L, it was conscious of all the clauses, especially Clause 19 which prescribed that the security deposited will not carry any interest. It is not the case of the Respondent that it had been coerced into signing the contract nor is it the case that when the contract was signed it was under some mistake or undue influence. Respondent has voluntarily entered into the contract by which they were obliged to deposit the amount as prescribed therein and the failure would result in termination. It has been consistently held by the learned Single Judge and the Division Bench of the High Court that the termination of the contract was purely by the conduct of the Respondent and it was the Respondent who is to be blamed for non-performance and for not depositing the monthly payments on time. The courts below have clearly examined the conditions and the exchange of letters and

notices between the parties and have finally concluded that there was no failure on the part of the Appellant for non-performance of the contract by the Respondent.

26. It has been consistently found that the order of termination of the contract was effected due to the failure of the Respondent in abiding by the conditions as stipulated in the agreement. It has been noticed that after one year of the execution of the agreement the Respondent-company sent a letter to the Appellant stating that they have been obstructed by the land owners and, therefore, they are unable to carry out the mining. However, it has been found that the Respondent did not carry out the mining on their own and they have had made up a false plea with regard to the issuance of a notice in order to secure benefits from the Department. The Respondent was also required to submit a monthly return about sand extracted and if it was not extracting any sand due to problems created by the land owners then it would certainly submit a monthly report to that effect mentioning therein that extraction of the sand is Nil. It was clearly found by the High Court that the Respondent was negligent in not reporting the matter though they were working in other villages and carrying out mining. Though the Appellant had served a notice on the Respondent calling upon them to make the payment of monthly instalment failing which contract would be cancelled, Respondent did not abide by the same and took excuses for not carrying out the obligation. Therefore, it has been found by the courts below that the order of termination of the contract does not suffer from any illegality particularly when the Respondent failed to respond even to the notice of termination. This aspect has also attained finality, especially in view of order dated 08.05.2009 passed by a coordinate bench of this Court in SLP(C) Nos. 9761-9762 of 2009.

27. **The High Court fell into error in declaring Clause 19 as unsustainable in law and against public policy.** The public policy cannot be pressed into service to set at naught the commercial contract which expressly denies interest on security deposit. Such a stipulation is neither immoral nor unlawful nor can it be classified as unsustainable in the legal sense. The Respondent as a commercial entity had participated in open auction and emerged as the highest bidder and executed the standard statutory Form-L with full knowledge and furnished an undertaking to abide by the same. Once parties have voluntarily accepted a contract they cannot turn around and assail the same as oppressive after major part of the contract period has gotten over. The reasoning of the High Court that when State charges interest on belated instalment they should pay interest on the security does not stand scrutiny. The stipulations in Clause 2 and in Clause 19 operate in different fields and they serve different purposes. While Clause 2 provides for liquidated damages or compensation which is payable or referable to the contractor's default on the timely payment which is a consequence of the contractor's own breach, the security deposit in Clause 19 is a performance guarantee held by the State and the parties have clearly agreed that it would carry no interest. There is no reciprocal obligation upon the State to pay interest on the security. In fact, both the Clauses are seen in the same contract which has been agreed between both the parties with their eyes open. To reason otherwise and without interpreting the contract as agreed but to add new terms which were not admittedly written therein amounts to rewriting the contract which a Writ Court is not entitled to do.

28. Hence, it is held that Clause 19 is a valid binding term of the agreement and the finding of the learned Single Judge as affirmed by the Division Bench that Clause 19 is unsustainable in law and opposed to public policy is set-aside.

43. This view is further fortified by the recent decision of the Supreme Court in North Eastern Electric Power Corpn. Limited (NEEPCO) v. Astra Construction (P) Ltd. (supra), wherein the relevant clause of the contract entered into between the Appellant and the Respondent-Corporation provided that no claims for interest or damages would be entertained by the Respondent-Corporation with respect to any money or balance which may be lying with the Respondent-Corporation owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and contractor on the other or with respect to any delay on the part of the Engineer-in-Charge making periodical or final payments or in any other respect whatsoever. The Court while examining the difference in the Act and the Arbitration Act, 1940 with regard to the power of the arbitrator to grant interest had held that the issue was no longer *res integra*, and rejected the contention that the bar under relevant clause was confined to interest claimed on money or balances held up owing to a dispute, and that it did not extend to interest on any other head of claim, including interest upon an award itself. It held that the relevant clause of the agreement between the parties, by naming delay in payment as a separate ground, standing on its own and not tied to any dispute expressly had shut out a claim for interest arising from delayed payment, whether or not there was any dispute about it at all. The Court therefore held that the Arbitral Tribunal, in awarding pre-reference or pendente lite interest, exceeded the bounds of its jurisdiction under Section 31 (7)(a) of the Act. Relevant paragraphs of the aforesaid decision are reproduced below:-

19. Clause 54 of the GCC is worded differently, and the difference matters. It bars claims for interest or damages in two separate situations, not one. The first is the

same as before, money or balance lying with the Corporation owing to a dispute, difference or misunderstanding. But Clause 54 then adds, in its own right and joined by the word “or”, a second, independent situation, “any delay on the part of the Engineer-in-Charge making periodical or final payments”, before finally adding the same closing words, “or in any other respect whatsoever.” This is not a small drafting difference. By naming delay in payment as a separate ground, standing on its own and not tied to any dispute, Clause 54 does what the clause in *Harish Chandra* (supra) never did: it expressly shuts out a claim for interest arising from delayed payment, whether or not there was any dispute about it at all. The very situation that fell outside the bar in *Harish Chandra* (supra), delay in payment, without more, is brought squarely inside the bar in Clause 54. That is the true and complete answer to the High Court's view that the two clauses say the same thing; they do not, and the difference is decisive.

20. This is also not a one-off or unusual way of drafting such a clause. The very same structure, a separate, additional line barring interest on delayed payments, over and above the bar on money withheld due to a dispute, appears in the clauses that this Court examined in *Sayeed Ahmed* (supra) and *THDC-II* (supra), and in each of those cases, for that very reason, this Court held that the clause was a complete bar on the arbitrator's power to award interest, whether for the pre-reference period or *pendente lite*. We respectfully agree with that reasoning and see no reason to depart from it. It follows that the High Court was in error in treating Clause 54 as no different from the clause in *Harish Chandra* (supra). The two clauses are worded differently, and that difference in wording makes all the difference in law. It is the line of decisions in *Sayeed Ahmed* (supra) and thereafter, not *Harish Chandra* (supra), that governs this case.

...

23. For the foregoing reasons, we are of the considered view that Clause 54 of the GCC bars the grant of interest for the pre-reference period, and that the Arbitral Tribunal, in awarding such interest, exceeded the bounds of its jurisdiction under Section 31(7)(a) of the 1996 Act. The High Court erred in equating Clause 54 with the clause considered in *Harish Chandra* (supra), and in restoring the grant of pre-reference interest on that basis. The impugned judgment, to the extent it restores the grant of pre-reference interest, cannot be sustained and is accordingly set aside.

44. I am therefore not inclined to accept the contention of the Respondent that *pendente lite* interest could be granted in the facts of the present case. Clause 24 of the Agreement being a bar from awarding any interest could not therefore be disregarded, and *pendente lite* interest in the facts of the present case could not be granted. I am also of the view that the decisions relied upon by learned counsel for the Respondent in ONGC Ltd. v. G & T Beckfield Drilling Services (P) Ltd. (supra), Reliance Cellulose Products Ltd. v. ONGC Ltd. (supra), and Ferro

Concrete Construction (India) (P) Ltd. v. State of Rajasthan (supra) have been rendered in a different fact pattern by the Supreme Court and hence cannot be applied in the facts of the present case.

45. The decision of the Supreme Court in the case of ONGC Ltd. v. G & T Beckfield Drilling Services (P) Ltd. (supra) is not apposite to the facts of the present case, as the same was rendered in a different fact pattern, inasmuch as the relevant clause in the aforesaid case was in respect of remittances from the Appellant-Corporation to the Respondent pursuant to submission of invoices, and the right of the Appellant-Corporation to withhold payment upon a question being any item or items of an invoice until its resolution. The relevant clause in this context stipulated that “No interest shall be payable by ONGC on any delayed payment/disputed claim”. In fact, the Supreme Court itself has held that a clause merely barring award of interest on delayed payment by itself could not be readily inferred as a bar to award pendente lite interest by the Arbitral Tribunal. The Court held that when read as a whole, the relevant clause does not expressly or by necessary implication proscribe grant of pendente lite interest by the Arbitral Tribunal. Since the relevant clause did not expressly put a bar on pendente lite interest, the Court held that the same could be granted to the Respondent. However, Clause 24 of the Agreement in the present case completely bars the Agent (Respondent) from claiming any kind of interest on any of their claims as per the Interest Act, 1978 or any other provisions, which includes interest granted pendent lite. Therefore, the aforesaid decision will not be applicable to the facts of the present case.

46. I am further not in agreement with the contention of learned counsel on behalf of the Respondent that the decision rendered in the case of Reliance Cellulose Products Ltd. v. ONGC Ltd. (supra) will be applicable to the facts of the present case, inasmuch as the same was rendered under the statutory provisions of the Arbitration Act, 1940. The Court in the aforesaid decision itself has differentiated between the Arbitration Act, 1940 and the Act, and held that under the Arbitration Act, 1940, unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest. The Court further recognized that the position under Section 31(7) of the Act is wholly different, inasmuch as it sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered. The Court had observed that the relevant clause in the agreement between the Appellant-Contractor and the Respondent only barred interest on delays in payments made by the Respondents, and not in respect of any other amounts payable by the Respondent. Therefore, upon strictly construing the relevant clause barring payment of interest, the Court held that the clause confined itself to delays in payment and not to any other amounts payable to the Appellant-Contractor under

the contract, and therefore there was no bar to the payment of interest. The dispute in the present case, is however governed by the Act, and Clause 24 of the Agreement indicatively completely bars payment of all interest under the Agreement, including pendente lite interest. Relevant paragraphs of the aforesaid decision are reproduced below:-

24. A conspectus of the decisions that have been referred to above would show that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act, 1978 as well as pendente lite and future interest. However, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Since interest is compensatory in nature and is parasitic upon a principal sum not having been paid in time, this Court has frowned upon clauses that bar the payment of interest. It has therefore evolved the test of strict construction of such clauses, and has gone on to state that unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Thus, when one contrasts a clause such as the clause in Second Ambica Construction case²² with the clause in Tehri Hydro Development Corpn. Ltd.¹⁸, it becomes clear that unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest under the 1940 Act. As has been held in First Ambica Construction case-, the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. We hasten to add that the position as has been explained in some of the judgments above under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.

25. In the present case, Clause 16 of the General Conditions of Contract only speaks of any delay in payment not making ONGC liable for interest. There is nothing in this clause which refers even obliquely to the arbitrator's power to grant interest. This Court finds that the aforesaid clause is narrower than the clause considered by the three-Judge Bench in Second Ambica Construction case-which states that no interest will be payable on amounts payable to the contractor under the contract. Clause 16 in the present case confines itself only to delay in payment and not to any other amounts payable to the contractor under the contract. Also, unlike the clause in Tehri Hydro Development Corpn. Ltd., Clause 16 does not contain language which is so wide in nature that it would interdict an arbitrator from granting pendente lite interest. It will be remembered that the clause in Tehri Hydro

Development Corpn. Ltd. spoke of no claim for interest being entertained or payable in respect of any money which may be lying with the Government owing to disputes, difference or misunderstanding between the parties and not merely in respect of delay or omission; Further, the clause in Tehri Hydro Development Corpn. Ltd. goes much further and makes it clear that no claim for interest is payable "in any other respect whatsoever". It is, thus, clear that Clause 16 cannot possibly interdict the payment of pendente lite interest on the facts of the present case.

47. Along similar lines, the decision of the Supreme Court in the case of Ferro Concrete Construction (India) (P) Ltd. v. State of Rajasthan (supra) is not relevant to the facts of the present case, inasmuch it was delivered in the context of the Arbitration Act, 1940. The Court in the aforesaid case had reiterated that under the Arbitration Act, 1940, a stricter approach is followed that requires a clear and express clause against the payment of interest in case of difference, dispute, or misunderstanding, in case of delay of payment, or any other case whatsoever, to constitute a bar on the arbitrator from granting interest, while under the Act, Section 31(7)(a) sanctifies party autonomy, and interest is not payable the moment the contract provides otherwise. The Court also held that the arbitrator's power to grant interest would depend on the contractual clause in each case, and whether it expressly takes away the arbitrator's power to grant pendente lite interest, and that this would have to be determined based on the phraseology of the agreement, clauses conferring powers relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest is contractually barred and for which period. The Court therefore held that the relevant clause prohibited the Appellant-Contractor from claiming interest on any payment, arrears or balance, which may be found due to him at any time, and

applying the above-stated law, the relevant clause did not expressly bar the award of pendente lite interest in the event of disputes, differences, or misunderstandings between the parties, or on delayed payment, or in any other respect whatsoever, and the Court had therefore not readily inferred a bar on the payment of interest. However, the factual matrix of the present case is governed by the provisions of the Act, particularly Section 31(7), where as soon as Clause 24 of the Agreement provided that no interest would be payable under the Interest Act, 1978 or any other provisions, there would be a bar to interest of payment to the Respondent. Further, the decision in Ferro Concrete Construction (India) (P) Ltd. v. State of Rajasthan (supra) has been considered by the Supreme Court in Sree Kamatchi Amman Constructions v. Railways (supra) wherein the Court recognized that the decision in Ferro Concrete Construction (India) (P) Ltd. v. State of Rajasthan (supra) was rendered under the statutory provisions of the Arbitration Act, 1940 and refused to grant the prayer of pendente lite interest under the regime of the Act in view of the express bar in the contract.

48. I am therefore of the view that the interest has not been rightly granted pendente lite to the Respondent, and the findings on the same need to be interfered with under Section 34 of the Act in the present petition, considering the express bar in the Agreement entered into between the parties. The impugned arbitral award is therefore set aside to that extent.

49. Tied in with the aforesaid claim is the third limb of the impugned arbitral award, i.e., the post-award interest at the rate of 18% per annum of the sum

awarded, which has been awarded in view of the provisions of Section 31(7)(b) of the Act. The aforesaid provision, prior to its substitution by Act 3 of 2016 read as follows:-

"(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."

The amended provision which is applicable to the facts of the present case is as follows:-

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation- The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).

On a reading of the amended and the unamended provisions, it is clear that prior to amendment, the arbitrator could direct future interest at the rate of 18% per annum from the date of the arbitral award to the date of payment. However, the amended section carries interest at a rate 2% higher than the current rate of interest prevalent from the date of the arbitral award till the date of payment. In the facts of the present case, the learned Sole Arbitrator has correctly awarded post-award interest as per the mandate of Section 31(7)(b), however, to my mind, he has mistakenly applied the rate of 18% per annum, which was the rate prior to the amendment by Act 3 of 2016 with retrospective effect from 23rd September 2015. In the facts of the present case, the date of the award is 1st April 2019, and the same will therefore be governed the amended provisions of Section 31(7)(b) of the Act, and hence in my view the rate of interest would be 9% per annum, considering that the date of award is 1st April 2019 and the rate of interest

prevalent on the date of award was roughly between 7% to 7.8%, and Section 31(7)(b) allows the arbitrator to charge interest at a rate 2% higher than the prevalent rate of interest. Hence, to that extent, the impugned arbitral award is modified, and instead of an interest rate of 18% per annum till the payment and realization of the awarded amount, an interest rate of 9% per annum would be charged.

50. The setting aside of the impugned arbitral award on the issue of pendent lite interest and the modification of the rate of post-award interest can be made in view of the fact that both these limbs of the impugned arbitral award can be severed from the other portions of the impugned arbitral award pursuant to the decision of the Supreme Court in the leading case of Gayatri Balasamy v. ISG Novasoft Technologies Ltd.¹⁵. In the aforesaid case it has been held that post-award interest granted by the Arbitral Tribunal can be modified by the Court. The relevant paragraphs of the aforesaid decision on the severability of arbitral awards and the modification of post-award interest by the Court are reproduced below:-

32. In the present controversy, the proviso to Section 34(2)(a)(iv) is particularly relevant. It states that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters non-submitted may be set aside. The proviso, therefore, permits courts to sever the non-arbitrable portions of an award from arbitrable ones. This serves a twofold purpose. First, it aligns with Section 16 of the 1996 Act, which affirms the principle of kompetenz-kompetenz, that is, the arbitrators' competence to determine their own jurisdiction. Secondly, it enables the Court to sever and preserve the "valid" parts) of the award while setting aside the "invalid" ones.- Indeed, before us, none of the parties have argued that the Court is not empowered to undertake such a segregation.

33. We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the "invalid" portion of an arbitral award from the "valid" portion, while remaining within the narrow confines of Section 34, is inherent in the Court's jurisdiction when setting aside an award.

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34. To this extent, the doctrine of *omne majus continet in se minus*—the greater power includes the lesser—applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.

35. However, we must add a caveat that not all awards can be severed or segregated into separate silos. Partial setting aside may not be feasible when the "valid" and "invalid" portions are legally and practically inseparable. In simpler words, the "valid" and "invalid" portions must not be interdependent or intrinsically intertwined. If they are, the award cannot be set aside in part.

...

40. A core principium of arbitration, an alternative dispute resolution (hereinafter referred to as "ADR") mechanism, is to provide a quicker and cost-effective alternative to courtroom litigation. While this suggests minimal judicial interference, the role of domestic courts remains crucial, as they function in a supportive capacity to facilitate and expedite the resolution of disputes. Therefore, it follows that judicial intervention is legitimate and necessary when it furthers the ends of justice, including the resolution of disputes.

41. To deny courts the authority to modify an award—particularly when such a denial would impose significant hardships, escalate costs, and lead to unnecessary delays—would defeat the *raison d'être* of arbitration. This concern is particularly pronounced in India, where applications under Section 34 and appeals under Section 37 often take years to resolve.

42. Given this background, if we were to decide that courts can only set aside and not modify awards, then the parties would be compelled to undergo an extra round of arbitration, adding to the previous four stages: the initial arbitration, Section 34 (setting aside proceedings), Section 37 (appeal proceedings), and Article 136 (SLP proceedings). In effect, this interpretation would force the parties into a new arbitration process merely to affirm a decision that could easily be arrived at by the Court. This would render the arbitration process more cumbersome than even traditional litigation.

43. Equally, Section 34 limits recourse to courts to an application for setting aside the award. However, Section 34 does not restrict the range of reliefs that the Court can grant, while remaining within the contours of the statute. A different relief can be fashioned as long as it does not violate the guardrails of the power provided under Section 34. In other words, the power cannot contradict the essence or language of Section 34. The Court would not exercise appellate power, as envisaged by Order 41 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code").

44. We are of the opinion that modification represents a more limited, nuanced power in comparison to the annulment of an award, as the latter entails a more severe consequence of the award being voided in toto. Read in this manner, the limited and restricted power of severing an award implies a power of the Court to vary or modify the award. It will be wrong to argue that silence in the 1996 Act, as

projected, should be read as a complete prohibition.

45. We are thus of the opinion that the Section 34 Court can apply the doctrine of severability and modify a portion of the award while retaining the rest. This is subject to parts of the award being separable, legally and practically, as stipulated in Part II of our Analysis.

46. Mustill and Boyd have observed that an order varying an award is not equivalent to an appellate process.³⁰ The authors suggest that a modification order would only be appropriate where the modification, including any adjustment of costs, follows inevitably from the tribunal's determination of a question of law. This approach would be beneficial, as it would reduce costs and delays. The courts need not engage in any fact-finding exercise. By acknowledging the Court's power to modify awards, the judiciary is not rewriting the statute. We hold that the power of judicial review under Section 34, and the setting aside of an award, should be read as inherently including a limited power to modify the award within the confines of Section 34.

...

73. The next question that arises is: Do courts possess the power to declare or modify interest, especially post-award interest? In respect of pendente lite interest, Section 31(7)(a) (Annexure A), states that unless otherwise agreed by the parties, the Arbitral Tribunal may include in its sum for the award, interest, at such rate it deems reasonable on whole or part of the money for whole or part of the period on which the cause of action arose and the date on which the award is made. In respect of post-award interest, Section 31(7)(b) (Annexure A) states that unless an award provides for interest on a sum directed to be paid by it, the sum will carry an interest at a 2% higher rate than the current rate of interest prevalent on the date of the award, from the date of the award till the date of payment. The Explanation defines the expression "current rate of interest".

74. There can be instances of violation of Section 31(7)(a), and the pendente lite interest awarded may be contrary to the contractual provision. We are of the opinion that, in such cases, the Court while examining objections under Section 34 of the 1996 Act will have two options. First is to set aside the rate of interest or second, recourse may be had to the powers of remand under Section

75. For the post-award interest in terms of Section 31(7)(b), the courts will retain the power to modify the interest where the facts justify such modification. This is why the standard rate stipulated in clause (b) applies when the award itself does not specify the applicable post-award interest. There can be a situation where the party to be paid money is at fault and is guilty of delay which may require a modification in the rate of interest. In the absence of grant of post-award interest in the award, the Court also possesses the power to grant post-award interest. Clearly, as per the legislative mandate, it is not the sole prerogative of the arbitrator.

76. Compare Section 31 of the 1996 Act with Section 31 of the Model Law. While both sections are titled similarly-"Form and Contents of Award"-only the 1996 Act addresses interest in Section 31(7). The Model Law does not provide standards governing the determination of interest rates. Thus, Section 31(7) is a unique creation of the Indian legislature. It was not borrowed from the Model Law. Specifically, under Section 31(7)(b), the legislature has established a standard rate of interest to guide the arbitrator's discretion when it comes to determining the post-award interest rate. While the arbitrator retains his flexibility based on facts and

circumstances of the case, the standard set by the legislature must weigh in on their consideration. Further, as there is a standard prescribed by the legislature, the post-award interest awarded can be scrutinised by courts against the standards prescribed.

77. Our reasoning is bolstered when considering the practical aspects. Ine Arbitral Tribunals, when determining post-award interest, cannot foresee future issues that may arise. Post-award interest is inherently future-oriented and depends on facts and circumstances that unfold after the award is issued. Since the future is unpredictable and unknown to the arbitrator at the time of the award, it would be unreasonable to suggest that the arbitrator, as a soothsayer, could have anticipated or predicted future events with certainty. Therefore, it is appropriate for the Section 34 Court to have the authority to intervene and modify the post-award interest if the facts and circumstances justify such a change.

78. Inherent in the discussion above, is the Court's power to both increase or decrease the post-award interest rate. It would be incorrect to state that the Court's power to interfere with this interest rate is limited solely to decreasing the interest rate. Situations may arise where the rate should be increased due to delays or obstructions in the execution of the award. Interest rates may also fluctuate over time.

79. However, the Court, while exercising this power, must be cautious and mindful not to overstep its role by altering the interest rate unless there are compelling and well-founded reasons to do so. In exercising this power, the Court is not acting in an appellate capacity, but rather under limited authority. For instance, the 1996 Act stipulates a standard post-award interest rate. When the statute itself benchmarks a standard, unless there are special and specific reasons, the rate of interest stipulated by the statute should be applied.

80. Nevertheless, this limited power is significant, as it can help avoid further rounds of litigation. Without it, the Court may be forced to set aside the entire award or order a fresh round of arbitration because of an erroneous interest rate rather than simply adjusting this rate.

...

87. Accordingly, the questions of law referred to by Gayatri Balasamy- are answered by stating that the Court has a limited power under Sections 34 and 37 of the 1996 Act to modify the arbitral award. This limited power may be exercised under the following circumstances:

87.1. When the award is severable, by severing the "invalid" portion from the "valid" portion of the award, as held in Part II of our Analysis;

87.2. By correcting any clerical, computational or typographical errors which appear erroneous on the face of the record, as held in Parts IV and V of our Analysis;

87.3. Post-award interest may be modified in some circumstances as held in Part IX of our Analysis; and/or

87.4. Article 142 of the Constitution applies, albeit, the power must be exercised with great care and caution and within the limits of the constitutional power as outlined in Part XII of our Analysis.

(emphasis supplied)

51. Coming to the last limb of the impugned arbitral award, i.e., the costs of Rs. 1,50,00,000/-, I am of the view that the same is governed by the provisions of Section 31A of the Act, and the learned Sole Arbitrator has on the basis of the statements of costs which have been submitted by both the parties, come to a figure of Rs. 1,50,00,000/-. Section 31A of the Act is reproduced hereinbelow:-

31A. Regime for costs.-(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine-

- (a) whether costs are payable by one party to another;
- (b) the amount of such costs; and
- (c) when such costs are to be paid.

Explanation.-For the purpose of this sub-section, "costs" means reasonable costs relating to-

- (i) the fees and expenses of the arbitrators, Courts and witnesses;
- (ii) legal fees and expenses;
- (iii) any administration fees of the institution supervising the arbitration; and
- (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,-

- (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
- (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including-

- (a) the conduct of all the parties;
- (b) whether a party has succeeded partly in the case;
- (c) whether the party had made a frivolous counter-claim leading to delay in the

disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay-

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

The Explanation to the word “costs” as given in the aforesaid section includes the fees and expenses of the arbitrators, courts and witnesses, legal fees and expenses, any administration fees of the institution supervising the arbitration, and any other expenses incurred in connection with the arbitral or court proceedings and the arbitral award. In the facts of the present case, it is clearly seen as recorded by the learned Sole Arbitrator, that two rounds of arbitration have taken place, and the parties have incurred considerable costs. In the present case, in fact, an expert was also appointed with the consent of the parties to conduct a thorough inspection of the accounts, charges of which also have to be included while awarding costs. The learned Sole Arbitrator on the basis of the costs incurred has to my mind rightly come to the figure of Rs. 1,50,00,000/-, and the findings on the same need not be disturbed. The relevant part of the findings is reproduced

below:-

91. Both parties were asked to submit their statement of costs. Claimant has submitted his statement showing that he has incurred, during this entire period, from 1996 to now, a sum of over Rs. 2 crs. Respondent have indicated that they have incurred costs of Rs: 1,62,61946/-.

92. In this case it is seen that, during the Contract Period, Respondent has collected a large sum of money. Even though Respondent has recovered from Claimant, all that the Claimant was to pay the Respondent with interest at 24% p.a. the Respondent has for the past over 20 years retained monies without accounting for the same. Claimant has had to incur expenses and costs indicated above. These are now claimed by Claimant. Even when the previous Arbitrator gave an Interim finding in favour of Claimant, and clearly the Respondent had collected much more, than what the previous Arbitrator had Awarded, the Respondent do not pay up the paltry sum Awarded by way of Interim measure. Instead Respondent makes allegations against the previous Arbitrator. As a result of such allegations the previous Arbitrator resigns. Claimant then has to go to Court to get this Tribunal appointed. Before this Tribunal also the Respondent have not given any details or particulars of the amounts collected by them during the Contract Period. They have held back the relevant records. They have forced Claimant to get information through RTI inquiries. By adopting such tactics the Respondent has, for the past so many years, not given to Claimant monies which rightly belongs to him. The Claimant has had to adopt Court proceedings and invoke Arbitration. The Arbitration has been dragged on for so many years. In my view this is a fit case where Respondent must pay to Claimant substantial costs. Even though Respondent may not be directed to pay the actual costs, claimed to have been incurred by Claimant, the Respondent must pay substantial costs. In my view costs of Rs. 1.5 crores must be paid by Respondent to Claimant. There will accordingly be an Award of costs in favour of the Claimant and against the Respondent in a sum of Rs. 1.5 crores.

(emphasis supplied)

52. I am therefore of the view that the reliance placed by learned counsel on behalf of the Petitioner on the case of Sanjeev Kumar Jain v Raghubir Saran Charitable Trust & Ors. (supra) to hold that in the present case the costs of Rs. 1,50,00,000/- are exorbitant would not be apposite, inasmuch as the same decision was rendered on a different fact pattern. In the aforesaid case, a Division Bench of the Delhi High Court had held that since the dispute was a commercial dispute, the party which would succeed in the dispute would be entitled to costs for litigation expenses, payable by the unsuccessful party. The parties to the dispute were directed to file memos indicating the expenses they

had incurred during the course of litigating the dispute. Thereafter, the dispute was decided in favour of the Respondents, and the Appellant-Tenant was directed to pay costs as per the memo filed by the Respondents. The Supreme Court however observed that that contrary to the Respondents' contentions, the order directing payment of costs was not a consent order, and that payment of costs had been ordered by the High Court in the absence of an assessment being carried out by the Taxing Officer of the High Court as to the efficacy of the memos filed by the parties. The Court had therefore set aside the order of costs and reduced them from Rs. 45,28,000/- to Rs. 3,000/.

However, in the facts of the present case, the learned Sole Arbitrator has examined the statements of costs filed by both the parties, the rather chequered history of the dispute, and the conduct of the Petitioner during the course of arbitral proceedings. The learned Sole Arbitrator has taken cognizance of the fact that the Petitioner did not even pay to the Respondent the sum payable pursuant to the interim award dated 23rd November 2005, and had instead leveled allegations against the erstwhile Sole Arbitrator, and that by not disclosing documents had compelled the Respondents to acquire the same through applications under the RTI Act. Therefore, in the present case, in contrast to the facts in Sanjeev Kumar Jain v Raghubir Saran Charitable Trust & Ors. (supra), the learned Sole Arbitrator has taken into account the statements filed by the parties and their conduct to come to a reasoned finding as to costs.

53. It is therefore my view that there is no patent illegality and no arbitrariness

or perversity which could be demonstrated by the Petitioner in so far as granting the monetary claim of Rs. 24,06,50,119.03/- as per the first limb of the impugned arbitral award and the costs of Rs. 1,50,00,000/- as per the fourth limb in the facts of the present case warranting interference under Section 34 of the Act. I am, in fact, of the view that the impugned arbitral award has been passed on detailed findings and on the basis of appreciation of the facts and documentary evidence, on which a possible view has been arrived at by the learned Sole Arbitrator. The view of the learned Sole Arbitrator was in fact strengthened by the assistance rendered by the expert, who was a Chartered Accountant firm, and therefore, to find fault in the impugned arbitral award and substitute it with this Court's view would result in travesty of justice. There is no further fact finding which can be made under the mandate of Section 34 of the Act, and the learned Sole Arbitrator has, considering the overall conduct of the Petitioner, rightly awarded the amount of Rs. Rs. 24,06,50,119.03/- and costs of Rs. 1,50,00,000/- to the Respondent. I am not satisfied that a case has been made out for interference with the impugned arbitral award. Further, the impugned arbitral award is set aside in respect of the pendente lite interest awarded as per the second limb of the impugned arbitral award, in view of the discussion in paragraph Nos. 36 to 48 of this judgement, and the impugned arbitral award is modified to the extent as provided for in paragraph No. 49 above in respect of post-award interest. Therefore, the Petition is disposed of in the aforesaid terms. Interim Application(s), if any, shall be disposed of accordingly. Any amount deposited in Court shall be released on the expiry of one month from the date

this judgment is uploaded on the website of this Court. No costs.

(AARTI SATHE, J.)

1. After pronouncement of the Judgment, learned counsel Ms. Anushka Parab, appearing on behalf of the Petitioner, seeks stay of the operation of the Judgment to enable the Petitioner to challenge the same by availing appropriate remedies. Learned counsel appearing for the Respondent opposes the said request.

2. The effect and operation of the Judgment shall remain stayed for a period of three weeks from today.

(AARTI SATHE, J.)