Himachal Pradesh
Public Works Department

No.PW. LC-Arb. Cases- Sh.N.D Naik-**Guidlines**/2015- 11676-86 Dated:- 20-3-15

From:-

Engineer-in-Chief
HP.PWD.Shimla-2.

To

1. The Chief Engineer (SZ)
   HP.PWD.Shimla-2.

2. The Chief Engineer (MZ)
   HP.PWD. Mandi (H.P)

3. The Chief Engineer (HZ)
   HP.PWD. Hamirpur (H.P)

4. The Chief Engineer (KZ)
   HP.PWD. Kangra (H.P)

5. The Chief Engineer-cum -Project Director
   HPRIDC Shimla -2

Subject: **Guidelines for defending Arbitration Cases before Ld. Arbitrator cases in view of the award passed by Ld. Arbitrator Sh. Sandeep Sharma (Sr.Advocate) dated 20.12.2014.**

I am enclosing herewith a copy of award **passed by Ld. Arbitrator Sh. Sandeep Sharma (Sr. Advocate) dated 20.12.2014** for kind perusal and future guidance. Its perusal shall reveal that on the one hand claim amounting to Rs.1 crore 11 lacs of contractor was rejected/disallowed except work not taken into M.B of Rs. 7 lacs and on the other hand two counter claims of liquidated damages and mobilization advance recovery of department were upheld amounting to apprx. 60 lacs. However in counter claim No.3, the respondent department claimed an amount of Rs.73.63 Lac due to price escalation and time over run.

Against this counter claim on rival contention while disallowing the counter claim, Ld. Arbitrator relied on Case law State of Rajasthan vs Ferro Concrete Construction Pvt. Ltd. (2009) 12 SCC Page-1 (copy enclosed) and held that on the one hand department granted four extentions each of one year and did not terminate the contract at appropriate time after taking into account the conduct of contractor. Besides on the other hand ~~also~~ did not supplement the claim statement with complete details as to how 73.63 Laks has been chosen against this counter claim. Definitely any claim requires corroborating evidence which except filing counter claim statement by Executive Engineer Gohar /Deptt. it was not corroborated with any other evidence.

Hence based upon the above mentioned law laid down by Hon'ble Apex Court so also rightly relied by Ld. Arbitrator, there appears inherent lacunae left by the department in the arbitration proceedings qua said counter claim No. 3, which by filings objections cannot be improved before Hon'ble High Court now. As such in future such claims or counter claims if raised by department /Executive Engineer be also proved by filing comparative statements of rescinded work and new awarded work of left out portion with exact item wise increased cost paid to subsequent contractor before Ld. Arbitrator.

Hence the said findings being land mark findings in effectively combating arbitration proceedings before Ld. Arbitrator whose kind perusal and strict following by department officers in pending or future proceedings may prove useful and handy in preparing its case/defence and also proving in counter claims effectively.

You are therefore, requested to **circulate the copy of this award passed by Ld. Arbitrator Sh. Sandeep Sharma (Sr. Advocate) to all S.E's, Executive Engineers, Div. Accountants and Assistant Engineers** with the direction that in the cases either pending before any Arbitrator or future cases of any Division/Circle, adopt future defence as dealt in this case and do not leave time over run & price escalation counterclaims without corroborating evidence by filling mere statement only.

D.A:- Copy of award dated 20.12.2015.

Engineer-in-Chief
HP.PWD.Shimla-2.

Copy forwarded for information and necessary action to:-

1. The Addl. Chief Secretary (PW) to the Govt. of H.P. Shimla-171002 please.
2. The Superintending Engineer Arbitration Circle HP.PWD Solan H.P please.
3. The Superintending Engineer(s) 3rd Solan, 4th Shimla, 11th Rampur, 12th Nahan & 14th Rohru circles HPPWD with a further request that copy of this letter along with copy of award & relied judgment be also circulated to all the Executive Engineer(s), Assistant Engineers and Divisional Accountants for their kind perusal and future guidance.

Engineer-in-Chief
HP.PWD.Shimla-2.

Sandeep Sharma
Sr.Advocate
HIGH COURT OF HIMACHAL PRADESH
SHIMLA -1.

Office :20-21,D.R. Complex,
Lakkar Bazar, Shimla -1
Phone 0177-2804503(O)
(M) 94180-95750,

Ref. No.....

Dated:09.01.2015

To

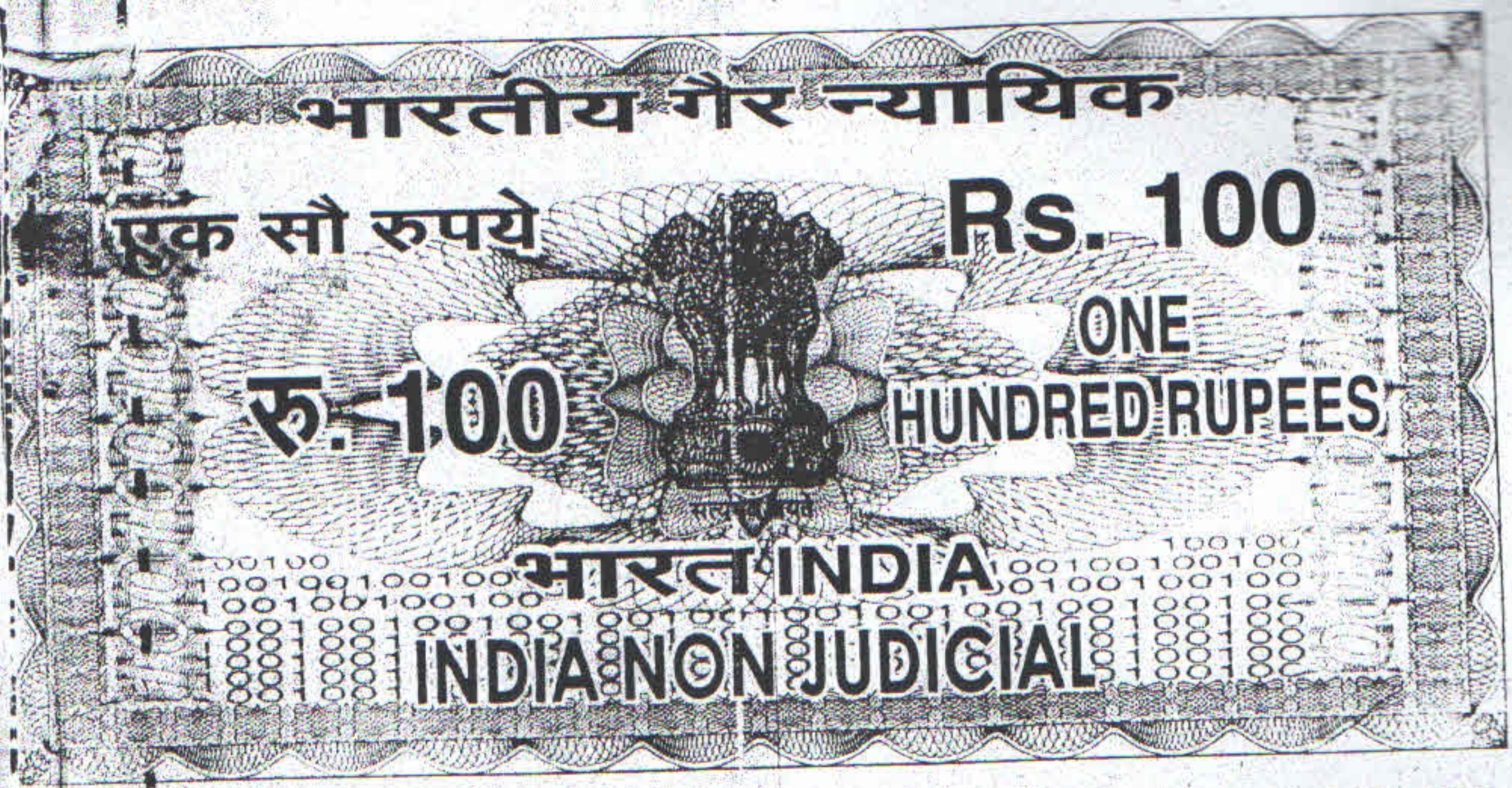
Executive Engineer,
Gohar Division,
HP PWD Gohar,Distt. Mandi (HP).

Subject :- Arbitration award passed in terms of reference entered by the undersigned on 12.12.2013 pursuant to the order passed by the Hon'ble High Court on 25.11.2013 in CMP MO.4097/13.

With reference to above captioned subject, it is to inform you that the undersigned has passed the Arbitration award, signed copy whereof is being enclosed herewith. This is for your information.

Sandeep Sharma
Sr.Advocate.
Sole Arbitrator.

Encls: as above



हिमाचल प्रदेश HIMACHAL PRADESH A 505600

BEFORE SH. SANDEEP SHARMA ,SR. ADVOCATE,THE SOLE ARBITRATOR, SHIMLA.

Sh Narain Dass Naik,Govt. Contractor,
Village Bhour, P.O. Kanaid, Tehsil Sundernagar,
Distt. Mandi, H.P.

.....CLAIMANTS

AND

Executive Engineer, Gohar Division,
HPPWD Gohar, Mandi, H.P.

.....RESPONDENTS

AWARD

1. Vide. order dated 25-11-2013, Hon'ble High Court of Himachal Pradesh was pleased to appoint the undersigned as a Arbitrator to adjudicate the dispute , detail whereof would be given herein after, while passing order in CMPMO NO. 4097/2013 filed by Sh Narain Das Naik under section 11 of the Arbitration and Conciliation Act 1996 .Hon'ble court vide order dated 25-11-2013 passed in CMPMO NO. 4097/of 2013 quashed the order dated 25-08-2012 passed by

हिमाचल प्रदेश HIMACHAL PRADESH 05AA 761844

the Ld Arbitrator-cum-superintending Engineer, Arbitration Circle, HPPWD. and appointed undersigned as a sole arbitrator to adjudicate/decide the dispute. Mr. Pankaj Negi Adv. was also appointed to assist the Arbitrator. Copy of order dated 25—11-2013 passed by Hon'ble High Court in CMPMO No. 4097/2013 is available on record as Annexure "A".

2. That strictly in terms of order dated 25-11-2013, Arbitrator hereinafter to be referred as undersigned, entered into reference well within stipulated time i.e. within two weeks, from the receipt c the copy of order dated 25-11-2013. Vide notice dated 12-12-201 undersigned entered upon the reference and fixed the date meeting/proceedings on 30-12-2013 in his office with a specif purpose to commence the arbitration proceedings . Notic intimating the scheduled date of 30-12-2013 were sent to tl parties, which were duly received by them. Copy of notice dated 1 12-2013 is available in the file containing the Gemini orders pass by the Arbitrator during the pendency of dispute before him.

3. That before adverting to the details of the proceedings held bef the arbitrator after issuance of notices, it would be apt to give detail of the dispute in question between the parties.

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" Claimant was awarded the work of construction / up gradation of link road No.T-01 under Chachiot block Tharjun to Tandi road(part of kanda to Pandoh KM 0/0 to 24/0 under package No HP-08-112 under PMGSY Bharat Nirman Phase –VI for an estimated cost of Rs 366.78 Lakhs vide letter dated 30-03-2007, claimant claimed that despite timely completion of work , department failed to make the payment compelling him to invoke the Arbitration clause vide notice dated 08-12-2011"

Albeit, brief narration of the dispute has been given herein above but it is also necessary to mention that before passing of order dated 25-11-2013 by the Hon'ble High Court, Ld Arbitrator –cum-Superintending Engineer had entered into reference pursuant to his appointment as a Arbitrator vide letter dated 2-01-2012. However fact of the matter is that those proceedings were terminated on 25-08-2012 and undersigned was appointed by the Hon'ble High Court as a sole Arbitrator to adjudicate/decide the dispute mentioned hereinabove.

That after issuance of notices to the parties, both parties filed its claims and counter claims respectively giving therein complete detail of dispute in question, which was to be precisely decided by the Arbitrator. Claims and counter claims filled by the claimant and department/ respondent have been made part of record as Annexure "B & C" of the file containing the records. Claimant also filled rejoinder/ rebuttal to the reply/ counter claims filled by the respondent department. Respondent Department also filled its rebuttal to the rejoinder filled by the claimant, which has been made as part of record as Annexure "D" & "E". After completion of proceedings, parties were also afforded an opportunity to file Evidence, if any, by way of affidavit, but both the parties submitted that statement of claims and counter claims filed by them may be read as evidence in support of their claims and counter claims. Order dated 02.06.2014 as well as 30.06.2014 may be read for reference in this regard.

That during pendency of the proceedings before the undersigned i.e. on 20.06.2014, Sh. Sunit Goel, Advocate, representing the claimant submitted that in case parties to the dispute agrees for joint measurement of the work done by the claimant, some disputes can be resolved amicably. Accordingly, vide order dated 20.06.2014 Arbitral Tribunal with the consent of both the parties afforded an opportunity to both the parties to carryout joint measurement to settle the dispute amicably. Accordingly on 30.06.2014, representative of department namely Sh. Prem Singh Chauhan, informed that respondent department is ready and willing to constitute a joint inspection committee to carry out joint measurement and in this regard claimant may be advised to come present in the office of Executive Engineer, PWD Division Gohar Distt. Mandi (HP) on 02.07.2014 so that site in question is visited jointly by the committee. Subsequently on 14.10.2014 Sh. Jitender Singh, Executive Engineer B & R, HP PWD, Gohar Division, Mandi Distt. Mandi submitted the report of joint inspection committee, where it was reported that after carrying out re-measurement of all the disputed components, it has been found that 614.38 Cumtr. Quantity of Grade-III has not been taken in to account inadvertently while preparing the bill and as such as per finding report submitted by the committee, approximately value of unpaid item is Rs.7.60 lacs. Copy of finding report is available on record as Annexure "F". However, claimant showed his dissent to the finding report and vide communication dated 13.10.2014 submitted his own measurement, copy whereof is available on record as Annexure "G". After perusing the communication dated 13.10.2014, Executive Engineer referred herein above, sought some time to go through the measurement submitted by the claimant. Thereafter, matter was listed for final arguments on 20.11.2014 in the presence of both the parties and on that day Executive Engineer, HP PWD Gohar, Division, filed reply dated 18.11.2014, copy whereof was made available to the claimant, to the communication dated 13.10.2014 filed by claimant, wherein it was mentioned that measurements relating to the removal of slips as placed on record by the claimant/ contractor is an after thought and this was never brought to the notice of department during the execution of the work. It was further

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job to the contractor and was not to be executed by the contractor as per terms and conditions of the contract agreement. Department also submitted that scrutiny of record nowhere reveals that such item was ever executed by the contractor. The item relating to the widening of existing road (ROFD) stands paid to the contractor as per actual work done on the site, copy of letter date 18.11.2014 is available on record as Annexure "H". Though during the final arguments held before undersigned on 20.11.2014 parties to the dispute were in agreement qua the majority of claims and counter claims setup by the parties, each claim and counter claim of the parties to the dispute was dealt with separately in the presence of both the parties and record was also perused in their presence. After conclusion of arguments, Sh.Suneet Goel Advocate submitted that he may also be allowed to file written arguments with in a period of one week before the pronouncement of the final award, which prayer was not opposed by the opposite party. Sequel to order dated 20.11.2014, claimant also filed written arguments, which is being made part of record as an Annexure "I". After completion of proceedings mentioned herein above, undersigned proceeded ahead to pass final award to the following effect taking into consideration material made available on record by the both the parties.

Before making final award, it would be apt to give detail of the work in question; which is as under:-

Name of work:- Work of Upgradation of road namely Tharjun to Tandi Km. 0/0 to 24/0 under PMGSY package No. HP 08-112.

Agreement No.:- 6/ 2006-2007

Contract Price:- 3,66,78,455/- (Rs. Three crore sixty six lacs seventy eight thousand four hundred fifty five) only. (Wrongly mentioned as Rs.2,66,78,455/- (Rs. Two crore sixty six lac seventy eight thousand four hundred fifty five) only by both parities in their claims and counter claims respectively.

Date of completion:- 14.04.2008.

Claimant being the lowest tenderer was awarded work, detail

Tender/2007-20438-45 dated30.03.2007. Albeit, claimant was bound to complete the work on or before 14.04.2008 in terms of agreement entered into between the parties but perusal of the record show that despite several reminders and four extensions of time i.e. one year each, claimant failed to complete the work within stipulated period. Record further reveals that on the request of the claimant as many as four extensions of time were granted to the claimant by the respondent department for completion of work in question. Finally vide communication dated 13.06.2012, claimant was granted time upto 31.10.2012 for completion of work in question. Respondent department while granting aforesaid extensions specifically mentioned in the letters that extension is/ are being granted without prejudice to the right of the Govt. to recover liquidated damages in accordance with the provision of clause-28 of the agreement. It further appears that despite extension of time, detail whereof, has been given herein above, claimant failed to complete the work compelling the respondent department to issue letter dated 12.12.2012 imposing liquidated damaged to the tune of Rs.36,67,886/- in terms of claus-44.1 of the contract agreement for in ordinate delay. Vide above referred letter claimant was advised to achieve the progress of the work by deploying sufficient labour and machinery, failing which department had reserved liberty to terminate the contract as per clause-52.2 (a) of the contract agreement. Finally vide communication dated 14.03.2014, department terminated the contract by invoking clause-52.2(a), (c) & (e) of the agreement in question and claimant was advised to contact the Asstt.Engineer, Gohar Sub Division, HP PWD for finalizing the measurement of the work done. All the communications referred hereinabove in the instant para are available with the copy of agreement as well as reply to the claim filed by the department.

In the aforesaid background, disputes arose between the parties and undersigned was appointed as a Sole Arbitrator by the Hon'ble High Court of Himachal Pradesh, complete details whereof has been given in the beginning of the award. Now in the given facts and circumstances, undersigned being an Arbitrator proceeds ahead to adjudicate upon the claims and counter claims as under:-

Claimant setup the following claims vide statement of claims dated 24.03.2014.

Claim No.1:- Payment of work done for Rs.58.10 lac but not measured.

Claim No.2:- Amount for idle machineries' and labour for Rs.20.70 lacs.

Claim No.3:- Loss of anticipated profit i.e. Rs.22.09 lac.

Claim No.4:- Wrong withholding of performance security in the shape of bank guarantee i.e. Rs.10.78 lac.

Claim No.5:- Payment of interest @ 18% from the same became due till the date of payment.

Claim No.6:- Cost of Arbitration i.e. R.s.1.00 lac.

Findings of the Arbitrator qua the claims stated herein above are as under:-

Claim No.1 By way of claim No.1, claimant has claimed that work amounting to Rs.58.10 lac has been not measured by the *department while making final measurement and as such he is* entitled to same. Claimant also given the detail of un measured work, which is as following:-

Description	Amount
Wearing(700 Cum approximately)	9.10 lac
Tarring & Repair	15.00 lac
Retaining wall	14.00 lac
ROFD	20.00 lac
Total	**58.10 lac**

Before making award qua the claim No.1, it may be re-iterated that during pendency of the arbitration proceedings, joint measurement committee was constituted with the consent of both the parities for re-measurement of the work done by the claimant. In that process joint measurement was carried out by the department in the presence of the claimant. In the finding report, committee pointed out that 614.38 Cumtr quantity of grade-III has been not taken in to consideration while preparing the final bill of

the contractor. Committee further reported that approximate value of unpaid item is Rs.7.06 lac. Respondent department accepted the aforesaid finding of the committee. However, claimant submitted his own measurement vide commutation dated 13.10.2014 alongwith annexure A to H. According, Executive Engineer, HP PWD was advised to make available complete record of measurement at the time of final arguments. On 2011.2014, matter was heard finally by the Arbitrator in the presence of the both the parties and complete record i.e. agreement in question and complete record of measurement (M.B.'s) was also perused. After detailed scrutiny of the measurement books brought by the department, claimant who was present alongwith his counsel Sh. Sunit Goel, Advocate was satisfied with the re-measurement of the work done by the joint inspection committee. But for the further satisfaction of the claimant, Arbitrator, granted another opportunity to the claimant to go through the record of measurement to establish that details of measurements given by him in his communication dated 13.10.2014 have been not taken note by the department while making final bill. Record was perused in the presence of Arbitrator but claimant could not point out any recording in the measurement books to substantiate the details of the measurement submitted by him vide letter dated 13.10.2014. On the other hand Executive Engineer, HP PWD invited the attention of the undersigned to the reply filed by department dated 18.11.2014, wherein it was mentioned that measurements relating to the removal of slips as placed on record by the claimant/ contractor is an after thought and this was never brought to the notice of department during the execution of the work. It was further submitted in the aforesaid communication that it was not assigned job to the contractor and was not to be executed by the contractor as per terms and conditions of the contract agreement. Department also submitted that scrutiny of record nowhere reveals that such item was ever executed by the contractor. The item relating to the widening of existing road (ROFD) stands paid to the contractor as per actual work done on the site. Claimant could not point out anything to dislodge the aforesaid submission of the department. Apart from above, claimant in his written argument has clearly admitted that certain amount under

joint measurements. Claimant even in his written argument has no where demonstrated that qua what work/ item he has not been paid. In view of the detail discussion and reasons stated herein above claimant is held not entitled to amount claimed under claim No.1. However, it is made clear that claimant shall be entitled to amount of Rs.7.06 lac as pointed out by the joint inspection committee in its finding report. Accordingly undersigned holds claimant entitled to Rs.7.06 lac alongwith interest @9% per annum from the date of preparation of final bill till its realization.

Claim No.2, 3 & 4 setup by claimant:-

Minute perusal of the claims 2 to 4 setup by the claimant in his statement of claims clearly shows that amount(s) indicated qua these claims are being claimed by the claimant solely on the ground that work in question could not be executed timely as department did not have requisite clearance under Forest Conservation Act-1988 at the time of awarding the work to the claimant apart from above. Hence issue No. 2, 3 & 4 are being taken up together for adjudication. Claimants in its statement of facts as well as during the final arguments held on 20.11.2014 submitted that no efforts, whatsoever were ever made by the respondent to obtain the necessary clearances under the Forest Conservation Act. Claimant further submitted that he kept on waiting for forest clearance which was never provided by the department and as such work could not be completed within stipulated time. Claimant also mentioned on 14.06.2011 work was stopped by the official by the Forest Official. It is worthwhile to mention at this stage that no document, whatsoever, demonstrating that claimant had ever requested the department to arrange for NOC from Forest Department under Forest Conservation Act- 1980, was either annexed with the statement of claim/ any pleadings or same was produced at the time of final argument. Claimant also failed to point out any document/ notice sent by the Forest Department particularly asking him to stop work in question for want of NOC from Forest Department. Admittedly, claimant in its statement of claims and rejoinder has placed on record two communications i.e. annexure " C-2 &C-3" annexed with statement of claims sent by Forest Department

advising the Department to obtain NOC from Forest Department before commencement of the project/ work. Though, perusal of aforesaid communications clearly shows that these communications were sent to the all the departments after passing of judgment dated 28.08.2009 by the Hon'ble High Court in COPC 56/ 2009. On the other hand respondent department by way of rejoinder placed on record letter dated 28.06.2014 i.e. annexure "R-1" annexed with rebuttal filed by the department to the rejoinder, issued by DFO, Nachan Forest Division at Gohar, Distt. Mandi wherein, it was specifically mentioned that "since Forest Department never objected to maintenance work of the road, therefore, there is no need to issue NOC at this stage". Apart from this DFO concerned in the letter under reference has also accepted that road in question was constructed some wherein 1970's . Sh. Jitender Singh, Executive Engineer, HP PWD, Gohar, Distt. Mandi inviting attention of the Arbitrator to the letter sent by Forest Department also submitted during the arguments that since work in question was only upgradation of already existing road, there was no necessity to obtain NOC from Forest Department before the commencement of work. He also submitted that claimant never raise the issue of forest clearance with the department and for the first time it has been raised in these proceedings. In view of above, Arbitrator is of the view that claimant cannot be allowed to take advantage of the general communications sent by the Forest Department to the PWD for necessary compliance of FCA, 1980. Claimant has miserably failed to place on record any document to suggest that he was ever objected to by the Forest Department while executing the work at hand. To the contrary Executive Engineer appearing on behalf of Department has successfully placed on record communication sent by DFO concerned, wherein it has been submitted that since road in question was constructed almost 40 years back i.e. 1970's, there was no need to obtain forest clearance for executing the work in question. Very description of work in question itself suggest that claimant was required to carryout certain works of upgradation on the already existing road and as such there was no requirement of obtaining NOC from the Forest Department before the of the work at hand. Even if it is presumed that

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of the work and for want of the same claimant was being harassed by the Forest Department, claimant should have brought it to the notice of the Department. But there is a nothing on the record to demonstrate that claimant had ever informed the department with regard to stopping of the work by the Forest Department. To the contrary, there is a communication of Forest Department on record in support of the contention of the department that work was never stopped for want of NOC from Forest Department. Hon'ble Apex Court in court case titled State of Rajasthan Vs Ferro Concrete Constructions Pvt. Ltd. (2009) 12 SCC Page-1 has held that Arbitrator cannot make an award of the amount claimed in the claims statement merely on the basis of claim statement without anything more Hence, undersigned is of the view that claimant cannot be granted any amount qua the claim No.2,3 &4 solely on the basis of non furnishing of NOC by the department. Arbitrator had an occasion to go through the complete records of the case, which clearly suggests that claimant was bound to complete the work on or before 14-04-2008 ,but he could not complete the same till 14-03-2014, when department terminated the contract invoking clause 52.2(a),(c) and (e) of the agreement . Arbitrator has also taken note of the various communications sent by the department while extending the time, wherein claimant was repeatedly advised to complete the work. Arbitrator cannot lose sight of the fact that as many as four extensions of one year each was given to the claimant on his request to ensure the completion of the work in question. Perusal of the repeated communications sent by the department also depicts that claimant was also reminded of penal consequences, which he may suffer for non completion of work within stipulated period. Accordingly, undersigned holds claimant entitled for no amount qua the claim no 2,3&4.

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Claim no 5:- Payment of interest.

By way claim No.5, claimant has claimed interest @18% per annum on all withheld amount from the date same became due till the date of its payment. Since Arbitrator has not held claimant entitled for any amount qua the claims made by him, there is no question of granting any interest on withheld amounts. However, Arbitrator holds claimant entitled to the interest on amount of Rs.7.06 lac as indicated by joint inspection committee @9% from the date it became due till the date of its payment.

Claim No.6:- i.e. Cost of arbitration.

Claimant by way of claim No.6 has claimed an amount of Rs.1.00 lac on account of cost of arbitration proceedings. Though claimant has failed to substantiate the claims setup by him in his statement of claims as he has failed to point out anything material against the department to suggest that work could not be completed well within stipulated time for want of completion of certain formalities in terms of contract agreement by the department but report of joint inspection committee has established that the actual work done by claimant was not recorded in the measurement book by the department at the time of making final bill and as such claimant was forced to invoke the arbitration clause. Non recording of actual work done by claimant in the measurement books compelled the claimant to claim the same by invoking arbitration clause. Accordingly the Arbitrator is of the view that had the department recorded actual work done by the claimant in the measurement books, claimant would have not resorted to arbitration. Hence undersigned hold the claimant entitled for Rs.1.00 lac on account of cost of the arbitration proceeding.

Counter claims setup by the department

Respondent department by way of its reply to the statement of facts also filed following counter claims:-

Counter Claim No.1:- Recovery of liquidated damages to the tune of Rs.3667846/-

Counter Claim No.2:- Recovery of Mobilization and equipment advance for Rs.2209028/-.

Counter claim No.3:- Additional financial implication of Rs.73.63 lac due to price escalation and time over run.

Findings of the Arbitrator qua the Counter Claims stated herein above are as under:-

Counter Claim No.1:-

Respondent department by way of counter claim No.1 has claimed an amount of Rs.3667846/- on account of recovery of liquated damaged by invoking clause-44.1 of the contract agreement. Clause-44.1 of the contract agreement is reproduced herein below:-

"The contractor shall pay liquidated damages to the Employer at the rate per week or part thereof stated in the Contract Date for the period that the Completion Date is later than the Intended Completion Date. Liquidated damages at the same rate shall be withheld if the Contractor fails to achieve the milestones prescribed in the Contract Date. However, in case the Contractor achieves the next milestone the amount of the liquidated damage already withheld shall be resorted to the Contractor by adjustment in the next payment certificate. The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Employer may deduct liquidated damages from payments due to the Contractor from other works and security with the Government. Payment of liquidated damages shall not effect the Contractor's other liabilities".

Respondent department while invoking aforesaid clause i.e. 44.1 of contract agreement has submitted that contractor/ claimant failed to achieve the milestone as prescribed in contract data and despite extension of time of completion date, claimant failed to achieve the milestone. On the other hand claimant has refuted the aforesaid counter claim of the department solely on the ground that since recovery of

being made alongwith interest as per terms of agreement, respondent cannot claim interest over interest on the said amount. But claimant has failed to place on record any material on record showing that respondent department could not invoke clause-44.1 of agreement in given circumstances. Even during arguments, Counsel representing the claimant again reiterated that since amount given as machinery as well as mobilization advance is being recovered alongwith the interest, respondent department cannot claim interest over interest on the said amount. But calculation of the amount claimed under this head has neither disputed by the claimant in his reply to statement of counter claim nor same was challenged during the arguments. Undersigned is of the view that claimant by mixing the issue of recovery of machinery as well as mobilization advance with the recovery of liquidated damages has tried to complicate the issue in question. Respondent department is well within its right to recover liquidated damages in terms of clause-44.1 of contract agreement, which specifically provides that in event of non achieving of milestone as prescribed in contractor data, department can impose liquidated damages. As for as recovery of advance rendered on account of machinery as well as mobilization is all together different from the liquidated damages specified in clause-44-1 of the contract agreement. Claimant by way of written arguments submitted in terms of judgment passed by Hon'ble Supreme Court in AIR-1989 Supreme Court-952 titled Vishwa Nath Sood V/s Union of India & others, Arbitrator has no jurisdiction to adjudicate the dispute pertaining to liquidated damages and rescission of the contract. After careful reading of the judgment referred herein above, Arbitrator is of the view that same is not applicable in the present case. Judgment cited by the claimant cannot be attracted to the facts and circumstances in the present case. Judgment relied upon by the claimant nowhere suggest that Arbitrator has not jurisdiction to adjudicate the disputes pertaining to imposition of liquidated damages and recession of contract. Hon'ble Apex Court in the aforesaid judgment has only held that amount of compensation chargeable under

Clause-2 (of agreement in question before Hon'ble Court) is a matter which has to be adjudicated in accordance with that clause and which cannot be referred to arbitration under Clause-25 (of agreement in question before Hon'ble Court). Perusal of the judgment passed by the Hon'ble Apex Court shows that facts of the case before Hon'ble Apex Court were quite different from the instant case. In the case before Hon'ble Apex Court there was specific penalty Clause i.e. Clause-2 of the agreement, which could be only adjudicated by the Superintending Engineer but same was also referred to arbitration under Clause-25. Hon'ble Apex Court came to the conclusion that once there was a specific clause i.e. clause-2, providing for adjudicating the penalty by the Superintending Engineer, dispute could not be referred to Arbitrator under Clause-25. Hence contention of the claimant that Arbitrator has no jurisdiction to adjudicate the instant claim cannot be accepted. Department has claimed liquidated damages to the tune of Rs.36,67,846/- in terms of Clause-44.1 of contract agreement, calculation whereof has been not challenged by the claimant and as such same deserve to accepted. Moreover respondent department while granting extension of time to claimant has repeatedly reminded the claimant of penalty clause as well as liquidated damages, which department may impose in terms of agreement and in this regard department had reserved liberty to itself (please see annexures annexed with reply/ counter claims as well as agreement entered into between the parities Hence, undersigned holds the respondent department entitled to amount of Rs.36,67,846/- on account of liquidated damages.

Counter Claim No.2:- Recovery of Mobilization and equipment advance for Rs.2209028/-.

Respondent claimant by way of counter claim No.2 has claimed an amount of Rs.22,09,028/- on account of recovery of mobilization and equipment advances. As per details given by the respondent department an amount of Rs.18,33,900/- was advanced claimant on account of mobilization advance and out of which an

But on this account claimant is still to pay an amount of Rs.7,36,346/- from the claimant. Respondent department has also detailed that an amount of Rs.36,67,800/- was advanced to claimant on account of equipment advance but department has only recovered Rs.2195118/- on this account from the bills of the claimant, meaning thereby that an amount ofRs.14,72,682/- is still recoverable on this account from the claimant. In total an amount of Rs.22,09,028/- is recoverable from claimant as per detail given by the respondent department in the statement of counter claims. Claimant in his reply to the counter claim as well as at the time of final arguments has not disputed the amount in question but has only reiterated that delay has been caused due to fault of respondent department as it failed to hand over the proper site of the execution of the work. Claimant submitted the work was stalled on account of the stoppage of the work by the respondent in view of annexure "C-2" annexed with statement of claims. Arbitrator while deciding the claims of the claimant has already held that there is nothing to suggest on the record that work was ever stopped by the Forest Department for want of NOC. Accordingly, Arbitrator is of the view that respondent department cannot be faulted for delay caused by the claimant and respondent department has rightly claimed an amount of Rs.22,09,028/- on account of recovery of mobilization and equipment advances, which has been actually taken by the claimant from the department for execution of the work in question. Hence, undersigned holds respondent department entitled to amount of Rs.22,09,028/- on account of recovery of mobilization and equipment advances.

Counter claim No.3:- Additional financial implication of Rs.73.63 lac due to price escalation and time over run.

Respondent department by way of counter claim No.3 has claimed an amount of Rs.73.63 lacs on account of price escalation and time over run. Department has submitted that work in question was awarded to contractor for Rs.366.78 lac and contractor

executed by another contractor by re-inviting the tender. Department further submitted that due to price escalation and time over run approximate awarded amount for getting the balance work done would be Rs. 220.90 lac. Had the claimant contractor completed the work within stipulated time, additional financial burden of Rs.73.63 lac could have been avoided. Claimant by way of reply to the counter claim submitted that they are still ready and willing to execute the balance work provided department hand over clear site. Claimant further submitted that since no clear details of the amount claimed has been given, no amount can be claimed by the respondent and such same deserves to be dismissed.

Undersigned, after careful perusal of the material on record and after hearing the parties is of the view that department has not placed on record any calculation to substantiate its instant claim. Respondent department by way of counter claim No.3 has claimed an amount of Rs.73.63 lac on account of price escalation and time over run but has not furnished any details to exhibit that department has suffered loss due to inordinate delay caused by the claimant by not completing the work within stipulated time. Respondent department has nearly stated that balance work will be got executed by another contractor and approximate award amount will be Rs.220.90 lac but no proof/ calculation has been placed on record to substantiate its claim. Admittedly, claimant has failed to complete the work in question within stipulated time and plea of claimant that site in question was not handed over in time cannot be accepted in view of the material available on record. But in the totality of facts and circumstances of the case, it appears that respondent department has been also negligent in getting the work done within reasonable time. Record shows that department has granted as many as four extension of one year each to the claimant to complete the work knowing well that claimant contractor has been not able to do substantial work inspite of enlargement of time. When claimant had failed to complete the work in question after one extension of time and there was no other valid reason for claimant to stop the work, department should have not granted further extension of time to the claimant. Now after six years of awarding of work, respondent department is not justified in claiming an amount of Rs.73.63 lac on account of price escalation and time over run. Moreover, department instead of giving complete details justifying the counter claim of Rs.73.63 lac has chosen to give

may invite, hence same cannot be accepted. Hon'ble Apex Court in court case titled State of Rajasthan Vs Ferro Concrete Constructions Pvt. Ltd. (2009) 12 SCC Page-1 has held that Arbitrator cannot make in award of the amount claimed in the claims statement merely on the basis of claim statement without anything more. Hon'ble Apex Court has further held that in case Arbitrator awards an amount qua any claim without there being any evidence solely on the basis of statement of claim, it has to be held that award on that account would be invalid and same would be termed wholly illegal and beyond the jurisdiction of the Arbitrator (See Para-55). Hence, undersigned holds respondent department entitled for no amount qua this counter claim.

A signed copy of the award be given to both the parties for information and compliance.

Shimla
20.12.2014

Sandeep Sharma,
Sr. Advocate,
Sole Arbitrator.

D.A's Copy

Supreme Court of India
State Of Rajasthan & Anr vs M/S. Ferro Concrete Construction ... on 22 April, 2009
Author: R.V.Raveendran
Bench: R.V. Raveendran, Lokeshwar Singh Panta

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2764 OF 2009
(Arising out of SLP [C] Nos.10818 of 2007)

State of Rajasthan & Anr. ... Appellants

Vs.

M/s. Ferro Concrete Construction Pvt. Ltd. ... Respondents

WITH

CA No. 2767/2009 [@ SLP (C) No.22565/2007]

JUDGMENT

R.V.RAVEENDRAN, J.

Leave granted. Heard learned counsel.

2. The appellants (also referred to as `employer') invited tenders for the manufacture, laying, testing and commissioning of water pipeline of a length of 37.41 km. under a water supply scheme in Ajmer District. Tenders were received from various tenderers including respondent (hereinafter referred to as the `contractor'). As different tenderers had stipulated different terms and conditions, the tenderers were invited for discussions, and common terms of reference (for short `CTR') were formulated on 22.2.1988 and the original tender conditions stood modified to the extent of the alterations in the CTR.

3. Thereafter the offer of the respondent was accepted and a work order dated 23.8.1988 was issued to him stipulating the period for completing the contract as two years from that date. There was an amendment to the work order on 8.11.1988. The employer and the contractor entered into an agreement dated 11.1.1989 enumerating and stipulating the documents which will form part of the

contract and the modifications agreed in regard to certain terms. The value of the work as per the work order was Rs.9,91,94,602.50. Ten percent of the value of work (Rs.99.19 lakhs) which was agreed to be released as mobilization advance, was released to the contractor between 25.1.1989 and 5.5.1989. The contractor created an equitable mortgage over its plant by depositing its title deeds thereto as security for the mobilization advance. By letter dated 15.12.1990, the contractor confirmed that the original title deeds will remain in deposit with the employer till the entire amount of advance was repaid in full with interest.

4. The contract (clause 23 of General Conditions of Contract) provided for settlement of disputes by arbitration. By letter dated 18.6.1990 respondent invoked the provision for arbitration and sought appointment of an arbitrator to decide its claims aggregating to Rs.2,01,66,547, arising on account of certain alleged omissions and commissions of the employer. Another dispute was raised in respect of the rate payable for work done subsequent to the due date of completion (22.8.1990). On 22.8.1990 the contractor stopped the work. By that date it had manufactured 15.26 km. of pipes and had laid 11.6 km. out of them and tested only 1.4 km. of pipeline as against the total contracted quantity of 37.41 km. On 13.9.1990 the employer notified the contractor that if he did not resume the work, the balance of the work would be got executed through an alternative agency in terms of the contract, by treating the contract as having been abandoned on 22.8.1990, and recover the excess cost from the contractor.

5. The respondent-contractor sent a reply dated 3.11.1990 stating its efforts to complete the work were rendered futile on account of the delays and breaches on the part of the employer; and it was necessary to enter into a fresh agreement as the tender was not accepted in the manner in which it ought to have been accepted. The contractor did not resume the work. The contractor's stand was that in the absence of an extension of time for completion by mutual consent before the stipulated date for completion, it was not liable to continue the work on the tendered rates. The employer on 30.3.1991 made a final demand calling upon the contractor to state whether it was ready to re-start and complete the remaining work and if so to submit a revised time schedule for such completion. As the contractor did not resume the work, the employer initiated steps to get the balance work executed through an alternative agency. In the meanwhile the contractor filed a suit against the appellant in the District Court, Ajmer and obtained a temporary injunction restraining the employer from imposing liquidated damages.

6. The contractor made an application to the District Court, Ajmer, under section 20 read with section 8 of the Arbitration Act, 1940 (Act for short) for filing the arbitration agreement into court and seeking appointment of an arbitrator. The District Court, Ajmer by order dated 27.4.1991 held that it had jurisdiction to appoint an arbitrator but deferred the actual appointment to a future date. The contractor revised its claim to Rs.5,51,90,306/- in the notice of appointment of arbitrator. The employer challenged the order of the District Judge and the High Court allowed the appeal on 9.8.1991 and set aside the order of the District Judge. The contractor in turn approached this Court. On 12.11.1991, this Court recorded the consent of parties for appointment of Mr. B L Mathur as sole arbitrator and directed the employer (Chief Engineer, Public Health Engineering Department, State of Rajasthan) to appoint him as the arbitrator. On being appointed, the arbitrator entered upon the reference and the contractor filed a claim statement before the arbitrator on 13.1.1992 making 43

claims aggregating to Rs.6,21,29,626/-.

7. The employer filed its reply to the claim statement, and also made five counter-claims aggregating for Rs.863,46,505/- before the arbitrator. In the meanwhile, the employer having concluded the arrangements to get the work completed through an alternative agency, on the contractor's failure to resume the work, awarded the work to M/s. Indian Hume Pipes Co. Ltd. on 10.8.1992. On the basis of the contract value in regard to the balance work, the employer revised its counter claim No. 2 relating to extra cost to Rs.6,66,62,000/-and consequently the total of the counter claims stood increased to Rs.11,55,98,388/-.

8. After considering the claims and counter claims, the learned arbitrator made an award dated 21.9.1994. He rejected claim nos. 4, 7,8,10, 14 21,22,23,26,36,36A, 37,38,39,40,41, & 41A,42, & 42A and 43 of the contractor. He awarded the following amounts to the contractor in regard to the remaining claims:

S. No.	Claim No.	Description of claim	Amount claimed Rs.	Amount awarded Rs.
1.	1	Loss of profitability due to late release of mobilization advance	83,49,913	33,06,500
2.	2 & 16	Refund of excess sales tax deducted	2,94,142	2,94,142
3.	3 & 15	5% amount withheld for testing of pipeline	14,70,956	14,70,956
4.	5 & 18	Excess recovery of security deposit	13,28,457	13,28,457
5.	6 & 17	Price escalation	58,83,854	43,47,520
6.	9 & 19	Refusal of employer for re-designing pressure pipes from higher into lower.	10,11,354	6,95,910
7.	11 & 20	Slow progress due to reduction of width of trench	21,32,496	21,07,195
8.	24	Refund of deduction for want of BG renewal	4,31,926	4,31,926
9.	27 & 28	Gap pipes fitted	2,60,200	67,098
10.	29	Payment for 8 kg pipes but paid for 6 kg pipes	1,17,150	1,12,294
11.	30	Refunds for paint of specials	9,759	9,759
12.	31	Deduction from running bill for pipes	22,385	22,385
13.	32	Refund for deduction for insufficient refilling	46,569	46,569
14.	33	Less measurement of pipe	1,15,738	1,15,738
15.	35 with 25	Difference in final bill Less payment re: sand bedding	1,47,00,000 7,31,676	23,74,458

	34	Payment for excavation		2,50,740	
16.	37A	Idle charges for machinery, staff etc.	12,072 day 13.1.92	per 12,072 per day from from date of award, if the factory was not released from mortgage security within 30 days.	
17.	12 & 13	Interest (pre-reference, pendente lite and future)	18% annum	per 18% per annum	

The arbitrator rejected counter claims 1, 2, 4 and 5 of the employer. In regard to counter-claim No. 3 (Rs.79,87,846/- towards refund of mobilization advance with interest), the arbitrator awarded a sum of Rs.59,42,275 with interest at 18% per annum from 18.9.1990 up to the date or decree or payment whichever was earlier.

9. The contractor made an application for making the award, a rule of the court. The employer challenged the award by filing objections under section 30 read with section 33 of the Act. By order dated 17.2.2003, the District Judge, Ajmer allowed the application of the contractor and made the award a rule of the court subject to a modification in regard to the award made on claim No.37A. In place of the award made by the Arbitrator (direction to employer to pay Rs.12072/- per day from the date of award), the District Judge directed that the employer shall return the original title deeds to the contractor and pay the amounts awarded to the contractor after deducting the amount awarded by way of counter-claim (that is Rs.59,42,275/- towards refund of mobilization advance due with 18% interest) within 30 days from the date of decree, failing which, the employer shall pay Rs.12072 per day from the date of decree.

10. The employer filed an appeal (Civil Misc. Appeal No.872/2003) against the said judgment and decree contending that the award ought to have been set aside. The contractor also filed an appeal (Civil Misc. Appeal No. 910/2003) aggrieved by the modification by the Learned District Judge directing compensation of Rs.12,072/- per day only from the date of decree (instead of the date of award). The High court dismissed the appeal filed by the employer by judgment dated 5.2.2007. The High Court allowed the appeal filed by the contractor by judgment dated 30.5.2007 and restored the direction of the arbitrator that the payment of compensation at Rs.12,072/- per day should be from the date of the award itself (21.9.1994). The High Court also granted interest at 18% per annum from the date of the award. Thus the High Court upheld the award.

11. Feeling aggrieved the employer has filed these two appeals by special leave. The first of the appeals (arising out of SLP [C] No.10818/2007) is against the dismissal of its appeal on 5.2.2007. The second of the appeals (arising out of SLP(C)No.22565/2007) is against the judgment dated 30.5.2007 allowing the contractor's appeal. One of the contentions urged by the appellants before the court below was that the Arbitrator did not have jurisdiction to enter upon the reference and make an award, as the appointing authority under the arbitration clause had merely appointed the arbitrator, but had not referred any dispute to him for arbitration. The said contention was rejected

by both courts on the ground that when the authority competent to appoint the arbitrator appointed the arbitrator, in pursuance of the agreement reached before this Court to have the pending disputes of both parties settled by arbitration, the employer could not be permitted to raise a technical plea that the arbitrator had no jurisdiction to proceed with the arbitration, in the absence of a further specific reference by the employer. Realising the unsoundness of the said contention, the appellants did not press it before us.

12. On the contentions urged, the question that arises for consideration is whether there is any legal misconduct or error apparent on the face of the award, in regard to the award of the Arbitrator in respect of (i) claims 1 and 37A; (ii) claims 12 & 13; (iii) claims 2 & 16, 3 & 15, 5 & 18, 6 & 17, 9 & 19, 11 & 20, 24, 27 & 28, 29, 30, 31, 32, 33, 35 (with claim nos. 25, 34); and

(iv) counter claims 1, 2, 4 and 5.

13. Section 30 of the Act inter alia provides that an award can be set aside on the ground that an arbitrator had misconducted himself or the proceedings, or that the award had been improperly procured or is otherwise invalid. An error apparent on the face of the award, is a ground for setting aside the award under section 30 or for remitting the award to the Arbitrator under section 16(1)(c) of the Act. In Champsey Bhara & Co. vs. Jivraj Balloo Spinning & Weaving Co. Ltd. [AIR 1923 PC 66] the Privy Council explained the term `an error of law on the face of the award' thus :

> "An error of law on the face of the award means that you can find in the award or a document actually incorporated thereto as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

It was well settled that under the Arbitration Act, 1940, an award was not open to challenge on the ground that the arbitrator has reached a wrong conclusion or failed to appreciate facts, as under the law, the arbitrator is made the final arbiter of the dispute between the parties. While considering the challenge to an award, the court will not sit in appeal over the award nor re-appreciate the evidence for the purpose of finding whether on the facts and circumstances, the award in question could have been made. When there is no allegation of moral misconduct against the arbitrator with reference to the award, and where the arbitration has not been superseded, there were only two grounds of attack. First was that there was legal misconduct on the part of the arbitrator in making the award. Second was that there was an error apparent on the face of the award. This Court explained the principles relating to interference with awards under the 1940 Act in State of Rajasthan v. Puri Construction Co. Ltd. [1994 (6) SCC 485] thus :

> "Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an

award in the Arbitration Act. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of mis-appreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the courts were impelled to have fresh look on the ambit of challenge to an award by the arbitrator so that the award does not get undesirable immunity. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous."

Keeping the said principles in mind let us examine the various claims. Re : Claim 1 :

14. The contractor claimed that the mobilization advance had to be released to it immediately on entrustment of work, to enable it to set up the factory for manufacturing the pipes. It was contended that prompt release of mobilization advance was crucial and fundamental to the contract as manufacture of pipes depended upon setting up a factory for that purpose. Even assuming that the mobilization advance could be released in three instalments, as per modified terms and conditions, the contractor contended that there was inordinate delay on the part of the employer in releasing the instalments, that too, in five instalments. It was further contended that if the mobilization

advance had been released immediately on award of the work, it would have set up a factory and commenced production within three months; that in view of the delay, it lost production for a period of eight months that is nearly one third of the contract period, and that as a consequence they were not able to execute the work of the value of Rs.5,56,66,086/- and the loss of profits and overheads on the said amount at a standard 15% was Rs.83,49,913/- and it was entitled to that amount as compensation for the breach by the employer. The calculation of the said loss of profit and overheads in claim no.(1) was as follows :

Amount of Contract (with ZVV)	Rs.9,91,94,602.00
Payment already received from the Department	Rs. 2,88,28,516.00
Balance	Rs. 7,03,66,086.00
Amount due to contractor against work Done	Rs.1,47,00,000.00
Balance	Rs. 5,56,66,086.00
Loss of Profitability & overheads @ 15%	Rs. 83,49,913.00
(0.15 x 5,56,66,086)	

15. The employer resisted the said claim contending that having regard to the relevant conditions in the work order and the contract agreement, the mobilization advance had to be released in three instalments against Bank Guarantees; that the second and third instalments had to be released only on production of the certificate of a chartered accountant on the utilization of the previously paid amount and on verification of the department of the progress; and that the mobilization advance was released in instalments in terms of contract and there was no delay no breach on their part.

16. We may refer to the relevant provisions of the contract in this behalf. Clause 8 of the Special Conditions relating to establishment of factory at site provided thus :

> "Establishment of factory at site :
>
> The contractor, if he so desires, may establish the pipe factory at site to avoid transportation of pipes. All material and equipment and land required for the purpose shall be arranged by the contractor at his own cost. The department may assist him in acquisition of land. However, the work should not be delayed on this account. The firm should commence and continue to supply the pipes etc. from their existing set up till the factory at site is established. As already stated, the supply of pipes etc. should commence within 30 days, from the award of contract."

The above clause was superseded by clause 3 of the Common Terms of Reference which is extracted below :

> "Mobilisation advance (for PSC Pipes only) 10% of the contract value shall be given against Bank Guarantee as mobilization advance at a simple interest rate of 18%. Recovery of mobilization advance shall be effected from 1st Running Bill on pro-rata basis in a way that complete mobilization advance is recovered by the time 75% work is complete. Interest shall also be recovered alongwith recovery of capital mobilization advance. The assets built by the contractor out of mobilization advance so made will be mortgaged to the department. In case work is left in-complete, liquidated damages will be imposed as per terms of the document and the assets built by the contractor for manufacturing pipe will become the property of the department. Such assets can be used by the department for the purpose of completing the remaining work."

In the subsequent work order issued on 23.8.1988, clause 5.1 relates to mobilization advance. While para (a) of clause 5.1 was a reproduction of clause (3) of the Common Terms of Reference, the following was added as para (b) in clause 5.1 of the work order :

> "The mobilization advance is being given for establishment of factory at site. In case the factory is not established in 3 months period the mobilization advance shall be recovered by way of the Bank Guarantee given in lieu of the mobilization advance."

By letter of amendment dated 8.11.1988 issued by the employer, several clauses of the work order including clause 5.1(b) were amended/replaced. Para 5.1(b) as replaced is extracted below :

> "The mobilization advance is being given for establishment of factory at site. The mobilization advance shall be paid in three instalments of which the second and third instalment shall be paid on production of the certificate of the Chartered Accountant about utilization of the previously paid amount and on verification by the department of the progress towards setting up of the factory."

This was followed by an agreement executed by both parties on 11.1.1989 and clause (7) thereof extracted below dealt with mobilization advance :

> "Mobilisation advance:
>
> 10% of the contract value shall be given as mobilization advance @ 18% simple interest subject to production of Bank Guarantee from any of the Nationalised Bank equal to the amount of such advance. The recovery of such advance shall be effected from 1st running bill on prorate basis in such a way that recovery of this advance is made by the time when 75% of the work is completed. Amount of interest is recoverable along with the recovery of principal amount.

(b) The assets built by the contractor out of the mobilization advance shall be mortgaged with the Government. Such assets will not be mortgaged with any other agency for any purposes.

(c) In case contractor fails to complete the work in specified time, the contractor shall pay the compensation as liquidated damages as per the terms and conditions of the contract and the assets built by the contractor for manufacturing of pipes will be the property of the government and the department will have right to use it as government property for completion of remaining work. xxxxx

17. The arbitrator held that clause 8 of the special conditions of contract stood superseded by clause 3 of the Common Terms of Reference which required the mobilization advance to be released in one instalment and not in three instalments. He held that clause 5(1)(b) inserted by the amendment to the work order dated 8.11.1988 was an unilateral incorporation by the employer and was not binding on the contractor. He further held that the employer ought to have released the mobilization advance along with the work order dated 23.8.1988, and the employer had abnormally delayed the release of mobilization advance by a total period of 8.5 months by releasing it in instalments. He held that there was a clear delay of about 8 months and during that period the contractor could have executed one third of the work of the value of Rs.330,64,867.50, and as the contractor was prevented from executing the said work on account of the delay, the contractor was entitled to 10% of the said amount, that is Rs.33,06,500/- as loss of profit. The said sum was therefore awarded to the contractor under claim (1).

18. There is no doubt that clause 8 of the special conditions of contract has to be read with clause 3 of the CTR. It is true that Clause 3 of CTR did not contemplate the mobilization advance being released in three instalments. But the CTR was followed by work order dated 23.8.1988 which was followed by amendment dated 8.11.1988 which specifically stated that the mobilization advance shall be paid in three instalments of which the second and third instalments shall be paid on production of a certificate of the Chartered Accountant about utilization of the previously paid amounts and on verification by the department towards progress of the factory. The arbitrator has held that the said clause was unilaterally introduced and therefore is not binding by the contractor. On the face of it this is erroneous. After the work order, the parties have executed a bilateral agreement dated 11.1.1989 which specifically states at para 2 and para 6 that the work order dated 23.8.1988 and subsequent amendment to the work order dated 8.11.1988 shall be deemed to be a part of the contract and will bind both the parties. The agreement dated 11.1.1989 itself contains a detailed clause (clause 7) relating to mobilization advance in addition to what was earlier agreed in regard to mobilization advance. Therefore obviously the clauses relating to mobilization advance in the amendment to work order dated 8.11.1988 and the agreement dated 11.1.1989 had to be read in addition to the earlier provision relating to mobilization advance contained in the CTR. Clause 5(1)(b) of the work order, as amended, specifically provided that the contractor had to provide a Bank guarantee for the mobilization advance. Sub-clause (b) of clause 7 of the agreement dated 11.1.1989 provided that assets built by the contractor by utilizing the mobilization advance should be mortgaged to the employer. Sub-clause (c) of clause 7 provided that if the contractor fails to complete the work, the assets built by the contractor would become the property of the employer

and the department could use it as government property for completion of the remaining work. Sub-clause (d) of clause 7 provided that if the contractor failed to establish the factory within three months of payment the mobilization advance, the said advance would be recovered by enforcing the bank guarantee given in lieu of the mobilization advance. Thus it is evident that the mobilization advance had to be released only against a bank guarantee to be furnished by the contractor.

19. If according to the contractor, the mobilization advance had to be released in a single instalment and if the contractor wanted the entire mobilization money to be released in one lump sum instead of in three instalments, it ought to have given a single bank guarantee for the entire sum. But strangely the contractor did not give such a bank guarantee. It gâve four bank guarantees for Rs.40 lacs on 21.5.1989, Rs.25 lacs on 1.2.1989, Rs.15 lacs on 17.2.1989 and Rs.25 lacs on 23.3.1989. It is thus evident that the contractor had also proceeded on the basis that the condition in clause 5(1)(b) of the work order amendment letter dated 8.11.1988 governed the payment of mobilization advance. We find that the mobilization amount corresponding to first bank guarantee was released within two days; mobilization amount corresponding to second guarantee was released in seven days; and mobilization amount corresponding to third guarantee, was partly released in 12 days and the balance in two months. The amount corresponding to the second and third bank guarantees had to be released only after the contractor produced a certificate in regard to the utilization of the earlier advance. It is seen that in regard to the first mobilization advance the certificate was produced on 7.2.1989 and on the same day the second instalment was released. Insofar as third instalment, the certificate was only received on 4.4.1989. Therefore it cannot be said that there was delay or breach on the part of the employer in releasing the mobilization advance. If at all there was any delay, the delay was on the part of the contractor. The fact that release of mobilization advance was governed by clause 5(1)(b) of the work order (as amended on 8.11.1988) and clause 7 of the agreement dated 11.1.1989 was totally overlooked by the arbitrator by proceeding on the basis that mobilization advance was governed by the CTR alone. The Arbitrator committed a legal misconduct by ignoring the terms of contract, that is the agreement dated 11.1.1989,which specifically provided that in addition to the CTR, the work order and amendment to work order dated 8.11.1988 would also form part of the contract. The Arbitrator also overlooked the fact that additional provision regarding mobilization advance was introduced in the agreement itself. Therefore the mobilisation advance was governed by the terms in the CTR, the work order, the amendment to the work order dated 8.11.1988 and agreement dated 11.1.1989 read together. If so read, it was clear that there was no breach on the part of the employer and the contractor was itself responsible for the delay. If so, the question of compensating the contractor on that score does not arise.

20. There is yet another aspect. The contractor claimed compensation on the basis that he could not do work of the value of Rs.5,56,66,086/- in view of the delay and he was entitled to 15% thereof namely Rs.83,49,913/- as compensation. But the arbitrator made an award in respect of the claim on the ground that there was delay in releasing the mobilization advance and during that period of delay, one third of the contract work could have been done and the value of the work that could have been done was Rs.3,30,64,867, and 10% thereof was the loss of profit. Firstly, there was no such plea. Secondly, we have already held that the delay relating to mobilisation advance, was not on the part of the employer. Thirdly, even if there was delay, it was nobody's case that no work was done or that the contractor had suffered loss for non-execution of the work during the contract period

Therefore we are of the view that the award of compensation of Rs.33,03,500/- towards claim no.(1) is liable to be set aside.

Re : Claim 37A :

21. Claim No.37A was linked to mobilization advance. The contractor claimed that it had mortgaged its pipe manufacturing unit in favour of the employer by deposit of title deeds, as security for repayment of the mobilization advance; that the machinery installed in the said factory had not been released by the employer in its favour and as a consequence, it could not be shifted to another place to enable it to start the manufacturing process elsewhere; and that on account of the failure on the part of the employer to release the plant, it had to keep the machinery idle and the employer was therefore liable to reimburse to the contractor the loss of production from 13.1.1992 at the rate of Rs.12,072/- per day. The contractor contended that if it had been permitted to shift its plant and machinery, it would have produced 15 pipes per day valued at Rs.1,20,000/-, that out of which the overhead and profit element was 15% (that is Rs.18,000/- per day); that as there were 306 working days in a year, the loss of profits/overheads would be 18,000 x 306/365 = Rs.15,090/- per day; and that if 20% thereof (Rs.3,018/-) was deducted therefrom towards labour component, the loss of profit per day on account of non-availability of plant and machinery was Rs.12,072 per day. The employer resisted the claim by contending that there was no obligation to release the plant and its title deeds until the mobilization advance was repaid with interest; that the contractor had not repaid the mobilization advance and interest thereon in spite of the award; and therefore the question of compensating any `daily loss' on that account did not arise. The employer also contested the correctness of the assumptions made for calculating the loss.

22. The contractor deposited the title deeds relating to the plant by way of mortgage of deposit of title deeds, in terms of the contract and specifically agreed that the original deeds will remain in deposit with the employer till the entire mobilization advance was repaid with interest. It is also not in dispute that though a mortgage security was created on the plant, it continued to be in the possession, enjoyment and control of the contractor, as the employer did not take over physical possession of the plant at any point of time.

23. The arbitrator considered Claim 37A with three other claims - (36, 36A and 37). The particulars of the said claims are:

Claim 36 Compensation for idling machinery, labour, staff due to delay and wrong decisions (for the period up to 12.1.1992)	Rs.48.21 lacs
Claim 36 A Compensation for idling machinery, staff & Labour etc. from 13.1.1992	Rs.6370 per day
Claim 37 Compensation for loss of production in the	

Factory (for the period upto 12.1.1992) Rs.61.48 lacs

Claim 37A
Compensation for loss of production in the

Factory from 13.1.1992 Rs.12,072 per day

The arbitrator held that none of the four claims was maintainable as the factory built out of mobilization advance had been mortgaged in favour of the employer. As a consequence he did not award any amount in respect of the four claims. But strangely he directed payment of Rs.12,072 per day from the date of award not because he held that there was any loss of production as a consequence of any breach by the employer, but on the following reasoning:

> "After perusal of the arguments of the parties and the evidence on record, I come to the finding that it is a case of real hardship to the claimants for having been denied the use of the factory and machinery elsewhere in their business venture, but because of legalities involved, such as mortgage, the claimants cannot be given the benefit of any award. Had the assets of factory built out of mobilization advance not being mortgaged in favour of the respondent I would have considered making an award in favour of the claimants. In view of the fact that I have allowed counter claim No.3 of the respondent for balance amount of mobilization advance in full along with interest, there is no reason why the assets built out of mobilization advance should continue to remain mortgaged with the respondents. I therefore direct the respondent to release the documents relating to mortgage as mentioned above within a period of 30 days from the date of this award failing which the claimants shall be entitled to an award of Rs.12,072 per day from the date of this award till the date of release of mortgage. No award in favour of the claimants for the period I entered upon, reference to the date of the publication of the award."
>
> [emphasis supplied]

24. Thus we find that the award under claims 37A was not made on account of any finding of breach on the part of the employer. It was made because the Arbitrator had made an award against the contractor in favour of the employer for Rs.59,42,275 with interest. The Arbitrator was of the view that if that sum was adjusted against the amounts due by the employer, there was no need for the mortgage of the plant to continue and therefore the employer should release the documents of title deposited by way of equitable mortgage, within 30 days from the date of award; and that if the employer failed to do so, the employer should pay to the contractor Rs.12,072 per day from the date of the award till the date of release of the mortgage. Therefore, the said award under claim 37A was made, not on account of any breach committed by the employer, but in respect a breach if made in future after the date of the award. There

was no such claim and the award was therefore beyond the reference. Further, the reasoning is very strange and is a classic case of an error apparent on the face of the award and a legal misconduct. The arbitrator rejected the claim No.37A for payment of Rs.12,072/- as compensation for loss of production from 13.1.1992 (which was the subject matter of claim) on the ground that the plant had been mortgaged in favour of the employer and therefore there was no justification for the contractor to claim that it should be permitted to remove and take away the plant when the mortgage subsisted. Having rejected the claim, the Arbitrator evolved a strange reasoning that though there was a subsisting valid mortgage in respect of the mobilization advance with interest in favour of the employer, because he had made an award in favour of the employer for Rs.59,42,275 plus interest, the mortgage came to an end and the employer became liable to return the documents and if it failed to return the documents, the contractor was entitled to damages of Rs.12,072/- per day from the date of award.

25. The arbitrator noticed the fact that the plant and machinery was mortgaged by deposit of title deeds in favour of the employer and that the contract was that "the original documents will remain in deposit with the employer till the amount of advance is repaid with full interest." The arbitrator in fact makes an award for return of Rs.59,42,276 in favour of the employer with interest at 18% per annum from 1.9.1990 to 17.9.1990 and interest at 18% per annum on Rs.59,42,275/- from 18.9.1990 till date of decree or payment, whichever was earlier. Therefore evidently until the amount of Rs.59,42,275/- with interest was paid by the contractor to the employer, the mortgage would continue. If the mortgage continued, there was no obligation on the part of the employer to return the documents; and if there was no obligation on the part of the employer to return the documents, the contractor could not complain that the documents were wrongly held by the employer nor could it claim loss of production as a result of employer wrongly withholding the documents.

26. It is of some interest to note that as per the award of the arbitrator, made under claim 37A, on a claim that was never made, the amount that would become due at Rs.12,072/- from 21.9.1994 to date will be approximately Rs.6,42,70,000/-. We have a strange situation where the arbitrator makes an award in favour of an employer directing the contractor to refund the employer Rs.59,42,275/- with interest at 18% per annum from 18.9.1990 upto date of decree/payment and then even though the said payment was not made, awards damages to the contractor which works out to Rs.6,42,70,000/- to the contractor. This to say the least is legal misconduct and an error apparent on the face of the award.

27. We may also refer to another aspect. A sum of Rs.12,072/- per day was claimed as damages by the contractor in a two line calculation without any supporting evidence or document. As noticed above, the claim was on the basis that the contractor would have manufactured 15 pipes per day of the value of Rs.1,20,000/- and that the profit and overhead element out of it would have been 15% or Rs.18,000/- per day. By taking the working days as 306 in a year and deducting 20% of labour component, the loss of profit per day was calculated to be Rs.12,072/- per day. There is no evidence to show that the contractor was at any point of time manufacturing 15 pipes a day of the value of Rs.8000/- each or that he would have made a profit of 15% on the cost thereof. The claim is made

on the ground that it is disabled from manufacturing that many number of pipes elsewhere. There is no evidence that it had other contracts where it was required to manufacture that number of pipes or that it could not manufacture the required pipes for want of plant and machinery. Nor is there any evidence as to the value of the plant and machinery that had been mortgaged to the employer and what would be the cost of an alternative plant with a capacity to manufacture 15 pipes per day. If the plant and machinery was of the value of say Rs.25 lakhs, or if the contractor could install another similar plant at a cost of Rs.25 lakhs, then the loss at best would be interest on Rs.25 lakhs and not anything more. In fact even though there is no evidence, while making claim nos.36 and 37 the contractor has given value of the plant and machinery as Rs.36,84,161/-. Even assuming the said figure to be true, at best the blocked up investment was only Rs. 36,84,161/- and the loss would be around 1% thereon per month by way of interest which would be Rs.36,841/- per month. What is more strange is nowhere in the award the arbitrator considers the validity of the claim of Rs.12072 per day nor accepts the said claim as valid or correct. In a reasoned award if the claim of a contractor is equated to proof of the claim, then it is obviously a legal misconduct and an error apparent on the face of the award. While the quantum of evidence required to accept a claim, may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.

28. Learned counsel for the contractor submitted that though there was an award in favour of the employer for refund of mobilization advance of Rs.59,42,275/- with interest, there was a larger award in its favour aggregating to about Rs.1.67 crores and interest and it was legitimately entitled to adjust the sum of Rs.59,42,275/- with interest towards the amount due by the employer under the award namely Rs.1.67 crores with interest and therefore as on the date of the award the liability towards mobilization advance stood wiped out on account of the same being adjusted towards the amount claimed by him and therefore as on the date of the award, the liability to refund the mobilization advance ceased. This contention is not sound. The mobilization advance amount was an ascertained sum due to the employer from the contractor, with a specific provision for interest. There was a specific contract for continuation of the mortgage until the said amount was paid. On the other hand the amounts that allegedly became due to the contractor under the award were mostly towards damages and escalation in prices validity of which were under challenge and there was no provision in the contract for payment of interest thereon. As noticed above at best the arbitrator could have directed return of the documents of title to the contractor and could not have directed payment of damages at the rate of Rs. 12072/- per day.

29. We therefore hold that viewed from any angle, awarding Rs.12,072/- per day as damages, from the date of award under Claim 37A cannot be sustained and the same is liable to be set aside.

Re : Claim Nos. 12 and 13 :

30. The contractor claimed pre-reference interest at 18% per annum on all its claims from the date of claim to date of arbitrator entering upon the reference (18.6.1990 to 15.12.1991), as also pendente

lite interest from 16.12.1991 to 21.9.1994 and future interest from the date of award till date of payment or decree whichever was earlier. The Arbitrator awarded the following interest : (a) pre-reference interest on all sums awarded except claim no.(1), from 3.9.1990 (date of contractor's application under section 8 and 20 of the Act) to 15.12.1991 at 18% per annum; (b) pendente lite interest on all sums awarded including claim No. 1, from 16,12.1991 to 21.9.1994 at 18% per annum; and (c) future interest on all sums awarded from 22.9.1994 till date of decree or payment whichever is earlier at the rate of 18% per annum. The District Court did not award any post decretal interest, but the High Court, however, granted interest from the date of decree till date of payment at 18% per annum.

31. The appellants contend that there was no provision in the contract for payment of interest on any of the amounts payable to the contractor and therefore no interest ought to be awarded. But this Court has held that in the absence of an express bar, the arbitrator has the jurisdiction and authority to award interest for all the three periods - pre reference, pendente lite and future (vide decisions of Constitution Bench in Secretary, Irrigation Department, Government of Orissa vs. G. C. Roy - 1992 (1) SCC 508, Executive Engineer, Dhenkanal Minor Irrigation Division vs. N. C. Budharaj - 2001 (2) SCC 721 and the subsequent decision in Bhagawati Oxygen vs. Hindustan Copper Ltd - 2005 (6) SCC 462). In this case as there was no express bar in the contract in regard to interest, the Arbitrator could award interest.

32. The appellant next contended that in regard to claims in the nature of damages, as contrasted from ascertained sums due, interest becomes payable only on quantification and therefore award of interest prior to the date of arbitrator's award was illegal. It is no doubt true that the position of law earlier was that in regard to award of damages, interest was not payable before quantification by a court. This was on the assumption that in so far as damages are concerned, there is no liability till determination of the quantum of damages. We may refer to a decision of the Bombay High Court in Iron & Hardware (India) Co. v. Firm Shamlal & Bros [AIR 1954 Bombay 423], where Chagla CJ, speaking for the Bench, stated the principle thus :

> "In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.....As already stated the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

33. The legal position, however, underwent a change after the enactment of Interest Act, 1978. Sub-section (1) of section 3 of the said Act provided that a court (as also an arbitrator) can in any proceedings for recovery of any debt or damages, if it thinks fit, allow interest to the person entitled to the debt or damages at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say, --

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings. Sub-section (3) of section 3 made it clear that nothing in that section shall apply to any debt or damages upon which interest is payable as of right, by virtue of any agreement; or to any debt or damages upon which payment of interest is barred, by virtue of an express agreement. The said sub-section also made it clear that nothing in that section shall empower the court to award interest upon interest. Section 5 of the said Act provides that nothing in the said Act shall affect the provisions of section 34 of Code of Civil Procedure 1908.

34. The position regarding award of interest after the Interest Act, 1978 came into force, can be stated thus :

(a) where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with the such contract.

(b) where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded.

(c) where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of section 3 of Interest Act will apply in regard to the pre-suit or pre-reference period and consequently interest will be payable :

(i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.

(d) payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of Interest Act, 1978 but by the provisions of section 34 of Code of Civil Procedure 1908 or the

provisions of the law governing Arbitration as the case may be.

35. Therefore, even in regard to claims for damages, interest can be awarded for a prior to the date of ascertainment or quantification thereof if

(a) the contract specifically provides for such payment from the date provided in the contract; or (b) a written demand had been made for payment of interest on the amount claimed as damages before initiation of action, from the date mentioned in the notice of demand (that is from the date of demand or any future date mentioned therein). In regard to claims for ascertained sums due, interest will be due from the date when they became due. In this case, interest has been awarded only from 3.9.1990, the date of the petition under Section 20 of the Act for appointment of arbitrator. We find no reason to alter the date of commencement of interest.

36. In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendente lite interest and future interest upto date of payment. Re: Claims 2 and 16, 3 and 15, 5 and 18, 6 and 17, 9 and 19, 11 and 20, 24, 27, and 28, 29, 30, 31, 32, 33, 35 (with 25 and 34) of the contractor.

37. Claims 9 & 19, 27 & 28, 29, 33, 35 (with 25 & 35) are for payment for work done by the contractor. Claims 2 & 16, 3 & 15, 5 & 18, 24, 30, 31 and 32 are for release/refund of amounts withheld or excess deductions. Claims 6 & 17 are for escalation in prices. Claims 11 & 20 are for compensation for slow progress due to reduction of width of trench. The arbitrator has awarded certain amounts against these claims by examining the material placed before him and the terms of contract. He has also assigned reasons for awarding the amount against these claims. Courts can not sit in judgment over the award of the arbitrator, nor re-appreciate the evidence. The awards on these claims do not suffer from any infirmity which can be the basis for interference either under Section 30 or under Section 16 of the Arbitration Act, 1940. Neither want of jurisdiction, nor legal misconduct, nor any inconsistency nor error apparent on the face of the award are made out in regard to awards made in regard to these claims. The awards in regard to these claims are therefore upheld. Re : Claims 4, 7, 8, 10, & 21, 14, 22, 23, 26, 38, 39, 40, 41 & 41A, 42 & 42A, 43 of the contractor

38. These claims of the contractor have been examined and rejected by the Arbitrator and upheld by the courts below. No ground is made out to interfere with the same.

Re: Counter claims of the employer

39. Out of the five counter-claims of the employer, the Arbitrator has allowed only counter-claim no.(3). Counter-claim no. (3) was for refund of mobilization advance (Rs.79,87,846) with interest and the Arbitrator has awarded Rs.59,42,275/- with interest at the contract rate of 18% per annum up to the date of decree/payment whichever was earlier. Counter-claims 1, 2, 4 and 5 made by the appellant against the contractor have been rejected. They are:

Counter claim No.	Brief description of counter claim	Amount of counter claim
1	Liquidated damages	Rs.99,19,460/-
2	Extra cost in getting work completed through another agency	Rs.6,66,62,000/-

4. Interest on payments made to the contractor Rs.2,17,42,168/-

and not utilized

5. Costs Rs.2,50,000/-

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

40. We therefore allow these appeals in part and modify the judgments of the courts below as indicated above. Resultantly:

(A) The award of Arbitrator on claim no.(1) (Rs.33,06,500/-) and claim 37A (Rs.12,072/- per day from 21.9.1994 till date of payment) are set aside.

(B) The award of Arbitrator on claims 2 and 16, 3 and 15, 5 and 18, 6 and 17, 9 and 19, 11 and 20, 24, 27 and 28, 29, 30, 31, 32, 33, 35 (with 25 & 24) aggregating to Rs.1,34,24,407/- is upheld. (C) Interest shall be payable at 9% p.a. on Rs.1,34,24,407/- from 3.9.1990 till date of payment. The award on claims 12 & 13 is modified accordingly.

(D) Award of Rs.59,42,275/- in respect of counter-claim no.(3) of appellant with interest at the rate of 18% per annum from the respective dates of release upto the date of payment is upheld. (E) The direction for adjustment of the amount due under counter-

claim no.(3) calculated as on 21.9.1994, against the amounts found due to the contractor calculated as on 21.9.1994 is upheld. Consequently, the appellant shall release the title deeds deposited in regard to the plant/machinery of the contractor.

The contractor will be entitled to remove the plant, if it is not already done.

(F) Rejection of claims 4, 7, 8, 10 & 21, 14, 22, 23, 26, 38, 39, 40, 41 & 41A, 42 & 42A and 43 contractor and counter-

claims 1, 2, 4, and 5 of the employer are upheld.

(G) Parties to bear their respective costs.

.....J.
(R. V. Raveendran)

New Delhi;
April 22, 2009.

.....J.
(Lokeshwar Singh Panta)