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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****ARBITRATION APPEAL NO. 8 OF 2009****IN****APPEAL NO. 798 OF 2005****IN****AWARD DATED 19TH JUNE, 2005****Union of India,**

Through the Chief Engineer (AF),
Camp Hanuman, Ahmedabad through
Shri. R.N. Singh, (CWE (AF) Lohogaon,
Pune) authorized signatory on behalf of
Chief Engineer (AF), Ahmedabad

... Appellants

Versus

1. **M/s. KR. Traders,**
G-3/4, Camellias Green Acres,
Salunke Vihar Road, Kondhwa,
Pune.

2. **Shri. S.G. Mahajan,**
Sole Arbitrator,
15, Swastishree Society,
Ganesh Nagar, Pune

... Respondents

Mr. S.R. Rajguru with Mr. A.R. Varma for the appellant.

Mr. A.A. Kumbhakoni, Mr. Ashutosh Gawnekar and Mr. Abhay Anturkar i/by
Mr. L.M. Acharya for respondents.

CORAM : R.D. DHANUKA, J.**RESERVED ON : NOVEMBER 23, 2012.****PRONOUNED ON : JANUARY 22, 2013.****ORAL JUDGMENT :**

1. By this appeal filed under section 37 of the Arbitration &
Conciliation Act, 1996 (for short hereinafter referred to as Act), the appellant

seeks to challenge the order and judgment dated 23rd October, 2008 passed by the District court, Pune rejecting the Arbitration Application filed by the appellant under section 34 of the Act. The appellants are hereinafter referred to as UOI and respondents are hereinafter referred to as Contractors for the sake of convenience. The UOI had impugned the award dated 19th June, 2005 made by the learned arbitrator allowing some of the claims with interest of the contractor and rejected the counter claims made by the UOI. The contractor was claimant in the arbitral proceedings and the UOI was respondent. Some of the relevant facts which are necessary for the purpose of deciding this appeal are as under :

(a) Some time in the year 1992, the UOI invited tenders for providing specialized technology accommodation at Air Force Station, Pune. The contractor submitted its tender for the said work. The bid of the contractor was accepted by UOI for the contract amount of Rs.4,75,27,093.05. Both the parties accordingly entered into formal contract on 28th September, 1992. The UOI issued work order in furtherance of the said contract on 10th October, 1992. The stipulated date for commencement of the work was 13th October, 1992 and the stipulated date for completion was 12th October, 1994. Time to complete the work was extended from time to time by UOI on the request made by the contractor. The last extension was granted till 20th April, 1997. The contractor completed the said work on 20th April, 1997. The work was certified by the UOI by its letter dated 27th April,

1997.

(b) The contractor used to submit running account bills from time to time. The contractor by its letter dated 23rd March, 2001 called upon the UOI to pay various outstanding dues payable to the respondent. The contractor by its letter dated 25th July, 2001 invoked arbitration clause and requested for appointment of the arbitrator to adjudicate the disputes which had arisen between the parties. The UOI however, did not appoint the arbitrator. The contractor thereafter filed an application being Arbitration Application (4 of 2002) under section 11 of the Act in this court for appointment of the arbitrator. It is the case of the contractor that inspite of the assurances given by the UOI before this court to appoint sole arbitrator, the UOI did not appoint any arbitrator. The contractor filed another arbitration application before this court for appointment of the arbitrator. By consent of both the parties, by an order dated 24th June, 2003, the Hon'ble Chief Justice appointed Mr. S.G. Mahajan as the sole arbitrator.

(c)Both the parties filed their respective pleadings before the learned arbitrator. By award dated 19th June, 2005, the learned arbitrator allowed some of the claims made by the contractor and rejected the counter claim made by UOI.

(d) The UOI impugned the said award by filing arbitration application (798 of 2005) in the District Court, Pune under section 34 of the Act. By

an order and judgment dated 23rd October, 2008, the learned District Judge, IV, Pune, rejected the said arbitration Application numbered as Civil Misc. Application No. 798 of 2005. The UOI thereafter filed this appeal under section 37 of the Act for impugning the order passed by the learned District Judge, Pune.

2. Mr. Rajguru, the learned counsel appearing on behalf of UOI submits that the learned arbitrator had acted bias in the matter and had committed misconduct. It is submitted that the learned arbitrator had defended the arbitration dispute pertaining to one M/s. Chaman Construction Company against the UOI before Mr. N.D. Bhagatkar, arbitrator appointed in another matter where similar claim of compensation in terms of the prolongation of contract was made. It is submitted that the learned arbitrator thus having taken similar plea as taken by the contractor in this matter, while appearing in another arbitration on behalf of M/s. Chaman Construction Company, he ought to have rescued himself to act as arbitrator in the dispute in question. It is submitted that the learned arbitrator thus acted in dual capacity i.e. one as arbitrator in the present dispute and another by canvassing similar claim against the UOI in another arbitration. It is submitted that in view of such situation, the award was liable to be set aside in terms of section 34(2)(b)(ii) of the Act on the ground that the aforesaid circumstances give rise to justifiable disputes as to independence or impartiality of the learned arbitrator.

3. Mr. Kumbhakoni the learned counsel appearing on behalf of the contractor submits that the learned arbitrator was appointed by consent of both the parties by this court. It was the case of the UOI that the learned arbitrator had given any advice to the contractor in the same matter. There is no bar in the arbitrator appearing and or representing the party in other matters if there is no conflict of interest. It is submitted that the allegations of bias or alleged apprehension on the part of the UOI about the independence or the impartiality of the learned arbitrator is totally unfounded and baseless. The UOI had raised the objection before the learned arbitrator by filing an application under section 12 and 13 of the Act raising doubt about the impartiality of the learned arbitrator. The learned arbitrator has considered this issue in the impugned award. The learned arbitrator rejected this objection on the ground that he had neither closely nor remotely associated with the contractor nor had represented it at any time in any proceedings. He was appointed by this court by consent of both the parties and found that the UOI had failed to make out any ground mentioned under section 12 of the Act and accordingly rejected the application filed by UOI. The District Judge in the impugned order and judgment has dealt with this issue elaborately. The District Judge rendered a finding that there was no statement made by UOI to the effect that the UOI was not aware at the time of appointment of the learned arbitrator that he was representing M/s. Chaman Construction Company against UOI in similar proceedings. It is held by the learned District Judge that no evidence was adduced on record by UOI that the learned arbitrator has actually represented M/s. Chaman Construction company in

another arbitration proceedings against UOI. The learned District Judge held that even if the learned arbitrator had represented any other construction company against the UOI, it was not not sufficient to give rise to the justifiable doubts as to the independence or impartiality and rejected the said objection raised by the UOI.

4. On perusal of section 12 of the Act, it is clear that the arbitrator is bound to disclose in writing that he was approached in connection with his possible appointment as arbitrator any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. In my view, merely because the learned arbitrator had even if appeared in similar matter at some point of time against the UOI, for some other party before another arbitrator, such event would not give any rise to the justifiable doubts as to his independence or impartiality. There is no bar in the arbitrator accepting the brief of another client against one of the party in which he acts as arbitrator unless there is conflict of interest. The learned arbitrator thus was not liable to disclose any such circumstances to the parties. The learned arbitrator was appointed by consent of both the parties by the Hon'ble Chief Justice. The word used in section 12(3)(a) of the Act. are "justifiable doubts" and not mere doubts. It is not that every suspicion held by the party that must reach to the conclusion that the arbitrator in the proceedings is biased. In my view, even if the learned arbitrator had appeared in the another matter against UOI before another arbitrator and had canvassed similar type of claim, it was not sufficient in itself to disqualify such arbitrator or is not sufficient ground for

revoking his authority. The relationship of the learned arbitrator in representing another contractor against the UOI in the other proceedings was of the professional nature and had ended much before he acted as arbitrator in the present proceedings. In my view the plea of bias raised by Union of India against learned Arbitrator was thoroughly misconceived and without any basis. The learned arbitrator as well as learned District Court has thus rightly rejected this untenable plea raised by the UOI. No fault can be found with the rejection of such plea raised by the UOI by the learned District Court as well as by the learned arbitrator.

5. The next plea raised by Mr. Rajguru, the learned counsel for the UOI is that the sub claim Nos. 65 to 75 of Claim no. 1 made by the petitioner and entertained by the learned arbitrator were totally without jurisdiction as the same were not made in the arbitration application filed by the Contractor in this court under section 11 of the Act for seeking appointment of the arbitrator. It is submitted that this court while appointing the arbitrator, thus had not referred such sub claims 65 to 75 of claim no. 1 to the learned arbitrator. The learned arbitrator has thus exceeded his authority by entertaining such claims which were not referred to him by this court.

6. Mr. Rajguru, also submitted that the contractor had already submitted his final bill both for disputed, as well as undisputed portion under condition No. 65 of the General Conditions of Contract duly signed. It is submitted that sub claim 65 to 75 of claim 1 were not included in last bill which

was final under section 65 and were thus waived. Clause 65 of the General Conditions of Contract reads as under :

“65. Final Bill (Applicable only to Measurement and Lump sum contracts). The final bill shall be submitted by the contractor on IAFW-2262 in duplicate within three months of physical completion of the works to the satisfaction of Engineer-in-Charge.

It shall be accompanied by all abstracts, vouchers, etc. supporting it and shall be prepared in the manner prescribed by the G.E.

No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished.

The contractor shall be entitled to be paid the final sum less the value of payments already made no account, subject to the certification of the final bill by the G.E.

No charges shall be allowed to the contractor on account of the preparation of the final bill.”

7. Mr. Kumbhakoni the learned counsel appearing on behalf of the contractor on the other hand submits that the UOI was under an obligation to supply to the contractor recovery statements in order to enable the contractor to prepare final bill. It is submitted that the UOI did not make available priced abstracts also to the contractor for preparing final bill. It is submitted that the contractor had submitted bill on 17th July, 2002 and on such date deviation orders 66 to 75 were not finalized by the UOI and which were

finalized admittedly only on 31st December, 2002 in the sum of Rs. 10800000. It is thus submitted that the bill submitted by the contractor on 17th July, 2002 was not a final bill as provided in condition no. 65 of the General Conditions of Contract and thus the contractor could not be precluded from making further claims after submission of the said bill or that it would not amount to any waiver or extinguishment of the rights of the contractor to make additional claim. It is submitted that there is no provision in the contract under which the contractor was required to notify the claims for adjudication of the disputes before UOI before invoking arbitration agreement. It is not in dispute that sub claim Nos. 65 to 72 were not referred to in the arbitration application filed by the contractor in this court. It is further submitted that under section 11(6) of the Act, the Chief Justice or his designate only can appoint an arbitrator and order scope of reference can not be decided under section 11(6) of the Act. The learned counsel placed reliance upon the judgment of the Supreme Court on this issue reported in the case of State of Goa Vs. Praveen Enterprises¹,. and more particularly para 23 which reads thus :

“23. Section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator/s. It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed under section 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures under section

¹ Dated 4th July, 2011 in Civil Appeal No. 4987 of 2011

11(6) of the Act to ensure compliance by the parties with such procedure. Where the arbitration agreement requires the disputes to be formulated and referred to arbitration by an appointing authority, and the appointing authority fails to do so, the Chief Justice or his designate will direct the appointing authority to formulate the disputes for reference as required by the arbitration agreement. The assumption by the courts below that a reference of specific disputes to the Arbitrator by the Chief Justice or his designate is necessary while making appointment of arbitrator under section 11 of the Act, is without any basis. Equally baseless is the assumption that where one party filed an application under section 11 and gets an arbitrator appointed the arbitrator can decide only the disputes raised by the applicant under section 11 of the Act and not the counter claims of the respondent."

8. As far as issue of waiver raised by the UOI, based on clause 65 of General Conditions of Contract is concerned, the learned counsel appearing for the contractor placed reliance upon the judgment of this court in the case of **Union of India Vs. Moti Enterprises and another**² and more particularly Para 14 which reads thus :

"14. The Arbitrator has duly considered the provisions of Clause 65. In paragraph 22 of the award, the Arbitrator has discussed this issue at a considerable degree of length. The Arbitrator has noted that the contractor had submitted his bill on 21st December, 1998. This bill, according to the Arbitrator, could not be construed to be the final bill under condition 65 of the general conditions of contract. The Arbitrator has noted that as on 21st December, 1998, the Deviation Orders (D.O.) had not been finalized and issued by the competent authority of the Union of India. D. O. Nos. 14 to 44 are all dated between 11th January, 1999 and 30th October, 2000. The "measurable items of the contract have to be priced on prescribed formats of abstracts" and this was the responsibility of the Departmental Officials. Moreover, the recovery statements were also required to be supplied to the contractor by the Department in order to enable him to

² 2003(2) Arb.L.R. 229 (Bombay)

prepare the final bill. This had also not been done as of 21st December, 1998. The Arbitrator noted that there are certain prerequisites to the submission of the final bill by the contractor. All D.Os. to cover the changes are required to be completed and issued as and when the charges are ordered or at the latest upon the completion of the contract. The department failed to do so. Similarly, the final bill requires the priced abstracts and recovery schedules which is the responsibility of the department. These are required to be submitted to the contractor upon completion of the contract after which the contractor can submit the final bill. In the present case, these prerequisites that were required to be complied with, the department had not completed. Consequently, the Arbitrator concluded by holding that the final bill properly called could not have been submitted on 21st December, 1998 and condition 65 of the contract was not attracted. Apart from this, which is a finding based on a construction of the contract, the Arbitrator has relied upon the provisions of Section [28\(B\)](#) of the contract Act in holding that every agreement which extinguishes the rights of any party or discharges any party thereto from any liability under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his right is void to that extent. It is not necessary for this Court to go into the correctness of the arbitral award to the extent that it is permissible under Section [34](#) in relation to the interpretation of Section [28\(B\)](#) of the Contract Act. **In my view, the award is liable to be sustained on the first finding as aforesaid, which was to the effect that condition 65 was not attracted in the facts and circumstances of the present case.** The Arbitrator has interpreted the contract to mean that all the prerequisites for the submission of a proper final bill must be fulfilled by the Department before condition 65 is attracted. Inasmuch as the Deviation Orders (D. Os) and recovery schedules were not finalized by the Department before the submission of the final bill on 21st December, 1998, the provision of condition 65 were not attracted.” (Emphasis supplied)

9. Clause 62 of the General Conditions of Contract provide for valuation of deviation orders and further provide that value of items of work covered by deviation orders shall be ascertained by measurements or lump

sum assessment in the order of preference set out therein. It is not in dispute that valuation of deviation Order No. 65 to 72 were not made by the UOI prior to 31st December, 2002 which was much after the contractor filing his last bill to the UOI for certification. Clause 61 of the General Conditions of Contract provides that all items having a financial value shall be entered in the M.E.S. Measurement Book. It is not in dispute that the prices in respect of the work done under deviation orders also ought to have been recorded in the measurement book which was required to be submitted at the time of submission of final bill by the contractor. In my view thus the contractor could not have submitted final bill till the valuation of the deviation orders was ascertained by the UOI. Perusal of the award indicates that this issue has been dealt with by the learned arbitrator at length and has rendered a finding that the prerequisites of preparing final bill were required to be completed were not completed by UOI and thus the final bill submitted by the contractor on 17th July, 2002 could not have been considered as final bill as contemplated under clause 65 of the General Conditions of Contract. The learned arbitrator rendered a finding that the UOI had not made available the pricing abstracts and recovery statement to the contractor which was a prerequisite for preparing final bill by the contractor. It was found that the valuation of deviation orders 66 to 75 amounting to more than Rs. 10.8 Crores were made much after submission of the final bill by the contractor. The learned arbitrator noticed that these deviation orders were neither signed nor sent to the contractor. The learned arbitrator thus rendered a finding that the bill submitted by the contractor on 17th July, 2002 was not a

final bill as provided in Condition No. 65 of General Conditions of Contract and thus the said condition was not attracted. The learned arbitrator held that there was no accord and satisfaction on the part of the contractor and thus he had jurisdiction to entertain, try and decide all the claims of the contractor included in the claim statement.

10. Considering the record produced by both the parties and on interpretation of clause 61, 62 and 65 of the General Conditions of Contract, it is clear that the contractor could submit final bill only if the UOI would have decided valuation of the deviation orders and valuation of such deviation ought to have been part of the final bill as required under clause 65 of the General Conditions of Contract. The UOI admittedly having decided the valuation of the deviation orders only on 31st December, 2002 and thus the bill submitted by the contractor on 17th July, 2002 could in no circumstances be construed as a final bill as contemplated under clause 65 of the General Conditions of Contract. In my view, the findings rendered by the learned arbitrator considering the fact that the bill submitted on 17th July, 2002 was not final bill and condition No. 65 was not attracted and therefore, there was no accord and satisfaction on the part of the contractor, can not be faulted with. In my view, the learned arbitrator had jurisdiction to entertain such claims and were not waived of and or extinguished by the contractor. In my view, as all the pre-requisites for submission of proper final bill were not available in view of valuation of deviation order not finalized by the UOI, condition under clause 65 was not attracted.

11. In so far as the issue raised by the respondent that the sub claim Nos. 65 to 75 of claim no.1 were not referred to the learned arbitrator by this court while appointing the arbitrator and the learned arbitrator thus exceeded his jurisdiction is concerned, on plain reading of section 11(5) and (6), it is clear that the said provisions provides for appointment of arbitrator or arbitrators, as the case may be and not for referring the disputes to arbitration. The Supreme Court in the case of State of Goa Vs. Praveen Enterprises (supra) has already dealt with this issue in detail. It has been held that in application under section 11, the Chief Justice or his designate has only to appoint arbitrator/s and is not required to identify the disputes. Considering the provisions of General Conditions of Contract, it is clear that there is no provisions in the Contract which obligates upon the contractor to notify its claim or disputes to the UOI before invoking arbitration agreement. The provisions also did not contemplate any procedure or requirement that only such claims which are referred to UOI by the contractor can be referred to arbitration. In my view, the contractor was not required to quantify and or specify the claims in its application under section 11 of the Arbitration and Conciliation Act, 1996. In my view, while deciding the application under section 11, the chief Justice or his designate can make an order for appointment of the arbitrator or refuse to appoint arbitrator. The scope of reference before the learned arbitrator cannot be decided under section 11 of the Act. Thus merely because sub items of 65 to 75 were not referred in application under section 11 filed by the contractor, it cannot be said that such sub claims made by the contractor before the learned arbitrator were

beyond the scope of reference or that the learned arbitrator exceeded his authority to entertain such claims. In my view there is no substance in this submission made by the UOI and the same is rejected.

12. The next submission of Mr. Rajguru, learned counsel for the UOI is that the contractor had unconditionally withdrawn certain claims and thus the learned arbitrator had no jurisdiction to entertain, try and decide these claims. The learned counsel placed reliance upon the undertaking given by the contractor in this regard for withdrawal of certain claims. Mr. Kumbhakoni the learned counsel appearing on behalf of the contractor on the other hand submits that by letter dated 6th May, 2002, the contractor had withdrawn three claims on the UOI assuring that the arbitrator would be appointed and the accounts of the contractor would be finalized. The learned counsel submits that when arbitration Petition no. 4 of 2002 filed by the contractor under section 11 of the Act appeared on the board, the UOI gave its consent for appointment of the arbitrator within eight weeks. The UOI had called the contractor for discussion and had assured that the accounts would be finalized and obtained an undertaking of the contractor for withdrawal of certain claims. However, instead of finalizing his accounts, the UOI has illegally reduced the measurement record in the measurement book and reduced the rates. Accordingly by letter dated 17th July, 2003 the contractor withdrew its undertaking given on 6th May, 2002 before the appointment of the arbitrator by this court was made. The learned counsel submits that out of three claims referred in the letter dated 6th May, 2002, the contractor did

not make claim nos. 1 and 3 before the learned arbitrator. It is submitted that the learned arbitrator considered only claims No. 2 in Para 47 of the impugned award (numbered as claim no. 62) and allowed the said claim in the sum of Rs. 6 lacs after giving credit of the amount already paid by the UOI to the contractor.

13. Perusal of the award indicates that the learned arbitrator has considered this issue in Para 32.4 of the impugned award and has accepted the explanation given by the contractor as to in what circumstances the contractor gave an undertaking and which was subsequently withdrawn. The learned arbitrator after accepting the submissions of the contractor and also UOI rendered a finding that he has jurisdiction to entertain, try and decide these claims. In my view, said finding of fact is not perverse and is based on the documents filed by both the parties on record and thus cannot be interfered with by this court under section 37 of the Arbitration and Conciliation Act, 1996. In my view, the learned arbitrator had jurisdiction to entertain such claims in view of the withdrawal of undertaking by the contractor in the circumstances stated aforesaid.

14. The next submission of Mr. Rajguru, learned counsel for the UOI is that the sub claims Nos. 65 to 76 of claim no. 1 were barred by limitation and thus the arbitrator ought to have rejected those claims. The learned counsel submits that the work was completed on 20th April, 1997 whereas request for

appointment of arbitrator was made by letter dated 25th July, 2001. It is submitted that those claims were raised for the first time on 19th September, 2003 and thus were on the face of it barred by law of limitation. Perusal of the written statement filed by UOI makes it clear that no such plea was raised by the UOI in the written statement before the learned arbitrator. The plea was however, raised before the District Court in application filed under section 34 of the Act. The learned District Court rendered a finding that the final bill was submitted by the contractor on 17th July, 2002 whereas deviation orders 66 to 75 were finalized only on 31st December, 2002. It is held that the cause of action thus in respect of the disputes pertaining to deviation orders 66 to 75 would arise only after 31st December, 2002 as since the claim was filed before the arbitrator on 19th September, 2003, the same was within three years from the date of finalization of the deviation orders by the UOI. The learned District Court has thus rightly rejected the plea of limitation on the ground that valuation in respect of deviation order 66 to 75 was pending before the UOI and the same was finalized only on 31st December, 2002. It is not in dispute that even as per rates decided by the UOI on 31st December, 2002, the payment was not released. Such deviation orders were not even sent by the UOI to the Contractor nor the same were signed by the contractor. In my view thus the cause of action in respect of such deviation orders did not commence till the same was valued by the UOI on 31st December, 2012. Thus the claims arising out of the deviation order 66 to 75 were within time and the plea of limitation thus raised by the UOI for the first time in its application under section 34 of the Act and rejected by the learned District

Court in his order does not warrant interference on this issue under section 37 of the Act.

15. The next submission of Mr. Rajguru, the learned counsel appearing for the UOI is that the various sub claims made in claim no.1 in respect of the work done, awarded by the learned arbitrator were based on no evidence. It is submitted that though the contractor had agreed to accept the payment at certain rates at the execution stage, has claimed additional amounts before the learned arbitrator at the later stage. It is submitted that the learned arbitrator has not considered the counter calim made by the UOI for recovery of substantial amount from the contractor.

16. On the other hand Mr. Kumbhakoni, the learned counsel for the contractor submits that the learned arbitrator has considered each and every claim in detail and the records produced by both the parties including the final bill prepared by the UOI itself. The learned arbitrator has not accepted all the claims made by the contractor but have reduced the claims in respect of several items while accepting the rates approved by the UOI. On perusal of the award, it is clear that the learned arbitrator has considered these claims at length in para 31F to Para 59 of the impugned award. The learned arbitrator has come to the conclusion that the contractor was entitled to amount against sub claim 1 of 75 of claim no. 1 at Rs.50420380.88.62, and an amount of Rs.6040000 towards escalation. The learned arbitrator came to

the conclusion that after deducing various amounts due and payable by the contractor to UOI towards payment already received, the credit for source items, etc. the UOI is yet to pay sum of Rs.1371000 to the contractor and the same is accordingly awarded. The learned arbitrator has dealt with each item separately and has rendered finding of fact after considering the measurements and documents produced by both the parties and has even accepted the rates in respect of some of the items as determined by UOI. The learned counsel for the UOI could not make out any ground on which such finding of fact rendered by the learned arbitrator could be interfered with by the learned District Court under section 34 of the Act and by this Court under section 37 of the Act and thus the submissions advanced by the learned counsel appearing for the UOI is rejected.

17. The next submission of Mr. Rajguru is that the learned arbitrator could not have awarded the claim for escalation in the sum of Rs.6040000 on the ground that the contractor was granted extension from time to time on the request of the contractor making it clear that no claim for compensation would be considered. It is submitted that the contractor was responsible for prolongation of the contract and was thus not eligible to claim for escalation. It is submitted that the contractor has also given undertaking not to claim escalation for certain period on certain material.

18. On the other hand the learned counsel for the contractor submits that

the contractor had given undertaking on 28th August, 1995 not to claim of escalation on material during the extended period 16th July, 1995 to 12th January, 1996. The contractor had not given any undertaking in respect of escalation of fuel and labour. It is contended by the learned counsel that the learned arbitrator had not awarded escalation on material during the period between 16th July, 1995 to 12th January, 1996 and such claim was rejected by the learned arbitrator in Para 58.10 of the impugned award. The learned counsel submits that the officers of the UOI illegally circulated a note on 13th December, 1995 to various departments of UOI that no escalation would be payable to the contractor. It is submitted that even otherwise, in view of clause 63 of the General Conditions of Contract, the contractor is entitled to be granted escalation till the completion of the work. It is submitted that the learned arbitrator had given finding of fact that the UOI was responsible for prolongation of the contract due to various reasons for which extension came to be granted and thus in such situation, circular issued by the UOI was not binding on the contractor and was illegal. It is submitted that no such circular in any event would form part of the contract.

19. On perusal of the award, it is clear that the learned arbitrator has considered this issue of escalation in detail in Paragraph 58.1 to 58.13 and has held that the total amount due to the contractor towards escalation was at Rs.6040000 under the heads of material, labour and fuel. The award indicates that the learned arbitrator has considered the documents, evidence and also the arguments advanced by both the parties and has held that in

view of the undertaking given by the contractor, the contractor would not be entitled to claim escalation for the quarter 13 and 14 which amounted to Rs.143919.44 and determined the material escalation for the balance quarters amounting to Rs.2268466.97. The learned arbitrator has similarly awarded labour escalation. The record indicates that even according to UOI the escalation was due and payable by the UOI to the contractor, however only upto 20th April, 1997. The learned arbitrator has considered escalation only upto the date of completion as agreed by the UOI, however, at different rates. In so far as payment of escalation upto the date of completion of work is concerned, there was no dispute about the maintainability raised by the UOI before the learned arbitrator. The learned arbitrator has also considered the fuel escalation under the provisions of contract. While allowing claim for fuel escalation, the learned arbitrator has compared the escalation statement submitted by the contractor and UOI and found that UOI had correctly considered the amount of work done as per the provisions of the contract and the learned arbitrator accordingly applied the value of work done and fuel indices as considered by the UOI. In my view no fault can be found with this part of the claim awarded by the learned arbitrator. Even otherwise, under the provisions of General Conditions of Contract, the contractor was entitled to claim escalation upto the date of the completion of work. No interference is thus warranted with this part of the award rendered by the learned arbitrator and with the rejection of the submissions of UOI by the learned District Judge.

20. The next submission of Mr Rajguru, the learned counsel appearing for UoI is that the claim for loss of overheads made by the contractor before the learned arbitrator for prolongation of contract is contrary to Clause 11(C) of the General Conditions of the Contract (GCC). The learned counsel submits that even if extension was granted by UoI on the request of the contractor under Clause 11(A) or (B), in view of Clause 11(C), no claim in respect of compensation or otherwise could be admitted. The learned counsel placed reliance on the letter of extension issued by UoI at page Nos.220 to 223 of the appeal paper-book which was issued in response to an application for extension of time submitted by the Contractor from time to time. It is submitted that the stipulated date of completion as per the Works Order expired on 12th October 1994 and the same was extended till 20th April 1997 at the request and on application of the Contractor. It is submitted that in all the extension orders except in respect of two of such extension orders, it was made clear that no claim or compensation would be entertained by the Government on that ground. It was mentioned that it was an express condition agreed to by both parties thereto that other conditions of that contract agreement shall still hold good. It is submitted that even if on two of such extension letters, the aforesaid note was scored off and though there was not initial by the officers of the UoI thereon, it would not mean that the original Clause-11(A) to (C) of the GCC would stand deleted. Such clause would continue to hold good and binding on the parties. It is submitted that though the learned arbitrator in para 60.2 of the impugned award has recorded that the UoI failed to perform reciprocal promises due to various

reasons set out therein and some of such reasons fall under Clause 11-A or B of GCC, the learned arbitrator has awarded claim for overheads in the sum of Rs.50,50,243.40 ps @ 10% per annum. It is submitted that not only the said claim is awarded in the teeth of Clause 11 (C) read with Clause (A) and (B), but the same is also based on no evidence. The learned counsel placed reliance on the Judgment of Supreme Court in case of Ramnath International Construction (P) Ltd. Vs. Union of India reported in (2007) 2 SCC 453 and more particularly paragraphs Nos.4,5,8,9,10,12 and 18 which read thus :

4. *In regard to the Hangar Contract, undisputedly, the contract work had to be completed in two phases, the first phase by 31-10-1989 and the second phase by 30-4-1990. However, the contract work could not be completed within the stipulated time, partly due to the default on the part of the respondent. It is also undisputed that on the request of the contractor, the employer gave several extensions – by a letter dated 28-2-1990 the period of completion of work was extended up to 30-6-1990; by a letter dated 10-5-1991, it was extended up to 31-5-1991; by a letter dated 27-8-1991 it was extended up to 30-9-1991; by a letter dated 23-1-1992 the time was extended up to 15-4-1992; by a letter dated 15-5-1992 it was extended up to 28-5-1992 and by a letter dated 6-6-1992, it was further extended up to 22-6-1992. The contract was subsequently terminated by the employer on 1-7-1997.*

5. *In respect of the Road Contract, the date of commencement of work was 3-1-1989. The due date of completion was 2-11-1990 (21 months). The employer granted extensions from time to time on the request of the contractor up to 31-5-1992. Subsequently, the contract was terminated by the employer on 14-7-1992.*

8. *The arbitrator held that where the work was delayed on account of delays attributable to the employer, grant of extension of time by the employer for completing of work does not exonerate the employer from the liability to pay damages for breach on account of the delay caused by the employer unless the employer establishes that the contractor has consented to accept the extension of time alone, in satisfaction of his claims for the delay. The arbitrator held that in these two contracts, the employer was*

not released of his liability for damages on account of the delays, by granting extension of time. He, therefore, proceeded to quantify the loss and awarded the amounts as aforesaid. The awards of the arbitrator on these items were affirmed by the learned Single Judge by making the awards a rule of the court, by judgments dated 24-8-1994 and 22-9-1995.

9. The Division Bench of the High Court after considering the threadbare submissions on the question of law arrived at a conclusion that the arbitrator has exceeded its jurisdiction in making an award towards Claim 24 in the Hangar Contract and an award towards Claims 13 to 16 in the Road Contract, as they were made in derogation of clause 11(C) of the contract, which prohibited the contractor from making any claim for compensation or otherwise, howsoever, arising, as a result of extension of time granted under the contract.

10. The core questions which arise for our consideration are these:

(a) Whether Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are unsustainable being in derogation of clause 11(C) of the contract, which prohibits any compensation as a result of extension of time granted by the department?

(b) Whether the arbitrator committed a legal misconduct for not acting in terms of clause 11(C) of the contract though pleaded and submitted before ?

12. Clause (C) provides that where extensions have been granted by reason of the delays enumerated in clause (A) which were beyond the control of the contractor, or on account of the delays on the part of the employer specified in clause (B), the contractor is not entitled to make any claim either for compensation or otherwise, arising in whatsoever manner, as a result of such extensions. After enumerating certain delays, sub-clause (viii) of clause (A) specifically mentions delay on account of any other cause beyond the control of the contractor. The causes for delays specified in clause (A), thus, encompass all delays over which the contractor has no control. This will necessarily include any delays attributable to the employer or any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as a consequence of

delays, that is Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are barred by clause 11(C).

18. In spite of having held that both were responsible for the delay and having noticed the arguments based on clause 11(C) of the General Conditions of Contract, the arbitrator proceeded to award damages on the ground of delay on the reasoning that the contractor is entitled to compensation, unless the employer establishes that the contractor has consented to accept the extension of time alone in satisfaction of his claim for delay. As rightly held by the High Court, which decision we have affirmed while considering Question (i), clause 11(C) of the General Conditions of Contract is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained, Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim for compensation. In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C), In Associated Engg. Co. this Court held : (SCC pp103 & 105, paras 24,26 and 28)

24. The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. ...

26. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside.

28. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. He digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question,

disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of the provisions of the contract to the contrary.

21. Mr Rajguru, the learned counsel also placed reliance upon an unreported Judgment delivered by Division Bench of this Court on 4th September 2012 in **Appeal No.121 of 2009 in Arbitration Petition No.355 of 2004 in case of Union Of India Vs. M/s Arctic India** to which R.D.Dhanuka, J., was a party. The learned counsel placed reliance upon paragraph Nos.9,10,11,13,14 and 15 which read as follows :

9.Clauses 67(a) and (b) of the General Conditions of the Contract reads as under :-

67. Recovery from contractor :- (a)
Whenever any claim (s) for payment of sum of money arise(s) out of or under this contract against the contractor, the contractor shall on demand make the payment of the same or agree for effecting adjustment from any amounts due to him by the Government. If, however, he refuses or neglects to make the payment on demand, or does not agree for effecting adjustment from any amount due to him, Govt shall be entitled to withhold an amount not exceeding the amount of the claim(s), from any sum when due or which any time there after may become due the contractor, under this or any other contract with the Govt or from any other sum due to the contractor from the Govt (which may be available with the Govt) or from the contractor's security deposit or security bond amount, and retain the same by way of lien till such claim payment is made by the contractor or till the claim(s) is/are settled or adjudicated upon, or till the contractor, at his expense furnishes fixed deposit receipt(s) duly endorsed as directed by the Accepting Officer, or a guarantee bond from a Scheduled Bank for an amount equal to the amount of the claim(s), in the form as directed by Accepting

Officer.

67 (b) :- It is an agreed conditions of this contract that the sum of money so withheld or retained as and by way of lien under this condition by the Govt, will be kept with held are retained as such by the Govt, till the claim(s) arising out of or under this contract is/are settled or adjudicated upon and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such sum so withheld.

10. The award indicates that the Arbitrator has given findings of fact that the Uol was responsible for delay in execution of the work. Uol had taken one year eight and a half months to communicate a firm decision regarding change in scope of work. Uol had not taken a final and binding decision on various issues. Most of the claims allowed by the Arbitrator in favour of the Contractor, as well as in favour of Uol are based on agreed liability towards each other. The Arbitrator after giving a finding of fact about delay against Uol has rightly rejected the claim of compensation made by the Uol. The other claims awarded in favour of the Contractor and rejection of claim made by Uol is also based on pure findings of fact. It is not for the court to sit as a court of appeal on the findings of the Arbitrator which had been arrived at after going through the material placed on record before him. Once it is held that the issue relating to who had committed breach and who is responsible for delay was referred to the arbitrator, the finding of fact given by the arbitrator that the contractor was not responsible for delay is not open to challenge. We, therefore, do not find any reason to interfere with the finding of fact given by the Arbitrator as canvassed by the Counsel appearing for the Uol.

11. As far as the claim of Rs.6,23,875/- allowed by the Arbitrator in favour of the Contractor is concerned, the record indicates that Uol had deducted a sum of Rs.6,48,504.70 towards compensation on the ground that the work was delayed by the Contractor and an amount of Rs.10,18,707.75 was deducted due to alleged defects in work executed by the Contractor under CA No. CENM-26 of 96-97 with another GE(NW) Kunjali in Mumbai. The Uol deducted these amounts relying upon Clause 67 of General Conditions of Contract. The Arbitrator gave a finding that the claim of Uol for such deduction had not been legally established and thus the Contractor was deprived of Rs.14.30 lacs for 7th RAR for the period starting from 1 September 1999 to 15 July 2002 and thus entitled to get compensation due to financial

loss suffered for not getting his legitimately due payments under this contract. The Arbitrator allowed compensation at the rate of 15.5.% per annum relying upon Section 70 of Indian Contract Act by directing UoI to pay a sum of Rs.6,23,875/-.

13. Clauses 67 (a) and (b) show that if any claim for payment arises out of or under the contract against the contractor and if the same is not paid by the contractor or he does not agree for effecting adjustment from any amount due to him by the Government, Government shall be entitled to withhold an amount not exceeding the amount of the claim, from any sum when due or which may at any time thereafter become due to the contractor, under this or any other contract with the Government or from any other sum due to the contractor from the Government and retain the same by way of lien till such payment is made by the contractor or till the claims are settled or adjudicated upon. It is further provided that the sum of money so withheld or retained as and by way of lien under this condition by Government, will be kept withheld as such by the Government till the claims arising out of or under the contract are settled or adjudicated upon and the contractor will have no claim for interest or damages whatsoever on any account in respect of such sum so withheld.

14. It is thus clear that the UoI had withheld part of the bill amount due and payable to the Contractor on the ground that the UoI had to recover certain amount in the other work or on account of compensation recoverable by the UoI in this work. Clause 67 (a) read with (b) clearly provides that the contractor will have no claim for interest or damage whatsoever in any amount in respect of such sum so withheld.

15. In our view, the Arbitrator by allowing claim for compensation has exceeded his jurisdiction and has decided contrary to the terms of the contract. When such a claim was prohibited under the terms of the contract, the Arbitrator could not grant it even though it was referred to him and therefore this part of the award suffered from jurisdictional error. By allowing such a prohibited claim, the Arbitrator has decided contrary to the terms of the contract and the award is thus in violation of Section 28(3) of the Act and is thus in conflict with public policy under Section 34(2) (b) of the Act.

22. Relying upon the aforesaid judgments in case of **Ramnath International (supra)** and **Union of India Vs. M/s Arctic India (supra)**, the

learned counsel appearing for UoI submits that any claim in the nature of compensation was prohibited under Clause 11(C) of the GCC and thus the learned arbitrator could not have awarded any claim for compensation in the teeth of such clause. The learned arbitrator having allowed prohibited claim, has exceeded his authority and has acted contrary to the terms of contract and this part of the award thus will conflict with the public policy.

23. Mr Kumbhakoni, the learned counsel appearing on behalf of the contractor on the other hand submits that the Union of India was solely responsible for prolongation of the contract which necessitated extension of time for which contractor was not responsible in any manner whatsoever. It is submitted that Clause 11(A) to (C) has been already interpreted by this Court in case of **Union of India Vs Moti Enterprises and Anr.**, reported in **2003(2) Arb. L.R 229 (Bombay)**. The learned counsel placed reliance upon paragraph Nos.10,11,12 which read thus :

10. *Be that as it may, for the sake of completeness and since point has been urged before the Court, I have considered it appropriate to deal with the submissions of the learned counsel. In the present case, the submission that was urged on behalf of the Union of India in defence to the claim in the arbitration was that an extension has been granted under sub-clause (vii) of Clause A of condition 11 of the General Conditions. That sub-clause deals with a situation where the work is delayed by reason of any other cause which in the absolute discretion of the Accepting Officer is beyond the contractor's control. The Arbitrator has construed the provisions of Condition 11(A). The Arbitrator was entitled to interpret the contract and to construe the provisions of the contract. The Arbitrator has held that the provisions contained in sub-clause (vii) of condition 11(A) envisage a situation where the work has been delayed for any other cause which is beyond the contractor's control. Sub-clauses (i) to (vi) of Clause (A) of condition 11 deal with eventualities such as force majeure, abnormally bad weather, loss or damage by fire, civil*

commotion, local combination of workmen, strike or lockout, delay on the part of nominated sub-contractors or delay on the part of contractors engaged by the government for executing the work not forming part of the contract. Consequently when sub-clause (vii) refers to any other cause it must necessarily be read in the context of sub-clauses (i) to (vi) which envisage a situation which is truly beyond the control of the contractor and not involving default of the Government either. Consequently, when the extension of the time has been warranted on account of the delay on the part of the Union of India in performing its part of the contractual obligations, the extension cannot be construed as an extension under sub-clause (vii) of Clause (A) of Condition 11. Condition 11(C) provides that no claim in respect of compensation or otherwise, which has arisen out of an extension granted under Clauses (A) and (B) shall be admitted. In other words, where the extension is referable not to Clauses (A) and (B) of Condition 11 but to a delay or default on the part of the Union Government, the prohibition which is contained in Condition 11(C) would not be attracted.

11. In the present case, the facts have been construed by the learned Arbitrator commencing from paragraph 44 of the award. The Arbitrator has noted that it was common ground that the extension had been granted by the Union of India on the basis of the letter of request submitted by the contractor at Exh. C-16. The ground on which the contractor had made his request for extension included several grounds which implicated a delay on the part of the Union of India in either fulfilling its part of the contract, making a change in the contractual stipulations or in finalizing the specifications. In this context, the learned Arbitrator upon discussing the evidence has found in paragraph 45 of the award that there were several delays on the part of the Union of India as a result of which the extension had to be and was in fact granted. Consequently, the delay could not be attributable to a ground specified either in Clause (A) or (B) of condition 11, but was independent thereof. Having regard to the facts and circumstances, the Arbitrator has estimated that out of a total delay of six months, a delay of five months was on account of considerations which did not fall within the purview of Condition 11(A) or (B) and to which therefore condition 11(C) would not be attracted. Therefore, insofar as this period of five months was concerned, the Arbitrator concluded by holding that the Union of India would have to bear the consequences thereof. The view which has been taken by the learned Arbitrator accords, in my opinion, with a plain construction of the contractual conditions in the present case. The view which has been taken by the Arbitrator cannot be in any manner considered to be perverse or of a nature which would warrant an invocation of the defence of public policy. The Arbitrator was entirely justified in taking the view

that if an extension that is granted is not referable to Conditions 11(A) and (B), the prohibition contained in Condition 11(C) would not be attracted. However, I must add that even if the view which was taken by the learned Arbitrator was a possible view to take, this Court under Section 34 would not have interfered. In the present case it does so happen that the interpretation taken by the Arbitrator is a correct view to take.

12. *The correctness of the decision of the Arbitrator on the question of interpretation is further fortified by a recent judgment delivered by a learned Single Judge of this Court on 17th June, 2002 in the Union of India vs. M/s Mukesh Construction Co. Before the learned Single Judge, (S.A.Bobde,J.) the same provision, as has arisen in the dispute in the present case came up for consideration. The learned Single Judge referred to an earlier judgment of the Division Bench of this Court in M/s Shyama Charan Agarwala and Sons vs. Union of India. A learned Single Judge of this Court has in that case set aside an arbitral award relying on the provisions of Clause 11(c) of the conditions of contract which was the same as that in the present case. The Division Bench affirmed the view of the learned Single Judge holding that since the extension of time was granted by the Union of India on the request of the contractor and for reasons beyond the control of the contractor, the extension was under condition 11(A) in which event the prohibition contained in 11(C) was attracted. The judgment of the Division Bench was, however, set aside in appeal by the Supreme Court on 7th September, 1998 in Civil Appeal No.4665 of 1998. In setting aside the judgment of the Division Bench, the Supreme Court relied a decision of the Court in K.R.Raveendranathan vs. State of Kerala, where the Court had held that by purporting to construe the contract, the Court could not take upon itself the burden of saying that the award was contrary to the contract and, as such, beyond jurisdiction. Relying upon the judgment of the Supreme Court in Raveendranathan's case my learned Brother Mr Justice S.A. Bobde has rejected a similar challenge to an arbitral award.*

24. The learned counsel for the contractor also placed reliance upon the Judgment of Supreme Court in case of **Asian Techs Limited Vs. Union of India reported in (2009) 10 SCC 354** and more particularly paragraph Nos.14, 16, 17 and 21 which read thus :

14. *Clause 11. of the contract reads as follows:*

11. Time, delay and Extension :

(A) Time is of the essence of the contract and is specified in contract documents or in each individual Works Order.

As soon as possible after the contract is let or any substantial Works Order is placed and before work under it has begun, the G.E. And the Contractor shall agree upon a Time Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof, and/or the Contract or Works order as a whole.

(B) If the works be delayed:

(a) by reason of non-availability of Government stores mentioned in Schedule 13; or

(b) by reason of non-availability or breakdown of Govt. Tools and Plant mentioned in Schedule 'C' then, in any such event, notwithstanding the provisions hereinbefore contained, the G.E. May in his discretion, grant such extension of time as may appear reasonable to him and the Contractor shall be bound to complete the works within such extended time. In the event of the Contractor not agreeing to the extension granted by the Garrison Engineer, the matter shall be referred to the Accepting Officer (or CWE in case of contract accepted by Garrison Engineer) whose decision shall be final and binding.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted."

15. Clause 62(G) of the Contract states as under:

(G) For all Contracts -

If any work, the rate for which cannot be obtained by any of the methods referred to in paras (A) to (E) above, has been ordered on the contractor, the rate shall be decided by the G.E. On the basis of the cost to the Contractor at Site of Works plus 10% to cover all overheads and profit. Provided that if the contractor is not satisfied with the decision of

the G.E. He shall be entitled to represent the matter to the C.W.E. Within seven days of receipt of the G.E.'s decision and the decision of the C.W.E. Thereon shall be final and binding.

If any alterations or additions (other than those authorised to be executed by day work or for an agreed sum) have been covered up by the Contractor without his having given notice of his intention to do so, the Engineer-in-Charge shall be entitled to appraise the value thereof and in the event of any dispute the decision of the G.E. Thereon shall be final and binding.

16. *In the present case it is apparent that the delay in the execution of the contract was solely due to the default of the respondents. In this connection we may refer to the following facts.*

(1) The Assistant Garrison Engineer sent letter dated 21.06.1988 admitting suspension of works of beams & of main roof slab building, due to non-finalization of design.

(2) The user of the building i.e. NPOL directed stoppage of many items of work pending their final decisions on them by letter dated 17.09.1988.

(3) On 26.9.1987 the appellant notified the respondents about the idling due to non-finalization of various structural particulars, and demanded compensation. 'The appellant again sent notice dated 9.2.1988 intimating the respondent about idling at the site and losses due to non-finalization of designs and particulars. The Assistant Garrison Engineer sent a letter on 21.6.1988 admitting suspension of works of beams and of main roof slab building due to non-finalization of design.

(4) On 17.9.1988 the user of the building i.e. NPOL directed stoppage of many items of works pending their final decision on them. Also, by letter dated 26.9.1988 respondent No. 3 directed stoppage of construction of many items of work pending their final decision on structural particulars.

(5) On 10.11.1988 respondent No. 3 intimated unconditional grant of extension of time from 8.9.1988 to 31.1.1989 by respondent No. 2.

(6) The appellant by letter dated 24.11.1988 requested respondent Nos. 2 & 3 to settle accounts of the value of the works already carried out, to make payment in terms of the agreement and to close the agreement due to continued suspension of works and increased cost of construction due to efflux of time so as to arrange the remaining works through separate work orders

(7) The Assistant Garrison Engineer of respondent No. 3 sent a letter dated 11.10.1989 assuring the petitioner to settle rates across the table and directed to carry out such items, agreeing to take up objections as to rates, for settlement by the appropriate authority.

(8) Respondent No. 3 on 23.11.1990 wrote to: the appellant directing it to forward paid vouchers for items to take up the objections as to rates before the respondent No. 2. who was the Accepting Officer.

(9) The last bill amount of Rs. 7,87,143/- was paid by respondent No. 3 which was received by the appellant under protest.

(10) The appellant issued demand notice for. payment of Rs. 1,24,58,108/- being the unpaid amount allegedly due and payable to it.

All the above facts show the repeated defaults by the respondents due to which the contract could not be completed in time.

17. The letter dated 24.11.1988 makes it clear that the appellant was not ready to carry out the work beyond the contracted period otherwise than on separate work orders, and the subsequent correspondence like the letter dated 11.10.1989 makes it clear that it was on the specific assurance given by the respondent to the appellant to continue the work and that the rates would be decided across the table that the appellant went ahead with the work. Hence, in our opinion it is now not open to the respondent to contend that no claim for further amount can be made due to Clause 11(C) and that the arbitrator would have no jurisdiction to award the same.

21. Apart from the above, it has been held by this Court in Board of Trustees, Port of Calcutta v. Engineers-De-Space-Age [MANU/SC/0735/1996](#) : (1996) 1 SCC 516, that a clause like Clause 11 only prohibits the department from entertaining the claim, but it did not prohibit the arbitrator from entertaining it. This view has been followed by another Bench of this Court in Bharat

Drilling & Treatment Pvt. Ltd. v. State of Jharkhand and Ors. in Civil Appeal No. 10216 of 2003 decided on 20th August, 2009.

25. The learned counsel appearing for contractor also placed reliance upon the Judgment of Supreme Court in case of General Manager (Northern Railway) Vs. Chopra reported in 2002 (4) SCC 45 and more particularly para 15 which reads thus :

15. In our country, question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is “ of the essence” of an obligation, Chitty on Contracts (28th Edn., 1999, at p.1106, para 11-015) states

“ a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')”.

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, “ unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by

entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

26. The learned counsel made an attempt to distinguish the Judgment of Supreme Court in case of **Ramnath International** (Supra) and Judgment of Division Bench of this Court in case of **Union of India Vs. Arctic India** (supra). The learned counsel submits that in the matter before the Supreme Court in case of **Ramnath**, a finding was rendered that contractor as well as employer were both responsible. In respect of the Judgment of Division Bench of this Court in case of **Union of India Vs. Arctic India**, the learned counsel submits that the clause interpreted by this Court was different and not identical to Clause 11(a) to (C) which was interpreted by the learned arbitrator in this matter.

27. It is submitted that in any event, the learned arbitrator as well as the District Judge interpreted Clause 11 (A) to (C) and has rendered a finding that the UoI was solely responsible for prolongation of contract and thus the claim for compensation awarded by the learned arbitrator was not contrary or in teeth of Clause 11 of GCC and such finding cannot be interfered with by this Court under Section 37 of the Act. It is submitted that in any event, the interpretation of the learned arbitrator in respect of Clause 11 (A) to (C) is a possible interpretation and thus this Court shall not substitute the view of the learned arbitrator by taking a different view.

28. The learned counsel submits that the case of the contractor in this case would be governed by the principle laid down by the Supreme Court in case of **Sarvesh Chopra** (supra). It is submitted that contractor had demanded compensation in its request for extension of time and such request with such demand was granted by the UoI. The UoI having accepted the work carried out during the extended period, thus could not reject the claim placing reliance upon Clause 11 (A) to (C) of the GCC. Clause 11 (A) to 11 (C) of GCC is extracted as under :

11. Time, delay and Extension : --

(A) Time is of the essence of the Contract and is specified in the contract documents or in each individual Works Order.

As soon as possible after Contract is let or any substantial Works Order is placed and before Work under it is begun, the G.R. and the Contractor shall agree upon a Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between the G.E. And the Contractor within the limitation of time imposed in the contract documents or Works Order. If the Works be delayed : -

- (i) by force majeure, or
- (ii) by reason of abnormally bad weather, or
- (iii) by reason of serious loss or damage by fire, or
- (iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or
- (v) by reason of delay on part of nominated sub-contractors, or nominated suppliers which the Contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or
- (vi) by reason of delay on the part of Contractors or tradesmen engaged by Government in executing works not forming part of the contract, or
- (vii) by reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control ; then, in any such case the Officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of Works for which separate periods of completion are

mentioned in the contract documents or Works Order, as applicable.

Upon the happening of any such event causing delay, the Contractor shall immediately, but not later than 30 days of the happening of the event, give notice thereof in writing to the G.E. But shall nevertheless use constantly his best endeavour to prevent or make good the delay and shall do all that any reasonably be-required to the satisfaction of the G.E. To proceed with the Works, Extension of time shall be granted as under :

- (a) by G.E. for all Terms Contracts ;
- (b) by Accepting Officer of the contract for all other Contracts.

In case the Contractor fails to notify the G.E. Of happening of an event(s) causing delay within the period of 30 days stipulated in sub-para 3 above, he shall forfeit his right to claim extension of time for delay caused due to such event(s).

Extension of time, as granted above, shall be communicated to the Contractor by G.E. In writing and shall be final and binding. PROVIDED THAT in the case of contracts (other than Term Contracts) accepted by the G.E., in the event of the Contractor not agreeing to the extension granted by the G.E., the matter shall be referred to the C.W.E. Whose decision shall be final and binding.

(B) If the Works be delayed : -

- (a) by reason of non-availability of Government stores shown in Schedule 'B'; or
- (b) by reason of non-availability or breakdown of Govt. Tools and Plant listed in Schedule 'C';

then, in any such event, notwithstanding the provisions hereinbefore contained, the Accepting Officer may in his discretion grant such extension of time as may appear reasonable to him and the same shall be communicated to the Contractor by the G.E. in writing. The decision so communicated shall be final and binding and the Contractor shall be bound to complete the works withing such extended time.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted.

29. Perusal of the correspondence relied upon by both the parties on record of these proceedings indicates that amongst other reasons, the contractor had applied for extension of time on the ground that the UoI had

not made available the stores under Schedule-B of various steel sections. The UoI while granting extension in the letters which are placed on record clarified that no claim for compensation would be entertained by the Government on this count in granting extension. It was also clarified that it was an express condition agreed to by both the parties thereto and all other conditions of contract agreement shall still hold good. Be that as it may, even if such note was scored off and that it was without any initial on the scored portion, fact remains that the original provisions of the contract are not given a go-by and would still hold good and were binding till completion of the contract.

30. Perusal of the award indicates that the learned arbitrator while allowing Claim 2(A) @ 10% towards overheads has in para 60.10.1(g) observed that the delay was attributable to the UoI and most of the reasons were not covered under condition 11(A) or 11(B). In para 60.10.2, the learned arbitrator observed that under Condition 11(C) claim in respect of compensation or otherwise as a result of extension granted under Condition 11(A) or 11(B) could not be admitted by the Accepting Officer but there was not bar against the arbitrator from awarding such compensation. The learned arbitrator on such premise proceeded to allow compensation @ 10% without any evidence on record. It is not in dispute that the contractor did not lead any evidence to prove the loss if any, towards overheads suffered by the contractor before the learned arbitrator.

31. In my view, the reliance placed by Mr Kumbhakoni the learned counsel appearing for the contractor on the judgment of this Court in case of UoI Vs. Moti Enterprises (supra) is of no assistance to the contractor. The learned arbitrator in the impugned award in the said matter had rendered a finding that out of total 6 months delay, 5 months delay was on account of consideration which did not fall within the purview of condition 11(A) or (B) and for which condition 11(C) would not attract. In those facts, this Court took a view that such finding of fact and the interpretation of the learned arbitrator could not be interfered with under Section 34 of the Arbitration & Conciliation Act, 1996. However, in this case it is clear that the extension was necessitated and applied for also on the ground that the UoI had not supplied the Schedule-B material from the stores and which was one of the reason of extension provided under Clause 11(B) of the GCC. The learned arbitrator though rendered a finding that for most of the reasons that were not covered under Clause 11(A) or 11(B), the consequence of condition 11 (C) was not attracted, did not apportion the delay covered by the reasons set out under condition 11(A) or 11(B) in respect of which no compensation was payable and the reasons outside the conditions mentioned in Clause 11(A) or 11(B). In my view, if according to learned arbitrator some reasons causing delay on the part of UoI were outside condition 11(A) or 11(B), the learned arbitrator ought to have apportioned the reasons covered under Condition 11(A) or 11(B) and other than those conditions and could have considered the claim for compensation only for delay attributable on the part of UoI for the reasons not forming part of condition 11(A) and 11(B). The learned arbitrator, however, did

not bifurcate and/or apportion the delay and awarded compensation @ 10% per annum on the entire amount.

32. There is another reason as to why the judgment delivered by the learned single Judge of this Court in case of **UoI vs. Moti Enterprises** (supra) is of no assistance to the contractor is in view of the interpretation of the same clause by the Supreme Court in judgment delivered subsequent in point of time in case of **Ramnath International** (supra). Similarly, in my view the judgment of the Supreme Court in case of **Asian Techs Limited** (supra) cited by the learned counsel Mr Kumbhakoni is of no assistance to the contractor. The judgment of Supreme Court in case of **Ramnath International** (supra) was not cited before the Supreme Court in that matter. The Supreme Court judgment in case of **Asian Techs Limited** (supra) has considered a situation where specific assurance was given by the UoI to the contractor to continue the work and that the rates would be decided across the table and only on such assurance, the contractor went ahead with the work. In the facts of that case, the Hon'ble Supreme Court took a view that it was therefore not open to UoI to contend that no claim for further amount would be due under clause 11(C) or that the arbitrator would have no jurisdiction to award the same. The Supreme Court also considered another judgment of Supreme Court in case of **Port of Calcutta v. Engineers-De-Space-Age reported in (1996) 1 SCC 516**. It would be relevant to refer to Clause considered by the apex Court in case of **Port of Calcutta** (supra) to appreciate the controversy before the Supreme Court in that matter. Clause 13(g) of the contract which was under

consideration of the Supreme Court reads thus :

No claim for interest will be entertained by the Commissioners with respect to any money or balance which may be in their hands owing to any dispute between themselves and the Contractor or with respect to any delay on the part of the Commissioners in making interim or final payment or otherwise.

Considering the aforesaid clause, the Supreme Court took a view that such clause would prohibit only the Commissioner from awarding the claim for interest made by the contractor and would not prohibit the arbitrator from awarding such claim. However, Clause 11(C) of contract in question, in my view, does not provide for any such bar only against officer of UoI but prohibits entitlement of claim and thus binds arbitrator also. In my view thus the judgment of Supreme Court in case of Asian Techs Limited (supra) is of no assistance to the contractor. The learned arbitrator was thus bound to decide in accordance with terms of the contract and not de hors its.

33. From the perusal of the award, it is clear that the contractor had not lead any oral or documentary evidence in support of the claim for damages. The learned arbitrator has allowed the claim @10% without any evidence. The award on this ground also is contrary to law. The award made by the learned arbitrator is based on no evidence and on this ground also, the same deserves to be set aside. I am of the view that the claim for loss of overheads awarded by the learned arbitrator was contrary to the specific terms of the contract and the learned arbitrator has exceeded his jurisdiction by allowing

the claim prohibited under the contract and thus, the award is in conflict with public policy and thus this part of award deserves to be set aside and is ordered accordingly.

34. As far as judgment of Supreme Court in case of **General Manager (Northern Railway)** (supra) relied upon by the contractor had in support of the proposition that the contractor reserved his right to claim compensation for loss occasioned by non performance of the reciprocal obligation by UoI while seeking extension and the UoI having granted extension without denying the claim of compensation, contractor become entitled to claim compensation under Section 55 of the Contract Act is concerned, on perusal of the judgment of Supreme Court, it is clear that the proceedings were filed under Section 20 of the Arbitration Act 1940 for referring dispute to arbitration. The question before the Hon'ble Supreme Court was as to whether any of the claims made by the contract was covered by "excepted matters" and thus were not arbitrable. While considering the said aspect, the Supreme Court also made observation on the effect of the contractor making a demand for compensation and the employer having accepted performance by the contractor in spite of delay and such notice, contractor become entitled to get compensation under Section 55 and 56 of the Indian Contract Act 1972.

35. Considering the facts of this case, however, it is clear that though the contractor had made such claim which was at the first instance contrary to Clause 11(C) of GCC, the UoI however, while granting extension, had made it

clear that no compensation on that count would be paid by the UoI to the contractor. In my view, the said paragraph of the judgment in case of **General Manager (Northern Railway)** (Supra) has to be read in that context and thus, the same is of no assistance to the contractor.

36. The next submission of Mr Rajguru, the learned counsel appearing for UoI is that the Award of Rs. 8,33,385/- under Clause 2(b) towards reimbursement of loss of contemplated profit sustained for deletion of the profitable scope of work under Schedule 'A' is also in teeth of the provisions of contract and thus, District Court ought to have interfered with this part of award made by the learned arbitrator under Section 34 of the Act. The learned counsel submits that in any event, some of the items were omitted due to administrative reasons which amounts to less than 2% of the contract amount. On the other hand, the learned counsel appearing for the contractor submits that the contract awarded to the contractor being in nature of lum-sum work with firm items, the contractor suffered loss of the expected profit which has been rightly considered by the learned arbitrator. In rejoinder, Mr Rajguru submits that the contractor did not lead any evidence to prove the loss suffered by the contractor @ 10% as awarded by the learned arbitrator.

37. On perusal of the impugned award, and more particularly para 61.1 to 61.3.2, it is clear that the learned arbitrator has considered 10% towards expected profit in respect of item A amounting to Rs.8,33,385.15 though rejected the claim in respect of items forming part of Schedule A II

and XII. The award indicates that no evidence was led by the contractor in respect of the expected loss or profit by deletion of such items by the UoI by exercising its rights under Clause 7 of the GCC. In my view, this part of award is based on no evidence and can be severed from the other part of the award and is set aside.

38. Next submission of Mr Rajguru is that learned arbitrator has awarded claim of Rs.6 lacs towards reimbursement of cost alleged to have been incurred towards bank charges and commission of Rs.26.50 lakhs for keeping the guarantees alive during the period 1998 till 2003. The learned counsel submits that the contractor was under obligation to keep the bank guarantee alive till payment of final bill and thus the claim awarded by the learned arbitrator is in teeth of the provisions of the contract. On the other hand, learned counsel appearing for the contractor submits that UoI was responsible in not finalising the final accounts under condition 66 of GCC and as a result thereof, the contractor was required to extend the bank guarantee time and again for which UoI was solely responsible.

39. Perusal of the award indicates that the learned arbitrator has allowed bank guarantee charges of Rs.6 lakh for the period from 1998 to 2003. The learned arbitrator has rendered a finding that due to various breaches committed by the UoI, completion of work was delayed and UoI has delayed finalization of deviation orders which resulted into delay in finalization of final bill and the Claimant had to keep the bank guarantee valid till actual

date of completion and reasonable period thereafter till 2003. The learned arbitrator took a view that the work was completed on 20th April 1997 and the bill ought to have been paid by UoI by December 1997 and the bank guarantee ought to have been released by same date. In my view, the UoI was responsible in finalising the bill from 1998 till 2003, hence contractor was not bound to renew the bank guarantee at his own cost till finalization of the bill. UoI ought to have finalised the bill within reasonable time. The learned arbitrator has not awarded charges for keeping the bank guarantee alive till the completion of work or till December 1997 by which date, according to learned arbitrator, such bank guarantees ought to have released by the UoI to the contractor, the work having been completed on 20th April 1997. In my view, finding of the learned arbitrator is not perverse and thus, the learned District Court has rightly not interfered with this finding of the learned arbitrator. In my view, no interference is warranted under Section 37 of the Act in respect of this claim awarded by the learned arbitrator and rejected by the District Court.

40. In so far as claim for award of interest is concerned, the learned counsel appearing for UoI submits that the learned arbitrator could not have awarded interest @ 18% per annum on Claim No.1 from 1st January 1998 to 25th July 2003. Perusal of the impugned award shows that the learned arbitrator has awarded simple interest @ 18% per annum on principal amount of Rs.13,71,000/- from 1st January 1998 to 25th July 2003 i.e. till expiry of expected date of payment i.e. December 1997 till 25th July 2003 and

thereafter @ 12% per annum on the said principal amount of Rs.13,71,000/- till the date of award. The learned arbitrator awarded interest @ 12% per annum on all the awarded amounts from the date of award till payment. It is thus clear that learned arbitrator has not awarded any interest on the claim for compensation for the past period. In my view, under Section 31(7)(a) of the Arbitration and Conciliation Act, the learned arbitrator is empowered to grant interest at such rate as he deems reasonable for whole or any part of money or for such period as he deems from the date of cause of till the award is made. In my view, the learned arbitrator having exercised his discretion and having awarded interest at different rates, no interference is warranted under Section 37 of the Act. It is however, made clear that in respect of the claims which are set aside by this order, interest corresponding to those claims also are set aside. In so far as counter claim made by the UoI is concerned, the learned arbitrator has rejected the counterclaim made by the UoI in para 65 to 68.6.6 of the impugned award, by rendering various findings. The learned counsel appearing for UoI could not demonstrate as to how such findings recorded by the learned arbitrator were perverse and warranted any interference by the District Court under Section 34 and by this Court under Section 37. In my view, the findings recorded by the learned arbitrator, being not perverse, the learned District Court was right in rejecting the challenge to the rejection of counterclaim made by UoI. I, therefore find no merits in the submission made by Mr Rajguru that the learned arbitrator has not dealt with the counterclaim or else erroneously rejected the same.

41. In the result, the appeal partly succeeds. I, therefore pass the following order.

- (i) Claim No.1 and Claim No.2-C are upheld.
 - (ii) Claim No.2-A, Claim No.2-B are set aside.
 - (iii) The contractor would be entitled to interest @ 18% per annum on Claim No.1 from 1st January 1998 to 25th July 2003 and @ 12% per annum on the principal amount from 26th July 2003 till payment.
 - (iv) The contractor would also be entitled to claim interest @ 12% per annum from the date of award on Claim No.2-C till payment.
 - (v) Interest awarded by the learned arbitrator on Claim Nos.2-A and 2-B is set aside.
- Appeal is disposed of in aforesaid terms.
There shall be no order as to costs.

In view of the above, Civil Application No. 10 of 2009 stands disposed of as infructuous.

(R.D. DHANUKA,J.)