ORISSA HIGH COURT : C U T T A C K

ARBA NO.18 OF 2004

An Appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996

Mahanadi Coalfields Ltd. : Appellant

-Versus-

M/s.S.K.Samant & Co. Ltd. & another : Respondents

For appellant : M/s.J.Patnaik, Sr.Advocate,
& S.Mohanty

For respondent no.1 : M/s.S.P.Mishra, Sr.Advocate,
S.K.Mohanty, B.Mohanty,
M.R.Samantray, B.S.Panigrahi,
N.K.Sahoo, N.Srinivas, S.Dash &
P.Choudhury

For respondent no.2 : None

PRESENT:-

THE HONOURABLE MR. JUSTICE BISWANATH RATH

Date of Hearing : 02.08.2019 & Date of Judgment : 22.08.2019

Biswanath Rath, J. This Appeal involves a challenge to the judgment of the learned District Judge, Sambalpur involving the Arbitration Petition No.13 of 2003 in exercise of power under Section 34 of the Arbitration and Conciliation Act, 1996 (herein after called as "the Act, 1996"), where the learned District Judge while dismissing the

Arbitration Petition was not inclined to interfere with the award of the Arbitrator dated 2.6.2003.

2. Short background involving the case is that the appellant is the Company, a subsidiary Coal India Limited, which invited tender for the work of design, supply, fabrication, erection and commission of "Unit Train Loadout System with Pyjama Chute" on turnkey basis for Belpahar CHC. Considering the tender application and upon entering into negotiation process, the offer of respondent no.1-Contractor was found suitable. As a consequence of decision of the Company, letter of intent was issued to respondent no.1, the Contractor along with detailed work order on 3.2.1997. A formal agreement was also executed between the Contractor and the Company on 6.6.1997 requiring the work to be completed within fifteen months from the date of handing over of the site or 10th day of the issue of work order, whichever was later. It is the admitted case that the site was handed over on 25.2.1997 and the scheduled date of completion, as agreed by the parties, was 24.5.1998. A dispute having arisen between the parties in connection with the agreement and on the request being made on the terms of the contract, the Mahanadi Coal Field Ltd. being the Appointing Authority appointed Sri L.K.Srivastava, the proforma respondent, as Arbitrator, to arbitrate the dispute involved therein. The arbitration proceeding was concluded by passing an award in

favour of the Contractor on 2.6.2003 thereby directing the Company to pay the Contractor a sum of Rs.65,40,322.11 on different counts but as a whole. The Company, as petitioner being aggrieved by the award of the Arbitrator filed an application before the learned District Judge, Sambalpur under the provision of Section 34 of the Act, 1996. The District Judge, Sambalpur by his judgment and order dated 29.4.2004 was pleased to dismiss the Arbitration Petition No.13/2003 resulting the Company, as appellant, preferring the present Arbitration Appeal, an Appeal under Section 37(1)(b) of the Act, 1996.

This Court here likes to take into account of certain facts involving the contract involved herein and also relevant provisions, which are necessary for adjudication of the dispute involved in the proceeding before the Arbitrator.

3. Both the company and the contractor entered into an agreement for the work of design, supply, fabrication, erection and commissioning of unit train load-out system for Belpahar Coal Handling Plant 3.5 Mty capacity in I.B Valley area. Relevant conditions involving the agreement between the parties are as such.

Condition No.2.1.6 deals with Security Deposit.

Condition No.2.1.6.1. reads as follows:

> "The total security deposit including Earnest money already deposited shall be 5%

> (five percent) of the contract value or the revised contract value, if any. The contractor shall deposit, immediately but within 30 days after receipt of Letter of Acceptance of tender, the balance of 1% of awarded value after adjustment of the Earnest Money already paid as initial security deposit. Failure to do so shall entail cancellation of the letter of acceptance of tender/award of work & forfeiture of Earnest Money Deposit. The balance amount of security deposit shall be recovered from first four or less running on account bills of the contractor for the work done under the contract and shall remain at the disposal of the company as security for the satisfactory execution and completion of the work in accordance with the provision of the contract/work order. The security deposit amount shall not carry any interest."

Condition No.2.1.11 deals with the Performance Guarantee, which reads as follows:

> "As a contract security, the Contractor shall be required to furnished a Performance Gurantee as per Proforma annexed for a sum equivalent to 10% of Contract Price (including 5% Security Deposit already furnished) from any Nationalized Indian Bank for the faithful performace of the contract in accordance with the terms and conditions and technical specifications specified in the contract.
>
> The performace guarantee shall remain valid till the expiry of 6 months after the end of the maintenance period. All costs in this respect shall be borne by the Contractor. No interest will be paid on any gurantee money. In the event of failure to fulfill the contract requirement, the company will be at liberty to forfeit the said amount without prejudice and other rights and remedy."

Condition No.2.1.14 deals with time of Completion of Contract, Extension thereof, Defaults and Penalties, which reads as follows:

> "2.1.14.1. Time is the essence of the Contract and as such all works shall be completed within the time stipulated in the Contract/work order.
>
> 2.1.14.2. Immediately after the Contract is executed/the work order is issued, the Engineer-In-Charge and the Contractor shall agree upon a detailed time and Progress Chart prepared in the form of BAR Chart/PERT CPM techniques on the basis of a construction schedule to be submitted by the Contractor showing the order in which the work is proposed to be carried out within the time specified in the Contract documents/work order. For the purpose of this time and progress chart, the work shall be deemed to have commenced on the expiry of 10(ten) days from the issue of Letter of Acceptance of tender/work Order or handing over the site of Work to the Contractor, whichever is later.
>
> 2.1.14.3. If the Contractor, without reasonable cause or valid reasons, commits defaults in commencing the execution of the work within the aforesaid time limit, the Company shall, without prejudice to any other right or remedy, be at liberty, by giving 15 days Notice in writing to the Contractor to commence the work, and to forfeit the Earnest Money deposited by him and to rescind the Letter of Acceptance of Tender/work order.
>
> 2.1.14.4 In the event of the Contractor's failure to comply with the rate of progress as per the agreed time and progress chart, the Contractor shall be liable to pay as compensation @1% of the Contract Value of the said part of the work per week that the balance quantity of the said part remains incomplete. The aggregate of such compensation / compensations shall not

exceed 10 percent of the total value of work as shown in the contract.

2.1.14.5. The Company may at its sole discretion, waive the payment of compensation on request received from the contractor indicating valid and acceptable reasons if the entire work is completed within the date as specified in the Contract/Work order or as validly extended date without stipulating any penalty to the Contractor.

2.1.14.6. If the progress of the work or of any portion of the work is unsatisfactory, the Engineer-In-Charge shall be entitled, after giving the Contractor 15 days Notice in writing, to employ another agency for executing the job or to carry out the work departmentally, either wholly or partly debiting the contractor with the cost involved in the engaging another agency or the cost involved in executing the work departmentally or as the case may be. The certificate to be issued by the Engineer-In-Charge for the cost of the work so done shall be final and conclusive and the extra cost if any shall be borne by the Contractor."

Condition No.2.1.15 deals with Extension of Date of Completion, which reads as follows:

"2.1.15.1. On happening of any event causing delay as stated here under, the Contractor shall intimate immediately in writing to the Engineer-In-Charge:-

a) Force Majeur – i)Nature phenomena, including but not limited to abnormally bad weather, unprecedented flood and draught, earth-quakes & epidemics, (ii) Political Upheaval, Civil commotion, Strikes, Lockouts, acts of any Govt. (domestic/foreign) including but not limited to war, proprieties,
b) Serious loss gr damage by Fire.

c) Non-availability of stores which are the responsibility of the Company to supply as per contract.
d) Non-availability of working drawings in time, which are to be made available by the Company as per contract during progress of the work.
e) Delay on the part of the Contractors or tradesmen engaged by the Company not forming part of the contract, holding up further progress of the work.
f) Non availability or breakdown of tools and plant to be made available or made available by the Company.
g) Execution of any modified or additional item of work of excess quantity of work.
h) Any other causes which, at the sole discretion of the Company, are beyond the control of the Contractor.

2.1.15.2. A Hindrance Register shall be maintained by both Department and the Contractor at Site to record the various hindrances, as stated above, encountered during the course of execution.

The Contractor shall request the Company in writing for extension of time within 15 days of happening of such event causing delay stating also the period for which extension is required. The Company may considering the genuineness of the request, give a reasonable extension of time for completion of the work. Such extension shall be communicated to the Contractor in writing by the Company through the Engineer-In-Charge within 1 month of the date of receipt of such request.

2.1.15.3. The opinion of the Engineer-In Charge, whether the grounds shown for the extension of time are or are not reasonable is final. If the Engineer-In-Charge is of the opinion that the grounds shown by the Contractor are not reasonable and declines to the grant of extension to time, the contractor can challenge the soundness of the opinion by reference to CGM(Civil)/GM/(Construction)/GM/(E&M).

2.1.15.4. The opinion of the Engineer-In-Charge that the period of extension granted by him is proper or necessary is not; however, final. If the Contractor feels that the period of extension granted is inadequate he can appeal to the CGM(Civil)/GM(Civil)/GM(E&M) of the Company for consideration on the question whether the period of extension is or is not proper or necessary.

2.1.15.5. Provisional extension of time may also be granted by the Engineer in charge during the course of execution, on written request for extension of time within 15 days of happening of such events as stated above, reserving the Company's right to impose/waive penalty at the time of granting final extension of time as per Contract Agreement.

2.1.15.6. When the period fixed for the completion of the contract is about to expire, the question of extension of the contract may be considered at the instance of the contractor or the Department or both. The extension will have to be bi party agreement, expressed or implied.

2.1.15.7 The Contractor shall however use his best efforts to prevent or make good the delay by putting his endeavours constantly as may be reasonably required of him to the satisfaction of the Engineer-In-Charge.

Condition No.2.1.35 deals with completion of Certificate, which reads as follows:

"2.1.35.1. Except in cases where the contract provides for "Performance Test" before issue of Completion Certificate, in which case the issue of Completion Certificate shall be in accordance with the procedure specified therein, the Contractor shall give notice of completion of work, as soon as the work is completed, to the Engineer-In-Charge. The Engineer-In-Charge and or any other Officer

nominated for the purpose by the Company shall within 30 days from the receipt thereof inspect the work and ascertain the defects/deficiencies, if any, to be rectified by the Contractor as also the items, if any, for which payment shall be made at reduced rate.

If the defects, according to the Engineer-in-charge are of a major nature and the rectification of which is necessary for the satisfactory performance of the contract, he shall intimate in writing the defects and instruct the Contractor to rectify the defects/remove deficiencies within the period and in the manner specified therein. In such cases completion Certificate will be issued by the Engineer-in-Charge after the above rectification are carried out/deficiencies are removed by the Contractor to the satisfaction of the Engineer-in-Charge.

In the event there are no defect or the defects/deficiencies are of a minor nature and the Engineer-in-Charge is satisfied that the Contractor has already made arrangements for rectification, or in the event of Contractor's failure to rectify the defects for any reason whatsoever, the defects can be rectified by the Company departmentally or by other means and the 50% of the Security Deposit of the Contractor shall be sufficient to cover the cost thereof, he shall issue the Completion Certificate indicating the date of completion of the work, defects to be rectified, if any, for which payment shall be made at reduced rate indicating reasons therefor and with necessary instructions to the Contractor to clear the Site/place of work or all debris/waste materials, scaffoldings, sheds, surplus materials etc. making it clean.

2.1.35.2. In cases where separate periods of completion for certain items or groups of items are specified in the contract, separate Completion Certificate for such item or groups of items may be issued by the Engineer-in-charge after completion of such items on receipt

> of notice from the Contractor only in the event, the work completed satisfactorily in every respect.
>
> Refund of Security Deposit and payment of Final Bill shall, however, be made on completion of the entire contract work, but not on completion of such items of work.

Condition No.2.1.49 deals with Security Lights, Security Guards, which reads as follows:

> "The Contractor shall, in connection with works, provide & maintain, at his own cost, all lights, Security Guards, fencing when & where necessary as required by the Engineer-in-Charge for the purpose of protection of the works, materials at site safety of workmen & convenience of the public."

Condition No.2.1.52 deals with Settlement of Disputes (Arbitration), which reads as follows:

> "If any dispute or difference of any kind whatsoever shall arise between the Company or the Engineer and the Contractor in connection with or arising out of the contract or for the carrying out of the works (whether during the progress of the works or after the Termination, Abandonment or breach of this contract), it shall be referred to and settled by an Officer nominated by the CMD or DIC of the Company. The Officer so nominated will not be disqualified being an Officer of the Company. The request for appointment of the Arbitrator can be made within 90 days of the cause of action and any request made thereafter cannot be entertained."

4. Similarly there are some important conditions in the Special conditions of Contract.

Condition No.3.1.6 deals with preliminary acceptance & start up, which reads as follows :-

> "a) Upon satisfactory completion of erection, the Company, the Prime Consultant and Contractor's representative shall jointly make record thereof that the PLANT/SECTION is ready for commissioning and preliminary acceptance tests under NO LOAD conditions.
>
> The preliminary acceptance tests shall be carried out to determine that the PLT/SECTION has been erected as per design meeting the duty requirements and is capable of taking coal for START-UP.
>
> b) The Company shall not, withhold the Certificate of Preliminary Acceptance for minor omissions or defects which do not impair the START-UP of the plant, provided that the Contractor shall undertake to make good such omissions and defects promptly.
>
> c) Upon issue of the PRELIMINARY ACCEPTANCE CERTIFICATE the Company shall supply all necessary Coal, utilities and operational/ maintenance staff as required for commissioning, start-up and performance gurantee tests, provided that the initial fill of all lubricants and necessary tools and tackles will be Contractor's responsibility.
>
> Procedure of conducting the preliminary acceptance test under NO LOAD condition shall be as under:
>
> i) Individual mechanical equipment will be run for one hour without load for testing its proper balancing, vibration and noise features and necessary suitable adjustments for rectification of teething trouble will be done for smooth running of the equipment.

ii) By trial runs of complete equipment the temperature rise of its bearings and other parts associated with it will be tested.

iii) Group running of equipment will be done for testing its sequence operation including the time lag for matching the stipulated objective of the entire system. This synchronizing of all the Mechanical/Electrical / Electronic equipment is a very important feature and will ensure theoretical time lag and Operation sequence of all Electrical/ Mechanical/ Electronic equipment."

Condition No.3.1.7 deals with final acceptance test, which reads as follows:

"The Contractor, after giving one months notice to the Company shall conduct Performance Gurantee Tests in the presence of such Company's representatives who are present during the Test Runs and in the manner described below:

a) For each major equipment as may be defined in the contract 24 hours operation at rated capacity as measured on the input and output side of the equipment. This 24 hours shall consist of six consecutive tests.

During each shift a non-stop performance test of four hours duration should be made.

b) For each major equipment as may be defined in the contract and required to give variable capacity, 12 hours at 75% load in spread over period of three consecutive tests with non-stop performance test of four (4) hours in each test the intervening period being available for making adjustment and arrangement as may be required.

c) In all the above tests the size of input, size of output, quantity of input, quantity of output of the coal as may be relevant and

consumption of lubricant and power and any other relevant feature peculiar to the equipment as may be specified under the provision of the contract, will be measured by the Contractor at his cost. A report shall be prepared by the Contractor comprising of observations and recording of various parameters as above. The report besides recording the details of the various observations, shall also include the date of start and fining of the Test Run and shall be signed by the representatives of all the parties. The report shall have sheet recording all the details of interruptions occurred, adjustments made and any minor repair done during the Test Run. Based on the observations, necessary modification/repairs to the plant/ equipment shall be carried out by the Contractor to the full satisfaction of the Company.

d) If during the Test run there is an interruption exceeding 2 hours due to any cause, the Test run will be discontinued and fresh date will be decided mutually by all the parties.

e) If the guarantee in respect of operational parameter of each equipment/ system are not fulfilled, the contractor will be given an opportunity to rectify or remove the causes of such failures at their cost within 60 (sixty) days. In the event, of the cause not being removed within the specified time the Company may at his discretion reject the equipment or accept it and ask the Contractor to compensate the Company by an amount to be decided reasonably by the Company.

f) After the construction of the entire plant has been completed the Contractor shall offer the Final Guarantee Test Run for the entire plant and equipment supplied for a period of 30 days, in terms of Cl.3.1.7(a) & (b) above, and satisfy the Company/the prime consultant that the plant during the period

can fulfill the gurantee performance in respect of hourly, daily and annual capacity and the requirements and any other specific features in terms of Specification and the contract. The cumulative time lost, if any during the test run due to any reason beyond the control of the contractor, shall be limited to maximum of 10 days i.e. period of Test run out of 30 days shall be extended by a max. of 10 days only. Thus making the total test run not exceeding 40days.

g) On successful completion of the Gurantee Test Runs under any of the clauses above, a Certificate will be signed and handed over by the Company in respect of each equipment/ circuit referred to under Clauses (a) to (c) above. On completion of the test Run at Sub-clauses (f) above, the parties will jointly sign a Handing over and Taking over report within 15 days of the completion of the Test runs.

Notwithstanding the issue of Final Acceptance Certificate, the Contractor and the Company shall remain liable for the fulfillment of any obligation incurred under provision of the contract which remain un-performed at the time of issue of such certificates, and for the purpose of determining the nature and the extent of any such obligation under the contract shall remain in force between the parties.

All equipment shall have metal name plates fixed in suitable position with full particulars engraved thereon."

5. For involvement of a dispute between the parties arising out of a contract under the condition of 2.1.52, a dispute was raised by the Contractor seeking arbitration of the dispute involving the

items raised therein requiring resolving of the same through the arbitration. As a consequence and as per the precedent, the Company appointed the Arbitrator. Parties being noticed on appointment of the Arbitrator more particularly the Contractor submitted its statement of claim before the Arbitrator on 7.11.2002. For the pleadings made therein, the Contractor made the following claims :

> "The Claimant claims:-
>
> (a) An award for Rs.2,62,815.21 in connection with the first Contract;
> (b) An award for Rs.1,11,85,035.00 in connection with the first Contract;
> (c) An award directing the Respondent to release and/or make over to the Claimant the Bank Guarantee instrument bearing No.8/1998-99 dated 17.09.1998 for Rs.45,88,100.00 in connection with the first Contract;
> (d) An award for Rs.7,38,295.81 in connection with the second Contract;
> (e) An award for Rs.1,11,75,982.00 in connection with the second Contract;
> (f) An award for interest @ 18% per annum on the bills withheld from the date of submission of such bills till payment;
> (g) An award for interest @ 18% per annum on the sum of Rs.1,11,85,035.00 claimed in connection with the first Contract from 16.10.2000 till the date of payment of the said sum;
> (h) An award for interest @18% per annum on the sum of Rs.1,11,75,982.00 claimed in connection with the second Contract from 16.10.2000 till the date of payment of the said sum;
> (i) An award directing the Respondent to issue Contract completion certificates in favour of the Claimant;
> (j) Costs of and incidental to this Arbitration be paid by the Respondent;
> (k) Such further or other reliefs as the learned Arbitrator may deem fit and proper."

6. Company on its appearance along with the statement of defence also filed counter statement. Company while resisting each

of the claims made by the Contractor, alleged that though the date of completion of the work was 24.05.1998 considering the completion period of 15 months from 29.02.1997, the Contractor did not commence the work from the date specified and the work could not be completed on or before 24.05.1998. While submitting that completion of the work would end with final acceptance test and handing over of the entire plant after stamping of the In-motion Weigh Bridge from the Weights & Measures Department of Government of Orissa, the claimant could be able to submit the stamping certificate from the Department of Weights and Measures, Government of Orissa with a registration Serial No.1312/2000 dated 8th of September, 2000 in the name of M/s.S.K. Samanta & Company Ltd. to the MCL authority. The Company also resisted the claim of the Contractor on the premises that the date of partial load test could only be done on 14th & 15th February, 2000 conducted only with 8 wagons on manual mode instead of full rake of 58 wagons in auto mode, which was actual intention of the Plant. It is alleged that even after pointing out the defects in the commissioning of Plant through numerous letters, the defects could not be rectified. Therefore a request was made to the Arbitrator to pay a visit to the site to have an overall assessment. For the defective operational problem the Company while denying its responsibility involving each of the claims submitted that the

Contractor should pay the penalty due to improper loading and weighment undertaken by the Company**.** It is also contended that finding the Contractor not rectifying the defects, the Company ultimately took the decision to go ahead with the rectification of the said work at the claimant's cost and risk. Ultimately by serving a notice on the Contractor on 3rd June, 2003 thereby exhibiting such letter as D/9, the modification work was ultimately finalized through an open tender through another agency vide work order produced as annexure D/10. In answering to each of the claim, the Company also attempted to deny each of the claims by the Contractor through the above response and while at the same time, the Company also made some claims before the Arbitrator which reads as follows:

> "1. An award of Rs.54,46,943.33 towards loss compensation on account of demurrages caused due to Overload and underload.
>
> 2. An award of Rs.11,98,766.00 towards modification of the weighing system which have been finalized at the cost and risk of the claimant.
>
> 3. An award for interest @ 18% per annum on the amount at sl (1) above."

7. Basing on the pleadings and evidence produced through the document by the respective parties, the Arbitrator

passed the award on different head which is reflected as hereunder :-

On the head of final bill the Arbitrator granted the entire claimed amount. On the head of claim against the security arrangement for the plant from 18.05.1998 to 31.12.2001, the Arbitrator granted full claim as against the claim on the head of extra expenditure incurred for replacement of some electrical items, which was stolen, refused such claim. Claim involving Idle resources at site from 19.5.98 to 31.12.2001 including share of Head office expenditure as against the claim of Rs.79,49,750.00 the Arbitrator granted a sum of Rs. 47,26,212.50. Similarly on the head of expenditure involved and financial loss suffered due to keeping valid the performance Bank Guarantee as against the claim of Rs.11,47,025.00, the Arbitrator granted a sum of Rs.4,47,399.75. As against extra expenditure incurred due to mobilization, de-mobilization and re-mobilization of original equipment manufacturers engineers, technicians on different occasions as against the claim of Rs.12,05,000.00 the Arbitrator granted a sum of Rs.7,55,000.00. On the head of expenditure on Legal and other incidental expenses incurred due to purported threat of MCL to en-cash BG after its expiry as against claim of Rs.3,05,000.00, this claim was, however, declined. On the head of claim for interest @18% per annum for non-payment of final bill submitted on

19.0.2000 till paid, this claim was declined. Interest @18% per annum on the claim (b) the Arbitrator directed, the claimant is entitled to interest @ 9% per annum on the total awarded amount from 3.10.2002 i.e. the date of appointment of Arbitrator till 2.5.2003 the date of award and calculating it to be Rs.4,04,077.65/- in this way the Arbitrator as a whole awarded a sum of Rs.71,38,705.11. Adjudicating the counter claim at the instance of the Company the Arbitrator refused to entertain the claim no.1 & 3. While allowing the claim no.2 at the instance of the Company, the Arbitrator allowed the Company to deduct a sum of Rs.5,99,383.00. It be indicated here that there is no challenge to the award of compensation involving the Claim no.2 involving the counter claim and there is no challenge to the denial of the claim nos.1 & 2 by the Company. Being aggrieved, the Company filed Arbitration Petition bearing No.13 of 2003 on the file of District Judge, Sambalpur.

8. Perusal of the Arbitration Petition No.13 of 2003 before the District Judge, this Court finds, the award of the Arbitrator was challenged on the premises that the award is unreasoned one and contrary to the provision at Section 31(3) of the Act, 1996. The Company also challenged the arbitral award being in conflict with the Public Policy of India and also on the premises of violative of justice and morality, further also involving patent

illegality. On the Arbitrator's awarding interest on the amount of Rs.47,26,212.50 for being contrary to the conditions in the agreement, the Company also challenged the grant of interest on the withholding of the performance gurantee @ 18% per annum. For being contrary to the clause 2.1.11. Company also pleaded that grant of interest on interest also contrary to the Indian Laws. Company also challenged the payment on the head of Additional Security Guard expenses on the premises of being contrary to the Clause 2.1.49. The award on the Idle resources was claimed to be not covered by the terms of contracts. Similarly the award involving the additional expenditure was also challenged for being contrary to the clause contained in the agreement.

Considering the submissions of the respective parties, the District Judge in disposal of the Arbitration Petition No.13 of 2003 summarized the contest of the Company through the Arbitration Petition in paragraph no.4 to the extent that the award has been challenged on the ground of being unreasoned one, against fundamental policy of the Indian Law, in conflict with Public Policy of India and some of the grant remaining beyond the terms of the contract. By framing appropriate issues the District Judge ultimately dismissed the Arbitration Petition.

9. Being aggrieved by the judgment of the District Judge, the Company preferred Arbitration Appeal U/s.37 of the Act, 1996. This Court since already recorded the contest involving the parties in the Section 34 proceeding, does not want to reiterate the same just to avoid repetition.

10. Though the Company has filed the Appeal involving several grounds stated therein but during course of argument, Sri J.Pattnaik, learned senior counsel for the appellant-Company assisted by Sri S.Mohanty, learned counsel, however, confined his argument on the following points :-

I) Involving the award of compensation on the head of claim towards security arrangement from 18.5.1998 to 31.12.2001.

II) Grant of compensation on the head of ideal resources at site from 19.5.1998 to 31.12.2001.

III) Financial loss due to valid bank guarantee and non-release of the same till 16.5.2002.

IV) On the head of extra expenditure incurred due to demobilization.

11. While making his submission, Sri J.Pattnaik, learned senior counsel for the appellant referring to condition no.2.1.49 in the term of agreement, particularly referring to ground no.1 contended that for the inclusiveness of the expenditure

towards Security Guards involving the contract, no amount on this head should have been allowed to the Contractor and grant of compensation on this head remains beyond the contract period.

On ground no.2, Sri J.Pattnaik, learned senior counsel for the appellant asserted the same on the premises that this claim has been adjudicated in favour of the Contractor not only without discussion but the awarded amount is also not based on the material available on record to support the award of such huge amount.

So far as ground nos.3 & 4 are concerned, Sri J.Pattnaik, learned senior counsel for the appellant-Company submitted that there is no scope for consideration on such aspect within the terms and conditions of the contract. Sri Pattnaik thus opposed the grant of compensation on these two heads on the premises that a determination on the above aspects is beyond the terms of the contract.

12. Sri J.Pattnaik, learned senior counsel for the appellant also challenged the award involving the above aspects on the ground that the decision of the Arbitrator as well as the judgment of the District Judge opposed to the public policy of the country. To establish such claim, Sri J.Pattnaik, learned senior counsel for the appellant took this Court to the decision in the case ***Oil & Natual Gas Corporation Ltd. vrs. Saw Pipes Ltd.*** : (2003)

5 SCC 705 and driving the attention of this Court to the role of the Arbitrator as well as the meaning of public policy, as decided by the Hon'ble apex Court through the above decision, Sri Pattnaik to supplement his above submission also took support of the decision of the Hon'ble apex Court in ***Associate Builders vrs. Delhi Development Authority*** : AIR 2015 SC 620 and the decision in ***Oil and Natural Gas Corporation Ltd. vrs. Western GECO*** **International Ltd.** : (2014) 9 SCC 263. Referring to a decision in the ***Food Corporation of India vrs. Chandu construction & another*** : (2007) 4 SCC 697, particularly taking this Court to paragraphs-12 & 15 of the same, Sri Pattnaik, learned senior counsel for the appellant drawing support of the above decisions submitted that ignoring of the compensation remaining contra terms of contract. Similarly taking this Court to another decision of the Hon'ble apex Court in ***Renusagar Power Co. Ltd. vrs. General Electric Co.*** : 1994 Supp.(1) SCC 644, Sri Pattnaik while referring to the discussion of the Hon'ble apex Court on public policy also submitted that the award can be set aside on four grounds enumerated therein. Taking this Court to another decision of the Hon'ble apex Court in ***M/s.Som Datt Builders Ltd. vrs. State of Kerala*** : AIR 2009 SC (Supp.) 2388, Sri J.Pattnaik, learned senior counsel for the appellant referring to paragraph-25 therein submitted that the challenge of the award for being unreasonable

one finds support from the above decision. In the above fact situation and the legal position demonstrated through the above decisions, Sri Pattnaik, learned senior counsel prayed this Court for interfering with the impugned judgment as well as the award involved herein.

13. Sri S.P.Mishra, learned senior counsel for the respondent-Contractor while opposing each submission of the learned senior counsel for the appellant taking this Court to the scope of the District Judge referring to the provision of Section 34 of the Act, 1996 and also the scope of the High Court in exercise of its power under Section 37 of the Act, 1996 and taking to paragraphs-10 & 11 in the case of ***MMTC Ltd. vrs. Vedanta Ltd.*** : (2019) 4 SCC 163 submitted that unless an award and/or judgment involved therein become arbitrary, capricious or perverse or shock the conscience of Court, there is no scope either for the District Judge to interfere with the award in exercise of power under Section 34 of the Act, 1996 or even for the High Court to interfere with the judgment of the District Judge in exercise of power under Section 37 of the Act, 1996. Taking this Court to the decision in ***Associate Builders vrs. Delhi Development Authority*** : (2015) 3 SCC 49, Sri Mishra, learned senior counsel for the respondent no.1 attempted to draw the attention of the Court for its scope under the forced circumstance enumerated therein. Sri Mishra taking this Court to

the decisions of this Court in ***Project Director, Integrated Tribunal Development Agency vrs. Odyssey Advanced Telematics Systems*** : 2019 SCC Online Ori. 37 (decided on 16.1.2019) and ***Mesco Kalinga Steels Ltd. and another vrs. Bijay Kumar Mohapatra*** (ARBA No.34/2013 decided on 12.4.2016) took the support of his contention on the scope of interference involving the award and judgment of the Arbitrator as well as the Court below through the above decisions on the grounds of attack involving the award and judgment by the Company, Sri Mishra, taking this Court to the document available therein and further referring to Clause 2.1.52 of the general terms and conditions of the agreement submitted that the submission of Sri J.Pattnaik, learned senior counsel for the appellant that consideration of certain items beyond the term of contract remained contrary to the above provision. Sri Mishra, learned senior counsel for the respondent no.1 on the premises that some of the claims, more particularly claim nos.3 & 4 since were in connection with the order arising out of the contract, submitted that the claims were very much maintainable. Coming to challenge the claim of the Company on the amount involving the security arrangement, Sri Mishra, learned senior counsel for the respondent no.1 though did not dispute that for the ultimate extension of the contract till 31.12.1999 but by order dated 5.11.2001 contended that the

Contractor is entitled to the claim of security arrangement for the period from 24.5.1998 to 31.12.2001.

14. On the allegation on claim nos.2 raised by the Company, Sri S.P.Mishra, learned senior counsel for the respondent no.1 referring to the decisions cited herein above on the scope of the District Judge and the High Court in their exercise of power under Sections 34 & 37 of the Act, 1996 and the restrictions therein respectively and referring to two decisions of this Court referred to herein above, submitted that for the very very limited power lying either with the District Court or the High Court, there is no scope for entertaining such submission. Sri Mishra taking this Court to the grounds of Appeal and the recording of the District Judge on the petitioner therein restricting his claim submitted that it is not open to the Company to raise all the above grounds herein. Controverting the submission of Sri J.Pattnaik, learned senior counsel for the appellant that even though the Arbitration Petition involved several grounds of attack to the award involved therein, unfortunately the District Judge has limited his scope of consideration for no reason involving therein, Sri Mishra, learned senior counsel for respondent no.1 referring to the decision in ***State of Maharastra vrs. Ramdas Shrinivas Nayak*** : AIR 1982 SC 1249 submitted that the Company had the only scope of raising such ground before the Court, which has committed such mistake, to rectify its mistake therein. Taking

support of the above decision, Sri Mishra, learned senior counsel for the respondent no.1 submitted that the appellant is now estopped from raising such question in this Court. It is in the above premises, Sri Mishra, learned senior counsel for the respondent no.1 prayed this Court for dismissal of the Arbitration Appeal.

15. Before going to answer on the other aspects involved herein, this Court first takes up the issue discussed in the last, Sri J.Pattnaik, learned senior counsel for the appellant referring to the grounds taken in the Arbitration Petition No.13 of 2003 and the findings of the District Judge therein submitted that the District Judge for no reason restricted the scope of consideration confining it to some of the items, and therefore, sought for interference of this Court involving the said item.

To his opposition, Sri S.P.Mishra, learned senior counsel for the respondent no.1 submitted that for having not raised any objection for rectification of the judgment of the District Judge before the District Judge itself, the appellant is estopped from raising such question here.

16. This Court from paragraphs-4 & 7 of the decision in Ramdas Shrinivas Nayak (supra) finds as follows :-

> "4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments

for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation".(1) We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (2) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

4-A. In R. V. Mellor (1958) 7 Cox. C.C. 454 Martin B was reported to have said: "we must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.

> 7. So the judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else."

For the settled position of law through the above decisions of the Hon'ble apex Court, this Court finds, there is substance in the submission of Sri S.P.Mishra, learned senior counsel for the respondent no.1, and therefore, observes, the appellant is estopped to raise the questions beyond the question considered by the District Judge involving the Arbitration Petition No.13 of 2003.

17. For the appellant giving much emphasis on the scope of interference by the Arbitrator involving claim nos.3 & 4 remaining contra the terms of the contract thereby grant of compensation on the said head opposed to public policy of India and reliance on certain decision of the Hon'ble apex Court, this Court entering into the interpretation of the word, "Public Policy" and the role of the Arbitrator through the decision in Oil & Natural Gas Corporation Ltd. (supra) from paragraphs-26, 28 & 31 finds as follows :-

> "26. It is true that Legislature has not incorporated exhaustive grounds for challenging the award passed by the arbitral Tribunal or the ground on which appeal against the order of the court would be maintainable.
>
> 28. From this discussion it would be clear that the phrase 'public policy of India' is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon

the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the arbitral tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the arbitral tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for the Parliament to provide for limited or wider jurisdiction to the Court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term 'public policy of India' as contended by learned senior counsel Mr. Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in Rattan Chand Hira Chand v. Askar Nawaz Jung observed thus (SCC pp. 76-77, para 17).

> "17. .. It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor as it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society."

31. Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is

likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra), it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to: -

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

From Paragraphs-34, 35, 38 & 39 of the decision in Oil and Natural Gas Corporation Ltd. (supra), this Court finds as follows :-

> "34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognised under Section 34(2)(b)(ii) (supra). The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words: (SCC pp. 727-28)
>
> > "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which

> concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case10 it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or [pic](d) in addition, if it is patently illegal.
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> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach'

in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to

challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available."

Similarly from paragraph-12 of the decision in Associate Builders vrs. Delhi Development (supra), this Court finds as follows :-

"12. In as much as serious objections have been taken to the Division Bench judgment on the ground that it has ignored the parameters laid down in a series of judgments by this Court as to the limitations which a Judge hearing objections to an arbitral award under Section 34 is subject to, we deem it necessary to state the law on the subject.

Section 34 of the Arbitration and Conciliation Act reads as follows-

"Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it

may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

This Section in conjunction with Section 5 makes it clear that an arbitration award that is governed by part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Section 34 (2) and (3), and not otherwise. Section 5 reads as follows:

"5. Extent of judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

It will be seen that none of the grounds contained in sub- clause 2 (a) deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.

In Renusagar Power Co. Ltd. v. General Electronic Co., 1994 Supp (1) SCC 644, the Supreme Court construed Section 7 (1)(b) (ii) of the Foreign Award (Recognition and Enforcement) Act, 1961.

"7. Conditions for enforcement of foreign awards.-(1) A foreign award may not be enforced under this Act-

(b) if the Court dealing with the case is satisfied that-

(ii) the enforcement of the award will be contrary to the public policy."

In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

1. The fundamental policy of Indian law

2. The interest of India

3. Justice or morality, would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see paras 85,95).

When it came to construing the expression "the public policy of India" contained in Section 34 (2) (b) (ii) of the Arbitration Act, 1996, this Court in ONGC v. Saw Pipes, 2003 (5) SCC 705, held-

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it,

patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

(a) Fundamental policy of Indian law; or
(b) The interest of India; or
(c) Justice or morality, or
(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

74. In the result, it is held that:

(A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality; or
(d) if it is patently illegal. (4) It could be challenged:
(a) as provided under Section 13(5); and
(b) Section 16(6) of the Act.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

The judgment in ONGC v. Saw Pipes has been consistently followed till date.

In Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445, this Court held:

"14. The High Court did not have the benefit of the principles laid down in Saw Pipes [(2003) 5 SCC 705] , and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes [(2003) 5 SCC 705] has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, this Court held:

"58. In Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a)

fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd.v. Saw Pipes Ltd. [(2003) 5 SCC 705] (for short "ONGC"). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC [(2003) 5 SCC 705] this Court, apart from the three grounds stated in Renusagar [1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished

from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77].)"

In Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245, Sinha, J., held:

"103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act."

104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular government. (See State of Rajasthan v. Basant Nahata[(2005) 12 SCC 77].)"

In DDA v. R.S. Sharma and Co., (2008) 13 SCC 80, the Court summarized the law thus:

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758, held:

"27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd.[(2003) 5 SCC 705] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

Union of India v. Col. L.S.N. Murthy, (2012) 1 SCC 718, held:

"22. In ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said: (SCC p. 727, para 31) "31. ... However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal".

Fundamental Policy of Indian Law Coming to each of the heads contained in the Saw Pipes judgment, we will first deal with the head "fundamental policy of Indian Law". It has already been seen from the Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

In a recent judgment, ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the

fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a

decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

The Audi Alteram Partem principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2) (a) (iii) of the Arbitration and Conciliation Act. These Sections read as follows:

"18. Equal treatment of parties.- The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

34. Application for setting aside arbitral award.-

(2) An arbitral award may be set aside by the Court only if-
(a) the party making the application furnishes proof that-

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; "

The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

a finding is based on no evidence, or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. A good working test of perversity is contained in two judgments. In H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312 at p. 317, it was held:

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

In Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 at para 10, it was held:

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

It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the

arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score[1]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594, this Court held:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.

Interest of India The next ground on which an award may be set aside is that it is contrary to the interest of India. Obviously, this concerns itself with India as a member of the world community in its relations with foreign powers. As at present advised, we need not dilate on this aspect as this ground may need to evolve on a case by case basis.

Justice The third ground of public policy is, if an award is against justice or morality. These are two different concepts in law. An award can be said to be against justice only when it shocks the conscience of the court. An illustration of this can be given. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The arbitral award ultimately awards him 45 lakhs without any acceptable reason or justification. Obviously, this would shock the conscience of the court and the arbitral award would be liable to be set aside on the ground that it is contrary to "justice".

Morality The other ground is of "morality". Just as the expression "public policy" also occurs in Section 23 of the Indian Contract Act, so does the expression "morality". Two illustrations to the said section are interesting for they explain to us the scope of the expression "morality".

"(j) A, who is B's Mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (XLV of 1860)."

In Gherulal Parekh v. Mahadeo Dass Maiya, 1959 Supp (2) SCR 406, this Court explained the concept of "morality" thus-

"Re. Point 3 - Immorality: The argument under this head is rather broadly stated by the learned Counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu Law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu Law considers to be immoral in that context may appropriately be applied to a case under s. 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu Law into the domain of contracts. Section 23 of the Contract Act is inspired by the

common law of England and it would be more useful to refer to the English Law than to the Hindu Law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:

"The only aspect of immorality with which Courts of Law have dealt is sexual immorality..... ."

Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138 :

"A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality."

In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

"Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible."

In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:

"The epithet "immoral" points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment."

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by Courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

The word "immoral" is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of S. 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative text-book writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "the court regards it as immoral", brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognized and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

This Court has confined morality to sexual morality so far as section 23 of the Contract Act is concerned, which in the context of an arbitral award would mean the enforcement of an award say for specific performance of a contract involving prostitution. "Morality" would, if it is to go beyond sexual morality necessarily cover such agreements as are not illegal but would not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the court's conscience.

Patent Illegality We now come to the fourth head of public policy namely, patent illegality. It must be remembered that under the explanation to section 34 (2) (b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on

which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Lord Justice Denning in R v. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw., 1952 1 All ER 122 at page 130:

"Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob, (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie, (1857) 3 C.B.N.S. 189, but is now well established."

This, in turn, led to the famous principle laid down in Champsey Bhara Company v. The Jivraj Balloo Spinning and Weaving Company Ltd., AIR 1923 PC 66, where the Privy Council referred to Hodgkinson and then laid down:

"The law on the subject has never been more clearly stated than by Williams, J. in the case of Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189.

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact ..... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law

necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

"Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, 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 does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying: "Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Cl.52." But they were entitled to give their own interpretation to Cl. 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous."

This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.

In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads -

(a) a contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the

root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.-(1) Where the place of arbitration is situated in India,-

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

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

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

"28. Rules applicable to substance of dispute.- (3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

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

In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, this Court held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to

the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325]).

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

In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573, the Court held:

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689], Thawardas Pherumal v. Union of India [AIR 1955 SC 468], Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362], Alopi Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588], Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])."

In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306, the Court held:

> "43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.
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> 44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.
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> 45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313) "43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

18. From reading of the aforesaid decisions, this Court finds, coming to decide on the limitation, which a Judge

hearing objection to an arbitral award under Section 34 of the Act, 1996 is subject to limitation of Section 35 as well as Section 37 of the Act, 1996 and further

(1) if the award remained contrary, the fundamental policy of Indian Law :-

(2) The interest of India

(3) Justice or morality or above if it is patently illegal.

While also adding the award becomes perverse or so irrelevant that no reasonable person would have arrived at the same is important and requires some degree of explanation, i.e., finding is based on no evidence or arbitral award, the Tribunal takes into account something irrelevant to the decision, which is arrived at or ignores vital evidence in arriving at its decision or even where the award remained patent illegal. This Court here also takes into account two of the decisions of this Court in Odyssey Advaced Telematics Systems (supra) and also the judgment involving the ARBA No.34/2013 and finds, the judgment of this Court also involves the scope of High Court in the proceeding involving Section 34 of the Act, 1996. For here there is no establishment of violation of Sections 24, 28, 31, 35 & 36 of the Act, 1996, consideration on the allegation involving item nos.3 & 4 shall remain opposed to restriction in Sections 34 & 37 of the Act, 1996. Considering the

series of decisions indicated herein above, this Court finds, the award can be challenged if the award opposed the fundamental policy of India or the interest of India or justice or morality and lastly if it is patently illegal. Hon'ble apex Court in the above decisions again clarified that illegality must go to the root of the matter and further if the illegality is of a trivial nature, it cannot be held that the award is opposed to public policy. Hon'ble apex Court even has gone to the extent saying that unless the award becomes void, same should not be interfered with by the District Judge in exercise of power under Section 34 of the Act, 1996 and on the same analogy, High Court is also debarred to interfere with the award in exercise of power under Section 37 of the Act, 1996. This is also the view of this Court in the case of ***Project Director, Integrated Tribunal Development Agency vrs. Odyssey Advanced Telematics Systems*** : 2019 SCC online Orissa 37 and in ***Mesco Kalinga Steels Ltd. & another vrs. Bijay Kumar Mohapatra*** (ARBA No.34 of 2013 decided on 12.4.2016). It is in the circumstances, this Court declines to interfere in the claim of the appellant so far as it relates to item nos.3 & 4 indicated herein above. This Court here finds, the claim of Sri J.Pattanaik, learned senior counsel for the appellant on the above counts is clearly opposed to the decision of Hon'ble apex Court reported in (2015) 3 SCC 49, which has been passed taking into account the entire

history of decisions dealing with the situation opposed to public policy of India and the scope of interference of the Court exercising power under Section 34 of the Act, 1996 as well as Section 37 of the Act, 1996.

19. Now proceeding to consider on the other two aspects involved herein, facts reveal, work was to be completed by 24.5.1998. Till 8.9.2000, the Contractor could not be able to submit the Stamping Certificate from the Weights & Measures Department of Government of Orissa with registration serial. The Contractor was ultimately served with a notice on 3rd June, 2003 handing over the work to somebody else through an open tender, vide work order Ext.D/10. The Contractor himself vide Ext.D/11 requested for extension of time at least up to 31.12.1999 and the Company by Ext.D/12 dated 5.11.2000 extending the time of contract. For inclusiveness of security charge in the tender value under the condition no.2.1.49 taken note herein above, this Court finds, grant of compensation on the head of Security Guard beyond 5.11.2000 remains contrary to terms of contract. Keeping in view, for their being no proper consideration on this aspect, further for the grant of compensation on the above head up to the extended period, being contrary to the condition no.2.1.49 but however, keeping in view that the sufficient time has been spent involving the dispute for over 16 years, this Court instead of remitting the matter to the Arbitrator

for appropriate assessment, interfering in the compensation of the Tribunal on this head, reduces the same at consolidated payment of Rs.1,50,000/- as a whole, which amount shall also carry interest @ 10% per annum all through. Similarly, coming to challenge of the award and judgment involved herein on claim of compensation on account of financial loss due to retention of valid bank guarantee and non-release of the same till 16.5.2002, this Court finds, Clause 2.1.11 of the conditions in the contract between the parties clearly prohibits grant of interest on guarantee money. This Court thus finds, grant of compensation on account of financial loss on retention of valid bank guarantee and non-release of the same till 16.5.2002 remains contrary to the condition of contract at Clause 2.1.11. Hence, this Court interfering in the grant of compensation by the Arbitrator on this head and confirmation of the same by the District Judge sets aside that part of the award.

20. In the result, this Court while declining to interfere with the grant of compensation by the Arbitrator insofar it relates to Idle Resources and on account of extra expenditure incurred due to mobilization, demobilization and re-mobilisation of original equipments manufacturing of original equipment, manufacturers engineers and technicians on different occasions, inclines to interfere with the award, so far it relates to compensation against withholding of Bank Guarantee and not releasing the same in time,

being contrary to condition no.2.1.11 of the conditions in the contract. Similarly on grant of compensation on account of expenditure on deployment of Security Guards beyond the contract period, this Court interfering with the same reduces the same to Rs.1,50,000/- with interest @ 10% beyond 5.11.2001. This Court here taking into account the part-allowing of the counter claim by the Arbitrator and there being no challenge to the award involving the counter claim, makes it clear that release of amount indicated herein above, however, should remain subject to adjustment of a sum of Rs.5,99,383/- allowed by the Arbitrator in part involving the counter claim.

21. The Arbitration Appeal succeeds in part, but however, there is no award of cost.

.....
Biswanath Rath, J.

Orissa High Court, Cuttack.
The 22nd day of August, 2019/**mkr, secy. /a.jena, sr.steno**