IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :

The Hon'ble Justice Soumen Sen

A.P.No.5 of 2013

M/S. BATA INDIA LTD.
VS.
SRI SAGAR ROY

For the petitioner	: Mr. Anindya Kr. Mitra, Sr. Adv., Mr. Jishnu Saha, Sr. Adv., Mr. Swatarup Banerjee, Mr. Biplab Majumdar.
For the respondents	: Mr.Ratnanko Banerjee, Sr. Adv., Mr. Probal Kr. Mukherjee, Sr. Adv., Mr. Rajat Dutta, Mr. Lokenath Chatterjee, Mr. Prashant Kr. Tripathi.
Heard on	:25.04.2014,02.05.2014,01.07.2014, 30.07.2014, 06.08.2014
Judgment on	: 29th October, 2014

Soumen Sen, J.:- The petitioner has filed this application for setting aside of an award under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act").

The arbitration proceeding is arising out of a tripartite settlement arrived at between the parties on 17th February, 2005.

The learned Arbitrator in the said reference had also passed an interim award which is, however, not subject matter of challenge in this proceeding.

The petitioner has challenged the award in so far as it relates to the execution of the work under three different work orders at the Gurgaon office of the petitioner executed under the work orders being Nos:-

(I) HO/04/CE(1)/018 Dated 04.03.2004 amounting to Rs.2,70,61,540/-

(II) HO/04/CE(D)/ 39 Dated 13.04.2004 amounting to Rs.1,00.83,750/-

(III) HO/04/CE/060 Dated 28.06.2004 amounting to Rs.18,59,547/-

In the statement of claim filed before the arbitrator, the claimant stated that following an invitation of interest and rates for the electrical works of the whole building issued by the architect the claimant expressed his interest and made tentative offer to architect (TAG) on March 27, 2004 by its letter bearing reference no. RDG/78/03 dated 27th March, 2004. The two other contractors had also submitted their offer. However, on evaluation of the offer, the petitioner accepted the offer submitted by the claimant.

That although the claimant had submitted its expression of interest with reference to the electrical works as per the Bill of Quantities the petitioner requested for extra electrical work of AC ducting. The claimant by its letter bearing reference no. RDG/80/03 dated March 31, 2004 informed the petitioner through TAG about the completion and value of extra electrical works of A.C flexi ducting of the 1st, 2nd, 3rd, 4th floor @ Rs.2,20,000/- for each floor and A.C. ducting of the 5th floor and Basement @ Rs. 2,80,000/- for each floor. Before awarding the said electrical job of the whole building the claimant already undertook, executed and completed the electrical and other civil and

interior job of the 3rd and 4th floor of the said office by April 5, 2004. Thereafter, the petitioner issued a work order/purchase order for the said electrical works of the whole building of the said office bearing work order no. HO/04/CE(D)/39 dated April 13, 2004 for providing internal electrical, data and voiceline installation including supply of all materials, labour, tools and plants, equipment etc. like DB's, Conducts, Busbar, tranking, Luminaries and fixtures, L.T cables, Automatic Fire Alarm systems and detection system L.T. panels, internal wiring work for electrical, telephone and computer connection complete as per tender specification and clauses mentioned in the Bill of Quantities (a) for basement value of Rs.9,20,350/- (b) for 1st and 2nd floor value of Rs.30,60,065/- (c) for 3rd and 4th floor value of Rs.34,71,425/- (d) for 5th floor value of Rs.15,61,910/- and for providing air-conditioning ducting made of aluminium flexi ducting including installation at site with necessary dampers including toilet area complete (a) For 1st, 2nd, 3rd and 4th floor round flexi ducting @ Rs.2,00,000/- each floor i.e., Rs.8,00,000/- (b) For G.I. ducting with insulation for 5th floor value of Rs.2,70,000/-. Therefore, the total value of the said work order comes to Rs.1,00,83,750/- excluding the 4% work contract Tax, 5% Transportation Cost and 8% Service Tax. It was also specifically stated in the work order that 75% of the work order shall be released alongwith the work order and the balance will be released on submission of bill after completion of work. The petitioner, however, did not made any advance payment along with the work order.

The claimant is an experienced and running contractor of the petitioner and at times, it was the practice of the business as well as the practice of the petitioner in order to meet the exigencies and make the project economically viable, to verbally direct the claimant to undertake various jobs/works on the assurance that formal work order will be issued after completion of formalities. The claimant was accordingly directed, as aforesaid, to undertake the job/works which were required to be completed in order to make the offices operative at an earlier date. It might have been that since the claimant had already commenced the job/works with respect to the building, thus in order to save on the cost of redeployment of men and materials and to make the offices operative, the claimant was directed to undertake the electrical work in respect of the 3rd and 4th floors by the petitioner although formal work order was issued at a later date. There are instances when the claimant was directed by the officials of the petitioner to undertake and complete various jobs on the assurance that formal work order will be issued at a later date and in fact such jobs have been completed to the full satisfaction of the petitioner.

The progress of the interior and exterior decoration work at the Gurgaon office was highly appreciated by the officials of the Bata India Ltd. during their visit in the mid week of April 2004. The said officials expressed their satisfaction with regard to the quality of the materials and workmanship of the claimant. Being satisfied with the execution of the aforesaid work, the petitioner decided to award the claimant with renovation work of another corporate office at Faridabad.

During the progress of the work at the corporate office at Gurgaon as per the Bill of Quantities and as per the work order bearing reference no. HO/04/CE(D)/018 dated March 3, 2004 and the work order bearing reference no. HO/04/CE(D)/39 dated April 13, 2004 the Bata higher officials namely Mr. S.J. Davis, Managing Director, Mr. Darkbormea, Senior Vice President and Mr. Tonolly, Senior Vice President and Mr. Anup Chowdhury, project in charge requested the claimant to execute some extra work at the said Gurgaon office which were not specified in the Bill of Quantities and also in the said two work orders but the same were required to be executed to reach the fineness of the work such as Server Rooms False Ceiling, Toilet False Ceiling with E-Board, AC gas line covering with MS tray, Shaft door remodification, sliding door for Board Room, CRC rod for power and data, wire display, special basin and mirror for MD's toilet, Aluco Boand Signage with neon Bata signage at 6th floor height, AC diffuser, Storage (1st to 4th floor), Granite steps for basement, Film paste for chamber, both staircase paint, wood handrail for both staircase, Toilet basin counterbox, Extra ducting for toilet (ventilation), Reception Table, Side Table, Arm Chair (Bush stain steel), Paint (plastic), Light fittings (Reception area), New storage for Bata shop at the Basement (including painting with POP and electrical), Wood and ply partition, Brush steel basket (for dustbin), White Board (including paint), Deco Frame (3rd and 4th floor). At that point of time the claimant duly asked the said officials to issue a formal work order of the said extra job required to be done but the said officials requested the claimant to undertake and execute the said job in continuation

with the job as per the earlier two work orders and assured issuance of formal work order for the said extra job later on. The claimant believing upon the said representation and relying on the said verbal assurance and considering the previous practice of Bata India Ltd. duly executed the said extra work at the Gurgaon office and ultimately completed the entire work of the entire building of the said Gurgaon office on May 31, 2004 with fullest satisfaction of the higher officials of the Bata India Ltd. Thereafter in terms of their commitment and/or promise as made while executing the said extra work at Gurgaon office, the Bata India Ltd. issued a formal work order bearing reference no. HO/04/CE(D)/061 dated June 28, 2004 after completion of the entire work. The total value of the said work order is Rs.29,34,796/- excluding Work contract Tax 4.6%, Transport charges 5% and Service Tax 8%.

On the verge of completion of the said work of the said Gurgaon office, the claimant raised the Running Account Bills to the said architect (TAG) for approval and the said architect on behalf of the Bata India Ltd. upon verification and on being satisfied, certified and approved the said Running Account Bills. Neither the said architect nor any responsible officials of the petitioner Bata India Ltd. at that time raised any dispute with regard to the quality of workmanship or the quantity of materials supplied and used in the job works. The petitioner or their architect at that time never raised any dispute of the amount quoted in the said Running Account Bills rather the said architect appreciated the same by verifying, certifying and recommending letters bearing reference no. J91: 2004-2005:05:39 dated May 31, 2004 and

bearing reference no. J91: 2004-2005:06:41 dated June 15, 2004. The detail of the Running Account Bills have been stated as follows:-

"I. Running Account Bill bearing reference no. RDG/01/2004 dated May 28, 2004

(a) For the civil and interior works for Basement of the said Gurgaon office for Rs.34,56,670/-

(b) For the civil and interior works for 1st and 2nd floor of the said Gurgaon office rs.74,82,675/-

(c) For the civil and interior works for 3rd and 4th floor of the said Gurgaon office Rs.77,29,325/-

(d) For the civil and interior works for 5th floor of the said Gurgaon office Rs.41,33,870/-

Total value of the said Running Account Bills for the civil and interior works of the said Gurgaon office comes to Rs.2,28,02,540/-.

II. Running Account Bills bearing reference no. RDG/02/2004 dated May 30, 2004

(a) For the electrical works of the 1st and 2nd floor of the said Gurgaon office for Rs.38,07,970/-

(b) For the electrical works of the 3rd and 4th floor of the said Gurgaon office for Rs.34,28,470/-

(c) For the electrical works of the 5th floor of the said Gurgaon office for Rs.17,32,480/-

Total value of the said Running Account Bills for the electrical works of the said Gurgaon office comes to Rs.89,68,920/-.

III. Running Bills bearing reference no. RDG/03/2004 dated May 30, 2004 for Rs.12,58,320/-.

IV. Running Bills bearing reference no. RDG/16/04 dated June 14, 2004 for Rs.19,92,004/-."

The job was duly completed. The claimant duly executed the job as specified in the bill of quantities as well as in the purchase orders/works order and completed the same and handed over the possession within the prescribed time limit i.e May 31, 2004.

Joint measurement of the work executed by the claimant was undertaken in respect of entire civil, interior and electrical work of all the floors of the said Gurgaon office within July 15, 2004 by the said architect in presence of the claimant. Thereafter on or about 25th July, 2004 the Managing Director of Bata India Ltd. namely Mr. S.J. Davis directed scrutiny of the work done by the claimant by the floor managers of each floors of the Gurgaon corporate office so that the defects, if any, may reveal and be rectified and report to that effect may be furnished. In view of the said direction of Mr. S.J. Davis, the then Managing Director, the floor managers of each floor went on making entry of the minor defects and after rectification of the same by the claimant went on furnishing satisfactory certificate in the Log Book of the Company till August 24, 2004. In the mean time the claimant by his letter

bearing reference no. RDG/25/04 dated July 30, 2004 duly informed the Bata India Ltd. about the completion of the work of all the floors. Thereafter the said architect issued completion and/or job done certificate with regards to the work of the Gurgaon corporate office by a letter bearing reference no. J91: 2004-2005:12:92 dated August 24, 2004. In the said certificate the said architect enclosed the claimant's completion letter bearing reference no. RDG/25/04 dated July 30, 2004 which categorically certified that the work for the 3rd and 4th floor were completed and handed over on April 5, 2004 and 1st, 2nd, 5th floor and basement were completed and handed over to Bata India Ltd. on May 31, 2004. In the Log Book, the Floor Managers had recorded their satisfaction for the work.

After satisfactory execution of the work at the Gurgaon office and after completion of the joint measurement of the work done by the claimant at the Gurgaon office with full satisfaction of the responsible officials of the petitioner, the claimant submitted the final bills Ref. No.RDG/15/2004 and RDG/16/2004 both dated August 3, 2004 for the works done at the Gurgaon office against the work order bearing Ref. No. HO/04/CE(D)/018 dated March 4, 2004 and Ref. No. HO/04/CE(D)/39 dated April 13, 2004 respectively through the architect as in terms of the said work order. The architect is the certifying authority. The bill was raised according to the terms and conditions of the tripartite agreement and joint measurement taken by the parties. The said final bills both dated August 3, 2004 were duly verified, corrected and forwarded to the petitioner company by the said architect by a letter dated

August 25, 2004. The sum total of final bills amounts to Rs.4,42,72,281/- (Rupees Four Crores Forty-two Lacs Seventy-two thousand Two hundred Eighty-one only) which includes work contract tax, transport costs and service tax as was agreed between the parties.

During the execution of the said work the petitioners made some payments from time to time by way of advance on repeated request, being an aggregate sum of Rs.2,90,00,000/- (Rupees Two crores ninety lacs only) and after adjustment of the aforesaid advance payment, a sum of Rs.1,52,72,281/- (Rupees One crores fifty-two lacs seventy-two thousand two hundred eighty one only) was due and payable by petitioners to the claimant for the said work executed by the claimaint.

The claimant has also stated that after completion of the work and after handing over possession of the building to the company during the defective liability for the period of six months from the completion of the date of work some complaints were made by Bata with regard to alleged defects in workmanship. On such complaints the claimant had rectified all defects either by way of repainting or replacement. The petitioner was satisfied with such rectification of work.

The claimant stated that it executed and completed the said work as per the work order and written contract and after satisfactory completion of the said work, no payment towards the balance amount of Rs.1,52,72,281/- has been made to the claimant although the petitioner/company never denied liability for making payment of the balance dues. In spite of the several

representation of the claimant dated June 18, 2004, July 9, 2004, August 6, 2004 and August 10, 2004 and in spite of receipt of such written and verbal representations, the petitioner/company did not make and release the payment.

By reason of failure on the part of the petitioner to pay the lawful dues of the claimant, the petitioner initiated criminal proceedings against the officials of the petitioner. During the progress of the criminal investigation, two applications were filed by the Officials of Bata for quashing of the criminal complaint lodged by the claimant being C.R.R. No.337 of 2005 and C.R.R. No.338 of 2005. The said petition for quashing, however, was rejected. In the said revisional application for the first time the company raised dispute regarding to the workmanship and the quality of the work done by the claimant after expiry of the defect liability period, presumably as a precursor to defence against the allegations made by the claimant.

In the said revisional applications filed by the company, the company disclosed for the first time that a report has been prepared by a third party namely KPMG an architect firm which alleged substandard workmanship of the claimant. It is alleged that the Hon'ble High Court did not place any reliance on the said purported report as the same was outside the purview of the tripartite contract dated February 27, 2004 made between the parties and behind the back of the claimant as well as the architect. The claimant further alleged that the said purported report was procured by the petitioner as a part of the large scale conspiracy for an excuse to deny the lawful dues of the

claimant, when during and even after completion of the works and during the defect liability period, the petitioner never raised any disputes as sought to be introduced through the alleged purported report.

The claimant has stated that in the criminal revision petition, the petitioner has alleged the following defects:-

a) Flooring – Chinese unbranded tiles instead of the contracted NITCO vitrified tiles.

b) Column Cladding – instead maple wood partition specified in the contract. The claimant has dishonestly used low quality teak ply and aluminium frames.

c) Partitions – used aluminium instead of Male wood/Malaysian sal.

d) The Bus Bar for computer networking – used locally fabricated aluminum instead of copper bus bar.

e) False ceiling – not installed but billed for four out of five floor.

f) Ceiling – not used the specified armed strong brand.

g) Toilet and bath room – unbranded items used and also did not provide auto flashing systems where as the contract specified the use of parry were and jaguar fittings. Further no granite partitions were installed.

It has been alleged that the petitioner had sustained losses due to TAG, Mr. Anup Chowdhury and the claimant colluding to fix exorbitantly high rate for even the contracted items and works.

The claimant has refuted the aforesaid allegations and asserted that such allegations are devoid of merits, baseless and motivated. They have been made as an afterthought only to deprive the claimant of his legitimate dues. The petitioner had even in the case of the claim of RDG IDEA Pvt. Ltd., wrongfully resisted making payment. However, only after initiation of winding up proceedings and criminal proceedings, the petitioner made some payments.

The claimant has stated that report of KPMG is a clear afterthought and brought into existence to deny payments.

The claimant refuted the allegations with regard to defective workmanship.

The claimant has stated that Kajaria brand vitrified tiles which was selected at site by the top Bata officials namely Mr. Rezo, Mr. S.J.Davis, Mr. Anup Chowdhury and Mr. S. Paul was used after the same was approved by TAG by its letter bearing reference no J91:2003-2004:07:179/B dated March 9, 2004 in reply to the letter of the claimant bearing no. RDG/070/2003 dated March 9, 2004 seeking permission to use Kajaria vitrified tiles instead of Nitco tiles since Bata India Ltd. has chosen the imported Kajaria tiles to be used for flooring deviating from the specification as agreed. Moreover after completion of the work the claimant duly informed the petitioner by its letter bearing reference no. RDG/55/04 dated August 23, 2004 about the few holes in the

flooring, which were exposed due to change of design and shifting of partitions as per company's instruction from time to time and also reminded the use of imported Kajaria tiles as per the company's choice. Thereafter on behalf of the Kajaria Ceramics Ltd. the said supply of imported Kajaria tiles as per approval of Bata officials, was also verified by a letter dated December 2, 2004. It is stated that since the petitioner chose the aluminium partition and column cladding instead of Maple wood partition the claimant by its letter bearing reference no. J91:2003-2004:07:75:B/181/1A dated March 18, 2004. It is stated that IPS flooring was done as per the instruction of the project architect to match the floor level with lift doors and to hide the exposed bolt alongwith the outer wall and the aluminium frame partition was proposed by the petitioner and accepted by the said architect to give a smarter look with the new concept of design and also save time to finish the project within the time limit.

In respect of the allegations the Rate of the shelves and the LT panel and the column cladding it is stated that the claimant has executed the work after getting the agreed rate stated in the purchase order/work order and the column cladding was done by Eurobrand aluminium to match the finish with aluminium partition as per direction of the said architect and Bata India Ltd which is more expensive than Maple wood. It is stated that all ceramic fixtures (urinals, W.C and basin) were made of Parryware and the same were chosen and approved by the said architect with the approval of Bata India Ltd. at the same rate. All the toilet fittings used are of Jaquar and EssEss. With regards

to the allegation of using locally fabricated bus bar instead of copper bus bar, it is stated that although in the tender document, no particular was mentioned regarding the bus bar system, during the work the petitioner and its architect duly approved the said specification as per the quality and price rate and after getting the certificate of the supplier.

It is stated that the allegation that the claimant has not installed false ceiling on four floors is frivolous. The concept of false ceiling was cancelled by the top Bata officials namely Mr. Rezo and Mr. Bata (Junior) at the time of their visit from abroad during February 12, 2004 and February 14, 2004 and thereafter the claimant got instruction from the said architect with the approval of the Bata India Ltd not to install the false ceiling in any floor save and except 5th floor of the said building only to enjoy the maximum height and the bills also raised by the claimant to that effect only and as such the allegation of false billing is baseless. It is stated that Nitco ceiling tiles were used instead of Armstrong brand with the architect approval to match the time limit. Moreover the said tiles are imported from Japan. The claimant in this regard has referred to the letters bearing reference no. RDG/08/2004 dated March 16, 2004 issued by the claimant, the letter bearing reference no. J91: 2003-2004:07:75:A/181/1 dated March 18, 2004 issued by the said architect, the letter of the claimant bearing reference no. RDG/070/2003 dated March 9, 2004, the letter bearing reference no. J91: 2003-2004:07:179/B dated March 9, 2004, issued by the said architect, the letter bearing reference no. RDG/55/04 dated August 23, 2004 issued by the claimant, the letter dated

December 2, 2004 issued by the Kajaria Ceramic Ltd., the letter bearing reference no. RDG/12/2004 dated March 15, 2004 issued by the claimant and the letter bearing reference no. J91: 2003-2004:07:75:B/181/1A dated March 18, 2004 issued by the said architect.

The claimant in addition to the claim for the balance amount has mad claims on account of loss of reputation and loss of profits. It is stated that the allegation of defective workmanship has caused damage to the reputation of the claimant. The claimant has made a further claim of Rs.25,00,000/- on account of expenditure incurred towards the price of materials purchased as per work orders dated 10th February, 2004. In addition to the cost of litigation, the claimant has claimed interest at the rate of 18% per annum on the unpaid bills from the date of submission of the final bills.

In the aforesaid facts and circumstances the claimant has made the following claims:-

i) Balance on the final bill for work done by the claimant. Rs.1,52,72,281/-

ii) Interest on the aforesaid sum @ 18% per annum from the date of submission of the final bill until 14th August, 2005. Rs. 27,49,010/-

iii) Value of wasted materials as per work order dt. 10th February, 2004 and as mentioned in paragraph 29 hereinbefore. Rs. 25,00,000/-

iv) Claim on account of loss of reputation of the claimant. Rs.1,00,00,000/-

v) Claim on account of loss of profit of the claimant. Rs.1,00,00,000/-

vi) Expenses for litigation. Rs. 2,00,000/-

Total Rs. 4,07,21,291/-

The petitioner in its reply to the statement of claim and also in the counter-claim refuted the allegations made in the statement of claim.

The petitioner in its reply to the statement of claim as well as in the counter-claim stated that the claimant has admitted that the works were carried out in deviation with the specification provided in the tripartite agreement. The claim in respect of the work which has not been executed and in respect of works were the quality of the material/quantity of the workmanship is substandard is challenged. The claimant is not entitled to claim payment in respect of such non-existent and substandard works.

The contention of the claimant that the petitioner agreed to such brazen downward deviation in the quality of the material and workmanship as against the contracted quality of work is abundantly false and baseless. The petitioner had never agreed to pay to the claimant any money for the work which was

never executed or for substandard quality of the material and/or workmanship done by the claimant. The petitioner had neither approved nor authorized anyone on its part to approve the substandard and miserable quality of work executed by the claimant.

The claimant colluded with the Architect, M/s TAG Architectonics and the employee(s) of the petitioner, who were in-charge of or were interacting with the claimant/architect, to make false and illegal claims against the petitioner, which were neither due nor payable to the claimant by the petitioner under the tripartite agreement or otherwise. The petitioner has stated that it is investigating the complicity, the extent of collusion and the non-contractual benefits, if any, availed by the said employee(s) in perpetrating the said fraud against the petitioner, either knowingly or otherwise.

The petitioner has alleged that in addition to claims in respect of which no works was ever executed and in respect of which substandard quality of material and/or workmanship was used, the claimant has made claims for value of the materials used as high and escalated as 500% of the then prevailing market price of the said materials. The petitioner has on its own carried out the exercise of verifying the extent of deviation and the extent of escalation through an independent agency.

The petitioner has submitted that the Arbitral Tribunal may appoint a local commissioner or an independent agency to verify the authenticity and veracity of the contents of the report filed in the proceeding. The petitioner

undertook to fully cooperate with the local commissioner or an independent agency, as may be appointed by the Arbitral Tribunal.

The petitioner has further submitted that the then employee of the petitioner having acted in collusion with the claimant in perpetrating the said fraud against the petitioner does not absolve the claimant of the legal consequences of the fraud vis-à-vis the petitioner, and does not entitle the claimant to any legally tenable or sustainable claim against the petitioner. The petitioner has alleged that the purported claim of the claimant is vitiated by fraud on the part of the claimant, amongst others.

The petitioner has submitted that in view of the aforesaid submission, the instant claim of the claimant is not maintainable either under the settled law of the land or under the well-established principles of equity. The involvement of TAG in the counter statement is explained by stating that the petitioner being desirous of renovating their corporate office at Gurgaon and stores at different locations in the country engaged M/s TAG Architectonics Ltd., inter alia, to identify a contractor for such interior designing and decoration of their corporate office and stores.

TAG identified the claimant as the contractor to carry out the works for the petitioner. For this purpose, parties being the claimant, the petitioner and M/s TAG Architectonics Ltd. entered into a tripartite contract dated February 27, 2004, providing details of the terms and conditions on which the work was to be executed and completed by the Contractor. The said contract among

other things contained the "defect liability" provisions on the Contractor for the period of six months after completion of work.

When the work was nearing completion, the petitioner became aware that the contractor was supplying poor quality materials and this was brought to the notice of the contractor and the architect. It was later, pursuant to an inquiry, confirmed that the contractor in collusion with the architect and the employees of the company who were entrusted with the supervision of the works on behalf of the petitioner had willfully and dishonestly deviated from the contract specifications regarding the quality of material to be used. The claimant used substandard materials (e.g. Chinese floor titles instead of NITCO vitrified Tiles as per contract specification/work order) when in fact the work orders were issued and bills were raised by the claimant on the petitioner for NITCO make tiles which is a more expensive material. The claimant in collusion got bills approved for work, which were never done or undertaken at all by the claimant such as providing false ceiling on each floor. When the petitioner became aware of the same on or about July, 2004, the petitioner took a decision to stop the balance payment for the claimant pending further inquiry into the matter. The claimant was informed of the internal inquiry and was requested to assist the same so that the matter could be resolved at the earliest. The claimant at various times requested to rectify and defects and/or cure the deficiencies in a manner consistent with the contract specifications and work orders.

To ascertain the extent of discrepancies and variations in the execution of the work orders, the petitioner engaged independent architects and contractors to review and analyze the works completed in the Gurgaon office. To the shock and dismay of the petitioner, it was found that sub-standard and locally made materials were used in the various works while the rates cited were of the original products. Apart from the inflation in rates, it was also found that the workmanship of the claimant was extremely shoddy and of very low standard.

M/s Sukriti Design Consultants, Architects, Engineers and Exterior Decorates, on completing an analysis of the works done by the claimant at the Gurgaon office, submitted a report wherein to the shock of the petitioner it was clear that the claimant had made use of locally manufactured and shoddy material, in complete disregard of the terms and conditions of his contract. The variance in the prices quoted and billed for the Civil, Sanitary and Interior works was, according to the Report approximately a whopping Rs.1,36,47,363.87 (being Rupees one crore thirty-six lakh forty-seven thousand three hundred and sixty-three and eighty-seven paise only.

The petitioner also engaged an experienced and reputed electrical engineer to review the electrical work done by the claimant in the project. The said engineer has verified and corroborated the contents of the report filed by Supriti which goes to show that the claimant has failed to carry out the work as per the specification provided in the contract and had used local brands of fixtures and materials in place of normal market brands. The petitioners also

indicated in their pleadings the following discrepancies in the work executed by the claimant:-

(a) Poor quality of workmanship in laying the vitrified tiles.

The claimant has unilaterally changed the specifications of the tiles to be installed. The tiles fitted in the Gurgaon office are not of any branded manufacturer, rather are the unascertainable chinese make and inferior quality. The rates charged by the claimant in the bills raised are for NITCO branded tiles and even those rates are highly inflated and not at all commiserate with the prevailing market rates for the identical product. Furthermore, as per the contract the skirting constructed was to be of vitrified tiles. However, the claimant has installed a wood skirting in place of a skirting of vitrified tiles as specified in the Work Order 1.

(b) The claimant has installed floor springs of a brand inconsistent with the work orders issued to him and has charged an exorbitant rated for the same of Rs.19,000.00/- (being Rupees nineteen thousand only).

(c) Automatic flushing systems have not been installed on any of the bathrooms in the petitioner's Gurgaon office and the claimant has charged the same in his bills.

(d) The fittings in the bathrooms were to be of jaquar brand. However, the claimant has used a local brand (Ess Ess) for the same in place of Jaquar fittings.

(e) The claimant has failed to install various fittings specified in the Work Order 1, Viz. Steel toilet paper holder, Cp/Acrylic liquid container, coat hooks, towel rails, black granite partition between urinals, etc.

(f) The claimant has not installed a false ceiling in the Basement, 1st, 2nd, 3rd and 4th floors of the petitioner' Gurgaon office. However, the same has been charged in his bills.

	Billed Amount	**Actual Amount as per Market Rates**	**Variations**
3rd and 4th floors	Rs. 75,98,925.00	Rs. 29,45,067.08	Rs. 46,53,857.92
5th floor	Rs. 41,41,870.00	Rs. 16,60,505.00	Rs. 24,81,365.00
Total	Rs. 2,26,81,390	Rs. 90,34,026.13	Rs.1,36,47,363.87

The petitioner has also indicated discrepancies in electrical works on conducting a survey in Gurgaon Office.

(g) The light fixtures installed were not according to the specifications specified in the work order.

(h) The Bus Bar Trunking used to connect the tube-lights and other light fixutres had not been installed according to specifications. The claimant has used aluminium sheets for the trucking, instead of cold-rolled steel sheets with electrolytic coatings, which is the usual practice. The trunking installed is of inferior quality and consists of just a bakelite strip inserted in an aluminium tube, instead of a proper bus-bar trunking system as available in the market. All the project works were carried out on site and all supplies received from suppliers are billed inclusive of transportation TO SITE charges.

(i) The claimant has charged work contract tax @ 4% of the contract price and service tax @ 8% of the contract price whereas only one of the said taxes can be levied at the same time.

(j) The claimant has deliberately and maliciously misled the petitioner and has clearly attempted to defraud the petitioner by his actions. The numerous discrepancies and glaring omissions in the works done by the petitioner clearly shows his mala fide intentions and also reflects on his negligent and reckless attitude towards the works.

(k) In all the claimant has maliciously inflated and overcharged the Petitioner for the Civil Interior and Sanitary Works as under:

Site	Billed Amount (Rs.)	Actual amount as per Market rates (Rs.)	Variation (Rs.)
Basement	34,57,170.00	12,66,313.25	21,90,856.00
1st and 2nd Floors	74,83,425.00	31,62,140.80	43,32,284.00

The claimant in gross violation of his mandate, has installed an inferior quality false ceiling that does not conform to the specifications of the work order and is made from a locally manufactured material, rather than a branded product.

(l) Maple wood has not been used for the partitions, as charged in the bills. The claimant has utilized aluminium sections in place of the partitions and has not used any maple wood, despite the same being mandated in the work order.

(m) The claimant was to install a show window in the basement of the Gurgaon office, as stipulated in the work order, with the glass to be used for the window specified by work order to be of Saint Gobain or Modi Guard brand. However, the claimant has not installed the same on site, but has charged the petitioner company for the same in the bills raised by him.

(n) The claimant has charged highly inflated rates for the loose furniture to be supplied by him to the company.

(o) A number of plaster of paris works do not exist on site. However, they have been billed. The PoP works, where existing, are extremely shoddy and display a very low quality of workmanship.

(p) The claimant has charged transportation charges at the rate of 5% as against the rate of 3% quoted by him in the bid. This difference of 2% by itself caused a loss of approx.. Rs. 2.00 lacs to the petitioner and is absolutely unjustified bearing in mind that as regard the wiring, MCB & DB Panels etc. used and installed as of sub-standard quality and the workmanship in the works is shoddy and negligent.

(q) The claimant has not installed any earthing, boring, copper strip on any floor. Only a few meters of GI Tape have been used to connect the earthing with the existing earthing points of the building.

(r) The claimant was to utilize 3 X 6 copper wire in the electrical works, however, the claimant has used regular cables in place of the same.

(s) In place of the 4MCBs, the claimant has installed motor starters.

(t) There are heavy discrepancies in the rates cited and prices charges for the various materials and fixtures utitlized. The claimant has not only overcharged the petitioner in many cases but has also substituted low grade material for the branded fixtures on all the floors.

(u) The claimant was to install decorative light fixtures of Phillips make. However, the same has not been installed on site, yet has been included in the bills raised by the claimant. In fact, the claimant has utilized fixtures of a local make – "Tulip" brand rather than Phillips which was the brand specified in the work order at the outset itself.

(v) The claimant has grossly overcharged the petitioner for the cable-end termination of 4 X 6 sq.mm. while the market rate for the same is Rs.5.90 (being Rupees Five and Ninety Paise only), the claimant has billed an amount of Rs. 320.00 (being Rupees Three hundred and twenty only) for the same.

(w) Furthermore, on inspection of the works, it was found that the work done is of extremely inferior quality and patently amatureish and shoddy.

(x) According to the petitioner, the claimant has overcharged the petitioner for the electrical works as under:-

Site	Billed Amount (Rs.)	Actual amount as per Market rates (Rs.)	Variation (Rs.)
Basement	10,76,750.00	3,80,040.00	6,96,710.00
1st and 2nd Floors	41,35,945.00	12,05,512.00	29,30,433.00

3rd and 4th Floors	41,49,125.00	11,04,000.00	30,45,125.00
5th Floor	17,32,480.00	6,03,591.00	11,28,891.00
Total	1,10,94,300.00	32,93,143.00	78,01,157.00

The inspections carried out and verifications done by the company and independent architects/contractors brought to light the gross negligence of the claimant, as well as the deliberate dishonesty in his conduct and actions while performing the contract.

The petitioner engaged an international firm KPMG to conduct an investigation and internal enquiry. KPMG has filed a report wherefrom it revealed that the bid documents prepared and submitted to TAG appears to be fabricated and whole process is clearly a façade perpetrated by the architect, in nexus with the claimant.

In the light of the above findings and being apprehensive of further continuing the works in light of the negligent and improper execution by the petitioner has also alleged that KPMG report also brought to light the collusion between TAG, the claimant and employee(s) of the petitioner company who were entrusted with the supervision and overseeing of the works. The nexus between the above parties began with the manipulation of the competitive bidding process and extended thereafter in the acceptance of blatantly exorbitant prices quoted for the contracted items by TAG and employee(s) of the petitioner company who were entrusted with the supervision and

overseeing of the works, despite the same being detrimental to the benefit of the petitioner.

It was found that the bidding process was a sham perpetrated by the claimant, TAG and employee(s) of the petitioner company who were entrusted with the supervision and overseeing of the works, in clear breach of the trust laid in them by the petitioner. In both bids, for appointment of a contractor for civil works as well as the appointment of a contractor for electrical works, the bids submitted by a third party, Mr. Sanjoy Bhattacharya, were found to be 'managed' and apparently the bids were just a cloak to cover-up the bias of TAG towards the claimant and to impart an air of authenticity to the process. A bare perusal of the bids received shows that the bid received from Sanjoy Bhattacharya is identical to the bid received from the claimant and it appears that the same has been merely modified to resemble an unrelated bid. The architect, TAG, has willfully mismanaged the bidding process so as to ensure that the contract was awarded to the claimant herein. The blatant manipulation of the bidding process was not known to the petitioner company, till such time as the petitioner company realized the gross errors in the works executed by the claimant and pursuant thereto initiated an inquiry into the matter, as stated hereinabove.

In light of the above findings and being apprehensive of further continuing the works in light of the negligent and improper execution by the claimant, the petitioner company stopped all payments to the claimant, till such time as the above matter could be completely resolved. Hence, the

petitioner took a decision to stop all further payments to the claimant till such time as the matter could be resolved.

However, before the petitioner could confront the claimant with the findings of the inquiry and the reports received by them, the claimant and his company by separate notices, dated 8th September, 2004, demanded payment and threatened to file winding-up petitions against the petitioner. The said notices were duly replied to by the petitioner vide letter dated 22nd September, 2004. In the reply, the petitioner pointed out large-scale discrepancies in the works done as well as the use of inferior materials being during the execution of the work orders by the claimant. Subsequent thereto, the claimant filed winding up petitions against the petitioner before the Hon'ble High Court at Calcutta. In addition, the claimant also filed criminal complaints, which culminated in complaint case no. C-11576/04 and complaint case no. C-11577/04, against the officers of the company to embarrass, harass and exert undue and illegal pressure on the petitioner and its senior officers to make forced payments to the claimant.

Thereafter, the petitioner, in view of the above actions of the claimant, filed a complaint against the claimant with the Station House Officer, Udyog Vihar, Gurgaon and filed a writ petition before the High Court of Calcutta, seeking to quash the above criminal and civil proceedings initiated by the claimant.

Subsequently, on February 17, 2005, the parties executed a settlement agreement amicably resolving all their disputes out-of-court except disputes

regarding the project that they agreed to refer to arbitration by this Hon'ble Tribunal.

On the basis of the aforesaid pleadings, the learned Arbitrator framed the following issues:-

(a) .Whether the Tripartite Agreement between the claimant, Bata and TAG Architectonics Ltd. (hereinafter referred to as TAG) and work orders issued to the claimant were obtained by the claimant by acting in collusion with TAG and some officials of Bata in particular its officer Mr. Anup Choudhury?

(b) Whether the works executed by the claimant were of inferior quality and inferior materials were used by the claimant in executing the works under the contract but bills of such works including inflated bills were approved and passed by TAG and some Bata officials acting in collusion with the claimant?

(c) Whether or not deviation in works executed by the claimant was approved or stand ratified by Bata and claimant is entitled to payment for the works executed by the claimant?

(d) Whether counter-claims of the petitioner are maintainable?

Although in the petition, several grounds have been taken to challenge the award dated 4th October, 2012, Mr.Anindya Mitra Sr. Adv. appearing with

Jishnu Saha Sr. Adv. submitted that the principal challenge to the award is that the said award is an unreasoned award.

It is submitted that on a reading of the said award, it would be apparent that the learned tribunal has given no reason in allowing some part of the claim of the petitioner. The objection and counter-claim raised by the petitioner were rejected without recording any reason. It is submitted that the Tribunal has ignored material evidence thereby rendering the said award perverse. It is submitted that the arbitrator has completely ignored the evidence of the expert appointed by consent of the parties who had visited the office at Gurgaon with a view to ascertain the nature of the execution of the work under the three several work orders. The findings arrived at during such inspection by expert would demonstrate that the petitioner had used sub-standard materials and there were material deviations in the work executed by the petitioner which facts, however, were completely ignored by the learned arbitrator. It is submitted that on the basis of the materials and evidence on record, no reasonable person conversant with the facts could have arrived at such a finding.

It is submitted that in the statement of claim, the claimant has claimed for payment of outstanding bills of Rs.1.52crores along with other claims. The award, however, does not indicate the basis of awarding of such amount. In the final bill, the claimant has indicated the basis of their claim. The final bill contains several items along with necessary particulars as to quantify rate,

price etc. The arbitrator in considering the claim and the counter-claim did not give any reason for awarding a sum of Rs.1,39,19,584/- to the claimant.

The arbitrator recorded in the award that from the materials on record and evidence adduced by the parties, it is not possible to precisely determine the exact quantum of difference in the market price at the relevant time on account of the materials used and materials specified in the contract for jobs in question. The arbitrator also did not fully accept the assertion of Mr. Sagar Ray on behalf of the claimant that inferior materials were used and the materials used were both qualitatively and price-wise more or less same or in some cases even superior and costlier. The arbitrator held that the case of the claimant is over-emphasized. However, the nature and extent of such exaggeration not stated in the award. The arbitrator reduced the claim flatly by 15 per cent. The arbitrator recorded that the assertion by Bata with regard to price variation and allegation of over-pricing is also not acceptable and both parties have resorted to exaggeration. The Tribunal, however, held that because of such over-emphasized and exaggeration of the claim for jobs executed at the corporate office of Bata at Gurgaon the amount claimed deserves to be appropriately reduced because of price difference of the materials used in some cases by way of admitted deviation. The Tribunal recorded that precise computation of the difference in price of the materials used both for execution of works as per agreement and also in case of deviation is not possible in the absence of acceptable and clinching evidence and thereafter the Tribunal flatly reduced the claim of the claimant by 15 per cent

relating to jobs executed at Gurgaon and the observation that such reduction would meet the ends of justice. The Tribunal also observed that a ready and rough computation in place of precise computation although undesirable is, however, to be followed in the instant case otherwise, by disallowing any reduction for want of accurate and acceptable evidence to arrive at precise computation might cause injustice to Bata in the facts of the case. The aforesaid observation made by the learned Tribunal according to Mr. Mitra is a complete guesswork and without any basis. The Tribunal according to Mr. Mitra, is under a duty to indicate the basis of the claim and to give a reason for not accepting the counter-claim. It is submitted that a one liner dismissal of the counter-claim clearly reflects non-application of mind. The award would also not show the basis of rejection of the counter-claim or the basis of allowing of the claimant's claim. The conclusion recorded in the award in favour of the claimant is not supported by any reason . In this regard, Mr. Mitra has referred to Section 31(3) of the Arbitration and Conciliation Act, 1996 which reads:-

> ***"S.31 (3).*** *The Arbitral award shall state the reasons upon which it is based, unless-*
>
> *(a) the parties have agreed that no reasons are to be given, or*
>
> *(b) the award is an arbitral award on agreed terms under Section 30."*

The Arbitrator passed a lumpsum award without giving any reason Under the Arbitration Act, 1940, an arbitrator could have passed a non-

speaking award but under the 1996 Act it is the statutory obligation on the part of the arbitrator to pass a reasoned and specific award unless there is n agreement to the contrary.

Mr. Mitra has referred to ***Tamil Nadu Electricity Board v. M/s. Bridge Tunnel Construction*** reported at ***AIR 1997 SC 1376 (Paragraph 26,29,32-34), Kishore Textile Mills v. Union of India*** reported at ***2001(1) Arb LR 101 (Del)*** **and** ***Shri Ram Syal & Sons v. Union of India*** reported at ***2007 (1) Arbitration Law Report 356 at pg. 363*** and submitted that the aforesaid decisions would show that the Courts have taken into consideration the mandatory requirement of assigning reasons in an award passed under the new Act. Although, the arbitrator would not be required to give better or exhaustive reasons and lack of them would not make the award vulnerable but some reasons are required to be given while accepting or rejecting the respective claims. It is submitted that the reasoned award is mandatory in terms of Section 31 sub section 3 of the Arbitration and Conciliation Act, 1996. The award shall state reasons upon which the awarded sum is based unless the parties have agreed that no reasons are to be given. It is argued that although under the 1940 Act, an arbitraror could have passed a non-speaking award in a lumpsum award but in **Sri Ram** (supra) it was held that the arbitral award shall state item-wise the sum awarded i.e. against each item of claim the amount awarded could be stated. The absence of any reason and failure to give itemize award would completely vitiate the said award.

The Tribunal was in possession of all the documents and it was the duty of the Tribunal to examine the claims and to find out if there had been any over-charging or supply of inferior material. The Tribunal while recording that there has been over-pricing and use of inferior material could not have passed an award by simply reducing the claim flatly by 15 per cent. This power and jurisdiction, according to the learned senior Counsel the arbitrator does not possess. In any event, it makes the said award arbitrary.

The learned arbitrator has the evidence of the cost of materials and on the basis of the materials on record could have easily quantified the amount charged in excess by the claimant. The overpricing of the materials could be discernible from the documents disclosed by the petitioner. The award shows that the arbitrator has done some guesswork and on the basis of such guesswork has reduced the amount claimed by the claimant by 15% of the motion of equity. The arbitrator unlike the Court cannot introduce the motion of equity to determine the claim as held in ***Ennore Port Ltd. Vs. Skanska Cementation India Ltd. & Ors. reported at 2008 (2) Arb. L.R. 598***.

The other ground of challenge is that the award suffers from legal perversity. The award would show that the learned Arbitration has failed to take into consideration the material evidence and documents disclosed by the petitioner. The report filed by the expert appointed by the learned Tribunal has not been considered at all. The said report of the expert would show that the work executed was not on the basis of contractual specifications. The

materials used were all inferior quality. The counter-claim made by the petitioner has been rejected by one liner. Although, the arbitrator has arrived at a finding that the claim of both the parties are exaggerated but no reason has been assigned for scaling down the claim of the claimant by 15 per cent. In a work order of this nature, it is argued that the learned arbitrator is required to consider item wise claim and to give a reason for accepting or rejecting such claim. It is argued that the learned Tribunal is required to bifurcate the claim of the claimant and arrive at a definite conclusion with regard to the validity of the said claim and due execution of the work in accordance with the work order. The award on various places refers to the cordial relationship between the parties and the tribunal presumed that having regard to the relationship of the parties, the petitioner must have issued oral orders for doing certain extra work and the petitioner having executed such work order, the claim made on account of extra work could not be denied. It is submitted that the arbitrator assumes jurisdiction on the basis of the tripartite settlement executed on 17th February, 2005 under which the learned Tribunal is required to decide the disputes and differences arising out of four several work orders as referred to above and the learned Arbitrator being a creature of this agreement cannot travel beyond the scope of the said agreement. Although a point was urged before the learned Tribunal with regard to the arbitrability of such additional works. The Tribunal by a cryptic order rejected the said claim. The award in so far as it relates to the works not covered under the said work orders are not arbitrable and any decision with regard thereto is

without jurisdiction. The learned Arbitrator has not considered the defect of workmanship and non-adherence of the petitioner to the contractual specifications as well as use of sub-standard material during execution. When in the counter-claim, the petitioner raised a specific issue with regard to bad workmanship and inferior quality of supply of material, it was incumbent upon the Ld. Arbitrator to decide the said issue and arrive at a definite finding. It is argued that a plain reading of the award would show that the learned Arbitrator has mechanically reproduced the averments made in the statements of the claim and counter-statement and, thereafter, proceeds to decide the matter in favour of the claimant without furnishing any reason in support of the conclusion. It further proceeded on an assumption that the architect appointed by the claimant has proved the deviations of the quality and quantity of the material supplied by the petitioner. It is submitted that those findings are based on presumptions.

It is submitted that a claim on account of extra work or additional job was allowed on the basis that the claimant is an experienced contractor and has been doing various projects and at times following practice of the business as well as to meet the exigencies and make the project and various works on the basis of verbal instruction of the petitioner on the assurance that formal work order would be issued after completion of formalities. In many cases, the claimant had already commenced job in respect of the building and in order to save the cost of redeployment and make the office operative, verbal instructions were issued to the claimant to complete electrical work in respect of the 3rd and

4th floor. Although, formal work order issued at a later date, it is argued that there was no material on record to show that any such verbal assurance was given to the petitioner and in fact they have executed extra work beyond the works specified in the work order. On the contrary, the petitioner frequently made deviations in the execution of the work.

Conclusions are not reasons. Conclusions are no substitute of reasons and if an award is passed without any reason such award becomes arbitrary, fanciful and vague is the other submission based on the decisions in ***Rukmuni Properties Pvt. Ltd. v. Mira Singh*** reported at ***2013 (5) CHN 309 (cal) and Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.*** reported at ***2011(1) Arb LR 373: 2011(3) SCC 507.***

Once an arbitrator comes to a conclusion that there is some deviation in the work executed by the petitioner it was incumbent upon the Ld. Arbitrator to arrive at a finding as to the nature of the deviation and determine the price of such inferior quality of materials or materials used not in terms of the contractual specifications. The price of the materials supplied under the work order are much less than the price mentioned in the bills raised by the claimant. It is argued that the petitioner has been able to demonstrate before the arbitral tribunal that there has been a significant variation in the price of the materials supplied by the petitioner and the materials referred to in the bills of quantity. The claimant cannot realize any amount to which he is not entitled to under the contract. There is no evidence to show that at any given

point of time, the claimant had accepted such inferior and substandard materials and had paid for the same.

The claimant has made a claim on account of false ceiling erected at the 3rd and 4th floor of the Gurgaon office, covering about 6000 sq. ft. at an alleged estimate cost of RS.5,08,000/- including laying of rigid cable pipe for electrical wires within false ceiling. The claimant included the aid amount in the running account bill. This work was never authorized by the petitioner and accordingly, the petitioner has no obligation to pay the aforesaid sum. The claimant alleged that such false ceiling work was carried out on the basis of some verbal assurance given by the some of the high officials of the petitioner. The claimant, however, has failed to prove any such assurance or construction of such false ceiling. It was not clear form the award as to whether this amount is included in the awarded sum of Rs.1,31,19,584/- .

The petitioner in the written statement has clearly stated the work orders that were procured by the claimant in complicity and in collusion with one Mr. Anup Chowdhury, representative of the petitioner and representative of the architect, namely TAG. In order to prove such complicity, an application was filed before the arbitrator under Section 27 of the said Act for examination of Anup Chowdhury as well as Manohor Dey, the representative of TAG which prayer was, however, turned down by the learned Arbitrator. It is, however, submitted that Mr. Anup Chowdhury left the organisation and is absconding. It is also submitted that no action has been taken against Mr. Anup Chowdhury or TAG for such alleged misconduct. On a specific query being

made to the learned senior Counsel if any disciplinary proceeding was initiated against Mr. Anup or any other proceeding against Mr. Anup Chowdhury and TAG for such acts of collusion or conspiracy as alleged in the counter statement, it has been specifically submitted that the petitioner has not initiated any step against any of them. It is, however, submitted that failure to take any action against any of them would be of no importanc or of any relevance and consequence in the arbitration proceeding.

The learned Senior Counsel has referred to Hudson's Building and Engineering Contracts (Volume I) 11th Editioon and Halsbury's Laws of England, 4th Edition (Volume 4).

The learned Senior Counsel has placed reliance upon Section 4 (Authority of the Architect and Engineer) from pages 269 to 272 of Hudsons Building and Engineering Contracts and relied upon the observations of the learned Author which states that when the owner enters into a written contract with a contractor, authority for the architect to vary the contract work would almost invariably be expressly given in all but the most modest or informal contracts. It remains important, however, to determine to the extent to which the architect, when carrying out his many duties or negotiating on behalf of the owner, can, in the absence of the express terms, commit or bind the owner vis-à-vis the contractor.

As to waiver of contractual requirements of building contract at the instance of the architect, reference was made to paragraphs 2.058 to 2.059 which, inter alia, states that it cannot be too strongly emphasized that the

architect would have no authority whatever to waive strict compliance to the contract or to bind the owner. However, the Author states in paragraph 2.059 that the general inability of the architect to commit the owner to any change of the building contract has a number of consequences including for instance:-

> *"(a)there is no implication that completion of the work to the architect's design is practicable or possible, so that the contract must do everything necessary to complete without additional payment, and an attempt by the architect to help the contract out of such a difficulty by ordering the extra work as a variation would not bind the owner to make additional payment, provided that the work would have been necessary to comply with the contractor's obligations in any event;*
>
> *(b) acceptance of work by the architect, or his presence and standing by at some earlier time during construction, or on practical completion, or at the end of the defects liability period, do not prevent the owner, in the absence of a binding certificate or approval, from suing for damages for defective work at any time during the period of limitation, notwithstanding that by reasonable diligence on the part of the architect the defects could have been discovered earlier and repaired at far less cost;*
>
> *(c) claims approved by the architect on interim certificate can be disallowed at any time subsequently and in no way bind the employer even if he has paid them in full at the time;*
>
> *(d) the fact that the architect orders work explicitly as a variation under the relevant provisions of the contract for ordering varied work in no way binds the owner if, on a true view of the contract, the work in question is included in the original contract obligation;*
>
> *(e) the granting of extensions of time by the A/E in no way binds the owner, nor his decisions as to the date of practical completion;*

(f) provisions requiring work to be done to the approval of the architect, or for shop drawings to be submitted for approval, for example, will almost invariably be construed in an "additional protection" sense, and the approval if given will not, subject to any possibilities of detriment and estoppel, bind the owner if the work is in fact in breach of contract. The foregoing propositions summarize the great majority of present day forms of contract but can, of course, yield to express provision."

An architect or engineer has no implied authority to make a contract with the contractor binding on his employer, or to vary or depart from a concluded contract. His duty when supervising a contract is to see that it is faithfully fulfilled according to its terms but it may, of course, be varied by the parties themselves, or by the architect or engineer under specific authority given to him in that behalf, whether under the express terms of the building contract, as in the case of variations clause (which in fact is a clause permitting variation of the contract work and not of the contractual provisions as such) or on direct instructions from the employer.

Paragraph 1324 of Halsbury's Laws of England has been referred to show that the architect or engineer has no general authority to vary, waive or dispense with any conditions contained in the contract without express authority to do so. Where he is authorized by the contract to give directions as to the manner in which the work is to be carried out, he could only give such directions as fall within the contract, and may not vary the scheme of the proposed works or allow the substitution of entirely different materials for those specified in the contract.

The arbitrator is required to decide all issues including the counter-claim. It is argued that the arbitrator has failed to consider the counter-claim and, accordingly, misconducted himself. In this regard, reference is made to ***Indian Minerals Company Vs. The Northern India Lime Marketing Association*** reported at ***AIR 1958 All 692*** and ***K.V. George Vs. The Secretary to Govt. Water & Power Dept. at Trivandrum*** reported at ***AIR 1990 SC 53***. The learned Senior Counsel has referred to the observations made in the **Indian Minerals Company** (supra) where the Division Bench stated that an award which does not dispose of the matters referred to arbitration is incomplete and consequentially it is invalid in law.

In **K.V. George** (supra) it was held that the Arbitrator would be committing a misconduct under the Old Arbitration Act if the learned Arbitrator makes an award on the basis of the claim of one party and the counter-claim of another party is kept for consideration subsequently. Mr. Jishnu Saha, learned Senior Counsel in supplementing the argument of Mr. Mitra has referred to ***Premier Fabricators Allahabad Vs. Heavy Engineering Corp. Ltd. Ranchi*** reported at ***1997 (4) SCC 319, T.N. Electricity Board Vs. Bridge Tunnel Constructions & Ors.*** reported at ***1997(4) SCC 121 and MD. Army Welfare Housing Organization Vs. Sumangal Services (Pvt.) Ltd.*** reported at ***2004 (9) SCC 619*** and submitted that the arbitrator has committed a jurisdictional error in failing to decide the arbitrability of the some of the claims in the petition with regard to extra work and non-consideration as the arbitrability of the dispute is an error of jurisdiction which goes to the very

root of the matter and, accordingly, the said award is liable to set aside. The last decision, namely, **Army Welfare Housing** (supra) also discussed the role of an architect in Paragraph 75 to 85.

Mr. Ratnanko Banerjee, the Ld. Senior Counsel appearing Mr. Prabal Mukherjee, Sr. Adv., defends the award. It is submitted that the petitioner has successfully completed the entire work of the corporate office at Gurgaon and Faridabad under supervision of the architect TAG and other officers of Bata India in terms of the work order, bill of quantities and tripartite contract entering into between the parties. During the course of execution of the work Rs.2.90 crores was released in favour of the petitioner. Due to failure to pay the balance of Rs.1,52,72,281/- arbitration proceeding has been initiated. An interim award was passed in favour of the Faridabad work leaving behind outstanding balance of Rs.1,31,19,584/-. This claim has been adjudicated in favour of the claimant/petitioner.

The balance outstanding amount was recommended for payment after consideration of the final bills by both officers of Bata India Limited and TAG in respect of the Faridabad work. It is submitted that bills dated 31st June, 2004 submitted by the petitioner for Faridabad, have been duly approved by both the officers of Bata India Limited and TAG. In respect of Gurgaon office the bills for the extra work submitted on 31st June, 2004 have been duly approved by the officers of Bata India Limited and TAG. The architect has also settled the final bill that was submitted on 3rd August, 2004. The endorsement of the Bata official and as well as TAG on the bills raised in respect of the extra work

and other works would show that the Bata Officials duly accepted its liability to pay the outstanding amount. It is argued that the recommendation for the balance amount was made after due consideration that the petitioner was paid a sum of Rs.2.90 crores as advance.

It is submitted that in order to avoid such liability the petitioner sought to make out a case of collusion between the Bata India Limited, TAG and the claimant without any explanation for the basis of such recommendation to make payment for the balance outstanding amount.

The petitioner has given documentary as well as oral evidence in the arbitration proceedings and has produced relevant documents including the document alluded to above to show that the denial of payment of the balance amount was totally arbitrary and without any justification. On the contrary it is submitted that no person involved and/or connected with the execution of the work has been called as a witness. It is submitted that the Ld. Arbitrator on consideration of the recommendation of TAG for two bills as well as the recommendation of Bata for payment of all the bills partly allowed the claim of the claimant. The Ld. Senior Counsel would however remonstrate that the arbitrator having found that the work was duly executed by the claimant could not have reduced the claim by 15 per cent from the balance outstanding sum. Mr. Banerjee, however, submits that Anup Chowdhury or any other officers involved in the work were not produced as a witness although the defence of Bata is of collusion and conspiracy between the petitioners and the officers of Bata. It is argued that subsequently the petitioner had paid the entire

remuneration of its architect namely, TAG. The arbitral tribunal appointed an architect to inspect the work executed by the petitioners and the evidence given by such expert, Mr. Alok Ranjan could show that the work had been duly executed by the claimant. The report would not justify or support the case of the petitioner that the item supplied were inferior quality. The Ld. Counsel has referred to clause 2, 4,8,10,11,12 of the contract to show the role required to be played by the architect in the entire contract. The architect had the power to supervise the execution of the work and approve the changes in respect of on going works. Under the contract the defect removal period is six months and within the said period no complain was received. Whatever defect was noticed by the senior officials of Bata were removed to the satisfaction of Bata. The materials on record would show that all the bills were scrutinized, rectified and approved by Bata and its architect TAG. Mr. Banerjee has referred to pages 524, 526 and 538 of the affidavit in opposition forming part of the statement of claim filed before the Ld. Arbitrator to substantiate the said argument. Specific reference was made to endorsement of the officials of Bata at page 523 to 524 which is a bill dated 31st June, 2004 for the extra work at the Gurgaon office showing approval of the extra work. The said document bears the signature of Anup Chowdhury who had signed the purchase order on behalf of the Bata India Limited. It is submitted that the work executed by the claimant has been scrutinized at every stage and joint measurement sheet would show that both the architect and the claimant had duly approved the work. Such joint measurement sheet which would show the progress of the

work as well as the nature and extent of work executed by the claimant. The Log Book forming part of the proceedings was also referred in order to show that correction have been carried out by pen. Initially some defects were pointed out on 29th July 2004 and removed on August 30, 2004. The officials of Bata India Limited had endorsed on the document that it was 'OK'. The allegation of collusion sought to be advanced and propagated before the tribunal was a clear afterthought, baseless, frivolous and without any foundation. It is submitted that no step has been taken by Bata against TAG for its alleged collusion with the petitioners nor it had withheld the fees of TAG that required to be paid to TAG as their remuneration. Although it was alleged that Mr. Arup Chowdhury an employee of Bata had colluded and conspired with offends of TAG but no step was taken against the said official. None of the employees of Bata India Limited who were involved in execution of the work were examined. In so far as the quality and nature of the materials used during the execution of the work and to some extent branded items were not used, it was submitted that the clause IV of the agreement clearly states that all materials and the execution of works were to be effected "as far as practicable" which means that if the branded item mentioned in the purchase order is not readily available the materials that are of same and/or similar quality could be used otherwise the expression "as far as practicable" would not have been inserted. The parties were aware that during execution situation might arise when a particular branded item might not be available in such huge quantity and if the work was to be postponed till such materials are

available the execution of the entire project would get delayed. The parties never intended that in such a situation the work would remain idle till such branded item is available. In fact, whatever items have been used in place of the branded items during the execution of the contract were being approved by the Bata officials as well as TAG. To illustrate the aforesaid point the reference was made to the documents at pages 113 and 627 to 634 of the affidavit in opposition with regard to the deviation of specification of tiles. It was further submitted that during execution TAG permitted deviation of specification of tiles and approved such deviation. Such deviation was approved by TAG in order to comply with the request made by Mr. S.J. Devis to use such materials. The endorsement of the Bata officials as well as corrections or rectification made in such bills by Bata officials as well as TAG would clearly show that the bills were scrutinized and thereafter only payment was recommended. The petitioners used Kajaria brand tiles since the huge quantity of Nitco Vitrified Tiles was unavailable from the suppliers at Delhi/Gurgaon and the quality of the tiles which were used are no less inferior than that of the Nitro Vitrified Tiles. The Ld. Counsel has referred to a letter dated 19th March, 2004 where request for approval was made for use of Kajaria tiles instead of Nitco tiles. The contract was in the nature of a trunkey contract and the cost agreed included various components including price and cost of materials used in the execution of the work along with other charges including those for fixing, fitting, labour etc. It was submitted that the dispute relating to Bus Bar Trunking are without any bases and Exhibits 7,8,9 would support the case of

the petitioners. The answers in cross examination to question nos. 323 to 341, 587, 588, 920 to 931 by Mr. Sagar Roy would show that the petitioner was justified to use Bus Bar Trunking. The justification for using Kajaria Tiles has also been established during the cross examination of the said witness namely, question nos. 527, 934, 935 and 1072. Similarly the case with electrical fittings used by the petitioner would appear from Exhibit 13 and question no. 3, 943 and 944 during cross-examination.

In the contract, there is a defect liability period of 6 months. Some defects which minor in nature were pointed out and were cured. There were no complaints from Bata and / or its architect. 3% of the billed amount is to be withheld as retention percentage towards the defect liability and security deposit which is governed under Clause 11 of the General Conditions of Contract. Such alleged defects were first raised in the criminal revision petition filed in this Court by Bata. The criminal revision petition was however, dismissed by a judgment and order dated 4th February, 2004.

False ceilings were erected at majority portions of the floors. Wall claddings which are similar in nature to false ceiling have been erected at places on the instruction of the petitioner and the architect, for aesthetic purpose in order to straighten the appearance of the side walls. The cost of raising wall cladding or affixing wall cladding is much more than that of false ceiling.

The bill of quantities contained the comprehensive job including laying cost of materials etc. and accordingly, the rates were quoted on the basis of such comprehensive work.

The Ld. Counsel has referred to the letters dated 30th January, 2004, 1st February 2004, 24th March 2004 both dated 18th March 2004, 19th March 2004, 15th March 2004 at pages 701-708 of the affidavit in opposition being letters exchange of correspondence between the TAG and the claimant with few of the letters addressed to Mr. Anup Chowdhury, Manager SIC Bata India Limited to show that the work of false ceiling using porcelain separator partition for urinal and ESS ESS brand taps and other plumbing fixtures instead of granite partitions and Jaguar brand plumbing fixtures, use of Nittobo brand false ceiling tiles instead of Armstrong and use of Alcu Bar System for BUS BAR Trunkin for the Bata Office interior project, Gurgaon were approved by the architect. The Bata officials were also aware of such deviation in the specification.

A false ceiling to cover the irregular finishing of the beam and lintel from the first floor to fourth floor with gypsum Plaster of Paris was erected and rates for which were the same as in the quotation and purchase order. In view of such authorization by the architect, the original false ceiling work was dismantled and ceiling claddings and false ceiling/ claddings were erected all through the first to fourth floors to cover the irregular finishing of the beam and lintel. The bill has been raised stating the same to be false ceiling as per

the quotation and purchase order since the rates were agreed to be the same and no bills have been raised in respect of basement.

Mr. Davis chose Tulip Brand light fixtures as his preferred choice and accordingly, the petitioner by a letter being Ref. No. RDG/08/2004 dated March 16, 2004 addressed to the architect sought permission to use Tulip Brand light fixtures instead of given specifications. In reply the architect by a letter being No.J 91:2003-2004:07:75:A/181/1 dated March 18, 2004 permitted the petitioner to use Tulip Brand light fixtures.

In as much as the petitioner has failed to show any breach of contract had taken place at the instance of the claimant and failed to establish any collusion the award passed by the Ld. Arbitrator cannot be touched and/or interfered with. The defence with regard to the price of the materials used is different since the materials used were in deviation of the brand mentioned in the purchase order is also unsustainable since the contract is in the nature of turnkey contract involving execution, fittings, fixing and to complete the entire work. The contract is not merely to supply materials. Although, much emphasis is given to the report filed by Aloke Ranjan but such report would not show that the tiles used by the claimant are of Chinese made. On due execution of work the bills were approved by TAG on 31st May, 2004 and 15th June, 2004. The defect indicated was cured as would appear from the endorsement in the Log Book. Final bills were submitted to Bata on the basis of the recommendation that was made for the payment of the bills by the

officials of Bata as well as TAG. Thereafter representation were made to the higher officials of Bata by letters dated 18th June, 2004, July9, 2004, August 6, 2004 and August 10, 2004 for payment to which there were no contemporaneous reply complaining of any alleged defect in work or use of inferior materials. The petitioner has failed to explain the basis of recommendation of the officials of Bata India Ltd. themselves and recommendation of TAG for making payment after consideration of the work and the bills submitted. The letter dated August 25, 2004 of TAG written to Bata India Ltd. specifically requests payment of Rs.97,56,464/- as the balance amount of the two work orders dated March 4, 2004 and April 13, 2004. This is after consideration of the advance payments, made and works executed. The petitioner in its argument has failed to give any explanation at all on such account. In dealing with the submission that the Arbitrator's finding on deviation, acceptance of Bills and no reason to deny the claims of the claimant, it is submitted that Bata has not taken appropriate curative or remedial steps immediately even though such course of action is reasonably expected of a big firm like Bata. Bata had not cancelled the Tripartite agreement even after of the alleged case of collusion and TAG was allowed to continue as Bata's architect and technical advisor. Such state of affairs runs counter to the case of fraud or collusion. In absence of any convincing and unimpeachable document justifying a finding that TAG was acting in collusion with Mr. Anup Chowdhury and had approved improper and inflated bills submitted by the claimant, the

Tribunal could not have held that the claimant was acting in collusion with TAG or any other officers of Bata.

In this case, it could not have escaped the notice of Senior officers of Bata when execution of works were in progress and more so, when the execution of works were carried out for quite some time and also before them at Bata's corporate office. Bata's inaction, when prompt action by way of remedial measures would have been warranted, remains inexplicable.

There is no material to show that Bata or its consultant TAG had given any order or direction to remove any other defects which still remains to be rectified. On the contrary TAG approved the bills of claimant for payment by Bata. If the defects had still subsisted and consequently were required to be rectified despite specific direction given for such rectification, Bata would have promptly put the claimant on notice of such defects still persisting. But such is not the case. That, after coming to know of the alleged collusion activities, Bata should have directly instructed the claimant to remove the defects by specifically indicating such defects. Bata has not done so. The claimant has removed all defects that were pointed out by floor managers of Bata to the satisfaction of Bata and its consultant TAG in August 2004 was acceptable to the Tribunal. In refuting the argument of the claimant that the award is unreasoned, it is submitted that the arbitrator has given adequate reasons in respect of the award. It is submitted that the petitioner has produced two witnesses namely Mr. Sanjoy Chawla as an expert appointed by the petitioner

after execution of the work by the claimant to assess the nature and quality of the works executed in terms of the work orders and Mr. Harpreet Singh one of the vice president of Bata. The evidence of Sanjoy Chowdhury is at best opinion of an expert even the petitioner did not rest its case solely on the assessment of Sri Chawla but prayed before the Tribunal to assess the quality of the work by an expert. Mr. Harpreet Singh admittedly did not supervise the execution of the agreement or in any way involved with the execution of work at any stage and/or to assess the quality of the work executed by the claimant. The allegation of collusion of conspiracy between the TAG, some officials of Bata and the petitioner could not be established before the Tribunal such assertion remain in the realm of surmise and conjuncture. There was no material before the tribunal on the basis of which the tribunal could arrive at a finding that there was a collusion conspiracy between the TAG, claimant and Bata and against the interest of Bata, the deviation and the works execution by the claimant was approved by TAG. TAG has admittedly approved the bills for various works done by the claimant and such approve and duly certified bills could not be discarded unless proved to be erroneous, unjustified or unauthorised. It is submitted that the failure to take any steps by the petitioner either against TAG or Anup Chowdhuy or any other officers (named not disclosed), immediately on raising of the final bills or prior thereto and even thereafter would show that the petitioner had no genuine claim against the claimant. It is unbelievable that till the filing of the criminal revision application before the High Court for quashing of the complaint case filed by

the claimant that the petitioner could not discover any breach of contract by the claimant or that TAG and the claimant had conspired with the some officials of the Bata in raising inflated bills such state of affairs clearly raise counter to the case of fraud or collusion as alleged by Bata.

It is submitted that the allegation of collusion is also a clear after thought since the Bata officials requested the claimant to carry out certain rectification work in August, 2004 and TAG was entrusted by Bata to supervise certain rectification work. This rectification work was carried out after the purported knowledge of Bata of such alleged collusion. The rectification work was carried out to the satisfaction of the TAG and Bata officials. It was only thereafter, TAG had recommended payment of outstanding dues. In the normal circumstances, TAG would have been denued of its responsibility and authority either to supervise such rectification work or to approve the Bills for payment. Bata should have directly taken up the matter with the claimant. The report of Alok Ranjan, an independent expert appointed by the tribunal also does not support the allegation of poor workmanship or use of inferior materials. The report on the contrary would show that the work entrusted to the claimant had been by and large satisfactory. The summary of the argument of Mr. Banerjee appears to be that the Bata officials were involved at every stage of the execution of the work and whatever works had been executed were not hidden works clearly visible and there is no contemporaneous protest or complaint either by Bata or TAG either with regard to the deviation of work or use of inferior quality of

materials. The changes in the works specification was made as desired and directed by the higher officials including the Managing Director of Bata and with prior approval of TAG.

On the aspect of the deduction of claim for the balance amount by 15 per cent it was argued that since it was not possible to precisely determine the exact quantum of difference in the market price at the relevant time on account of materials used and materials specified in the contract for jobs in question in the absence of clinching evidence. The tribunal awarded the claim for the balance amount by reducing it by 15 per cent. It is submitted that the petitioner has been unable to demonstrate as to why any figure other than 15 per cent should be reduced from the claim of the claimant. It is not open to the petitioner to urge as to why 15 per cent has been reduced because it is the claimant who has suffered the deduction of 15 per cent from its claim. The petitioner cannot be an aggrieved party in so far as deduction of the 15 per cent from the claim of the petitioner. Although the learned Senior Counsel remains treated that in the facts and circumstances of the case and having regard to the clinching evidence in support of the balance claim the tribunal ought not to have reduced the claim by 15 per cent, however, it is submitted that it is not impermissible for an arbitral tribunal to apply a guess work and accept 15 per cent as the basis either as a measurement of damages or for any other purposes which could be same and similar in nature. In this regard the learned counsel has relied upon this ***A.T. Brij Paul Singh and Ors. vs. State of Gujarat*** reported at ***AIR 1984 SC 1703*** and similar view expressed in ***Md.***

Salamatullah & Ors vs. Govt. of Andhra Pradesh reported at ***AIR 1977 SC 1481: (1977) 3 SCC 590.***

It is submitted that in the aforesaid decisions the Hon'ble Court has accepted 15 per cent as a measure of damages for loss of profit. It was further held that appellate court would not interfere with the finding of the fact given by the trial court "If the first work was a guess it was at least a better guess than the second one". The arbitrator was not expected to go through the minute details to ascertain the exact figure of the damages. The arbitrator applied rough and ready formula to arrive at the damages payable. Once the arbitrator arrives at a figure even by guesswork, the court may not interfere with it, if it is not unreasonable.

The learned counsel has referred to ***T.P. George vs. State of Kerala and Anr.*** reported at ***AIR 2001 SC 816*** to submit that the Court in considering an application for setting aside an award should not substitute its views for those of the arbitrators unless the view taken by the Arbitrator is unreasonable or one which could not be arrived at by a reasonable person.

The learned senior Counsel has referred to ***U.P. State Electricity Board vs M/s. Searsole Chemicals Ltd.*** reported at ***AIR 2001 SC 1171*** to submit that when the arbitrator has applied its mind to the pleadings, the evidence adduced and the terms of the contract, it would not be within the scope of the court to re-apprise the matter as if it were an appeal and when it appears that two views are possible, the view taken by the arbitrator would prevail. The learned senior Counsel has referred to the pleadings, relevant

documents and the terms of the contract to show that the view taken by the arbitrator is a possible view inasmuch as the arbitrator has applied his mind, the Court would not interfere with the said award. It is submitted that unless it is demonstrated to the Court that the reasons given by the arbitrator are erroneous as such as propositions of law or a view which the arbitrator has taken is a view which it could not possibly be sustained in view of the matter then the challenge to the award cannot be sustained.

In this regard the Ld. Counsel has referred to ***State Electricity Board-vs- M/s Searsole Chemicals Ltd.*** reported at ***AIR 2001 SC 1171- U.P.*** **Food Corporation of India-vs-Joginderpal Mohinderpal & Anr** reported at ***AIR 1989 SC 1263***.

In respect of reasons given by the arbitrator for his conclusions even if it is assumed that there are some mistakes in the construction by the arbitrator such mistake is not amenable to be corrected while scrutinizing the award by the Court since the court cannot sit in appeal over the views of the arbitrator by examining and re-assessing the material nor could the court re-appreciate the evidence.

The Ld. senior counsel has also referred to the following three decisions in support of the aforesaid propositions:-

I) Food Corporation of India-vs-Joginderpal Mohinderpal & Anr. reported at ***AIR 1989 SC 1263;***

II) Steel Authority of India Ltd.-vs- Gupta Brother Steel Tubes Limited reported at ***2009 (10) SCC 63-;***

III) K.V. Mohammad Zakir-vs- Regional Sports Centre reported at ***2009 (9) SCC 357;***

IV) P.R.Shah, Shares and Stock Broker (P) Ltd.–vs-B.H.H. Securities (P) Ltd. and Ors. reported at ***2012 (1) SCC 594.***

The court should not substitute its own view for the view taken by the arbitrator while dealing with the proceeding for setting aside an award. Where the arbitrator acts within jurisdiction, "the reasonableness of the reasons" given by the arbitrator is not open to scrutiny by court.

A court does not sit in appeal over the award of an arbitral tribunal by reassessing or reappreciating the evidence and submitted that in all the aforesaid decisions it was held that in the event that the arbitrator has made an honest guess work while passing an award the Court should not interfere with such award. In referring to ***Delhi Development Authority Vs. Anand & Association*** reported at ***2008(1) Arb LR 490 (Del),*** **Good Value Engineers vs. M.M.S. Nanda, Sole Arbitrator and Union of India; CS (OS) No.2461/1997 reported at MANU/DE/4668/2009 (Mahanagar Gas Ltd. Mumbai Vs. Babulal Uttamchand & Co. Mumbai)** it is submitted that if the arbitrator had resorted to honest guesswork after duly considering the various facts, evidence and circumstances, the court unless finds it perverse or unreasonable would not interfere with the award.

To sum up it is submitted that if on the basis of the available material the arbitrator has passed an award by making an honest guess work the Court should not go into the reasonableness of the reasons and ought not to exercise appellate jurisdiction over the said award by reassessing or re-appreciating the evidence.

The petitioner's argument of inconsistent finding is not apparent on the face of the record. The petitioner is really inviting this Hon'ble Court to go into re-appreciation of evidence and to come to a different conclusion than what has been found by the Learned Arbitrator for the purpose of sitting aside the award. On consideration of the evidence, the Learned Arbitrator has held that it is not possible to arrive at a precise computation for want of accurate and acceptable evidence. The entire argument has been based on the nature of the evidence before the Learned Arbitrator which has already been considered by the Learned Arbitrator and a conclusion arrived at.

The petitioner in its argument has wholly abandoned its main case in the Counter-Statement that there was collusion between the petitioner Architect and some officers of Bata India Ltd.

It is submitted that none of the cases relied upon by the petitioner with regard to the unreasoned award is applicable in the present facts and circumstances of the case as the award on a true and meaningful reading could not be said to be an unreasoned or a non-speaking award. The fact that the learned Arbitrator has arrived at a finding that there is no acceptable or

clinching evidence to make a precise computation is also a finding on the basis of the assessment of the evidence and it cannot be said that the conclusion arrived at by the arbitrator in reducing the claim by 15% cannot be said to be inappropriate or not a possible view that the arbitrator could have taken on the basis of the materials on record.

The learned senior Counsel has distinguished the decisions cited on behalf of the petitioner submitted that since the award is a reasoned award, the ratio of the cited decisions which deal with the absence of reason are not applicable. It is further submitted that since the arbitrator has duly applied his mind and referred to the terms of the contract and interpreted it, it cannot be said that the arbitrator has misconducted himself or the award suffers from legal perversity.

It is submitted that para 2.057 of Hudsons Building and Engineering Contracts does not state anything new. In so far as the architect TAG is concerned, their role has been described in the contract itself. The architect has been defined at pg.123 of A/O and Clauses 2,8,10 & 11 appearing at Pg. 123 and 125, with regard to scope of the work and performance, the words 'architect' and 'employer' were used interchangeably. Therefore, under the contract, whatever the Bata could do, the architect, i.e., TAG can also do the same.

It is submitted that, the proposition in paragraph 1324 of Halsbury's Laws of England, 4th Edition, supports the case of the petitioner. It is well within the powers of the architect to waive or dispense with any conditions contained in the contract if there is express authority to do so. In the contract, Clause 2 specifically empowers the architect, in his absolute discretion to issue written instructions, details, directions, explanations, with regard to variations or modifications of the work or alternations, substitutions of any work. The scope of the clause is not confined to issuance of written instructions only. It also refers to "directions" which maybe both written and oral. It is submitted that, none of the propositions relied upon by the petitioners in Hudsons Building and Engineering Contracts or Halsbury's Laws of England, make the carrying out of the work illegal. In so far as the cost is concerned, a chart was handed over to the learned Arbitrator being 'Annexure-A' to the written notes of arguments filed with the learned Arbitrator. It was submitted on the last day of the arbitration at the hearing before the learned Arbitrator when the petitioner chose not to be present in the arbitration in spite of notice of such hearing. There was no one to oppose the cost, which was claimed by the petitioner.

Section 31(8) of the Arbitration Act provides for fixing of cost by the Arbitral Tribunal. The section provides for reasonable cost to be awarded. The learned Arbitrator has given reasonable cost in the absence of any objection by the petitioner. No copy of the written notes of the petitioner was served on the claimant/petitioner. The share of learned Arbitrator's fee paid by the petitioner

was Rs.11,70,000/-, and the stenographer's fee was Rs.1,75,500/-. The learned Arbitrator's air fare was Rs.2,96,000/- and the stenographer's air fare was Rs.80,000/-. The details of cost claimed is appearing at Pages 774 of the Affidavit in opposition.

Let me now consider the rival contentions.

The claimant and RDG Interior Decoration Exterior have been assigned to do the work covered under the works order. Bata India Ltd. is the employer and TAG Architectonics Pvt. Ltd. is the architect appointed by Bata India Ltd.

The work is required to be carried out to the entire satisfaction of the architect/employer in accordance with the specifications and any further instructions and details that might be provided by the architect/employer. If the work or such further instructions and details that might be necessary to comply with the instructions, directions or explanations would be in the opinion of the contractor extra for that comprised in or reasonably to be inferred from the contract, the contractor before proceeding with such work would be required to give notice in writing to the architect. In the event of architect/employer agreeing to the same in writing, the contractor would be entitled to an allowance in respect of such extra work as an authorised extra. If the architect/employer decided that the work is to be carried out by the contractor, the contractor would do so and the amount thereof, failing any agreement, shall be settled by arbitration as provided in the said general terms and conditions, but such deference shall in no way delay the contract.

All materials and workmanship shall be, as far as practicable, of the respective kinds as specified in the schedule of rates and/or specifications and in accordance with architect/employer instructions. The contractor upon the request of architect/employer would furnish to them all invoices, accounts & receipts together with vouchers to prove the materials complied with or used therein. The contractor would not be entitled to make any alteration or addition to or omission from the work or any deviation from work or directions without the written approval of architect/employer and no claim for any extra work would be allowed. Unless it has been executed with the authority of architect/employer, the list of items not included in the schedule of rates shall be settled by the architect/employer and the contractor; mutually in accordance with the provisions of Clause 9 of the contract. The variations in quantity shall however not exceed 10% of the contract price. Clause 9 of the contract provides for ascertainment of the prices for extras.

The architect under the contract, during the progress of the work has the power to order in writing from time to time removal from the works within such reasonable time as may be specified in the order of any materials which in the opinion of the architect/employer are not in accordance with the specifications or the instructions of the architect/employer. The substitution of proper materials and the removal and proper execution of any work which has been executed with materials or workmanship if not in accordance with the specifications or the instructions then the contractor would be required to forthwith carry out the order at his own cost. In case of default, the employer

would be entitled to carry out the same and all expenses consequent thereupon shall be recoverable from and on behalf of the employer or may be deducted by the architect/employer from any money due or may become due to the contractor. The contractor has to intimate in writing to the engineers/employee as and when the contract is complete in all respects in order to enable the architect/employer to take possession of the same. The defect liability period would commence from the date of completion certificate. The contract is to be executed within 120 days and the defect liability period is for a period of six months.

The special conditions of the contract provides that the contractor would submit interim bills on the basis of the work actually carried out by the said contractor, at intervals not less than one calendar month and with payments to be normally made by the employer within 15 days from the date of receipt of the certificate. Quantity mentioned in the schedule of rates in the contract would be subject to any variations as per site conditions and as directed by the architect/employer. No compensation however would be paid on account of such variation. All works are to be carried out as described in the schedule of rates and contract specifications in conformity with the specification and requirement of the local authorities. Quality of materials and workmanship are to confirm strictly to tender specifications and the contractor is required to ensure that the best quality of work is done to the satisfaction of architect/employer with strict control on materials, workmanship and supervision.

The primary challenge to the award appears to be that the said award is unreasoned award. This court is unable to accept the submission made by Mr. Mitra that the award is unreasoned. The arbitrator has taken into consideration the materials on record and has given reasons in allowing a part of the claim of the claimant. With regard to the arbitrability of some of the disputes, the award states that the objections raised by the petitioner that some of the claims in the arbitration are not covered by the agreement for reference was not pressed. The learned Arbitrator, however, stated that if for examining the claim made by the claimant, it is found that any claim is outside the purview of the agreement for reference as contained in the bilateral settlement, such claims shall be disallowed. The learned Arbitrator held that the petitioner has failed to establish any case of fraud or collusion. The learned Arbitrator on examination of various clauses of the agreement held that the architect was not only acting as a technical advisor but was entrusted to take decision for change of specification of some works and also change of materials or equipments to be used by the claimants for executing the works covered under the agreement whenever such changes are warranted. The role of TAG cannot be doubted on a vague allegation of acting in collusion by Mr. Anup Choudhury and an officer of TAG with the claimant is a definite finding arrived at by the arbitrator. At this stage, it is significant to mention that the agreement would show that the expressions “employer and architect” have been used inter-changeably. In fact, TAG has been given the supreme authority to take all important decisions with regard to the execution of the

work. On completion of the work and certification of the final bill, the entire remuneration of TAG has been paid. The endorsement of Bata Officials as well as TAG on the bills for extra works and other works would show that Bata is liable to pay the outstanding amount. The final Bill dated 31st June, 2004 was duly submitted bears the endorsement and approval of both the officers of Bata India Ltd. and TAG. On consideration of recommendation of TAG for the bills as well as the recommendation of Bata for payment of the bills, the arbitrator has partly allowed the claim of the claimant. It is significant to mention that the allegations of poor workmanship by use of inferior quality of material was raised for the first time in the criminal revision petition. Ultimately, the matter was resolved by entering into the agreement where the parties have agreed to refer to some of the disputes to arbitration. It is also significant to mention that none of the persons involved with the execution of the said work has been produced as witnesses by Bata. The report of the independent expert appointed by the tribunal at the instance of the parties would not show that the work executed by the claimant was in material deviation of the contracts specifications. However, there are certain deviations noticed which are insignificant in terms of quality. The scope of reference to assess the works executed by the claimant. The expert appears to have extensively cross-examined by the petitioner. The expert maintained althroughout that it cannot be said that the work executed by the claimant is unsatisfactory. The floor managers against whom no allegation of collusion was made and had admittedly been directed to scrutinize the defects in the execution of works in

different floors have not been examined by Bata for inexplicable reasons. That from time to time payments were released to the claimant by Bata coupled with fact that even the Bata Officials have accepted the final bill and had agreed to pay for the extra work would go to show that the stand taken by the petitioner subsequently about the inferior workmanship or supply of substandard or inferior material is a clear afterthought. That both the offices are functional and Bata did not feel it necessary to replace the alleged so-called substandard and/or inferior materials by any other superior material is an admitted position. It is unacceptable that the bills were passed and were approved by Bata without ascertaining the quality and quantity of the work. A large number of documents having legally binding implication on Bata are on record. It is also significant to mention that notwithstanding such allegation of collusion and conspiracy, TAG has been fully paid and no proceeding has been initiated against Mr. Anup Chowdhury or TAG for recovery of any amount. In a normal situation like this, Bata would have withheld payment of the remuneration of TAG and also would have initiated proceeding against Mr. Anup Chowdhury for recovery of loss or damage suffered by any act of collusion or conspiracy as alleged before the arbitrator. It appears to be too late in the day to raise such issues in order to avoid its liability. The architect of Bata, namely, TAG has admittedly approved the bills submitted by the claimant. The learned Arbitrator held that the petitioner was unable to lead any evidence to show that the works executed by the claimant is of inferior quality or the approval of TAG was tainted by any act of collusion between the

claimant and TAG and officials of Bata. The tripartite agreement gives flexibility and discretionary power to the architect to execute the works in question. The paragraphs cited by Mr. Mitra from Hadson's Building and Engineering Contract and Halsbury's Laws of England suggest that architect has a very important role to play and his role is to be assessed on the basis of the terms of the contract. No discussion on the role of the architect would be useful unless one reads the contract to find out the extent of power conferred upon the architect. Under the contract, as indicated above, the expression "employer" and the "architect" has been used inter-changeably and the architect has been given an eminent and discretionary power to vary the contractual specifications. Clauses 2,8,10 and 11 of the contract gives wide discretionary power to the architect to issue written instructions, details, explanations with regard to variations or modifications of the claimed policies and specifications of any work. The oral direction to carry out the work is also implicit. In any event, the petitioner has certified extra work and accept its liability to make payment for the extra work. The petitioner could not have approved such bills for extra work without ascertaining the scope, nature and extent of the work carried by the claimant. The reasons recorded by the Tribunal in rejecting the plea of collusion and conspiracy cannot be said to be a view which was not possible view under the facts and circumstances of the case. The entire chain of events from the due execution of the contract till the execution of the settlement agreement would show that the plea taken by Bata to deny its liability is a clear afterthought and unsustainable. It is only in the

criminal proceeding that for the first time Bata raise collusion of the claimant with some officials of Bata and also with TAG in support of its application for quashing of complaints. The long association of the claimant with Bata and TAG considered to be a relevant factor in accepting the case of the claimant that on a verbal consideration, extra works were executed. In fact, works have been started prior to the issuance of the formal work orders. The learned Arbitrator has taken into consideration clause 4 of the agreement which provides flexibility, not only in execution of the work but also in the materials of works in the execution. The expression "as far as practicable" deserved proper appreciation and the Tribunal held that the use of certain materials in substitution of the contract specifications falls within the scope of the expression "as far as practicable". This interpretation of the contract cannot be questioned in this proceeding. That the defects have been removed by the claimant on instructions being received by Bata is also not in dispute. There is no other defects that is required to be removed by the claimant apart from that was indicted by Bata. The learned Arbitrator, however, reduced the claim by 15% on the ground that the claim made by the claimant is over-emphasized.

The learned Arbitrator did not accept the contention of the claim that since it is a turnkey contract, the price variation materials used in deviation of specifications would be irrelevant.

There were various changes which were brought about in the 1996 Act from the 1940 Act. The purpose of the new Act was to have speedy disposal through the forum of arbitration.

The strive towards achieving the aim, the Act proceeds to give a sense of finality to the awards of the arbitral proceedings. The new Act is based mostly on the UNCITRAL model law. The object of the new Act was to make the law less technical then it has been hitherto. As compared to the 1940 Act, the 1996 Act restricts the court interference with the awards passed by the arbitrator. The major difference between the acts can be mapped through the reading of S.30 of the 1940 Act and S.34 of the 1996 Act, which covers the grounds on which an arbitral award could be set off.

Arbitration and Conciliation Act, 1940	**Arbitration and Conciliation Act, 1996**
Section 30: Grounds for setting aside award	Section 34: Application for setting aside arbitral award

Grounds: (a) "Misconduct" of an arbitrator or umpire (b) "Invalidity" of arbitration proceedings or by an order of court the arbitration is superseded. (c) Award is improperly procured or is "other-wise invalid"	Grounds: (a) If the party proves that: (i) That party was under some incapacity (ii) That arbitration is invalid under the law to which parties have been subjected or under the law being in time force (iii) That the award passed is beyond the scope of the submission or not falling within the terms of the submission to arbitration. (Provided: if decisions on matters not submitted can be separated from those which are submitted then only the award based on the former may be set aside) (iv) Composition of the arbitral tribunal or procedure was not in accordance to the agreement

	of the parties unless it ws in conflict with the provisions of the Part from which parties cannot derogate or failing such agreement, was not in accordance with this Part. (b) If the Court finds out: (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 award is in conflict with the public policy of India. Explanation: An award is in conflict of the public policy of the India if the award was induced or affected by fraud or corruption or was in violation of S.75 or S.81.

The aforesaid Table lays down the grounds which were given in the respective Act with respect to setting aside of arbitral awards. It is important to understand how the grounds for setting aside an award under the 1996 Act are more restricted than the grounds given in the 1940 Act.

The 1940 Act, has grounds like "misconduct of arbitrator", "invalidity of arbitrational proceedings" and "award other-wise invalid" were wide, sweeping and open ended which used to give an extensive power to the courts to set aside an award. These expressions were usually interpreted widely by the courts and the awards were most often set aside – especially on the basis of "misconduct" inter alia apparent error of law in the award. Thus, the aim of arbitration which is to reduce the burden of the courts was not being achieved. Rather, due to the number of opportunities in the hand of the litigants to ask the court for intervention regarding the award -–the burden was increasing on the courts.

To make the arbitration proceedings effective and binding on the parties who choose for arbitrational proceedings, it was imperative to structure a new Act to fill in the loopholes of the 1940 Act. The 1996 Act was thus brought into the picture which tried to fill in the gaps of the previous law of arbitration in the country. The need of an arbitrational system favoring nation was to reduce the workload of the courts and give certainty and finality to the arbitration proceedings and the awards thereon. Thus, the 1996 Act under S.34 lays down restrictive grounds of interference of the courts with the arbitral awards.

Section 34 introduces itself by saying that the grounds mentioned thereunder are the "only" grounds on which an arbitral award may be set aside. However, apart from the grounds mentioned under S.34, the Act also provides for other grounds as under S.13, S.16, S.75 and S.81 on the basis of which the award can be set aside.

Section 13 provides for challenge under S.34 on the ground of lack of independence or impartiality or lack of qualification of the arbitrator regarding the arbitration proceedings.

Section 16 authorizes an arbitration tribunal to rule its own jurisdiction and pass an award. However, an aggrieved party can challenge it under S.34 to set aside the award.

Section 75 and Section 81 are provided in the explanation of S.34(2)(b)(ii) which explains the ambit of public policy. Under Section 75, the conciliation agreement and proceedings need to be confidential and if the same is breached, there lies a challenge to an award passed from such conciliation proceeding under Section 34. Under Section 81 if an award is based on the admission of evidence which are not to be considered on a conciliation proceeding, such an award can attract the challenge under S.34.

The grounds given under S.34(2)(a) are crisp and precise and lay the law as it is without the inclusion of any open-ended expression which otherwise would have given the courts an opportunity to widen their scope of interference with the arbitral awards. The only open-ended expression which can be and has been of concern is the ground of public policy of India. It has been under

many cases defined as an unruly horse thus giving the interpretation that it can never be defined or be a certain thing. However, for the purpose of achieving the aim of the new Act, the Act of 1996 – the legislature while drafting the Act limited the scope of public policy in its explanation restricted it to:-

a) Fraud

b) Corruption

c) S.75 or S.81 (confidentiality breach or admissibility of evidence)

The scope of public policy was, however, widened after Supreme Court in its decision of ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003 (5) SCC 705)*** (also referred to as : "Saw Pipes Case") interpreted it to include "patent illegality" in its definition. The case mentioned that the term public policy can be construed and understood in a narrow or with a wider meaning and then went ahead to say that it should not have a limited meaning – thus, included the term "patent illegality" within the scope of public policy. "Patent Illegality" as explained by the Saw Pipes Case meant any error of law on the face of award, however, it did mention that the error which would be taken into consideration should not be trivial in nature. **Lord Mansfield in Holman v. Johnson** stated that the principle of public policy is ex dolo malo non oritur actio. No Court of law will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The rule has been further illustrated by Russel by stating that grounds of public policy on which an award may be set aside include: (1) that its effect is to enforce an illegal contract; (2) that the arbitrator,

for instance manifested obvious bias too late for an application for his removal to be effective before he made his award.

In its decision in ***Oil and Natural Gas Corpn. Ltd. V. Saw Pipes Ltd.,*** the Supreme Court has elaborated the concept of public policy at great length. The concept was extended to mean permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice. It is stated:-

> *"Therefore, in our view, the phrase 'public policy of India' used in S.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, it is required to be held that the award could be set aside if it is patently illegal. 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.

The expression "public policy" or "opposed to public policy" is not defined either in the Arbitration and Conciliation Act, 1996 or in the Contract Act, 1872. The reason is that these expressions are incapable of precise definition. The concept has to be taken to connote larger public interest on public good. Broadly speaking it would mean policy of law and, therefore, whatever tends to obstruct justice or violate a statute, whatever is against good morals is against public policy.

Public policy means the principles and standards regarded by the legislature or by the Court as being of fundamental concern to the state and the whole of the society. The notion of public policy is not static. Ideas on what is good for the public or what is in public interest, keeps changing with time. The enforcement of an award is to be refused as being contrary to public policy if it is contrary to the fundamental policy of Indian law, country's interests, and its sense of justice and morality. The case in which this point was raised did not involve any such violation, nor any other ground for setting aside could be proved.

The words "public policy" are not to be confined to the Explanation appended to the provision. That would be a very narrow construction of the provision."

The Saw Pipes Case was criticized as it to shook the policy of the new Act. It opened up the gates of judicial review and intervention in the arbitration proceedings which had been cut down by the Act of 1996 from the

Act of 1940 to provide a back bone to the arbitration proceedings. The law laid down by the Supreme Court in this case has led many other courts to interpret the law to include any error of law to be hit by S.34 for instance in the case of ***Delhi Development Authority v. R.S. Sharma (2008(13) SCC 80)*** stated that:

> *"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 S.34(2) of the Act.*
>
> *(b) Award could be set aside if it is contrary to:*
>
> *(i) Fundamental policy of Indian Law; or*
>
> *(ii) The interest of India; or*
>
> *(iii) Justice or morality;*
>
> *(iv) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court;*
>
> *(v) 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 ***ONGC Ltd. Vs. Garware Shipping Corporation Ltd. reported at 2007(13) SCC 434***, it was held that under Section 34 of the Act, an award can be set aside on the ground that it is erroneous in law.

Even though the Supreme Court in Saw Pipes case widened the power of the courts for judicial review of the arbitral awards, other Supreme Court judgments have been trying to read down what was laid down by it. For instance, in the case of ***Mc Dermott International v. Burn Standard Co. Ltd.; 2006 (11) SCC 181,*** the Saw Pipes judgment was tried to be read down.

The Supreme Court in ***McDermott International***, has commented on the scope of the powers of the arbitrator to interpret terms of the contract, and the permissible interference by the courts on the assessment of the arbitrator. It was held:-

> *" 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.*
>
> *The 1996 Act makes the provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrator, violation of natural justice, etc. The court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin the*

> *arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

The Supreme Court in **Mc Dermott** (supra) has taken judicial note of the adverse comment generated by Saw Pipes and observed in Paragraph 62 of the said report that it is for the larger Bench to consider the correctness or otherwise of the said decision. This ground of challenge as contrary to public policy is the source of much debate and potentially of broad application is confined to the public policy of India. Its application is to be approached with extreme caution. It is not intended to furnish an open ended escape route for refusing enforcement of an award.

Notwithstanding such aforesaid criticism, the Law Commission has recommended introductions of Section 34A incorporating a ground of a "substantial question of law" in the Act subject to like conditions under the English Act (Section 69) so far purely domestic awards between Indian parties are concerned possibly being influenced by grounds of challenge to award available in USA & UK namely "manifest disregard of parties contracts or misjudging oral testimony or misunderstanding the applicable law." **(Gary Barn, Commentary on Arbitration, 2nd Edition, 2002, paragraph 7)**.

The Court will not judge the reasonableness of a particular interpretation accorded by the arbitrator to the terms of the contract. Even an error in

interpretation, unless patently illegal, will only amount to an error within the jurisdiction of the arbitrator.

In ***KV Mohd. Zakir v. Regional Sports Centre*** reported at ***AIR 2009 SC (Supp) 2517*** it held that the courts should not interfere unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his/her jurisdiction.

In ***P.R. Shah Shares & Stock Brothers v. M/s. B.H.H. Securities (P) Ltd.; 2012 (1) SCC 594*** it states that a court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-approaching the evidence. An award can be challenged only on the grounds mentioned in S.34(2) of the Act.

In ***Steel Authority of India Ltd. v. Salzgitter Mannesmann; OMP No.736 of 2009, decided on 18th April, 2012 (Delhi HC)*** it refused to set aside the award in view of court's limited and restricted powers for judicial intervention as under S.34 of the Act. The court relied upon the judgment in ***P.R. Shah Shres (supra)*** and held that the court cannot sit in appeal over the award of the tribunal by re-assessing and re-evaluating the evidence.

Where the arbitrators failed to adjudicate the counter-claims it amounts to misconduct and their award liable to be set aside. It was their duty to have adjudicated all the claims and counter-claims specifically referred to them.

Under the 1996 Act, the arbitrator is not only required to decide on the counter-claim but is required to give reasons for the decision, unless of course, there is a contract to the contrary or the award is on agreed terms.

The Arbitration and Conciliation Act, 1996 provides in S. 31(3) that an award must state reasons on which it is based unless it is an award on agreed terms or the parties have dispensed with the requirement of reasons.

Reasonableness of an award was not to be considered unless the award was per se preposterous or absurd. It is argued that the arbitrator has not specifically referred to any evidence or arguments. Non-acceptance of evidence and submissions of the parties could not be regarded as a ground for setting aside when the arbitrator record in his award that he had carefully considered the claims and counter-claims, oral evidence and written submission filed by the parties and arguments advanced by them. It is immaterial that the arbitrator had not specifically referred to any evidence or arguments.

The expression public policy may be an elusive concept and may be difficult to define and may not be capable of precise interpretation, yet it cannot be used for extending the scope of judicial intervention in awards beyond the restricted sphere envisioned by the Parliament.

The scope of public policy is now very wide after *Saw Pipes.* Awards contrary to the terms of the contract, or in violation of substantive law can be said to be "patently illegal" and may be set aside on the ground of "public policy". However, an award where the tribunal arrives at a particular interpretation after considering the relevant terms of the contract is not reason enough for interference on this ground. In ***National Highways Authority of***

India v. Afcons Infrastructure Ltd. reported at 2008 (3) Arb LR 56, the Delhi High Court has elaborated on the idea of patent illegality in these words –

> *"What the arbitral tribunal has done is to arrive at a particular interpretation after considering the relevant terms of the contract and, just because the interpretation that has been arrived at by the tribunal is not palatable to the petitioner, is not ground enough for interfering with the award. Such interference can only be justified where the award is contrary to the terms of the contract. The award must be so patently illegal that it goes to the root of the matter. If the illegality is of a trivial nature, the award cannot be said to be against public policy. The award must be so unfair and unreasonable that it shocks the conscience of the court. It is then that such an award can be said to be opposed to Public Policy of India."*

The learned arbitrator after considering the respective contentions held that although overall valuation of the job is to be considered for the contractual obligation of the parties, the price component of materials actually used should not be left totally out of consideration because price of the material is obviously a very important component constituting the valuation of the job. The learned Arbitrator did not accept the contention of the claimant that since the contract is in the nature of the turnkey contract, no evaluation of price of materials used in the job is warranted and it was held to be an over-simplification of the obligation of the parties flowing from the contract.

In Black's Law Dictionary turnkey contracts have been defined in the following manner:-

"A fixed price, schedule-intesive construction contract – typically used in the construction of single-purpose projects, such as energy plants – in which the contractor agrees to a wide variety of responsibilities, including the duties to provide for the design, engineering, procurement, and construction of the facility; to prepare start-up procedures; to conduct performance tests; to create operational manuals; and to train people to operate the facility."

In Hudson's Building and Engineering Contracts, the essential conditions of a turnkey contract are enumerate as under:

"Thus, in these contract the essential feature is that the owner does not employ his own professional advisers to produce the design of the building or project which he requires. Either by negotiations, or by outline specification to tendering contractors, the owner makes known his requirements and the contractor then produces the design, in the form of drawings, a specification and sometimes schedules of rates to cover possible variations. Bills are not usually used in such contracts, which will almost invariably be lump sum, since clearly there would be unacceptable pricing risks for an owner if bills were to be prepared by a contractor for use in a measured contract…."

In FIDIC – An Analysis of International Construction Contracts, it has been stated:

"In India the concept of Turnkey is understood in the same way as it is in most of the other countries. Generally speaking, it relates to that aspect of Construction Contracts where the contractor takes 'complete responsibility' for an engineering project. Complete responsibility would include furnishing of all plant, labour, materials, supplies, equipment, transportation, supervision, technical, professional and other services. The contractor is under an obligation to perform all operations relating to

design, manufacture, delivery installation and the design and execution of building or engineering works, as contracted."

Even in a lump sum contract, price variation is allowable.

"The lump-sum price regime does not allow for adjustment or revision of the contract price, unless specifically provided for in the contract. There may be adjustment for incorrect data provided for in the contract. There may be adjustment for incorrect data provided by the employer, unforeseeable adverse sub-surface conditions, or changes in the works required by the employer. The employer may also decide to assume the risk of inflation and exchange rate risk. The parties should specify with clarity the situations in which adjustment is available."

Further in pargraph 2-07 of the same authority, it has been provided that:

"However, even where the contract is priced on a lump-sum basis, the contractor will normally have a right, under certain limited circumstances, to claim an increase in the contract price." ***(PC Markanda Building & Engineering Contracts, Law & Practice, 3rd Edition, 2010, Volume 1)***

The learned arbitrator held that if on account of admitted deviation in the job, there has been unmerited gain of the contractor for ends of justice, employer also deserves to be compensated by reducing the value of the job flowing from such deviation to the extent practically. It was held that from the materials on record an evidence adduced by the parties, it is not possible to precisely determine the exact quantum of difference in the market price at the relevant time on account of the materials used and the materials specified by

the contract for jobs in question. The Tribunal on the basis of the available materials held that claim for jobs executed in the corporate office of Bata deserves to be appropriately reduced because of price difference of the materials used both for execution of works as per agreement and also in case deviations. Such course of action, according to the learned Arbitrator, would conform to "right and justice". The petitioner, of course, questioned the wisdom of the arbitrator to apply such principle. It is a settled position of law that the court would not interfere with an award simply because it is to some extent based on guesswork. Unless there is a justification for the court to intervene, the court will not interfere with a concrete finding of fact arrived at by the arbitrator. In case of a conflict, the guess of the arbitrator must necessarily prevail over a guess by the court, since that is the intention of the parties once they agree to the determination of their disputes by the arbitrator. The arbitrator is entitled to arrive at a finding of fact which may not be perfect to the extent of being tested on a golden scale.

Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. The argument is that the learned Arbitrator has only given his conclusions without any reason.

Where the award only narrated the facts and gave conclusions of the arbitrator without stating any reasons for those conclusions, the award becomes a non-speaking award. In the instant case, the arbitrator even if may not have stated detailed reasons, but he has sufficiently indicated his mind and gave reasons for allowing the claim by reducing it by 15%.

In the instant case, it does not appear that the arbitrator has shown any conscious disregard of the law or of the provision of the contract. The picture that emerged from the document disclosed by the parties in this proceeding would go to show that the plea of defective workmanship or use of inferior quality of material is a clear afterthought. It cannot be said on the basis of the materials on record that the materials used are of inferior quality. In fact, it appears that the defence as such was not of use of inferior quality of material but of over-pricing of the items used during the execution of the contract in deviations of specified items. The arbitrator has duly considered this aspect of the matter of over-pricing. On overall assessment of the materials on record the plea of over-pricing was accepted and the claim was reduced by 15%. It cannot be said that the decision of the arbitrator is "obviously wrong" or demonstrably wrong. In view of the aforesaid, it cannot be said that the award is unreasoned or susceptible to challenge. Once the arbitrator has come to a finding the Court should not interfere with the award unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his jurisdiction. Moreover, the Court does not sit in appeal over the award of the arbitral tribunal by re-assessing, re-approaching or re-appreciating the evidence. It is well settled that the Court does not sit in appeal over an award. It is not for this Court to reassess the evidence on record. It is also not for this Court to weigh the quality and quantity of the evidence put forward before the Arbitration. In ***Ravindra Kumar Gupta & Co. v. Union of India*** reported at ***2010 (1) SCC 409*** it is reiterated that reappraisal of evidence by the Court is

not permissible. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a Judge on the evidence before the arbitrator. The award can be challenged only on the ground mentioned in Section 34(2) of the Act.

However, there appears to be some justification in challenging the award in so far as the cost is concerned. It appears that no argument had taken place with regard the cost claimed in the proceedings. It further appears that the claimant has submitted an account of cost incurred by it in the arbitration case without circulating the same. The Tribunal could not have allowed and assessed the cost without giving an opportunity to the petitioner to respond to such statement and without giving an opportunity of hearing. Moreover, it cannot be said that the defence of Bata in the proceeding was wholly unmeritorious. The arbitrator noticed over-pricing and admitted deviation. In view thereof, the award in so far as the awarding of cost is concerned needs suitable reduction. The claimant shall be entitled to cost assessed at Rs.8 lacs which is approximately fifty per cent of the remuneration of the Arbitration being the share of expenses incurred by the claimant as indicated in the award.

The contractor cannot claim interest as a matter of right. The claimant had received ad hoc payments from time to time to facilitate execution of the work, although, payment terms were different. In view thereof, I am inclined to reduce the rate of interest from 10% to 6% per annum in favour of the claimant from March, 2005 upto August, 2012, that is for 19 months. The award stands modified to the aforesaid extent.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

(Soumen Sen, J.)