NEUTRAL CITATION
2026:GUJHC:54112-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3731 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2023
In
R/FIRST APPEAL NO. 3731 of 2023
With
R/FIRST APPEAL NO. 3743 of 2023
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R/FIRST APPEAL NO. 3744 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL
and
HONOURABLE MR.JUSTICE D.N.RAY

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Approved for Reporting	Yes	No
	✓	

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MADHYA GUJARAT VIJ COMPANY LIMITED
Versus
M/S A. K. PATEL AND CO.

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Appearance:
MR MAULIK NANAVATI for NANAVATI & CO.(7105) for the Appellant(s) No. 1
MR PRASHANTH S UNDURTI (10983) for the Defendant(s) No. 1

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CORAM:**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR.JUSTICE D.N.RAY

Date : 10/08/2026

ORAL JUDGMENT
(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

1. These three connected appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 *(in short as the "Act' 1996")* are directed against three separate arbitral awards, one dated 25.12.2018 and two dated 26.06.2019.

2. As the nature of the contract and the controversy pertaining to the challenge to the three arbitral awards are one and the same, the above referred three appeals under Section 37 of the Act' 1996 have been heard together and are being decided by this common judgment, with the consent of the learned Counsels for the parties.

3. At the outset, we may note that the Madhya Gujarat Vij Company Limited (MGVCL), the appellant herein, had published a Tender No. MGVCL/SE(Const)8M PSC POLE Supply/2013/2 for supply of 8 metre/200kg ready made Pre-Stressed Concrete (PSC) poles from existing PSC pole manufacturers and new entrepreneurs, for the total tendered quantity of 5,90,000 PSC poles, which was sought to be requisitioned by 31.03.2015. The tender notice mentioned the tentative requirement for Financial Year 2013-14 and 2014-15

for Godhra circle as 3,03,526 PSC poles.

4. Negotiations were held between the parties herein and after matching the price of L1 bidder, the claimant informed MGVCL that it was willing to confirm the ex-work price of Rs.1690/- plus taxes per PSC pole, on the basis that MGVCL would be placing orders for the quantities offered in the bid and will permit the claimant to execute the ordered quantities within a stipulated time, i.e., by the end of Financial Year 2014-15. It was also discussed that the rates offered would not be viable in case of reduction in the ordered quantities.

5. The Letter of Acceptance (LOA) came to be issued by MGVCL to the claimant on 26.07.2013, whereby rates for supply offered by the claimant vide offer letter dated 24.07.2013 came to be accepted and the claimant was asked to offer poles for testing. In continuation of the LOA dated 26.07.2013, the MGVCL issued two letters, Reference No. MGVCL/CIVIL/Tender2013/1454 and Reference No. MGVCL/CIVIL/Tender2013/1455 both dated 14.08.2013 whereby the order to purchase 63,300 and 64,700 quantity of ready made PSC poles 8 metre/200kg was placed, and the offered quantity was converted into a firm ordered quantity. As against the estimated value of two orders as aforesaid, the claimant deposited Rs.28,64,600/- and Rs.28,25,750/-.

6. In continuation thereof, two separate purchase orders dated 05.09.2013 vide communications, Reference No.

MGVCL/CIVIL/PF's/FY13-15/PKM/1493 and Reference No. MGVCL/CIVIL/PF's/FY13-15/PKM/1497, were issued for the manufacture and supply of PSC poles for overhead power traction lines 8 metres in length and capable of sustaining working load of 200kg. These two purchase orders are the subject matter of controversy in the First Appeals No. 3744 of 2023 and 3731 of 2023.

7. In the third connected appeal, namely First Appeal No. 3743 of 2023, in continuation of the same tender notice, as aforesaid, MGVCL had issued a Letter of Acceptance dated 17.05.2013 to the claimant where under the claimant was required to supply total 48,000 poles in 24 months. The Bank guarantee of Rs. 20,12,000/- was submitted by the claimant and a trial purchase order for 1,000 PSC poles 8 metre/200 kg within four months from the date of LOI was placed by the MGVCL. It is the case of the claimant that 408 poles were supplied pursuant to the aforesaid trial order. The respondent MGVCL though found that the quality was up to the mark and constructed poles fulfilled the technical specifications, however, instead of lifting the entire lot of 1,000 PSC poles, it had cancelled the requisition of balance 592 poles required for testing.

8. The work order dated 01.07.2014 was placed for manufacture and supply of 5,000 poles at the price shown therein in the Schedule 'B'. The said quantity was to be supplied within six months and the claimant had satisfactorily

completed the first work order. The second work order for the balance quantity of 43,000 poles was placed by the MGVCL on 24.12.2013 and the supply was to be made up to 31.03.2015 or as per the schedule given by the MGVCL.

9. On 18.01.2014, MGVCL issued a circular letter to all pole manufacturers stating that *"In this connection, it may be noted that the order quantities mentioned in the purchase order are indicative and MGVCL will be lifting the poles as per field requirements only."*

10. It is the case of the claimant in First Appeal No. 3743 of 2023 that the claimant requested MGVCL to issue necessary material requisitions from 07.04.2014 till 17.02.2015 and then raised grievances on 01.05.2015 regarding non-lifting of the balance quantity of ordered poles, despite the manufactured poles having been inspected and approved by the personnel of MGVCL.

11. In the other two connected appeals, namely First Appeal Nos. 3731 of 2023 and 3744 of 2023, the grievance of the claimant is that the lifting of poles by MGVCL was very slow and far behind the total number of poles manufactured by the claimant, hence the claimant requested MGVCL to ensure that the lifting and manufacturing run parallel to each other. It was intimated by the claimant vide letter issued in the month of November, 2013 that lifting of poles was very poor as against the massive quantity of tested poles as well as

untested poles lying in the stockyard of the claimant due to failure on the part of MGVCL to requisition the said quantity. The claimants wrote letters between 21.09.2013 to 09.10.2014 raising the aforesaid issue.

12. It is the case of the claimant that by 31.03.2015, as against the ordered quantity of 63,300 PSC poles, MGVCL had lifted only 27,300 PSC poles (nearly 43% of the original ordered quantity), whereas as against 64,700 PSC poles, only 26,676 PSC poles, (which comes to 41.23% of the original ordered quantity), was lifted. By communication dated 29.05.2015, MGVCL intimated the claimant that tenure of the contract will not be considered as “up to 31.05.2015”, but instead it was required to be considered as two years from the date of the purchase order. Similar communications were issued with respect to three purchase orders subject matter of consideration herein.

13. Further, by communication dated 15.06.2015, MGVCL reduced the quantity of poles to be supplied from 48,000 to 37,980; from 64,700 to 52,190 and from 63,300 to 51,430, with the further extension of the duration of the contracts by a further period of one year.

14. It is stated that for the quantity of 37,980 poles reduced from 48,000, it was communicated that the said quantity was required to be supplied up to 31.03.2016 or till completion of required quantity. By a second amendment to the said

quantity, vide communication dated 03.02.2016, 37,980 was reduced to 32,980 poles and the said quantity was required to be supplied up to 31.03.2016 or till completion of the ordered quantity, as communicated to the claimant.

15. It is the case of the claimant that vide communication dated 11.01.2016 with regard to ordered quantity of 63,300 and 64,700 reduced to 51,430 and 52,190; respectively, the claimant sought reduction in the Bank guarantee, but the said request was declined by MGVCL.

16. Again, by second amendment dated 03.03.2016, MGVCL further reduced the supply quantity from 52,190 to 47,190 and 51,430 to 47,430. Thus, in two phases, the supply quantity was reduced by MGVCL in respect of three orders, as aforesaid.

17. The claimant raised a dispute and the sole Arbitrator was appointed in all the three disputes under the order passed in the Section 11 application. It may be noted that two arbitral awards dated 26.06.2019 have been passed by the same Arbitrator whereas the third arbitral award dated 25.12.2018 was rendered by a different Arbitrator.

18. Be that as it may, in all the three Arbitration, the learned Arbitrators have awarded claims for under-utilization, loss of profit and the cost of arbitration. In the arbitral award dated 26.06.2019, subject matter of consideration in First Appeal

No. 3731 of 2023, the claims awarded are:-

(i) Claim for under-utilization - Rs 10,41,025.50 with 18% interest.

(ii) Claim for loss of profit - Rs 57,35,750.70 with 18% interest.

(iii) Cost of Rs 10,00,000 with 18% interest.

19. In the award dated 25.12.2018, the awarded amount are:-

(i) Claim for under-utilization - Rs 35,10,517/-

(ii) Rs. 2,11,222.36 being differential amount as per PSC poles supplied by claimant after 06.09.2016 at the old contract rates, despite the fact that the PSC poles were being lifted at new contract rates from other suppliers.

(iii) Claim for loss of profit to the tune of Rs. 44,80,766.40.

(iv) Cost of arbitration to the tune of Rs. 7,56,673/-.

Thus, the total amount of Rs. 89,59,178/- was directed to be paid to the claimant on or before 31.01.2019.

Beyond that, simple interest on and from 01.02.2019 on the aforesaid amount @ 10% per annum till the said amount was actually paid to the claimant, was awarded.

20. In the third award dated 26.06.2019 for ordered quantity of 63,300 poles, the amount awarded are:-

(i) Claim for under-utilization - Rs.14,75,056.83 with 18%

interest.

(ii) Claim for loss of profit - Rs.51,98,535.90 with 18% interest.

(iii) Rs. 10,00,000 with 18% interest towards cost.

21. On a challenge to the aforesaid arbital awards, the Commercial Court had rejected the application under Section 34 of the Act’ 196 and upheld the arbital awards. Hence these appeals.

22. Before proceeding further, we may note that another set of first appeals with the leading First Appeal No. 3732 of 2023, connected with this bunch has been decided vide judgment and order dated 30.01.2026 after they were detached on the request of the learned Counsel for MGVCL. The only distinction from the said decision, in the facts and circumstances of the said case and that of the present set of appeals, is that the contract therein was entered into between the MGVCL and the claimants herein for supply of PSC poles of 10 metres/27 kg., whereas the supply order in the present set of appeals was for PSC poles of 8 metre/200 kg.

23. The Arbitrator therein had awarded claims for under-utilization, loss of profits and the cost of the arbitration. The claimant therein had short-closed the contract on account of non-lifting of the ordered quantity and then put forth his claims for under-utilization, loss of profit.

24. In the present set of appeals, the claimants pleaded that MGVCL had committed breach of the terms of the contract and had selectively discriminated the claimant to benefit the other parties/factories. It was asserted that the consensus *ad idem* under the original contract whereunder the quantity allotted was to be supplied by 31.03.2015 or till the complete requisition came to an end, whichever was earlier, has been unilaterally modified by reduction of the total requisition quantity. The claimant was made to suffer on two counts (i) keeping its factory operational at optimum levels for more than one year and; (ii) reducing the actual income that the claimant would have earned on account of reduction of total requisition quantity.

25. It was asserted that the MGVCL illegally attempted to novate the contract and the claimant suffered losses due to reductions in quantity, and mitigation of losses was not possible for the fact that the only purchaser of PSC poles manufactured by the claimant was MGVCL. The claimant had no option but to work for the MGVCL under financial duress as any retaliation would have led to the MGVCL blacklisting the claimant and financially annihilating it.

26. The grievance of the claimant was that despite having issued communication dated 15.06.2015 by which unilaterally the time period of the contract was extended and reduction in quantity of requisition was effected, the respondent did not reduce the value of the Bank guarantee required to be

furnished by the claimant for the extended period. It was emphatically pleaded by the claimant that considering the total assured quantity of PSC poles under the original purchase orders, the claimant had created new massive infrastructure, organizational setup, etc. and had also employed a team of experienced managers, foremen and labourers. However, for the reasons attributable only to the MGVCL, despite existence of clear demand/requirement of PSC poles, the MGVCL had failed to perform its obligations under the contract and during the original period of contract, lifted a very small portion of the total quantity ordered, which had resulted into huge financial distress to the claimant.

27. It was the case of the claimant that despite there being continuous demand for PSC poles, the MGVCL had not lifted poles from the claimant and had instead transferred the requisition/order to other parties/factories by reducing the original quantity agreed with the claimant. It was placed in the arbitration proceedings that the MGVCL was enhancing orders of other factories in other circles by reducing the quantity of claimant in the Godhra circle, so as to create a sense of fake justification on record, inasmuch as, stability of actual quantum of procurement was concerned. The claimant has also brought on record a statement showing the details of quantity allotted and redistributed to the other pole manufacturing units noted in the award. It was, thus, the case of the claimant that the MGVCL had committed breach of the contract and had selectively discriminated the claimant to benefit other parties/factories.

28. In the written statement, the MGVCL, however, pleaded that the claimant was raising grievances regarding non-lifting of poles as against the original ordered quantity and unilateral action of extension of contract period by one year, but those actions of MGVCL were saved or accepted by express terms and conditions of the contract.

29. It was the case of the MGVCL before the Arbitrator that Section 73 of the Contract Act, 1872 envisages compensation for loss or damage only in case of breach of contract and in view of the ratio laid down in ***[Alopi Prasad & Sons Ltd Vs. Union of India] 1960 SCC OnLine SC13]*** **and** ***[Travancore Devaswom Board Vs. Thanath International [2004 (13) SCC 44]***, the claims were not justified, inasmuch as, there was no breach of any terms and conditions of the contract on the part of MGVCL.

30. It was the case of the MGVCL that it had reserved the right to vary the ordered quantity up to 40% increase and/or decrease as per the requirement of MGVCL, and therefore, the claims were not maintainable. It was pleaded that the MGVCL reserved the right to review and redistribute the ordered quantity as per its requirement and that no compensation was payable for such decrease or increase in the ordered quantity.

31. Referring to Clause 10 of the tender document, it was

asserted that the terms and conditions of the tender envisaged that MGVCL had reserved the right to vary ordered quantity as per its requirement. It was contended that reduction of the quantity of PSC poles was within the permissible limit of 40% and attracts the clause of tender document which stipulates that for such reduction, claimant would not be entitled to compensation. The MGVCL had denied the stand of claimant that MGVCL was the only buyer of PSC poles and submitted that there was uniform reduction into the quantity of all the pole factories under Godhra circle and the claimant alone was not discriminated.

32. It was the case of the respondent MGVCL that time was not essence of the contract since the terms and conditions of tender as well as purchase order clearly envisage extension of time. The averments made by the claimant that it had to make arrangement for at least 14 production lines which would have been capable of manufacturing 120 poles per day was denied while reiterating that the MGVCL had reserved its right to increase or decrease the supply of poles to the extent of 40% of ordered quantity.

33. It was sought to be emphasized by the learned Counsel for MGVCL/appellant herein, in the present appeals, that in fact the claimant had offered to supply 80,000 poles, but the said offer was not considered by MGVCL and the claimant was ordered to supply 64,700 poles regarding which he did not raise any grievance at the relevant point of time. The stand of the claimant that it had enhanced its infrastructure or made

additional arrangements for the supply of total quantity ordered, therefore, has not been denied as unacceptable. It was contended that the price quoted by the claimant cannot be said to be a reduced price or that the claimant had quoted threadbare rates only because huge quantity was offered.

34. As regards the grievances for slow lifting of poles, it was contended that no specific target of monthly production was ever communicated to the claimant. It was left to the estimation and calculation of the claimant to match the supply with the requirement of the respondent MGVCL. Mere slow lifting of poles would not entitle the claimant to claim any sum of amount from the respondent on the alleged breach of legitimate expectation unless there is a breach of any terms or conditions of the contract.

35. It may be noted, at this juncture, that since the tender document is one and the same for three different purchase orders issued by the respondent MGVCL, the stand of the parties in all the three claims under the two awards dated 26.06.2019 are practically same rendered by the same Arbitrator separately, and hence, for the sake of brevity, we may refer to the findings of the learned Arbitrator in the award, subject matter of challenge in First Appeal No.3731 of 2023. However, the award dated 25.12.2018, subject matter of challenge in First Appeal No.3743 of 2023, it had been rendered by a different Arbitrator, the findings wherein will be considered in the later part of this judgment.

36. The common issues framed in two awards dated 26.06.2019 challenged in First Appeals No. 3731 of 2023 and 3744 of 2023 are as under: -

> *"25. Vide procedural order dated 01/12/2018 following 23 issues, arising out of the pleadings of the parties, were framed for determination:*
>
> *[1] Whether the claimant proves that the respondent has committed breach of the terms and conditions of the contract between the parties by reducing the contractual procurement / ordered quantity?*
>
> *[2] Whether the claimant proves that it is entitled to supply the ordered quantity, irrespective of destination of requirement?*
>
> *[3] Whether the claimant proves that it had increased production capacity just to meet the requirement of ordered quantity?*
>
> *[4] Whether the claimant proves that it had, in fact, suffered the loss on account of non-utilization of its enhanced infrastructure capacity?*
>
> *[5] Whether the claimant proves that it has actually suffered loss of profit?*
>
> *[6] Whether the claimant is entitled to the sum as claimed in the SOC?*
>
> *[7] Whether the respondent proves that the claim does not disclose cause of action?*
>
> *[8] Whether the respondent proves that during the subsistence of contract, it had acted in accordance with terms and conditions of the Tender documents read with purchase order?*
>
> *[9] Whether the respondent proves that the removal of certain areas from the scope of supply of the respondent*

by the Govt. of Gujarat entitles the respondent to reduce the contractual procurement / ordered quantity of the claimant?

[10] Whether the respondent proves that giving additional orders to other factories entitles the respondent to reduce the contractual procurement / ordered quantity of the claimant?

[11] Whether the respondent proves that there was a uniform reduction in the quantity of all pole factories under the Godhra Circle?

[12] Whether the respondent proves that it is entitled to reduce contractual procurement /ordered quantity of the claimant under the 'uniform reduction policy' of quantity of all pole factories?

[13] Whether the respondent proves that there was a reduction in the requirement of PSC Poles after the contractual procurement /ordered quantity of the claimant had been finalized?

[14] Whether the respondent proves that it could have reduced contractual procurement /ordered quantity of the claimant except in reduction the event requirement?

[15] Whether the respondent proves that the claim does not survive since the contract is duly performed?

[16] Whether the respondent proves that it has right to reduce the ordered quantity upto 40% as per the terms and conditions of the Tender documents read with purchase order?

[17] Whether the respondent proves that giving of additional orders to other pole factories was because there was steep rise in the target of connection in the respective areas of those pole factories?

[18] Whether the respondent proves that it has purchased reduced quantity within permissible limits as per the clause No.7 of the commercial terms and

conditions of the tender?

[19] Whether the respondent proves that under the contract, it had a right to extend the contract for one year?

[20] Whether the respondent proves that it has a justifiable right to purchase the quantity of poles as per business efficacy within the terms and conditions of contract?

[21] Whether the claimant proves that it is entitled to interest on the amount claimed in the SOC and if yes, at what rate?

[22] What order as to cost?

[23] What award?"

37. Issues Nos. 9, 10, 11, 12 and 17 were reframed as under:-

"[9] Whether the respondent proves that:

(a) Govt. of Gujarat has lifted dark zone restrictions off in Anand, Nadiad and Vadodara districts in the year, 2012?

(b) That consequent upon lifting of such restrictions and the Govt. Policy, respondent had to give more agriculture and lighting connections in Anand, Nadiad and Vadodara districts?

(c) That on account of increased targeted connections in the above specified districts, respondent was required to order more poles from factories situated in nearby areas in above districts?

(d) That on account of such increased requirement of poles in the above three specified districts, quantity of requirements of poles from factories in Godhra Circle is required to be reduced?

[10] Whether the respondent proves that steep rise in target of giving connections in Anand and Nadiad and Vadodara resulted in reducing the requirement of poles to be ordered from factories situated in Godhra Circle?

[11] Whether respondent proves that on account of reduced requirement of poles, ordered quantity of poles to factories located in Godhra Circle is proportionately reduced to maintain uniformity in ordered quantity?

[12] Issue No.12 is not required to be framed in view of reworded issue No.11 and accordingly, issue No.12 is ordered to be deleted.

[17] Similarly issue No.17 is not required to be framed in view of reworded issue No.10 and therefore, the same is also directed to be deleted."

38. The learned Arbitrator after noticing the factual aspects of the matter has proceeded to note that it has to decide the question whether the respondent MGVCL was justified in reducing the quantity of poles ordered with the claimant and grant additional quantity of poles to the other pole manufacturers operating in Districts Anand, Nadiad and Vadodara circles.

39. The findings of learned Arbitrator in paragraph '45' to '53' are relevant to be extracted hereinunder :-

"45. The requisitioned quantity of 5,90,000 pre-stressed concrete poles was for financial years 2013-14 and 2014-15. It was the respondent's own intent as regards period of the contract being co-terminus with financial year 2014-15. There is no manner of doubt that claimant had successfully complied with all the conditions of the Tender and was issued a firm Purchase Order for 64,700

PSC Poles. The criteria for the respondent in allocation of quantity was the price evaluation and what was considered by the respondent was the lowest rate offered by the bidders and quantity offered per month. The quantity allocation clause incorporated in the Tender also stipulated that the period of the contract was to be for twenty four months considering the full quantity offered per month. A purposeful and conjoint reading of "quantity allocation" and "price evaluation" alongwith the other portions of the contract, makes it abundantly clear that huge investment by the claimant was envisaged by the respondent after approval of the bid by the respondent and verification / inspection of the factory /infrastructure of the claimant by the respondent. Clause No.7 of the Tender stipulated that the claimant should plan to supply PSC Poles as per the offered quantities indicated in its tender which was 80,000 PSC Poles. It was further mentioned in the said clause that MGVCL shall place order based on quantity allocation and price evaluation criteria defined in special conditions of Tender and MGVCL had reserved the right to alter monthly, quarterly or yearly quantity of supply. The said clause also stipulated that MGVCL had reserved right to vary the ordered quantity upto 40% increase and / or decrease as per the requirement of MGVCL. Thus, there is no manner of doubt that the Tender contemplated two quantities i.e. (1) offered and (2) ordered. The respondent being the dominant party which had drafted the tender, had a substantial play in the joints at the stage of offer. At this preliminary stage, where there was no contract between the parties and there was no consensus ad idem between the parties, the respondent could have altered the offered quantity in the manner prescribed. However, having once accepted in part the offered quantity, and having converted the offered into quantity firm ordered quantity, MGVCL could have increased or decreased the said ordered quantity, only if there was an actual change in the requirement of MGVCL and not otherwise. It is for this very reason that clause No.10 of the Tender envisaged that, ".....The entire supply is to be completed within the stipulated time or as per production programme given by MGVCL, if any." Here, the phrase "entire supply" *means the ordered quantity. The right reserved by the respondent to itself to review and redistribute the ordered quantity as per respondents requirement is not an independent right as it is dependent upon multiple factors such as, the actual offered quantity, the actual requirement of PSC Poles within Godhra Circle, the ordered quantity accepted by MGVCL, etc.*

46. At this stage, it would be relevant to notice that the phrase "contractual delivery date" is to be found in the explanation to clause No.11 and it means and includes, the last day of the period within which the supply was to be completed i.e. 31/03/2015. The "stipulated period" of the contract was financial year 2013-14 and financial year 2014-15 and for this reason the contractual delivery date as explained in the Explanation to clause No.11 which is upto 31/03/2015, was co-extensive with the stipulated period and they ran hand in hand. Further, clause No.33 of the Tender made it more than clear that the supply of the PSC Poles which was subject matter of the contract was envisaged for two years only. Thus, the Tribunal is of the opinion that the respondent was required to requisition the entire ordered quantity on or before 31/03/2015 and having failed to do so, it should be held that the respondent had committed a breach of the contract.

47. Clause No.12 of the Tender prescribed deferment in delivery. It was stated in the said condition that in view of the changed requirement, if any, MGVCL reserved right to defer the delivery schedule and intimate the supplier to change the production schedule suitably. It further mentioned that however, such intimation would be given in writing before one month as and when required. If carefully read, this clause categorically contemplated only change in the delivery / production schedule and not of the quantities of PSC Poles already ordered to be purchased and / or to be supplied by the pole manufacturer. The unnumbered para 2 of clause No.7 which indicated that MGVCL had reserved the right to vary the ordered quantity upto 40% increase and / or decrease as per the requirement of MGVCL must be read in the light of what is stated in *clause No.12 of the tender. This restrictive covenant found in clause No.12, limits the power of MGVCL to reduce the quantity ordered, once a firm Purchase Order had been issued to the manufacturer of the PSC Poles. In such a situation, MGVCL can no longer modify the quantity and can only modify the delivery schedule and that too, after giving a one month written advance notice.*

48. At this stage it would be relevant to refer to clause No.30 of the Tender. By this clause MGVCL had reserved the right to reduce / enhance the Tender quantity as per its requirement at the time of finalization of the Tender. On construction of this clause, the Tribunal is of the opinion that this is a negative covenant and a restriction on MGVCL's unhindered powers. MGVCL who had drafted the Tender strikes a balance under this clause assuring the claimant that once the quantity is ordered it shall not be reduced. What is relevant to notice is that clause No.31 by which MGVCL had reserved the right to place orders for full or part quantity, of the quantity offered by a bidder and MGVCL had reserved the right to place orders on one or more than one bidder. The intent of clause No.31 is that while the discussions between the parties were still at the stage of invitation to offer pursuant to Tender and / or offer the bid, MGVCL could have decided to place order for either in part or all the quantity offered by a bidder, but, having once converted the offered quantity into the ordered quantity, the restrictions contained in clause No.13 and clause No.12 would be attracted. Resultantly, the Tribunal is of the opinion that the interpretation of different clauses of the Tender as suggested in the above referred two paragraphs should be adopted to achieve the purpose for which the Tender was issued.

49. What is most important to note is that a firm Purchase Order dated 05/09/2013 for supply of ready made PSC Poles of 8 mtr. / 200 kg. was issued to the claimant and the claimant was called upon to manufacture and supply 64,700 numbers of PSC Poles at the price shown in the purchase order. The claimant was informed in categorical words that claimant had to *manufacture and supply the poles ordered upto 31/03/2015 or as per the schedule given to the claimant and delay in supplying part / full quantities of the order, would attract penalty and that penalty amount would be deducted as specified in the relevant clause. The claimant was also very clearly instructed to commence supply of PSC Poles immediately. In clause No.1 of the Purchase Order dated 05/09/2013, the claimant was informed that the claimant had to manufacture and supply 64,700 numbers of PSC Poles and that MGVCL had reserved right to place additional order / orders as per the requirement but not in excess of the maximum quantity offered for supply. By the said clause claimant was informed that MGVCL had reserved the right to review and redistribute the ordered quantity as per MGVCL requirement.*

50. This clause must be interpreted to mean that additional order for PSC Poles could have been placed with the claimant or ordered quantity could have been reviewed and redistributed only if there was increase or decrease in the requirement of PSC Poles in Godhra Circle and not otherwise. The respondent has failed to produce any document before the Tribunal which would show that the demand for PSC Poles in Godhra Circle was reduced. Neither in its written statement it is the case of the respondent that there was reduction in requirement of PSC Poles as far as Godhra Circle was concerned nor, the witness Mr. Vhora who is examined on behalf of the respondent had stated that there was any reduction in requirement of PSC Poles so far as Godhra Circle was concerned. Only reduction in requirement of PSC Poles could have prompted the respondent to review and redistribute ordered quantity. The offer made by the claimant having been converted into a specified order, respondent could have modified the delivery schedule and production schedule only and the word "also" appearing in sub para 2 of clause No.7 of the Tender document will have to be regarded as not relating to offer but, in relation to the firm order. Therefore, as has been conceded to by the learned counsel for the respondent during oral arguments, the alteration under clause No.7 was permissible only *internally and that too, with reference to the delivery schedule but, not in relation to quantity ordered.*

51. At this stage it would be relevant to notice the price negotiations between the parties and the correspondences exchanged between the parties as well as the contents of purchase order. There is no manner of doubt that the respondent had constrained the claimant to negotiate rates and to reduce its price to match L-1 rates. After reduction of price, Purchase Order was issued by the respondent to the claimant. The claimant had submitted bank guarantee of 2% of the "order value". In the meantime, since the respondent had assured lifting of substantial quantity of PSC Poles from the claimant, the claimant had immediately taken steps to upgrade its existing factory and made it operational to the satisfaction of the respondent. The claimant had addressed a letter dated 24/07/2013 to the respondent wherein, it was clearly stated by the claimant that it was willing to confirm the ex-works price of Rs.1690/- + taxes per PSC Pole on the basis that the respondent would be placing orders for the quantities offered in the bid and based on the fact that the respondent would be permitting the claimant to supply the ordered quantities within a stipulated time i.e. by the end of financial year 2014-15. The claimant had without mincing words had stated that the rates offered would not be viable in case of reduction in offered quantities. From the record, it is evident that the respondent had accepted the aforesaid request made by the claimant which was contained in the letter dated 24/07/2013. Making a specific reference to the said letter dated 24/07/2013, the respondent had issued a letter of acceptance on 26/07/2013. In the said letter of acceptance, the respondent, inter alia, had stated that the quantity allocation would be decided and communicated considering factors such as "requirement of MGVCL, offered quantity, production capability, etc." Thus, there is no manner of doubt that the respondent was well aware and conscious of the fact that the claimant had offered its rates looking only to the huge quantity that was assured to be lifted by the respondent. Subsequently, the respondent had addressed a letter dated 14/08/2013 whereby, the respondent had *converted the offered quantity into a firm ordered quantity and had decided to place order for 64,700 PSC Poles with the claimant. On 05/09/2013, against the bid offered by the claimant, the respondent had issued a purchase order, accepting the rates of the claimant and had inter alia informed the claimant that it would lift a quantity of 67,400 PSC Poles within the stipulated time frame from the claimant. The issues involved in the matter for adjudication by the tribunal will have to be appreciated in the light of above mentioned facts. But for the assurance of lifting huge quantity of manufactured PSC Poles, the claimant would not have quoted threadbare rates and this assurance was mutually a profitable proposition for both the parties, i.e. the claimant would get good quantum of work and the respondent would get PSC Poles at minimum rates.*

52. Once the work under the contract had commenced, immediately the claimant had started to observe a deviant trend in the conduct of the respondent which was in breach of the specific terms and conditions of the contract. Instead of honouring the Purchase Order issued to the claimant, against which the claimant had incurred sizable expenditure to supply the massive quantity outflow, the respondent had started reducing the quantity to be requisitioned despite the fact that there was a clear demand for the PSC Poles. Under the circumstances, the claimant was constrained to make multiple oral representations to the respondent from time to time and on each occasion, the respondent would assure the claimant that since there was a steady and consistent demand / requirement of the PSC Poles, the claimant would be asked to supply the entire quantity mentioned in the purchase order. However, the assurance was never fulfilled. This had constrained the claimant to address a letter dated 21/09/2013 wherein, the claimant had made grievance regarding slow lifting of poles by the respondent. It was pointed out by the said letter that not only the lifting of pole by the respondent was slow but, was far behind the pole manufacturing figures and the claimant had requested the respondent to plan its lifting programmes of poles in such a manner that the lifting and manufacturing of the *poles ran parallel to each other. Since the respondent had failed to comply with the terms of the contract between the parties, the claimant had addressed another letter dated 16/11/2013 to the respondent mentioning clearly that the lifting of the poles by the respondent was very poor and that a massive quantity of 2592 tested poles and 2858 untested poles were lying in the stock yard of the claimant, due to failure on the part of the respondent to requisition the said poles. The claimant had specifically pointed out that as against the monthly allotment, the respondent had failed to lift the entire quantity of poles and resultantly the claimant was facing financial burden while purchasing raw materials. Once again the claimant had addressed a letter dated 01/07/2014 to the respondent reiterating the fact that the respondent had not lifted the poles as committed in the Purchase Order and that resultantly, the claimant was facing financial burden. Similar such request was made by the claimant by way of a letter dated 09/10/2014 addressed to the respondent.*

53. In view of blatant breach of the contract for the a entire currency of the contract, the respondent had addressed letter dated 29/05/2015 wherein, the respondent had adopted a stand, completely contrary, to the scheme of the agreement between the parties. The respondent had taken a view that the tenure of the contract was not to be considered as upto 31/03/2015 but was required to be considered as two years from the date of the Purchase Order. In the written statement, filed on behalf of the respondent, no explanation is given as to why such a stand was adopted by the respondent contrary to the terms of Tender and purchase order."

40. It was, thus, concluded that the contention of the MGVCL that it had the right to review and redistribute the quantity of the claimant's order and, therefore, statement of claim should be rejected has no substance. It was held that once the offer of the claimant was converted into a firm offer, the MGVCL could have only reduced the quantity if there was

a reduction in the requirement of poles in Godhra circle. Out of total quantity of 5,90,000 PSC poles, the requirement of the respondent MGVCL for Godhra circle was of 3,03,526 PSC poles.

41. It was noted that in Godhra circle, there were many pole manufacturing units and out of these units, a firm order for supply of 64,700 PSC poles was placed with the claimant. No document was produced nor any evidence was adduced before the tribunal that the requirement of the respondent of 3,03,526 PSC poles had been reduced during the Financial Year 2013-14 and 2014-15. On the contrary, the evidence on the record showed that there was consistent and steady requirement of poles in Godhra circle.

42. It was also noted that strangely, after reducing the quantity of PSC poles, which were to be supplied by the claimant, the respondent MGVCL had increased and placed additional orders for supply of PSC poles to the manufacturing units operating in Districts Anand, Nadiad and Vadodara circles. Such a step would have been a valid exercise only if there had been reduction in requirement/demand for PSC poles in Godhra circle and sudden increase in requirement of PSC poles in other circles.

43. It was, thus, held that reduction in the quantity of the PSC poles ordered with the claimant is not only contrary to the terms of the tender and the purchase order but is

arbitrary and without any valid basis. On the poor lifting of ordered pole and the extension of duration of contract, it was observed by the learned Arbitrator that by the first amendment to the contractual quantity, the MGVCL had materially and unilaterally amended the terms of the original contract between the parties. The respondent MGVCL while unilaterally extending the duration of the contract by a period of one year had also bound the claimant for one year to supply PSC poles at the rates which were made in the purchase order while reducing the actual quantity which were to be lifted from the claimant. On the other hand, the claimant was left with no option but to ask for reduction of the value of the Bank guarantee corresponding to the reduction in quantity, inasmuch as, for lack of better option, the only alternative left with the claimant was of continuing to supply PSC poles to honour its contractual commitment under the contract.

44. The claimant had no alternative but to continue to provide the poles as and when demanded. Further, the respondent MGVCL utilizing its position of power and monopoly had reduced the quantity by another amendment while there was no reduction in the demand of PSC poles in Godhra circle. A

45. As regards the stand of the respondent in the written statement and during the course of argument before the tribunal that there was increase in demand of PSC poles in Anand, Nadiad and Vadodara circles, it was noted on

appreciation of the evidence on record that the real reason for reducing the quantity of the PSC poles mentioned in the purchase order was to minimize the carting distance and not because that there was sudden steep/increase in requirement of PSC poles in Anand, Nadiad and Vadodara circles.

46. It was held that on such untenable and flimsy ground the ordered quantity could not have been reduced by the MGVCL. The finding in the awards is that there was consistent and continuous demand of PSC poles in Godhra circle and the reduction ordered in the quantity of poles which were to be supplied by the claimant, unilaterally, to minimize the carting distance will have to be regarded as not only breach of the terms and conditions of the tender and purchase order, but also will have to be regarded as illegal and totally unwarranted in the facts of the case.

47. It was further held that the conduct of the respondent in reducing the quantity of claimant despite the existence of requirements/demand and passing on the resultant increment benefit to other factories in other circles, apparent from the record, makes it abundantly clear that the MGVCL had committed a breach of the terms of the contract and had selectively discriminated the claimant to benefit other parties/factories.

48. It was further noted that the claimant had increased its infrastructure to ensure supply of the quantity ordered, which

was utilized only to 40% of its optimum output, and that the claimant had no bargaining power against the unilateral decisions of the respondent because the respondent was capable of financially destroying the claimant since the MGVCL was the only purchaser of the PSC poles manufactured by the claimant.

49. The findings in paragraph ‘61’ in that regard are relevant to be extracted hereinunder:-

> *“61. The claimant has stated in the SOC that the claimant had constructed 14 line moulds, each having space for 23 pole castings so that the huge quantity could be supplied by the claimant to the respondent. It may be mentioned that considering the 72 hour curing period provided under the contract and the curing dead capacity of the claimant, the daily production capacity of the claimant was over 120 to 122 poles. If the contract duration is considered cumulatively i.e. after the extensions unilaterally effected by the respondent from time to time, then, as against the total requisition OF 47,190 poles, the infrastructure of the claimant was only utilized at 40% of its optimum output, because of the breach of the contract committed by the respondent. It is necessary to reiterate at this stage that the claimant had no bargaining power against the unilateral decisions of the respondent because, the respondent was capable of financially destroying the claimant since the respondent was the only purchaser of the PCS Poles manufactured by the claimant.”*

50. The discussion in paragraphs ‘62’ and ‘63’ are also relevant to be extracted hereinunder:-

> *“62. The stand taken by the respondent in its written statement that it was not bound to explain the rationale or purpose behind its actions and that it had reduced the requirement of the claimant merely because the*

requirement had correspondingly increased in some other circles, cannot be upheld. If there was increase in demand / requirement of poles in some other circles / Districts, the quantity of the pole suppliers operating in those circles could have been enhanced or additional orders for PSC Poles could have been placed with them. But when, the requirement / demand in Godhra Circle was consistent, compatible, steady, constant, dependable, regular and unchanging, the quantity of the PSC Poles mentioned in the Purchase Order which was issued to the claimant could not have been reduced. Even otherwise, the argument advanced on behalf of the respondent which is referred to earlier, is dehors the contractual scheme and would make the contract between the parties not only unworkable and unviable but, would frustrate the whole contract and its purpose.

63. Mr. M.A. Vhora had filed his affidavit of evidence in lieu of examination in chief on 18/12/2018 wherein, he had relied upon certain "internal circulars" and "internal guidance" on the basis of which it was argued by the learned counsel for the respondent that the respondent was justified in giving additional orders to other pole factories and to reduce the quantity mentioned in the Purchase Order as far as claimant was concerned. Mr. Vhora was cross-examined on 11/01/2019. In answer to question No.1 the said witness had admitted that he was never involved in the decision to reduce the quantity firmly allotted to the claimant. Therefore, his whole affidavit on the point of placing reliance on certain internal circulars and internal guidance to justify giving of additional orders to other pole factories and reducing the quantity of the claimant cannot be relied upon by the Tribunal and will have to be treated as hearsay evidence. Further, answers to question Nos. 5 and 6 put to this witness in his cross examination show that the witness had made certain statements in support of which he had not produced any document on record. The answers of the witness to question Nos.7, 8, 13, 16, 17, 18, 19 and 20 make it abundantly clear that witness Mr. Vhora had made statements which he himself had believed to be false. This is SO because Shri Vhora did not have any knowledge of the factual working of the contract and *was never involved in the decision to reduce the number of PSC Poles of the claimant. Mr. Vhora could not certify as to on what basis the quantity of the claimant was reduced and the quantity of the other factories was increased. Thus, the testimony of Mr. Vhora cannot be relied upon by this Tribunal as a valid justification for reduction of quantity of PSC Poles ordered with the claimant."*

51. The learned Arbitrator has also discussed the arbitral award dated 25.12.2018 (subject matter of challenge herein in First Appeal No. 3743 of 2023) therein to note that the said award was rendered in a matter arising out of the same tender and though it has no precedential value, it can be looked into for a limited purpose as to how the reduction in quantity was viewed in the said award. The observation in this regard in paragraph '64' of the arbitral award dated 26.06.2019 is relevant to be extracted hereinunder:-

"64. At this stage, it would be relevant to note the contents of the Arbitral Award dated 25/12/2018 rendered by Hon'ble Mr. Justice D.A. Mehta, former Judge of Gujarat High Court in another matter arising out of the same tender. At the outset it must be stated by this Tribunal that the said award has no precedential value. It is not binding upon this Tribunal. Moreover, the learned counsel for the respondent has stated that the respondent has already filed an appeal against the said award. However, the said award produced alongwith purshis dated 05/02/2019 filed by the learned advocate for the claimant can be looked into for limited purpose as to how the reduction in quantity was viewed in the said award. It would be suffice to reproduce paragraph No.46 of the said Award which reads as under:

"46. However, neither the QUANTITY ALLOCATION paragraph appearing as part of

SPECIAL TERMS AND CONDITIONS under PART-1 of General Terms and Conditions of Tender, nor the terms of clause 7 of the Tender permit the Respondent to reduce the total ordered quantity qua the Claimant, and allot the same to one or more of the other suppliers, because the terms and conditions only permit variation in the range of 40% of the ordered quantity based the requirement of the Respondent. The moment it is established that the Respondent requires poles, the Respondent is bound to lift such poles upto the ordered quantity, varied within the range of 40%, either upwards or downwards of 48,000 PSC Poles, ie, the ordered quantity. Only in the case of the Respondent not requiring PSC Poles can the Respondent call upon the Claimant to reduce the total figure of ordered quantity to the extent the Respondent does not require PSC Poles. In no other situation, such a right of reduction is available to the Respondent."

52. While concluding that, in view of consistent, continuous and constant demand of PSC poles in Godhra circle, the respondent MGVCL was not justified at all in reducing the quantity of PSC poles ordered with the claimant vide purchase order.

53. The claim for under-utilization was awarded holding that during the original period of the contract, as also after the extended duration, the claimant was only able to utilize around 41% to 42% of its infrastructure which had been created to meet requirement of 100% of 64,700 PSC poles firm demand, made by the respondent.

54. The learned Arbitrator, upon evaluation of evidence produced by the claimant that it had enhanced, refurbished and upgraded its existing factory so as to ensure that it would be in a position to supply the PSC poles ordered by the respondent and promised under the contract, recorded that **:-**

> *"69. As far as claim No.1 for Rs. 10,41,025.50/- ps. is concerned this Tribunal finds that during the original period of the contract, as also after the extended duration, the claimant was only able to utilize around 41% to 42% of its infrastructure which had been created to meet requirement of 100% of 64,700 PSC Poles firm demand, made by the respondent. The claimant had enhanced, refurbished and upgraded its existing factory so as to ensure that it would be in a position to supply the PSC Poles ordered by the respondent and promised under the contract. In order to substantiate the claim that the claimant had enhanced, refurbished and upgraded its existing factory, the claimant has produced various invoices, challans, bank statements, other documents, etc. which evidence the huge expenses incurred by the claimant. A summary of various invoices, challans, bank statements and other documents evidencing the expenses incurred by the claimant to upgrade and enhance its pole factory have been produced at EXH.16-A which is to be found from page Nos.240 to 242 of the SOC whereas, invoices against the expenses incurred is separately exhibited by the claimant as C-17 which is to be found from page Nos.243 to 329 of the SOC. These documents relate to purchase of bearings, welding rolls, machines and tools, chain pulley, etc. These documents are not disputed by the respondent at all. Due to passage of substantial time since the expenses were incurred, the claimant has produced and claimed only those components of the expenditure for which it has been able to gather evidence.*
>
> *On account of the breach contract committed by the respondent, and extension of period of contract upto*

31/05/2016, the overall expenditure incurred by the claimant towards maintenance and upkeep of the pole factory had increased. The infrastructure of the pole factory was subjected to the elements / weather conditions, irrespective of the fact that whether they were used or not and they required recurring expenditure for maintaining them at optimum levels. Moreover, some components of the pole factory were single use components which could not be maintained / repaired after passage of certain time and were required to be replaced. Just as in the present case with any other fixed asset, with every passing day, the overall rate at which the expenses were required to be incurred to maintain the pole factory had increased. The claimant has successfully established that it had made an investment of Rs. 17,64,450/-. Since, the respondent had failed to meet with the contractual milestone during the original two years, 59% of the said amount of Rs.17,64,450/-would come to Rs. 10,41,025.50 ps. should be awarded to the claimant to be paid by the respondent. Thus, the first claim succeeds and is hereby granted. The claimant has demanded the aforesaid amount with interest at the rate of 18% p.a. Sec.31 of the Arbitration and Conciliation Act, 1996 deals with Form and Contents of Arbitral Award. Sub-Sec.7(a) of Sec.31 of the said Act, inter alia provides that unless otherwise agreed by the parties, where and insofar as an Arbitral Award is for payment of money, the Arbitral Tribunal may include in the sum for which the Award is made, interest, at such rate as it deems reasonable on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the Award is made. Sub-Sec.7(b) of Sec.31 of the said Act mentions that a sum directed to be paid by an Arbitral Award shall, unless the award otherwise directs, carry interest at the rate of 2% higher than the current rate of interest prevalent on the date of Award, from the date of Award to the date of payment. Having regard to the totality of the facts and circumstances appearing in the case, this Tribunal is of the view that substantial justice would be done between the parties if the amount due to the claimant is awarded with interest at the rate of 18% p.a.

from the date of service of notice u/s.11 of the Arbitration and Conciliation Act, 1996 till the date of actual payment. Therefore, the principal sum of Rs.10,41,025.50 ps. would carry interest at the rate of 18% p.a. from the date of notice served u/s.11 of the Act, till the date of actual payment of the amount."

55. As regards, Claim No.2 in paragraph '70' reads that :-

"70. As far as claim No.2 is concerned, it relates to loss of profit. The record shows that the respondent was always conscious of the fact that the claimant would not have any recourse to the unilateral decisions taken by the respondent. The respondent being the only purchaser of the PSC Poles manufactured by the claimant and other factory owners, the question of mitigation of losses does not arise on the facts and in the circumstances of the present case. There was no other market or consumer or purchaser of the PSC Poles available to the claimant. In fact, the pole factory of the claimant was setup only for the respondent and this fact was well within the knowledge of the respondent. The purchase policy and vendor registration policy of GUVNL which has been adopted by and is made applicable to the respondent, itself indicates that the work of manufacturing pre-stressed concrete poles is specialized in nature and has unique design requirement of DISCOMs of Gujarat. The issue of purchase of pre-stressed concrete poles is not like other purchases made by DISCOMs. In normal purchases of the materials, other than PSC Poles, there are many suppliers and buyers. As held earlier, the respondent had committed breach of the contract and as a direct consequence thereof, the claimant had suffered a sizable loss for which the claimant is entitled to receive compensation. As on 23/05/2012, the rate per PSC Pole was Rs.1714/-. Yet, for the purpose of calculation of loss of profit the claimant has calculated the rate of profit at a lower rate per pole being Rs. 1690/-. The profit earned by the manufacturers as per the say of the respondent itself is Rs.132.42 ps. per PSC Pole. The claimant has produced the invoices for cement and steel to define the parameters for input tax credit, VAT, etc., at C-19 which

are to be found on page Nos.335 and 336 of SOC. From those documents, it is evident that the input of cement was Rs.275/- per bag and the input of high tensile steel was Rs.59.80 ps. per kg. per PSC Pole. The rate of cement was Rs.275/-including 15% VAT and Rs.239.13 ps. excluding 15% VAT. The input credit of VAT for cement per bag was Rs.35.07 ps. and resultantly the input credit for cement received per PSC Pole was Rs.52.01 ps. As far as steel is concerned, the rate was Rs.59.80 ps. per kg. including 5% VAT and Rs.56.95 ps. per kg. excluding 5% VAT. The input credit of VAT for steel received per kg. was. Rs.2.85 ps. and the input credit of VAT for steel received per pole was Rs.32.51 ps. From the record it is evident that the input credit of excise for steel received per kg. was Rs.6.32 ps. and therefore, the total input credit per PSC Pole as regards steel was concerned was Rs.72.11 ps. The total VAT and excise credit available on the cement and steel per PSC Pole was Rs.195.15 ps. which is summarized by the claimant in paragraph No.63 which is on running page No.30 of the SOC. The said tabulation is not challenged by the respondent. From the data accepted by the respondent itself, the profit per PSC Pole available to the claimant as on 23/05/2012 was Rs.327.57 ps. which in the estimate of the Tribunal is very reasonable and as per acceptable industry standards. The total deduction of 17,500 PSC Poles from the quantity originally allocated to the claimant, the claimant has suffered a loss of Rs.57,68,669.50 ps. computation of which is I detailed in paragraph No.65 of the SOC. Therefore, the said amount of Rs. Rs.57,68,669.50 ps. deserves to be awarded to the claimant and is hereby awarded. This amount also shall carry interest at the rate of 18% p.a. from the date of the service of notice u/s.11 of the Arbitration and Conciliation Act, 1996 till the date of actual payment."

56. None of these findings returned by the learned Arbitrator about the arbitrary action of the respondent MGVCL in reducing the awarded quantity of PSC poles to be supplied by the claimant under the original award; the

claimant having refurbished and upgraded its existing factory to ensure supply of PSC poles ordered by the respondent so as to discharge its contractual obligations; the case being of reverse monopoly for the respondent MGVCL being the only purchaser of the PSC poles manufactured by the claimant and other factory owners and hence, the question of mitigation of losses does not arise, could be assailed before us.

57. For the facts noted hereinabove, the manner in which the respondent MGVCL had unilaterally extended the period of contract, reduced the quantity of PSC poles to be supplied under the original contract, and that there was no other market or consumer or purchaser of the PSC poles manufactured by the claimant and the pole factory of the claimant was set up only for the respondent MGVCL, we are of the view that the present case is a clear instance of arm-twisting of the manufacturer and supplier by the respondent MGVCL.

58. The awards record that:-

(i) The work of manufacturing Pre-Stressed Concrete poles (PSC poles) is specialized in nature and has a unique design requirement of DISCOMs of Gujarat. The direct consequence of the breach of the contract by the respondent would be the loss suffered by the claimant, and hence, the learned Arbitrator has rightly held that the claimant is not only entitled for the award of the claim of under-utilization of its resources, but is also entitled for compensation for the loss of profit.

(ii) Because of huge quantity of PSC poles requisitioned by the respondent, the claimant had quoted threadbare rates so that the contract could be a mutually profitable proposition for both the parties, in the sense that the claimant would get good quantum of work, whereas the respondent MGVCL would get PSC poles at very competitive rates.

(iii) The lifting of poles was very poor during the tenure of the contract and a massive quantity of poles were lying in the stockyard of the claimant due to failure on the part of the respondent to requisition the ordered poles. The reduction in the quantity of poles and extension of period of contract unilaterally, without any involvement of the claimant to negotiate the price of the pole as initially offered, resulted in financial distress caused to the claimant.

(iv) Moreover, as against the monthly allotment made by the respondent MGVCL, the claimant was required to purchase raw materials for manufacturing of PSC poles, which has disturbed the balance of mutually profitable proposition as against the claimant, inasmuch as, the claimant had quoted very competitive rates to secure order for the huge quantity of PSC poles so that he can earn its profits. As such, the claimant was facing financial burden for ensuring manufacturing of PSC poles as per the monthly allotment of quantity to be requisitioned by the respondent MGVCL, and also because of reduction in the total ordered quantity to be supplied by the claimant in the original contract.

(v) Besides that, the claimant has proved that the PSC poles market is a reverse monopoly where there are many sellers such as the claimant, but only one buyer, i.e., the respondent MGVCL. The manufacturing of PSC poles is an activity of specialized nature, having unique design specifications pursuant to the requirements of DISCOMs of Gujarat State only, and hence mitigation of losses was not possible.

(vi) It was also proved by the claimant that it had upgraded its factory to meet with the massive demand under the tender, and since the manufacturing of PSC poles was a time and money intensive activity, the claimant would not have made huge investments in upgradation of plant and machinery if it were not to receive any monetary benefits.

(vii) The claimant was required to keep its factory fully manned and its production at full capacity and the respondent MGVCL was not honoring its commitment to lift the poles in the manner prescribed under the contract. Even the demand of the claimant to reduce the value of the Bank guarantee required to be furnished by the claimant for the extended period, corresponding to the reduction in quantity of PSC poles, was refused.

59. In view of the above, we do not find any substance in the

submission of the learned Counsel for the appellant that the compensation for loss or damages under Section 73 of the Indian Contract Act' 1872 could not have been awarded to the claimant as the claimant has failed to mitigate the losses, and that it was permissible for the MGVCL to reduce the ordered quantity of PSC poles by 40% under the terms of the contract. No illegality, much less patent illegality, can be found in the impugned awards dated 26.06.2019. No error can be attached to the orders of the Commercial Court in rejection of the applications under Section 34 of the Act' 1996 filed by MGVCL challenging the said awards.

60. Coming to the award dated 25.12.2018 for the work order for supply of PSC poles arising out of the same tender, the findings in paragraphs '56', '57', '58', '62', '63', '64', '65', '66', '67', '68', '69', '70', '71', '72', '74', '75', '76', '77' and from paragraphs '78' to '100' are relevant to be taken note of. However, for the sake of brevity, they are not being extracted herein.

61. Suffice it to note that by two amendments, the respondent had modified/rewritten the terms of the contract unilaterally. The time frame in the first work order required the supply to commence not later than four months from the date of order/LOI, and the poles to be made available and from then onwards, delivery was for every month regularly in proportion to the ordered quantity and the entire supply was to be completed within the stipulated time as per the production program given by the respondent. The delivery

schedule provided in Clause 3 of the Work order dated 01.07.2013 stipulated supply of 5000 PSC poles within six months from the date of LOA, and the claimant, thus, was required to supply such poles by 31.12.2013.

62. It was noted that after trial purchase order dated 17.06.2013, the first work order was placed on 01.07.2013 for supply of 5000 PSC poles. For fulfilling the trial purchase order dated 17.06.2013, the claimant was required to set up infrastructure. No prudent businessman can be expected to put up plant and machinery only for manufacturing of 1000 PSC poles as per trial purchase order, and once again put up plant and machinery for the manufacture of further number of poles for which a work order or work orders may be issued upon successful completion and supply of the trial purchase order.

63. It was, thus, held by the learned Arbitrator in the award dated 25.12.2018 that the argument of the respondent MGVCL that the claimant should not have put up infrastructure till the point of time the trial purchase order and/or the first work order was issued, was not acceptable. It was noted that considering the total assured quantity of 48,000 PSC poles, the claimant had created new massive infrastructure, organizational setup, etc., and had also employed experienced managers, foremen, and labourers. Since the contract was inclusive of freight and carting of the PSC poles, the claimant modified and deployed specialized

tools, equipment, and transportation vehicles to streamline the supply of poles.

64. The statement of the claimant in the claim statement was considered by the learned Arbitrator to note clause [2]B of the tender document that it contemplated that if a new supplier establishes the pole factory within the time frame and completes all formalities related to vendor registration, detailed order upto maximum 20% of the tender quantity shall be issued depending upon the manufacturing capacity and requirement of poles in the area.

65. It was noted that it was not the case of the respondent that the claimant as a new supplier, did not fulfill the required technical satisfaction upon the respondent having carried out the inspection of the factory of the claimant. The claimant would be entitled to have a legitimate expectation of being allocated atleast substantial quantity, if not maximum stipulated in clause [2]B of the tender document. Besides that, the conduct of the respondent in not lifting the PSC poles, which had already been manufactured and were lying with the claimant was also looked into, to conclude that the respondents not only committed breach of the contract, but has continued committing the said breach by unilaterally modifying the ordered quantity from time to time in complete violation of the terms and conditions of the tender document read with the terms and conditions of two work orders which comprised the contract as a whole.

66. It was, thus, concluded that:-

"119. Hence, it can be stated that:

(i) The Respondent committed breach of the Terms and Conditions of the Contract;

(ii) The Respondent reduced the quantity of poles from the stipulated quantity to be procured as per the Contract from the Claimant, and at the same time, increased the quantity of poles to be procured from other pole suppliers;

(iii) The Respondent could not have restricted the quantity of procurement of PSC Poles from the Claimant upon exhaustion of the non-excisable limit in absence of any such covenant in the Contract;

(iv) The Respondent has failed to prove that time was not the essence of the Contract;

(v) The Respondent has failed to prove that the increase /decrease in the quantity was as per the terms of the Tender Document and within the conditions of the Contract;

(vi) The Respondent has failed to prove that construction of the factory by the Claimant was independent of the Contract irrespective of any commitment given by the Respondent with respect to lifting of the PSC Poles.

120. Each of the issues stands answered accordingly.

121. In relation to the first claim being reimbursement of 66% of underutilized infrastructure cost incurred by the Claimant, the total amount of claim worked out by the Claimant is Rs.62,68,751.64 (Rupees Sixty Two Lakhs Sixty Eight Thousand Seven Hundred and Fifty One Rupees and Sixty Four paise). According to the

Claimant, considering that the Claimant was able to utilise only upto 32% to 34% of its infrastructure which had been created to meet the requirement of the ordered quantity of 48,000 PSC Poles (= 100%) the Claimant should be reimbursed / compensated for such investment. The figure of investment placed on record by the Claimant is Rs.94,98,154/- and 66% thereof has been worked out at the aforesaid figure of Rs.62,68,751.64.

122. Even, by applying the principles of Commerce & Accountancy, it would not be possible to reimburse the entire investment cost. In the first instance, over a period of two years, the assets would have depreciated, i.e. undergone normal wear and tear. Neither side has contended nor placed on record this aspect, and hence, the rate of depreciation of different assets is not available on record. Though, certain assets like moulds, are likely to have limited life, but no details are available Hence, by way of a reasonable estimate, one can apply the rate of 10% depreciation per year, which would amount to 20% over a period of two years.

123. Therefore, this claim can be re-worked in the following manner.

Description	***Amount (Rs.)***
Original investment	*94,98,154.00*
Depreciation @ 20%	*(-) 18,99,631.00*
Balance	*75,98,523.00*
Being 66% of balance	*50,15,025.00*

However, considering the fact that the plant and machinery must have also been used for fulfilling other contracts entered into by the Claimant subsequently with the Respondent and other companies, the said factor will have to be considered for the purpose of arriving at the final figure of cost of under-utilised infrastructure claimed by the Claimant. A reasonable estimate can be made that 30% of the aforesaid figure of Rs.50,15,025/- would have been employed for *manufacturing PSC Poles under other contracts. The same would work out as under:*

Description	*Amount (Rs.)*
Being 66% of balance from above	*50,15,025.00*
Deduct 30% for assets having been used for other contracts	*(-) 15,04,508.00*
Balance	*35,10,517.00*

Therefore, against claim of Rs.62,68,751.64, the amount that the Claimant would be entitled, is Rs.35,10,517/- in relation to the first claim.

124. The <u>second claim</u> is for Rs.2,11,222.36 being differential amount as per PSC Poles supplied by the Claimant after 6 September 2016, at the old contract rates despite the fact that the PSC Poles were being lifted at new contract rates from other suppliers.

125. In relation to this claim, the Claimant has referred to and relied upon a fresh Purchase Order dated 6th September, 2016 bearing No.37694 contending that in connection with the said Purchase Order, the rates of PSC Poles, both under non-excisable and excisable categories had been revised upwards. Therefore, the Claimant is entitled to be reimbursed for such difference in the rates under the old contract and the new contract.

126. According to the Respondent, the Claimant cannot be granted any relief as no new contract had been entered into nor were any rates revised. It was only an extension of the period for one year, and as time was not the essence of the contract, the Claimant cannot be granted any relief. That in fact, the Claimant had already been granted price variation as per the Terms of the Contract (paragraph No.31.a of Statement of Defence).

127. As against that, it is contended by the Claimant that the Claimant has not taken the new rates in entirety but has factored in the price variation while computing this *claim. This fact has been stated in paragraph No.24 of the Affidavit-in-Rejoinder and has not been disputed by the Respondent in its Written Submissions.*

128. In the Written Submissions filed by the Respondent, it has been contended that if the Arbitral Tribunal comes to the conclusion that extension of the contract was not as per the Terms of the Contract, then the Claimant is required to file a suit and the Arbitral Tribunal would have no jurisdiction to deal with the same. This contention is self-defeating. No reason or ground has been advanced to establish how and why the Arbitral Tribunal is divested of jurisdiction. The Respondent, on the one hand, in the Statement of Defence, only relies on the price variation clause in the Contract, and in the Written Submissions goes beyond the said pleading by stating that the Claimant is not entitled to price variation. Once in the pleadings, the Respondent has relied on the price variation clause in the Contract, in the Written Submissions, the Respondent cannot travel beyond the stand taken

129. The Respondent has not disputed the workings tendered by the Claimant in relation to this claim Accordingly. Claim No.2 is allowed in the entirety, i.e. an amount of Rs.2,11,222.36 would be payable by the Respondent to the Claimant.

130. The <u>third claim</u> relates to loss of profit which has been worked out by the Claimant at a sum of Rs.44,80,766.40. The Claimant has given the working of this claim in paragraph Nos.69 to 76 of SOC as under:

> *"69 The Claimant respectfully submits that on. 23.05.2012, the Association met with the officers of GUVNL, i.e. the parent-superior authority of the Respondent and agreed to certain price variation and costing related aspects of the manufacturing of PSC Poles The Minutes of the said Meeting is separately exhibited **<u>(C-40: pg. nos. 427 to 431)</u>** From the said Minutes, following aspects become clear.*

70. As on 23.05.2012, the rate per PSC Pole was Rs.1,714/-. The profit earned by the manufacturers as per the say of the Respondent itself is Rs. 134.30/- per PSC Pole. The input of cement is Rs. 235/- per bag and the input of High Tensile Steel is Rs.50/-per KC per PSC Pole. The rate of cement is Rs.235/- (including 15% VAT) and Rs.204 34 (excluding 15% VAT). The input credit of VAT for cement per bag is Rs.30.66/- and, resultantly, the input credit of VAT for cement received per PSC Pole is Rs.44.45/-.

71. Inasmuch as steel is concerned, the rate is Rs.50 per kg (including 5% VAT) and Rs.47.62 per kg (excluding 5% VAT). The input credit of VAT for steel received per kg is Rs.2.38 and the input credit of VAT for steel received per pole is Rs.27.16/-

72. Now, on the aforesaid, factoring in the excise component:

Rate-Steel: Rs.50.00/kg (incl 5% VAT, incl 12.36% excise)
Rate-Steel: Rs 47.62/kg (excl 5% VAT, incl 12.36% excise) Rate-Steel: Rs.42.38/kg (excl 5% VAT, incl 12.36% excise)

73. Therefore, the input credit of excise for steel received per kg is Rs.5.24/- and, therefore, the total input credit per PSC Pole as regards, steel is concerned is Rs.59.81/-.

74. Resultantly, the total VAT and excise credit available on cement and steel as per PSC Pole in Rs. 164.02/-, as summarized herein below.

Sr. No.	*Commodity*	*Rate considered by committee*	*VAT (in Rs.) per pole*	*Excise (in Rs.) per pole*	*Remarks*
1	*Cement*	*235 per bag*	*44.45*	*32.60*	*Vat 15% Excise 12.36%*
2	*Steel (HTS)*	*50 per kg*	*27.16*	*59.81*	*Vat 15%*

				Excise 12.36%
3.	*TOTAL*	*71.61 per pole*	*92.41 per pole*	
4	*Grand Total*	*164.02*		

75. Therefore, from the data accepted by GUVNL/Respondent itself, the profit per PSC Pole available to the Claimant as on 23.05.2012 was Rs.298.32/- (134.30 164.02), which is a very reasonable and industry standard acceptable 17.40% of the total value of the commodity.

76. Therefore, for the total reduction of 15,020 PSC Poles from the quantity originally allocated to the Claimant, the Claimant has suffered a loss of Rs.39,91,114.40/-, computation for which is as below:

Reduced quantity	*:*	*15,020*
Profit per Pole	*:*	*Rs.298.32/-*
Total Loss	*:*	*Rs. 44,80,766.40/-*

In words: Rupees Forty Four Lacs Eighty Thousand Seven Hundred and Sixty Six and Forty Paisa Only"

131. In the Statement of Defence, vide paragraph No.32; the Respondent disputed this claim principally on the ground that: (i) the quantity of 15,020 PSC Poles which were reduced by the Respondent would have been made up by the Respondent having given new contract, and by virtue of contract awarded by DGVCL, to the Claimant; (ii) the working adopted by the Claimant is based on purchase of cement bags and steel bars in the year 2013, but actually such purchases would have been made as per requirement from time to time and not in bulk, and alternatively would have been utilised in subsequent contracts. It has also been contended that the Claimant would have taken benefit of VAT and Excise under the bills for new contract. In the Written Submissions, the Respondent has raised an alternative contention that at the best, the Claimant would be entitled to interest on *loss of profit and not actual loss of profit. A further alternative contention is based on the rate of profit being 8.5% and the figure of loss of profit has been worked out at Rs.21,57,623/-*

132. Thus, in effect, the Respondent has not found fault with the working adopted by the Claimant except drawing a presumption that the cement and steel would not have been purchased in bulk; and further stating that the reduced quantity of poles, i.e. 15,020 PSC Poles would have been taken care of by new contracts. No reason is given by the Respondent as to why not loss of profit and why and how only interest on loss of profit is allowable.

133. Hence, Claim No.3 for Rs.44,80,766.40 is allowed in entirety and the Respondent is liable to pay the same to the Claimant.

134. Claim No.4 relates to the costs of arbitration, inclusive of legal expenditure. The details thereof have been furnished by the Claimant in form of the following table appearing in paragraph No.3.4.3 of Written Submissions:

xxxx xxxx xxxx

135. Considering the fact that the Claimant has not succeeded fully in relation to all the claims, it would be just and fair if the aforesaid. costs are proportionately reduced. Accordingly, instead of the figure of Rs. 10,80,961.05, the Claimant would be entitled to 70% thereof which is Rs.7,56,673/-.

136. The Claimant has claimed interest on each of the claims @ 18% per annum. However, it would not be just and fair to award interest at such high rate. The Claimant would, therefore, be entitled to simple interest @ 10% per annum on the total amount awarded. The interest shall start running from ***1st February, 2019****, if the total amount awarded is not paid by the Respondent* ***on or before 31st January, 2019****."*

67. None of the reasons given by the learned Arbitrator can be said to suffer from any illegality, much less patent illegality.

68. The submissions made by the learned Counsel for the appellant based on the decision of the Apex court in ***[Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, 1961 SCC OnLine SC 100]*** and ***[Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., (2024) 2 SCC 375]*** are of no benefit to the appellant.

69. For the aforesaid, the awards dated 25.12.2018 and 26.06.2019 of the learned Arbitrators subject matter of challenge in this set of appeals cannot be said to suffer from patent illegality, perversity which goes to the root of the matter. All the three connected appeals are accordingly, dismissed being devoid of merits. No order as to cost. Connected Civil Applications is not survive and shall stand disposed of, accordingly.

(SUNITA AGARWAL, CJ.)

(D.N.RAY, J.)

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