(2022) 06 KL CK 0051

High Court Of Kerala

Case No: Arbitration Appeal No. 1 Of 2017, 26 Of 2017

Secretary To Government		APPELLANT
	Vs	
Oriental Structural Engineers Pvt.Limited		RESPONDENT

Date of Decision: June 6, 2022

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 34(2)(a)(iv), 37
- Contract Act, 1872 - Section 19(a), 28(a)

Hon'ble Judges: P.B.Suresh Kumar, J; C.S.Sudha, J

Bench: Division Bench

Advocate: K.V.Manoj Kumar, K.L..Varghese, K.L.Varghese, Santha Varghese, Rahul Varghese, Ranjith Varghese

Final Decision: Disposed Of

Judgement

,,,,,,,,,,,,,,

1. These appeals are against the common order dated 04/03/2016 in O.P.(Arb.) No.144/2009 and O.P.(Arb.) No.186/2009 of the Additional District,,,,,,,,,,,,,,

Judge-III, District Court, Thiruvananthapuram. The Applications under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) filed by the",,,,,,,,,,,,,,

appellant herein, were dismissed by the impugned order. Aggrieved, the appellant who is the respondent in the arbitration proceedings has come up in",,,,,,,,,,,,,,

appeal. The respondent herein is the respondent before the court below and the claimant in the arbitral proceedings. The parties in these appeals will,,,,,,,,,,,,,,

be referred to as described in the arbitral proceedings.,,,,,,,,,,,,,,

2. The facts in Arb. Appeal No. 1/2017 â€",,,,,,,,,,,,,,

For the work, namely, â€œKerala State Transport Project, Phase-I, upgradation of State Highway from Muvattupuzha â€" Thodupuzha and",,,,,,,,,,,,,

Muvattupuzha â€" Angamaliâ€" Contract: KSTP-III (Agreement No.13/KSTP/PMT/2002-2003 dt 07.11.02)â €th,e Kerala Public Works",,,,,,,,,,,,,

Department awarded the work to the claimant/contractor vide letter of acceptance dated 01/10/2002. A contract agreement was entered into between,,,,,,,,,,,,,

the parties on 07/11/2002 for a contract price of ` 92.89 Crores. Notice to commence the work was issued on 16/12/2002 with the time for completion,,,,,,,,,,,,,

as 24 months. The works were agreed to be completed by 15/12/2004. However, the works were finally completed only on 31/01/2007. Several",,,,,,,,,,,,,

disputes arose between the parties. Dispute No.9 relates to payment for the work of providing safety barricading, signals etc. for the construction",,,,,,,,,,,,,

zone, while dispute No.10 is in respect of payment for extension of performance, security and insurances.",,,,,,,,,,,,,

2.1. In accordance with Clause 67.1 of the contract agreement, the aforesaid disputes were referred to the Disputes Review Board (DRB) by the",,,,,,,,,,,,,

claimant/contractor. The DRB gave its recommendation on 15/01/2006. The respondent/Employer was not satisfied with the recommendations of the,,,,,,,,,,,,,

DRB and so they notified their intention to commence arbitration for both these disputes vide letter dated 21/01/2006. Based on Clause 67.3 of the,,,,,,,,,,,,,

General Conditions of Contract (GCC), the Arbitral Tribunal (AT), consisting of three members with one of them as the Presiding Arbitrator was",,,,,,,,,,,,,

constituted. Both parties were given opportunity to adduce evidence by the (AT). After considering the documentary evidence submitted by both sides,,,,,,,,,,,,,

and hearing both sides, the (AT) passed the impugned Award dated 05/05/2009, by which the claims relating to disputes no.9 and 10 were allowed.",,,,,,,,,,,,,

Aggrieved by the Award, the respondent/Employer moved under Section 34 of the Act to set aside the same. The court below by way of the",,,,,,,,,,,,,

impugned order, dismissed the application and hence the appeal.",,,,,,,,,,,,,

3. Heard Sri.K.V.Manoj Kumar, the learned Senior Government Pleader for the appellant and Sri.Rahul Varghese, the learned counsel for the",,,,,,,,,,,,,

respondent in the appeals.,,,,,,,,,,,,,

4. The respondent/Employer challenges both the aforesaid claims on merits as well as on the ground of its maintainability in view of the Supplementary,,,,,,,,,,,,,

Agreement dated 18/01/2007 executed between the parties. Before the AT, the respondent/Employer took up a preliminary objection, that in the light",,,,,,,,,,,,,

of the terms contained in the Supplementary Agreement, the claims are not maintainable as all the claims had been given up by the claimant.",,,,,,,,,,,,,

According to the respondent/Employer, when the parties executed the Supplementary Agreement, the claimant had given up/waived all their claims",,,,,,,,,,,,,

for the period after 31/10/2005 and hence they can no longer make any further claim(s). This objection was considered by the AT before the disputes,,,,,,,,,,,,,

were considered on merits, and the same was rejected accepting the case of the claimant that the Supplementary Agreement had been executed",,,,,,,,,,,,,

under vitiating circumstances and so the same is voidable. The AT also held Clause 3 of the Supplementary Agreement to be violative of Section,,,,,,,,,,,,,

28(a) of the Contract Act and hence void. In the proceedings under Section 34, the impugned Award was inter alia challenged on the ground that the",,,,,,,,,,,,,

AT had no jurisdiction to entertain the challenge against the Supplementary Agreement and to adjudicate on its validity as it was beyond the scope of,,,,,,,,,,,,,

reference. This contention was rejected by the court below.,,,,,,,,,,,,,

4.1. The findings of the AT relating to the Supplementary Agreement is seriously assailed by the learned Senior Government Pleader. It was,,,,,,,,,,,,,

submitted that the AT has travelled beyond its jurisdiction in dealing with the validity of the Supplementary Agreement, a dispute not contemplated by",,,,,,,,,,,,,

or not falling within the terms of the submission to arbitration and hence a decision on the same is a matter beyond the scope of the submission to,,,,,,,,,,,,,

arbitration, and so a ground to set aside the Award as provided under Section 34(2)(a)(iv) of the Act. It was also argued that the AT has arrived at a",,,,,,,,,,,,,

finding regarding the vitiating circumstances in the execution of the Supplementary Agreement in the complete absence of any pleadings or,,,,,,,,,,,,,

materials/evidence to substantiate the same. It was pointed out that the finding of the AT that the Supplementary Agreement is void in view of Section,,,,,,,,,,,,,

28(a) of the Contract Act is wrong, as the terms of the Agreement do not absolutely bar the claimant from pursuing remedies available to them under",,,,,,,,,,,,,

law. Clause 3 of the Supplementary Agreement as per which the claimant agreed not to raise any claims for the period after 31/10/2005 till the,,,,,,,,,,,,,

completion of the project in all respects, was in lieu of the respondent giving up their claim for liquidated damages (LD). The fact that the claimant is",,,,,,,,,,,,,

responsible for the delay is apparent from Ext.A-10 G.O., which was issued after a series of negotiations and talks at various levels and also based on",,,,,,,,,,,,,

the recommendation of the Cabinet Subcommittee. Ext.A-10 was issued on the basis of a consensus reached between the parties. There was meeting,,,,,,,,,,,,,

of minds between the parties and the terms in Ext.A-10 were arrived at on the basis of mutual agreement and free will of the parties and so the,,,,,,,,,,,,,

findings to the contrary are perverse and wrong, argues the learned Senior Government Pleader.",,,,,,,,,,,,,

5. We deem it appropriate to refer to the Supplementary Agreement dated 18/01/2007 executed between the parties, from which we quote the",,,,,,,,,,,,,

relevant portions which reads -,,,,,,,,,,,,,

â€œ---------- (2) The Employer has considered the request of the Contractor for extending the time of completion in respect of Muvattupuzha-Thodupuzha section,,,,,,,,,,,,,

till 31.10.2006 and Muvattupuzha-Angamali section till 31.01.2007 and whereas the request of the Contractor for such extension of time has been duly discussed,,,,,,,,,,,,,

and mutually agreed upon by both the parties subject to the following terms and conditions.,,,,,,,,,,,,,

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:,,,,,,,,,,,,,

1. The approval of extension of time for Muvattupuzha-Thodupuzha sector is upto 31.10.2006 and for Muvattupuzaha -Angamali sector is upto 31.1.2007.,,,,,,,,,,,,,

2. No liquidated damages will be imposed for the delays upto 31.10.2006 for Muvattupuzha-Thodupuzha section. Similarly liquidated damages will not be,,,,,,,,,,,,,

imposed in Muvattupuzha-Angamali sector till 31.01.2007.,,,,,,,,,,,,,

3. The Contractor shall not raise any claim against the Employer for the period after 31.10.2005 till the completion of the Project in all respects.,,,,,,,,,,,,,

4. Release of interim payment certificates for the month of June, July, August, September and October 2006 and future IPC payments.",,,,,,,,,,,,,

5. The Contractor shall complete all works before 31.01.2007 including straightening of bends in the Muvattupuzha sector. Extension of time, if found, absolutely",,,,,,,,,,,,,

necessary for the strengthening of works alone will be considered. The Contractor shall be liable for liquidated damages for any further delays. However, this will",,,,,,,,,,,,,

be subject to the conditions prescribed in Government Order (MS) No.69/06/PWD dated 22.12.2006.â€,,,,,,,,,,,,,

(Emphasis supplied),,,,,,,,,,,,,

5.1. Therefore, referring to the aforesaid clauses/terms, with special reference to Clause 3 of the agreement, the argument advanced on behalf of the",,,,,,,,,,,,,

respondent/Employer is that the claimant/contractor can no longer raise any claim after the execution of the Supplementary Agreement. The,,,,,,,,,,,,,

respondent/Employer has raised the objection regarding the maintainability of the claims in their defense statement. So, in reply to the same, rejoinder",,,,,,,,,,,,,

was filed by the claimant in which they allege that the respondent/Employer had sought a 'no claim certificate' from them as a pre-condition for,,,,,,,,,,,,,

approving extension of time recommended by the Engineer and for releasing the payments certified by the Engineer. According to the claimant such a,,,,,,,,,,,,,

pre-condition is in breach of the provisions of the contract and the insistence by the respondent/Employer for the no claim certificate, amounted to",,,,,,,,,,,,,

coercion, which is unlawful. This fact has been brought out in the communications, namely, Ext.A-01 to A-5. The claimant also alleged that they had",,,,,,,,,,,,,

made their stand clear that the respondent/Employer's demand of withdrawal of their claims as a pre-condition for approval of extension of time,,,,,,,,,,,,,

recommended by the Engineer and for release of the payments certified by the Engineer, was not acceptable to them and that in the event of they",,,,,,,,,,,,,

being forced to accept the said condition due to the adverse cash-flow conditions, the acceptance would only be under duress. In fact, the Engineer of",,,,,,,,,,,,,

the respondent vide Ext.A-06 letter dated 19/12/2006 had informed the claimant that he had been urging the respondent/Employer to pay the claimant,,,,,,,,,,,,,

the certified amounts in time, to approve the extension of time recommended by him and not to impose liquidated damages. In the meetings held on",,,,,,,,,,,,,

02/12/2006 and 07/12/2006 with the respondent/Employer, the claimant was asked to withdraw their claim for compensation due to delays for the",,,,,,,,,,,,,

period from 01/11/2005 to 31/01/2007 as a pre-condition for the Employer to approve extension of time recommended by the Engineer and to release,,,,,,,,,,,,,

the payments certified by the Engineer. The claimant was told that the consequence of failing to agree to the said term, would be non-approval of the",,,,,,,,,,,,,

extension of time, levy of liquidated damages and non-release of certified payments.",,,,,,,,,,,,,

5.2. According to the claimant, the contract executed between the parties is based on reciprocal promises and the promise of the claimant to complete",,,,,,,,,,,,,

the works within the approved time was subject to the fulfillment of the respondent's promise to hand over within time the unencumbered site and the,,,,,,,,,,,,,

drawings for construction. The respondent/Employer had failed to fulfill these promises and so non-approval of extension of time and consequent,,,,,,,,,,,,,

levying of liquidated damages would therefore have been breach of the contract provisions, as there was no default on the part of the claimant. The",,,,,,,,,,,,,

claimant was not in a position to bear any further losses at that juncture, as they had already suffered huge losses on account of the delay and the",,,,,,,,,,,,,

cash-flow condition was exceptionally adverse. Therefore, in order to infuse the desperately needed cash-flow for sustaining the performance of the",,,,,,,,,,,,,

contract, the claimant was forced to submit to the respondent's terms for release of certified payments. Hence the claimant as per Ext.A-07 letter,",,,,,,,,,,,,,

informed the respondent that they were conditionally withdrawing their claim for compensation due to the delay caused for the period from 01/11/2005,,,,,,,,,,,,,

to 31/01/2007, provided extension of time as approved by the Engineer was granted and the payments certified by the Employer were released. The",,,,,,,,,,,,,

respondent/Employer thereafter issued Ext.A-10 Government Order dated 22/12/2006 and approval of extension of time as recommended by the,,,,,,,,,,,,,

Engineer was communicated to them vide Ext.A-11 letter dated 04/01/2007. On receipt of Ext.A-10, the claimant sent Ext.A-12 letter dated",,,,,,,,,,,,,

12/01/2007 to the respondent informing the latter of their understanding of Ext.A-10. Even after Ext.A-10 order, payments due to the claimant were",,,,,,,,,,,,,

not released. To substantiate the aforesaid allegations raised in the rejoinder, the claimant relies on Exts.A-01 to A-18.",,,,,,,,,,,,,

6. A referenceÂ toÂ theÂ relevantÂ portionsÂ ofÂ theÂ aforesaid communications produced along with the rejoinder is highly necessary to,,,,,,,,,,,,,

answer the arguments advanced on behalf of the respondent. Ext.A-01 is a letter dated 16/10/2006 sent by the claimant to the respondent/Employer,",,,,,,,,,,,,,

the relevant portion of which reads-,,,,,,,,,,,,,

â€œWe wish to invite your kind attention to the Engineer's letter no. 1b/RJP/055 dated 22nd July 2006, whereby extension of time has been recommended by the",,,,,,,,,,,,,

Engineer for approval of the Employer, till 31 st October 2006 for Section II (Muvattupuzha Thodupuzha Section) and till 31st January 2007 for Section 1",,,,,,,,,,,,,

(Muvattupuzha-Angamaly Section). ---------- .,,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,

In this context, we refer to the further discussions held regarding formal approval of extension of time to be communicated by the Employer to the Engineer",,,,,,,,,,,,,

pursuant to Sub Clause 2.1 of the Conditions of Contract with reference to the recommendation for extension of time made by the Engineer vide letter dated 22nd,,,,,,,,,,,,,

July 2006. We are deeply pained to note that during the discussions, as a pre-condition for such formal approval of extension of time, we have been asked to",,,,,,,,,,,,,

submit a â€œNo Claim Certificate"" foregoing our right to compensation of the additional cost arising from the delays encountered in the Works necessitating",,,,,,,,,,,,,

such extension of time.,,,,,,,,,,,,,

We do not agree to submit any such ""No Claim Certificate"" withdrawing our claim / foregoing our right under the Contract terms to claim for compensation of",,,,,,,,,,,,,

additional cost on account of delays to Works not attributable to us. In this regard, we wish to clarify that any such pre-condition would be in clear breach of the",,,,,,,,,,,,,

Contract provisions and any such certificate / waiver of right if forced out from us would be under duress, making it invalid under the law of the land in",,,,,,,,,,,,,

particular, under the Indian Contract Act, 1872.",,,,,,,,,,,,,

It is regretted that extension of time approval is held hostage to this demand and furthermore, release of certified payments is held hostage to extension of time",,,,,,,,,,,,,

approval. This uncalled for, unjust and untenable demand in breach of the Contract provisions is having an adverse effect on the progress of Works. ----------",,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,,

We, therefore, request you not to continue demanding the ""No Claim Certificate"" from us in breach of the Contract for granting approval of extensions of time. We",,,,,,,,,,,,,,

trust you would reconsider the matter in view of the above clarifications and go by the merits of the case and approve extension of time without insisting on such,,,,,,,,,,,,,,

non-Contractual demand. ---------- .â€,,,,,,,,,,,,,,

6.1.Â Ext.A-02 letter dated 08/11/2006 sent to the respondent reads-,,,,,,,,,,,,,,

â€œWe wish to invite your kind attention to the fact that the Interim Payment Certificates for the months of June, July, August and September 2006 have been",,,,,,,,,,,,,,

issued by the Engineer but till date no payment has been released against these IPCs by the Employer. This withholding of payments is in clear breach of Sub-,,,,,,,,,,,,,,

Clause 60.8 of the Conditions of Contract ----------,,,,,,,,,,,,,,

Notwithstanding this claim for interest, the cashflow constraints caused by such unjust, uncalled for, unwarranted and inexplicable withholding of certified sums",,,,,,,,,,,,,,

by the Employer have necessitated slowdown of the progress of Works, pursuant to Sub-Clause 69.4 of the Conditions of Contract. Unless and until the payments",,,,,,,,,,,,,,

against IPC's for the months of June, July, August and September 2006 are released by the Employer enabling us to take remedial measures thereafter to restore",,,,,,,,,,,,,,

the rate of progress of works to required levels for earliest completion, this slowdown of Works pursuant to Sub-Clause 69.4 of the Conditions of Contract would",,,,,,,,,,,,,,

persist.,,,,,,,,,,,,,,

We hereby request you to kindly released the amounts certified by the Engineer under the IPC's for June, July, August and September 2006 immediately, in the",,,,,,,,,,,,,,

overall interest of the Works. ---------- .,,,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,,

On the one hand, encumbrances continue to affect the progress of works at Site and design and drawing changes continue to be made even now, affecting the",,,,,,,,,,,,,

completion schedule adversely. This fact has been admitted by the Engineer as well as Employer as would be seen from the correspondence on record, including",,,,,,,,,,,,,

determinations of extension of time on account of delays. On the other hand, the Employer is not making payments certified by the Engineer for the past four",,,,,,,,,,,,,

months - severely crippling our cashflow. As a result, we are distressed to such extent that we are unable to sustain the rate of progress of works any more to be as",,,,,,,,,,,,,

required for earliest completion. We have therefore had to resort to slowdown of works pursuant to Sub-Clause 69.4 of the Conditions of Contract. We hereby,,,,,,,,,,,,,

request additional time and cost to be considered on this account. We shall soon submit the detailed particulars in this regard to the Engineer.,,,,,,,,,,,,,

We once again request you to kindly release the certified payments forthwith so as to mitigate the losses. ---------- .â€,,,,,,,,,,,,,

Â,,,,,,,,,,,,,

6.2. Ext.A-03 is another letter dated 25/11/2006 sent by the claimant reiterating their request for release of the payments due, the relevant portion of",,,,,,,,,,,,,

which reads-,,,,,,,,,,,,,

â€œWe wish to invite your kind attention to the fact that the Interim Payment Certificates for the months of June, July, August and September 2006 have been",,,,,,,,,,,,,

issued by the Engineer as detailed below but till date no payment has been released against these Interim Payment Certificates by the Employer:,,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,

Total Amount certified by Engineer but withheld by Employer Rs.8,40,91,879/-",,,,,,,,,,,,,

This withholding of payments is in clear breach of Sub-Clause 60.8 of the Conditions of Contract whereby the Employer â€œshall payâ€ the amounts certified by,,,,,,,,,,,,,

the Engineer in the Interim Payment Certificate within 42 days of the Contractor's submission of Monthly Statement of application for payment. ---------- .,,,,,,,,,,,,,

Notwithstanding this claim for interest, the cashflow constraints caused by such unjust, uncalled for, unwarranted and inexplicable withholding of certified sums",,,,,,,,,,,,,

by the Employer have necessitated slowdown of the progress of Works, pursuant to Sub-Clause 69.4 of the Conditions of Contract. Unless and until the payments",,,,,,,,,,,,,

against IPCs for the months of June, July, August and September 2006 are released by the Employer enabling us to take remedial measures thereafter to restore",,,,,,,,,,,,,

the rate of progress of works to required levels for earliest completion, this slowdown of Works pursuant to Sub-Clause 69.4 of the Conditions of Contract would",,,,,,,,,,,,,

persist.,,,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,,

We hereby request you to kindly release the amounts certified by the Engineer under the IPCs for June, July, August and September 2006 immediately, in the",,,,,,,,,,,,,

overall interest of the Works. ---------- .,,,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,,

It would not be in anybody's interest that the legitimate payments due to us be withheld in clear breach of the Contract provisions. We request you not to choke,,,,,,,,,,,,,

the cashflow by precipitating the matter any further, which would force us to seek recourse to Sub-Clause 69.1 of the Conditions of Contract for termination of",,,,,,,,,,,,,

the Contract, to cut our losses. We therefore request you to kindly release the certified payments immediately without any further delay in the overall interest of",,,,,,,,,,,,,

the works.,,,,,,,,,,,,,,

In this context, we wish to invite your kind attention to the fact that, encumbrances continue to affect the progress of works at Site and design and drawing",,,,,,,,,,,,,

changes continue to be made even now, affecting the completion schedule adversely. Additional works such as buys bays and new drains at new locations in",,,,,,,,,,,,,

Angamali etc. are being introduced even at this stage. This fact has been admitted by the Engineer and Employer as would be seen from the correspondence,",,,,,,,,,,,,,

including determinations of extension of time on account of delays.,,,,,,,,,,,,,

The Engineer had recommended vide letter no. 5b/KSTP-3/RJP/031 dt. 22nd July 2006, interim extension of time for Muvattupuzha â€" Thodupuzha Section till",,,,,,,,,,,,,

31st October 2006 and for Muvattupuzha â€" Angamaly Section till 31st January 2007. We have on our part completed the Muvattupuzha â€" Thodupuzha,,,,,,,,,,,,,

Section on 31st Â October 2006 and the Section has been taken over pursuant to Clause 48 of the Conditions of Contract as on such date by the Engineer. We,,,,,,,,,,,,,

regret that we are being coerced by the Employer to give a ""No Claim Certificate"" in breach of the Contract provisions as a pre-condition for approval of",,,,,,,,,,,,,

extension of time as recommended by the Engineer and for release of the withheld payments. In this regard, we refer to our letter no. OSE/KSTP-",,,,,,,,,,,,,

III/17/2006/6649 dt. 16th October 2006 clarifying that such demand is unlawful pursuant to Indian Contract Act 1872 and that such â€œNo Claim Certificateâ€,,,,,,,,,,,,,

even if secured through coercion would serve no good for the Employer eventually. We therefore requested therein to approve the extension of time on the merits,,,,,,,,,,,,,

of the case, as recommended by the Engineer.",,,,,,,,,,,,,

In the meanwhile, additional works and changes to drawings have been ordered after the date of Engineer's recommendation, necessitating further extension of",,,,,,,,,,,,,

time. Encumbrances and inadequacies in possession of land continue to affect the progress of works adversely as on date. The letters no.,,,,,,,,,,,,,

KSTP3/BCEOM/RE/06/301.2/201 dt. 20th September 2006 and KSTP3/BCEOM/RE/06/301.2/275 dt. 22nd November 2006 are representative of the additional,,,,,,,,,,,,,

works being ordered, changes to drawings being effected and encumbrances and inadequacy of land possession as on date. Additional time to complete the",,,,,,,,,,,,,

balance works, after addressing such additions / changes / possession and encumbrance issues, cannot therefore be denied. Such additional time entails extended",,,,,,,,,,,,,

stay and the consequent costs of extended stay, both of which are due for determination and compensation pursuant to Sub-Clauses 6.4, 12.2, 42.2, 44.1, 44.3 and",,,,,,,,,,,,,

53 of the Conditions of Contract.,,,,,,,,,,,,,

Delays due to reasons not attributable to us continue to occur on the one hand as brought out hereinabove and on the other hand, the Employer has not made",,,,,,,,,,,,,

payments certified by the Engineer for the months of June, July, August and September 2006, amounting to 8,40,91,879/-. This withholding of certified payments,",,,,,,,,,,,,,

amounting to over 10% of the revised value of the Works, has severely crippled our cashflow. As a result, we are distressed to such extent that we are unable to",,,,,,,,,,,,,

sustain the rate of progress of works any more to be as required for earliest completion. We have therefore had to resort to slowdown of works pursuant to Sub-,,,,,,,,,,,,,

Clause 69.4 of the Conditions of Contract. We hereby request additional time and cost to be considered,,,,,,,,,,,,,

on this account. ---------- .,,,,,,,,,,,,,

We once again request you to kindly release the certified payments forthwith so as to mitigate the losses. ---------- .â€,,,,,,,,,,,,,

6.3. Ext. A-04 letter dated 01/12/2006 sent to the respondent reads-,,,,,,,,,,,,,

â€œWe thank you for the opportunity provided to our Shri N Mohan, Chief Project Manager and Shri N Neelakanteswaran GM (Contracts) for representing the",,,,,,,,,,,,,

issues of concern to us in completing the Works before the Cabinet Sub-Committee on 29th November 2006 and before the World Bank officials on 30 th November,,,,,,,,,,,,,

2006. We understand the importance and seriousness accorded by the Employer to the issues of concern, as evidenced by the presence of the Honourable Law",,,,,,,,,,,,,

Minister Shri Vijay Kumar and Honourable PWD Minister Shri T U Kuruvilla in the meeting held on 29th November 2006. During the meetings, we have brought",,,,,,,,,,,,,

out the following issues:,,,,,,,,,,,,,

a) ---------- .,,,,,,,,,,,,,

b) ---------- .,,,,,,,,,,,,,,

c) ---------- .,,,,,,,,,,,,,,

d) ---------- .,,,,,,,,,,,,,,

e) ---------- .,,,,,,,,,,,,,,

f) ---------- .,,,,,,,,,,,,,,

g) ---------- .,,,,,,,,,,,,,,

h) ---------- .,,,,,,,,,,,,,,

i) ---------- .,,,,,,,,,,,,,,

j) ---------- .,,,,,,,,,,,,,,

k) ---------- .,,,,,,,,,,,,,,

l) ---------- .,,,,,,,,,,,,,,

m) ---------- .,,,,,,,,,,,,,,

We hope and pray that the Honourable Ministers and other members of the Cabinet Sub-Committee appreciate the importance of cash-flow in sustaining the rate,,,,,,,,,,,,,,

of progress of works in our Contract and turn this Contract into a success by approving payment of Rs. 9,29,69,432/- before 6th December 2006, and allowing",,,,,,,,,,,,,,

further payments under the Contract within the due dates, without any hindrance. We trust the World Bank would facilitate this payment release in the overall",,,,,,,,,,,,,,

interest of the Contract and all the stakeholders concerned.â€,,,,,,,,,,,,,,

6.4. Ext. A-05 letter dated 01/12/2006 sent by the claimant to the respondentâ€™s authorized Engineer reads-,,,,,,,,,,,,,,

â€œ ---------- .,,,,,,,,,,,,,,

---------- .,,,,,,,,,,,,,,

We disagree with these generalized contentions in particular reference to our Contract and we wish to reiterate the following in this regard:,,,,,,,,,,,,,,

a) ---------- .,,,,,,,,,,,,,,

b) ---------- .,,,,,,,,,,,,,,

c) ---------- .,,,,,,,,,,,,,,

d) When the Engineer has recommended extension of time, in the absence of justified grounds duly supported by documentary evidence for denial of such",,,,,,,,,,,,,

extension of time, in the context of our having completed Section II on time and the time for completion still remaining unexhausted in case of Section 1, the",,,,,,,,,,,,,

question of levying liquidated damages does not arise at all. The purported threat made in the news reports regarding application of liquidated damages is,,,,,,,,,,,,,

therefore not in accordance with the provisions of the Contract.,,,,,,,,,,,,,

e) With regard to the Employer's demand for withdrawing claims as a pre-condition for approval of extension of time and consequent release of certified,,,,,,,,,,,,,

payments, as corroborated in the newsclips, we have already clarified that such demand is not acceptable to us and even if we are to accept this, it will be under",,,,,,,,,,,,,

duress, which pursuant to the Indian Contract Act, 1872 is unlawful. The Contract provides for extension of time with cost compensation due to delays not",,,,,,,,,,,,,

attributable to the Contractor. Such reasons of delay have occurred and the implications thereof have been established on record. Waiver of such implications,,,,,,,,,,,,,

pertaining to cost compensation cannot be sought as a pre-condition for approving extension of time. We have already stated that the Contract provides for,,,,,,,,,,,,,

dispute resolution procedure under Clause 67 and if the Employer does not find the cost claims to be meritorious then such disputes are to be resolved pursuant,,,,,,,,,,,,,

to Clause 67 only. Pressurizing the Contractor to yield to the demand for withdrawing the claims as a precondition for releasing the certified payments is,,,,,,,,,,,,,

therefore tantamount to blackmail. The Employer will have to face the consequences of withholding certified payments on this account.,,,,,,,,,,,,,

f) Unless the Employer releases the long overdue payment of Rs. 9.30 Crores by 6th December 2006, we shall slowdown / suspend the progress of works pursuant",,,,,,,,,,,,,

to Sub-Clause 69.4 of the Conditions of Contract, with effect from 6th December 2006. We shall then be not able to substantially complete Section I by the",,,,,,,,,,,,,

recommended completion date of 31st January 2007. The delay in completion shall be on account of the Employer's delay in effecting certified payments,",,,,,,,,,,,,,

requiring extension of time and additional cost compensation pursuant to Sub-Clause 69.4 of the Conditions of Contract. The Employer's actions and intentions,,,,,,,,,,,,,,

as made out in the news reports will eventually entail additional costs to the Employer only.,,,,,,,,,,,,,,

In view of the aforesaid clarifications, in the overall interest of the Works, we hereby request you to kindly impress upon the Employer to:",,,,,,,,,,,,,,

a) avoid deviations from the Contract due to politicization of the Contractual issues of extension of time and release of payments;,,,,,,,,,,,,,,

b) approve extension of time for Sections I and II as recommended by you;,,,,,,,,,,,,,

c) release the withheld payment of Rs. 9.30 Crores immediately to avoid slowdown; and,,,,,,,,,,,,,,

d) release the balance amounts under the Contract within the due dates henceforth.,,,,,,,,,,,,,,

---------- . â€,,,,,,,,,,,,,,

6.5. Ext.A-06 dated 19/12/2006 the reply given by the Engineer to Ext.A-05 reads-,,,,,,,,,,,,,,

â€œWe do not know why you have written the referenced letter to us. You must be well aware that we have been urging the Employer for some time to pay the,,,,,,,,,,,,,,

Contractors on time, to approve the Engineer's EOT recommendations and not to impose LD. Our role as impartial Engineer does not allow us to get involved in",,,,,,,,,,,,,,

what you describe as â€œpoliticisation of contractual issues"".",,,,,,,,,,,,,,

We are sure you will appreciate that we have already, to our own (at least short term) detriment, pushed the Employer as far as our impartial role will allowâ€.",,,,,,,,,,,,,,

,Â,Â B,Â Â Â,,J,Â,B B,> M,Â,,Â,Â,", 2005",

,31 -,Â,Â,Â,,,Â,Â,Â,Â Â B,U,Â,,,

,J,BÂ,,,,,Â,,[,,,,,@,

,,,,,31-1-2007,,,Â,"Â , Â",,,,,,

,,,,,,,,,,,,,,

,,,,,,,,,,,,,,

16. It is true that the claim for compensation for delay was reiterated by the claimant by way of Ext.A-16 letter dated 03/01/2007, apparently after",,,,,,,,,,,,,

Ext.A-10 G.O. dated 22/12/2006. But this was not a fresh claim. As per Ext.A-14 letter dated 01/12/2006 the claimant requested the respondent to,,,,,,,,,,,,,

approve certification for payment of ₹ 15,24,76,815/- as compensation for delay for the period from 01/11/2005 to 31/01/2007 on account of the delay",,,,,,,,,,,,,

in handing over the site, delay in issue/revision of design details and drawings, delay due to additional works and reworks ordered and delay due to",,,,,,,,,,,,,

slowing done of the works due to failure to release the interim payments on time. To Ext.A-14, the respondent gave Ext.A-15 letter dated 08/12/2006",,,,,,,,,,,,,

justifying their stand. It is in reply to Ext.A-15, the claimant gave Ext.A-16 reiterating their stand. In response to this, the respondent issued Ext. A-17",,,,,,,,,,,,,

letter stating thus-,,,,,,,,,,,,,

â€œAs per the reference cited above, you have claimed compensation for the delays during November 2005 to January 2007 for an amount of Rs.15,24,76,815/-.",,,,,,,,,,,,,

The claims are not maintainable in view of the mutual agreement between Government and Contractor at the Cabinet Sub Committee meeting held on 7/12/2006,,,,,,,,,,,,,

at North Conference Hall. Secretariat, hence you may requested [SIC] to withdraw the claims immediately.â€",,,,,,,,,,,,,

17. Pursuant to Ext. A-17, the claimant withdrew the claim as per Ext.A-18 letter dated 19/01/2007 which reads-",,,,,,,,,,,,,

â€œWe invite your kind attention to the Supplementary Agreement and the Minutes of Meeting signed on 18th January 2007. We have been assured that payment,,,,,,,,,,,,,

certifications made by the Engineer shall not be construed as claims in terms of the Supplementary Agreement and that the claims / disputes / issues raised by us,,,,,,,,,,,,,

before 31st October 2005 shall not be affected by the terms of the Supplementary Agreement. The Engineer has already clarified vide letter no. Ib/RJP/213 dt. 11th,,,,,,,,,,,,,

January 2007 and we have clarified vide our letter no: OSE/C/KSTP-III/882 dt. 8th December 2006 on the claims/disputes/ issues raised before 31st October,,,,,,,,,,,,,

2005.,,,,,,,,,,,,,

Accordingly, the only claim that is due for withdrawal consequent to the Government Order dated 22nd December 2006 and the Supplementary Agreement dated",,,,,,,,,,,,,

18th January 2007 is the claim for compensation due to delays during the period from 1st November 2005 to 31st January 2007, notified by us vide our letter no.",,,,,,,,,,,,,

OSE/C/KSTP-111/867 dated 1st December 2006. As required by you vide your letter no. PWD/KSTP/PMT/150/02 dt. 4th January 2007, we hereby withdraw our",,,,,,,,,,,,,

claim notified vide our letter no. OSE/C/KSTP-111/867 dated 1st December 2006.,,,,,,,,,,,,,

We trust this is in order. We now request you to kindly release the withheld payments immediately.â€,,,,,,,,,,,,,

18. The claimant is no longer pursuing the claim given up as per Ext.A-07 and Ext.A-18. Therefore, though the Supplementary Agreement is seen to",,,,,,,,,,,,,

have been executed under vitiating circumstances and hence voidable at the option of the claimant, they are not pursuing the said claim in the light of",,,,,,,,,,,,,

Ext. A-10. On the other hand, their specific case is that the claim that they had given up is only the claim specified in Ext.A-07 and Ext.A-18 and not",,,,,,,,,,,,,

all claims as canvassed on behalf of the respondent and that Clause 3 of the Supplementary Agreement being violative of Section 28(a) of the,,,,,,,,,,,,,

Contract Act, cannot be enforced.",,,,,,,,,,,,,

19. According to the AT, Clause 3 of the Supplementary Agreement absolutely restrains the claimant from enforcing their rights under the contract",,,,,,,,,,,,,

and so held it to be void as it violates Section 28(a) of the Contract Act. The respondent on the other hand contends that Section 28(a) is not attracted,,,,,,,,,,,,,

as Clause 3 was arrived at on the basis of a mutual understanding that took place between the parties. This argument certainly cannot be,,,,,,,,,,,,,

countenanced in the light of the aforesaid discussion and also for the following reasons. Section 28(a) of the Contract Act reads-,,,,,,,,,,,,,

â€œ28. Agreements in restraint of legal proceedings, void. â€" Every agreement, â€"",,,,,,,,,,,,,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary",,,,,,,,,,,,,

tribunals, or which limits the time within which he may thus enforce his rights; or",,,,,,,,,,,,,

(b) ---------- is void to that extent.â€,,,,,,,,,,,,,

Clause No.3 of the Supplementary Agreement dated 18/01/2007 says that the Contractor shall not raise any claim against the Employer for the period,,,,,,,,,,,,,

after 31/10/2005 till the completion of the Project in all respects. The Clause, seems to be restricting the contractor absolutely from enforcing his rights",,,,,,,,,,,,,

under the contract from a prior date. Ext.A-07 makes it apparent that the claim that was given up by the claimant is only the claim for compensation,,,,,,,,,,,,,

amounting to ₹ 15,24,76,815/- due to delays during the period from 01/11/2005 to 31/01/2007 and they have also made it clear that they would not",,,,,,,,,,,,,

withdraw any other claim or dispute and that they should not be forced to withdraw any other claim or dispute in future. This withdrawal was on,,,,,,,,,,,,,

condition that the long overdue interim payments are released, and extension of time granted. After this, some clarifications appear to have been",,,,,,,,,,,,,

sought for, to which the claimant gave Exts.A-08 and A-09 replies, both dated 08/12/2006 which read-Ext.A-08 â€"",,,,,,,,,,,,,

â€œIn continuation to our letter no. OSE/C/KSTP-111/881 dt. 7th December 2006 and with reference to the discussions held in this regard in the Ministerial,,,,,,,,,,,,,

Sub-Committee Meeting held on 7th December 2006, we wish to clarify that we shall undertake to complete the work of straightening of curves already ordered.",,,,,,,,,,,,,

We trust this clarifies the matter and enables you to proceed with approval of the proposal submitted vide our letter referred hereinabove.â€,,,,,,,,,,,,,

Ext.A-09 -,,,,,,,,,,,,,

â€œFurther to our discussions in this regard, we wish to clarify that the Disputes # 9 to 16 were all raised by us well before 31st October 2005, as seen below:",,,,,,,,,,,,,

Dispute #9 - Payment of Safety Barricades and Signals for construction zone, requested vide our letter no. OSE/KSTP-III/18/2005/4357 dt. 9th July 2005.",,,,,,,,,,,,,

Dispute # 10 - Payment for extension of Performance Security and Insurances, requested vide our letter no. OSE/KSTP-III/37/2004/3033 dt. 6th December 2004.",,,,,,,,,,,,,

Dispute # 11 - Additional Cost due to Deduction at Source of 1% as Workers Welfare Fund, requested after our repeated requests against each IPC till October",,,,,,,,,,,,,

2005 not to recover the additional cost were not approved, vide our letter no. OSE/KSTP-III/18/2006/5528 dt. 18th February 2006. The requests and Engineer's",,,,,,,,,,,,,,

feedback are recorded in the Monthly Progress Reports and Minutes of Meetings prior to 31st October 2005.,,,,,,,,,,,,,,

Dispute # 12 - Compensation for delay in change of Foreign Currency proportion, requested vide our letter no. OSE/KSTP-III/34/2004/2014 dt. 8th May 2004.",,,,,,,,,,,,,,

Dispute # 13 Compensation of Additional Sales Tax due to Subsequent Legislation requested vide our letter no. OSE/KSTP-III/18A/2004/2458 dt. 13th August,,,,,,,,,,,,,,

2004.,,,,,,,,,,,,,,

Dispute # 14 - Payment for Vehicles operated in the extended time period, requested vide our letter no. OSE/KSTP-III/18(20)/2005/3400 dt. 3rd February 2005.",,,,,,,,,,,,,,

Dispute # 15 - Payment for weep holes in Structures, Retaining Walls and Drains, requested vide our letters no. OSE/KSTP-III/18(14)/2004/1447 dt. 30th January",,,,,,,,,,,,,,

2004 and OSE/KSTP-III/18(15)/2004/1445 dt. 30th January 2004.,,,,,,,,,,,,,,

Dispute # 16 - Payment of Additional Quantity of DBM Infill in SBST Layer, requested vide our letter no. OSE/KSTP-III/2/2004/2482 dt. 19th August 2004.",,,,,,,,,,,,,,

We trust this clarifies the matter.â€,,,,,,,,,,,,,,

Â,,,,,,,,,,,,,,

20. It was thereafter Ext.A-10 dated 22/12/2006 was issued in which it is stated that as the claimant has agreed to give up the claim raised after,,,,,,,,,,,,,,

31/10/2005 and also agreed not to raise any further claims in future, the LD intended to be imposed for the delay caused by the claimant has been",,,,,,,,,,,,,,

given up and that the interim payments due to the contractor released and the extension of time granted till 31/01/2007. After the issuance of Ext.A-10,,,,,,,,,,,,,,

G.O. in Malayalam, the claimant wrote Ext.A-12 letter dated 12/01/2007 to the respondent which reads-",,,,,,,,,,,,,,

â€œWe have received a copy of the Government Order dated 22nd December 2006 on 8th January 2007. The Order is in Malayalam language and we have been,,,,,,,,,,,,,,

unable to understand the same. We wish to submit in this regard that pursuant to Sub-Clause 5.1 of the Conditions of Contract, language for communication is",,,,,,,,,,,,,,

English. Nevertheless, we had earlier received a fax copy of the same, and we had been told by your representatives then that extension of time has been granted",,,,,,,,,,,,,

in the Order, against our offer of withdrawal of claim for compensation due to delays during the period from 1 st November 2005 till 31 st January 2007, made",,,,,,,,,,,,,

vide our letter no. OSE/C/KSTP-111/881 dated 7 th December 2006. We note our letter references in the Order, which confirm this understanding. We trust this is",,,,,,,,,,,,,

in order.â€,,,,,,,,,,,,,

21. This letter which is not disputed by the respondent refers to the understanding of Ext.A-10 by the claimant. The respondent does not have a case,,,,,,,,,,,,,

that they had replied to the same and informed the claimant that their understanding of the document is incorrect. Here it has to be noted that what,,,,,,,,,,,,,

has been agreed to be withdrawn by the claimant after discussions is evident from Ext.A-07 letter, which letter is also not disputed by the respondent.",,,,,,,,,,,,,

Ext.A-10 apparently does not reflect the understanding arrived at between the parties. Unilateral statements like, the claimant has given up all claims",,,,,,,,,,,,,

and that delay was on the part of the claimant are seen incorporated. No materials have been produced by the respondent to substantiate their case,,,,,,,,,,,,,

that this was the agreement or understanding arrived at before Ext.A-10 was issued. On the other hand, the materials on record substantiate the stand",,,,,,,,,,,,,

of the claimant. Clause 3 is certainly barring the claimant from raising any and every claim arising from the contract, which was never agreed to by",,,,,,,,,,,,,

the claimant. Hence the Clause is certainly violative of Section 28(a) of the Contract Act.,,,,,,,,,,,,,

22. Another argument advanced is that the AT by adjudicating on the validity of the Supplementary Agreement, has travelled beyond the terms of the",,,,,,,,,,,,,

reference and hence the Award is violative of Section 34(2)(a)(iv) of the Act. According to the Government Pleader, Clause 53.1 of the GCC which",,,,,,,,,,,,,

reads - â€œNotwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any",,,,,,,,,,,,,

Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days",,,,,,,,,,,,,

after the event giving rise to the claim has first arisen.â€, mandates the contractor to give 28 daysâ€™ notice of his intention to raise a claim.",,,,,,,,,,,,,

Therefore, if the claimant had any quarrel regarding the validity of the Supplementary Agreement, he ought to have notified his intention to raise a",,,,,,,,,,,,,

claim by giving notice as contemplated under Clause 53.1, which admittedly has not been done here. The mandate of Clause 67 of the GCC is that if a",,,,,,,,,,,,,

dispute of any kind whatsoever arise between the Employer and the contractor, the matter in dispute shall in the first place be referred in writing to the",,,,,,,,,,,,,

Engineer. If either the Employer or the contractor is not satisfied with the decision of the Engineer or if the Engineer fails to give notice of his decision,",,,,,,,,,,,,,

either of the parties may on the 28th day give notice to the other party with a copy of information to the Engineer of his intention to commence,,,,,,,,,,,,,

arbitration and no arbitration in respect thereof can be commenced unless such notice is given. Further, as per Clause 67.3 of the Conditions of",,,,,,,,,,,,,

Particular Application (CoPA) any dispute in respect of which the recommendation of the Board has not become final and binding, shall be finally",,,,,,,,,,,,,

settled by arbitration pursuant to Sub-clause 67.1. Referring to the aforesaid Clauses, the argument advanced is that no dispute had been formulated",,,,,,,,,,,,,

as per Clause 67 and that no reference was made to decide that issue and hence the AT had no jurisdiction to decide the dispute raised by the,,,,,,,,,,,,,

claimant regarding the Supplementary Agreement. Reference was made to the decision in Rajasthan State Mines & Minerals Ltd. vs. Eastern,,,,,,,,,,,,,

Engineering Enterprises â€" (1999) 9 SCC 283 in support of this argument. It was also submitted that the court below without applying its mind has,,,,,,,,,,,,,

blindly accepted the findings of the AT and hence the finding of the court below is also pointed out to be perverse.,,,,,,,,,,,,,

23. The AT held that in the light of the preliminary objection raised by the respondent/Employer, it was not possible to consider the various claims of",,,,,,,,,,,,,

the claimant without adjudicating on the objection raised by the respondent based on the Supplementary Agreement. According to us, the AT was",,,,,,,,,,,,,

justified in finding so for the following reasons. Other than Exts.A-01 to A-18, no documents or materials have been produced from the side of the",,,,,,,,,,,,,

respondent to show that the understanding between the parties was something other than what is revealed from the communications. It was accepting,,,,,,,,,,,,,

the said terms, Ext.A-10 is seen issued. As referred to earlier, the claimant on receipt of Ext.A-10, sent Ext.A-12 explaining their understanding of",,,,,,,,,,,,,

Ext.A-10, to which no reply is seen given by the respondent disputing the same. To a query by us whether Ext.A-12 was replied to by the respondent,",,,,,,,,,,,,,

pat came the answer that the same was unnecessary as Ext.A-10 was issued on the basis of a mutual understanding arrived at between the parties,,,,,,,,,,,,,

and so there is no question of any â€˜understanding of the documentâ€™ by the claimant. This argument would certainly have been right, had Ext.A-",,,,,,,,,,,,,

10 reflected the actual agreement or understanding arrived at between the parties. The communications produced by the claimant, referred to earlier,",,,,,,,,,,,,,

and in the absence of any other materials produced by the respondent, will show that the claimant had never given up all of their claims as is tried to",,,,,,,,,,,,,

be picturized by the Government Pleader. Therefore, in the absence of any challenge to the stand taken by the claimant in Ext.A-12, when claims 9",,,,,,,,,,,,,

and 10 or for that matter the other connected claims were raised, there was never an occasion for the claimant to raise any complaint against the",,,,,,,,,,,,,

Supplementary Agreement because the same did not arise at that point. The disputes went before the DRB. The respondent was not happy with the,,,,,,,,,,,,,

recommendations made by the DRB. Hence the respondent notified their intention to commence arbitration, which led to the disputes being referred",,,,,,,,,,,,,

for arbitration.,,,,,,,,,,,,,

23.1. Before the AT, the claimant filed their claim statement raising disputes 9 and 10. The respondent in their defense statement inter alia contended",,,,,,,,,,,,,

that the claims are not maintainable in the light of Clause 3 of the Supplementary Agreement. In reply, the claimant filed rejoinder in which they allege",,,,,,,,,,,,,

in detail the vitiating circumstances under which the Supplementary Agreement was got executed and with specific reference to Ext.A-07 pointed out,,,,,,,,,,,,,

the exact claim that had been given up by them which led to the issuance of Ext.A-10 by which extension of time was granted. As the respondent,,,,,,,,,,,,,

raised objection regarding the maintainability of the claims itself, and also canvassed for considering the same as a preliminary point, the AT",,,,,,,,,,,,,

considered the same. While adjudicating on the maintainability of the claims, the allegations and counter allegations of both sides were required to be",,,,,,,,,,,,,

considered. Had the contention of the respondent regarding maintainability been accepted, then the claims put forward by the claimant would have",,,,,,,,,,,,,

failed. Therefore, adjudication of the preliminary objection raised by the respondent called for an interpretation of Clause 3 of the Supplementary",,,,,,,,,,,,,

Agreement, and so for understanding the intention of the parties in arriving at the same, the circumstances which led to the same and what exactly",,,,,,,,,,,,,

was agreed to be given up by the claimant, were required to be considered by the AT, which it rightly and correctly did.",,,,,,,,,,,,,

24. Further, this ground is not seen taken by the respondent in the application under Section 34 seen filed on 14/08/2009. In fact, the contention in the",,,,,,,,,,,,,

Application is that the terms of the Supplementary Agreement have not been properly understood or appreciated by the AT. According to the,,,,,,,,,,,,,

claimant, the contention of lack of jurisdiction was raised only on 04/03/2016 as an afterthought. After having raised such a contention before the AT,",,,,,,,,,,,,,

persuaded the AT to adjudicate on the same, obtained an adverse finding and then canvassing for a position that the AT lacked authority for deciding",,,,,,,,,,,,,

the same, is nothing but unfairness to the core. In these circumstances, we find that the AT has been perfectly right in rejecting the preliminary",,,,,,,,,,,,,

objection raised by the respondent/Employer. We find no perversity in the findings of the Tribunal or the court below on this aspect.,,,,,,,,,,,,,

25. Before we go into the merits of the claims under disputes No.9 and 10, we refer to the dictum in UHL Power Company Ltd. vs. State of",,,,,,,,,,,,,

Himachal Pradesh - 2022 SCC Online SC 19 relied on by the claimant wherein it has been held that the jurisdiction conferred on Courts under S.34 of,,,,,,,,,,,,,

the Act is fairly narrow and that when it comes to the scope of an appeal under S.37 of the Act, the jurisdiction of an Appellate Court in examining an",,,,,,,,,,,,,

order, setting aside or refusing to set aside an Award, is all the more circumscribed. Referring to MMTC Limited v. Vedanta Limited, (2019) 4 SCC",,,,,,,,,,,,,

163, the Apex court held that the reasons for vesting such a limited jurisdiction on the Court in exercise of its powers under S.34 is because the Court",,,,,,,,,,,,,

does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under S.34(2)(b)(ii), i.e., if the award is",,,,,,,,,,,,,

against the public policy of India. The legal position clarified through decisions of the Apex Court prior to the amendments to the 1996 Act in 2015, a",,,,,,,,,,,,,

violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with",,,,,,,,,,,,,

justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the ""fundamental policy of Indian law"" would",,,,,,,,,,,,,

cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury",,,,,,,,,,,,,

reasonableness. Furthermore, ""patent illegality"" itself has been held to mean contravention of the substantive law of India, contravention of the Act,",,,,,,,,,,,,,

and contravention of the terms of the contract.,,,,,,,,,,,,,

25.1. The Honâ€™ble Supreme Court referred to the dictum in K.Sugumar v. Hindustan Petroleum Corporation Ltd., (2020) 12 SCC 539, where a",,,,,,,,,,,,,

similar view, as stated above, has been taken. It has been held that the contours of the power of the Court under S.34 of the Act are too well",,,,,,,,,,,,,

established to require any reiteration. Even a bare reading of S.34 of the Act indicates the highly constricted power of the Civil Court to interfere with,,,,,,,,,,,,,

an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to",,,,,,,,,,,,,

reconcile themselves to the wisdom of the decision of the arbitrator and the role of the Court should be restricted to the bare minimum. Interference,,,,,,,,,,,,,

will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal,,,,,,,,,,,,,

perversity by the arbitrator.,,,,,,,,,,,,,

25.2. It has also been held time and again by the Apex court that if there are two plausible interpretations of the terms and conditions of the contract,",,,,,,,,,,,,,

then no fault can be found, if the Arbitrator proceeds to accept one interpretation as against the other. In Dyna Technologies (P) Ltd. v. Crompton",,,,,,,,,,,,,

Greaves Ltd., (2019) 20 SCC 1, the limitations on the Court while exercising powers under S.34 of the Act has been highlighted. There is no dispute",,,,,,,,,,,,,

that S.34 of the Act limits a challenge to an award only on the grounds provided therein. Courts need to be cognizant of the fact that arbitral awards,,,,,,,,,,,,,

should not be interfered with in a casual and cavalier manner, unless it comes to a conclusion that the perversity of the award goes to the root of the",,,,,,,,,,,,,

matter without there being a possibility of alternative interpretation which may sustain the arbitral award. S.34 is different in its approach and cannot,,,,,,,,,,,,,

be equated with a normal appellate jurisdiction. The mandate under S.34 is to respect the finality of the arbitral award and the party autonomy to get,,,,,,,,,,,,,

their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course,,,,,,,,,,,,,

on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.",,,,,,,,,,,,,

25.3. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if a term of the contract has been construed in a reasonable",,,,,,,,,,,,,

manner, then the award ought not to be set aside. (Parsa Kente Collieries Limited v. Rajasthan Rajya Vidyut Utpadan Nigam Limited, (2019) 7 SCC",,,,,,,,,,,,,

236; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran,",,,,,,,,,,,,,

(2012) 5 SCC 306). It has been further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless,,,,,,,,,,,,,

the Arbitrator construes the contract in such a way that it could be said to be something that no fair - minded or reasonable person could do. It has,,,,,,,,,,,,,

been further observed that when a Court is applying the ""public policy"" test to an arbitration award, it does not act as a Court of appeal and",,,,,,,,,,,,,

consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the,,,,,,,,,,,,,

ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence",,,,,,,,,,,,,

or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on that score.,,,,,,,,,,,,,

25.4. Further, courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts",,,,,,,,,,,,,

need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such,,,,,,,,,,,,,

award portrays perversity unpardonable under S.34 of the Arbitration Act (Dyna Technologies (P) v. Crompton Greaves Ltd., (2019) 20 SCC 1).",,,,,,,,,,,,,

Keeping the aforesaid principles in mind we proceed to consider the disputes on merits.,,,,,,,,,,,,,

26. Dispute No.9 relates to payment for the work of providing safety barricading, signals etc. for the construction zone. According to the claimant,",,,,,,,,,,,,,

BoQ item No.112-02 for this item of work is at the unit rate of ₹1,460/- per linear meter(lm) for a scope of 10,000 lm. This work is to be executed as",,,,,,,,,,,,,

per Clause 112 of the Technical Specifications. Clause 112.5 in particular requires the contractor to provide, erect and maintain on the site and such",,,,,,,,,,,,,

positions on the approaches to the site as may be required by the Engineer all traffic signaling and traffic barricading as per drawings and as approved,,,,,,,,,,,,,

by the Engineer before erection. During the course of erection of the work, the Engineer set out the requirements on safety barricading, signals etc.",,,,,,,,,,,,,

pertaining to this BoQ item vide Ext. C1/03. The Engineer had also instructed the minimum requirements to be complied with, to realise the payments.",,,,,,,,,,,,,

Though the safety barricading and signaling work was executed in a construction zone spanning 2330 lm, the certification was made only for a length",,,,,,,,,,,,,

of 649 lm by the Engineer in Interim Payment Certificate (IPC) No.6. On a pro rata basis, certification was made for a total length of 2700 lm by the",,,,,,,,,,,,,

Engineer in IPC No.12. The reasoning adopted by the engineer is that as the BoQ provision for barricading is only about 20.36% (10,000 lm) of the",,,,,,,,,,,,,

project road length (49,230 lm), certification was being made at the same proportion of project road length where upgradation work had been taken up.",,,,,,,,,,,,,

This was reconfirmed by the Engineer vide Ext.C1/06 letter by stating that though the safety barricading and signaling etc. are to be provided and,,,,,,,,,,,,,

maintained throughout the project length of 49,230 lm, certification for payment shall be done under the BoQ item only for a scope of 10,000 lm. This",,,,,,,,,,,,,

decision of the Engineer, according to the claimant, is in breach of the contract provisions.",,,,,,,,,,,,,

26.1. The instructions of the Engineer directing that safety barricading and signals etc. to be provided for the entire length of 49,230 lm is a Variation",,,,,,,,,,,,,

as per Sub-clause 51.1 (a) of the GCC, which the contractor has complied with. BoQ item 112-02 r/w Technical Specifications Clause 112.6 require",,,,,,,,,,,,,

every lm of the construction zone where the safety barricades, signals etc. are provided, to be measured for certification and payment. Hence every",,,,,,,,,,,,,

lm of safety barricading and signaling work executed in the construction zone is to be measured for certification and payment. Sub-clause 55.1 of the,,,,,,,,,,,,,

GCC states that the quantities set out in the BoQ are the estimated quantities for the works, and they are not to be taken as the actual and correct",,,,,,,,,,,,,

quantities of the works to be executed by the contractor in fulfillment of his obligations under the contract. This according to the claimant would show,,,,,,,,,,,,,

that the BoQ quantity is not the final word and that if the Engineer decides that the entire project length should be provided with safety barricading and,,,,,,,,,,,,,

signaling during the construction period, the BoQ scope would be subject to such resultant variation in quantity, increasing from 10,000 lm to 49,230 lm.",,,,,,,,,,,,,

Any increase in the scope of work under a BoQ item has to be subject to the provisions of Sub-clause 52.2 of the GCC, wherein it is stated that no re-",,,,,,,,,,,,,

fixation of the item rate of any item of work shall be done unless the item accounts for more than 2% of the contract price and the actual quantity of,,,,,,,,,,,,,

the work executed under the item exceeds or falls short of the quantity set out in the BoQ by more than 25%. The BoQ item 112-02 for an amount of,,,,,,,,,,,,,

₹1,46,00,000/- does not qualify for re-fixation of rate. Hence the entire length of safety barricading and signaling etc. provided in the construction zone",,,,,,,,,,,,,

is payable, without any limit of 10,000 lm.",,,,,,,,,,,,,

26.2. Till 31/05/2005, the claimant had provided and maintained safety barricading and signals etc. for a length of 27, 206 lm as can be seen from",,,,,,,,,,,,,

Ext.C1/10. Accordingly, the Engineer was requested to certify the payment of an amount of ₹3,57,78,760 towards safety barricading and signaling etc.",,,,,,,,,,,,,

together with price adjustment pursuant to Sub-clauses 70.1 to 70.7 with interest 18% / annum compounded monthly as per Sub-clause 60.8 and all,,,,,,,,,,,,,

payments to be made in Indian currency. However, the Engineer rejected the request of the claimant for certification and payment of the aforesaid",,,,,,,,,,,,,

amounts. The reasoning of the Engineer, that the safety barricading is similar to Formwork which can be used repeatedly and hence payment is to be",,,,,,,,,,,,,

limited to the BoQ scope, though barricading for the entire length of the project has been done, is not based on the contractual provisions - be it in",,,,,,,,,,,,,

specifications, drawings or BoQ. Such denial is arbitrary, unilateral and is a clear breach of Clauses 2.6, 56.1, 51 and 60 of the GCC. Hence the",,,,,,,,,,,,,

claimant issued a notice of dispute to the Employer in accordance with Sub-clause 67.1 of the GCC seeking resolution of the matter. The Employer,,,,,,,,,,,,,

refused to accede to this request. The claimant made a request for the recommendation of the DRB. The respondent / Employer before the DRB,,,,,,,,,,,,,

objected to the claim contending that eligible payments have been certified pro rata to the progress achieved and that the balance amount within the,,,,,,,,,,,,,

BoQ provision would be certified on providing the items instructed for procurement and pro rata to the works progress achieved on ground. The DRB,,,,,,,,,,,,,

recommended payment as claimed by the claimant. The respondent/Employer disagreed with the recommendation of the DRB and notified their,,,,,,,,,,,,,

intention to commence arbitration. The claimant sought payment of ₹14,46,23,220/- for this work carried out for the period till 31/01/2007 along with",,,,,,,,,,,,,

payment of price adjustment as per Clause 70 of the GCC and interest @ 18% per annum and all the payments to be made in the Indian currency as,,,,,,,,,,,,,

per Clause 52.,,,,,,,,,,,,,

27. The respondent/Employer disputed this claim and contended - As per the specifications, the contractor is obliged to implement the traffic",,,,,,,,,,,,,

management plan and road safety emergency plans which include safety barricading and signaling as a sub part as covered in the Environmental,,,,,,,,,,,,,

Management Plan (EMP) approved by the Engineer. The EMP submitted by the contractor and approved by the Engineer, is based on contract",,,,,,,,,,,,,

drawings and technical specifications. The payments for providing safety barricades and signages is covered in two parts of the BoQ, that is, pay item",,,,,,,,,,,,,

No.112.02, for procurement and providing all approved items, whereas pay item No.11000-15 is for implementation of the barricading and signages,",,,,,,,,,,,,,

that is, installing and maintenance during the construction period, which is payable for the whole length of the project road and the unit of measurement",,,,,,,,,,,,,

in kilometer. These two pay items are complimentary to each other. The items of barricading and signages are intended for repeated use and hence,,,,,,,,,,,,,

are similar to shuttering material or formwork which the contractor is not required to mobilize in full at a time for working on the whole project. Hence,,,,,,,,,,,,,

while framing the contract itself, provision of barricading against pay item No.112-02 has been made only for 10,000 m, particularly considering the",,,,,,,,,,,,,

PAY

ITEM

NO.","Special

Spec.",DESCRIPTIONS,UNIT,"ESTIMATED

QUANTITY","UNIT

RATE

(Rs.)","UNIT

RATE

(Rs.) IN

WORDS","AMOUNT

(Rs.)",,,,,,,

112.02,112,"Providing safety

barricading,

signals etc for

construction zone",Lm,10000,1460,"Rupees

one

thousand

four

hundred

sixty

only","14,600,00.00",,,,,,,

correctly in relation to the original points, lines and levels of reference given by the Engineer in writing. After referring to the trade usages and the",,,,,,,,,,,,,

specification of MORTH, the AT held that BOQ item No.11000-15, dealing with implementation of Traffic and Safety Management Plan, would not",,,,,,,,,,,,,

fall in the category of ""works"". On the other hand it would come under the ambit of 'Contractors' Equipments' only as defined in Sub-clause 1.1(f)(v).",,,,,,,,,,,,,

So when item no.11000-15 is not an item of 'work' and when its setting out is not required as contemplated under Sub-clause 17.1 and 17.2, then the",,,,,,,,,,,,,

concept of RFIs is not applicable at all to this item. This was stated to be the reason as to why RFIs as per trade usages are never submitted by any,,,,,,,,,,,,,

contractor for works of this nature.,,,,,,,,,,,,,

28.2. Further, after going through the various RFIs submitted by the respondent, the AT noted that the remarks regarding safety barricading had been",,,,,,,,,,,,,

given under the heading - ""Remedial works to be completed"". All the said remarks given in the RFIs were for necessary compliance by the Contractor",,,,,,,,,,,,,

before executing the items of ""works"" for which the RFIs were submitted. It was also held that when these items of ""works"" have been allowed to be",,,,,,,,,,,,,

executed and even paid by the Engineer, then it has to be deemed that necessary compliance as sought for in the RFIs must have been done by the",,,,,,,,,,,,,

Contractor, if not, the Engineer would not have allowed the Contractor to execute those items of ""works"" and would not have paid the Contractor for",,,,,,,,,,,,,

those items of ""works"" for which the RFIs had been submitted.",,,,,,,,,,,,,

28.3. Regarding the contention of the respondent that certification of payment under item 11000-15 was required, the AT held that Clause 53.5 of the",,,,,,,,,,,,,

GCC is not applicable for making claims against BOQ items executed by the contractor. For making any claim for payment against BOQ items, the",,,,,,,,,,,,,

contractor had to submit Interim Payment Applications (IPAs) and a monthly statement as required under Clause 60.1. After measuring the works,,,,,,,,,,,,,

under Clause 56.1, the Engineer issued to the Employer IPCs under Sub-clause 60.2 certifying the amount due to the contractor. The",,,,,,,,,,,,,

claimant/contractor was found to have been claiming under BoQ item No.112.02 and item no.11000-15, which are co-related. After going through the",,,,,,,,,,,,,

remarks of the Engineer in various IPCs, the AT arrived at two inferences, that is, - (i) till January 2006, there was no issue about the requirement of",,,,,,,,,,,,,

RFI for certification of item no. 11000-15; and (ii) after January 2006, the Engineer started recording that certification against item 11000-15 was not",,,,,,,,,,,,,

being made in the light of the recommendations of DRB, which, in the opinion of the Engineer amounted to double payment. But the AT noted that",,,,,,,,,,,,,

even after January 2006, the Engineer had nowhere recorded that, item 11000-15 had not been executed by the contractor. The only remark that was",,,,,,,,,,,,,

seen made by the Engineer was that the claim had been made without supporting documents, like RFI. The AT found that if the contractor had not",,,,,,,,,,,,,

actually satisfactorily executed item no. 11000-15 of work then the Engineer had the full authority to issue instructions to the contractor under Sub-,,,,,,,,,,,,,

clause 39.1 of the contract. If even after the issuance of such directions by the Engineer, had the contractor not removed the short-comings in the",,,,,,,,,,,,,

Traffic Management and Safety Plan within the time specified by the Engineer, then the Engineer was entitled to employ as well as pay persons for",,,,,,,,,,,,,

removing the short-comings under Sub-clause 39.2 of the Contract and thereafter recover such costs from the contractor. However, no materials",,,,,,,,,,,,,

were produced to show that the Engineer had resorted to any such step. The photographs produced by the respondent were found to be not,,,,,,,,,,,,,

contemporaneous records and so the AT declined to rely on them. Hence the AT concluded that the claimant/contractor is entitled to payment of item,,,,,,,,,,,,,

No.11000-15 for the quantity of 49.987 Kms. as per monthly statement submitted by the contractor and consequently, the contractor was also held",,,,,,,,,,,,,

entitled to payment of 10,000 linear meters under item 112.02.",,,,,,,,,,,,,

28.4. This finding of the AT is challenged and the argument advanced is that all the relevant Clauses in the GCC and CoPA have either been,,,,,,,,,,,,,

completely ignored or interpreted in a manner helpful to the claimant. It was pointed out that it is in the complete absence of contemporaneous,,,,,,,,,,,,,

records, which is a must as per the GCC and CoPA, the claim has been wrongly allowed by the AT. The said finding in the complete absence of",,,,,,,,,,,,,

evidence is perverse, which ought to have been set aside by the court below. However the court below failed in exercising its duties properly, argues",,,,,,,,,,,,,

the Government Pleader.,,,,,,,,,,,,,

28.5. All the Clauses referred to by the respondent have been considered in detail by the AT and the finding arrived at. The findings are based on,,,,,,,,,,,,,

facts and materials produced by both sides and on the basis of interpretation of the various Clauses and terms in the GCC and CoPA. As held by the,,,,,,,,,,,,,

Hon'ble Supreme Court in the decisions referred to earlier, the power of the Court under Section 34 is fairly narrow and the jurisdiction of this Court",,,,,,,,,,,,,

under Section 37 is all the more circumscribed. Neither the court under Section 34 nor this Court under Section 37 can re-appreciate the evidence,,,,,,,,,,,,,

adduced before the AT. If the view taken by the AT is a plausible one, then it is not possible for the court to substitute the same with its view.",,,,,,,,,,,,,

Interference is not possible unless it is shown that the findings are perverse and the findings are such that no reasonable or prudent man would arrive,,,,,,,,,,,,,

at. In the case on hand we do not find any such perversity. The AT manned by retired Engineers, well qualified in this field of work, appear better",,,,,,,,,,,,,

qualified in deciding the disputes involved, than courts. We do not find any infirmity in the findings of the AT and therefore the court below was also",,,,,,,,,,,,,

justified in not interfering with the same.,,,,,,,,,,,,,

29. Now coming to dispute no.10, which is relating to payment for extension of performance security and insurance. According to the claimant,",,,,,,,,,,,,,

performance security and insurance policies had been taken by the claimant for the original stipulated contract period of 24 months as stated in,,,,,,,,,,,,,

Appendix to Bid. Thereafter extension of time as approved by the Engineer was granted. This necessitated extension of performance security and,,,,,,,,,,,,,

insurance policies also by such period, as a Variation to the contract, pursuant to Sub-clause 51.1 of the GCC. The extension of performance security",,,,,,,,,,,,,

and insurance policies formed additional work to be performed under the contract, as required by the Engineer. The Performance Security, Insurance",,,,,,,,,,,,,

of the Works, Insurance of Construction Plant / Machinery and Third Party Insurance were extended for a period of 25.5 months. As such extension",,,,,,,,,,,,,

amounted to an additional work with respect to these pay items, and hence they qualified as a Variation pursuant to Clause 51 of the Conditions of",,,,,,,,,,,,,

Contract. The Variation of extension of Performance Security, Insurance of the Works, Insurance of Construction Plant / Machinery and Third Party",,,,,,,,,,,,,

Insurance are required to be evaluated on the basis of the relevant BoQ rates, in accordance with the provisions of Clause 52 of the GCC. The total",,,,,,,,,,,,,

amount per month of extension amounts to `6,93,125/mth. Thus the Variation item rate should therefore be determined for the respective item on pro-",,,,,,,,,,,,,

rata basis, in accordance with the provisions of Clause 52 of the Conditions of Contract. The Engineer and Employer by offering to pay the actual cost",,,,,,,,,,,,,

of extension of Performance Security, Insurance of the Works, Insurance of Construction Plant / Machinery and Third Party Insurance have deviated",,,,,,,,,,,,,

from the provisions of the Contract. The DRB found merit in the claim and hence recommended payment accordingly as a Variation based on the,,,,,,,,,,,,,

BoQ rates. Thus the amount due under the Variation items works out to `1,76,74,688/-, which the claimant is entitled with interest.",,,,,,,,,,,,,

30. The respondent denied the claim made by the claimant and contended thus - The Contract provides for the payment under BOQ items in lump,,,,,,,,,,,,,

sum for item no.100-01,100-02,100-03,100-04. As per specification 114, in absence of any directions to the contrary, the rates are to be considered as",,,,,,,,,,,,,

full inclusive rate for the finished works covering all labor, materials, wastage, temporary work, plant equipment, overhead charges, profit as well as",,,,,,,,,,,,,

the general liabilities, obligations, insurance and risks arising out of the GCC. These Contract items are in lump sum. These are not for 24 months but",,,,,,,,,,,,,

till the completion of the project. Payment was made in lump sum and not in installments. When extension of time was granted by the Engineer, the",,,,,,,,,,,,,

validity of the Performance Guarantee and Insurance were also required to be extended. The contractor is liable as per Clause 10.2 of CoPA and,,,,,,,,,,,,,

21.1 of GCC to extend the validity of Performance Guarantee and Insurance. Clauses 51 and 52 of the Contract Agreement clearly stipulates that,,,,,,,,,,,,,

Engineer can only recommend any variation according to the site conditions. However, there is no variation involved and hence the contractor is not",,,,,,,,,,,,,

entitled to get any amount. This cannot be considered as a pro-rata amount per month, as alleged by the claimant. This item is for the Completion of",,,,,,,,,,,,,

the project as a lump sum item and there is no unit for measurements. There is no provision for payment for these items in the Contract, but the",,,,,,,,,,,,,

Employer is willing to pay the actual cost based on the extension of time. The recommendation of the DRB is wrong and made without understanding,,,,,,,,,,,,,

the terms of the contract. According to the respondent, there is no amount due for payment to the claimant.",,,,,,,,,,,,,

31. The AT held that, the basic concept of actual cost / additional cost payable to the contractor, as per the Contract Act as well under Clauses 12.2",,,,,,,,,,,,,

and 42.2 of the Contract, is to compensate the contractor for the loss / damages caused to them on account of delays etc. attributable to the",,,,,,,,,,,,,

Employer. However, if any varied work is got executed, then the valuation of that varied work is to be done not on the basis of actual cost, but on the",,,,,,,,,,,,,

basis of rates and prices of BOQ items contained in the Contract. Thus the AT concluded that the claimant/contractor is entitled to the additional cost,,,,,,,,,,,,,

only as incurred by them in arranging the extension of validity of the BG for performance securities and insurance policies. This conclusion is in,,,,,,,,,,,,,

accordance with the stand taken by the respondent/ Employer in their defense statement. The authenticity of the details of additional cost furnished by,,,,,,,,,,,,,,

the contractor, was not contested by the respondent/Employer and hence the same was accepted by the AT.",,,,,,,,,,,,,,

31.1. As far as the claim for price adjustment pursuant to Clause 70 of the contract was concerned, the AT was of the opinion that the",,,,,,,,,,,,,,

claimant/contractor was not entitled to such price adjustment as the basic concept of price adjustment is to compensate the contractor for the,,,,,,,,,,,,,,

fluctuations in the rates of materials, labour, machinery etc. caused by the market forces during the execution of work. However, for the extension of",,,,,,,,,,,,,,

BGs, all the inputs in its valuation are determined at the time of extension of the BGs and hence there is no effect of the market forces. Holding so,",,,,,,,,,,,,,,

the contractor has been held entitled to the amounts stated in the Award. The AT held that the claimant is not entitled for extension of Insurance for,,,,,,,,,,,,,,

third party as the same is included in the Insurance for works and also that they are not entitled to price adjustment, pursuant to Clause 70 of the GCC",,,,,,,,,,,,,,

on the amounts awarded.,,,,,,,,,,,,,,

32. The court below accepted the findings of the AT. In the appeal memorandum no ground(s) are seen raised challenging the findings under dispute,,,,,,,,,,,,,,

no.10. During arguments, the main challenge raised relating to dispute no.10 is also the same preliminary objection raised relating to dispute no.9,",,,,,,,,,,,,,,

which we have already answered. As the payment is to be made on the basis of actuals, which is in accordance with the stand taken by the",,,,,,,,,,,,,,

respondent/employer before the AT, we find no infirmity in the findings of the AT on this aspect also. That being position, we find that the court below",,,,,,,,,,,,,,

was justified in not interfering with the Award of the AT.,,,,,,,,,,,,,,

Arb.Appeal No.26/2017,,,,,,,,,,,,,,

33. The contract and the parties involved are the same as in the earlier appeal. This appeal deals with disputes no.17 to 20. As per Sub-clause 67.3,",,,,,,,,,,,,,,

the claimant and the respondent nominated one Arbitrator each and both the said Arbitrators nominated the third Arbitrator as the Presiding,,,,,,,,,,,,,,

Arbitrator. Before the AT disputes 17 to 20 were considered and adjudicated. An unanimous award was passed with respect to disputes 17, 19 and",,,,,,,,,,,,,,

20. As far as dispute no.18 is concerned, the Award is of two Arbitrators and there is a dissenting note of one Arbitrator. Both Award and the",,,,,,,,,,,,,

dissenting note are dated 20/06/2009. Aggrieved by the Award, the respondent/Employer filed O.P.(Arb)No.186/2009 under Section 34 of the District",,,,,,,,,,,,,

Court, Ernakulam. The Application has been dismissed and aggrieved by the same, the respondent/Employer has come up in appeal.",,,,,,,,,,,,,

34. Dispute no.17 relates to Payment of Price Adjustment for Bitumen based on official price of the Indian Oil Corporation (IOC). According to the,,,,,,,,,,,,,

claimant, Clause 70 of the GCC, provides for price adjustment to cover changes in costs. Sub-clause 70.3 sets out the price adjustment formula. Sub-",,,,,,,,,,,,,

clause 70.3(v) in particular covers price adjustment for bitumen component of the value of works executed. Under the said formula. price adjustment,,,,,,,,,,,,,

is determined on the basis of change in the average official retail price of bitumen at IOC depot at Cochin. The IOC which provided the official price,,,,,,,,,,,,,

details of bitumen applicable at Cochin from time to time, were incorporated by the Engineer till IPC No.34 in the computation of price adjustment for",,,,,,,,,,,,,

the bitumen component of the value of works executed. The claimant had procured bitumen from different sources and at different costs, which is not",,,,,,,,,,,,,

prohibited under the contract. During the course of execution of the works, bitumen had been procured not only from IOC Cochin but also from",,,,,,,,,,,,,

BPCL Cochin and IOC Mangalore. Sample invoice copies of bitumen procured from such entities were also produced. According to the claimant, this",,,,,,,,,,,,,

has no bearing on the price adjustment formula set out under Clause 70 of the GCC. The actual purchase price may be higher or lower than the,,,,,,,,,,,,,

average official price of IOC at Cochin. However the claimant was told that the price adjustment for bitumen would be based on their actual purchase,,,,,,,,,,,,,

price of bitumen, after taking into consideration the special discount they were given as a preferred customer of IOC, with respect to the official price",,,,,,,,,,,,,

of bitumen. This according to the claimant is in breach of the relevant provisions of the contract for the following reasons â€" the price adjustment,,,,,,,,,,,,,

formula set out under Clause 70 provide for price adjustment for bitumen based on the average official retail price of bitumen at IOC depot at Cochin.,,,,,,,,,,,,,

The IOC has furnished the official price details of bitumen at their Cochin centre. The IOC has further clarified vide their letter dated 19/03/2007 that,,,,,,,,,,,,,

the discount, if any, given to a customer depends on the volume, business association of the customer with IOC and also based on policies of Oil",,,,,,,,,,,,,

Companies from time to time. The official price of bitumen due for consideration in the price adjustment formula under the Contract may be different,,,,,,,,,,,,,

from the actual price at which the claimant procured bitumen. The price adjustment has been certified for bitumen component based on IOC price,,,,,,,,,,,,,

details till IPC no.34 and the Employer has paid accordingly also. Hence any change to consider the actual procurement price of bitumen would be in,,,,,,,,,,,,,

breach of Sub-clause 70.3 (v) of the GCC.,,,,,,,,,,,,,

34.1. The Engineer proceeded to recover ₹68,72,469/- in IPC no.35 for the period ending 31/01/2007 stating that the price adjustment amount has",,,,,,,,,,,,,

been reduced by ₹68,72,469 /- to take into account the actual retail price of bitumen paid by the contractor, i.e., he has enjoyed ₹600/-discount per",,,,,,,,,,,,,

metric ton for all 60/70 grade, on which the Engineer did not agree that the claimant should be paid escalation. The recovery thus made is in breach of",,,,,,,,,,,,,

the provisions of Sub-clause 70.3 (v) of the GCC. The claimant therefore issued notice of dispute based on Sub-clause 67.1 of the GCC, requesting",,,,,,,,,,,,,

the respondent's intervention and resolution of the disputes. However, the Employer has not made the payments as requested by the claimant. The",,,,,,,,,,,,,

claimant hence made a request for recommendation of the DRB. The DRB as per recommendation dated 10/08/2007 directed the amount of,,,,,,,,,,,,,

₹68,72,469/- wrongly recovered from IPC no.35 to be refunded to the contractor. The Employer disagreed with the recommendations of the DRB and",,,,,,,,,,,,,

hence issued notice of intention to commence arbitration.,,,,,,,,,,,,,

35. The respondent/Employer relying on Clause 53.2 of CoPA, Clause 3 of the Preamble, serial no.17 of the Addendum to 'Queries and Clarifications',",,,,,,,,,,,,,

contended that the official price is the price payable by the contractor supported by official invoices to which the claimant is entitled to. The official,,,,,,,,,,,,,

retail price is nothing but the actual price paid by the contractor which is supported by official invoices and is the price on which VAT has been,,,,,,,,,,,,,

charged and it does not include any taxes and levies. As per Clause 60.9 of CoPA, the Engineer can make any correction or modification to any",,,,,,,,,,,,,

previous IPC that has been issued by him. The Engineer has also the authority in case the work has not been carried out to his satisfaction to omit or,,,,,,,,,,,,,

reduce the value of such works in any IPC. Hence the over payments made to the claimant as per IPC no.35, was rightly recovered. IOC had given",,,,,,,,,,,,,

an amount of `600/- as special discount to the claimant from the ex-depot price which is evident from the invoices of bitumen submitted by the,,,,,,,,,,,,,

claimant for payment. VAT has been computed only at this discounted price. This discount is neither an expenditure nor applicable to VAT. Hence,,,,,,,,,,,,,

the invoice price plus discount alone can be taken as the official price for calculating price escalation since IOC does not have one standard official,,,,,,,,,,,,,

price for all customers, but it varies based on the purchases made. The contractor is not entitled to make unlawful gains. The discount applied by IOC",,,,,,,,,,,,,

on the ex-depot price of bitumen cannot be taken as the average official retail price. IOC has also clarified that there is no official retail price of,,,,,,,,,,,,,

bitumen and it will vary depending upon the customer, so it is not possible for the Employer to accept IOC assessed price submitted by the claimant",,,,,,,,,,,,,

for the purpose of calculating escalation to compensate the contractor for the rise in price of bitumen. The allegation that it is the official price that,,,,,,,,,,,,,

should be considered for the computation for price adjustment, is incorrect. The discount granted is also a material input. The very purpose of the",,,,,,,,,,,,,

various Clauses in the agreement is to see that neither the contractor nor the Employer makes any wrongful gain.,,,,,,,,,,,,,

35.1. Further, in the bid document it has been made clear that the average official price at IOC, Cochin, would be the actual price and it will be taken",,,,,,,,,,,,,

for price adjustment. This has also been clarified in the Addendum. The contractor while quoting the rates for various items, was aware of this fact.",,,,,,,,,,,,,

The claimant is free to purchase bitumen from any sources. But they are entitled to only the actual price paid which alone can be considered in the,,,,,,,,,,,,,

price adjustment formula set out in Clause 70 of the CoPA. So there is no breach of any provisions of the contract as alleged. Recommendation made,,,,,,,,,,,,,

by the DRB is not in accordance with the terms of the contract and hence the claim is liable to be dismissed, contended the respondent.",,,,,,,,,,,,,

36. The AT noticed that as per Clause 70.3(c)(v) of CoPA, a formula has been set out for the computation of price adjustment amount for bitumen.",,,,,,,,,,,,,

The Formula reads -,,,,,,,,,,,,,

â€œVb=0.85 x Pb / 100 x R1 x (B1-B0)/B0,,,,,,,,,,,,,

Vb=Increase or decrease in cost of work during the month under consideration due to changes in the rate of bitumen.,,,,,,,,,,,,,,

B0=The average official retail price of bitumen at IOC depot at Cochin on the day 28 days price to the submission of Bids.,,,,,,,,,,,,,,

B1=The average official retail price of bitumen at IOC depot at Cochin on the day 28 days prior to the period to which a particular interim payment certificate is,,,,,,,,,,,,,,

related.,,,,,,,,,,,,,,

Pb=Percentage of the bitumen component of work,,,,,,,,,,,,,,

R1=Portion of total value of work done, during the month, as payable in Indian Rupees.â€",,,,,,,,,,,,,,

As is evident from the formula, the price adjustment for bitumen is based on official retail price of bitumen at IOC depot, Cochin. Accordingly, the",,,,,,,,,,,,,,

Engineer had been taking the value of B1 and B0 from the official price date of bitumen, ex-refinery at Cochin, as furnished by IOC from time to",,,,,,,,,,,,,,

time. Based on such price data, the price adjustment for bitumen had been accordingly computed by the Engineer and paid to the contractor till IPC",,,,,,,,,,,,,,

no.34. However, as directed by the respondent/Employer, the Engineer effected a recovery of `68,72,469/- in IPC no.35 stating that the contractor has",,,,,,,,,,,,,,

enjoyed the benefit of discount. This according to the AT is against the clearly worded stipulation in the formula contained in Clause 70.3(c)(v). As,,,,,,,,,,,,,,

per this formula, there is no scope to say that the actual price paid by contractor is to be considered in the price adjustment formula. The fact that the",,,,,,,,,,,,,,

claimant/contractor can purchase bitumen from different sources, is not disputed by the respondent also. That being the position, the AT held that if",,,,,,,,,,,,,,

the price adjustment is allowed to be based on the actual price, said to have been paid by the contractor, then the same would have been highly",,,,,,,,,,,,,,

vulnerable to misuse. It is to avoid the same, that as per trade usage, the price adjustment formula for materials like diesel, bitumen etc. are based on",,,,,,,,,,,,,,

the official retail price at the nearest IOC Depot, i.e. Cochin.",,,,,,,,,,,,,,

36.1. The respondent/Employer before the AT also took up a contention that there is no official retail price for bitumen as has been explained by IOC,,,,,,,,,,,,,,

in their letters produced by the claimant/contractor along with the Statement of Claims. In these letters, the price stated is the basic price of bitumen,",,,,,,,,,,,,,,

which according to the respondent cannot be assumed to be the official retail price and keeping in view the primary intention behind the price,,,,,,,,,,,,,

adjustment for compensating the contractor for the fluctuations in the actual cost incurred by the contractor, it is the actual price only, which he has",,,,,,,,,,,,,

paid in procuring the bitumen, to which he is eligible for price adjustment. The AT after going through all the letters of IOC, concluded that the IOC",,,,,,,,,,,,,

had been furnishing data about the basic price of bitumen through these letters in which they had clarified that the retail price is applicable for diesel,,,,,,,,,,,,,

and not for bitumen and that the official ex-depot price of bitumen at Cochin as intimated in the various letters is infact, the price applicable to the",,,,,,,,,,,,,

consumers at that particular period exclusive of Sales Tax. It was also clarified that the discount, if any, given to a customer, depends on the volume",,,,,,,,,,,,,

of their business, business association with IOC and also based on the policies of Oil Companies from time to time and so the discounted price offered",,,,,,,,,,,,,

to the claimant herein would not be a permanent feature. The AT also found that the bid documents, prepared by the respondent/Employer, the",,,,,,,,,,,,,

expression â€œofficial retail price of bitumenâ€ at the IOC depot at Cochin, had been incorporated in the price adjustment formula. Hence the stand",,,,,,,,,,,,,

taken by the respondent that there is no official retail price of bitumen at IOC depot at Cochin and that the contractor is eligible for price adjustment,,,,,,,,,,,,,

based on the actual price paid by the contractor, is against the terms of the contract.",,,,,,,,,,,,,

36.2. The AT also held that as per trade practice, the price adjustment is usually worked out on the basis of price indices published by the Ministry of",,,,,,,,,,,,,

Industrial Development and Ministry of Labour etc. If price adjustment is required to be worked out on the basis of price of materials like diesel,",,,,,,,,,,,,,

bitumen, etc., then such price adjustment is based on the official retail price of diesel, bitumen etc. at the nearest IOC depot. It further held that as per",,,,,,,,,,,,,

trade practice, the price adjustment is never based on the actual price of the materials paid by the contractor. Thus the AT concluded that the basic",,,,,,,,,,,,,

price of bitumen communicated by IOC through their various letters, is in fact the official ex-depot price of bitumen at Cochin as applicable to the",,,,,,,,,,,,,

customers at that particular period exclusive of Sales Tax. It was also found that the Employer while giving clarification at serial no. 17 of the,,,,,,,,,,,,,

Addendum, has used the word â€œaverage official priceâ€ and not ""average official retail priceâ€. Therefore in view of the clarification given by the",,,,,,,,,,,,,

respondent in the pre-bid meeting and the specific provision made in the price adjustment formula, the AT concluded that the recovery of `68,72,469/-",,,,,,,,,,,,,

made by the Engineer in IPC no.35 was not justified. This finding of the AT has been accepted by the court below.,,,,,,,,,,,,,

37. In the appeal memorandum we do not find any challenge made to the findings of the AT on this dispute. The main challenge is relating to the,,,,,,,,,,,,,

maintainability of the claim which we have already dealt with in the connected appeal. Though in the appeal memorandum no challenge is seen raised,,,,,,,,,,,,,

against dispute no.17, however in the arguments, the learned Senior Government Pleader canvassed for a point that the findings of the AT are against",,,,,,,,,,,,,

Clauses 70.1, 70.2, 70.3, 70.3 (c) and 70.5 of CoPA. The argument is apparently against the terms of their own document. The respondent does not",,,,,,,,,,,,,

dispute the fact that the price of bitumen is required to be computed on the basis of the formula given under Clause 70.3(c)(v). The component B0 in,,,,,,,,,,,,,

the formula is constant. But B1 keeps varying as it is the average official retail price of bitumen at IOC depot, Cochin, 28 days prior to the period to",,,,,,,,,,,,,

which a particular interim item certificate is related. If the argument advanced on behalf of the respondent is accepted and the claimant held to be,,,,,,,,,,,,,

entitled only as per the actuals, it would amount to changing one of the components in the formula, i.e., changing or varying B1 which obviously cannot",,,,,,,,,,,,,

be done. Therefore the AT was right in allowing the claim of the claimant as it is in accordance with the terms of the formula prescribed for,,,,,,,,,,,,,

computing the payment of price adjustment for bitumen based on the official price of IOC. The court below was also right in accepting the findings of,,,,,,,,,,,,,

the AT. We find no infirmity in the said finding calling for an interference by this Court.,,,,,,,,,,,,,

38. DisputeÂ Â No.18Â Â pertainsÂ Â toÂ Â theÂ Â recoveryÂ Â of `2,14,63,000/- effected by the respondent while issuing an Interim",,,,,,,,,,,,,

Payment Certificate to the claimant. The Kerala General Sales Tax Act, 1963 was applicable on the date 28 days prior to the submission of the bid",,,,,,,,,,,,,

and the sales tax payable at source for bitumen in terms of the said statute including surcharge was 34.5%. Later, in the course of execution of the",,,,,,,,,,,,,

work, the Kerala General Sales Tax Act, 1963 was replaced by the Kerala Value Added Tax Act, 2003, in terms of which the tax payable at source",,,,,,,,,,,,,

for bitumen was only 4%. The recovery aforesaid was effected on the premise that the reduction in the cost of bitumen used for the work amounting,,,,,,,,,,,,,

to `2,14,63,000/- on account of the change in the law governing the tax payable at source for bitumen is liable to be deducted from the contract price in",,,,,,,,,,,,,

terms of Sub-clause 70.8 of CoPA. The case of the claimant is that Sub-clause 70.8 does not apply to a situation of this nature and the recovery is,",,,,,,,,,,,,,

therefore, unsustainable.",,,,,,,,,,,,,

38.1. Clause 70 of CoPA is one dealing with price adjustments. Sub-clause 70.1 provides that the amounts payable to the contractor shall be adjusted,,,,,,,,,,,,,

in respect of the rise or fall in the cost of materials and other inputs to the works by applying to such amounts the formula prescribed. Sub-clause 70.3,,,,,,,,,,,,,

prescribes the various formulae to be applied for price adjustment of materials and other inputs to the works. Sub-clauses 70.4 to 70.7 deal with,,,,,,,,,,,,,

different other situations which cause addition or reduction in the cost of the work. Sub-clause 70.8 provides that, if after the date 28 days prior to the",,,,,,,,,,,,,

latest date for submission of the tenders for the contract, there occur change to any statute which causes addition or reduction in the cost of the work",,,,,,,,,,,,,

which is not covered by the preceding sub clauses, such addition or reduction shall also be added to or reduced from the contract price, if the same",,,,,,,,,,,,,

has not been taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with Sub-clauses 70.1 to 70.7. Sub-,,,,,,,,,,,,,

clause 70.1 and the relevant portion of Sub-clause 70.3 read thus:,,,,,,,,,,,,,

â€œ70.1 The amounts payable to the Contractor, in various currencies pursuant to Sub-Clause 60.1.shall be adjusted in respect of the rise or fall in the cost of",,,,,,,,,,,,,

labour. Contractor's Equipment, Plant, materials, and other inputs to the Works, by applying to such amounts the formulae prescribed in this clause.",,,,,,,,,,,,,

70.3 Contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following",,,,,,,,,,,,,

principles and procedures as per formula given below. ---------- . â€,,,,,,,,,,,,,

Sub-clause 70.8 reads thus:,,,,,,,,,,,,,

â€œIf, after the date 28 days prior to the latest date for submission of tenders for the Contract there occur in the country in which the Works are being or are to

be",,,,,,,,,,,,,

executed changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority,",,,,,,,,,,,,,

or the introduction of any such State, Statute, Ordinance, Decree, Law, regulation or by-law which causes additional or reduce preceding Sub-Clauses of this",,,,,,,,,,,,,

Clause, in the execution of the Contract, such additional or reduced cost to the Contractor, other than under the preceding sub-clauses of this clause, in the",,,,,,,,,,,,,

execution of the contract, such additional or reduced cost shall after due consultation with the Employer and the Contractor, be determined by Engineer and",,,,,,,,,,,,,

shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly, with a copy to the Employer. Notwithstanding",,,,,,,,,,,,,

the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have taken into account in the indexing of any",,,,,,,,,,,,,

inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-clause 70.1 to 70.7.â€,,,,,,,,,,,,,

38.2. The AT found that a subsequent legislation causing addition or reduction in the cost would fall under both Sub-clauses 70.3 and 70.8. It was also,,,,,,,,,,,,,

found by the AT that having regard to the expression â€œother than under the preceding Sub-clauses of this clauseâ€ used in Sub-clause 70.8 and the,,,,,,,,,,,,,

clarification in Sub-clause 70.8 that such additional or reduced cost shall not be separately paid or credited if the same has already been taken into,,,,,,,,,,,,,

account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-clauses 70.1 to 70.7, it cannot be said",,,,,,,,,,,,,

that Sub-clause 70.8 would be attracted whenever there is a subsequent legislation. It was also held by the AT that it requires to be checked for every,,,,,,,,,,,,,

subsequent legislation as to whether the same affects the cost of materials and if it so does, then that subsequent legislation would attract only Sub-",,,,,,,,,,,,,

clause 70.3. However, if a subsequent legislation does not affect cost of materials but would otherwise cause addition or reduction to cost of the work,",,,,,,,,,,,,,

then alone such subsequent legislation would attract Sub-clause 70.8. After having interpreted Sub-clauses 70.1 to 70.8 in the aforesaid fashion, the",,,,,,,,,,,,,

AT came to the conclusion that the change in the legislation in the case on hand resulting in cost reduction of bitumen, would fall only under Sub-",,,,,,,,,,,,,

clause 70.3 and not Sub-clause 70.8. While holding so, although the AT took note of the fact that price adjustment has not been done on the cost of",,,,,,,,,,,,,

bitumen in the case on hand, in the light of the clarification given by the respondent in the pre-bid meeting that the change in the tax rate applicable to",,,,,,,,,,,,,

bitumen will not be taken into account for price adjustment in terms of Sub-clause 70.3, the AT took the view that the same cannot be a reason to",,,,,,,,,,,,,

bring the case under Sub-clause 70.8. Accordingly, the AT passed an award permitting the claimant to recover from the respondent the amount",,,,,,,,,,,,,

recovered from the claimant with interest.,,,,,,,,,,,,,

38.3. As noted earlier, the award on this dispute was not unanimous. One of the arbitrators expressed a dissenting opinion. According to said",,,,,,,,,,,,,

arbitrator, insofar as Sub-clause 70.3 dealing with contract price adjustment of materials including bitumen does not take care of the reduction in the",,,,,,,,,,,,,

cost of bitumen on account of any change in the legislation dealing with tax payable for bitumen, the savings of the claimant on the tax payable on",,,,,,,,,,,,,

bitumen on account of the change of legislation should certainly enure to the benefit of the respondent in terms of Sub-clause 70.8. Sub-clause 1.1(g),,,,,,,,,,,,,

(i) of the Conditions of Contract defines â€œcostâ€ as all expenditure properly incurred or to be incurred, whether on or of the site including overhead",,,,,,,,,,,,,

and other charges properly allocable thereto. The learned arbitrator has relied on the said definition which gives a clear indication that when the tax,,,,,,,,,,,,,

payable for a particular material is decreased, the cost of material will also be decreased, to reinforce his opinion.",,,,,,,,,,,,,

38.4. The fact that the tax burden of the claimant on bitumen was reduced by 30.5% on account of the change in the tax regime and that they had a,,,,,,,,,,,,,

saving of `2,14,63,000/- on account of the said change is not disputed. The question is as to whether the said amount is liable to be deducted from the",,,,,,,,,,,,,

contract price. If the said amount is liable to be deducted from the contract price, then the recovery cannot be said to be bad.",,,,,,,,,,,,,

38.5. On a careful reading of the award, we are of the view that insofar as Sub-clause 70.3 specifically excludes the tax component while making",,,,,,,,,,,,,

price adjustment on the cost of bitumen, the respondent was certainly justified in invoking Sub-clause 70.8 for price adjustment of the cost of bitumen",,,,,,,,,,,,,

since the cost difference occurred on account of the change in the law applicable on the tax payable for bitumen at source, and not merely a revision",,,,,,,,,,,,,

of the rate of tax under the then existing regime. If that be so, the saving of the contractor in this regard is liable to be deducted from the contract",,,,,,,,,,,,,

price. If Sub-clause 70.3 is not interpreted equitably in this fashion, in a hypothetical situation where there is rise in the cost of bitumen on account of",,,,,,,,,,,,,

the change in the tax regime, the contractor would be constrained to bear the burden, irrespective of its quantum. In the circumstances, we are of the",,,,,,,,,,,,,

view that the interpretation given to Sub-clause 70.8 by the AT is perverse inasmuch as the view that Sub-clause 70.8 does not apply for price,,,,,,,,,,,,,

adjustment on the cost of bitumen, for the said situation is covered by Sub-clause 70.3 and the view that Sub-clause 70.3 does not apply for price",,,,,,,,,,,,,

adjustment on the cost of bitumen as it specifically excludes the tax component while making price adjustment, are mutually destructive. The award",,,,,,,,,,,,,

under this head, in the circumstances, is liable to be interfered with, upholding the dissenting opinion.",,,,,,,,,,,,,

39. Now coming to dispute no.19 which is relating to payment of variation item of Mix Seal Surface (MSS) on shoulders. According to the claimant,",,,,,,,,,,,,,

the contract provided for two coats of surface dressing on the shoulders payable under BoQ items no. 510-01 and 510-02, at the combined total rate",,,,,,,,,,,,,

of ` 82 / sq.m. Because of the inherent weak nature of the surface dressing, the claimant proposed MSS layer, a denser and more homogenous (pre-",,,,,,,,,,,,,

mixed) layer, as a variation in replacement of this surface dressing requirement. Request was made for approval of MSS as variation pursuant to",,,,,,,,,,,,,

Clauses 51 and 52 of the GCC, at an item rate of ₹107 / sq.m. It was made clear that the MSS mix would be laid manually in Muvattupuzha -",,,,,,,,,,,,,

Angamaly Section and mechanically in Muvattupuzha - Thodupuzha Section. The Engineer proposed ₹76 / sq.m. for the MSS work, stating further",,,,,,,,,,,,,

that use of mechanical paver can be approved subject to maintenance of proper control on Fire Resistence Level (FRL). The claimant informed the,,,,,,,,,,,,,

Engineer that the rate of ₹ 82 / sq.m. for the MSS work in shoulders was agreeable to them, such rate being equal to the composite total rate for",,,,,,,,,,,,,

execution of two coat surface dressing as contained in the contract. The Engineer in turn, accepted this proposal. The Engineer further noted that this",,,,,,,,,,,,,

is in accordance with the agreement that any change would be at no additional cost to the Employer. The Variation for MSS work, determined",,,,,,,,,,,,,

pursuant to Clauses 51 and 52 of the GCC, was within the powers of the Engineer in accordance with the provisions of Sub-clause 2.1 of the GCC.",,,,,,,,,,,,,

Accordingly, on the basis of such approved variation, the claimant proceeded with the work. Irrespective of the methodology adopted, i.e. laying",,,,,,,,,,,,,

manually or mechanically, the item rate due for operation as agreed between the Contractor and the Engineer within the framework of acceptance by",,,,,,,,,,,,,

the Employer at no additional cost is ₹82/sq.m.,,,,,,,,,,,,,

39.1. The Employer, however, approved ₹81/ sq.m. for MSS shoulder work done in Muvattupuzha - Angamaly Section and ₹62 / sq.m. for MSS",,,,,,,,,,,,,

shoulder work done in Muvattupuzha - Thodupuzha Section. The reason given is to differentiate the MSS shoulder work by mechanical means from,,,,,,,,,,,,,

manual means. Clause 512 of the Technical Specifications does not specify separate rates for manually laid MSS and for mechanically laid MSS. The,,,,,,,,,,,,,

claimant disagreed with the decision of the Employer. The additional payment due, for the MSS shoulder work executed till 31/01/2007 is ₹ 21,03,114/-",,,,,,,,,,,,,

based on the quantities measured and certified by the Engineer till IPC no.35. As the claimant disagreed with the reduced rates approved by the,,,,,,,,,,,,,

Employer, they issued notice of dispute based on Sub-clause 67.1 of the GCC and requested the Employer's resolution of the dispute.",,,,,,,,,,,,,

39.2. The Employer did not resolve the disputes. Hence the claimant proceeded to make the request for recommendation of DRB based on Sub-,,,,,,,,,,,,,

clause 67.1 of the GCC. The Employer opposed the claim. The DRB by its recommendations dated 10/08/2007 directed payment for MSS work done,,,,,,,,,,,,,

in both the Sections, namely Muvattupuzha-Angamaly and Muvattupuzha-Thodupuzha Sections, to be made at the uniform rate of ₹82/sq.m. The",,,,,,,,,,,,,

Employer disagreed with the recommendation and hence they issued notice of intention to commence arbitration. The claimant therefore claimed an,,,,,,,,,,,,,

amount of ₹21,03,114/- due for the Variation work of MSS in shoulders for the period till 31/01/2007 with interest @18% p.a. compounded monthly",,,,,,,,,,,,,

from the date of month-wise under payment of such amount till payment and also for payment of the entire amounts in Indian currency.,,,,,,,,,,,,,,

40. The respondent disputed the claim. According to them as per Clauses 51 and 52 of the GCC, Variation can be approved by the Engineer. As per",,,,,,,,,,,,,,

the request of the claimant/contractor the rate for the item was approved by the Engineer, pursuant to which payment was also made. The rates",,,,,,,,,,,,,,

approved are reasonable. The contractor notified the disagreement to the rates approved by the Engineer only after the completion of works. As per,,,,,,,,,,,,,,

the Agreement, any notification for the claim should have been made within 28 days after the event giving rise to the claim. The Engineer notified the",,,,,,,,,,,,,,

contractor that the recommended rate is ₹59/sq.m. in August 2005, i.e., about six months prior to the commencement of the work. No claim was",,,,,,,,,,,,,,

raised for six months. Hence the claim is nonexistent as per Clause 53.1 of the GCC. The Engineer recommended this item on 15/02/2006 and the,,,,,,,,,,,,,,

measurement was certified in IPC-24 covering the period up to 28/02/2006 at the approved rate. As per design, 20mm thick Double Bituminous",,,,,,,,,,,,,,

Surface Treatment (DBST) was proposed for shoulder treatment. Alternate proposal to change the surface treatment from DBST to MSS Type A,,,,,,,,,,,,,,

was initiated by the claimant to suit their convenience of construction. The respondent/Employer was constrained to agree to this proposal on the,,,,,,,,,,,,,,

ground of claimant's inability to complete DBST that would satisfy the specification requirement, particularly due to the non-availability of appropriate",,,,,,,,,,,,,,

and specific machinery with the claimant. Hence the claimant cannot be allowed to encash his own inability to provide DBST. The contractor's claim,,,,,,,,,,,,,,

of providing a denser and more homogeneous layer in place of DBST is not correct. Providing and laying MSS requires the usage of bitumen @,,,,,,,,,,,,,,

22kg/10 sq.m., where as in DBST the bitumen content is 28kg/10 sq.m. This would show that DBST uses more binding materials than MSS and hence",,,,,,,,,,,,,,

it is denser.,,,,,,,,,,,,,,

40.1. Initially the Engineer had approved a rate of ₹ 82/sq.m. for MSS for Muvattupuzha-Angamali Section where the work would be done manually,,,,,,,,,,,,,,

on the shoulder within only one meter. Subsequently based on a detailed rate analysis furnished by the Engineer, the respondent approved a rate of",,,,,,,,,,,,,,

₹81/sq.m. for Muvattupuzha â€" Angamali Section and ₹62/sq.m. for Muvattupuzha â€" Thodupuzha Section. This was arrived at after a detailed,,,,,,,,,,,,,

discussion by the Engineer with the Employer. The rate for a work would be different depending on whether manual or mechanical method is used.,,,,,,,,,,,,,

All variation orders are not according to the MORTH specifications. There are number of variation items whose rates are arrived at by the Engineer,,,,,,,,,,,,,

not according to the MORTH data, but on his own observations. The allegation that Clause 512 of the Technical Specification does not specify rates",,,,,,,,,,,,,

for manually or mechanically laid, is not applicable for this variation item. The Employer cannot act against the term of the Contract Agreement. The",,,,,,,,,,,,,

respondent approved the rates based on the rate analysis submitted by the Engineer. The respondent has never interfered in the affairs of the,,,,,,,,,,,,,

Engineer or asked them to reduce the rate for MSS. No amount is due for payment. All the amounts certified by the Engineer have been paid. Hence,,,,,,,,,,,,,

the question of interest also does not arise. The recommendations of DRB are incorrect and as the claim raised is false and baseless, the same is",,,,,,,,,,,,,

liable to be rejected, contended the respondent.",,,,,,,,,,,,,

41. The AT noticed that the contract provided for two coats of surface dressing on the shoulders, under BOQ items No. 510-01 and 510 at the",,,,,,,,,,,,,

combined total rate of ₹82/- per sq.m. However, it was found practical by the parties that instead of two coats of surface dressing, MSS be provided",,,,,,,,,,,,,

on the shoulders and accordingly Variation Order was issued by the Engineer vide Ext.A19/06 letter dated 07/03/2005, which reads -",,,,,,,,,,,,,

â€œYour proposal (as per above reference) for changing the surfacing on shoulders of the re-constructed roads is accepted.,,,,,,,,,,,,,

The shoulders shall be surfaced with 20 mm of Type A MSS as per MORTH Specification.,,,,,,,,,,,,,

The rate shall be Rs. 82/- per sq. m including Tack Coat. Price adjustment as per Clause 70 of the Contract, shall be applicable to the above rate.",,,,,,,,,,,,,

This fulfills the agreement that any change will be at no cost to the Employer.""",,,,,,,,,,,,,

Therefore, the Chief Engineer (Project) [CE(P)] approved the Variation Items as - MSS Type A 2 cm thick on MA Section in lieu of DBST = ₹81/-",,,,,,,,,,,,,

per sq.m. and MSS Type A 2 cm thick on MT Section in lieu of DBST = ₹62/- per sq.m. According to the [CE(P)], all these items are based on",,,,,,,,,,,,,,

market rates without escalation. It was clarified that the rate for MSS in Muvattupuzha-Angamali Section is for manually laid while the rate of MSS in,,,,,,,,,,,,,,

Muvattupuzha-Thodupuzha Section is for machine laid. The Engineer certified the IPCs based on the above stated rates as approved by the [CE(P)].,,,,,,,,,,,,,,

41.1. The AT on the basis of the materials submitted before them noticed that before issuing the aforesaid Variation Order, analysis of rates submitted",,,,,,,,,,,,,,

by the contractor vide their letter dated 01/03/2005, showed the rate to be ₹86.36/- per sq.m., which they restricted to ₹82/- per sq.m. The Variation",,,,,,,,,,,,,,

Order so issued by the Engineer was within his competency under Sub-clause 2.1 of the GCC and no specific approval of the Employer was,,,,,,,,,,,,,,

warranted. The Variation Order had neither been withdrawn till date nor had the Employer invoked DRB proceedings against the Variation Order,,,,,,,,,,,,,,

issued by the Engineer. It was held that the specific stipulation in Clause 52.1 of the GCC, governs the valuation for such varied works. The three",,,,,,,,,,,,,,

options available in this Clause were considered and the second option was applied. A detailed analysis of the rates and the method to be adopted is,,,,,,,,,,,,,,

seen made by the AT, which can be seen at pages 25 to 28 of the Award. The technical aspects and the various components involved etc. were",,,,,,,,,,,,,,

considered and the AT arrived at the conclusion that in the light of the terms of the contract, the rate of ₹82/- per sq.m. for MSS Type A as provided",,,,,,,,,,,,,,

in Variation Order was fully justified and hence the contractor was held entitled for the same.,,,,,,,,,,,,,,

42. The court under Section 34 accepted the findings of the AT. On going through the appeal memorandum it can be seen that there is no challenge,,,,,,,,,,,,,,

whatsoever to this finding under dispute no.19. Of the grounds (A) to (K) raised in the appeal memorandum, all the grounds except (E), (H) and (I),",,,,,,,,,,,,,,

are challenges relating to the maintainability of the claim. Grounds (E) and (H) state that some claims allowed are virtually duplication of the rate,,,,,,,,,,,,,,

awarded as per the contract, which have not been considered in the impugned order. Ground (I) relates to the grant of interest @ 18% by the court",,,,,,,,,,,,,,

below, which is apparently wrong. The AT has not granted interest @ 18%. It has only granted interest @ 10%, which is also not seen challenged.",,,,,,,,,,,,,,

During the course of arguments and in the argument notes submitted, the findings of the AT on this dispute has also been challenged. The AT has",,,,,,,,,,,,,

considered the objections raised by the Employer and has arrived at its conclusion. We find no infirmity in the findings and so no interference is called,,,,,,,,,,,,,

for.,,,,,,,,,,,,,

43. Dispute no.20 is relating to certification and payment of BoQ item no.11000-15, which has already been considered along with dispute no.9 in",,,,,,,,,,,,,

Arb.Appeal No.1/2017 and hence the same need not be considered again.,,,,,,,,,,,,,

In the result, Arb.Appeal No.1/2017 is dismissed. Arb. Appeal No.26/2017 is partly allowed and the impugned order and the Award of the court",,,,,,,,,,,,,

below relating to the claim under dispute no.18 is set aside.,,,,,,,,,,,,,

Interlocutory applications, if any pending, shall stand disposed of.",,,,,,,,,,,,,