Patel Engineering Co. Ltd. Vs B.T. Patil and Sons Belgaum (Construction) Pvt. Ltd. and Others

Court: BOMBAY HIGH COURT

Date of Decision: Jan. 8, 2016

Acts Referred: Arbitration and Conciliation Act, 1996 - Section 11, Section 11(6), Section 16, Section 23, Section 23(3), Section 33, Section 34
Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1

Citation: (2016) 3 ArbiLR 162 : (2016) 3 BCR 128 : (2017) 1 RAJ 54

Hon'ble Judges: R.D. Dhanuka, J.

Bench: Single Bench

Advocate: Aspi Chinoy, F.E. Divetri, M.S. Doctor, Senior Advocates and Nimay Dave i/by Bachubhai Munim & Co., for the Appellant; Virendra Tulzapurkar, Senior Advocate, Nikhil Sakhardande and Mandar Soman i/by N.V. Bandiwadekar, for the Respondent

Final Decision: Allowed

Judgement

R.D. Dhanuka, J.
1. By the Arbitration Petition No. 891 of 2010 filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for

short ""Arbitration Act""), the petitioner has impugned the orders/decisions dated 17th December 2009, 29th December 2009 and the award dated

25th January 2010 as corrected by the order dated 22nd February 2010 in so far as it allows the claims, or part thereof, in favour of the

respondent is concerned and by the Arbitration Petition No. 893 of 2010 filed under Section 34 of the Arbitration and Conciliation Act, 1996, the

petitioner has impugned the orders/decisions dated 17th December 2009 and 29th December 2009 (as corrected by the arbitrator''s letter dated

4th January 2010) and the award dated 25th January 2010 as corrected by the order dated 22nd February 2010 in so far as it allows the claims,

or part thereof, in favour of the respondent is concerned.

2. By consent of the parties, both the petitions were heard together and are being disposed of by a common order and judgment. The petitioner

herein was the original respondent in the arbitral proceedings whereas the respondent herein was the original claimant. Some of the relevant facts

for the purpose of deciding both these petitions are as under:--

3. On 10th March 1992, the petitioner was awarded a contract by the State of Maharashtra for civil work pertaining to Stage IV of Koyna Hydro

Electric Project (KHEP Contract). On 15th October 1992, the petitioner entered into a sub-contract agreement with the respondent for a portion

of the work under the KHEP Contract. A part of the work under the KHEP Contract was also sub-contracted to a sister concern of the

respondent namely SBP & Co. (the respondent in Arbitration Petition No. 893 of 2010) under the Piecework Agreement. It is the case of the

petitioner that after execution of the sub-contract agreement, the respondent and their sister concern handed over to the petitioner two letters both

dated 15th October 1992 stipulating therein that the claims paid by KHEP authorities are based on the quoted and accepted rates of PEC and that

the petitioner herein would pay to the respondent after deducting 11.5% from the payment received from KHEP authorities. It was also alleged to

have been stipulated that other benefits/claims which were settled and paid by the KHEP authorities were to be shared between the petitioner and

the respondent on 50-50 basis after deducting expenses incurred by executing the works related to such claims/benefits.

4. On 30th May 1996, the respondent informed the petitioner that it would henceforth be executing the work of their sister concern M/s. SBP &

Co. under the Piecework Agreement and that all bills and cheques should be made by the petitioner in the name of the respondent. The disputes

and differences arose between the petitioner and KHEP authorities. The petitioner herein initiated three separate arbitration proceedings for claims

relating to extra items and price that is other than BOQ items/rates. Sometime in the month of October 1999, the respondent as well as their sister

concern M/s. SBP & Co. completed their work under the sub-contract with the petitioner. In the arbitral proceedings filed by the petitioner against

KHEP authorities, three awards (Volume Nos. I, II and III : for Rs. 31 crores, Rs. 24 crores and Rs. 2.31 crores respectively) were made by the

learned arbitrator in favour of the petitioner and against the said KHEP authorities/Government. In so far as the awards in respect of Volume Nos.

II & III are concerned, the KHEP authorities/Government made payment to the petitioner.

5. On 22nd February 2000, the respondent and the said M/s. SBP & Co. demanded an alleged balance amount of Rs. 5,19,22,824/- in respect

of R.A. Bill No. 139/PEC R.A. Bill No. 81 from the petitioner as per the statement of account prepared by the respondent. It is the case of the

petitioner that on 2nd April 2000, a meeting was held between the representative of the respondent and the petitioner. According to the petitioner,

in the said meeting for the first time, the respondent made a claim for the amount which the petitioner was to receive in respect of the arbitration

awards made in the arbitration proceedings between the petitioner and the said KHEP authorities (State of Maharashtra) in respect of the awards

i.e. Volume Nos. I & II in the sum of Rs. 31 crores and Rs. 24 crores respectively. It is the case of the petitioner that after negotiations, the parties

agreed that in so far as the award in respect of Volume No. II is concerned, the petitioner would retain 11.50% and the balance would be shared

on 50-50 basis i.e. the petitioner''s share would be 55.75% and the respondent''s share would be 44.25%. It was agreed that in so far as the

award in respect of Volume No. I and all future/other cases are concerned, the amount would be shared by the petitioner and the respondent on

52% : 48% respectively.

6. It is the case of the petitioner that on 2nd April 2000, on the basis of the said agreement arrived at in the meeting held on 2nd April 2000, the

petitioner paid to the respondent a sum of Rs. 9,76,93,283/-, being its 44.25% share in the amount received by the petitioner from the said KHEP

authorities (State of Maharashtra) in respect of the award i.e. Volume No. II.

7. On 2nd May 2000, the State of Maharashtra challenged the award in respect of Volume No. I before the Court of Civil Judge, Senior Division,

Satara. On 13th June 2000, pursuant to the order dated 2nd May 2000, the State of Maharashtra had deposited the amount awarded by the

learned arbitrator arising out of Volume No. I along with interest thereon.

8. It is the case of the petitioner that on 5th June 2000, the balance amount payable to the respondent as per the award arising out of Volume No.

II relating to the work contract tax deducted by the State of Maharashtra in the sum of Rs. 77,43,750/- was made by the petitioner to the

respondent by cheque No. 77520. It is the case of the petitioner that after the said payment was made, no further claim was made in respect of the

award arising out of Volume No. II for the next 13 months.

9. It is the case of the petitioner that in the month of June, 2001, the petitioner and the respondent through their representatives finally arrived at a

settlement with respect to the amounts of Rs. 5,19,22,824/- payable by the petitioner to the respondent which the respondent had originally

demanded from the petitioner with regard to the owners R.A. Bill No. 139/PEC R.A. Bill No. 81.

10. It is the case of the petitioner that on 8th June 2001, the respondent signed an updated statement of account prepared by Shri.Murlidharan P.

of the petitioner showing the amounts payable by the petitioner to the respondent in regard to the claim of Rs. 5,19,22,824/- which amount after

adjustment was shown as Rs. 28,132.51 payable to the respondent and Rs. 21,121/- payable to M/s. SBP & Co.

11. It is the case of the petitioner that on 8th June 2001, drafts of two "No Claim" letters which were to be executed between the respondent and

the said M/s. SBP & Co. on receiving the agreed final payment were prepared by Shri. Sapre on instructions of Shri. Pravin Patel of the petitioner

and were faxed to Shri. Balasaheb Patil of the respondent.

12. On 15th June 2001, the State of Maharashtra withdrew its challenge to the award in respect of Volume No. I. The petitioner accordingly

received an amount of Rs. 30,07,33,273/- after deduction of TDS/Income Tax + Works Contract tax of Rs. 1,26,61,131/- from the total amount

of Rs. 31,33,94,404/- in respect of the award i.e. Volume No. I. According to the petitioner, out of the said sum, the petitioner was liable to pay a

sum of Rs. 15,50,98,891/- to the respondent.

13. It is the case of the petitioner that on 16th June 2001, a meeting was held between authorised representative of the petitioner and the

respondent where in pursuance of the aforesaid full and final settlement arrived at between the parties, the representative of the petitioner had

handed over to the representative of the respondent a cheque for Rs. 18,132.51 dated 14th June 2001 in favour of the respondent and a cheque

for Rs. 21,121/- in favour of M/s. SBP & Co. and post dated cheque for the sum of Rs. 14,85,26,717/- towards the share of the respondent and

the said M/s. SBP & Co. in respect of the Volume No. I award.

14. It is the case of the petitioner that by their letter dated 16th June 2001 to the respondent, the petitioner recorded that the cheques towards full

and final settlement including dues toward Volume No. I have already been paid to the respondent and the respondent has accepted the same in

full and final settlement including the dues towards Volume No. I. It was recorded that all the issues pertaining to Koyna Stage IV Project along

with Arbitration (Volume Nos. I, II and III) stand completed and settled once for all. It was recorded that no further discussion will be entertained

in future. It is the case of the petitioner that the said letter was admittedly acknowledged/confirmed by Shri. Balasaheb Patil, Director of the

respondent without any demur or objection.

15. It is the case of the petitioner that the said Mr. Balasaheb Patil had carried with him the two ''No Claim'' letters both dated 8th June 2001 and

at the request of Shri. Balasaheb Patil, representative of the petitioner Shri. Murlidharan mentioned the details of the cheques/demand drafts in the

said letters after which the said Shri.Balasaheb Patil signed the said letters and handed over the same to the petitioner along with a covering letter

dated 9th June 2001.

16. On 20th June, 2001 the respondent claimed a sum of Rs. 5,00,000/- from the petitioner towards the expenditure incurred with respect to legal

proceedings pertaining to arbitration award Volume No. I.

17. By letter dated 27th June 2001, the petitioner informed the respondent that all matters with regard to Volume No. I had already been settled in

the meeting of 16th June 2001 except for payment of an amount of Rs. 2,38,014/- to the respondent"s advocate which would be paid to him

shortly.

18. It is the case of the petitioner that on 3rd July 2001, after having encashed the cheques given to the respondent by the petitioner under the said

full and final mutual settlement on 16th June 2001, the respondent and the said M/s. SBP & Co. by their joint letter falsely contended that the the

petitioner had by coercion and undue influence on one of the power of attorney holders of the respondent and the said M/s. SBP & Co. made

them to sign on some of the unilaterally doctored documents. The respondent made five separate claims/demands on the petitioner and called upon

the petitioner to pay the said alleged dues within 30 days and threatened them to refer the matter to the arbitration.

19. By letter dated 2nd August 2001, the petitioner responded to the letter dated 3rd July 2001 and contended that the entire matter pertaining to

the payments to be made to the respondent for the awards (Volume Nos. I and II) had been settled and that all statements, letters and calculations

had been prepared and signed by Shri. Balasaheb Patil of the respondent.

20. The respondent and the said M/s. SBP & Co. by their letter dated 9th August 2001 referred to the letters dated 2nd August 2001 and 3rd

August 2001 of the petitioner and denied that their claim had been settled.

21. On 3rd October 2001, the respondent and the said M/s. SBP & Co. jointly addressed a letter to the petitioner referring to those five claims

which were made by letter dated 3rd July 2001 and invoked the arbitration proceedings under clause 18 of the Sub-contract Agreement and

clause 19 of the Piecework Agreement respectively. The respondent and the said M/s. SBP & Co. appointed Shri.T.G. Radhakrishna as their

arbitrator and called upon the petitioner to appoint its arbitrator.

22. The petitioner vide their letter dated 1st November 2001 informed the respondent that all disputes and differences had been settled between

the parties and that there were no arbitrable disputes whatsoever between the parties. Without prejudice to its contention the petitioner appointed

Shri. S.N. Huddar as its arbitrator. The said Shri. S.N. Huddar, however, refused to act as an arbitrator some time in the years 2001-02. The

respondent and the said M/s. SBP & Co., therefore, contended that the petitioner could not appoint an arbitrator in place of the said Shri. S.N.

Huddar and insisted that their arbitrator Shri. T.G. Radhakrishna shall act as a sole arbitrator.

23. On 30th April 2001, the petitioner filed applications under Section 11 of the Arbitration Act being Arbitration Application No. 90 of 2002

against the respondent and Arbitration Application No. 114 of 2002 against M/s. SBP & Co. before the Hon"ble Chief Justice of this Court for

appointment of an arbitrator in place of the said Shri. S.N. Huddar.

24. On 18th November 2002, the learned designate of the Hon''ble Chief Justice allowed the said applications filed by the petitioner and upheld

the right of the petitioner to appoint a substitute arbitrator in place of Shri. S.N. Huddar. By the said order, there was also a direction to appoint a

third arbitrator in the matter.

25. On or about 3rd February 2003, the respondent and the said M/s. SBP & Co. filed two separate writ petitions bearing Nos. 20 of 2003 and

21 of 2003 respectively inter alia praying for setting aside the order dated 18th November 2002. Both the said writ petitions were dismissed on

3rd February 2003. Some time in the year 2003, the respondent and the said M/s. SBP & Co. filed two separate special leave petitions before the

Supreme Court against the said order dated 3rd February 2003.

26. On 29th February 2008, during the pendency of the said special leave petitions filed by the respondent, pursuant to the arbitration proceedings

initiated by the petitioner against the State of Maharashtra/KHEP authorities, three further awards (Volume Nos. IV, V, VII+VIII) were made in

favour of the petitioner for Rs. 40 crores, Rs. 138 crores and Rs. 82 lakhs respectively. In so far as the claim in the arbitration in respect of

Volume No. VI is concerned, the said claim of the petitioner was rejected by the learned arbitrator.

27. Some time in the month of April 2008, the respondent and the said M/s. SBP & Co. filed a suit in the Court of Civil Judge, Senior Division,

Satara against the petitioner and the State of Maharashtra praying that the State Government be restrained from paying and releasing the amount of

Rs. 163 crores due to the petitioner with regard to the awards (Volume Nos. IV, V, VII and VIII) till the claim of the respondent was settled.

28. On 13th June 2008, the State of Maharashtra challenged the awards arising out of Volume Nos. IV, V, VII and VIII. The Court at Satara in

which the said proceedings were filed stayed the said awards on the condition that the State of Maharashtra shall deposit an amount of Rs. 100

crores (out of the total awarded amount of Rs. 163.31 crores and interest) pending disposal of the award petitions. The petitioner was required to

give an indemnity for Rs. 50 crores and a bank guarantee for Rs. 50 crores for withdrawing the said deposited amount of Rs. 100 crores by the

State of Maharashtra pursuant to the order passed by the concerned Court in the said proceedings.

29. On 2nd August 2008, the petitioner filed its written statement in Suit No. 117 of 2008 before the Civil Judge, Senior Division, Satara pointing

out that until the entitlement of the respondent was decided in any arbitration proceedings that may be commenced, they could not make any claim

against the amounts deposited by the State of Maharashtra pursuant to the order passed by the concerned Court in the arbitration petitions

challenging the awards (Volume Nos. IV, V, VII and VIII).

30. On 6th September 2008, the respondent applied for an amendment to their plaint and prayed by adding a prayer for a declaration that the

respondent was entitled to 88.5% of the amounts to be disbursed towards the awards (Volume Nos. IV to VIII) and for an order directing the

petitioner herein to pay 88.5% share of the amounts to be disbursed by the Government to the petitioner in respect of the awards (Volume Nos.

IV to VIII). The said application for amendment filed by the respondent came to be allowed by the Civil Judge, Senior Division, Satara. The

respondent, however, did not carry out the said amendment though allowed by the learned Civil Judge, Senior Division, Satara.

31. By their letter dated 18th September 2008, the respondent recorded that the arbitration had earlier been invoked only in connection with the

disputes relating to the awards (Volume Nos. I & II). It was further recorded that the awards in respect of Volume Nos. IV, V, VII and VIII had

been made on 29th February 2008 and that the petitioner would be receiving or must have already received the payment for the same from the

State Government. The respondent had alleged that the payments shall be made by the petitioner to the respondent within 10 days from the date of

receipt of the payment from the State Government and called upon the petitioner to make the said payment within 10 days from the date of receipt

of the said payment from the State of Government and made it clear that in case of failure, it would presume that the dispute had arisen between

the parties and the same would be referred to the arbitration in terms of clause 18 of the Sub-contract Agreement and clause 19 of the Piecework

Agreement.

32. By an order dated 21st October 2009, the Supreme Court has set aside the order dated 18th November 2002 passed by the learned

designate of the Chief Justice of this Court appointing a substitute arbitrator and also a third arbitrator and directed that the arbitration should

proceed before the said Shri. T.G. Radhakrishna who was appointed by the respondent and the said M/s. SBP & Co. as a sole arbitrator.

33. On 27th October 2009, the respondent and the said M/s. SBP & Co. filed an application under Order XXIII Rule 1 of the Code of Civil

Procedure, 1908 before the learned Civil Judge, Senior Division, Satara inter alia praying for permission to withdraw the suit with liberty to

prosecute appropriate legal proceedings. The petitioner filed its reply to the application filed by the respondent before the learned Civil Judge,

Senior Division, Satara on 10th November 2009.

34. On 16th November 2009, the respondent filed Statement of Claim before the learned arbitrator. It is the case of the petitioner that in the said

statement of claim, the respondent included not only the five claims which were earlier raised and referred by their letters dated 3rd July 2001 and

3rd October 2001 but also unilaterally included further distinct claims pertaining to the subsequent awards (Volume Nos. IV to VIII) which had

been made only on 29th February 2008 and which claims had never been referred to the arbitration. Claim No. 1 and Claim No. 2 were for

88.5% of the amounts received by the petitioner under the awards (Volume Nos. I and II & interest thereon) i.e. original claim Nos. 3 and 4.

35. Claim No. 3 was for Rs. 26.12 crores towards the alleged share of the respondent in the amount of Rs. 100 crores received by the petitioner

under the awards (Volume Nos. IV & V) pending the arbitration petition challenging those awards and subject to the petitioner furnishing an

indemnity for 50% and a bank guarantee for 50%. The respondent claimed that it was entitled to receive the said amount from the petitioner on the

same basis i.e. by furnishing indemnity for 50% of the amount payable by the petitioner to the respondent and the bank guarantee for the balance

50%.

36. Claim No. 4 made by the respondent was for Rs. 25 crores on the basis of the additional benefits alleged to have been received by the

petitioner from the State of Maharashtra. Claim No. 5 was for Rs. 70 crores in respect of the award (Volume Nos. VI) which claims of the

petitioner had been rejected on the ground that the petitioner had failed and neglected to make the claims upon the State of Maharashtra as per the

terms of the procedure specified in the main contract. Claim No. 6 was for Rs. 292 lakhs arising out of deduction of 11.5% in respect of cement

and steel supplied by the respondent. Claim No. 7 was for Rs. 5,19,22,824/- claimed under RA Bill No. 139 & PEC''s RA Bill No. 81. Claim

No. 8 was in respect of Rs. 5 lakhs towards litigation expenditure incurred in the Civil Court at Satara. Claim No. 9 was for interest @ 24% p.a.

Claim No. 10 was for costs of the arbitration.

37. On 7th December 2009, the petitioner filed an application under Section 16 of the Arbitration Act before the learned arbitrator raising a

preliminary objection to the jurisdiction of the learned arbitrator to entertain the claim Nos. 1, 2, 6, 7 and 8 which according to the petitioner had

already been finally settled by the Settlement Agreement in view of the respondent signing ''No Claim'' letters. The jurisdiction in respect of claim

Nos. 3, 4 and 5 was challenged on the ground that the said claims were directly made in the statement of claim dated 16th November 2009 and

were not referred in the letter invoking arbitration agreement. It was also contended by the petitioner that by filing the said suit in the Court of Civil

Judge, Senior Division, Satara and seeking an amendment for claiming the amounts of the awards (Volume Nos. IV to VIII) in the said suit, the

respondent had waived, abandoned/rescinded the arbitration agreement. The respondent filed their objections to the said application on 8th

December 2009.

38. On 17th December 2009, the learned arbitrator rejected the application filed by the petitioner under Section 16 and held that the petitioner

had insisted upon and took "No Claim" letters/undertakings as per the draft supplied by it and only then it released the payments. It established

that the letters are the result of coercion and undue influence. It is further held that the filing of the suit in Satara Court for injunction did not amount

to waiver/abandonment of the arbitration clauses and that the petitioner themselves having relied on the arbitration agreement could not be allowed

to raise such plea. It is held that the arbitration clause was wide enough to take in disputes/claims arising subsequent to the reference.

39. On 19th December 2009, the petitioner filed an application for recall and clarification of the order dated 17th December 2009. By an order

dated 29th December 2009, the learned arbitrator rejected the said application for recall and clarification made by the petitioner on 19th

December 2009 holding that the arguments were not confined to only the question as to whether the said application should be decided as a

preliminary issue or not as alleged, but also on merits of the application.

40. The petitioner through their advocate"s letter dated 5th January 2010 denied the entire annexures C-151, C-152 and C-153. In the month of

January 2010, both the parties filed affidavit of evidence. The petitioner filed affidavit of evidence of Shri. Sunil Sapre and Shri. Murlidharan. The

respondent filed affidavit of evidence of Shri. Balasaheb Patil and Shri. Mahendrappa. All witnesses were cross-examined.

41. On 12th January 2010, the witness examined by the respondent produced the balance sheets of the respondent for the year ended 31st March

2001 and 31st March 2002 showing that the respondent was making large profits during that period. It is the case of the petitioner that the

allegation of the respondent that during the said period, the respondent was suffering from financial crunch was false and contrary to the profits held

by the respondent during that period as reflected in the said two balance sheets. On 25th January 2010, the learned arbitrator made an award

approximately for Rs. 16 crores in respect of the original five claims. Claim Nos. 4 and 8 were rejected. The learned arbitrator awarded a sum of

Rs. 73.54 crores in respect of the new Claim Nos. 3 and 5. Claim No. 3 had been made by the respondent in respect of the awards (Volume

Nos. IV & V) and was in respect of the amount of Rs. 100 crores which had been received by the petitioner pending the arbitration petition

challenging those awards and subject to the petitioner furnishing an indemnity and a bank guarantee. Though the respondent had made the said

claim against the respondent subject to furnishing a similar indemnity and bank guarantee, the learned arbitrator awarded a sum of Rs. 23.11 crores

to the respondent absolutely. The learned arbitrator awarded a sum of Rs. 30.53 crores in respect of the Claim No. 5.

42. On 6th February 2010, the respondent made an application for certain corrections in the said award under Section 33 of the Arbitration Act.

By an order dated 22nd February 2010, the learned arbitrator allowed the said application filed under Section 33 of the Arbitration Act. On 29th

April 2010, the petitioner herein filed two petitions bearing Arbitration Petition No. 891 of 2010 and Arbitration Petition No. 893 of 2010 inter

alia praying for setting aside the claims which were awarded in favour of the respondent in both the petitions respectively.

43. By an order and judgment dated 21st March 2013, 22nd March 2013 and 4th April 2013, learned Single Judge of this Court allowed the

Arbitration Petition No. 891 of 2010 and was pleased to set aside the impugned award dated 25th January 2010. However, by the said order and

judgment, learned Single Judge remanded back the matter for fresh re-consideration.

44. By an order dated 5th April 2013, learned Single Judge of this Court allowed the Arbitration Petition No. 893 of 2010 and was pleased to set

aside the award dated 25th January 2010, the matter was remanded for fresh reconsideration. By the said award, the learned arbitrator had

allowed some of the claims made by the respondent.

45. The petitioner herein impugned the said order dated 21st March 2013, 22nd March 2013 and 4th April 2013 thereby remanding the matter to

the learned arbitrator for fresh consideration by filing two separate Appeals bearing Nos. 311 of 2013 and 312 of 2013. By an order and

judgment dated 30th January 2014 passed by the Division Bench, the said order and judgment dated 21st March 2013, 22nd March 2013 and

4th April 2013 delivered by the learned Single Judge and companion arbitration petition came to be set aside and the petitions are restored for

fresh consideration to the learned Single Judge. It was made clear that the Division Bench had not gone into merits of the case. In view of the said

order passed by the Division Bench, both these petitions were restored to file and have been heard by this Court afresh.

46. Mr. Chinoy, learned senior counsel for the petitioner submits that by the end of 1999 the contract work had been completed. In the year 1999

and in the year 2000, the respondent had claimed that an amount of R.5.41 crores was due and payable to the respondent under PEC RA bill No.

8 on account of the work done. The petitioner had also initiated three separate arbitration proceedings against the Government for Volumes I, II

and III. By the end of February, 2000, the arbitral tribunal in those proceedings between the petitioner and the Government of Maharashtra

delivered three separate awards in favour of the petitioner. By February, 2000, the State Government made payment of the awarded sum to the

petitioner insofar as the award under Volume-II is concerned. By the end of June, 2001, the State Government made payment to the petitioner

insofar as the awarded sum under Volume-I was concerned.

47. It is submitted that by the letter dated 3rd July, 2001, the respondent had called upon the petitioner for settlement of payment for the work

done and payable under Volume-I and II arbitration awards. Claim ""A"" was for Rs. 5,19,22,824/- which was for the work done as per the

petitioner''s RA bill No. 139 which was as per Owner''s RA bill No. 139/PEC RA bill No. 81. Claim ""B"" was for wrongful deduction of 11.50%

in respect of steel and cement supplied. Claim ""C"" was for Rs. 10,66,09,739/- being the balance amount payable towards 88.50% of Volume-II

award. Claim ""D"" was for Rs. 12,94,17,231/- being the balance amount payable towards 88.50% of Volume-I award and claim ""E"" was for the

costs of Rs. 5 lacs alleged to have been incurred by the respondent in pursing Volume-I arbitration case filed by the respondent in the Court of

Civil Judge Junior Division, Satara.

48. Learned senior counsel invited my attention to the letter dated 9th August, 2001 in which a reference was made to ""settlement of payment for

the work done and payment as per Volumes-I and II arbitration awards and the reference was also made to the earlier letter dated 3rd July, 2001.

By the said letter the respondent called upon the petitioner to pay the amounts failing which the respondent threatened to initiate the process of

arbitration in terms of sub-contract agreement/piece work agreement as enumerated in the said letter. Reliance is also placed on the letter dated

3rd October, 2001 having the same subject and the respondent thereby submitting the list of outstanding dues pertaining to the said sub-contract

agreement and referring to the earlier letter dated 3rd July, 2001.

49. By the said letter, the respondent made it clear that if the petitioner failed to make payment of dues in accordance with the said list within 30

days, the respondent will presume that the disputes had arisen between the parties which will be referred to arbitration in terms of the said sub-

contract agreement/piece work agreement. It was also mentioned that since the petitioner had failed in making the said payment, disputes had

arisen between the parties which the respondent intended to refer to arbitration.

50. By the said letter dated 3rd October, 2001, the respondent invoked clause 18 of the sub-contract agreement and clause 19 of the piece work

contract and appointed Shri T.G. Radhakrishna, a retired Chief Engineer, Bangalore as an arbitrator on their behalf. The petitioner by letter dated

1st November, 2001, without prejudice to their rights and contention appointed Shri S.N. Huddar, Joint Secretary, Irrigation Department,

Government of Maharashtra as an arbitrator on their behalf.

51. It is submitted by learned senior counsel that the reference to arbitrator was accordingly made only in respect of five claims which were listed

in the letter dated 3rd July, 2001. He submits that in the year 2001, the arbitrations in respect of Volumes-IV to VIII had not resulted in any

awards. The awards in respect of Volumes-IV to VIII were made only in the year 2008. Learned senior counsel placed reliance on the letter

dated 18th September, 2008 addressed by the respondent referring to the settlement of payment of work done payment as per Volumes-IV to

VIII of the arbitration awards. He submits that in the said letter, the respondent had stated that they were given to understand that the petitioner

would be receiving/must have already received payments in relation to Volumes-IV to VIII onwards from the State of Maharashtra and shall pay

to the respondent after deducting 11.50% within ten days of receipt of payment from the State of Maharashtra. By the said notice the respondent

called upon the petitioner to make the said payments within ten days making it clear that in case of failure the respondent would presume that the

disputes had arisen between the parties and the same would be referred to arbitration in terms of clause 18 of the sub-contract agreement and

clause 19 of piece work agreement.

52. It is submitted by the learned senior counsel that the matter however, remained pending for ten years though the reference was made in the

year 2001 by the respondent under those three letters and the arbitral panel was not constituted in view of the fact that the respondent had

challenged the appointment of replaced arbitrator by the High Court on the application of the petitioner. Some time in the month of October, 2009,

the Supreme Court allowed the challenge of the respondent and directed that the learned arbitrator appointed by the respondent shall act as a sole

arbitrator. He submits that though the reference to the learned arbitrator was in respect of five specific claims under those three letters, in the

statement of claim filed by the respondent on 16th November, 2009, the respondent did not restrict their claims to five specific claims enumerated

in the letter dated 3rd July, 2001 but included several additional claims including claims 3, 4 and 5 which were pertaining to the award Volumes-IV

to VIII. He submits that the petitioner raised the issue of jurisdiction before the learned arbitrator insofar as the additional claims including claims 3,

4 and 5 which were pertaining to the award Volumes-IV to VIII were concerned before the learned arbitrator. The petitioner had also relied upon

various judgments of the Supreme Court on this issue before the learned arbitrator. The respondent objected to the said plea of jurisdiction before

the learned arbitrator by referring to few other judgments of the Supreme Court.

53. By an order dated 17th December, 2009, the learned arbitrator rejected the plea of the petitioner of jurisdiction and held that the said

additional claims made by the respondent were referred to the learned arbitrator and he had jurisdiction to adjudicate upon those additional claims.

The learned arbitrator held that the work had been completed prior to 2000 and the work done by the respondent and covered by letters dated

3rd July, 2001 and 3rd October, 2001 had remained unpaid. It is submitted that in fact in the year 2001, the arbitration for Volumes-IV to VIII

were still being formulated and the respondent was furnishing the documents to the petitioner to make claims in arbitration against the State

Government. The respondent had thus never made any claims against the petitioner at that time and thus there was no question of such claims

regarding Volumes-IV to VIII forming part of reference made by the letters dated 3rd July, 2001 or 3rd October, 2001. He submits that the

respondent on their own had made reference to the awards made for Volumes-IV to VIII for the first time in their letter dated 18th September,

2008 and had made a demand in respect thereof thereby making it clear that in case of failure on the part of the petitioner, the respondent would

presume that the disputes had arisen between the parties and the same would be referred to arbitration under the said arbitration agreement.

54. Learned senior counsel for the petitioner submits that the claims/disputes enumerated in the letters dated 3rd July, 2001, 9th August, 2001 and

3rd October, 2001 addressed by the respondent to the petitioner was a purely consensual reference. There was no occasion to approach the

Chief Justice or his designate under section 11 by filing an arbitration application. The arbitral tribunal was constituted by the consent of parties to

decide the five specific claims enumerated in the said three letters. The issue before the Supreme Court was only relating to the replacement of an

arbitrator who had declined to act and there was no detraction from the consensual nature of the reference or of the fact that the party had agreed

to refer only the listed/enumerated disputes. He submits that under clauses 4 and 14 of the sub-contract agreement, there could not have been any

claim made by the respondent against the petitioner till the awards in respect of Volumes-IV to VIII were made in favour of the petitioner and the

petitioner would have received amounts under those awards from the State of Maharashtra. He submits that the respondent by their letter dated

18th September, 2008 had made such claim for the first time for 88.50% of the amounts which the petitioner were likely to receive under the

awards for Volumes-IV to VIII making it clear that if the payments were not received, it would be presumed that the disputes had arisen between

the parties and the same would be referred to arbitration in accordance with the arbitration agreement.

55. Learned senior counsel placed reliance on the judgment of the Supreme court in case of Indian Aluminium Cable v. Haryana State Electricity

Board reported in (1996) 5 Scale 708 and various other judgments on this issue and also distinguished three judgments of the Supreme Court

which were relied upon by the learned arbitrator in the impugned award on the issue of jurisdiction. He submits that the learned arbitrator by

adjudicating upon subsequent claims relating to Volumes-IV to VIII has exceeded beyond his jurisdiction and thus the award discloses an error

apparent on the fact of record and shows patent illegality. It is submitted by learned senior counsel that even though the respondent herein who

were original claimants could have amended the statement of claim, section 23(3) of the Arbitration & Conciliation Act, 1996 does not permit

enhancement of jurisdiction of the learned arbitrator. Learned senior counsel distinguished the judgment of the Supreme Court in case of State of

Goa v. Praveen Enterprises reported in , 2011 (3) Arb.LR 209 (SC).

56. In his alternate submission, Mr. Chinoy, learned senior counsel for the petitioner submits that the impugned award discloses error apparent

insofar as it allows claim Nos. 1, 2, 3 and 5. He submits that though in their letter dated 15th October, 1992 addressed by the respondent to the

petitioner which stipulated that the payments were received for the works other than those for quoted/accepted rates should be shared by the

petitioner and the respondent by 50:50 basis after deducting the expenses incurred for executing the works related to such claims, the learned

arbitrator has referred to the said letter/agreement dated 15th October, 1992 only while dealing with claim No. 4 and not while awarding claim

Nos. 1, 2, 3 and 5 and has erroneously held that the said letters/agreement dated 15th October, 1992 had not been accepted by the petitioner.

Learned senior counsel invited my attention to paragraph 3.2 of the reply filed by the petitioner to the statement of claim filed by the respondent

and also paragraph 12 of their reply contending that the said letter dated 15th October, 1992 was part of the agreement between the parties

modifying/varying sub-contract dated 15th October, 1992. The petitioner had also expressly relied upon the said letter while opposing or

defending the claim of the respondent for 88.50% of Volumes-I and II.

57. In paragraph 34 of the reply also the petitioner had relied upon the said letters/agreements while opposing or defending the claims in Volumes-

IV and V. The petitioner had also relied upon the said letter/agreement in the written submissions filed before the learned arbitrator and more

particularly at paragraph 6 vis-Ã¯Â¿Â½-vis the claim relating to Volumes-I and II and of paragraph 14 relating to Volumes-IV and V. It is submitted

that the finding of the learned arbitrator in paragraph 19.3 of the impugned award that the petitioner had not accepted the letter/agreement dated

15th October, 1992 is ex-facie perverse and shows patent illegality. Learned senior counsel also invited my attention to paragraph 15 of the

arbitration petition and would submit that the issue relating to non-consideration of the said letter dated 15th October, 1992 has been specifically

raised in the present arbitration. He also placed reliance on the written submissions filed by the respondent thereby contending that the awards

should not be interfered with on the ground of non-consideration of the letter/agreement dated 15th October, 1992, the petitioner would allegedly

have received less than 11.50%. He submits that on the contrary both the parties had relied upon the letter/agreement dated 15th October, 1992

before the learned arbitrator. Reliance is placed on the judgment of the Supreme Court in case of K.P. Poulose v. State of Kerala, , (1975) 2

SCC 236 and in particular paragraph 6 thereof. He submits that the award thus in respect of the claim Nos. 1, 2, 3 and 5 is ex-facie perverse,

discloses patent illegality and deserves to be set aside on this ground also.

58. Insofar as claim No. 5 (Volume-VI) is concerned, it is submitted by learned senior counsel for the petitioner that the award of Rs. 30.53

crores and interest thereon is without jurisdiction since the said award is contrary to the claim made by the respondent and also contrary to the

specific terms of the contract. He submits that the arbitral tribunal appointed under the principal contract while adjudicating the claims of the

petitioner against the State of Maharashtra had not entertained the said claim on the ground that the petitioner had allegedly not duly complied with

the procedure stipulated in clause 66(b) of the main contract. He submits that the said claim No. 5 had been made by the respondent in their

statement of claim filed in the year 2009 on the basis that although the respondent had required the petitioner to make an arbitral claim for the same

on the principal employer/KHEP, the petitioner had allegedly failed and neglected to make the said claim upon the principal employer i.e. the State

of Maharashtra as per the terms of the procedure specified in the main contract between the petitioner and the State of Maharashtra. It was

pleaded by the respondent herein that since the petitioner has admitted that those claims are legitimately due and payable for carrying out the

works in question, the petitioner is liable to pay the said amount to the respondent herein.

59. Learned senior counsel for the petitioner invited my attention to the statement of claim regarding the said claim No. 5 (Volume-VI) i.e.

pertaining to ""revision of rate, variation"" of the contract work. He submits that the learned arbitrator however, has awarded the said claim No. 5 on

the basis that clause 6 of the said contract agreement required the petitioner herein to pay to the respondent for the work carried out and since the

said claim No. 5 related to the work admittedly carried out by the respondent, the petitioner is bound to pay the same to the respondent. It is held

by the learned arbitrator that if there was any lapse on the part of the petitioner in not collecting the same from KHEP authorities, the same could

not be an excuse not to pay to the respondent herein who had incurred enormous amounts of money for carrying out the work. He submits that the

said claim No. 5 was not made by the respondent on the basis of ""payment for the work done"".

60. The work had already been completed in the year 2000. Claim No. 5 had been made by the respondent only in the year 2009 consequently

upon the arbitral tribunal refusing to entertain the claim regarding Volume-VI in the year 2008, which was made by the petitioner against the State

of Maharashtra/KHEP authorities. The respondent had accordingly made the said claim No. 5 on the basis of the petitioner''s alleged failure and

neglect in not properly making the claims upon the principal employer/KHEP authorities, which had allegedly resulted in the said claim (Volume-

VI), not being entertained/awarded by the arbitral tribunal and would submit that it was a claim in tort. It is submitted that the learned arbitrator has

however awarded a sum of Rs. 30.53 crores as payment required to be made by the petitioner under clause 6 of the subcontract agreement, for

the work done/carried out by the respondent.

61. It is submitted by the learned senior counsel that the claims as made in the statement of claim was for revision of rate and variation which would

fall under clauses 4 and 14 of the sub-contract and not under clause 6. He submits that in the statement of claim regarding the said claim No. 5

(Volume-VI), there was no reference to clause 6 of subcontract agreement. He submits that under clauses 4 and 14 of the subcontract agreement,

it was expressly stipulated that the payment would be made by the petitioner to the respondent only after/subject to the petitioner having received

payment for such claim from the principal employer/KHEP. He submits that sub-contract agreement did not contemplate the respondent being

paid by the petitioner unless and until the petitioner had first received payment for such items/claims from the State of Maharashtra/KHEP

authorities.

62. It is submitted that the impugned award thus awarding the said claim No. 5 on the basis that the petitioner was liable to pay to the respondent

for the work done in Volume-VI irrespective of the fact that it had not received payment for such claims/work done for the State of

Maharashtra/KHEP authorities is contrary to clauses 4 and 14 of the subcontract agreement of 1992 and is also contrary to the claim made by the

respondent in its statement of claim. He submits that admittedly the said claim No. 5 (Volume-VI) was rejected by the arbitral tribunal which was

made by the petitioner against the State of Maharashtra/KHEP authorities and no amount was paid by the principal employer to the petitioner and

thus the petitioner was not liable to make any payment under the said claim to the respondent. He submits that the award shows patent illegality

being contrary to the terms of the contract and contrary to the statement of claim filed by the respondent itself and thus deserves to be set aside.

63. It is submitted by learned senior counsel that the respondent themselves were waiting for the out come of the arbitral award between the

petitioner and the principal employer. Claim No. 5 was for the extra and variation work and thus the learned arbitrator could not have awarded the

said claim though the petitioner had not received any payment from the principal employer. The learned arbitrator has not decided as to why the

petitioner could not have recovered any amount under claim No. 5 (Volume-VI) from the principal employer but has allowed the said claim made

by the respondent simplicitor on the basis that the respondent had already done the said work. He submits that if the claim was for the work done,

the respondent could not have waited for the out come of the arbitral award till 2008 since the work was already completed in the year 2001 itself.

He submits that the claim for the extra and variation would not fall under clause 6. The impugned award allowing the said claim on the premise that

the said claim would fall under clause 6 is contrary to clause 6 of the sub-contract agreement and also contrary to the pleadings filed by the

respondent itself.

64. Learned senior counsel for the petitioner submits that the finding of the learned arbitrator in paragraphs 17 to 17.21 holding that no claim/full

and final settlement letters dated 8th June, 2001 and 16th June, 2001 were resulted of alleged coercion and undue influence and that the petitioner

had failed to prove that no claim letters were given voluntarily after receiving amounts specified therein discloses errors apparent on the fact of the

award and is also beyond the pleading and claim of the respondent itself. In support of this submission the learned senior counsel invited my

attention to the letter dated 22nd February, 2000 from the respondent to the petitioner demanding payment of the alleged balance sum of Rs.

5,19,22,824/- in respect of their RA bill No. 81. He also placed reliance on the updated statement of account which was prepared by the

petitioner and signed by the respondent on 8th June, 2001 showing the balance amount payable by the petitioner to the respondent as Rs.

28,132.51 and Rs. 21,121/- respectively. He submits that three awards were made in the arbitration proceedings filed by the petitioner against the

State of Maharashtra/KHEP authorities in respect of Volumes-I, II and III on 11th February, 2000. The State of Maharashtra had made payment

in respect of the award Volumes-II and III. The award in respect of Volume-I was challenged by the State of Maharashtra. The petitioner had

already paid a sum of Rs. 9.76 crores being 44.21% of the amount received by the petitioner from the Government in respect of Volumes-II

award on 2nd April, 2000. On 1st June, 2000, the respondent had made a claim for the works contract tax. On 5th June, 2000 the petitioner paid

further sum of Rs. 77,43,750/- to the respondent towards the works contract tax. He submits that there was thus no claim made by the respondent

regarding Volume-II till July, 2001 i.e. for a period of 13 months.

65. It is submitted by learned senior counsel that the drafts of two letters which were to be executed by the respondent regarding full and final

settlement on receiving the balance amount were faxed by the petitioner to the respondent which expressly excluded ""share in the payment to be

received against the arbitration award in case of Volume-I and further arbitration, if any"". He submits that on 8th June, 2001, no amount had been

received by the petitioner in respect of Volume-I award from the State of Maharashtra/KHEP authorities. He submits that only on 15th June,

2001, the petitioner had received a sum of Rs. 30,01,33,273/-from the Government of Maharashtra in respect of Volume-I award. On 16th June,

2001, the parties held a meeting in which Mr.B.G. Patil, on behalf of the respondent executed two ""full and final settlement"" letters dated 8th June,

2001 after entering details of cheques of Rs. 28,132.21 and Rs. 21,121/-. The petitioner paid to the respondent a sum of Rs. 14,85,26,717/- and

Rs. 65,72,174/- towards their share of Volume-I payment received from the State of Maharashtra. The petitioner addressed a letter recording that

the said payment of dues pertaining to Volumes-I and III were finally settled. It is submitted that the respondent had acknowledged the receipt of

the said letter addressed by the petitioner. He submits that though the respondent had signed the said letters dated 8th June, 2001 in full and final

settlement after holding a meeting, after receiving payments from the petitioner, on 3rd July, 2001 the respondent addressed a letter for the first

time alleging that they had been made to sign the said letters by undue influence and coercion.

66. Learned senior counsel invited my attention to paragraphs 33 to 47 of the statement of claim in which the respondent had alleged that they had

been coerced into signing/giving full and final settlement letters on 8th June, 2001, as the petitioner had allegedly informed that unless they did so,

the petitioner would not release Volume-I payment. It was alleged that on 9th June, 2001, after receiving the said settlement letters/undertakings,

the petitioner had paid over a sum of Rs. 14,85,26,717/- to the respondent. He submits that in the statement of claim filed by respondent, there

was no case of coercion regarding non-payment of Volume-II award payments or Volumes-IV and V award payments. He submits that there was

only a reference to a letter dated 3rd July, 2001 in the statement of claim in which the respondent had alleged coercion and undue influence.

However, the claim made in the statement of claim by the respondent was only on the basis of the alleged coercion and there was no plea or case

of undue influence.

67. It is submitted that the petitioner had denied the allegations of coercion made by the respondent in the statement of claim. He submits that the

allegation of coercion in respect of Volume-I payment alleged to have been withheld was ex-facie false and untenable since the date on which

settlement letters were already prepared and forwarded on 8th June, 2001, Volume-I payment had not been even received by the petitioner and in

the said letters it was specifically excluded the share in the payment to be received against the arbitration award in case of Volume-I. He submits

that insofar as withholding of payment under award Volumes-II, IV, V and VI was sought to be introduced only in the oral evidence of the witness

examined by the respondent, which was contrary to the case pleaded or claim made in the statement of claim.

68. Learned senior counsel invited my attention to paragraph 17.3 of the impugned award holding that the drafts of the letters were forwarded by

the petitioner and sought for by the petitioner had indicated that those letters were not voluntarily given and were result of pressure. He submits that

the finding of the learned arbitrator that there was a case of undue influence pleaded by the respondent in paragraph 37 of the statement of claim

and that the said letters were vitiated on the grounds of undue influence is contrary to the record and the case pleaded in the statement of claim.

69. It is submitted by learned senior counsel that similarly in respect of Volume-II award, the learned arbitrator has accepted the case of the

alleged coercion based on the alleged non-payment of Rs. 10 crores which is totally contrary to the case pleaded by the respondent in the

statement of claim and beyond the pleadings. There was no case of coercion based on withheld non-payment of Volume-II award amount pleaded

by the respondent. Volume-II amount had already been paid by the petitioner to the respondent in the month of May/June 2000 i.e. much earlier

than no claim letters.

70. In so far as the finding of the learned arbitrator in respect of payment arising out of Volumes-IV and V award aggregating to over Rs. 100

crores is concerned, it is held by the learned arbitrator that the the amount aggregating to over Rs. 100 crores were due and receivables by the

petitioner in the year 2001 and 2003 being withheld by the petitioner resulted in the respondent being ""in an extreme weak position"" and the

petitioner being in a dominant position, who dictated the terms to the respondent. It is submitted that this finding of the learned arbitrator is also ex-

facie beyond the plea of the respondent. In the statement of claim, there was no reference whatsoever to Volumes-IV and V being withheld. He

submits that there was no claim made for Volumes-IV and V amounts by the respondent till 2008. The awards in respect of those volumes itself

had been made by the arbitral tribunal in the year 2008.

71. It is submitted by the learned senior counsel that the finding of the learned arbitrator assuming a case of coercion in respect of the alleged

withholding of the amount of Volume-I also discloses error apparent on the fact of award. He submits that Volume-I award amount was not even

received by the petitioner from the Government till 15th June, 2001 and there was thus no question of the petitioner withholding the share of the

respondent thereof or of the petitioner coercing the respondent to sign full and final settlement letters. It is submitted by learned senior counsel that

the plea raised by the respondent that the said full and final settlement letters were signed by the respondent under coercion was strictly required to

be proved by the respondent and such plea could not be decided on the basis of assumption. The findings recorded by the learned arbitrator are

based on facts not pleaded or proved. The claims price for Volumes-IV to VIII were not even matured. There could be thus no alleged duress or

coercion in respect of those claim on the date of the receipt of no claim letters. Learned senior counsel invited my attention to a specific ground

raised in the arbitration petition in this regard at page 93 of the arbitration petition.

72. Dr.Tulzapurkar, learned senior counsel for the respondent on the other hand submits that there is no dispute that the respondent had

substantially completed the entire work. The petitioner had already issued a completion certificate on 19th August, 2000. The learned arbitrator

has rightly considered the completion certificate issued by the petitioner. Learned senior counsel strongly relies upon the findings rendered by the

learned arbitrator and would submit that this Court cannot interfere with the findings of fact rendered by the learned arbitrator and cannot re-

appreciate the evidence considered by the learned arbitrator. He submits that the scope of section 34 of the Arbitration & Conciliation Act, 1996

is very limited.

73. In so far as claim No. 3 is concerned, learned senior counsel for the respondent invited my attention to paragraphs 42 to 46 of the statement of

claim. Claim No. 3 arose out of Volumes-IV and V. The respondent had made a claim of approximately about Rs. 46 crores. He submits that the

petitioner had already received a sum of Rs. 100 crores from the State Government/KHEP authorities. The petitioner under the contract entered

into with the respondent was liable to give proportionate amount out of the said amount to the respondent. The learned arbitrator on interpretation

of the terms of the contract has rightly come to the conclusion that the respondent had already completed the said work. He submits that the

learned arbitrator has also on interpretation of clauses 1 and 6 of the sub-contract agreement has rightly come to the conclusion that the liability of

the petitioner to pay the said amount under claim No. 3 had arisen under clauses 1 and 6 of the sub-contract agreement. He submits that under

clause 6 of the contract, the liability of the petitioner had arisen when the respondent had completed the work and it was accepted by KHEP

authorities. He submits that the rights of the respondent to receive the payment under the provisions of the contract was not postponed or

contingent upon the payment to be received by the petitioner from the State Government/KHEP authorities otherwise clause 1 of the contract

would have become redundant.

74. It is submitted by learned senior counsel that the claim entertained under clause 4 of the price variation and under clause 14 may depend upon

payment received by the petitioner from the Government. He submits that however, the claim under clause 6 for the work done however, would

not be contingent upon or conditional upon the receipt of such payment made by the State Government or KHEP authorities. He submits that in

any event the interpretation of the contract by the learned arbitrator of clauses 1 and 6 of the sub-contract agreement is possible interpretation and

not perverse and thus such interpretation cannot be substituted by another interpretation by this Court under section 34 of the Arbitration &

Conciliation Act, 1996.

75. Learned senior counsel for the respondent invited my attention to paragraphs 42 to 46 of the statement of claim and would submit that the

respondent was ready and willing to give the bank guarantee. Though the respondent had claimed more than Rs. 26 crores, the learned arbitrator

has only awarded a sum of Rs. 23,11,69,623/- after deducting 11.50%. He invited my attention to the findings recorded by the learned arbitrator

in paragraph 27 and would submit that the learned arbitrator has rendered detailed reasons and has rendered a finding of fact which is not perverse

and thus cannot be interfered with by this Court under section 34 of the Arbitration & Conciliation Act, 1996.

76. Insofar as the issue of jurisdiction raised by the petitioner in respect of three claims arising out of Volumes-IV to VIII is concerned, Dr.

Tulzapurkar, learned senior counsel for the respondent invited my attention to several letters annexed to the compilation of documents addressed

by the respondent making various claims and for referring disputes to arbitration. It is submitted by the learned senior counsel that the reference

was made by the respondent pursuant to an order under section 11 passed by the Supreme Court. In support of this submission, learned senior

counsel placed reliance upon the said order and judgment between the same parties reported in , (2009) 10 SCC 293 and in particular paragraphs

6, 7 to 13, 15, 16, 22, 25 to 28 and 49. He submits that in view of the said order passed by the Supreme Court arising out of the order passed by

the learned designate of this Court under section 11, the learned arbitrator had jurisdiction to decide all the claims and not only claim Nos. 1 to 3

as canvassed by the petitioner.

77. Dr. Tulzapurkar placed reliance on the judgment of the Supreme Court in case of State of Goa v. Praveen Enterprises reported in (2011) 3

Arb.LR 209 (SC) and in particular paragraphs 16, 22 and 32 and would submit that there was no restriction under the arbitration agreement that

only specific claims could be referred to arbitration. He submits that there was no provision in the agreement that only those claims which were

notified to the petitioner by the respondent could be referred to arbitration.

78. Learned senior counsel also placed reliance on the judgment of the Supreme Court in case of V.H. Patel & Company & Ors. v. Hirubhai

Himabhai Patel & Ors, reported in , (2000) 4 SCC 368 and in particular paragraphs 8 and 9 and also the judgment of the Supreme Court in case

of I.O.C. Limited v. Industrial Cases Limited reported in (1989) Supp.(2) SCC 290 in respect of this submission. He also placed reliance on the

judgment of the Supreme Court in Shyama Charan Agarwala v. Union of India reported in , (2002) 6 SCC 201 and in particular paragraphs 9,

15, 20 and 21. It is submitted that the order passed under section 11 of the Arbitration & Conciliation Act, 1996 did not restrict any claim

mentioned in any letter addressed by the respondent. Learned senior counsel also placed reliance upon the averments made by the petitioner in

Suit No. 117 of 2008, which was filed by the respondent and also paragraph 11.11 of the impugned award. Learned senior counsel invited my

attention to a letter addressed by the respondent to the petitioner on 18th September, 2008 which letter was addressed by the respondent before

delivery of the Supreme Court judgment and would submit that the learned arbitrator had thus jurisdiction to adjudicate upon all the claims made

by the respondent and no part of the award is beyond the jurisdiction of the learned arbitrator.

79. earned senior counsel for the respondent distinguished the judgment of the Supreme Court in case of K.P. Poulose v. State of Kerala (supra)

relied upon by the learned senior counsel for the petitioner on the issue that the learned arbitrator had not considered the letter dated 15th

October, 1992 addressed by the respondent to the petitioner and would submit that the said judgment will not apply to the facts of this case at all.

He submits that since only the second part of the said letter was applicable to claim No. 4 which claim was admittedly rejected by the learned

arbitrator, the said letter was not a material document in respect of other claims and thus reliance placed by the petitioner on the said judgment is

misplaced.

80. In so far as the submission of the petitioner that there was already an agreement between the parties for sharing the amount received from the

State of Maharashtra under the said letter dated 15th October, 1992 is concerned, it is submitted that the said arrangement of sharing the amount

equally would be for the claims other than those mentioned in the first paragraph of the letter dated 15th October, 1992. He submits that all the

claims except claim No. 4 of the respondent would fall under the first part of the said letter dated 15th October, 1992 by which the petitioner was

liable to pay to the respondent after deducting 11.50%. He submits that insofar as claim No. 4 is concerned, the said claim was to be covered by

the second part of the said letter dated 15th October, 1992 and the said claim is accordingly rejected by the learned arbitrator. He submits that the

said letter dated 15th October, 1992 was thus not material in respect of other claims at all.

81. In so far as claim No. 5 (Volume-VI) is concerned, it is submitted by the learned senior counsel for the respondent that the petitioner had

forwarded the claim for revision of rates under clause 14 of the sub-contract agreement to the Government. The learned arbitrator had rejected the

said claim. Learned senior counsel placed reliance on the averments made in paragraph 53 of the statement of claim. He submits that merely

because the claim of the petitioner was rejected by the arbitral tribunal in the proceedings filed against the State of Maharashtra/KHEP authorities,

the petitioner cannot refuse to pay the amount for the work done to the respondent. He submits that the claim for price variation was arising out of

the work done under the contract.

82. It is submitted that though clause 14 of the sub-contract agreement provided that the payment was to be made by the petitioner after receiving

from the Government but the petitioner cannot refuse to pay the said amount to the respondent since the said amount was not received by the

petitioner because of merits but was rejected because of the default committed by the petitioner in carrying out the requisite procedure. He submits

that the said claim was not rejected on the ground of price increase or variation. He submits that the petitioner had admittedly not challenged the

said part of the arbitral award rejecting the said claim on the ground of failure of the petitioner in complying with the procedure under the contract.

He submits that merely because the petitioner has accepted the said rejection of the said claim by not filing any arbitration petition challenging that

part of the award, the entitlement of the respondent to recover the said amount for the work done cannot be taken away. He submits that the

learned arbitrator on interpretation of clause 14 has held that the liability of the petitioner would not cease in view of the petitioner"s own default.

The respondent had already incurred extra expenditure.

83. Learned senior counsel invited my attention to the findings rendered by the learned arbitrator in paragraph 18 and would submit that the said

claim has been allowed by the learned arbitrator not only after interpreting clause 14 of sub-contract agreement but also oral evidence of the

witness examined by the petitioner, who admitted that the requisite procedure was not followed by the petitioner. Such findings of fact cannot be

interfered with by this Court under section 34 of the Arbitration & Conciliation Act, 1996. He submits that the said claim related to the contract

and thus the learned arbitrator had jurisdiction to decide the issue. Reliance was placed on the judgment in case of Woolf vs. Collis Removal

Service reported in (1947) 2 All England Report, 260 in respect of this submission.

84. It is submitted by the learned senior counsel that claim No. 5 was made by the respondent under the contract. The respondent had also asked

the petitioner to verify the said claim. The petitioner had verified the claim of the respondent. The respondent had also asked the petitioner to

follow requisite procedure while making the said claim against the State of Maharashtra/KHEP authorities. This Court thus cannot interfere with

this part of the award.

85. Learned senior counsel for the respondent submits that the right of the respondent to receive the amount on merits when the amount was

received by the petitioner from the Government would apply only if the claim was rejected on merits and not because of default of the petitioner.

86. In so far as the issue of allegation of coercion made by the respondent against the petitioner is concerned, it is submitted by learned senior

counsel for the respondent that the learned arbitrator has appreciated the documentary as well as oral evidence and has rendered a finding of fact

that the respondent was coerced by the petitioner in addressing the letters of full and final settlement and unless it is shown by the petitioner that

there was no material on record before the learned arbitrator and that the finding recorded by the learned arbitrator was perverse, this Court

cannot interfere with the finding of fact recorded by the learned arbitrator.

87. In so far as claim Nos. 1 and 2 are concerned, it is submitted by learned senior counsel that the claim of the respondent was much larger than

what was paid by the petitioner to the respondent. The respondent had thus applied for outstanding amount which has been granted by the learned

arbitrator. This Court cannot re-appreciate and interfere with the evidence considered by the learned arbitrator.

88. In so far as the alleged agreement dated 2nd April, 2000 is concerned, it is submitted by learned senior counsel that the respondent had

examined the witness and was cross-examined by the petitioner on this issue. Though the petitioner had filed an affidavit in lieu of examination in

chief, the witness who was proposed to be examined, did not enter the witness box. The learned arbitrator has rendered a finding of fact in

paragraph 17 of the impugned award which is not perverse and thus no interference with such finding of fact is permissible. He submits that

admittedly the draft of no claim letter was sent by the petitioner to the respondent, which was interpreted by the learned arbitrator while rendering

a finding in favour of the respondent. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Chairman & M.D.

NTPC Ltd. v. Reshmi Construction reported in , (2004) 2 SCC 663 and in particular paragraphs 2 and 27 thereof.

89. Mr. Chinoy, learned senior counsel appearing for the petitioner in rejoinder submits that clause (6) of sub-contract would apply to the regular

work i.e. BOQ Items etc. Clause 4 was applicable in respect of extra items. Clause 14 of the sub-contract would apply to claim for price

variation. He submits that the payment of all work done under clause 6 was already paid except arrears for Rs. 5.99 crores which was pending.

He submits that the said claim No. 3 was not a claim for work done under clause 6. The claim was for price variation under clause 14. The said

claim was made for the first time in the year 2008 based on Volumes IV to VIII. The award was declared sometime in the year 2002. Learned

senior counsel placed reliance on part of the compilation No. 1 and would submit that there was no dispute that the said claim was not made under

clause 6 but was made under clauses 4 and 14 of the subcontract. He also placed reliance on the averments made by the petitioner in the written

statement at page 106 of Volume I and the averments of the respondent in rejoinder in para 79 at page 235.

90. Learned senior counsel also placed reliance on the break up of the claims at Ex. C-49 in Volume XII and would submit that even such break

up of claim furnished by the respondent would show that the said claim was for extra item and thus was under clause 4. He submits that the learned

arbitrator could not have considered the said claim under clause 6 and thus the award is contrary to the terms of the contract and also the

pleadings of the respondents and is thus vitiated on that ground. He submits that even though the respondent had in the summary of claim had

claimed full amount, it would not change the nature of claim. The award made by the learned arbitrator is contrary to the claim made.

91. In so far as issue of jurisdiction in respect of claims arising out of Volume IV to Volume VIII is concerned, it is submitted that no demand was

made by the respondent in respect of those claims till 2008. The demand was made for those claims only after seven years when the award in

respect of those four claims were made in the proceedings filed by the petitioner against the State of Maharashtra/KHEP Authorities in the month

of February 2008. He submits that the original reference was not made under section 11 of the Arbitration and Conciliation Act, 1996. The

Supreme Court had merely restored the appointment of the sole arbitrator who was nominated by the respondent. He placed reliance on the

judgment of Supreme Court in case of S.B.P.& CO. v. Patel Engineering Ltd. and more particularly paragraphs 5, 9 to 13, 15, 45, 48 and 49 and

submits that there was no reference of dispute under the said order. The reference of dispute was purely a consensual reference and not under

section 11 of the Arbitration and Conciliation Act, 1996.

92. On the issue whether there was any implied reference of the dispute, the learned senior counsel placed reliance on the judgment of Supreme

Court in case of State of Goa v. Praveen Engineering and more particularly paragraphs 7 to 10, 23, 29 and 30.

93. Learned senior counsel distinguished the judgment of Supreme Court in case of V.H. Patel & Co.(supra) and would submit that in this case

there were enumerated claims made by the respondent for referring those claims to arbitration. He also distinguished the judgment of Supreme

Court in case of Shyama Charan Agarwala & Sons. (supra) on the ground that in that matter, there was a finding rendered by the Supreme Court

that the reference of dispute included the future claims. He submits that in this case the claims arising out of Volume IV to Volume VIII were not

even made or cause of action had not even arisen when the earlier three claims which were enumerated under various letters were made or were

referred to arbitration. He submits that the learned arbitrator had jurisdiction only to decide the claims arising out of Volume I to Volume III.

94. In so far as submission of Dr.Tulzapurkar that the letter dated 15th October, 2002 addressed by the respondent was not a material letter is

concerned, he submits that the learned arbitrator has not rendered such reasons in the impugned award. He submits that the finding of the learned

arbitrator insofar the said letter is concerned is totally contrary to the record and is perverse. He submits that paragraph (2) of the said letter is

material. The claims under Volume IV to Volume VIII fell under paragraph (2) of the said letter dated 15th October, 2002. The respondent had

not made those claims under the BOQ items.

95. In so far as claim No. 5 (Volume VI) i.e. claim for revision of rate is concerned, it is submitted by the learned senior counsel for the petitioner

that though it was the submission of the respondent that the said claim would fall under clauses 4 or 14 of the sub-contract, the learned arbitrator

however has dealt with the said claim only under clause 6 contrary to the provisions of the contract and contrary to the plea raised by the

respondent themselves. The learned arbitrator has not relied upon clauses 4 and 14 and thus the respondent now cannot rely upon those clause.

He submits that the learned arbitrator has not awarded the said claim No. 5 on the alleged plea of tort. No finding of tort is rendered by the

learned arbitrator. The entire claim is contrary to law and is contrary to claims made by the respondent.

96. In so far as issue of coercion is concerned, it is submitted by the learned senior counsel that the claims made by the respondent was made on

the allegation of the coercion whereas the impugned award is based on the alleged coercion and undue influence. Reliance is placed on paragraph

14.8 of the impugned award in support of the submission that the finding of alleged undue influence was based without any such plea raised by the

respondent. In the statement of claim, the respondent had only alleged coercion qua Volume I. The learned arbitrator however has rendered a

finding in respect of the alleged coercion for Volume II also. Insofar as claims arising out of Volumes IV to VIII are concerned, it is submitted that

since the award in respect of those claims were made in the year 2008, no question of withholding any amount by the petitioner arose in the year

2001 and thus the question of any undue influence or coercion in the year 2001 in respect of those claims did not arise. The petitioner had already

made payment in respect of Volume II in the year 2000 itself and there was no claim made for Volume II at all. He submits that the award shows

perversity and patent illegality on the face of the award. He submits that the award in respect of claim Nos. 1, 2, 4, 5 and 6 is in variance with the

plea raised by the respondent in the statement of claim.

REASONS AND CONCLUSIONS:--

97. A perusal of the impugned award which is subject matter of Arbitration Petition No. 891 of 2010 indicates that there were total 10 claims

made by the respondent including claim for interest and arbitration cost. The learned arbitrator has rejected claim Nos. 4 and 8. Insofar as claim

No. 10 i.e. towards cost of arbitration is concerned, the learned arbitrator has directed that each party to bear its own cost.

98. The respondent examined two witnesses i.e. Shri. Balasaheb Patil, Director of the respondent and Shri. Mahendrappa an Engineer who had

filed their respective affidavits in lieu of examination in chief and were cross-examined. The petitioner had initially sought to examine three witnesses

i.e. Shri. Sunil D. Sapre, Vice President of the petitioner, Shri. Muraleedharan, Manager, Accounts and Administration of the petitioner and Shri.

Pravin Patel, Chairman of the petitioner and filed the affidavits of evidence of all of them. The petitioner however tendered only first two witnesses

i.e. Shri. Sunil Sapre and Shri. Muraleedharan for cross-examination. The petitioner made a statement before the learned arbitrator by filing a note

that the petitioner did not wish to examine Shri. Pravin Patel, Chairman of the petitioner. The learned arbitrator framed 18 points for consideration.

Whether learned Arbitrator exceeded jurisdiction

in respect of additional claims?

99. In so far as issue of jurisdiction raised by the petitioner under section 16 of the Arbitration and Conciliation Act, 1996 before the learned

arbitrator is concerned, the learned arbitrator has discussed the said issue in paragraph 11 of the impugned award.

100. In so far as letter dated 3rd October, 2001 addressed by the respondent is concerned, it is held by the learned arbitrator that the wordings of

the said letter clearly indicated that the entire payment dispute of the parties in relation to all the work which the respondent had carried out in term

of the sub-contract agreement/piece work agreement were referred to arbitration. It is held that the entire work was already completed by the time

various letters were written by the respondent to the petitioner for referring the dispute to arbitration. It is held by the learned arbitrator that the

arbitration award pertaining to part Volume IV to volume VI were covered by the reference. It is held that it was clear that the claim had been

made by the respondent herein for the work carried out till the date of reference and the payment sought for had been denied and in view thereof

the respondent had invoked arbitration clause. It is held that every claim of the respondent made in the claim statement before the learned

arbitrator were covered by the reference.

101. In so far as claim No. 4 is concerned, the learned arbitrator however took a view that the said claim was regarding sharing of the additional

benefit and was connected with the work carried out by the respondent and therefore that claim also was within the scope of reference. Insofar as

part of claim No. 1, claim No. 2 and claim No. 9 is concerned, it is held that the same related to the claim with interest and since the principle

amount was within the scope of reference, the claim for interest in relation thereto was also a part of the reference. Similarly in respect of claim for

arbitration cost also the learned arbitrator was of the view that there was a demand for payment of litigation cost and thus was within his

jurisdiction being part of reference. In paragraph 11.10 of the impugned award it is held that considering the wording in the letter dated 3rd July,

2001 it could be safely concluded that the reference encompasses all the claims made in the claim statement including claim relating to Volumes IV,

V, VI awards.

102. The learned arbitrator also made a reference to the suit filed by the respondent (117/2008) on the file of Civil Judge, Satara for deciding the

issue of jurisdiction. In the said suit, the petitioner herein had filed a written statement. In paragraph 2.12 of the written statement, it was stated by

the petitioner that if and when the arbitration proceedings invoked by the respondent against the petitioner finally commences, the question with

regard to the entitlement of the respondent to claim any amounts from the petitioner herein with respect to the work executed by them, would be

decided in such arbitration proceedings and thus till that question was decided, there could be no question of the respondent making any claim

against the petitioner in that suit. It is held that in view of the statement made by the petitioner in the written statement stating that the claim in

Volumes IV to VIII were to be adjudicated by the present arbitral tribunal, it was not open to the petitioner herein to state that those claims could

not be adjudicated by the learned arbitrator. The learned arbitrator held that the petitioner could not be permitted to take contradictory stand.

103. The learned arbitrator referred to the judgment of Supreme Court relied upon by both the parties on the issue of jurisdiction but relied upon

three judgments referred to and relied upon by the respondent in case of Shyama Charan Agarwala & Sons. (supra), Indian Oil Corporation Ltd.

(supra) and State of Orissa (supra) and held that in the arbitration agreement entered into between the parties herein, covered all disputes between

the parties and in view of the same, all the claims could be adjudicated by the learned arbitrator.

104. In so far as claim arising out of Volumes IV to VI is concerned, it is held by the learned arbitrator that since the respondent had completed all

the work by 3rd July, 2010, those claims were also got covered by the reference in view of the specific demand made in the letters dated 3rd July,

2001, 3rd October, 2001 where demands were made for the settlement of the payment for the work done.

105. In so far as claims arising out of the piece work agreement dated 15th October, 1992 entered into between the respondent and the SBP &

Co. is concerned, it is held by the learned arbitrator that the portion of the work which had been transferred to the respondent herein and which

was the original part of the piece work agreement and which were carried out within the scope of clauses 3 and 4 of the agreement and were thus

arbitrable.

106. Some of the relevant provisions of both the contracts which will have hearing on the issue of jurisdiction raised by the petitioner in respect of

various claims are extracted as under:--

The agreement dated 15 October 1992:--

Piece-work agreement-

4) Any extra item of work within the scope of the works of ""SBP"" as described hereinabove that will be required to be carried out based on

instruction of the Chief Engineer, Irrigation Department, Koyna Hydro Electric Project or his authorised representative which is not included in the

BOQ shall also be executed by ""SBP"" as per the relevant clauses in the Agreement. Payment for the extra item of works shall be made to ""SBP

after deducting 11.50% from the payment for the said extra item of work that will be received by ""PEC"" from ""KHEP Authorities."" These extra

items will form part of this Agreement/Contract.

Any claim or claims that may arise within the scope of ""SBP""s work which may be approved and paid by ""KHEP Authorities"" the payment for the

same as and when received by ""PEC"" shall be made after deducting 11.50% from the payment for the said claims that will be received by ""PEC

from ""KHEP Authorities.

15) Price variation clauses except for steel and cement (as incorporated in clause 1 hereinabove) as incorporated in the Contract Agreement and

which shall be paid by the ""KHEP Authorities"" shall be paid to ""SBP"" on the pro-rata basis of the work done by ""SBP"" when such payment are

received by ""PEC"", after deducting 11.50%.

19) The continuance of this Piece Work Agreement/Contract or at any time after the termination thereof, any difference or dispute shall arise

between the parties hereto in regard to the interpretation of any of the provision herein contained or act or thing relating to this

Agreement/Contract, such difference or dispute shall be forthwith referred to two Arbitrators for Arbitration in Bombay, one to be appointed by

each party with liberty to the Arbitrators in case of differences or their failure to reach an Agreement within one month of the appointment, to

appoint in umpire resident in Bombay and the award which shall be made by two Arbitrators or Umpire as the case may be shall be final,

conclusive and binding on the parties hereto.

If either party to the difference or dispute shall fail to appoint an Arbitrator within 30 calendar days after notice in writing having been given by the

parties or shall appoint an Arbitrator who shall refuse to act then the Arbitrator appointed by the other party shall be entitled to proceed with the

reference as a Sole Arbitrator and to make final decision on such difference or dispute and the award made as a result of such arbitration shall be a

condition precedent to any right or action against any of two parties hereto in respect of any such difference or dispute.

However, before and during the arbitration proceedings the works shall be continued as usual.

Under the circumstances, either party agrees not to revert to Court proceedings.

Sub-Contract agreement-

1) ""B.T.P."" has agreed to execute the entire works as mentioned above at the accepted rates as entered into the B.O.Q. Less 11.50% as mutually

agreed to between ""PEC"" and ""B.T.P."". Rates are for finished work in situ and includes all direct and indirect expenses for labour, materials,

equipment, conveyance leads and lifts etc. complete in all respects that go in for completion of the said works.

4) Any extra item of work within the scope of the works of ""B.T.P."" as described hereinabove that will be required to be carried out based on

instruction of the Chief Engineer, Irrigation Department, Koyna Hydro Electric Project or his authorised representative which is not included in the

B.O.Q. shall also be executed by ""B.T.P."" as per the relevant clauses in the Agreement. Payment for the extra item of works shall be made to

B.T.P."" after deducting 11.50% from the payment for the said extra item of work that will be received by ""PEC"" from ""KHEP Authorities."" These

extra items will form part of this DEED.

Any claim or claims that may arise within the scope of ""B.T.P""s work as and which may be approved and paid by ""KHEP Authorities"" the

payment for the same when received by ""PEC"" shall be released to ""B.T.P."". Payment towards such claim by ""PEC"" to ""B.T.P."" shall be made

after deducting 11.50% from the payment for the said claim that will be received by ""PEC"" from ""KHEP Authorities.

6) ""B.T.P. Shall submit to ""PEC"" after end of each month on agreed date, a statement showing the estimated value of the specific items of the

works executed upto the end of the month and ""PEC"" shall pay ""B.T.P."" the amount due less deduction on account of advances, retention money,

power supply and other recoveries if any, based on the quantities accepted by ""KHEP AUTHORITIES"".

Every reasonable effort shall be made by ""PEC"" to make all payments due in this Sub-contract Agreement to ""B.T.P. "" within seven days of receipt

of such payment by ""PEC"" from ""KHEP Authorities"". The percentage of the security deposit deducted from the monthly bills of ""B.T.P."" to ""PEC

will be of the same percentage as deducted by ""KHEP Authorities"" from the value of the monthly bill of ""PEC"". Security Deposit deducted shall be

paid to ""B.T.P."" by ""PEC"" on receipt thereof by ""PEC"" from ""KHEP Authorities"" as per the terms of the Agreement between ""PEC"" and ""KHEP

Authorities"". The Bank commission charges towards the Bank Guarantees for refund of Security deposits from ""KHEP Authorities"" shall be

recovered by ""PEC"" from the monthly running bills of ""B.T.P."".

14) Price variation clauses as incorporated in the Contract Agreement and which shall be paid by the ""KHEP Authorities"" shall be paid to ""B.T.P.

on the pro-rata basis of the work done by ""B.T.P."" when such payment are received by ""PEC"", after deducting 11.50%. The said payment shall

be released by ""PEC"" to ""B.T.P."" on receipt of the said payments.

18) The continuance of this DEED or at any time after the termination thereof, any difference or dispute shall arise between the parties hereto in

regard to the interpretation of any of the provision herein contained or act or thing relating to this DEED, such difference or dispute shall be

forthwith referred to two Arbitrators for Arbitration in Bombay, one to be appointed by each party with liberty to the Arbitrators in case of

differences or their failure to reach an Agreement within one month of the appointment, to appoint in umpire resident in Bombay and the award

which shall be made by two Arbitrators or umpire as the case may be shall be final, conclusive and binding on the parties hereto.

If either party to the difference or dispute shall fail to appoint an Arbitrator within 30 calendar days after notice in writing having been given by the

parties or shall appoint an Arbitrator who shall refuse to act then the Arbitrator appointed by the other party shall be entitled to proceed with the

reference as a Sole Arbitrator and to make final decision on such difference or dispute and the award made as a result of such arbitration shall be a

condition precedent to any right or action against any of two parties hereto in respect of any such difference or dispute.

Under any circumstances, either party agrees not to revert to Court proceedings.

21) Financial arrangements between the parties pertaining to this Subcontract Agreement as mutually settled between ""PEC"" and ""B.T.P."" are

separately recorded. However, ""PEC"" are fully responsible to ""KHEP Authorities"" for all the contractual obligations under the Contract Agreement

between ""PEC"" and ""KHEP Authorities.

The relevant clauses of MOU are as under:--

(.....)

From the monthly running bills which shall be released to ""B.T.P."" by ""PEC"" all recoveries towards advance payments, security deposit, electricity

charges for the energy consumed for ""B.T.P."s portion of works, Bank commission charges and any other and all that may become due, shall be

made by ""PEC"".

When price adjustment bills for cement and steel are received from KHEP Authorities, the same shall be shared in proportion of value of work

done by ""PEC"" and ""B.T.P."". However, from the funds so realised initially ""PEC"" & ""B.T.P."" shall keep at site to a maximum of Rs. 15.00 lacs

each as a revolving fund (i.e. total Rs. 30.00 lacs). The said funds shall be uilised for purchase of cement & steel as required. This provision is in

addition to the funds as mentioned under clause 8(a) hereinbelow.

Out of the amount received by ""B.T.P."" on account of price adjustment of cement and steel as above, Rs. 7.00 lacs shall be paid to ""PEC"" by

B.T.P."" in due course of time to be mutually agreed to.

107. There is no dispute that the proceedings in respect of the disputes and differences between the petitioner and KHEP authorities were initiated

in the month of October, 1996 and three separate arbitral proceedings for the claims relating to extra items and price i.e. other than BOQ

items/rates were referred to arbitration. In the said arbitral proceedings, three awards (Volumes-I, II and III) for Rs. 31 crores, Rs. 24 crores and

Rs. 2.31 crores approximately were made in favour of the petitioner and against the said KHEP authorities on 11th February, 2000. The said

KHEP authorities made payment to the petitioner in respect of the awards in respect of Volumes-II and III. On 22nd February, 2000, the

respondent in both the matters demanded an alleged balance amount of Rs. 5,19,22,824/- in respect of RA bill No. 139/PAC and RA bill No. 81

from the petitioner.

108. It is the case of the petitioner that a meeting came to be held between the representatives of the parties on 2nd April, 2000. The parties

agreed that from the award arising out of Volumes-II, 11.58% would be retained by the petitioner and the balance would be shared at 50:50 basis

i.e. the petitioner''s share would be 55.75% and the share of the respondent would be 44.25% arising out of Volume-II. Insofar as Volume-I

award is concerned, it was agreed that in all future/other case, amounts would be shared by the petitioner and the respondent on 52% : 48% basis.

It is the case of the petitioner that on the basis of such agreement on 2nd April, 2000, the petitioner paid to the respondent a sum of Rs.

9,76,93,283/- being its 44.25% share in the amount received by the petitioner from the KHEP authorities in respect of the award arising out of

Volume-II.

109. In so far as award in respect of Volume-I is concerned, the State Government challenged the said award in the Court of Civil Judge, Senior

Division, Satara. The State Government deposited the awarded amount along with interest on 13th June, 2000 before the Civil Judge, Senior

Division, Satara. On 5th June, 2000, the petitioner made balance payment of Rs. 77,43,750/- payable to the respondent for the award (Volume-

II). The respondent did not make any further claim in respect of award (Volume-II) for the next 13 months.

110. It is the case of the petitioner that on 8th June, 2001, an updated statement of account was prepared by the Accountant of the petitioner and

was signed by the representative of the respondent showing the amounts payable by the petitioner to the respondent in regard to the claim of Rs.

5,19,22,824/- which amount after adjustment was shown as (i) Rs. 28,132=51 payable to the respondent and (ii) Rs. 21,121/- payable to M/s.

SBP & Co. The draft of two No Claim Letters were faxed to the respondent. The State Government subsequently withdrew the challenge to the

award arising out of Volume-I and subsequently the petitioner received the amounts of Rs. 30,07,33,273/- after deduction of tax/income tax/less

contract tax in respect of Volume-I.

111. According to the petitioner on 16th June, 2001, a meeting was held by the representatives of the parties in which the representative of the

petitioner handed over to the representative of the respondent various payments. By a letter dated 16th June, 2001, the petitioner recorded full and

final settlement in respect of Volumes-I, II and III. It is the case of the petitioner that the respondent had acknowledged the receipt of the said

letter and did not raise any objection.

112. By their letter dated 3rd July, 2001, the respondent in both the matters alleged that the petitioner by coercion and undue influence of one of

the power of attorney holder of sub-contract and piece work contract made him to sign on some erstwhile doctored documents. By the said letter,

the respondent enumerated five specific claims and raised a demand thereof upon the petitioner. It was stated in the said letter that if the petitioner

failed to pay the said alleged dues enumerated in the said letter dated 3rd July, 2001 within 30 days, the dispute would be referred to arbitration.

By a letter dated 2nd August, 2001, the petitioner denied the said claim contending that the matter pertaining to the payments to be made to the

respondent for the awards (Volumes-I and II) had been settled and all the statements and calculations had been prepared and signed by Shri.

Balasaheb Patil of the respondent. Both the respondents vide their letter dated 9th August, 2001 denied that their claims had been settled.

113. It is not in dispute that on 3rd October, 2001 both the respondents jointly addressed a letter to the petitioner once again referring to those

five claims made by a letter dated 3rd July, 2001 and invoked arbitration agreement under clause 18 of the sub-contract agreement and clause 19

of the piece work agreement respectively and appointed Shri T.G. Radhakrishna as its arbitrator and called upon the petitioner to appoint their

arbitrator. Without prejudice to the rights and contentions, the petitioner appointed Shri S.N. Huddar as its arbitrator. The said Shri S.N. Huddar

however, refused to act as an arbitrator. There is no dispute that the petitioner thereafter had filed two separate arbitration applications against

both these respondents respectively under section 11(6) of the Arbitration & Conciliation Act, 1996. The said arbitration applications were

opposed by both the respondents on the ground that the petitioner could not appoint any other arbitrator in place of Shri S.N. Huddar and insisted

that Shri T.G. Radhakrishna, who was appointed by both the respondents shall act as a sole arbitrator.

114. The designate of the Chief Justice however, upheld the right of the petitioner to appoint a substitute arbitrator in place of Shri S.N. Huddar

and also directed to appoint a third arbitrator in the matter. The writ petitions filed by the respondent in this Court impugning the said order passed

by the learned designate of the Chief Justice were dismissed on 3rd February, 2003. The respondent thereafter filed two separate Special Leave

Petitions before the Supreme Court against the said order dated 3rd February, 2003.

115. There is no dispute that during the pendency of the said two Special Leave Petitions filed by the respondent, the learned arbitrator made three

further awards on 29th February, 2008, in the disputes between the petitioner and the said KHEP authorities/State Government arising out of

Volumes-IV to VIII. The claim of the petitioner in respect of Volume-VI was however, rejected in those arbitral proceedings.

116. There is no dispute that the respondents in both the matters had filed a suit in the Court of Civil Judge, Senior Division, Satara against the

petitioner and the State Government in the month of April, 2008 praying for an injunction against the State Government from paying and releasing

the amounts of Rs. 163 crores due to the petitioner with regard to the awards arising out of Volumes-IV, V, VII and VIII till the claim of the

respondent was settled. During the pendency of the said suit, the said KHEP authorities/State Government challenged those three awards airing

out of Volumes-IV, V, VII and VIII in the Court of Civil Judge, Senior Division, Satara on 13th June, 2008. There is no dispute that the learned

Civil Judge, Senior Division, Satara granted a stay of those three awards in favour of the said KHEP authorities/State Government on the condition

that the petitioner therein shall deposit a sum of Rs. 100 crores out of the total award of Rs. 163.31 crores and interest in the said Court pending

disposal of the said petitions. The petitioner was however, allowed to withdraw the said amount of Rs. 100 crores on furnishing bank guarantee of

Rs. 50 crores and on giving an indemnity for Rs. 50 crores. It is not in dispute that the said arbitration petition filed under section 34 of the

Arbitration & Conciliation Act, 1996 is still pending.

117. The petitioner herein filed its written statement in the said proceedings (Suit No. 117 of 2008) before the Civil Judge, Senior Division, Satara

which was filed by the respondent herein contending that until the entitlement of the respondent was decided in any arbitral proceedings that may

be commenced, they could not make any claim against the amounts deposited by the State Government pursuant to the order passed by the

concerned Court in arbitration petition challenging the awards arising out of Volumes-IV, V, VII and VIII. It is not in dispute that the respondent

had applied for an amendment to the plaint in the said suit on 6th September, 2008 and sought an addition to the prayer clause for a declaration

that the respondent was entitled to 88.5% of the amounts to be disbursed towards the awards (Volumes-IV, V, VII and VIII) and for an order

directing the petitioner herein to pay 88.5% share of the amounts to be disbursed by the Government to the petitioner in respect of the awards.

There is no dispute that the learned Civil Judge, Senior Division, Satara had allowed the said application for amendment filed by the respondent but

the respondent did not carry out the said amendment.

118. The respondent however by their letter dated 18th September, 2008 recorded that the arbitration had earlier been invoked only in connection

with the disputes that relating to the awards (Volumes-IV, V, VII and VIII) had been made on 29th February, 2008. The respondent alleged that

the petitioner would be receiving or must have received payment for the same from the State Government and further demanded that the payments

shall be made by the petitioner to the respondent within 10 days from the date of receipt of the payment from the State Government and

threatened that in case failure on the part of the petitioner, it would be presumed that the dispute had arisen between the parties and the same

would be referred to arbitration in terms of clause 18 of the sub-contract agreement and under clause 19 of the piece-work agreement.

119. By an order dated 21st October, 2009, the Supreme Court accepted the contentions of the respondent herein and has set aside the order

dated 18th November, 2002 passed by the Division Bench of this Court and also the order passed by the learned designate of the Chief Justice

thereby appointing a substituted arbitrator. The Supreme Court held that the arbitration proceedings to be proceeded with before the said

Shri.T.G. Radhakrishna, who was appointed by the respondent and the said M/s. SBP & Co. as a sole arbitrator. The respondent thereafter

applied for withdrawal of the said suit on 27th October, 2009 with liberty to file appropriate legal proceedings.

120. It is not in dispute that the respondent in their statement of claim filed before the learned sole arbitrator Shri T.G. Radhakrishna made not only

those five claims which were enumerated in the letters dated 3rd July, 2001 and 3rd October, 2001 but also made claims arising out of subsequent

awards i.e. arising out of Volumes-IV, V, VII and VIII which had been made only on 29th February, 2008. The petitioner thereafter raised a plea

of jurisdiction by filing an application under section 16 of the Arbitration & Conciliation Act, 1996 before the learned arbitrator in respect of the

additional claims which were made in the statement of claim and which were not enumerated in the letters dated 3rd July, 2001 and 3rd October,

2001. The learned arbitrator however, rejected the said application and held that he had jurisdiction to entertain all the claims.

121. The question that arose before the learned arbitrator was whether the claims which were not enumerated in the letters dated 3rd July, 2001

and 3rd October, 2001 and which were made vide letter dated 18th September, 2008 could also be made in the statement of claim or whether the

said additional claims were also required to be referred to the arbitral tribunal by following the procedure under clause 18 of the subcontract

agreement and clause 19 of the piece work contract respectively.

122. There is no dispute that in the said letter dated 18th September, 2008, the respondent did not nominate its arbitrator under clause 18 of the

sub-contract agreement and clause 19 of the piece work contract and also did not call upon the petitioner to nominate its nominee arbitrator. The

petitioner therefore could not nominate any arbitrator in respect of those additional claims which had arisen in view of the declaration of the awards

arising out of Volumes-IV, V, VII and VIII.

123. A perusal of the said letter dated 18th September, 2008 clearly indicates that the demand made in the said letter was on the basis of the

declaration of the awards arising out of Volumes-IV to VIII which were made on 29th February, 2008. Much prior to 29th February, 2008, the

process of appointment of the arbitrators of both the parties was already complete. The matter was pending in the Supreme Court. In the said

letter dated 18th September, 2008, the respondent itself had recorded that the arbitration had earlier been invoked only in connection with the

dispute relating to the awards (Volumes-I and II). The additional claims made in the said letter were on the premise that the petitioner would be

receiving various amounts under those awards from out of Volumes-IV, V, VII and VIII or must have received the said amount. The cause of

action thus arose even according to the respondent in respect of those claims enumerated in the said letter dated 18th September, 2008 only after

the awards in respect of Volumes-IV, V, VII and VIII were made by the learned arbitrator in the arbitral proceedings between the petitioner and

the said KHEP authorities/State Government on 29th February, 2008.

124. In the back drop of these facts in hand, the petitioner herein had contended that the respondent unilaterally could not have included these new

claims which arose only after 29th February, 2008 in the statement of claim which was filed before the learned arbitrator, who was appointed for

adjudicating the dispute in respect of five enumerated claims in the letters dated 3rd July, 2001 and 3rd October, 2001. On the other hand, it is

vehemently urged by the respondent that the claims were made before the learned arbitrator pursuant to an order passed by the Supreme Court in

the Special Leave Petition which were filed by the respondent arising out of the proceedings filed in this Court under section 11 of the Arbitration

& Conciliation Act, 1996. It was urged that since the entire work was completed in the year 2000-2001, the learned arbitrator had jurisdiction to

entertain, try and dispose of all the claims. It is also vehemently urged by learned senior counsel for the respondent that under the arbitration

agreement, there was no bar against the respondent from making subsequent claims arising out of the same contract in respect of which the work

was already completed much earlier before the same arbitrator. In support of this submission, learned senior counsel for the respondent placed

reliance heavily on the judgment of the Supreme Court in two Special Leave Petitions which were filed by the respondent herein, reported in ,

(2009) 10 SCC 293 against the petitioner arising out of the order passed by this court in the writ petition filed by the respondent.

125. It is not in dispute that there was no demand made by the respondent in respect of these additional claims which were not enumerated in the

letters dated 3rd July, 2001 and 3rd October, 2001 till the arbitral awards came to be declared by the arbitral tribunal arising out of Volumes-IV,

V, VII and VIII on 29th February, 2008. It is also not in dispute that Shri S.N. Huddar, the learned arbitrator nominated by the petitioner had

refused to act as an arbitrator. The petitioner had nominated another arbitrator in place of Shri S.N. Huddar. Two arbitration application were filed

under section 11(6) of the Arbitration & Conciliation Act, 1996 by the petitioner. The learned designate of the Chief Justice had accepted the

contention of the petitioner that the petitioner was entitled to appoint another arbitrator in place of Shri S.N. Huddar. The writ petitions filed by the

respondent challenging the said order passed by the learned designate of the Chief Justice came to be dismissed. Special Leave Petition came to

be filed by the respondent arising out of the said order passed by the Division Bench of this Court dismissing the writ petition filed by the

respondent and the order passed by the learned designate of the Chief Justice allowing the petition filed by the petitioner to substitute an arbitrator

and directing the learned arbitrators to appoint a presiding arbitrator. All these proceedings were arising out of the applications filed under section

11(6) of the Arbitration & Conciliation Act, 1996. The Special Leave Petition filed by the respondent was pending in the Supreme Court for about

six years.

126. A perusal of the said order and judgment delivered by the Supreme Court in the Special Leave Petition filed by the respondent herein clearly

indicates that after considering the scope of arbitration agreement recorded in this case, it is held that the said clause specifies the consequence of

failure of either party to the difference or dispute to appoint an arbitrator within 30 calendar days or refusal of arbitrator appointed by either party

to accept such appointment or act upon the same. It is held that in that event, the arbitrator appointed by other party becomes entitled to proceed

with the reference as a sole arbitrator and make an award. It is held that there is nothing in the said clause from which it can be inferred that in the

event of refusal of an arbitrator to accept the appointment or arbitrate in the matter, the party appointing such arbitrator has an implicit right to

appoint a substitute arbitrator. The Supreme Court held that thus in terms of the agreement entered into between the parties, the petitioner herein

could not appoint Shri S.L. Jain as a substitute arbitrator simply because Shri S.N. Huddar declined to accept the appointment as an arbitrator and

consequently Shri T.G. Radhakrishna who was appointed as an arbitrator by the respondent herein became the sole arbitrator for deciding the

disputes or differences between the parties.

127. In my view, the Supreme Court in the said reported judgment , (2009) 10 SCC 293 in the matter arising out of the same contract has

interpreted the terms of the agreement and held that since Shri S.N. Huddar, the arbitrator nominated by the petitioner had failed to act as an

arbitrator, under the arbitration agreement, he could not have been substituted by making another appointment by the petitioner and in that event

the arbitrator nominated by another party only can act as a sole arbitrator. In my view, the said judgment of the Supreme Court does not decide

the scope of reference of specific dispute between the parties to Shri T.G. Radhakrishna or does not provide that respondent could make all

claims before the learned sole arbitrator.

128. In my view since the cause of action had arisen in respect of those additional claims after 29th February, 2008, the respondent ought to have

followed the same procedure for appointment of an arbitrator and for referring the disputes to arbitration which was followed in respect of five

initial claims. There is no dispute that the respondent could have referred such additional claims by way of successive reference arising out of the

subsequent award having declared during the pendency of the earlier arbitral proceedings. In my view, if the respondent would have followed the

said mandatory procedure by nominating its arbitrator and by calling upon the petitioner to nominate its arbitrator, the petitioner in that event could

have nominated its arbitrator and the arbitrators nominated by both the parties would have appointed the presiding arbitrator and would have

constituted an arbitral tribunal. The said Shri T.G. Radhakrishna in that event could not act as sole arbitrator for adjudication of additional claims.

The respondent thus could not have made those claims directly before the learned sole arbitrator who was directed to act as a sole arbitrator by

the Supreme Court in view of the arbitrator nominated by the petitioner having failed to act as an arbitrator.

129. In my view, since the respondent did not follow the mandatory procedure under clause 18 of the sub-contract agreement and clause 19 of the

piece work contract and since the petitioner did not get an opportunity to nominate any arbitrator in respect of the subsequent claims enumerated

in the letter dated 18th September, 2008, the learned arbitrator Shri T.G. Radhakrishna could not have acted as a sole arbitrator in respect of

additional claims and had no jurisdiction to entertain those additional/subsequent claims.

130. Under section 11 of the Arbitration & Conciliation Act, 1996, the Chief Justice or his designate is not required to specify the dispute or refer

any specific dispute to arbitration nor does it require the arbitrator to decide only the referred disputes.

131. However, once the respondent had enumerated five claims which had arisen when the letters dated 3rd July, 2001 and 3rd October, 2001

were addressed and had admittedly not made any demand in respect of the subsequent claims which arose only in view of the arbitral awards

having been declared on 29th February, 2008. there being consensual reference of specific five claims, the respondent not having followed the

mandatory procedure under clause 18 of the sub-contract agreement and clause 19 of the piece work agreement respectively, in my view the

learned arbitrator has acted beyond his jurisdiction and has travelled beyond the scope of reference by entertaining the claims arising out of

Volumes-IV, V, VII and VIII and by entertaining the claims which were not made in the letters dated 3rd July, 2001 and 3rd October, 2001.

132. The Supreme Court in case of State of Goa v. Praveen Enterprises (supra), which is heavily relied upon by Dr.Tulzapurkar, learned senior

counsel for the respondent has held that the Chief Justice or his designate is not required to draw up the list of disputes and refer them to

arbitration. It has been held that the arbitrator will have jurisdiction to entertain the counter claim even though it was not raised at a stage earlier to

the stage of pleadings before the arbitrator. A perusal of clause 18 of the sub-contract agreement and clause 19 of the piece work agreement

respectively clearly indicates that only if a party fails to appoint an arbitrator within 30 calendar days after notice in writing having been received or

an arbitrator appointed by such party refuses to act as an arbitrator, the arbitrator appointed by either party shall be entitled to proceed with the

reference as a sole arbitrator.

133. It is not in dispute that in respect of subsequent claims in respect of which the cause of action had arisen, admittedly in view of the arbitral

awards in the arbitral proceedings filed by the petitioner against KHEP authorities were referred on 29th February, 2008. The petitioner was not

given any notice of 30 days for nominating any arbitrator in respect of these additional claims. Since there was no default on the part of the

petitioner for nominating any arbitrator for want of notice, the learned arbitrator nominated by the respondent in respect of five enumerated claims

could not have acted as a sole arbitrator. The judgment of the Supreme Court in case of State of Goa v. Praveen Enterprises (supra) thus would

not assist the case of the respondent.

134. Supreme Court in case of Indian Aluminium Cables Ltd. (supra) has held that the arbitrators must confine themselves to the reference and

cannot travel outside it merely because under the terms of the contract the dispute in regard to the matter would have been covered and could have

been referred to arbitration. In my view even if the respondent could make subsequent claims, which were referred in the notice dated 18th

September, 2008 by invoking clause 18 of the subcontract agreement and clause 19 of the piece work agreement respectively in view of the

additional awards arising out of Volumes-IV, V, VII and VIII, that itself would not be a ground for the learned arbitrator entertaining even those

claims which were not referred to him by following mandatory procedure under clause 18 of the sub-contract agreement and clause 19 of the

piece work agreement respectively. In my view, the judgment of the Supreme Court in case of Indian Oil Corporation Ltd. v. Industrial Gases Ltd.

(supra) relied upon by Dr.Tulzapurkar, learned senior counsel for the respondent is concerned, the Supreme Court interpreted the terms of

reference and held that the terms of reference were sufficiently comprehensive and having regard to special type of agreement, the claims for

subsequent period may also be included in the same reference. The Supreme Court upheld the interpretation of the High Court of the arbitration

agreement. The facts of this case however are totally different than the facts before the Supreme Court in the said judgment.

135. In this case, the respondent did not follow any procedure under clause 18 of the sub-contract agreement and clause 19 of the piece work

agreement respectively for referring the disputes arising out of Volumes-IV, V, VII and VIII and for the appointment of an arbitrator according to

those provisions. The judgment of the Supreme Court in case of Indian Oil Corporation Ltd. (supra) thus would not assist the respondent.

136. In so far as the judgment of the Supreme Court in case of Shyama Charan Agarwala & Sons (supra) relied upon by Dr.Tulzapurkar, learned

senior counsel for the respondent is concerned, a perusal of the said judgment clearly indicates that Union of India had not raised any plea before

the learned arbitrator that the future claims were beyond the scope of reference. The said judgment of the Supreme Court thus is clearly

distinguishable in the facts and circumstances of this case. The petitioner had raised the issue of jurisdiction specifically in this case by filing an

application under section 16 of the Arbitration & Conciliation Act, 1996.

137. In so far as the judgment of the Supreme Court in case of V.H. Patel & Co. (supra) relied upon by Dr.Tulzapurkar, learned senior counsel

for the respondent is concerned, the issue before the Supreme Court was whether in a partnership dispute, the learned arbitrator could have

entered upon the question of dissolution of partnership. In that context, it is held that the idea was to settle all the disputes between the parties and

not to confine the same to any one or other issue arising there under. The judgment of the Supreme Court in case of V.H. Patel & Co. (supra) thus

does not apply to the facts of this case and would not assist the respondent.

138. In so far as the submission of Dr.Tulzapurkar, learned senior counsel for the respondent that there was no provision in the agreement that only

those claims which were notified to the petitioner by the respondent could be referred to arbitration is concerned, there is no dispute that

successive reference under the same arbitration agreement is permissible if two separate causes of action under the same arbitration agreement

arise at different stages. A perusal of the notice/letters issued by the respondent on 3rd July, 2001 and 3rd October, 2001 enumerating five claims

and perusal of the notice dated 18th September, 2008 issued by the respondent making an issue in respect of subsequent claims arising out of the

arbitral awards under Volumes-IV, V, VII and VIII clearly indicates that both the causes of action had occurred at a different stages though under

the same agreement and thus successive reference was permissible. The respondent themselves had enumerated separate claims in two separate

notices invoking arbitration agreement. In respect of the first five claims, the respondent had followed mandatory procedure for the appointment of

an arbitrator, whereas in respect of remaining claims which had arisen after declaration of the arbitral award in Volumes-IV, V, VII and VIII, no

such mandatory procedure was followed. There is thus no merit in the submission of learned senior counsel for the respondent that claims arising

out of subsequent award were within the jurisdiction of the learned arbitrator.

139. In so far as the submission of learned senior counsel for the respondent that since the letter dated 18th September, 2008 was addressed by

the respondent before delivery of the Supreme Court judgment and thus the learned arbitrator had jurisdiction to adjudicate upon all the claims

made by the respondent is concerned, the fact remains that the respondent did not nominate any arbitrator in respect of those claims made on 18th

September, 2008, nor called upon the petitioner to nominate their nominee arbitrator so as to constitute the arbitral tribunal. There is thus no merit

in this submission of learned senior counsel for the respondent.

140. A perusal of the award indicates that the learned arbitrator while rejecting the plea of jurisdiction raised by the petitioner has heavily placed

reliance on the fact that since the work was already completed by 3rd July, 2010, those claims were also covered by reference in view of the

specific demand made in the letters dated 3rd July, 2001 and 3rd October, 2001. In my view the said conclusion drawn by the learned arbitrator

is contrary to the stand taken by the respondent themselves in the letter dated 18th September, 2008 that those claims had arisen in view of the

arbitral awards dated 29th February, 2008. If according to the learned arbitrator the cause of action had already arisen in respect of the

subsequent claims prior to 3rd July, 2001, the learned arbitrator ought to have dismissed all the subsequent claims on the ground of limitation itself.

141. The learned arbitrator has also placed reliance on the written statement filed by the petitioner in the suit filed by the respondent before the

learned Civil Judge, Senior Division, Satara iner-alia praying for injunction. A perusal of the record indicates that though the respondent had

applied for amendment in the said suit inter-alia praying for a declaration that the respondents were entitled to 88.5% of the amounts to be

distributed under Volumes-IV to VIII and for an order and decree against the petitioner herein to pay the said amount and though the said

amendment was allowed by the learned Civil Judge, Senior Division, Satara, the respondent did not carry out the said amendment. The learned

arbitrator totally over looked these admitted facts and placed reliance only on the written statement filed by the petitioner in the said suit contending

that until the entitlement of the respondent was decided in any arbitration proceedings that may be commenced, the respondent could not make any

claims to the said amounts. Even such averments in the written statement would not preclude the petitioner to raise plea of jurisdiction in the arbitral

proceedings.

142. In so far as reliance on section 23 of the Arbitration & Conciliation Act, 1996 by learned senior counsel for the respondent is concerned,

though the said provision permits the amendment of the statement of claim and defence, the said provision would not permit the learned arbitrator

to travel beyond the scope of reference or permit the amendment of the claim and to seek adjudication without following mandatory procedure

prescribed in the arbitration agreement required to be followed for referring the dispute to arbitration.

143. In my view claim No. 1 (second part), claim No. 2 (second part), claim No. 4, claim No. 8 (second part) and claim No. 9 (first part) were

thus beyond the jurisdiction of the learned arbitrator and the learned arbitrator thus exceeded his jurisdiction in respect of those claims. The

impugned awards in respect of those claims is thus set-aside on that ground itself.

Whether the parties had agreed to share payments in the

agreed ratio in view of the letter dated 15th October 1992

addressed by the respondent to the petitioner?

144. In so far as the issue whether the petitioner had proved that there was an agreement between the petitioner and the respondent whereunder

the respondent had agreed to receive only 50% of the award amount pertaining to Volume I and 44.25% of the award amount pertaining to

Volume No. II is concerned, the learned arbitrator held that it was an admitted fact that the works under the Volume Nos. I and II were carried

out entirely by the respondent and the M/s. SBP & Co. and thus they were entitled to get the awarded amount. It is held that the petitioner herein

was entitled to 11.5% of such amount as its commission/margin. The petitioner herein had alleged that in respect of Volume No. I, an agreement

was arrived at between Shri. Pravin Patel, Chairman of the petitioner and Shri. Balasaheb Patil, representative of the respondent on 2nd April

2001.

145. It is held by the learned arbitrator that Shri. Pravin Patel and Shri. Rupen Patel had not been examined by the petitioner. Shri. Sapre, the

witness examined by the petitioner admitted that Shri. Pravin Patel had attended the proceedings on 11th January 2010 and Shri. Rupen Patel was

hale and hearty. Though Shri. Pravin Patel filed an affidavit by way of the examination-in-chief but did not tender himself for cross-examination.

The petitioner had made a statement subsequently that the petitioner did not wish to examine Shri.Pravin Patel. Learned arbitrator accordingly

drew adverse inference against the petitioner that the agreement set up by the petitioner was false. It is held that minutes of meeting were not signed

by any one. Shri.Balasaheb Patil had denied the minutes of meeting in the cross-examination. Learned arbitrator has held that since there were no

written documents which evidenced the alleged agreement, only conclusion could be drawn was that there was no agreement between the

petitioner and the respondent as alleged by the petitioner.

146. It is urged by learned senior counsel for the petitioner that in view of the letter dated 15th October, 1992, addressed by the respondent to the

petitioner stipulating that the payments were received for the works other than those for quoted/accepted rates should be shared by the petitioner

and respondent on 50:50 basis after deducting the expenses incurred, claim Nos. 1, 2, 3 and 5 were not maintainable. The respondent has

however urged that the said letter was not applicable in respect of the entire claim.

147. A perusal of the award indicates that though the learned arbitrator has referred to the said letter/agreement dated 15th October, 1992 in the

impugned award only while dealing with claim No. 4 and rejecting the said claim, the learned arbitrator while dealing with claim Nos. 1, 2, 3 and 5

has held that the said letter/agreement dated 15th October, 1992 had not been accepted by the petitioner. A perusal of paragraph 3.2 of the

reply/written statement filed by the petitioner to the statement of claim filed by the respondent and also paragraph 12 clearly indicates that it was a

specific plea raised by the petitioner that the said letter/agreement dated 15th October, 1992 was a part of the agreement between the parties

thereby modifying/varying sub-contract dated 15th October, 1992. The petitioner had expressly relied upon the said letter while opposing or

defending the claim of the respondent for 88.5% of Volumes-I and II. The petitioner had also relied upon the said letter/agreement in paragraph 34

of their reply while opposing or defending the claims arising out of Volumes-IV and V and also in the written submissions filed before the learned

arbitrator and more particularly in paragraph 6 vis-Ã¯Â¿Â½-vis claim relating to Volumes-I and II and in paragraph 14 of the claims relating to

Volumes-IV and V.

148. A perusal of the arbitration petition also indicates that a specific plea is raised by the petitioner in paragraph 15 that the issue relating to non-

consideration of the said letter dated 15th October, 1992 had been specifically raised in the present arbitration petition. In the written submissions

filed by the respondent in the present proceedings also clearly indicates that it was the submission of the respondent that the award cannot be

interfered with on the ground of non-consideration of the letter/agreement dated 15th October, 1992. A perusal of the record indicates that both

the parties had specifically relied upon the said letter/agreement dated 15th October, 1992. A perusal of the record indicates that the learned

arbitrator however, has rendered a perverse and patently illegal finding that the petitioner had not accepted the said letter/agreement dated 15th

October, 1992 while rejecting the plea of the petitioner that the said letter dated 15th October, 1992 was part of the agreement between the

parties modifying/varying the sub-contract dated 15th October, 1992. Though both the parties had relied upon the said letter/agreement dated

15th October, 1992, the learned arbitrator totally over looked the said letter/agreement in the impugned award and has acted contrary to what

was submitted by both the parties before the learned arbitrator.

149. The Supreme Court in case of K.P. Poulose (supra) has held that the learned arbitrator by ignoring the material documents had committed

misconduct in conducting the proceedings. In my view, the said judgment of the Supreme Court would assist the case of the petitioner. The learned

arbitrator thus ought to have rejected claim Nos. 1, 2, 3 and 5 on this ground also.

150. In so far as the submission of Dr.Tulzapurkar, learned senior counsel for the respondent that all the claims except claim No. 4 of the

respondent would fall under first part of the said letter dated 15th October, 1992 by which the petitioner was liable to pay to the respondent after

deducting 11.5% is concerned, a perusal of the award indicates that the learned arbitrator has not rejected the contentions of the petitioner on that

ground. The learned arbitrator has not dealt with the contention of the petitioner that the claims under Volumes-IV to VIII fell under paragraph 2 of

the said letter dated 15th October, 1992 and that the respondent had not made those claim under BOQ items.

Whether the respondent had given any "no claim" letters"

dated 8th June 2001 and whether those letters were the result

of coercion and undue influence exercised by the petitioner?

151. It is held by the learned arbitrator that "no claim" letters were sent under the cover of no claim letter dated 9th June 2001 by the petitioner to

the respondent. It is held that the petitioner who had in his possession over Rs. 10 crores pertaining to award arising out of Volume No. II and was

about to receive another amount of Rs. 30 crores relating to award arising out of Volume No. I, was in a dominant position to pressurize the

petitioner to give no claim letters. It is held that the fact that about Rs. 15 crores which were legitimately belonged to the respondent were paid

over to them immediately thereafter was the clear indicator of pressure being put upon the respondent for issue of no claim letter.

152. Learned arbitrator has held that the letters were the result of coercion and undue influence exercised by the petitioner. If the respondent

would not have given such no claim letters, monies would not have been paid by the petitioner which amounted to undue influence. It is held that by

the time no claim letters were given, the respondent herein had already completed the work. The claims in Volume Nos. I, II and VI in respect of

which the entire works were carried out by the respondent and the works in Volume Nos. IV and V relatable to portion of the works carried out

by the respondent aggregate to over Rs. 100 crores. It is held that the respondent being a contractor was thus in an extremely weak position and

the petitioner held the position to dominate the will of the contractor. It is held that the respondent had already carried out the work relating to

Volume Nos. I, II, IV, V & VI by the time, "No claim letters" were given by the respondent.

153. In paragraph 17.9 of the impugned award, the learned arbitrator held that as per the agreement, all monies for the work carried out by the

respondent had to be first received by the petitioner from KHEP authorities and the petitioner in turn was to pay it over to the respondent. The

learned arbitrator has held that if the amount received by the respondent from the petitioner was excluded, the balance sheet of the respondent

would clearly show that the respondent was under loss in all the three years. In the concluding paragraph, the learned arbitrator has held that no

claim letters were the result of coercion and undue influence and that the petitioner herein had failed to prove that no claim letters were given

voluntarily after receiving the amount specified therein.

154. It is the case of the petitioner that Balasaheb Patil had executed two No Claim Letters both dated 8th June, 2001, at his request,

representative of the petitioner had mentioned the details of the cheques/demand drafts in the said letter after which said Shri. Balasaheb Patil had

signed the said letters and had handed over the said cheques to the petitioner along with covering letter dated 9th June, 2001. The petitioner had

thereafter released the said amount to the respondent. The respondent had encashed the cheques given by the petitioner to the respondent. By

their letter dated 3rd July, 2001 the respondent however alleged that the said ""No Claim Letters"" were signed under coercion and undue influence

committed by the petitioner on one of the power of attorney holders of the respondent and he was made to sign on some of the unilateral doctored

documents. A perusal of the record indicates that the petitioner had already recorded by his letters dated 16th June, 2001 and 27th June, 2001

that all materials with regard to Volumes-I and II had already been settled in the meeting held on 16th June, 2001 except for payment of a sum of

Rs. 3,28,014/- which would be paid shortly.

155. A perusal of the statement of claim filed by the respondent clearly indicates that there was no plea of alleged undue influence caused by the

respondent against the petitioner in signing No Claim Letters dated 8th June, 2001 and 16th June, 2001. The learned arbitrator however, has

rendered a finding that the said no claims letters were result of alleged coercion and undue influence. The finding rendered by the learned arbitrator

in my view, is beyond the case of the respondent in the statement of claim. A perusal of record further indicates that three awards were made in

favour of the petitioner and against KHEP authorities in respect of Volumes-I, II and III only on 11th February, 2000. The State Government had

already made payment in respect of Volumes-I and II. The petitioner had already made payment of Rs. 9.76 crores in respect of Volume-II award

on 2nd April, 2000. On 1st June, 2000, the respondent had made a claim for the the Works Contract Tax. On 5th June, 2000, the petitioner paid

further sum of Rs. 77,43,750/- to the respondent towards the Works Contract Tax. There was no claim made by the respondent regarding

Volume-II till July, 2001 i.e. for a period of 13 months. The record further indicates that on 8th June, 2001, no amount had been received by the

petitioner in respect of Volume-I from the KHEP authorities/State Government. The said amount under Volume-I was received only on 15th June,

2001. On 16th June, 2001, the parties already held a meeting in which the said writing dated 8th June, 2001 was executed after noting the details

of the cheques. The petitioner had accordingly made payment to the respondent as agreed. The respondent raised plea of coercion and undue

influence after more than 18 days. The finding of the learned arbitrator that there was coercion or undue influence by the petitioner in respect of

claim under Volumes-I and II is thus ex-facie perverse and without application of mind.

156. A perusal of record further indicates that withholding of payment under award Volumes-II, I V, V and VI was sought to be introduced only

in the oral evidence of the witness examined by the respondent which was contrary to the case pleaded by the respondent in the statement of

claim. Similarly the finding of the learned arbitrator in respect of payment arising out of Volumes-IV and V over Rs. 100 crores holding that the

said amount was due and receivable by the petitioner in the year 2001 and 2003 being withheld is also ex-facie perverse and patently illegal. The

arbitral award in respect of those volumes were not even made by the arbitral tribunal till 2008 and thus the question of the petitioner withholding

the said amount alleged to be due and payable to the respondent on the date of signing the said "no claim letters" in the year 2001 did not arise.

The respondent had not even made any claims arising out of Volumes-IV to VIII till 2008.

157. In so far as the submission of Dr.Tulzapurkar, learned senior counsel for the respondent that the learned arbitrator has appreciated the

documentary as well as oral evidence and has rendered a finding of fact which cannot be interfered with by this Court is concerned, in my view, if

the finding is totally perverse and the award shows patent illegality, the Court has power to interfere with such perverse finding and the award

which shows patent illegality.

158. In so far as the finding of the learned arbitrator that the petitioner did not examine the Chairman of the petitioner on the issue of coercion and

undue influence and thus adverse inference was required to be drawn is concerned, in my view, adverse inference drawn by the learned arbitrator

on this ground also is totally perverse. The onus was on the respondent to prove that there was any coercion or undue influence committed by the

petitioner upon the respondent while the respondent signing no claim letters. The respondent thus having failed to prove such allegation of coercion

and undue influence, the learned arbitrator could not have drawn any adverse inference in favour of the respondent and against the petitioner.

159. In so far as the judgment of the Supreme Court in case of Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors

(supra) relied upon by Dr.Tulzapurkar is concerned, the Supreme Court in the said judgment has held that in the case where a contractor has made

huge investment, he cannot afford not to take from the employer the amount under the bills for various reasons which may include discharge of his

liability towards the banks, financial institutions and other persons. It is held that in such a situation, the public sector undertakings would have an

upper hand. In the facts before the Supreme Court, the respondent had raised an objection on the same day on which the respondent had signed

such no due certificate. In the facts of this case however, the respondent had alleged coercion and undue influence after more than 18 days of

receipt of payment.

160. The Supreme Court in case of S.K. Jain v. State of Haryana & Anr. (supra) has taken a view that the plea of unequal bargaining of power

not is applicable in case of commercial contracts. The petitioner in this case has already made payment in respect of award Volume-II in the year

2000 itself and there was no claim made for award Volume-II at all. It is thus clear that the award in respect of claim Nos. 1, 2, 4, 5 and 6

allowed by the learned arbitrator is in variance with the plea raised by the respondent in the statement of claim and thus deserves to be set aside on

this ground also.

Claim No. 1 (Volume No. I)

161. Learned arbitrator has observed that it was an admitted fact that the petitioner had received award amount of Rs. 31,40,60,958/- towards

Volume No. I award. As per the terms of the sub-contract and piecework contract, the petitioner was entitled for commission/margin of 11.5%

which worked out to Rs. 3,61,17,010/-. It is held that the share of the respondent and M/s. SBP & Co. together worked out to Rs.

27,79,43,948/-. Out of this, the respondent had received an amount of Rs. 15,50,98,891/- leaving the balance payable by the petitioner to the

respondent and M/s. SBP & Co. which worked out to Rs. 12,28,45,057/-. Learned arbitrator has held that it was an admitted fact that the

petitioner had not denied the calculations made available by the respondent in annexure C-153 nor produced any counter calculations against the

demand of the respondent to defend the differences, if any.

162. Learned arbitrator has referred to the oral evidence of Shri Murlidharan who was the Accountant of the petitioner and held that he had not

denied the correctness of the computation. Learned arbitrator has accordingly held that if the claim of M/s. SBP & Co. was deducted from the

amount of Rs. 12,28,45,057/-, balance amount payable to the respondent was Rs. 6,91,27,570/-. Learned arbitrator has held that a separate

award was being made in respect of the amount of Rs. 5,37,17,487/- in so far as M/s. SBP & Co. is concerned. Learned arbitrator has

accordingly awarded a sum of Rs. 6,91,27,570/- in favour of the respondent along with interest thereon @18% p.a. from 15th June 2001 till the

date of award and has awarded further interest under the separate head of interest.

163. In so far as award of claim No. 1 is concerned, a part of this claim is challenged on the ground of jurisdiction and the entire amount is

challenged on the round that the respondent had already signed No Claim Letter and had accepted the payment in full and final settlement. The

petitioner has also placed reliance on the letter dated 15th October, 1992 addressed by the respondent to the petitioner for sharing of the amount

to be recovered from the said KHEP authorities/State Government which letter was varying the terms and conditions of the said contract. While

dealing with the issue of jurisdiction and alleged coercion and undue influence and the effect of the said letter dated 15th October, 1992, this Court

has already held aforesaid that the learned arbitrator could not have allowed the said claim on the ground of the alleged undue influence. This Court

is also of the view that the said letter dated 15th October, 1992 which was signed by the respondent was relied upon by both the parties as part of

the agreement and thus the finding of the learned arbitrator that the said letter was not accepted by the petitioner is ex-facie perverse and that part

of the award shows patent illegality. For the reasons recorded aforesaid, the learned arbitrator thus could not have allowed this claim.

Claim No. 2 (Volume No. II)

164. Learned arbitrator has held that it was an admitted fact that the petitioner had received an award amount of Rs. 24,09,25,965/- towards

Volume No. II award and as per the terms of the sub-contract/piecework contract, the petitioner was entitled to commission/margin of 11.5%

which worked out to Rs. 2,77,06,486/- and therefore, the share of the respondent and M/s. SBP & Co. together worked out to Rs.

21,32,19,479/-. Out of this, the respondent had already received an amount of Rs. 10,54,37,033/- and balance amount payable to the respondent

and the said M/s. SBP & Co. together worked out to Rs. 10,77,82,446/-. Learned arbitrator has rendered a finding that the petitioner had not

denied the calculations made available in annexure C-153 by the respondent nor produced any counter calculations against the demand of the

respondent to defend the differences, if any.

165. Learned arbitrator placed reliance on the oral evidence of Shri Murlidharan who was an accountant of the petitioner and held that he has not

denied the correctness of the computation. Learned arbitrator has held that the said M/s. SBP & Co. was entitled to Rs. 6,15,23,377/- and a

separate award was being made in that regard whereas the respondent herein was entitled to Rs. 4,62,59,069/-. Since the respondent herein had

claimed only a sum of Rs. 4,14,88,793/-, learned arbitrator therefore awarded only a sum of Rs. 4,14,88,793/- in favour of the respondent along

with interest thereon @18% p.a. from 13th April 2000 till the date of award and further interest from the date of award separately.

166. In so far as award of claim No. 1 is concerned, a part of this claim is challenged on the ground of jurisdiction and the entire amount is

challenged on the ground that the respondent had already signed No Claim Letter and had accepted the payment in full and final settlement. The

petitioner has also placed reliance on the letter dated 15th October, 1992 addressed by the respondent to the petitioner for sharing of the amount

to be recovered from the said KHEP authorities/State Government which letter was varying the terms and conditions of the said contract. While

dealing with the issue of jurisdiction and alleged coercion and undue influence and the effect of the said letter dated 15th October, 1992, this Court

has already held aforesaid that the learned arbitrator could not have allowed the said claim on the ground of the alleged undue influence. This Court

is also of the view that the said letter dated 15th October, 1992 which was signed by the respondent was relied upon by both the parties as part of

the agreement and thus the finding of the learned arbitrator that the said letter was not accepted by the petitioner is ex-facie perverse and that part

of the award shows patent illegality. For the reasons recorded aforesaid, the learned arbitrator thus could not have allowed this claim.

Claim No. 3 (Volume No. IV & V)

167. Learned arbitrator has observed that the respondent in their calculations had not deducted 11.5% commission/margin which the respondent

was entitled to deduct from their claim of Rs. 26,12,08,613/- and after deducting the said margin amount, remaining amount worked out to Rs.

23,11,69,623/-. It is held that the petitioner was given ample opportunity to verify and submit counter calculations, if any, to that effect. It is held

that the witness Shri. Murlidharan who was the Accountant of the petitioner had not denied the correctness of the computation filed by the

respondent.

168. On perusal of the award in respect of this claim, it is clear that the submission of the petitioner before the learned arbitrator was that the claim

in respect of Volume Nos. IV and V was in the nature of interim order and thus while passing a final award, such direction could not be issued by

the learned arbitrator whereas, it was submitted by the respondent herein that the relief in respect of claim No. 3 which related to award pertaining

to Volume Nos. IV & V was not in the nature of an interim order. It is observed by that the relief sought in the claim statement was for the

payment of entire amount of Rs. 26,12,08,613/- along with interest. It is observed by the arbitral tribunal that incidentally, it had been stated in the

pleadings that the respondent was entitled to the same treatment as that of the petitioner and as an ad-hoc measure during the pendency of the

present proceedings, for a direction to pay 60% of the amount. It is held by the learned arbitrator that the claim was not in the nature of interim

measures but was a final relief as indicated in paragraph 67 of the claim statement wherein the entire amount had been sought for. It is held that

merely because the award in respect of Volume Nos. IV and V had been challenged by the State of Maharashtra/KHEP authorities that did not

mean that the obligation of the petitioner to pay the said amount to the respondent was ceased.

169. It is held by the learned arbitrator that it was an admitted fact that the respondent had carried out the work in respect of part of the claims in

Volume Nos. IV and V and these works had been completed prior to February 2000 and thus the respondent was entitled to receive money in

respect thereof. Learned arbitrator accordingly directed the petitioner to pay a sum of Rs. 23,11,69,623/- with interest thereon @18% p.a. from

29th February 2008 till the date of award and has awarded further interest thereon separately.

170. The petitioner has impugned the award in respect of claim No. 3 not only on the ground of jurisdiction but also on merits. Claim No. 3 was

made by the respondent for Rs. 26.12 crores towards the alleged share of the respondent in the amount of Rs. 100 crores received by the

petitioner under awards (Volumes-IV and V) pending arbitration petition filed by KHEP authorities/State Government subject to the respondent

also furnishing indemnity for 50% and bank guarantee for 50%. In the statement of claim, the respondent had claimed that it was entitled to receive

the said amount from the petitioner on the same basis i.e. by furnishing indemnity for 50% of the amount payable by the petitioner to the

respondent and the bank guarantee for the balance 50%. The respondent had not made the said claim No. 3 for the work done under clause 6 but

the said claim being a claim for rate variation was under clause 14 of the contract. The said claim was made for the first time in the year 2008

based on award Volumes-IV to VIII.

171. A perusal of clause 14 of the sub-contract agreement clearly indicates that the petitioner was liable to make the said payment for the price

variation on pro-rata basis for the work done by the respondent when the said payment was received by the petitioner from KHEP

authorities/State Government after deducting 11.5%. The said payment was liable to be released on receipt of such payment from KHEP

authorities/State Government. It is not in dispute that the said KHEP authorities/State Government had challenged the arbitral awards arising out of

Volumes-IV to VIII. The learned Civil Judge, Senior Division, Satara had directed KHEP authorities/State Government to deposit Rs. 100 crores

in that Court while granting stay and had permitted the petitioner to withdraw the said amount upon furnishing the bank guarantee of 50% and to

furnish an indemnity in respect of balance 50% as a condition for withdrawal of the said amount.

172. Though the respondent had also demanded the said payment from the petitioner on the similar terms in view of the pendency of the arbitral

proceedings filed by KHEP authorities/State Government in the statement of claim, the learned arbitrator has permitted substantial part of the claim

unconditionally through the arbitral proceedings filed by KHEP authorities/State Government challenging those awards is still pending in the Court

of Civil Judge, Senior Division, Satara. In my view, the impugned award allowing this claim in favour of the respondent is contrary to the provisions

of the contract and more particularly clause 14 thereof. The finding of the learned arbitrator that the claim was for the work done under clause 6 is

contrary to the pleadings of the respondent themselves and the claim made in arbitral proceedings. The award shows patent illegality.

173. In so far as the submission of Dr.Tulzapurkar, learned senior counsel for the respondent that the claim under clause 6 for the work done was

not contingent upon or conditional upon the receipt of such payment made by the KHEP authorities/State Government or that the interpretation of

the learned arbitrator of the contract is a possible interpretation is concerned, since the respondent had not made such claim for the work done but

had waited for such claim till the arbitral award was rendered in favour of the petitioner in the proceedings filed against KHEP authorities/State

Government and such claim was for the price variation, the petitioner would have become liable to pay the share of the respondent only upon

receipt of such payment from KHEP authorities/State Government and not prior thereto. There is thus no merit in this submission made by learned

senior counsel for the respondent. The learned arbitrator has not interpreted the terms of the contract but has awarded the claim contrary to the

terms of the contract and contrary to the claims made by the respondent. Claim No. 3 thus deserves to be set aside on this ground also.

Claim No. 5 (Volume No. VI)

174. Learned arbitrator has held that since the petitioner herein had filed a claim statement in Volume No. VI before the arbitral tribunal in the

arbitral proceedings by the State of Maharashtra/KHEP authorities, it has to be presumed that the petitioner had agreed and admitted the claims

made therein. Claim in Volume No. VI was rejected by the arbitral tribunal on the ground that the procedure specified under clause 66(a) (b) of

the main contract entered into between the petitioner and the KHEP authorities had not been followed. Learned arbitrator has considered the oral

evidence led by the witnesses examined by the petitioner who admitted that the procedure prescribed under clause 66(a) (b) of the main contract

had to be followed before referring the claim before arbitration. The award rejecting the claim in respect of Volume No. VI was not challenged by

the petitioner herein by filing any petition. Learned arbitrator has held that the claims in respect of Volume No. VI relate entirely to the works

carried out by the respondent. It is held that the petitioner had filed the claim in Volume No. VI and thereby admitted the correctness of the claims

made therein.

175. In paragraph 18.6 of the impugned award, the learned arbitrator has held that clause 6 of the Sub-contract Agreement and Clause 2(iii) of the

MOU and also clauses 1(iii) and 6 of the Piecework Agreement required the petitioner to pay to the respondent for the works carried out by

respondent. It is held that since the work in respect of Volume No. VI was carried out by the respondent, the petitioner was bound to pay the

same to the respondent. It is held that if there was any lapse on the part of the petitioner in not collecting the same from KHEP authorities, the

same could not be an excuse for not paying to the respondent herein, who had incurred enormous amounts of money for carrying out that work.

176. Learned arbitrator has held that in so far as computation of the said amounts is concerned, the said computation was prepared by the witness

examined by the respondent. No suggestion was put to him that the computation made by him was not correct. Learned arbitrator has held that

after deducting the commission/margin of 11.5% which aggregated to Rs. 3,96,83,309/-, the petitioner was liable to pay an amount of Rs.

30,53,88,945/- to the respondent in respect of Volume No. VI.

177. There is no dispute that the petitioner herein had made this claim in the arbitral proceedings filed by the petitioner against KHEP

authorities/State Government and this claim was rejected by the arbitral tribunal on the ground that the petitioner had not made that claim as per the

terms of the procedure specified in the main contract between the petitioner and KHEP authorities/State Government. This claim was made by the

respondent in the statement of claim towards ""revision of rate, variation"" of the contract work. A perusal of the award indicates that the learned

arbitrator has allowed this claim on the premise that the said claim was for the work carried out by the respondent and thus even if there is any

lapse on the part of the petitioner in not collecting the said amount from KHEP authorities/State Government, the same could not be an excuse not

to pay to the respondent herein who had incurred enormous amount of money for carrying out the work.

178. It is not in dispute that the work was already completed in the year 2000 and the said claim was made by the respondent only in the year

2009 consequent upon the arbitral tribunal in the arbitral proceedings filed by the petitioner against KHEP authorities/State Government refusing to

entertain the said claim by making an award in the year 2008. The respondents themselves were waiting for the out come of the said award and

did not make any claim prior to 2008-2009.

179. A perusal of clauses 4 and 14 of the sub-contract would clearly indicate that the claims as made in the statement of claim by the respondent

for revision of the rates and variation would fall under clauses 4 and 14 of the special contract and not under clause 6. In the statement of claim

filed by the respondent while making this claim, there was no reference to clause 6 of the special contract agreement.

180. The question that arose for consideration of the learned arbitrator was whether the petitioner was liable to make such payment to the

respondent even if the petitioner had not received any amount for the said claim from the said KHEP/State Government or not. A perusal of the

record clearly indicates that the respondents themselves had waited to make this claim based on the out come of the arbitral proceedings filed by

the petitioner against the said KHEP authorities/State Government. In my view, the finding of the learned arbitrator that the petitioner was liable to

pay the said amount to the respondent for the work done in Volumes-VI irrespective of the fact that it had not received payment for such

claim/work done for KHEP authorities is contrary to and in violation of clauses 4 and 14 of the sub-contract agreement entered into between the

parties and even contrary to the claim made by the respondent in its statement of claim.

181. If according to the learned arbitrator the said claim was to be considered as a claim for the work done prior to the year 2000, the fact that

the said claim was made for the first time in the year 2009, the learned arbitrator ought to have dismissed the said claim on the ground of limitation

itself. The admitted fact that the respondents themselves made this claim based on the out come of the arbitral proceedings filed by the petitioner

against the said KHEP authorities clearly indicated that the entitlement of the respondent in respect of such claim would be only if the petitioner at

the first instance would have received such amount from the said KHEP authorities and if after receipt of such amount, the petitioner would have

refused to pay the share of the respondent. In my view, Mr. Chinoy, learned senior counsel for the petitioner is right in his submission that the

learned arbitrator has not awarded the said claim on the alleged plea of tort. No finding of tort is rendered by the learned arbitrator. In my view,

the learned arbitrator has totally overlooked the provisions under clauses 4 and 14 of the special contract and has allowed the said claim under

clause 6 contrary to the said clause and also contrary to the plea raised by the respondents themselves.

182. In so far as the submission of learned senior counsel for the respondent that the petitioner had not challenged the award made by the arbitral

tribunal against the petitioner in respect of this claim and on that ground itself the petitioner could not refuse to pay the said amount to the

respondent is concerned, in my view, there is no merit in this submission of the learned senior counsel for the respondent. The respondent had

made that claim based on the out come of the arbitral proceedings between the petitioner and the said KHEP authorities/State Government. I am

not inclined to accept the submission of the learned senior counsel for the respondent that the interpretation of the learned arbitrator of clause 14 is

a possible interpretation.

183. In so far as the submission of the learned senior counsel that the learned arbitrator has also considered the oral evidence of the witness

examined by the petitioner and has rendered a finding of fact which cannot be interfered with by this Court under section 34 of the Arbitration &

Conciliation Act, 1996 is concerned, in my view, since the learned arbitrator has awarded the said claim contrary to the terms of the contract and

contrary to the plea raised by the respondents themselves, this Court can interfere with such part of the award under section 34 of the Arbitration

& Conciliation Act, 1996 on the ground of perversity and award showing patent illegality. Similarly there is no merit in the submission made by

learned senior counsel that since the claim of the petitioner was not rejected on merits by the arbitral tribunal in the arbitral proceedings filed by the

petitioner against the said KHEP authorities/State Government but was rejected because of default on the part of the petitioner, the petitioner was

liable to pay such amount to the respondent. The respondent had not made such claim in tort against the petitioner.

184. In so far as the judgment of the Court of Appeal in case of Woolf v. Collis Removal Service reported in 1947(2) All England Law Reports,

260, relied upon by learned senior counsel for the respondent is concerned, it is held by the Court of Appeal that even if the claim in negligence

was a claim in tort and not under the contract, yet there was sufficiently closed connection between that claim and the transaction to bring the claim

within the arbitration clause. It is not the case of the petitioner that even if the said claim was in tort, the same was not within the jurisdiction of the

learned arbitrator to adjudicate upon the said claim. The judgment of the Court of Appeal thus relied upon by Dr.Tulzapurkar, learned senior

counsel for the respondent would not assist the case of the respondent.

185. Be that as it may, a perusal of clause 6 of the sub- contract agreement clearly indicates even if such claim as made by the respondent under

claim No. 5, would fall under clause 6 of the special contract agreement, a perusal of the said clause clearly indicates that even such payment was

to be made by the petitioner within 7 days of the receipt of such payment from the said KHEP authorities by making every reasonable efforts after

deducting certain amounts mentioned therein. The award of the learned arbitrator allowing this claim itself, in my view, is ex-facie contrary to the

terms of the contract and deserves to be set aside.

Claim No. 6 (original claim)

186. The respondent had made a claim of Rs. 2,92,07,110/-being alleged illegal excess deduction towards escalation by adopting wrong

methodology. Learned arbitrator has held that the respondent had submitted a detailed calculations on this aspect at Exhibit C-152, according to

which the balance receivable on that account had been worked out at Rs. 2,81,55,742/-. The petitioner although had an opportunity to challenge

the calculations, the petitioner did not challenge the calculations or did not submit counter calculations during the pendency of arbitral proceedings.

It is held that Shri. Murlidharan, accountant of the petitioner who was examined as a witness, had not examined the calculations submitted by the

respondent. Learned arbitrator has held that the petitioner was accordingly liable to pay a sum of Rs. 2,81,55,742/- to the respondent along with

interest @18% p.a. from 22nd February 2000 till the date of award and has awarded further interest thereon separately.

187. In my view, the learned arbitrator could not have awarded this claim in view of the respondent having signed no claim letter having accepted

the amount in full and final settlement. The award thus deserves to be set aside.

Claim No. 7

188. In so far as the issue as to whether the respondent is entitled to a sum of Rs. 5,19,22,824/- towards running and final bill i.e. illegal excess

deduction made by the petitioner is concerned, learned arbitrator has held that Shri. Mahendrappa, in his cross-examination admitted that the

amount claimed under this head included the claim in the proceedings namely claim for illegal deduction regarding escalation and thus the amount

awarded in the proceedings claim had to be deducted from out of the claim under this head worked out to Rs. 2,37,67,082/-. After deducting the

amount awarded under the claim No. 6, balance amount worked out to Rs. 2,37,67,082/-. Learned arbitrator has awarded only the said sum with

interest @18% p.a. from 22nd February 2000 till the date of award and has awarded further interest thereon separately.

189. In my view, the learned arbitrator could not have awarded this claim in view of the respondent having signed no claim letter having accepted

the amount in full and final settlement. The award thus deserves to be set aside.

Claim No. 9

190. In so far as the claim for interest made by the respondent @24% p.a. compounded monthly on all claims made by them is concerned, learned

arbitrator has held that the respondent had admittedly borrowed money for their work and accordingly it would be just and proper to award

simple interest @18% p.a. till the date of award and thereafter @18% p.a. to be compounded monthly.

191. A perusal of the award indicates that the learned arbitrator has awarded interest at the rate of 18% compound monthly from the date of the

award till the date of the payment. Since this Court is of the view that the learned arbitrator could not have awarded principal amount in favour of

the respondent for the reasons recorded aforesaid, the learned arbitrator could not have awarded any interest on such principal amount in favour of

the respondent. Be that as it may, since admittedly there was no provision for payment of any compound interest monthly or otherwise, the learned

arbitrator has power to award reasonable rate of interest if there was no agreement between the parties. In my view award of interest at the rate of

18% compound monthly from the date of award till the date of payment is not a reasonable rate of interest and thus this part of the award deserves

to be set aside on that ground also.

192. In so far as the impugned award which is the subject matter of Arbitration Petition No. 893 of 2010 is concerned, the challenge to the said

award is also on the identical grounds raised in Arbitration Petition No. 891 of 2010. For the reasons recorded in respect of the arbitral award

which is subject matter of Arbitration Petition No. 891 of 2010, the impugned award which is the subject matter of Arbitration Petition No. 893 of

2010 also deserves to be set aside.

193. I therefore pass the following order:--

a) The impugned orders/decisions dated 17th December, 2009, 29th December, 2009, the awards dated 25th January, 2010, as corrected by an

order dated 22nd February, 2010, which are the subject matter of Arbitration Petition Nos. 891 of 2010 and 893 of 2010 are set aside;

b) Arbitration Petition Nos. 891 of 2010 and 893 of 2010 are allowed in aforesaid terms;

c) There shall be no order as to costs.