

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) No.1259/2000**

7th January, 2010

SIMPLEX CONCRETE PILES (INDIA) LTD. ...Petitioner

Through: Mr. V.P.Chaudhry, Senior Advocate with
Mr. Nitinjya Chaudhry, Advocate and
Ms. Sushma Sachdeva, Advocate.

VERSUS

UNION OF INDIARespondent

Through: Mr. B.V. Niren, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

% **JUDGMENT (ORAL)**

VALMIKI J.MEHTA, J

I.A. No.6442/2001 in CS(OS) No. 1259/2000

1. By this application, the respondent/Union of India has preferred objections under Sections 30 & 33 of the Arbitration Act, 1940 to the Award dated 28.2.2000 passed by the sole Arbitrator. The disputes which arose between the parties pertained to awarding of a contract by the objector to the petitioner for construction work of foundation and basement of the RR Hospital at Delhi Cantonment. The counsel for the objector has only pressed the

objections as regards for Claim Nos. 2,7,12,18,26,27 and the Claim of interest, as decided by the Award. I shall take up the arguments of the parties with respect to each claim one by one.

2. The first objection pertains to award of a sum of Rs.14,39,340/- under Claim No.2 by the Arbitrator. This amount has been awarded by the Arbitrator because the Arbitrator has held that over-breaks in the rock base naturally occur in the process of blasting and therefore, except to the extent of small irregularities/levelling, where RCC is required to be filled up for levelling, the excess filling of RCC has to be to the account of the objector where the over-breaks in the rocks are of a large extent.

3. In order to appreciate the respective contentions of the parties it is necessary to refer to the relevant terms of the contract being Clauses 3.1.3, 3.1.4 and the Schedule A of the contract which contains the list/descriptions of the items of works. The relevant Clauses and items in Schedule A read as under:

“3.1.3 The bottom surface of excavation in rock shall be made as level and true as possible prior to laying concrete, and any small irregularities shall be filled up with cement concrete (1:4:8) at no extra cost to Government.

3.1.4 In case excavation is done to depths greater than those required, extra depth shall be made up with cement concrete (1:4:8) at no extra cost to Government.”

“

3.	Excavation over areas not exceeding 1.5 metre deep in soft/disintegrated rock and getting out	Per Cubic Metre	5000	Rs.50/- Rupees fifty only	2,50,000/-
4.	Ditto but depth exceeding 1.5 metre and not exceeding 3	Per Cubic Metre	20000	Rs.55/- Rupees fifty five only	11,00,000

	metre.				
5.	Excavating over areas, exceeding 1.5 metre deep but not exceeding 3 metre deep in hard rock and getting out and property stacking for measurement.	Per Cubic Metre	7500	Rs.180/- Rupees one hundred eighty only	13,50,000/-
6.	Ditto-but depth exceeding 3 metre and not exceeding 4.5 metre and ditto-	Per Cubic Metre	7500	Rs.185/- Rupees One hundred eighty five only	13,87,500/-

On the basis of these provisions the Arbitrator has accepted the arguments and contentions of the claimant/petitioner/contractor and has held as under:-

“ 47.8 There is no other provision in contract regulating the excavation in hard rock or concerning this aspect. One has to analyse these provisions to find out as to what the contract intended. Clause 3.1.3 deals with excavation in hard rock while Clause 3.1.4 is generalistic in nature possibly covering all types of excavations. Further, Clause 3.1.4 states that “In case excavation is done” covering thereby the situations when contractor knowingly or unknowingly carries out excavation to depths greater than those required. This is not the case in the issues involved in this dispute. For this dispute, therefore, Clause 3.1.3 would be relevant. This Clause, read in conjunction with Clause 3.1.2 urges the contractor to carry out controlled blasting, obtain the bottom surface of excavation as level and true as possible and in the process if any small irregularities occur these shall be filled up by PCC (1:4:8) without any extra cost to Government. The drafter of tender documents therefore felt that this was possible to be achieved and would not result in more than “small irregularities”. This aspect has been vehemently contested by contractor while arguing that process of blasting, even controlled blasting, could not lead to such a situation. I agree with contractor’s views in principle. When excavation is carried out by blasting, hole is drilled into the rock, explosive placed inside and then detonated. One could proceed slowly and steadily and continue the process both side ways as well as depth wise but it would well be impossible to stop the excavation at precise levels. Over-breaks would occur. However, the extent of over-breaks could vary. Under these circumstances, it would not be correct to conclude that such over-breaks would only result in “small irregularities”.

47.8 Contractor has claimed the involved quantity as 4171.91 cubic metres, as having been taken from the MBs maintained by Department, for which he had actually carried out the work but not paid for. During the hearing, UOI was asked if they had any comment on the quantities involved but they had none. This much quantity cannot be said to have occurred on account of “small irregularities”. There was also no case made out by UOI if contractor had not taken the required precautions as envisaged by the contracted provision of “controlled blasting” nor was any evidence produced by them in this regard. I therefore take it that this much “over-break” had actually occurred in the process of controlled blasting as envisaged in the contracted provisions. Contractor is expected to have taken care of small irregularities only. The additional quantity involved over and above the small irregularities, in my appreciation, would be 75% of it or say 3129 Cubic Metres. In an item rate contract where contractor is asked to quote his unit rates, the rates could be made inclusive of certain provisions which are specifically mentioned. If contractor had done certain additional concrete works, he ought to be paid for it and such works could not be said to have been done gratuitously (sec 70 of Indian Contract Act). Cost of cement supplied to him by the Department has been recovered from his dues.

47.9 In view of above, claim of contractor is partially sustained as he could not be blamed if over breaks occur in the process of blasting for the extent beyond “small irregularities”. Accordingly, I award an amount of Rs.14,39,340.00 (Rupees fourteen lakh thirty nine thousand three hundred and forty only) to contractor against this claim”

4. The counsel for the objector has, and in my opinion rightly, argued that once there are direct, specific and categorical contractual Clauses which provide that whatever are the over-breaks, big or small, which occur due to blasting, then, filling up those irregularities has necessarily to be to the cost of the contractor. He referred to Clauses 3.1.3 and 3.1.4 which specifically provide that the levelling work done with RCC with respect to all irregularities will be at no extra cost to the Government. The counsel for the objector has further, and again rightly, referred to the Schedule A of the contract which provide for payment of the items of work, and wherein separate payment is provided for excavation for separate depths, thereby indicating that controlled blasting is for

different depths with different rates and consequently over-breaks should not occur if competence is applied while blasting.

The counsel for the non-objector, in reply, contended that Clause 3.1.4 cannot apply to the facts of the present case because it deals with excavation in 'soil' and not for excavation in 'rock'. The counsel for the non-objector also further contended that over-breaks do occur even in controlled blasting and therefore the contractor cannot be held responsible and it ought not to be held liable to pay the cost of levelling on account of over-breaks.

5. I do not find any substance in the reply arguments as raised by the learned counsel for the non-objector, because, the expression "soil" is not to be found in Clause 3.1.4. Clauses 3.1.3 and 3.1.4, are found in those fasciculus of provisions, which deal with cost of levelling required due to over blasting and which categorically require the same to be done at no extra cost to the Government. Levelling may be required because of excessive over-breaks or limited over-breaks. In both the cases, levelling necessarily has to be to the cost of the contractor in terms of the contractual clauses. If there was any doubt whatsoever, the same is cleared from items of work 4 to 6 appearing in Schedule A of the contract. These items specifically provided for different charges for excavation for different depths thus requiring competence in blasting which brings about specific depths while blasting. If that be so, it is not understood as to how it can be contended that excessive over-breaks are "natural" and the contractor should not be held liable. The contract was taken

by the contractor with open eyes and which required a certain expertise in the form of controlled blasting with respect to different depths. Now, therefore, the contractor cannot turn around and say that if even because of blasting, more amount of levelling is required, then, it is to the cost of the Government and for which it has to be compensated. If this interpretation of the Clause in the contract, and what is sought to be urged by the learned Senior Counsel for the petitioner, is accepted, the same will not only amount to doing violence to the language of the aforesaid provisions, the interpretation in fact would also hit at the spirit of the Clauses which requires certain amount of competence/expertise at the time of blasting. Once it is found that competence is required in blasting or in any case for whatever reason, levelling is required, whether in small irregularities or greater, Clauses 3.1.3 and 3.1.4 directly come into play, thereby requiring the levelling of the over-breaks to the cost of contractor and at no extra cost to the Government.

It is now settled law that an Arbitrator cannot act against the direct provisions of the contract. In the present case in the face of the contractual provisions of the contract there cannot arise any so called huge “natural over-breaks” for which the contractor, as contended by it, should not be held responsible. Accordingly, I accept the objection with respect to awarding of Claim No.2 and the Award in this regard is set aside.

6. The next objection of the Union of India is with respect to Claim No.7. Under this Claim, the contractor was awarded charges with regard to the work

of making nozzles in the raft beams. For this purpose, the Arbitrator has referred to the relevant clauses of the contract, and which clauses of the contract talk only of the rates for providing nozzles in the slabs, and not in the beams, and accordingly, the contention of the Union of India was rejected by the Arbitrator whereby the Union of India sought to fix the rates for the nozzles in the beams at the same rate as that of the nozzles in the slabs. I agree with the counsel for the non-objector that once there is found no rate in the contract for a particular type of work, then, the contention of Union of India cannot be accepted that the rates for nozzles in the slabs should be accepted for the rates for the nozzles in the beams. I may only add here, to what has been stated in the Award, that material content of a beam and a slab are noticeably different because whereas a beam contains iron saria, slabs surely do not contain such iron saria. The strength of beam is also much different than the strength of a slab because the beam is normally expected to carry the weight of the entire structure. In any case and as stated by me above, once there is no rate provided for making of nozzles in the beam, the Arbitrator was fully justified in awarding this claim for making nozzles in the beams. The Arbitrator, in my opinion has in this regard rightly held as under:-

“51.3 First part of contractor’s claim is that threaded nozzles fixed in the raft beams were much longer than half the thickness of raft slab. It was argued by him that he was made to provide these nozzles of length equal to half the depth of beam and that no financial adjustment was made. UOI’s contention is that contract did not provide for a separate rate for beams and that mode of measurement, as per item 42 of Sch ‘A’ and Clause 4.12.A on page 122(R), was for basement slab which included beams and slabs both.

51.4 I have examined the submissions and arguments of both the parties. I agree that mode of measurement is on per square metre basis and it would cover the entire raft area which included both beam and slab. Firstly, neither item 42 nor Clause 4.11.3 had mentioned about fixing of nozzles in the beams. If at all it intended so, it would clearly imply that length of nozzle would be equal to half the thickness of raft slab. Contractor has been claiming that he was asked to provide nozzles equal to half the depth of beams (i.e. more than half the thickness of slab). This central issue in the claim has been skirted by UOI in their written submissions and arguments. They have instead relied on Clause 4.12.A which deals with water proofing treatment and states the method of measurement for basement slab as "Actual peripheral area (below basement raft slab and raft beam) of the treatment given shall be measured and paid for". This is for the water proofing treatment payable under other items of Sch 'A' and does not touch upon the issue in this claim which is that item 42 of Sch 'A' (under which payment has been made) provides for nozzles of length equal to half the thickness of slab where-as contractor has provided nozzles in beams equal to half the depth of beams. UOI has not denied if the actual work as claimed to have been done by contractor was not carried out.

51.5 In view of above, the claim of contractor is sustained in principle. I do not agree with the method adopted by contractor in working out the amount of claim. It is only the cost of nozzle that would increase but other elements like fixing in position, welding etc. would remain more or less same. Then by reducing the length from $D/2$ to $D/4$, the actual length of Nozzle in beams also gets reduced. I have therefore analysed the additional rate by considering $D/4$ for beams and rates in DO No. 27 and I find that for beam area, the addition rate payable would be Rs.17.50 per Square metre only as against Rs.45.00 claimed by contractor. The amount becoming payable to contractor would thus be Rs.57,141.00."

Accordingly, I do not find any valid basis for sustaining the objection to the awarding of Claim No.7 and as raised by the objector.

7. The next objection pertained to Claim No.12 as awarded by the Arbitrator. This claim was awarded for making the plaster in the aggregate work smooth, instead of merely fair and even. Once RCC work is done by putting aggregate, then, no doubt there can be a fair and even finish by use of wooden trowel, but, to make the surface totally smooth, undoubtedly there is required application of a different type of cement layer. The Arbitrator, and in

my opinion, rightly has referred to the fact that in the tender conditions, there is no provision for a smooth surface but there is only a provision for fair and even surface. If therefore the contractor is required to make a smooth surface, and not just a fair and even surface, and which smoothening work by applying cement layer has resulted in extra cost to the contractor, I do not find any illegality or perversity in the action of the Arbitrator whereby he has awarded an amount of Rs.1,54,011/- with respect to this claim. The relevant portion of the Award in this regard, which discusses this issue with clarity and accepts the stand of the contractor, runs as under:

“56.6 I have examined the submissions and arguments of both the parties. First issue to be decided is the intention of contract. Clause 4.11.1 as well as description of the item in Sch ‘A’ required the PCC (1:4:8) to be finished fair and even. Fair and even surface is achieved by use of wooden trowel and it cannot result in surface finish as ‘smooth’. Even otherwise, lean concrete using 20 mm aggregate (without extra cement) cannot yield a smooth surface at top; considering the content of cement in PCC (1:4:8) and size of aggregates. Clause 4.11.2 demands laying of tape-crete on “rendered smooth surface of lean concrete”. The work involved therefore is for converting the fair finished surface to smooth surface. UOI says it is deemed to be included in the rates quoted by contractor. In an item rate contract where contractor is asked to quote his unit rates against description of various items, as described in Sch ‘A’, it is difficult to agree with this contention of UOI. The drafter of tender has clearly defaulted in not matching the requirement in condition 4.11.2 with the description in Sch ‘A’. Even the two Clause i.e. 4.11.1 and 4.11.2 are mis-matched. Why ask the contractor to quote for ‘fair and even surface’, when the requirement clearly was “smooth surface” and it was known to the Department and drafter of tender documents. The work activities involved in achieving “smooth” surface finish are different than those required for achieving “fair” finish surface.

56.7 GE’s letter dated 21-4-92, relied upon by UOI, rejects the claim only on the grounds that “CA clearly states that top surface of concrete shall be finished fair and even. As such no extra payment is admissible to you.” It is correct that CA states fair and even finish but the requirement is to have smooth finish. What about conversion of fair finished surface to smooth finish surface? After duly considering all these provisions, I conclude that Sch ‘A’ of contract intended for provision of fair and even surface for the lean concrete.

56.8 In view of the above analysis, claim of contractor is sustained in principle. UOI, in letter dated 8-2-97, were required to give their comments on quantities claimed by contractor, but they did not respond to this requirement.

56.9 Contractor has claimed the work done by rendering 10 mm thick plaster. Though the surface could be achieved smooth by other methods as well, but there were no comments by UOI. Since UOI had agreed to issue cement for this work, I will take it that the work, as claimed by contractor, was actually carried out.

56.10 Keeping the above in view, I conclude that the work done by contractor was over and above the contracted provisions. Accordingly, I award an amount of Rs,1,54,011.00(Rupees one lakh fifty four thousand and eleven only) to contractor against this claim”.

Objection with respect to awarding this claim is also therefore dismissed.

8. The next Claim which has been awarded by the Arbitrator is Claim No.18 for moorum filling. The dispute under this head was with regard to the rate which was required to be fixed for moorum filling. The contractor had originally asked for a rate of Rs.123.60 per cubic metre (pcm) and which was increased to Rs.154.52 pcm during the arbitration proceedings. The Union of India sought to restrict this rate to Rs.85 pcm. The Arbitrator, has disallowed the stand of the restriction to Rs.85 pcm made by the Union of India. Mr. Chaudhry, learned Senior counsel for the petitioner, and in my opinion has rightly, argued that the contractor was not bound to the restricted rate merely because he signed and agreed to the star rate on 13.3.1993 and so argued by the Union of India. He further contended that it is common knowledge that if a contractor's payment is withheld then he is caused great losses and facts of the case clearly demonstrate that the contractor signed on the rate as asked for by the Union of India under pressure as otherwise the payment would not have

been released. He has further contended that retraction to the agreed rate was also within a short time thereafter, as when the final bill was made after about 20 days after 13.3.1993, the contractor had signed the same under protest and had thereby objected to the rate as fixed by the objector. Accordingly, Mr. Chaudhry has argued with respect to un-sustainability of the objection in this regard.

I agree with the contention of Mr. Chaudhry and find that the Award of the Arbitrator in this regard cannot be said to be in any manner perverse. The Arbitrator was indeed entitled to interpret the different documents and letters exchanged by the parties under the contract and hold that the rate agreed on 13.3.1993 was only under pressure. His interpretation is one plausible interpretation in the facts of the present case. Merely because there is another possible interpretation, it is not open to the Union of India to contend that the Award should be set aside because this alternative view should have been accepted by the Arbitrator. Accordingly, I reject the objection with respect to Claim No.18 and uphold the findings of the Arbitrator in the following paragraphs of the Award:

“61.4 UOI submitted that the star rate was finally signed by contractor on 13-3-93 without any reservation and therefore no further amount was payable. UOI also relied on CWE’s letter dated 8-2-97 to argue that his signatures implied his acceptance in terms of section 63 of Indian Contract Act. Contractor argued that his signatures were under duress, not of his free will (referred to GE’s letter dated 07-1-93 asking him to withdraw his protest) and he had put his signatures on 13-3-93 for the undisputed part of rate, after completion of contract and for progressing of his final bill (Paid 20 days later). It was argued that this did not extinguish his claim as he had signed the final bill under protest.

61.5 For the subject matter of the claim, UOI was asked to produce evidence of market enquiry i.e. quotations invited by Department for restricting the rate. They agreed to do so but during subsequent hearing, submitted that there was no quotation on their files but the restriction must have been based on telephonic enquiries.

61.6 I have examined the submissions and arguments of both the parties and I find as under:-

(a) Star rate was not based on "Cost to contractor" as envisaged in condition 62(G) of IAFW-2249.

(b) Reference to condition 62(E) of IAFW-2249 in GE's letter dated 07-1-93 is not correct as the actual rate had not been fixed in terms of this condition.

(c) UOI could produce no evidence for the basis of restriction made by them in the star rate.

(d) Circumstantial evidence, as produced, indicates that stage of accord and satisfaction in terms of condition 63 of Indian Contract Act had not reached.

61.7 Further, condition 7 of IAFW-2249 provides:

"Contractor will be deemed to have accepted the order and conditions stated therein without in any way affecting the right of the parties to rectify any mistake on the basis of payment only to the extent it differs from condition 62". This implies that if any rate has not correctly been fixed under condition 62, it could be rectified. Condition 67(f) of IAFW-2249 provides for payment to contractor if any under-payment is discovered.

61.8 In view of Para 61.6 and 61.7 ante, I have come to the conclusion that UOI has failed to justify the "restriction" made in the finalised star rate. Accordingly, the claim of contractor is sustained in principle. The quantity involved as per final bill is 928.259 Cubic metre. The claim is therefore sustained for an amount of Rs.37,984.00. I award Rs.37,984.00 (Rupees thirty seven thousand nine hundred and eighty four only) to contractor against this claim."

9. The next objection of the Union of India was with respect to Claim No.26 whereunder the Arbitrator has ordered refund of the excess recovery made from the contractor due to less weight of cement in the cement bags. The point before the Arbitrator, and as decided by him, was that in the facts of the present case there was more loss of cement from the bags than ordinarily happens, and for this purpose, the Arbitrator has relied upon the report of the Board of Officers appointed by the objector itself. The report of the Board of Officers clearly shows that in the facts of the present case, the loss of cement from the

bags was much more than average. Accordingly on account of the higher loss of cement from cement bags, the contractor was not held to be responsible. In my opinion this is a reasonable finding, more so as the Arbitrator relies upon documentary evidence and which is the document of evidence of the objector itself. In my opinion no objection can be raised in this regard, when the document of the objector itself shows excess loss of cement from the cement bags. The relevant portion of the Award which gives the findings of the Arbitrator are from paras 67.2 to 67.7, which paras pithily gives necessary findings and is reproduced as under:

“67.2 Case of contractor is that cement bags issued to him contained much less cement and this had the effect of excess recovery for 6254 bags costing him Rs,3,23,332.00 (Sch ‘B’ rate + 10% extra for handling and transportation). Contractor had submitted details in support thereof vide his letter dated 13-5-96. It was argued by him that cement bag was expected to weigh 50.54 Kg (50 kg for cement and 0.54 Kg for jute bag) whereas the average weight of cement bag issued to him was 48.75 Kg. This implied a difference of 1.79 Kg of cement, on average, per bag. For this claim, contractor relied on the proceedings of Board of Officers appointed by the Department.

67.3 UOI, in their submissions and arguments, relied on Note (o), as mentioned in Para 67.1 ante, and held that the loss could be due to transportation of bags of cement from place of issue to site of work. It was argued by them each bag contained 50 Kg of cement and there was no case of these being under weight. During the hearing, it was stated by them that there was no Board of Officers but subsequently agreed to it when contractor produced copies thereof vide his letter dated 16-6-99.

67.4 I have examined the submissions and arguments of both the parties. A total of 177,276 bags of cement had been issued to contractor. A Board of Officers was detailed by GE (P) No. 1 vide its order No.18 dated 18-6-89 for the task of checking the actual weight of cement received at site. I have perused the proceedings of this Board of Officers and find that the Board had checked by actual weighment of cement bags, from time to time, by taking random samples from various consignments involving 132,699 bags (out of total issue of 177,276 bags). The Boards had determined the quantity of less weight of cement as 3568 bags (without considering the weight of jute bags). If weight of jute bags is also accounted, the less weight would become 3568+1433 i.e. 5001 bags out of consignments involving 132,699 bags. The quantity claimed by contractor is therefore correct as per this analysis of the

Board of Officers and it works out to less cement in bags by 3.52% or 1.76 Kg per bag, on average.

67.5 The above analysis is based on exhaustive board proceedings prepared on directions of GE. UOI vide their letter dated 22-1-97 had filed Annexure 54 which was the Proceedings of Board of Officers who had checked consignment of 1600 bags on 28-5-89 and 16-6-89 (this was prior to the Board ordered by GE). I find from it that this Board had considered 0.70 Kg as weight of bag (against 0.54 Kg considered by contractor) and found shortage of 2.483 per bag in consignment of 600 bags and 1.255 Kg per bag in consignment of 1000 bags. The annexure filed by UOI only proves the arguments of contractor.

67.6 UOI passes on the liability on this account to the contractor under the provisions of Note (o) to Schedule 'B' (supra). I have perused this note and it states that the contents of cement in each bag may be slightly less than 50 Kg and the contractor is to take cognisance of this aspect while quoting. The term "slightly less" has neither been elaborated nor quantified in terms of percentage of the contents of bags. How much would then a tenderer understand by terms "slightly less" and accordingly account for it in his quotation? Can 1.76 Kg of cement be called "slightly less" in relation to 50 Kg? On analysis of surrounding evidence, even considering the necessity of the afore mentioned Board of Officer, I conclude that 1.76 Kg in relation to 50 Kg, in absence of any elaboration or quantification in the contract, is more than what the term "slightly less" would construe. The extra shortage of cement in the bags has placed additional financial burden on the contractor; the burden which was not intended by the said note (o) relied upon by UOI. I therefore decide that effect of less weight of cement in bag to an extent of one third shall be borne by contractor as falling within the ambit of "slightly less" and balance two third be borne by UOI, the supplying agency being the Department.

67.7 In view of above, I conclude that claim of contractor is partially sustained and I award an amount of Rs.1,95,958.00 (Rupees one lakh ninety five thousand nine hundred and fifty eight only) to contractor against this claim. Contractor had claimed 10% extra over it to cover for cost of transportation and loading/unloading. I consider it fair not to allow for any percentage enhancement over this amount"

This objection is accordingly rejected.

10. Claim No.27 as awarded by the Arbitrator, pertains to the refund of recoveries made due to wrongful application of the escalation formula. The dispute between the parties in this regard was that according to the objector there was a negative escalation and consequentially the Contractor was bound to refund charges and was in fact not entitled to any escalation for the work done. I note that the Arbitrator while deciding this Claim has referred to the letter dated

22.11.1990 of the E-in-C whereby clarifications were issued on this aspect and as per which nil escalation is to be considered for the periods where though there is negative escalation yet the quantity of work is more than the work which was required to be performed under the contract. The Arbitrator, in my opinion, has correctly examined and decided this position as per paras 68.3 to 68.5 of the Award and the same are reproduced as under:

“68.3 Contractor further brought out that action of Department was even against the Departmental instructions contained in E-in-C’s letter No.35073/EC/E8 dated 22-11-90.

68.4 UOI, in their submissions and arguments, brought out that escalation amount had been worked out as per the formulae contained in the contract and that in some of the quarters “escalation works out on minus side due to Sch ‘B’ issued, work done and material lying at site during the period”. UOI further argued that E-in-C’s letter referred by contractor was not part of contract.

68.5 I have examined the submissions and arguments of both the parties as also the escalation calculations attached with the final bill. Minus escalation for materials had been considered against adjustment period Nos.7,8,10 to 14 and 16 for a total amount of Rs.5,24,452.30 and this had been deducted from the total of plus escalations for other adjustment periods. It is also seen that WPI had increased during the period of reckoning in these adjustment periods. Work done during these periods had also increased but minus figures worked out on account of increase in “VB”. In such cases “minus” escalation tantamounts to making a demand on the contractor for certain amount when there is increase in work done and increase in WPI. For implementation of escalation formulae, in such situations, E-in-C’s Br letter dated 22-11-90 have issued necessary clarifications. As per this, nil escalation is to be considered for such periods of reckoning. There could be no case for making a demand on contractor by way of ‘minus’ escalations. Department has obviously not followed the correct interpretation given by E-in-C’s Branch. Even their argument during the hearing, that this letter was not part of contract, is not justified as the policy letter by E-in-C’s Branch was to give instructions about the methodology of application of formula to overcome the anomalies as had occurred in this case. Similarly, I find no logic in their letter dated 18-1-97 stating that ‘KM’ has not exceeded 60%. This argument has nothing to do with the issues involved in the dispute in this claim.”

Accordingly, objections to this Claim are also rejected.

11. That takes me to the issue of the rate of interest which has to be awarded.

The Arbitrator has awarded interest @ 14% and 12% per annum. The Supreme Court in its recent catena of judgments reported as *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.* 2005 (6) 678, *McDermott International Inc. Vs. Burn Standard Co. Ltd. & ors* 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.* (2006) 7 SCC 700 and *Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra,* 2007 (2) SCC 720 and *State of Rajasthan vs. Ferro Concrete Construction Pvt. Ltd* (2009) 3 Arb. LR 140(SC) has held that in view of the liberalized economic scenario which has resulted in the lowering of rate of interest, the Courts ought to reduce the rate of interest as granted under the Award. Following the aforesaid chain of judgments, this Court has in all cases been generally granting interest @ 9% per annum simple. The ratio of aforesaid Supreme Court judgments has also been followed by various Division Bench judgments of this Court. Accordingly, I accept the objection of the objector with regard to the rate of interest and award interest @ 9% per annum simple, instead of the rate of 14% and 12% as given under the Award. I am, however, not changing the period for which interest has been granted under the Award. In case the awarded amount and as modified by this judgment is paid within a period of 90 days from today then rate of interest shall be @ 9% per annum simple, however, if the requisite amount is not paid to the contractor/petitioner within a period of 90 days then the rate of interest shall be 12% per annum simple instead of 9% per annum simple.

12. With the aforesaid observations the objections of the Union of India are partly allowed with regard to the setting aside of the Claim No.2 and reduction of the rates of interest. For the rest of the Claims as awarded the objections are dismissed and, the Award is made rule of the Court.

I.A. No.9385/2000 in CS(OS) No. 1259/2000

13. By means of this application, the petitioner/contractor has preferred objections to the Award with regard to counter Claim No.1 as awarded by the Arbitrator. This Counter Claim pertains to the Claim of Union of India for defect in the works done by the contractor and which defects led to seepage in the building. The Arbitrator has considered this issue in great detail and 12 pages of the Award are devoted to the contentions and findings with respect to this Counter Claim. The sum and substance of the findings with respect to this Counter Claim is that both the contractor and the Union of India have been held guilty for the seepage. Whereas the contractor has been held guilty because the contractor had given a 10 year warranty and there were in fact defects and the consequent seepage in the structure, the Union of India was held responsible because it has been found that subsequent events changed the water level, water drainage and local conditions which also added to the issue of seepage. I am tempted to reproduce the detailed discussion and findings of the Arbitrator but this would make the present judgment very bulky and therefore I only observe that the Arbitrator has referred to various reports of IIT Delhi, IIT Roorkee and

other reports to come to a finding that the contractor cannot be held to be fully responsible. On the other hand, the Arbitrator has referred to the contractual provisions to arrive at a finding that why should the contractor have accepted the work if according to it the work which was required of it would not have given warranty against the seepage, in spite of the fact that the contract required a 10 year warranty period.

14. It is settled law that an Arbitrator on the basis of the evidence as available before him is entitled to make a reasonable guesstimate. The Arbitrator has considered the entire voluminous evidence and has arrived at a figure with respect to the Claim of the Union of India for damages on account of the seepage. The Arbitrator has not awarded the complete amount as claimed by the Union of India of Rs.1,30,000,00/- but has only awarded a sum of Rs.10 lacs i.e. one thirteenth of the amount claimed. The Arbitrator has done so after considering all the aspects as stated above. This Court cannot interfere with the finding of facts as arrived at by the Arbitrator unless there is illegality or gross perversity in the finding of facts. In view of the detailed discussions and findings of the Arbitrator, I do not find that there is any illegality or perversity whatsoever for this Court to interfere within the parameters of law under Sections 30 and 33 of the Arbitration Act, 1940 inasmuch as I do not find that the Arbitrator has in any manner mis-conducted himself or the proceedings.

15. One additional aspect may also be noted with respect to the Award for dismissing the objection with respect to Counter Claim No.1. The Arbitrator is

a Chief Engineer and therefore a technical person. It has now been held in various judgments of this Court that once an Arbitrator is a technical person, then, lee-way is permitted to such a technical person with respect to technical issues which are considered by him. While awarding this claim only at Rs.10 lacs instead of Rs.1,30,000,00/-, the Arbitrator, who is an Engineer well versed with construction works, has considered the entire evidence. Accordingly, in view of this additional fact that the Arbitrator is a Chief Engineer, I do not find any reason to interfere with the Award with respect to this Claim.

16. At this stage, Mr. Chaudhry has drawn my attention to para 82.27 of the contract whereby the Arbitrator has made observations of not deducting from Rs.10 lacs a sum of Rs.3,10,000/- which is the guarantee money which is in possession of the Department. Mr. Chaudhry states that since now the guarantee period of 10 years is over, this amount should be adjusted against the amount of Rs.10 lacs. I find that this is a valid contention and no argument in reply could be raised by the Union of India in this regard because it is not as if by the Award in addition to Rs.10 lacs has awarded a further sum of Rs.3,10,000/-. While making Award rule of the Court on dismissing these objections of the contractor/petitioner, I clarify that under this Counter Claim No.1 now a sum of Rs.6,90,000/- shall be payable by the petitioner to the Union of India.

17. In view of awarding interest @ 9% per annum to the contractor the Union of India shall also under this Claim be entitled to interest @ 9% per annum

simple for the period given under the Award, in view of the reasoning already given by me above.

18. With the aforesaid observations, both the applications are disposed of. The Award is made rule of the Court except to the extent of allowing of the objection to Claim No. 2 and variation in the rates of interest. Parties are left to bear their own cost.

VALMIKI J.MEHTA, J

January 07, 2010

Ne