

MCDERMOTT INTERNATIONAL INC.
v.
BURN STANDARD CO. LTD. AND ORS.

MAY 12, 2006

[B.P. SINGH AND S.B. SINHA, JJ.]

Arbitration and conciliation Act, 1996:

Sections 31, 33 and 34—Partial award made by deferring some claims—Nature and character of—Held: It is same as of interim award envisaged in the Act, even though expression "partial award" is not used therein—If it answered definition of award under Section 2(c), for all intent and purport, it would be a final award—It is not akin to a preliminary decree—It is final in all respects with regard to disputes referred to arbitrator which are subject matter of such award—By such an award no prejudice is caused as both partial and final awards are subject matter of challenge under Section 34—Additional award is not vitiated in law, especially keeping in view powers of arbitral tribunal under Section 33.

Section 16—Plea that a claim was arbitrary or beyond its authority—Held: It has to be raised before arbitrator.

Contract—Construction of—Held: It is within jurisdiction of arbitrators even if it gives rise to determination of a question of law—In this regard conduct of parties and correspondences exchanged by them are relevant factors.

Denial of claim—Held—In every case claim is not required to be followed by denial—If a matter is referred to any arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator.

Parties to arbitration—Reduction of claim of party to contract by one who was not party to it—Held: Latter was involved in the matter and had a direct nexus with claim of former.

Contract Act, 1872:

- A Section 55—*Time being essence of construction contract—Specific date for performance set by contract at time when it was entered into—Notice invoking arbitration agreement therein served much after expiry of those dates—Held: Service of notice would not mean that party repudiated the contract as soon as schedule fixed by contract expired—Delay and disruptions might have occurred for various reasons—Parties did not intend time to be*
- B *of essence of contract as (i) contract itself provided for extension of time and payment of damages in case of delay in execution of contract (ii) party claiming that time was of essence did not raise that plea before the Arbitrator (iii) contract being a construction contract wherein generally time was not*
- C *essence unless special features existed therefor, which in facts of the case were not brought to notice of Court.*

- Sections 55 and 73—*Quantification of claim for damages—Held—Amount for damages is not required to be quantified as that is merely a matter of proof—Different formulas for quantification can be applied in*
- D *different circumstances—Formulae evolved over the years and accepted internationally can be adopted as that is neither prohibited nor inconsistent with Indian law—However, court or arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse formula—One formula may be preferred as against another—In facts of the case,*
- E *choice of formula by arbitrator not interfered by Court—Section 16 of Arbitration and Conciliation Act, 1996.*

- Section 73—*Claim for damages for breach of contract—Held: Invoice is not the only base where under such claim be made as it is drawn only in respect of a claim made in terms of contract—Claim for breach of contract*
- F *can be made through correspondence or in meetings—In facts of the case, held that the claim for overhead costs resulting in decrease in profit or additional management costs was a claim for damages, and it could be claimed in arbitration proceedings without invoice being drawn for it.*

- Section 73—*Consequential damages—Main contract providing that neither of parties thereto were liable to other for such damages—Applicability to sub-contract with one of those parties with another party—Held: Main contract was a matter of an agreement between parties thereto and in law it could not be extended to obligations assumed by another party to sub-contract It was not subsumed in sub-contract irrespective of latter providing*
- H *for its application—Party common to it and sub-contract was not absolved*

of its liability for breach of terms and conditions of sub-contract with another party.

A

Section 73—Consequential damages—Failure to perform contractual time bound commitments leading to claim for Damages on account of increased overhead cost and decreased profit and additional management costs—Held—Claim was related for direct losses and they were not consequential damages.

B

Novation—Acceptance sub-Silentio—Contract providing that one party was to procure material which was to be reimbursed by other party—Extra amount incurred for procuring materials with extra thickness—Claim for—Held: Extra amount was not payable, and to that extent there was novation of contract—It was especially so as correspondences between parties indicated that party that procured materials with extra thickness had accepted that it would not be entitled to any extra amount in that behalf—Principle of acceptance sub-silentio found applicable.

C

D

With a view to achieve exploration of production programme, ONGC appointed contractors to fulfill substantial portions of its off-shore construction requirements. Respondents were awarded contracts for fabrication, transportation and installation of six platforms and associated pipelines. Respondent and appellant entered into Technical Collaboration Agreement in terms whereof the latter agreed to transfer technology to the former with regard to design, construction and operation of a fabrication yard. The said agreement had an arbitration clause. Disputes and differences having arisen between the parties, appellant invoked the arbitration clause by a legal notice. A sole arbitrator was appointed by the Court. Before him, appellant raised their claims under several heads and respondent filed counter statements as also counter-claims. It was agreed between the counsel for the parties that the Arbitration and Conciliation Act, 1996 instead and in place of Arbitration Act, 1940 shall apply.

E

F

G

The arbitrator having heard the parties *inter alia* on jurisdictional question initially passed a partial award determining the same in favour of appellant. The decision on some other points were deferred for a period of four months so as to enable respondent to dispose of all claims raised by appellant in the meanwhile which had arisen before reference

H

A to the arbitration. The said claims were rejected. A detailed reasoned statement by ONGC/respondent referring to each individual document relied upon were filed in the arbitral proceedings. However, by reason of the said partial award, as regards other points appellant became entitled to payment from respondent amounts as determined therein.

B The parties thereafter filed applications under Section 33 of the 1996 Act alleging that certain claims made by them had not been dealt with and/or were omitted from consideration by the arbitrator in his partial award. Respondent raised a preliminary objection that there was no provision for making a partial award in the 1996 Act. Arbitrator
C passed an additional award and also rejected the respondent's objection in regard to the maintainability of the said proceeding stating that the same can be a subject matter for determination of jurisdictional question in a proceeding under Section 33 of the 1996 Act.

D Respondent filed an application under Section 34 of the Act questioning the said partial award as also the additional award.

The Arbitrator thereafter took up the left over matters for his consideration, observing that ONGC in the meantime had expressed no interest in participating in the decision making process at the inter-party level and, thus, arrived at an inference that the machinery set up
E' under the sub-contract has broken down and it would be for him to determine the same. The final award was thereupon passed holding the appellants to be entitled to various amounts quantified therein.

F Respondent filed an application under Section 34 of the Act praying for setting aside the final award contending that (i) the arbitrator had no jurisdiction to make a partial award (ii) the time was of the essence of contract and in terms of Section 55 of the Contract Act only remedy was to revoke the contract upon giving a notice therefor, and in absence of such a notice, damages could not be claimed (iii) as no
G invoice in respect of the claim on account of certain amounts, the Arbitrator had no jurisdiction to decide the same (iv) the Arbitrator was bound to determine the actual loss suffered by the parties and as the same was not determined, the award cannot be enforced (v) mechanical application of Emden Formula was wholly uncalled for and no award
H could be made relying on or on the basis thereof (vi) in terms of Clause

37 of the contract entered into by and between ONGC and respondent, no award by way of damage was payable, and similar provision was also contained in the subcontract entered into by and between the parties (vii) for relying on the basis of American Institute of Steel Construction (AISC) Code as a base for measurement being contrary to the contract, the award is liable to be set aside (viii) regarding Buoyancy Tanks in respect of ED and EE Jackets respondent had paid appellant for fabrication of them and they were the same which were used for W18, W19 and W110 and N3 Platform, claim on the said account once over again was not maintainable (ix) regarding Tie Down and Sea Fastening as they are required for safe transportation of structures allotted on transportation barge, the Arbitrator erred in allowing the claim of appellant as they are not permanent part of jacket decks of any platform (x) regarding substitution of materials the Arbitrator committed a serious error in not taking into account the material evidence adduced by respondent to the effect that appellant was instructed to substitute the specified material with available material at no additional cost of fabrication; in terms of the contract, it was for the appellant to procure the materials which were to be reimbursed by respondent (xi) appellant's claim of "exchange loss" was wrongly allowed without any amendment to the statement of claim, for entire value of the invoices without any deduction as delay in making payment by respondent to appellant on account of delay in receiving payment from ONGC has no relevance and in any event was contrary to the terms of the contract.

Appellant contended (i) that no case has been made out for setting aside the award of the Arbitrator (ii) partial award is in effect and substance an interim award within the meaning of Section 31(6) and 2(c) of the Act and, thus, the validity of the partial award is not open to question (iii) time was not the essence of contract and in terms of Section 55 of the Indian Contract Act, damages were payable (iv) invoice is merely a basis for claim and such a claim may be raised in correspondences as also in the meetings (v) the quantification of damages being a matter of evidence and proof, no case has been made out for interference with the award (v) reliance on the Emden Formula cannot be said to be against the law prevailing in India as Sections 55 and 73 of the Indian Contract Act provided only for entitlement to compensation and not the mode and manner in which such compensation is to be quantified (vi) Clause 37 of the Main Contract between ONGC

- A and respondent has no application as appellant's claim is not for any consequential damage but for the direct losses occasioned by respondent's breach of contractual duty to honour its time bound commitments; the said clause cannot be extended to the obligations towards appellant under the sub-contract as ONGC has no role to play in respect of the breach of its obligations towards it by respondent under the sub-contract (vii) regarding method of measurement, clause 23.1.1 (a) & (c) of the Main Contract between respondent and ONGC has no application as the same covers payment for 'structural material' which is an altogether different claim; the claim was towards labour charges for fabrication of structures and not claim for cost of material; AISC Code applied in relation to the fabrication job (viii) regarding Buoyancy Tanks for ED and EE Jackets, appellant's claim is for labour cost for fabrication work in the refurbishment of the Buoyancy Tanks; the finding of the Arbitrator is a finding of fact *inter alia* based on the admission of the witness examined on behalf of respondent (ix) regarding Tie Down and Sea Fastening, in offshore construction, jackets and decks are fabricated onshore and then they are transported on barges to the offshore location for installation; jobs pertaining to Tie Down and Sea Fastening required substantial fabrication work and no claim has been made towards costs of welding the Tie Downs and Sea Fasteners to the deck; clause 2 of the Contract would have no application to the instant case as it provides only for a stage payment on milestone basis; but clause 2.1(a)(i) which substantially covers sea fastening job as part of the fabrication contract would be applicable; respondent had not been able to show that the fabrication of Tie Down and Sea Fastening materials were included within the scope of transportation and not as a separate item under the head 'fabrication' (x) regarding substitution, it was for respondent in terms of the sub-contract to procure and supply all materials but as it was not in a position to do so, appellant on instructions of respondent used available materials which was having larger thickness and weight vis-a-vis those specified in the ONGC's specifications; the same having been approved both by the Engineer and ONGC, appellant was entitled to compensation towards the labour charges (xi) regarding Exchange Loss, clause 4.0 of contract only relates to payment for transportation and installation and respondent did not make any payment to appellant despite receipt of the whole amount from ONGC except a small amount; Clause 4.0 had no relevance to the exchange loss dispute; respondent acted contrary to the agreed terms

as it made payment upon applying the fixed exchange rate of Rs. 100=US\$8.575; respondent was to pay to appellant the amount as per the current rate, only on reconciliation appellant was to refund the excess amount to respondent which ensured that exchange loss would be shared by both the parties.

HELD : 1. The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined under Section 2(c) to include an interim award. Sub-section (6) of section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage. The arbitrator evolved the aforementioned procedure so as to enable the parties to address themselves as regard certain disputes at the first instance. As would appear from the partial award of the arbitrator, he deferred some claims. He further expressed his hope and trust that in relation to some claims, the parties would arrive at some sort of settlement having regard to the fact that ONGC directly or indirectly was involved therein. While in relation to some of the claims, a finality was attached to the award, certain claims were deferred so as to enable the arbitrator to advert thereto at a later stage. If the partial award answers the definition of the award, as envisaged under Section 2(c) of the 1996 Act, for all intent and purport, it would be a final award. In fact, the validity of the said award had also been questioned by respondent by filing an objection in relation thereto. A partial award is not akin to a preliminary decree. It is, final in all respects with regard to disputes referred to the arbitrator which are subject matter of such award. Some arbitrators instead and in place of using the expression "interim award" use the expression "Partial award". By reason thereof the nature and character of an award is not changed. In any view of the matter, respondent is not in any way prejudiced. Both the partial award and the final award are subject matter of challenge under Section 34 of the Act. The additional award is not vitiated in law, especially keeping in view powers of arbitral tribunal under section 33 of the Act. [450-B-H, 451-B, C, F]

2.1. At that time when the contract was entered into it was supposed to be performed by 30th December, 1985. In terms of the provisions of the contract the jobs in respect of WI-8, WI-9, WI-10, and

A N-3 were to be performed within the said period. A stipulation for commissioning of ED and EE platforms within a time frame has also been mentioned, i.e., February, 1986. [451-H, 452-A-D]

B 2.2. Appellant served a notice on 10th April, 1998 invoking the arbitration agreement. The same would not mean that it should have repudiated the contract as soon as 20 months schedule fixed by the contract expired. Delay and disruptions might have occurred for various reasons. In the instant case, therefore, the matter would be covered by the second part of section 55 of the Indian contract Act providing that where the parties did not intend time to be the essence of the contract, C the contract was not voidable, but the promisee was entitled to compensation for loss occasioned. For the aforementioned purpose, no notice was required to be served. In any event, the contract provided for extension of time, as would appear from clause 27(ii) and the relevant portions of clause 28. The parties, furthermore, agreed for payment of D liquidated damages, as would appear from clause 28(v)(a). Moreover, the contract itself contains provisions for extension of its terms and payment of damages in case of delay in execution of the contract. Therefore the second part of Section 55 of the Indian Contract Act would be attracted and not the first part. [452-E-F, 453-D, F, 458-D]

E *Arosan Enterprises Ltd. v. Union of India*, [1999] 9 SCC 449 and *Hind Construction v. State of Maharashtra*, [1979] 2 SCC 70, referred to.

F 2.3. The question which, further, arises for consideration is as to whether the respondents having proceeded on the basis that time was the essence of the contract, it was bound to issue a notice of repudiating the contract subject to reservation as regards its claim of damages. Appellant, however, states that it had never raised a contention that the time was of the essence of the contract, but the claim arises in view of the delay caused in completion of the contract for a period of 34 months and consequent escalation of costs. The price payable in terms of the G sub-contract did not adequately cover increased costs expended by appellant. On a plain reading of the provisions of section 55 of the Indian Contract Act, it is evident that as the parties did not intend that time was to be of the essence of the contract on the expiry whereof the contract became voidable at the instance of one of the parties, but by H reason thereof the parties shall never be deprived of damages. The

respondent had never pleaded before the Arbitrator that the time was the essence of the contract. In Construction contracts generally time is not the essence of the contract unless special features exist therefor. No such special features, in the instant case, was brought to notice of the Court. [458-E-G, H, 459-A]

3. It is not correct to contend that the invoice is the only base whereby and whereunder a claim can be made. There is no legal warrant for the said proposition. A claim can also be made through correspondence or in meetings. A claim for overhead costs resulting in decrease in profit or additional management costs is a claim for damages. An invoice is drawn only in respect of a claim made in terms of the contract. For raising claim based on breach of contract, no invoice is required to be drawn. It is furthermore not in dispute that the claim for damages had been made prior to invocation of arbitration. Once such a claim was made prior to invocation, it became a dispute within the meaning of the provisions of the 1996 Act. [463-G-H, 464-A-C]

4.1. While claiming damages, the amount therefor was not required to be quantified. Quantification of a claim is merely a matter of proof. In fact respondent never raised any plea before the arbitrator that the said claim was arbitrary or beyond its authority. Such an objection was required to be raised by respondent before the arbitrator in terms of Section 16 of the 1996 Act. It is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Arbitrator. If arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court. [464-C-D, 467-C-D]

Norwest Holst Construction Ltd. v. Cooperative Wholesale Society Ltd., decided on 17 February, 1998; *Beechwood Development Company (Scotland) Ltd. v. Mitchell*, decided on 21 February, 2001; *Harvey Shoplifters Ltd. v. Adi Ltd.*, decided on 6 March, 2003; *Nicon Inc. v. United States*, decided on 10 June, 2003 (USCA Fed. Cir.); *Gladwynne Construction Company v. Balmimore*, decided on 25 September, 2002 and *Charles G. William Construction Inc. v. White*, 271 F.3rd 1055,

A referred to.

4.2. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India. As computation depends on circumstances and methods to compute damage, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. There is no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [467-G-H, 468-A-B, H, 469-A-B]

Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission, [2003] 8 SCC 593 and *D.D. Sharma v. Union of India*, [2004] 5 SCC 325, relied on.

4.3. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award. A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the arbitrator in the facts and circumstances of the case has allowed appellant to prove its claim relying on or on the basis of Emden Formula, the same by itself would not lead to the conclusion that it was

in breach of section 55 or Section 73 of the Indian Contract Act.

[469-C, E, F]

State of U.P. v. Allied Constructions, [2003] 7 SCC 396; *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors*, [2004] 2 SCC 663; *Union of India v. Banwari Lal & Sons (P) Ltd.*, [2004] 5 SCC 304; *Continental Construction Ltd. v. State of U.P.*, [2003] 8 SCC 4 and *State of U.P. v. Allied Constructions*, [2003] 7 SCC 396, relied on.

5. In every case the claim is not required to be followed by a denial. If a matter is referred to any arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator. [470-D-E]

Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, [1988] 2 SCC 338, distinguished.

6.1. In terms of Clause 37 of the main contract neither of the parties are liable to the other for any consequential damages. The claim for damages raised by appellant cannot be said to be consequential damages. The claim relates to direct losses purported to have been occasioned by the failure to perform the contractual duty on the part of the respondent and to honour the time bound commitments. Such a loss, according to appellant occurred on account of increased overhead cost and decreased profit and additional management costs by reason of respondent's delays and disruptions. It is only in that view of the matter, the Emden formula was taken recourse to. [471-C-D]

Bharat Coking Coal Ltd. v. L.K. Ahuja, [2004] 5 SCC 109, distinguished.

6.2. Clause 37 of the main contract was a matter of an agreement by and between ONGC and respondent. In law, it could not have been extended to the obligations assumed by respondent towards appellant in terms of the contract entered into by and between the said parties. So far as ONGC is concerned, it cannot be said to have any role to play in the event of breach of obligation on the part of the respondent towards its sub-contractor. By reason of Article 3.1 of the sub-contract the Main Contract between ONGC and respondent would apply to the

A relevant sub-contract work and appellant was enjoined with a duty towards respondent to fulfill its obligations and responsibilities. But, thereby, respondent cannot absolve itself from its liability so far as breach of the terms and conditions of the sub-contract is concerned. In other words, by reason of Article 3.1., the contract by and between ONGC and respondent has not been subsumed in the sub-contract so as to absolve the respondent from its own contractual liability for breach of contract or otherwise. [471-D-E, 472-A-B]

C 7.1. Submission of respondents that a combined reading of the Clauses 5, 11 and 23.1.1(a) and (c) would go to show that the method of measurement was the subject matter of the contract is not acceptable. Clause 23.1.1 has no application in the present case as it covers payment for structural material which has no nexus with the Claim No. 4. The claim of appellant was for labour charges due under the sub-contract for fabricating the structures. The use of AISC Code relates to the claim for fabrication charges being Claim No. 1. The said claim was for labour charges which was not a claim for cost of material and, thus, nothing to do therewith. The scheme of the contract provides that total estimated tonnage of 18,178 ST. Since the total tonnage of 18,178 ST was only an estimated tonnage, the sub-contract made provision for variation of the contract price on the basis of 'as fabricated' tonnage. Further the quantities of the materials used were to be jointly determined by ONGC/EIL, respondent and appellant on the basis of fabricated tonnage which was to be used for adjusting the sub-contract price. If the "as fabricated tonnage" was found to be less than the estimated tonnage, the excess payment received by appellant through monthly bills was to be refunded. If the "as fabricated tonnage" was found to be more than the estimated tonnage, appellant was to be paid for the additional tonnage by applying the rate of US \$ 1067 per ST. The contract was silent with respect to the method or code to be applied for determining the "as fabricated tonnage". [473-F, 474-E-F, G-H, 475-A]

G *Gangappa v. Atmakur Nagbhushanam Setty & Co.*, [1973] 3 SCC 406, referred to.

Lavurack v. Woods of Colchester Ltd., [1967] 1 QB 278, referred to.

H 7.2. Clause 1.1.13 defined specifications to mean Industry Standard Codes (ISC). In the absence of a contractually specified method of

calculation, the appellant applied the AISC Manual of Steel Construction for calculating the fabricated tonnage. AISC is an industry standard. It has been applied by ONGC in other contracts. Even the Arbitrator has noted that the respondent has also accepted the validity of the AISC Code. Now the respondent cannot turn around and take a contrary position before this court in the proceedings under Section 34 of the Act. Hence by adopting the AISC Code, the Arbitrator has not acted contrary to the terms of contract. The arbitrator in his award noticed that the parties impliedly accepted the validity of the AISC method of calculation for calculating the final fabricated weight. If before the arbitrator, the said mode of calculation was accepted, the respondent should not be permitted to raise the said question before the Court.

[475-B-C, D, G]

8. Claim for Buoyancy Tanks for ED and EE Jackets involves a question of fact. It was a part of Claim No. 1 for fabrication. The arbitrator in his partial award found as of fact that substantial fabrication work had been done by appellant in the refurbishment of the said Buoyancy Tanks. It has further been held by the arbitrator that appellant had also been able to establish that there had been a difference in weight between the original Buoyancy Tanks used on N-3 and WI-8 Jackets and the weight of those tanks when used in ED and EE Jackets. In fact, the arbitrator in arriving at the said conclusion had taken into consideration the admission of witness examined on behalf of respondent itself that attachment of Buoyancy Tanks involved substantial fabrication activity. The dispute raised is a matter of appreciation of evidence. The findings arrived at by the arbitrator cannot, thus, be said to be perverse. [475-H, 476-A-C, F-G]

9. The claim regarding Tie-Downs and Sea-Fastening relates to the question whether appellant was entitled to payment for fabrication as the tie-downs and sea-fastening require substantial fabrication job in regard whereof there did not exist any provision in the contract. The arbitrator has accepted the claim of appellant holding that offshore construction contracts, jackets and decks are fabricated onshore and then they are transported on barges to the offshore location for installation where for the lugs, braces and other sea fastening and tie-down items are required to be created which the installation contractor is to use to weld the jackets and decks to the transportation barges, thereby securing the jackets for their journey to the offshore location. Appellant had merely claimed payment for fabrication of tie-downs and

A sea-fastening as part of the fabrication scope of work. Clause 2 of the contract has no application in the instant case as it merely provides for stage payment on milestone basis. In fact, the clause which would be attracted in the present case is contained in clause 2.1(a)(i). It specifically covers sea-fastening as part of the scope of fabrication contract work.

B WI-8, WI-9, WI-10 and N-3 fabrication contract also contains a similar clause in Clause 2.1. The arbitrator in para 12.24 of his award noticed that respondent itself has acknowledged to ONGC that the tie-down materials had been fabricated as part of the fabrication scope and the weight could not be disallowed in calculating the 'as fabricated tonnage'. It, therefore, evidently cannot take a stand which is contrary thereto

C and inconsistent therewith. Thus, by reason of the award, the arbitrator was of the opinion that the sea-fastening and tie-down were part of the transportation and installation scope and respondent did not succeed in proving that the said item should be included in the scope of transportation and is not a separate item under the head of fabrication. Again, the findings of the arbitrator were within his domain, being findings of fact. [476-H, 477-A-B-H, 478-A-C]

10. The arbitrator held that appellant would be entitled to receive the entire amount as respondent, despite receipt of payment from ONGC, did not pay the amount to appellant. For the purpose of applicability of the exchange rates, the same is irrelevant. The award was required to be made in terms of the contract whereby and whereunder the foreign exchange rate was frozen as was applicable on 9th August, 1984. The parties were bound by the said terms of contract. It may be noticed that the sub-contract was entered into on 1st January, 1986. The execution of the contract had started much earlier, i.e., much

E before the date of entering into the contract. The purpose for which the Rupees-US Dollar conversion rate has been frozen as on 9th August, 1984 must be viewed from the angle that thereby the parties thought that loss or gain towards the exchange rates would be on account of appellant. It is in the aforementioned situation that a letter of intent was served. It cannot be said that the exchange variation provision does not

F relate to the payments in respect of Claim Nos. 1, 2 and 3. The objection raised by the claimant to the said extent is accepted. [481-A-C, 483-H]

11.1. Clause 5 of the contract categorically states that appellant was to procure the material which was to be reimbursed by respondent.

H The extra amount incurred by appellant for procuring materials having

extra thickness, therefore, was not payable. To the aforementioned extent, there has been a novation of contract. Appellant had never asserted, despite forwarding of the contention of ONGC, that it would not comply therewith. It, thus, accepted in sub silentio. It, thus, must be held to have accepted that no extra amount shall be payable. [484-H, 485-A-B]

11.2. The exchange of letters categorically proves that appellant had accepted that it would not be entitled to any extra amount in that behalf, appellant by necessary implication accepted the said contention. The principle of acceptance sub-silentio shall be attracted in the instant case. Appellant was, therefore, not entitled to raise a claim to the extent of fabrication on account of the increased charges for substitution of material used for WI-8, WI-9, WI-10 and N-3 Jackets and piles. To the aforementioned extent, the claim of appellant was beyond the terms of the contract. [485-E-F]

12. It is one thing to say that some more amount might have been spent towards fabrication but the arbitrator has awarded the exact amount claimed by appellant. It is in the aforementioned context that the involvement of ONGC was necessary and if it is the accepted case of the parties that ONGC would not entertain any claim of respondent in this behalf, a fortiori having regard to the tripartite agreement, the arbitrator could have no jurisdiction to determine the claim in favour of appellant only because at one point of time respondent had raised its own claim with ONGC. In other words, any reduction of the claim of the respondent by ONGC had a direct nexus with the claim of appellant. It was, therefore, not a case where ONGC was not involved in the matter. [485-B, C-D]

13. The 1996 Act provides for award for 18% interest. The arbitrator in his wisdom has granted 10% interest both for the principal amount as also for the interim. By reason of the award, interest was awarded on the principal amount. An interest thereon was upto the date of award as also the future interest at the rate of 18% per annum. However, in some cases, this Court was resorted to exercise its jurisdiction under Article 142 in order to do complete justice between the parties. In this case, given the long lapse of time, it will be in furtherance of justice to reduce the rate of interest to 7%. [486-C-D, H]

A CIVIL APPELLATE JURISDICTION : I.A. No. 2-3 in Civil Appeal No. 4492 of 1998.

From the Judgment and Order dated 8.5.1998 of the High Court of Calcutta in A.P. No. 237/1997.

B Dipankar Gupta, Sr. Adv., Anil Bhatnagar, O.P. Khaitan, Mrs. Bharti Badesra for M/s. O.P. Khaitan & Co., Advs., with him for the Appellant.

Jayanto Mitra, Debal Banerjee, Sr. Advs., Pallav Sisodia, Rudgaman Bhattacharya, Ms. Shipra Ghose, Adv., with them for the Respondents. -

C The Judgment of the Court was delivered by

S.B. SINHA, J. :

INTRODUCTION

D Oil was discovered in the Bombay High Region in 1974 whereupon a plan of rapid development of off-shore oil and gas production was embarked by the Government of India through Oil and Natural Gas Commission (ONGC). With a view to achieve exploration of production programme, ONGC appointed contractors to fulfill substantial portions of its off-shore construction requirements. Burn Standard Company Limited (for short "BSCL") was interested in the second stage of platform construction of ONGC, i.e., structural and progress fabrication and material procurement. Four contracts were thereafter awarded in favour of BSCL for fabrication, transportation and installation of six platforms bearing No. ED, EE, WI-8, F WI-9, WI-10 and N3 and associated pipelines. They were to be installed in ONGC's Bombay High Sea.

CONTRACT

G The said contracts covered:

- (i) Material procurement and fabrication of the ED and EE jackets, piles and decks.
- (ii) Transportation and installation of the ED and EE jackets, piles and decks.

H

- (iii) Material Procurement and fabrication of the WI-8, WI-9, WI-10 and N-3 Jackets, piles, temporary decks and decks (the "Four Platform Fabrication Main Contract") and A
- (iv) Transportation and installation of the WI-8, WI-9, WI-10 and N-3 jackets, piles, temporary decks and decks, and installation of four pipelines and eight risers (the "Four Platform Installation Main Contract"). B

The said contracts contained arbitration agreements.

BSCL and McDermott International Inc. (for short "MII") entered into Technical Collaboration Agreement on 25th September, 1984 in terms whereof the latter agreed to transfer technology to the former with regard to design, construction and operation of a fabrication yard. The said agreement contains a separate arbitration clause between the parties. C

However, with regard to the fabrication and installation of off-shore platforms, BSCL decided to give a sub-contract of the work to MII on a project by project basis. BSCL while retained the job of fabrication of the ED and EE decks, six helidecks and procurement of materials for the overall project other than pipeline materials and some process equipment which was issued by ONGC sub-contracted the remaining work. D

In terms of a letter of intent dated 14th September, 1984 a contract was entered into by and between BSCL and ONGC for fabrication and installation of offshore platforms ED, EE, WI-8, WI-9, WI-10 and N-3 and laying of WI-8 to WI-9, WI-9 to WI-10, WI-9 to WIS and N-3 to NO pipelines and 8 associated risers as well as WI-7 to WI-8, WI-9 to SD, WI-10 to SV, EB to SC1, EC to SHP, ED to SHP, EE to SHP pipelines and 11 associated risers. A part of the said contract work was assigned to MII in respect of fabrication, transportation and installation of structures, modules, platforms and pipeline components on or about 1st January, 1986. The work under the said agreement was to be completed within 24 months but in all respects it was completed in early 1989. E

TERMS OF THE CONTRACT F

The relevant covenants between the parties contained in the said agreement are as under: G

H

A “Article 2. MII shall unless inconsistent with the provisions of this Sub-contract perform fulfill and observe all the obligations, covenants and agreements required on the part of BSCL to be performed, fulfilled and observed in terms of the Main Contracts to the extent these obligations, covenants and agreements relate to the Sub-contract Work including such obligations, agreements and covenants as may in future be added, modified or provided in the Main Contracts between the Buyer and BSCL with concurrence of MII to the extent thereof. These obligations, covenants and agreements, as have been agreed to be performed, fulfilled and observed by MII shall include the performance of the Sub-contract work in the manner and to the specifications as provided in the respective Main Contracts.

B

C

Article 3

D 3.1 MII shall be bound to BSCL by the terms of this Sub-contract Agreement and to the extent that the provisions of the respective Main Contract between Buyer and BSCL apply to the relevant Sub-Contract work of MII as defined in this Sub-contract Agreement, MII shall assume towards BSCL all the obligations and responsibilities which BSCL, by such Main Contract, assumes to Buyer and shall have the benefit of all rights, remedies and redresses against BSCL which BSCL, by such Main Contract, has against Buyer, insofar as applicable to this sub-contract Agreement, provided that when any provision of the respective Main Contract between Buyer and BSCL is inconsistent with this Sub-contract Agreement, this Sub-contract Agreement shall govern and prevail over the Main Contract.

E

F

G 3.2 BSCL shall be bound to MII by the terms of this Sub-Contract Agreement and to the extent that the provisions of the respective Main Contracts between Buyer and BSCL apply to the relevant Sub-contract work of MII as defined in this Sub-contract Agreement, BSCL shall assume towards MII all the obligations and responsibilities that Buyer, by such Main Contracts, assumes towards BSCL, and shall have the benefit of all rights, remedies and redress against MII which Buyer, by such Main Contracts, has against BSCL insofar as applicable to this sub-contract Agreement provided that when any provisions of the Main Contract between Buyer and

H

BSCL is inconsistent with any provisions of this Sub-contract Agreement, this Sub-contract Agreement shall govern and prevail over the Main Contract.

A

Article - 5

5.1 Except as otherwise provided herein, all claims made by Buyer against BSCL shall be the responsibility of MII when such claims arise or are derived from MII's Sub-contract Scope of Work; similarly, all claims made by Buyer that arise or derive from BSCL's Scope of Work shall be the responsibility of BSCL. To the extent that BSCL, as Main Contractor vis-à-vis Buyer, would be liable for any claims that arise or are derived from MII's Sub-contract Scope of Work, MII shall hold harmless and keep indemnified BSCL from any such claims to the extent analogous with MII's Sub-contract.

B

C

Article - 6 - Arbitration

D

6.1 Should there be any dispute or difference between BSCL and Buyer in regard to any matter connected with BSCL relating to or arising out of the Main Contract (s), which may involve MII's performance or affect MII's interest under the subcontract, BSCL shall keep MII informed and shall act in consultation and coordination with MII to ascertain the facts and agree on the appropriate action to be taken. MII shall render all assistance and cooperation that BSCL may require in this regard. If it is determined that the dispute or difference does not involve MII's performance or affect MII's interests, MII shall render such reasonable assistance and cooperation as BSCL may require; provided, however, that MII shall be entitled to reimbursement of costs, if any, incurred therefor with the prior approval of BSCL.

E

F

6.2 If any dispute or difference arising between BSCL and Buyer under or in respect of or relating to the Main Contract insofar as it relates to the work to be carried out by MII is referred to arbitration and any award/ judgment/ decree/ order is passed, or a settlement is otherwise reached with MII's consent, MII shall be bound to accept the same and bear all MII's liability resulting therefrom. MII shall, however, be assisted at all stages by BSCL

G

H

A with such arbitration proceedings and MII shall bear all expenses of such arbitration/ litigation and/ or negotiated settlement, if any. However, expenses incurred by BSCL in deputing their officials to attend such arbitration/ proceeding/ litigation would be to BSCL/s accounts.

B 6.3 All disputes and differences in respect of any matter relating to or arising out of or in connection with the execution or construction of this subcontract document, if the same cannot be and/ or is not the subject matter of dispute between BSCL and the Buyer under the Main Contracts and is not settled mutually by negotiation, shall be referred to arbitration under the Indian Arbitration Act, 1940, as amended from time to time, by appointing some agency acceptable to both the parties as Arbitrators and if no agency is found acceptable to both the parties, then by constituting a Board of Arbitration consisting of three Arbitrators, one to be nominated/ appointed by each party and the third to be appointed by the two Arbitrators as Umpire. The arbitration proceeding shall be held at New Delhi and the decision of the Arbitrators or the Umpire as the case may be shall be final and binding on both parties hereto. The arbitrators or the umpire, as the case may be, shall record their reasons for passing awards, copies of which shall be sent to the parties.

E Article - 10

10.1 Any amendment and/ or modification of this Sub-contract shall be valid only if it is in writing and signed by both the parties.

F All other terms and conditions not specified in this sub-contract shall be as stipulated in the Main Contracts.

10.2 This Sub-Contract Agreement shall be governed by the Laws of the Republic of India.”

G DISPUTES

Disputes and differences having arisen between the parties, MII invoked the arbitration clause by a legal notice dated 10th April, 1989.

H Several proceedings as regards invocation of arbitration clause were

initiated by the parties before the Calcutta High Court. The said proceedings ultimately ended in favour of MII leading to appointment of two arbitrators for determination of the disputes and differences between the parties. The arbitrators who were earlier appointed were removed and Mr. Justice A.N. Sen, a retired Judge of this Court was appointed as a sole arbitrator. It is stated that Mr. Justice A.N. Sen declined to act as an Arbitrator and by an order dated 28th August, 1998, Mr. Justice R.S. Pathak was appointed by this Court as a sole arbitrator. The Arbitrator was to continue with the proceedings from the stage it had reached. The said order is in the following terms:

“1. Mr. Justice R.S. Pathak, retired Chief Justice of India is appointed as the sole Arbitrator. In the case to resolve the disputes and differences which had been raised by the parties and were the subject matter of the arbitration proceedings before the arbitrators earlier appointed;

2) That the Learned Arbitrator shall enter upon the reference within three weeks from the date of service of this order upon him.

3) That the arbitration proceedings shall be held at New Delhi. However, in the event the learned Arbitrator considers it necessary to hold any sitting at any other place, he may do so with the consent of the parties;

4) The learned Arbitrator shall continue with the proceedings from the stage where the proceedings of the arbitration were on 8.5.1998, when the impugned order came to be made by the Calcutta High Court;

5) All the proceedings held till 8.5.1998 shall be treated as the arbitration proceedings held before the learned sole Arbitrator now appointed;

6) It shall be in the discretion of the learned Arbitrator to take or not to take oral evidence or to take oral evidence by way of affidavits. The learned arbitrator would be at liberty to adopt summary proceedings for concluding arbitration proceedings.

- A 7) That the learned Arbitrator shall publish his Award, as far as possible, within a period of one year from the date of entering upon the reference;
- 8) That the fees of the Arbitrator (which may be fixed by him) and all expenses of arbitration proceedings shall be shared equally by the parties;
- B 9) The learned Arbitrator shall file the Award in this Court.
- 10) Any application which may become necessary to be filed during or after the conclusion of arbitration proceedings, shall be filed only in this Court.”
- C

CLAIM OF MII

Before the learned Arbitrator, MII raised the following claims:

D	1. For Fabrication of jackets, Temporary Decks and Main Decks	US\$ 1,182,817.94
	2. For Transportation and Installation of jackets and Decks	US\$ 4,351,062.68
	3. For Installation of Pipelines and Risers	US\$ 840,064.23
E	4. For Structural Material Procurement	US\$ 5,301,534.13
	For Bulk Material Procurement	US\$ 84,919.14
		UKL 262,296.43 S\$ 680,764.29
F	5. For Transportation of Pipe	US\$ 1,231,415.00
	6. For Reimbursables	US\$ 377,309.30
	7. For Change Orders and Extra Work	US\$ 7,423,741.95
	8. For Delays & Disruptions	US\$ 13,233,343.00
	8A. For exchange Entitlements	US\$ 2,881,195.03
G	9. For Interest upto 21 August, 1989	US\$ 10,909,772.19
		UKL 148,254.14
		S\$ 521,102.56
Total		US\$47,817,174.59
		UKL 410,550.57
H		S\$ 1,201,866.85”

Before the Arbitrator, apart from the aforementioned amount, interest on the outstanding amount was also claimed at the rate of 15% per annum on all claims for which invoices were not paid until the award, as well as interest from 21st August, 1989 and future interest at the rate of fifteen per cent.

BSCL filed counter statements as also counter-claims before the learned Arbitrator.

The learned arbitrator took up for his consideration the following claims for his consideration:

1. Fabrication of Jackets, Temporary Decks and Main Decks
2. Transportation and Installation of Jackets, Decks (Permanent & Temporary) and Helidecks
3. Pipelines and Risers Installation
4. Structural Material and Rolling
5. Bulk Material
6. Transportation of Pipes
7. Reimbursables
8. Change Orders and Extra Works
9. Delays and Disruptions
- 9A. Whether MII is entitled to an exchange loss as claimed in paragraphs 4.74 to 4.78 of the Statement of Claims? If so, in what amount?
10. Interest
11. Jurisdiction
12. Did MII commit breach of the contract?
13. Is the Claim of MII barred by limitation?
14. Counter Claim
15. General

- A It was agreed to by and between the learned counsel for the parties that the 1996 Act instead and in place of 1940 Act shall apply.

PARTIAL AWARD

- B The learned arbitrator having heard the parties *inter alia* on jurisdictional question initially passed a partial award on 9th June, 2003 determining the same in favour of MII. The decision on points Nos. 6, 8 and 9 were deferred for a period of four months by the learned Arbitrator so as to enable BSCL to dispose of all claims raised by MII in the meanwhile which had arisen before reference to the arbitration. The said claims were rejected. A detailed
- C reasoned statement by ONGC/BSCL referring to each individual document relied upon were filed in the arbitral proceedings. However, by reason of the said partial award, as regards points Nos. 1 to 5, 7 and 9A, MII became entitled to payment from BSCL the following amounts:

D	“On Point No. 1	US\$	1,182,817.69
	On Point No. 2	US\$	3,133,612.40 &
		US\$	28,400.00
	On Point No. 3	US\$	665,039.41 &
		US\$	54,000.00
	On Point No. 4	US\$	2,809,100.54 &
E		US\$	2,300,200.00
	On Point No. 5	US\$	65,207.39
		UK Pound	232,604.40 &
		Singapore\$	548,271.81
	On Point No. 7	US\$	322,351.87
F		US\$	52,422.51
		US\$	1,573,466.00
		US\$	512,187.16
	On Point No. 9A	US\$	3,330,790.94”

PROCEEDINGS RE: ADDITIONAL AWARD

- G On point No. 10, MII was held to be entitled to interest on the amount awarded at the rate of 10% per annum from the date on which the amount fell due for payment till the date of the partial award and the awarded amount together with interest was directed to bear interest at the same rate from the
- H date of the award to the date of payment.

The parties thereafter filed applications under Section 33 of the Arbitration and Conciliation Act, 1996 alleging that certain claims made by them had not been dealt with and/ or were omitted from consideration by the learned arbitrator in his partial award. A

MII in its application contended: B

“(i) While deciding Point No. 4 regarding Structural Material and Rolling, MII’s claim for US\$ 128,000.00 as contended in paragraph 4.29 of the Statement of Claim has not been dealt with and has been omitted from the Award. C

(ii) While deciding Point No. 7 regarding Corporate Income Tax, MII’s claim that BSCL should be liable to the tax authorities for all further liabilities for Indian Corporate Income Tax as may be assessed in respect of the income received by MII under the Sub-contract as also for all tax liabilities that may be assessed in respect of any Award in favour of MII in the present arbitration proceedings as contained in paragraph 4.84 of the Statement of Claim has not been dealt with and has been omitted from the Award. D

(iii) In deciding Point No. 7 regarding Corporate Income Tax, MII has claimed two amounts one of US\$ 804,789.36 being interest @15% per annum up to 29 February, 1992 paid by MII in respect of Corporate Income Tax liability to the Tax authority, and the other on account of principal amount of tax payment of US\$ 1,623,048.00. In paragraphs 18.17 and 18.18 of the Award, the learned Arbitrator has in respect of the principal claim allowed an amount of US\$ 1,573,466.00 on account of Corporate Income Tax and an amount of US\$ 512,187.16 by way of interest. MII has also claimed interest on these two amounts from 29 February 1992 till payment. This claim for interest has not been dealt with in the Award and has been omitted from the Award. E F G

(iv) While deciding Point No. 10 relating to interest, MII’s claim for interest on amounts paid but paid late as contained in paragraphs 5.1 and 5.2 has not been dealt with and has been omitted from the Award.” H

- A BSCL raised a preliminary objection in regard to the MII's claim under Section 33 of the Act contending that there exists no provision for making a partial award.

ADDITIONAL AWARD

- B By reason of the additional award dated 29th September, 2003, the learned Arbitrator, however, held:

"1. MII's claim in respect of US\$ 128,000.00 is not accepted.

- C 2. MII's claim for a declaration that BSCL is liable to the tax authorities for all further liabilities for Indian Corporate Income-tax as may be assessed in future in respect of income received by MII under the Sub-Contract is allowed only insofar as it related to MII's liability, if any, to Corporate Income-tax, on the amounts awarded to it by a Partial Award, an Additional Award and a Final Award.

- D 3. MII is entitled to interest at 10% per annum for the period from 1 March 1992 to the date of payment in respect of the principal amount of US\$ 1,573,466.00 on account of Corporate Income-tax and the interest amount of US\$ 512,187.16 calculated up to 29 February, 1992.

- E 4. MII is entitled to interest at 10% per annum for the period of delay in BSCL making payment of MII's invoices, that is, for the period from due date of payment to the date of actual payment.
- F Such amount will carry interest at 10% per annum from the date of the Partial Award to the date of its payment."

- G The learned Arbitrator rejected the BSCL's objection in regard to the maintainability of the said proceeding stating that the same can be a subject matter for determination of jurisdictional question in a proceeding under Section 33 of the 1996 Act.

- H BSCL filed an application under Section 34 of the Act questioning the said partial award dated 9th June, 2003 as also the additional award dated 29th September, 2003.

FINAL AWARD

The learned Arbitrator thereafter took up the left over matters for his consideration, viz., points Nos. 6, 8 and 9 observing that ONGC in the meantime had expressed no interest in participating in the decision making process at the inter-party level and, thus, arrived at an inference that the machinery set up under the sub-contract has broken down and it would be for him to determine the same.

The final award was thereupon passed.

On point No. 6 which related to transportation of pipes, the learned arbitrator held MII to be entitled to US\$ 919,194.32 against BSCL in respect of the nine barge pipes for transporting them from Mangalore to Bombay.

Point No. 8 related to Change Orders and Extra Work. The learned Arbitrator awarded MII US\$ 305,840.00 as regards Change Order No. 1. As regards Change Order No. 6, MII was awarded US\$72,000.00 against BSCL. Furthermore, in respect of Change Order No. 9, MII was awarded US\$ 300,000.00 against BSCL. As regards Extra Work, MII was awarded US\$ 4,870,290.96 against BSCL pursuant to the invoices covered under the said point whereas MII's claim for US \$637,473.00 was rejected.

Point No. 9 related to delays and disruptions. MII was awarded US\$ 574,000.00 against BSCL in respect of Change Order No. 2. MII was further awarded US\$1,271,820.00 and US\$355,000.00 against BSCL under Change Order Nos. 3 and 7 respectively. As regards increased cost and expenditure incurred by MII, it was awarded US\$8,973,031.00.

So far as the claim of interest is concerned, the learned arbitrator made the following order:

"MII is entitled to interest on the amounts awarded under various heads by Final Award. In my opinion, having regard to the circumstances of the case, a rate of interest at 10 percent per annum will be appropriate from the date on which the amount fell due for payment to the date of this Final Award. The awarded amount including interest shall bear the interest at the same rate from the date of this Final Award to the date of the payment by BSCL."

A The learned arbitrator also awarded US\$750,000.00 as costs of the arbitration.

An application was filed by BSCL under Section 34 of the Act praying for setting aside the final award.

B
SUBMISSIONS:

Mr. Jayanto Mitra, learned senior counsel and Mr. Pallav Sisodia, learned counsel appearing on behalf of BSCL made the following submissions:

- C (i) The arbitrator had no jurisdiction to make a partial award which is not postulated under the 1996 Act as an award in piecemeal is impermissible in law.
- D (ii) While making the partial award, the learned Arbitrator opined that involvement of ONGC was imperative for determination of point Nos. 6,8 and 9, i.e., claims relating to transportation of pipes, Change Orders and Extra Work and delays and disruptions and, thus, the final award must be held to be bad in law.
- E (iii) As the subcontract provided for a back to back contract, determination of various claims depended upon determination of interpretative application of the main contract by ONGC wherefor directions of ONGC were binding on the parties.
- F (iv) Although US \$ 8.8 million has been awarded as regard alleged delay and disruption of work, no reason, far less any cogent or sufficient reason, as was mandatorily required in terms of Section 31 of the Act having been assigned, the impugned award is vitiated in law.
- G (v) In its award, the learned Arbitrator was bound to determine the actual loss suffered by the parties and as the same was not determined, the award cannot be enforced.
- H (vi) The award as regards loss of profit under various heads is based

on no evidence and, thus, wholly unreasonable.

A

- (vii) The claims made by MII were not only contrary to the terms of contract but also substantive law of India and were otherwise opposed to public policy.

- (viii) As the contract did not contain any agreed schedule or any stipulation as to whether the work was required to be finished within a stipulated period, in view of the fact that the contention of the MII was that the time was of the essence of contract, the only remedy available to it in terms of Section 55 of the Indian Contract Act was to revoke the contract upon giving a notice therefor. In absence of such a notice, damages could not be claimed. Reliance in this behalf has been placed on *Arosan Enterprises Ltd. v. Union of India and Another*, [1999] 9 SCC 449.

B

C

- (ix) No amount towards extra work was payable to MII having regard to the payment clauses contained in the contract and in particular the minutes of the meeting held by the parties on 9th August, 1984.

D

- (x) In view of the clear terms of the contract, ONGC was a necessary party and the learned Arbitrator committed an error in refusing to implead it in the proceeding.

E

- (xi) The learned Arbitrator having rejected the claim of the MII in his partial award dated 9th June, 2003 on the ground that increased overhead decrease of profit and additional management cost had not been raised before reference to arbitration and, thus, was beyond the scope of arbitral reference, could not have determined the self same question in his final award. The objection and the award for US\$ 8.8 million had not been taken into consideration and, thus, the same is liable to be set aside.

F

G

- (xii) The learned Arbitrator could not have awarded the said sum solely on the basis of the opinion of one Mr. D.J. Parson who did not have any personal knowledge of the facts of the case, particularly in view of the fact that no evidence was adduced

H

A as regards sufferance of actual loss by MII. Mechanical application of Emden Formula was also wholly uncalled for and no award could be made relying on or on the basis thereof.

B (xiii) So far as the claim of extra work is concerned, the learned Arbitrator has wrongly allowed the claim of MII in respect of invoice Nos. 2806470 to 2806475 although due date for payment of the said amount fell after the commencement of reference to arbitration and, thus, as no dues existed on that date, the Arbitrator had no jurisdiction to make an award in relation thereto.

C (xiv) As regards “exchange loss”, MII’s claim was allowed without any amendment to the statement of claim. Claim of MII was wrongly allowed by the learned Arbitrator for entire value of the invoices without any deduction as delay in making payment by BSCL to MII on account of delay in receiving payment from ONGC has no relevance and in any event was contrary to the terms of the contract.

E The learned Arbitrator had also not taken into consideration that in terms of the contract, foreign exchange rate was frozen at the rate of Rs. 100 X 8.575 Dollars as was applicable on 9th August, 1984.

F (xv) The claim for US\$ 2.3 million was outside the scope of reference to arbitration as no demand therefor was made. Such a claim was made for the first time only in the statement of claim.

G (xvi) In terms of Clause 37 of the contract entered into by and between ONGC and BSCL, no award by way of damage was payable. Similar provision was also contained in the subcontract entered into by and between the parties.

H (xvii) As MII was to compensate for the supply of materials by BSCL subsequently, no award for a sum of US\$ 2.3 million could be made.

- (xviii) As no invoice in respect of the claim of US\$ 28,400 on account of an additional barge trip to transport the ED Temporary Deck had been raised, the learned Arbitrator had no jurisdiction to decide the same. A
- (xix) The award under the said head for a sum of US\$ 54,000 on account of additional survey of W18 and W19 pipeline was not an arbitrable dispute being clearly outside the purview of the arbitration proceedings. B
- (xx) Relying on or on the basis of American Institute of Steel Construction (AISC) Code as a base for measurement being contrary to the contract, the award is liable to be set aside. C
- (xxi) (a) Re: Buoyancy Tanks in respect of ED and EE Jackets
- As BSCL had paid MII for fabrication of the same buoyancy tanks and the buoyancy tanks were the same which were used for W18, W19 and W110 and N3 Platform, claim on the said account once over again was not maintainable ignoring the evidence of Mr. S.K. Mukherjee (RW-1). D
- (b) Tie Down and Sea Fastening E
- As Tie Down materials are required for safe transportation of structures allotted on transportation barge, the learned Arbitrator erred in allowing the claim of MII as they are not permanent part of jacket decks of any platform. F
- (c) Substitution of Materials
- The learned Arbitrator committed a serious error in not taking into account the material evidence adduced by BSCL to the effect that MII was instructed to substitute the specified materials with available material at no additional cost of fabrication. G
- In terms of the contract, it was for the MII to procure the materials which were to be reimbursed by BSCL. The claim H

A for US\$ 20832.108 was based on fabrication charges on account of increased tonnage for material substitution for W18, W19, W110 and N3 jackets and piles as well as ED and EE jackets and, thus, as the learned Arbitrator had allowed claim only to the extent of fabrication, the amount claimed by MII could not have been allowed in toto.

B

Mr. Dipankar Gupta, learned senior counsel appearing on behalf of MII, on the other hand, submitted that no case has been made out for setting aside the award of the learned Arbitrator.

C

In reply to the submissions made on behalf of BSCL, it was urged:

Re. Increased Overhead Decrease of Profit and Additional Management Cost

D

The amount has been awarded on the basis of statement of Mr. D.J. Parsons. The contract clearly provided that W18, W19, W110 and N3 platforms were to be completed by 30th December, 1985 whereas ED and EE platforms were to be commissioned in February, 1986. It is not the case of MII that the time was of the essence of contract and, thus, in terms of Section 55 of the Indian Contract Act, damages were payable. Even in terms of the main contract between BSCL and ONGC, time was not of the essence of the contract. The contract contained clauses for extension of time and liquidated damages which is also indicative of the fact that time was not of the essence of the contract and, thus, damages for delay is permissible in law in view of the decision of this Court in *Hind Construction v. State of Maharashtra*, [1979] 2 SCC 70.

E

F

G

H

Change Order Nos. 2, 3 and 7 covered compensation under various heads as specified therein. The award of the learned Arbitrator clearly shows that additional costs had been incurred by MII and, thus, the award cannot be faulted. The partial award did not deal with the said claims. The dispute was specifically referred to arbitration in terms of notice dated 10th April, 1998. The quantification of damages being a matter of evidence and proof, no case has been made out for interference with the award particularly in view of the fact that BSCL had never raised any objection as regards the jurisdiction of the Arbitrator.

Reliance on the Emden Formula cannot be said to be against the law prevailing in India as Sections 55 and 73 of the Indian Contract Act provided only for entitlement to compensation and not the mode and manner in which such compensation is to be quantified.

A

Clause 37 of the Main Contract between ONGC and BSCL has no application as MII's claim is not for any consequential damage but for the direct losses occasioned by BSCL's breach of contractual duty to honour its time bound commitments. The said clause cannot be extended to the obligations towards MII under the sub-contract as ONGC has no role to play in respect of the breach of its obligations towards it by BSCL under the sub-contract.

B

C

Re: Partial Award

A partial award is in effect and substance an interim award within the meaning of Section 31(6) and 2(c) of the Act and, thus, the validity of the partial award is not open to question.

D

Re: Exchange Loss

Clause 4.0 of contract only relates to payment for transportation and installation and BSCL did not make any payment to MII despite receipt of the whole amount from ONGC except an amount of Rs. 12,70,290. In any event, Clause 4.0 has no relevance to the exchange loss dispute. BSCL acted contrary to the agreed terms as it made payment upon applying the fixed exchange rate of Rs. 100 = US\$8.575. BSCL was to pay to MII the amount as per the current rate, only on reconciliation MII was to refund the excess amount to BSCL which ensured that exchange loss would be shared by both the parties.

E

F

Re: Uninvoiced Claims

BSCL never raised any objection before the Arbitrator that the claim for US\$ 2,300,200 for procurement of structural material could not be raised in view of the provisions contained in Section 16 of the 1996 Act. Invoice in any event, is merely a basis for claim and such a claim may be raised in correspondences as also in the meetings. The claim for US\$ 2,300,200 was not strictly claim for damages, as in terms of the contract BSCL was required

G

H

- A to procure the steel and as it being not in a position to do so, MII agreed to procure the same on its behalf if BSCL would agree to pay US\$ 2,300,200 to cover MII's cost for accelerated procurement and other costs. This offer was the subject matter of correspondence between the parties. As no dispute was raised to recover the same amount from BSCL, procurement job was undertaken. The finding arrived at by the learned Arbitrator in this behalf
- B is entirely a finding of fact. Reference to Clause 5 of the Contract was wholly irrelevant. This clause provides that BSCL shall procure suitable steel for "jackets" on replacement basis for MII purchased steel. BSCL did not procure the required amount of steel to replace the structural materials that MII provided from its inventory as an accommodation to BSCL. MII did so
- C on the understanding that the structural material removed from MII's inventory would be promptly replaced by BSCL. BSCL did not replace the material.

Re: Method of Measurement

- D Clause 23.1.1 (a) & (c) of the Main Contract between BSCL and ONGC has no application as the same covers payment for 'structural material' which is an altogether different claim being Claim No. 4. The claim was towards labour charges for fabrication of structures, labour charges and not claim for cost of material. AISC Code applied in relation to the fabrication job is as
- E under:

"The scheme of the Contract provides in relation to Fabrication and the application of AISC Code is explained below:

- F (i) the sub-contract provides total estimated tonnage of 18, 178 ST with following break-up:

ED?EE Platforms 6078 ST (page 166 I.A. no.2 Vol.2)

W18, W19, W110 and N3 platforms

- G 12,100 ST/ 18, 178 ST (page 371 I.A. no.2 Vol.2)"

Re: Buoyancy Tanks for ED and EE Jackets

- H MII's claim is for labour cost at the rate of US\$ 1067 per ST involved for fabrication work in the refurbishment of the Buoyancy Tanks. The

finding of the Arbitrator is a finding of fact *inter alia* based on the admission of the witness, namely, Shri S.K. Mukherjee, who was examined on behalf of BSCL

A

Re: Tie Down and Sea Fastening

In offshore construction, jackets and decks are fabricated onshore and then they are transported on barges to the offshore location for installation. Jobs pertaining to Tie Down and Sea Fastening required substantial fabrication work and no claim has been made towards costs of welding the Tie Downs and Sea Fasteners to the deck.

B

Clause 2 of the Contract would have no application to the instant case as it provides only for a stage payment on milestone basis. But, clause 2.1(a)(i) which substantially covers sea fastening job as part of the fabrication contract would be applicable. BSCL had not been able to show that the fabrication of Tie Down and Sea Fastening materials were included within the scope of transportation and not as a separate item under the head 'fabrication'.

C

D

Re: Substitution

It was for BSCL in terms of the sub-contract to procure and supply all materials but as it was not in a position to do so, MII on instructions of BSCL used available materials which was having larger thickness and weight vis-a-vis those specified in the ONGC's specifications. The same having been approved both by the Engineer and ONGC, MII was entitled to compensation towards the labour charges at the rate of US\$ 1067 per ST.

E

F

Re: Extra Work Invoice Nos. 2806470 to 2806475

The invoices which were contained in Annexure 9 to MII's statement of claims were substituted by new documents in terms whereof the due date of invoice was corrected to 9th March, 1989 and, thus, fall due for payment prior to the notice dated 10th April, 1989 invoking arbitration. The payment of extra work became due when the work was performed and moreover, the invoices in question did not specify any date for payment.

G

Re: Interest

H

- A The ground has been taken only in the supplementary affidavit filed on behalf of BSCL on 21st September, 2004 beyond a period of three months as specified in Section 34 of the Act. The Arbitrator has awarded the principal amount and interest thereon upto the date of award and future interest thereupon which do not amount to award on interest as interest
- B awarded on the principal amount upto the date of award became the principal amount which is permissible in law.

CHALLENGE TO AWARD: LEGAL SCOPE OF

- C Section 2(1)(b) of the 1996 Act reads as under:

“2(1)(b) “arbitration agreement” means an agreement referred to in section 7”

- D In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-à-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder.

- E Section 30 of the 1940 Act reads, thus:

“Grounds for setting aside award - An award shall not be set aside except on one or more of the following grounds, namely:

- F (a) That an arbitrator or umpire has misconducted himself or the proceedings;
- (b) That an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec 35;
- G (c) That an award has been improperly procured or is otherwise invalid.”

- H The Section did not contain expression “error of law....”. The same was added by judicial interpretation. While interpreting Section 30 of the 1940 Act, a question has been raised before the courts as to whether the

principle of law applied by the arbitrator was (a) erroneous or otherwise or (b) wrong principle was applied. If, however, no dispute existed as on the date of invocation, the question could not have been gone into by the Arbitrator.

CHANGES UNDER THE NEW ACT

The 1996 Act makes a radical departure from the 1940 Act. It has embodied the relevant rules of the modern law but does not contain all the provisions thereof. The 1996 Act, however, is not as extensive as the English Arbitration Act.

Different statutes operated in the field in respect of a domestic award and a foreign award prior to coming into force of the 1996 Act, namely, the 1940 Act, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. All the aforementioned statutes have been repealed by the 1996 Act and make provisions in two different parts, namely, matters relating to domestic award and foreign award respectively.

Vis-à-vis Grounds for setting aside the award:

After the 1996 Act came into force, under Section 16 of the Act the party questioning the jurisdiction of the arbitrator has an obligation to raise the said question before the arbitrator. Such a question of jurisdiction could be raised if it is beyond the scope of his authority. It was required to be raised during arbitration proceedings or soon after initiation thereof. The jurisdictional question is required to be determined as a preliminary ground. A decision taken thereupon by the Arbitrator would be subject matter of challenge under Section 34 of the Act. In the event, the arbitrator opined that he had no jurisdiction in relation thereto an appeal thereagainst was provided for under Section 37 of the Act.

The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims

A at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

B However, this Court, as would be noticed hereinafter, has the occasion to consider the matter in great detail in some of its decisions.

C In *Primetrade AG v. Ythan Ltd.*, [2006] 1 All ER 367, jurisdictional issue based on interpretation of documents executed by the parties fell for consideration having regard to the provisions of the Carriage of Goods by Sea Act, 1924. It was held that as the appellant therein did not become holder of the bills of lading and alternatively as the conditions laid down in Section 2(2) were not fulfilled, the arbitrator had no jurisdiction to arbitrate in the disputes and differences between the parties.

D *Vis-à-vis* the duty to assign reasons

Another important change which has been made by reason of the provisions of the 1996 Act is that unlike the 1940 Act, the Arbitrator is required to assign reasons in support of the award. A question may invariably arise as to what would be meant by a reasoned award.

E In Bachawat's *Law of Arbitration and Conciliation*, Fourth Edition, pages 855-856, it is stated:

F "... 'Reason' is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

G The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in *Poyser and Mills' Arbitration In Re*, "proper, adequate reasons". Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons.

H

The meaning of the word “reason” was explained by the Kerala High Court in the contest of a reasoned award...

“Reasons are the links between the materials on which certain conclusions are based and the actual conclusions.”...

A mere statement of reasons does not satisfy the requirements of s.31(3). Reasons must be based upon the materials submitted before the arbitral tribunal. The tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored...

Statement of reasons is mandatory requirement unless dispensed with by the parties or by a statutory provision.”

In *Konkan Railway Corporation Ltd. v. Mehul Construction Company*, [2000] 7 SCC 201, this Court emphasized the mandatoriness of giving reasons unless the arbitration agreement provides otherwise.

Public Policy

In *Renusagar Power Co. Ltd. v. General Electric Co.*, [1994] Supp 1 SCC 644, this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian Law, (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression ‘public policy’ was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (for short ‘ONGC’) [2003] 5 SCC 705. This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*, [1986] 3 SCC 156 wherein the applicability of the expression ‘public policy’ on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/ or otherwise arrived at because of the unequal bargaining power would not only be *ultra vires* Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In *ONGC* (supra), this Court, apart

A from the three grounds stated in *Renusagar* (supra), added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

B Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merit of the matter.

C What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular government. [See: *State of Rajasthan v. Basant Nahata*, [2005] 12 SCC 77.

In *ONGC* (supra), this Court observed:

E "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar case*¹⁰ it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

H (a) fundamental policy of Indian law; or

(b) the interest of India; or

A

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

B

We are not unmindful that the decision of this Court in *ONGC* (supra) had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases. [See: *The Law and Practice of Arbitration and Conciliation* by O.P. Malhotra, Second edition, page 1174.]

C

Before us, the correctness or otherwise of the aforesaid decision of this Court is not in question. The learned counsel for both the parties referred to the said decision in *ex tenso*.

D

We, therefore, would proceed on the basis that *ONGC* (supra) lays down the correct principles of law.

E

SUPERVISORY JURISDICTION

F

We may consider the submissions of the learned counsel for the parties on the basis of the broad principles which may be attracted in the instant case, i.e., (i) whether the award is contrary to the terms of contract and, therefore, no arbitrable dispute arose between the parties; (ii) whether the award is in any way violative of the public policy; (iii) whether the award is contrary to the substantive law in India, viz., Sections 55 and 73 of the Indian Contract Act; (iv) whether the reasons are vitiated by perversity in evidence in contract; (v) whether adjudication of a claim has been made in respect whereof there was no dispute or difference; or (vi) whether the award is vitiated by internal contradictions.

G

H

A For the aforementioned purpose, it would be necessary to see as to what law the arbitrator was required to apply.

We may, therefore, consider the legal submissions before adverting to the merit of the matter.

B VALIDITY OF THE 'PARTIAL AWARD'

C The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined under Section 2(c) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage.

D The learned arbitrator evolved the aforementioned procedure so as to enable the parties to address themselves as regard certain disputes at the first instance. As would appear from the partial award of the learned arbitrator, he deferred some claims. He further expressed his hope and trust that in relation to some claims, the parties would arrive at some sort of settlement having regard to the fact that ONGC directly or indirectly was involved therein. While in relation to some of the claims, a finality was attached to the award, certain claims were deferred so as to enable the learned arbitrator to advert thereto at a later stage. If the partial award answers the definition of the award, as envisaged under Section 2(c) of the 1996 Act, for all intent and purport, it would be a final award. In fact, the validity of the said award had also been questioned by BSCL by filing an objection in relation thereto.

F We cannot also lose sight of the fact that BSCL did not raise any objection before the arbitrator in relation to the jurisdiction of the Arbitrator. A ground to that effect has also not been taken in its application under Section 34 of the Act. We, however, even otherwise do not agree with the contention of Mr. Mitra that a partial award is akin to a preliminary decree. G On the other hand, we are of the opinion that it is final in all respects with regard to disputes referred to the arbitrator which are subject matter of such award. We may add that some arbitrators in stead and in place of using the expression "interim award" use the expression "partial award". By reason thereof the nature and character of an award is not changed. As, for example, H we may notice that in arbitral proceedings conducted under the Rules of

Arbitration of the International Chamber of Commerce, the expression "partial award" is generally used by the arbitrators in place of interim award. In any view of the matter, BSCL is not in any way prejudiced. We may state that both the partial award and the final award are subject matter of challenge under Section 34 of the Act.

Section 33 of the Act empowers the arbitral tribunal to make correction of errors in arbitral award, to give interpretation of a specific point or a part of the arbitral award, and to make an additional award as to claims, though presented in the arbitral proceedings, but omitted from the arbitral award. Subsection (4) empowers the arbitral tribunal to make additional arbitral award in respect of claims already presented to the tribunal in the arbitral proceedings but omitted by the arbitral tribunal provided

1. There is no contrary agreement between the parties to the reference;
2. A party to the reference, with notice to the other party to the reference, requests the arbitral tribunal to make the additional award;
3. Such request is made within thirty days from the receipt of the arbitral award;
4. The arbitral tribunal considers the request so made justified; and
5. Additional arbitral award is made within sixty days from the receipt of such request by the arbitral tribunal

The additional award, in our opinion, is not vitiated in law.

DELAY AND DISRUPTION

Operative facts

According to the applicants, the contract entered into by and between MII and BSCL did not provide for any period of completion. MII, on the other hand, states that at that time when the contract was entered into it was

A supposed to be performed by 30th December, 1985 as would appear hereinafter:

B "For Jackets and Temporary Decks (for platforms WI-8, WI-9, WI-10 and N-3), the completion period is 30 April 1985 and for Decks and Helidecks (for platforms WI -8, WI-9, WI-10 and N-3) the completion date is 30 December 1985. Clause (ii) in the 'Schedule of Completion of Well Platforms' states: "...the completion dates...will be reckoned for purpose of L/d."

C In terms of the provisions of the contract the jobs in respect of WI-8, WI-9, WI-10 and N-3 were to be performed within the said period.

A stipulation for commissioning of ED and EE platforms within a time frame has also been mentioned, i.e., February, 1986 as would appear from the following:

D "1. The agreed for commissioning of platforms ED & EE is by end of February 1986, subject to the provisions of this Contract."

E MII served a notice on 10th April, 1998 invoking the arbitration agreement. The same would not mean that it should have repudiated the contract as soon as 20 months schedule fixed by the contract expired. Delay and disruptions might have occurred for various reasons. In the instant case, therefore, the matter would be covered by the second part of Section 55 of the Indian Contract Act providing that where the parties did not intend time to be of the essence of the contract, the contract was not voidable, but the promisee was entitled to compensation for loss occasioned. For the
F aforementioned purpose, no notice was required to be served. In any event, the contract provided for extension of time, as would appear from clause 27(ii) and the relevant portions of clause 28 which read as under:

G "27 (ii) Should be amount of extra work, if any, which Contractor is required to perform under clause 24 to 26 ants, fairly entitled Contractor to extension of time beyond the scheduled date for completion of either the whole or part of the works or for such extra work as the case may be, Company and Contractor shall mutually discuss and decide extensions of time, to be granted to Contractor
H and the revised schedule for completion of the Works.

28 (i) Subject any requirements in the Contract Specifications as to the completion of any portion of the work before completion of the whole and subject to the other provisions contained in the Contract, the Works shall be completed in accordance with the agreed schedule as indicated in Appendix-II. Company may, if the exigencies of the works or other projects so required amend the completion schedule and/or phase out completion.

28(iii)...No extension in completion shall be permitted unless authorized in writing by Company as a "Variation in completion schedule" or as otherwise specified in the Contract. In any case, no portion of the works shall extend beyond the commencement of the 1986 monsoon."

The parties, furthermore, agreed for payment of liquidated damages, as would appear from clause 28(v)(a) which reads as under:

"a) recovery is its sole and only remedy for delayed completion of work by Contractor, as ascertained and agreed liquidated damages, and not by way of penalty, as sue equivalent to 2.5% of the Contract Price for the item which is delayed, for each month of delay (or prorate thereof for part of a month), beyond the scheduled completion date, subject to a maximum of 7.5 % of the said Contract price. Such liquidated damages shall be payable after allowing a grace period of 15 days. The monsoon peril requiring which no work can be carried out orders, shall be excluded for the purpose of determining the quantum of delay in completion of work.."

Moreover, the contract itself contains provisions for extension of its terms and payment of damages in case of delay in execution of the contract.

The claim for increased overhead and decreased profit and additional project management cost flows out of the same operative facts as the delay and disruption change in respect of Change Order Nos. 2, 3, and 7.

We may at the outset point out that the question as regards the effect of the said claims which were not considered in the first round of the arbitral proceedings shall be dealt with a little later.

A So far as the Change Order No. 2 is concerned, the learned arbitrator has accepted the contention of the MII that it had to incur additional cost due to delay in receipt of equipment and materials supplied. In his Final Award, the learned arbitrator noticed:

B “...It appears that BSCL accepted and acknowledged that MII had incurred additional cost on account of this delay occasioned by BSCL...”

 So far as, Change Order No. 3 is concerned, the learned arbitrator in paragraph 67.2 of the Final award noticed as under:

C “...This was followed by a meeting on 7-8 October 1986 attended by the representatives of ONGC, EIL, BSCL and MII, during which ONGC advised BSCL that BSCL should absorb one half the mobilization and demobilization costs of MII’s marine equipment, since the delay was occasioned by BSCL in completing the helidecks...”

 So far as Change Order No. 7 is concerned, the learned Arbitrator has recorded in paragraph 68.1 of the Final Award as under:

E “...This Change Order was accepted by BSCL and ONGC but MII has received no payment...”

 It was further recorded in paragraph 68.4 of the Final Award:

F “...Even after the work was completed, there was a meeting on 16-17 June, 1987 at which ONGC informed that the Change Order was agreed to in principle...”

 So far as the claim of compensation in addition to the said Change Order Nos. 2, 3 and 7 is concerned, the statement of claim of MII is as under:

G “4.65: The BSCL delays and disruptions required McDermott to alter the fabrication and installation sequence to match deliveries of equipment. This precluded McDermott performing certain activities as planned in the Subcontract. Change order No.2 relates to additional cost incurred by McDermott due to delay in receipt of

H

equipment and material supplied by BSCL. BSCL's delivery of the equipment was upto seventeen months late. During this period, McDermott continued to fabricate the decks installing material as it became available. The delay resulted in additional costs to McDermott due to change order with cost effect of US\$574,000.00. BSCL has failed and neglected to make payment of the invoice for this change order.

4.66: Change order no.3 relates to mobilization and demobilization of Derrick Barge 26 to complete BSCL work in the 1986/1987 construction season. The Subcontract price was based on mobilization and demobilization of a single barge in the 1984/1985 and 1985/1986 construction seasons only and performance of the offshore scope of work in a continuous sequence. Due to BSCL delays, the WI-8, WI-9, WI-10 and N3 decks and helidecks were not completed for installation during the 1985/1986 work season. Further, the WI-7 to WI-8 pipeline and five risers could not be installed due to unavailability of material and lack of access to the EB and EC jackets, which were still under construction. In the 1986/1987 construction season, McDermott used Derrick Barge 27, which was already in the field, to install the WI-8, WI-9, WI-10 and N3 decks. McDermott also had to mobilize Derrick Barge 26 in the same construction season for installation of the WI-7 to WI-8 pipeline and associated risers. On the instructions of BSCL, McDermott mobilized Derrick Barge 26 in February 1987. Derrick Barge 26 installed the pipelines and risers and was demobilized from the field on 10 March 1987. For the mobilization/demobilization of Derrick Barge 26 for the 1986/1987 construction season work, McDermott submitted a change order to BSCL with cost effect of US \$ 1,271,820.00. BSCL has failed and neglected to make payment of the invoices for this change order.

4.67 Change Order no.7 relates to offshore installation or late-supplied equipment on the WI-8, WI-9, WI-10 and N3 decks. As early as February, 1986, the parties contemplated that certain BSCL-supplied equipment planned for installation by McDermott onshore would have to be installed offshore due to the projected late delivery. The cost of installing equipment off shore is much US \$ 1,140,705.00. On 6 November 1986, McDermott reviewed the list

A of outstanding equipment and revised its change order to US \$ 355,000.00. On the instructions of BSCL, McDermott performed the change order work and installed outstanding equipment offshore. BSCL has failed and neglected to make payment of the invoice for this change order.”

B In the Final Award also the learned arbitrator noticed:

C “The discussion covering earlier issues establishes that BSCL was guilty of delays and disruptions. Proceeding from there, the question is whether MII is entitled to an amount on account of increased overhead and loss of profit and additional project management costs? MII states that construction law recognizes that construction contractor incurs two general jobs of costs in the course of its operation; the operating costs that are attributable to a particular project, and costs such as overhead that are expended for the performance of the business as a whole, including the particular project. Consequently, construction law recognizes that owner caused delay entitles the contractor to recover from the owner the increased overhead and loss of profit as part of damages. Reference has been made to Hudson’s building and Engineering Contracts, Article 8.176-91 pp. 1074-81 (11th edn.), Molly J.B., “A formula for Success”. Three formulae have been evolved for computation of a claim for increased overhead and loss of profit due to prolongation of the works : the Hudson Formula; The Emden Formula and Eicheay Formula. Of these three, the Emden Formula is the one widely applied and which has received judicial support in a number of cases.”

Section 55 of the Indian Contract Act

Section 55 of the Indian Contract Act reads as under:

G “55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

H

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

A

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

B

C

In *Arosan Enterprises Ltd.* (supra), the law was stated in the following terms:

"13. These presumptions of the High Court in our view are wholly unwarranted in the contextual facts for the reasons detailed below but before so doing it is to be noted that in the event the time is the essence of the contract, question of there being any presumption or presumed extension or presumed acceptance of a renewed date would not arise. The extension if there be any, should and ought to be categorical in nature rather than being vague or on the anvil of presumptions. In the event the parties knowingly give a go-by to the stipulation as regards the time- the same may have two several effects: (a) parties name a future specific date for delivery, any (b) parties may also agree to the abandonment of the contract- as regards (a) above, there must be a specific date within which delivery has to be effected and in the event there is no such specific date available in the course of conduct of the parties, then and in that event, the courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards the time being the essence of the contract. Be it recorded that in the event the contract comes within the ambit of Section 55, Contract Act, the remedy is also provided therein..."

D

E

F

G

It was further observed:

H

- A “19. Turning now on to the issue of duty to speak, can it be said that silence on the part of the buyer in not replying to the letters dated 15-11-1989, 20-11-1989, 24-11-1989, 4-12-1989 and 20-12-1989 only shows that the buyer was not willing to extend the delivery period after 15-11-1989 - the answer cannot but be in the negative, more so by reason of the fact that fixation of a second delivery date by the Appellate Bench of the High Court as noticed above, cannot be termed to be in accordance with the law. There was, in fact, a duty to speak and failure to speak would forfeit all the rights of the buyer in terms of the agreement. Failure to speak would not, as a matter of fact, jeopardise the seller’s interest neither would the same authorise the buyer to cancel the contract when there have been repeated requests for acting in terms of the agreement between the parties by the seller to that effect more so by reason of a definite anxiety expressed by the buyer as evidenced in the intimation dated 8-11-1989 and as found by the arbitrator as also by the learned Single Judge.”
- B
- C
- D

We, therefore, are of the opinion that in the instant case the second part of Section 55 of the Indian Contract Act would be attracted and not the first part.

E *Whether time was the essence of contract*

- The question which, further, arises for consideration is as to whether the Respondents having proceeded on the basis that time was of the essence of the contract, it was bound to issue a notice of repudiating the contract subject to reservation as regards its claim of damages. MII, however, states that it had never raised a contention that the time was of the essence of the contract, but the claim arises in view of the delay caused in completion of the contract for a period of 34 months and consequent escalation of costs. The price payable in terms of the sub-contract did not adequately cover increased costs expended by MII. On a plain reading of the provisions of Section 55 of the Indian Contract Act, it is evident that as the parties did not intend that time was to be of the essence of the contract on the expiry whereof the contract became voidable at the instance of one of the parties, but by reason thereof the parties shall never be deprived of damages.
- F
- G

- We may notice that the BSCL had never pleaded before the Arbitrator that the time was of the essence of the contract. In Construction contracts
- H

generally time is not of the essence of the contract unless special features exist therefor. No such special features, in the instant case, has been brought to our notice.

The learned arbitrator proceeded on the basis that the BSCL had accepted and acknowledged that no additional cost on account of delay was occasioned in completing the helidecks. MII is found to have incurred additional cost for offshore installation. The learned arbitrator has also found that MII had not received any payment on account of such increased cost. The compensation under the said head of claim was only in addition to Change Order Nos. 2, 3 and 7 to which we shall advert to a little later.

This Court in *Hind Construction v. State of Maharashtra*, [1979] 2 SCC 70 stated:

“7. The question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. [See *Halsbury's Laws of England*, 4th ed., Vol.4, para 1179].”

“8. Even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental. [See *Lamprell v. Billericay Union*, (1984) 3 Exch 283, 308; *Webb v. Hughes*, [1870] LR 10 Eq 281; *Charles Rickards Ltd. v. Oppenheim* (1950) 1 KB 616].”

UNINVOICED CLAIMS:

The principal question which arises for consideration is whether uninvoiced claims could be a subject matter of dispute. While dealing with the claims falling within the purview of the partial award, the arbitrator noticed:

“23, Interruption of WI-9 to WI-S Pipeline laying (US\$ 115,087.50)

The Statement of claim by MII mentions that an amount of US \$ 10,671,340.00 on account of delay and disruption expenses and

A costs are claimed. Admittedly, they had not yet been invoiced when the reference to arbitration was made. It is not clear what are the specific claims included within that sum. If they had not been invoiced, it cannot be said that they remained unpaid, and that therefore, a difference or dispute had arisen between the parties when the reference to arbitration was made."

B It was further noticed:

C "Reference has been made to the claim in respect of the standby of the MII transportation spread, additional compensation on account of the construction of temporary emergency helidecks, the extended stay of MII personnel and a claim in respect of Lay Barge 26. All these claims will be considered after it has been satisfactorily proved that invoices in respect of each of these claims were issued and had become due for payment before the reference to arbitration was made and also meanwhile the arbitration record will have received the statement of ONGC/BSCL in respect of Change Order Proposals Nos. 2,3,7 and 8. Therefore, the consideration of these claims is deferred."

D No invoice was raised by MII for the following claims:

- E
- (i) Claim of US\$ 2,300,200 for procurement of structural material on BSCL's behalf.
 - (ii) US \$28,400 for additional Barge trip.
 - F (iii) US \$54,000 for additional pipeline survey.

The said claims are the subject matter of the partial award. It was dealt with by the learned arbitrator in the following terms:

G "It was pointed out by BSCL that ONGC did not accept the reconciliation attempted by MII in regard to the pipelines. I have examined the documents pertinent to this question, and I find that the variation is so marginal that it can reasonably be ignored. It seems to me that to take account of those variations is to attempt
H to make too fine a point. I would accept the reconciliation statement

and proceed on that basis. BSCL contends that the claim made by MII on account of the additional survey of the WI-8, WI-9 pipelines is not acceptable because it is covered within the lump sum price mentioned in the Subcontract. I am not impressed by that submission because had it been so covered ONGC would not have undertaken to conduct the additional survey itself. It was treated as some thing outside the subject matter covered by the lump sum price and when ONGC requested BSCL to conduct the additional survey, and at the behest of BSCL the additional survey was conducted by MII, there is good reason for MII to claim the payment of US\$54,000 for that survey.”

While dealing with the claims for the standby of DB 26 and interruption to WI-9 to WI S pipelines laying, the arbitrator in its partial award held:

“22. Standby Derrick Barge 26 (US\$1,396,800.00)

The claim for payment of standby charges in respect of Derrick Barge 26 relates to a standby for 24 days of that vessel. The MII Statement of Claim mentions that MII has not sent any invoice to BSCL. Therefore it cannot be said that any claim has been made by MII yet in the matter. Consequently, the position is that no difference or dispute concerning this had arisen between the parties when the reference to arbitration was made. Therefore, so far as this arbitration is concerned, the claim cannot be entertained. It falls outside this arbitration and cannot be considered.”

“23. Interruption of WI-9 to WI-S Pipeline Laying (US\$115,087.50)

The Statement of Claim by MII mentions that an amount of US\$10,671,340.00 on account of delay and disruption expenses and costs are claimed. Admittedly, they had not yet been invoiced when the reference to arbitration was made. It is not clear what are the Specific claims included within that sum. If they had not been invoiced, it cannot be said that they remained unpaid, and that therefore a difference or dispute had arisen between the parties when the reference to arbitration was made.”

The said claims were, thus, rejected only on the ground that no invoice had been raised and consequently no difference or dispute had arisen by and

A between the parties at the time when the reference to arbitration was made.

B Mr. Mitra contended that applying the same line of reasoning, the learned arbitrator should have rejected the aforementioned claims. However, we may notice that the said claim as regard procurement of structural material related to damages. According to MII, the said claim strictly did not relate to damages under the contract. The BSCL was required to procure the steel and as it was not in a position to do so, the MII had agreed to procure steel on its behalf provided it agreed to cover the MII's cost for accelerated procurement, material priced premiums, order fixing costs and other incidental charges. It is not in dispute that such a claim was the subject matter of correspondence which passed between the parties. Receipt of such letters from MII is not denied or disputed by BSCL. It has also not been disputed that right reserved by MII to claim such additional costs towards procurement of the materials on behalf of BSCL was not denied or disputed. Only pursuant to or in furtherance of the said correspondence, procurement on the said basis had been undertaken by MII and acceptance of BSCL in this behalf was presumed. The learned Arbitrator proceeded on such presumption. According to learned arbitrator, despite such knowledge, BSCL failed to make payment. The learned arbitrator in his award has gone into the said question in detail. Reference had been made to the evidence of Shri A.R. Taylor, who was examined on behalf of MII. The said witness was cross-examined by BSCL. Both the parties had filed detailed written submissions before the learned arbitrator. It is on the basis of such evidence brought on record and submissions made before him, the learned arbitrator held:

F "...In my opinion, BSCL must be taken to have accepted the proposal of MII and to have gone along with MII's action flowing from that proposal and to have benefited thereby."

G With a view to consider the submission of Mr. Mitra that in terms of the contract entered into by and between the parties, MII was not entitled to the said claim, it would be proper to notice the relevant clause of the contract which is in the following terms:

"5. Replacement Steel :

H BSCL shall procure suitable steel for jackets (based on MTO supplied by MII) on a replacement basis for MII purchased steel.

BSCL shall purchase steel as plate suitable for rolling 24 in O.D. and above tubulars. Replacement material shall be delivered by BSCL to MII's yard at Dubai Emirate, United Arab Emirates or to Singapore Port Authority for transshipment by MII (at BSCL's cost) to Batam Island, Indonesia. MII shall indicate the destination when furnishing the replacement steel request."

In terms of the aforementioned provision of the contract, BSCL was required to procure suitable steel for jackets on replacement basis in regard to quantum of steel purchased by MII. If BSCL had failed to procure the said required amount of steel to replace the structural materials which MII had provided from its inventory as an accommodation to BSCL, indisputably the understanding between the parties was that either such materials should be replaced or the cost therefor had to be paid. It has not been disputed before the arbitrator that BSCL promptly replaced the material. It is in that view of the matter, the learned arbitrator in his partial award held:

"15.19 The procurement was effected by MII from its inventory on the basis that it would be replaced by BSCL promptly. It was not so replaced. To effect the replacement MII would be compelled to pass through the entire burdensome process of procuring the structural material directly from outside sources. MII suffered loss and damage which it has quantified at US\$ 2.3 million in the light of the considerations mentioned by it earlier."

The arbitrator has noticed that the claim of MII arose only after it has been satisfactorily proved that the invoices in respect of each of these claims were issued and had become due for payment before reference to arbitrator. It furthermore appears that paragraph 23 of the partial award and the claim for compensation on the aforementioned head are not identical. Para 23 of the partial award dealt with the claim in respect of WI-9 to WI-S pipeline laying. So far as paragraph 24 of the said award is concerned, the learned arbitrator noticed the specific invoices issued against Change Order Nos. 2, 3 and 7 relating to delay and disruptions. It is, therefore, in our considered opinion, not correct to contend that the invoice is the only base whereby and where under a claim can be made. There is no legal warrant for the said proposition. A claim can also be made through correspondence or in meetings.

- A A claim for overhead costs resulting in decrease in profit or additional management costs is a claim for damages.

An invoice is drawn only in respect of a claim made in terms of the contract. For raising a claim based on breach of contract, no invoice is required to be drawn.

B

It is furthermore not in dispute that the claim for damages had been made prior to invocation of arbitration. Once such a claim was made prior to invocation, it became a dispute within the meaning of the provisions of the 1996 Act. It is not disputed that the same claim was specifically referred to arbitration by MII in terms of its notice dated 10th April, 1989.

C

While claiming damages, the amount therefor was not required to be quantified. Quantification of a claim is merely a matter of proof.

D

In fact BSCL never raised any plea before the arbitrator that the said claim was arbitrary or beyond its authority. Such an objection was required to be raised by BSCL before the arbitrator in terms of Section 16 of the 1996 Act. It may also be of some interest to note that this Court even prior to the enactment of a provision like Section 16 of the 1996 Act in *Waverly Jute Mills Co. Ltd. v. Raymon & Co.*, [1963] 3 SCR 209; *Dharma Prathishthanam v. Madhok Construction*, [2005] 9 SCC 686 clearly held that it is open to the parties to enlarge the scope of reference by inclusion of fresh dispute and they must be held to have done so when they filed their statements putting forward claims not covered by the original reference.

E

METHOD FOR COMPUTATION OF DAMAGES

F

What should, however, be the method of computation of damages is a question which now arises for consideration. Before we advert to the rival contentions of the parties in this behalf, we may notice that in *M.N. Gangappa v. Atmakur Nagabhushanam Setty & Co. and Another*, [1973] 3 SCC 406, this Court held that the method used for computation of damages will depend upon the facts and circumstances of each case.

G

In the assessment of damages, the court must consider only strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.

H

(See *Lavarack v. Woods of Colchester Ltd.*, [1967] 1 QB 278)

The arbitrator quantified the claim by taking recourse to the Emden formula. The learned arbitrator also referred to other formulae, but, as noticed hereinbefore, opined that the Emden Formula is a widely accepted one.

It is not in dispute that MII had examined one Mr. D.J. Parson to prove the said claim. The said witness calculated the increased overhead and loss of profit on the basis of the formula laid down in a manual published by the Mechanical Contractors Association of America entitled 'Change Orders, Overtime, Productivity' commonly known as the Emden Formula. The said formula is said to be widely accepted in construction contracts for computing increased overhead and loss of profit. Mr. D.J. Parson is said to have brought out the additional project management cost at US\$1,109,500. We may at this juncture notice the different formulas applicable in this behalf.

(a) Hudson Formula: In Hudson's Building and Engineering Contracts, *Hudson formula* is stated in the following terms:

"Contract head office x *contract sum* x period of delay"
overhead & Profit contract period
percentage

In the Hudson formula, the head office overhead percentage is taken from the contract. Although the Hudson formula has received judicial support in many cases, it has been criticized principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.

(b) Emden Formula: In Emden's Building Contracts and Practice, the *Emden formula* is stated in the following terms:

"*Head office overhead & profit* x *Contract sum* x period of delay"
100 contract period

Using the Emden formula, the head office overhead percentage is arrived at by dividing the total overhead cost and profit of the contractor's organization as a whole by the total turnover. This formula has the advantage

A of using the contractors actual head office and profit percentage rather than those contained in the contract. This formula has been widely applied and has received judicial support in a number of cases including *Norwest Holst Construction Ltd. v. Cooperative Wholesale Society Ltd.*, decided on 17 February, 1998, *Beechwood Development Company (Scotland) Ltd. v. Mitchell*, decided on 21 February, 2001 and *Harvey Shoplifters Ltd. v. Adi Ltd.*, decided on 6 March, 2003.

(c) Eichleay Formula: The *Eichleay formula* was evolved in America and derives its name from a case heard by Armed Services Board of Contract Appeals, *Eichleay Corp.* It is applied in the following manner:

C

Step 1

$$\frac{\text{Contract Billings}}{\text{Total Billings for contract period}} \times \text{Total overhead for contract period} = \text{Overhead allocable to the contract}$$

D

Step 2

Allocable overhead

E

$$\text{Total days of contract} = \text{Daily Overhead rate}$$

Step 3

$$\text{Daily Contract Overhead Rate} \times \text{Number of Days of delay} = \text{Amount of Unabsorbed overhead"}$$

F

This formula is used where it is not possible to prove loss of opportunity and the claim is based on actual cost. It can be seen from the formula that the total head office overheads during the contract period is first determined by comparing the value of work carried out in the contract period for the project with the value of work carried out by the contractor as a whole for the contract period. A share of head office overheads for the contractor is allocated in the same ratio and expressed as a lump sum to the particular contract. The amount of head office overhead allocated to the particular contract is then expressed as a weekly amount by dividing it by the contract period. The period of delay is then multiplied by the weekly amount to give the total sum claimed. The *Eichleay formula* is regarded by the Federal

G

H

Circuit Courts of America as the exclusive means for compensating a contractor for overhead expenses. A

Before us several American decisions have been referred to by Mr. Dipankar Gupta in aid of his submission that the Emden formula has since been widely accepted by the *American courts being Nikon Inc. v. United States*, decided on 10 June, 2003 (USCA Fed. Cir.), *Gladwynne Construction Company v. Balmimore*, decided on 25 September, 2002 and *Charles G. William Construction Inc. v. White*, 271 F.3d 1055. B

We do not intend to delve deep into the matter as it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Arbitrator. C

If the learned Arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court. D

ACTUAL LOSS : DETERMINATION OF

A contention has been raised both before the learned Arbitrator as also before us that MII could not prove the actual loss suffered by it as is required under the Indian law, viz., Sections 55 and 73 of the Indian Contract Act as Mr. D.J. Parson had no personal knowledge in regard to the quantum of actual loss suffered by the MII. D.J. Parson indisputably at one point of time or the other was associated with MII. He applied the Emden Formula while calculating the amount of damages having regard to the books of account and other documents maintained by MII. The learned Arbitrator did insist that sufferance of actual damages must be proved by bringing on record books of account and other relevant documents. E

Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India. F

G

H

A As computation depends on circumstances and methods to compute damage, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.

B In *State of U.P. v. Allied Constructions*, [2003] 7 SCC 396, this Court held:

C “4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret clause 47 of the agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see *Sudarsan Trading Co. v. Govt. of Kerala*). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering (see *U.P. SEB v. Searsole Chemicals Ltd.* and *Ispat Engg. & Foundry Works v. Steel Authority of India Ltd.*).”

H It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of

construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*, [2003] 8 SCC 593 and *D.D. Sharma v. Union of India*, [2004] 5 SCC 325.

Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.

The above principles have been reiterated in *Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors*, [2004] 2 SCC 663; *Union of India v. Banwari Lal & Sons (P) Ltd.*, [2004] 5 SCC 304; *Continental Construction Ltd. v. State of U.P.*, [2003] 8 SCC 4; *State of U.P. v. Allied Constructions*, [2003] 7 SCC 396.

A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our opinion, would not lead to the conclusion that it was in breach of Sections 55 or Section 73 of the Indian Contract Act.

CLAUSE 37 - EFFECT OF

We may now look at clause 37 of the main contract entered into by and between ONGC and BSCL which reads as under:

“37. INDIRECT AND CONSEQUENTIAL DAMAGES:

Neither company nor contractor shall be liable to the other for any consequential damages, which shall include but not be limited to

A loss of revenue/ profits, loss or escape of product, etc.”

In *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* [1988] 2 SCC 338, whereupon Mr. Mitra placed strong reliance, an award made under the old Act was in issue. A dispute had arisen whether there was a claim and denial or repudiation thereof. In that context, it was held:

B

“There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.”

C

D

There is no dispute about the aforementioned principle but the same would not mean that in every case the claim must be followed by a denial. If a matter is referred to any arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator.

E

In *Bharat Coking Coal Ltd. v. L.K. Ahuja*, [2004] 5 SCC 109, this Court opined:

F

“24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading “Loss or Profit”. It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case,

G

H

no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. Ltd. v. Cunard White Star Ltd.* by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6,00,000 awarded to the claimant."

We are herein not concerned with such a case.

In terms of Clause 37 of the main contract, reference whereeto has been made hereinbefore, neither of the parties are liable to the other for any consequential damages. The claim for damages raised by MII cannot be said to be consequential damages. The claim relates to direct losses purported to have been occasioned by the failure to perform the contractual duty on the part of the BSCL and to honour the time bound commitments. Such a loss, according to MII, occurred on account of increased overhead cost and decreased profit and additional management costs by reason of BSCL's delays and disruptions. It is only in that view of the matter, the Emden formula was taken recourse to. Furthermore, clause 37 of the main contract was a matter of an agreement by and between ONGC and BSCL. In law, it could not have been extended to the obligations assumed by BSCL towards MII in terms of the contract entered into by and between the said parties. So far as ONGC is concerned, it cannot be said to have any role to play in the event of breach of obligation on the part of the BSCL towards its sub-contractor.

Article 3.1 of the sub-contract reads as under:

"MII shall be bound to BSCL by the terms of this Sub-contract Agreement and to the extent that the provisions of the respective Main Contract between Buyer and BSCL apply to the relevant sub-contract work of MII as defined in this sub-contract agreement, MII shall assume towards BSCL all the obligations and responsibilities which BSCL, by such Main Contract, assumes to Buyer and shall have the benefit of all rights, remedies and redresses against BSCL which BSCL, by such Main Contract, has against Buyer, insofar as applicable to this sub-contract Agreement, provided that when any provisions of the respective Main Contract between Buyer and BSCL is inconsistent with this sub-contract agreement, this sub-

A contract agreement shall govern and prevail over the Main Contract.”

By reason of the said provision, therefore, the Main Contract between ONGC and BSCL would apply to the relevant sub-contract work and MII was enjoined with a duty towards BSCL to fulfill its obligations and responsibilities. But, thereby, BSCL cannot absolve itself from its liability so far as breach of the terms and conditions of the sub-contract is concerned. In other words, by reason of Article 3.1, the contract by and between ONGC and BSCL has not been subsumed in the sub-contract so as to absolve the BSCL from its own contractual liability for breach of contract or otherwise.

C METHOD OF MEASUREMENT

The main contention of BSCL in this behalf is that the learned arbitrator acted illegally and without jurisdiction in adopting the AISC Code. The question arose in the context of the provisions in the contract that MII was required to undertake to fabricate the materials which were required to be supplied and, therefore, was entitled to fabrication charges from BSCL. It has not been denied or disputed before us that the parties did not agree to a fixed method of measurement. They did not refer to the AISC Code in the contract but only because AISC code was not referred to in the contract, the same by itself may not be a ground for us to hold that the arbitrator had gone beyond the terms of the contract. Clause 23.1.1(a) and (c) of the main contract reads as under:

“(a) Payment for structural material viz. steel and steel tubulars, anodes, flooding and grouting stems, rubberized rings and rubberized items for barge hampare, rub-strips and boat landing shall be made on the basis of actual landed cost at Contractor’s yard. Landed cost would include c.i.f. price, testing charges, if any plus port charges clearing and handling charges at Port, transportation to Contractor’s fabrication yard plus local taxes (like octroi) if any, company shall pay to Contractor an additional 7 ½ per cent of the landed cost referred to above to cover the cost of procurement.”

(c) In computing the quantity of steel materials used on each platform for the purpose of sub-clause (a) above, an allowance of 4% shall be made for wastage. The payment to Contractor shall be

for weights including the wastage element credit for steel scrap shall be given by Contractor to Company at the rate of Rs. 500.00 per short ton for the said wastage of 4%.”

A

Clause 11 and Clause 5 read as under:

“11. Fabricated Tonnages:

B

“The quantities of materials used in the Works shall be jointly (i.e. by ONGC/Engineer, BSCL and MII) determined on the basis of as-fabricated tonnage as per the Main Contract between Buyer and BSCL and shall be used for adjusting the Subcontract Price.”

C

“5. The preceding fabrication rates are worked out taking into consideration installation of all equipment, fabrication and installation of process piping, electricals and instrumentation work including pre-commissioning and all yard test in addition to structural fabrication work in accordance with the specifications. For computing the tonnage for reimbursement of fabrication, installation, pre-commissioning and testing work at the yard by MII the tonnage of equipment and items for top side facilities shall not be included and fabrication tonnage shall be solely on the basis of as built tonnage as approval by buyer.”

D

E

Submission of Mr. Mitra is that a combined reading of the aforementioned provisions would go to show that the method of measurement was the subject matter of the contract. We do not agree. Clause 23.1.1 has no application in the present case as it covers payment for structural material which has no nexus with the Claim No. 4. The claim of MII was for labour charges due under the sub-contract for fabricating the structures.

F

The learned arbitrator, in his partial award, while dealing with the said claim held:

G

“15.7: As regards replacement steel, BSCL would procure suitable steel for jackets (based on MTO supplied by MII) on a replacement basis for MII purchased steel. BSCL would purchase steel as plate suitable for rolling 24 in OD and tubulars. Replacement material would be delivered by BSCL to MII's yard at Dubai, UAE or

H

A to Singapore Port Authority for transshipment by MII, at BSCL's cost, to Batam Island, Indonesia. In the matter of computing the prices payable for structural fabrication of piles, Jackets and decks Clause 23.1.1 of the main fabrication contracts provided that the prices would be computed as follows: The payment for structural material, namely, steel and steel tubulars and anodes, flooding and grouting system, rubberized rings and rubberized items for barge bumpers, rub strips and boat landing would be made on the basis of actual landed cost at the yard of BSCL or MII. The landed cost would include CIF price, testing charges, if any plus port charges, clearing and handling charges at port, transportation to BSCL's or MII's fabrication yard plus local taxes, and ONGC would pay to BSCL in additional 7 ½ per cent of the landed cost to cover the cost of procurement."

D Wastage allowance was relevant only for the purpose of allowance due to BSCL from MII in respect of scrap materials. The learned arbitrator in his award had referred to evidence adduced in this behalf by Shri A.R. Taylor. The provisions of the contract have no bearing on calculation of gross fabricated weight of the structures for determining the fabrication charges due.

E The use of AISC Code relates to the claim for fabrication charges being Claim No. 1. The said claim was for labour charges which was not a claim for cost of material and, thus, nothing to do therewith. The scheme of the contract provides that total estimated tonnage of 18,178 ST will have the following break-ups:

F

ED/EE Platforms	— 6078 ST
W1-8, W1-9, W1-10 and N3 platforms	— <u>12100 ST</u>
	18178 ST

G Since the total tonnage of 18,178 ST was only an estimated tonnage, the sub-contract made provision for variation of the contract price on the basis of 'as fabricated' tonnage. Further the quantities of the materials used were to be jointly determined by ONGC /EIL, BSCL and MII on the basis of fabricated tonnage which was to be used for adjusting the sub-contract price. If the "as fabricated tonnage" was found to be less than the estimated

H

tonnage, the excess payment received by MII through monthly bills was to be refunded. If the "as fabricated tonnage" was found to be more than the estimated tonnage, MII was to be paid for the additional tonnage by applying the rate of US \$ 1067 per ST. The contract was silent with respect to the method or code to be applied for determining the "as fabricated tonnage".

Clause 1.1.13 defined specifications to mean Industry Standard Codes (ISC). In the absence of a contractually specified method of calculation, the MII applied the AISC Manual of Steel Construction for calculating the as fabricated tonnage. AISC is an industry standard. It has been applied by ONGC in other contracts. Even the Arbitrator has noted that the BSCL has also accepted the validity of the AISC Code. Now the BSCL cannot turn around and take a contrary position before this court in the proceedings under Section 34 of the Act. Hence by adopting the AISC Code, the Arbitrator has not acted contrary to the terms of contract.

The arbitrator in his award noticed that the parties impliedly accepted the validity of the AISC method of calculation for calculating the final fabricated weight in the following terms:

"...Instances of those contracts have been provided by MII during the arbitration proceeding showing that the AISC Code has been employed for determining the final "as fabricated tonnage" of structures...It seems to me that inasmuch as BSCL has applied the AISC Code in the case of long to long point distance measurement it cannot be denied that the AISC Code is regarded as a valid basis for measurement it cannot be denied that the AISC Code is regarded as a valid basis for measurement. There is no reason why it should be applied in the case of one category of fabrication and not in the case of another."

If before the arbitrator, the said mode of calculation was accepted, we do not see any reason why the BSCL should be permitted to raise the said question before us.

BUOYANCY TANKS FOR ED AND EE JACKETS

It involves a question of fact. It was a part of Claim No. 1 for fabrication. The contention of the BSCL is that whereas Buoyancy tanks which were used in W1-8 and N3 jackets were removed by MII after

A installation thereof, the same had been used after refurbishment on the ED/EE jackets and in that view of the matter, no fabrication was required to be done. The claim of MII was that it had nothing to do with the cost of material or the nature of the fabrication work involved. Its claim was purely based on the labour cost at the rate of US \$1067 per ST which was incurred by it towards fabrication work in the refurbishment of the Buoyancy Tanks.

B According to it, the tonnage of the Buoyancy Tanks had not been taken into account by ONGC on the ground that no fabrication work was done after removal of the Buoyancy Tanks from N3 and WI-8 Jackets. The learned arbitrator, however, in his partial award found as of fact that substantial fabrication work had been done by MII in the refurbishment of the said

C Buoyancy Tanks in the following terms:

D “12.22....Accepting those instructions, MII made substantial fabrication in refurbishing, handling, rigging and welding the buoyancy tanks on the ED and EE jackets. The oral evidences of RW S.K. Mukherjee shows that the attachment of buoyancy tanks involves substantial fabrication activity. There can be no doubt that fabrication work had to be done and that involved a measure of labour activity. MII has demonstrated that there was difference in weight between the original buoyancy tanks used on the N-3 and W-8 jackets and the weight of those tanks when used on the ED

E and EE jackets. It says that this clearly points to substantial fabrication activity for refurbishment of those two tanks.”

F It has further been held by the learned Arbitrator that MII had also been able to establish that there had been a difference in weight between the original Buoyancy Tanks used on N-3 and WI-8 Jackets and the weight of those tanks when used in ED and EE Jackets. In fact, the learned arbitrator in arriving at the said conclusion had taken into consideration the admission of Shri S.K. Mukherjee who was examined on behalf of BSCL itself that attachment of Buoyancy Tanks involved substantial fabrication activity. The dispute raised is a matter of appreciation of evidence. The findings arrived

G at by the learned arbitrator cannot, thus, be said to be perverse.

TIE-DOWNS AND SEA-FASTENING

H This claim relates to the question whether MII was entitled to payment for fabrication as the tie-downs and sea-fastening require substantial fabrication

job in regard whereof there did not exist any provision in the contract. The learned arbitrator has accepted the claim of MII holding that offshore construction contracts, jackets and decks are fabricated onshore and then they are transported on barges to the offshore location for installation wherefor the lugs, braces and other sea-fastening and tie-down items are required to be created which the installation contractor is to use to weld the jackets and decks to the transportation barges, thereby securing the jackets for their journey to the offshore location. MII had merely claimed payment for fabrication of tie-downs and sea-fastening as part of the fabrication scope of work. Reference has been made to clause 2 of the contract which is as under:

“2.1 (i) (a) Load-out, seafastening, ... 60% of the transportation and installation lumpsum price of jacket, piles & appurtenances

(b) Load-out, seafastening, ...40% of the transportation and installation lumpsum price of Decks, Hook-up and resting

The said provision has no application in the instant case as it merely provides for stage payment on milestone basis. In fact, the clause which would be attracted in the present case is contained in clause 2.1(a)(i) is as under:

“The scope of work to be executed by Contractor under this Contract shall comprises...

(i) Jackets

Including bergs bumpers, best landing, grouting and flooding systems, launch trustees, riser clamps. Cathodic protection anodes, and mats and other accessories and components indicated in the drawings and specifications including lifting lugs, pulling lugs, retaining lugs etc. for lead out and refastening and upending of the jacket.”

It specifically covers sea-fastening as part of the scope of fabrication contract work. WI-8, WI-9, WI-10 and N-3 fabrication contract also contains

A a similar clause in Clause 2.1.

B The learned arbitrator in para 12.24 of his award noticed that BSCL itself has acknowledged to ONGC that the tie-down materials had been fabricated as part of the fabrication scope and the weight could not be disallowed in calculating the 'as fabricated tonnage'. It, therefore, evidently cannot take a stand which is contrary thereto and inconsistent therewith. Thus, by reason of the award, the learned arbitrator was of the opinion that the sea-fastening and tie-down were part of the transportation and installation scope and BSCL did not succeed in proving that the said item should be included in the scope of transportation and is not a separate item under the head of fabrication. Again, the findings of the learned arbitrator were within his domain, being findings of fact.

FOREIGN EXCHANGE

D Dispute in relation to the said claim would depend upon the interpretation of clause 3 of Section 2 of the Consolidated Sub-Contract Price Schedule which provides:

E "While the sub-contract price for the work described in the letter of intent is payable by BSCL to MII in U.S. Dollars the Main Contract Price is payable by ONGC to BSCL in Indian Rupees. It has been agreed that Rupee-U.S. Dollar Exchange rate shall remain fixed at Rs. 100.00=U.S.\$8.575 and loss or gain due to any variation in the Rupee-U.S. Dollar exchange rate at the time of actual remittance of bills would be to MII's account.

F The aforesaid rate was the prevailing rate as on 9 August 1984 as mentioned in the Letter of Intent dated 11 September 1984. Within 30 days of completion of MII's scope of work under the Sub-contract, a reconciliation will be made of all the payments made from time to time.

G If the cumulative value of all Rupees expended to buy U.S. Dollar remittance for the Sub-contract work described in the Letter of Intent is less than the Rupee equivalent of the Sub-contract price as determined on the basis of the aforesaid rate prevailing on 9 August 1984, BSCL shall remit the balance amount of Indian

H

Rupees, if any, to MII in U.S. Dollars at the prevailing rate of exchange on the date of such U.S. Dollar remittance; and if after such reconciliation it is found that BSCL have expended Rupees in excess of the Rupees equivalent of the Sub-contract Price for the work described in the Letter of Intent, MII shall arrange to refund any such excess in Rupees to BSCL.”

Clause 4.0 of the contract provides that the payment will be made by BSCL to MII on receipt of payment by BSCL from ONGC.

It is not in dispute that by reason of the contract entered into by and between the parties the rate was frozen at Rs. 100 = US\$ 8.575. One of the questions which arise for consideration is as to whether the said provision applied to all the claims or not. According to MII, having regard to the provisions for milestone payments for transportation and installation, Clause 4.0 would apply only in relation thereto.

It is contended that BSCL had not correctly understood the merit and purport of the said provision which has been sought to be explained. The said provision according to MII would be as under:

If the contract is followed, MII gets US\$100 and pays back US\$7.43, therefore the net receipt of MII is US\$ 92.57. However, BSCL had adjusted the exchange rate at the time of payment only. The rate as per contract 1 US\$= 11.662. Thus, the rate on the date of payment is Rs. 13. Therefore, the net receipt of MII is only US\$ 89.70. In reality, the loss suffered by MII was much greater since in the fifty-four month life of the project, the value of the Indian rupee deteriorated drastically against the U.S. dollar.

It is not in dispute that in terms of the contract, the payments made by BSCL, which was to be in US dollars, was required to be reconciled at the end of the contract. According to MII, if BSCL expended less than the rupee amount stipulated in the sub-contract in dollar payments, BSCL would convert the unused rupees to dollars to remit the dollars to MII. Whereas if BSCL expended more than the agreed amount of rupees, MII would refund the excess amount to BSCL so as to ensure sharing of exchange loss by both the parties. According to MII, however, BSCL acted contrary to the said provision insofar as instead of paying the full amount of invoice in US dollars

A it paid at the fixed exchange rate relying on, or on the basis of, the
aforementioned provisions, resulting in loss suffered by MII.

B The learned arbitrator proceeded on the basis that loss of exchange
provisions had no application in respect of structural material (claim 4), bulk
material (claim 5), transportation of pipe (claim 6), reimbursables (claim 7),
change orders and extra work (claim 8) and delay and disruption (claim 9).
BSCL although has acted in breach of the contract in which variation
provision as regard the claims of the sub-contract, viz., scope of fabrication
work (Claim 1), transportation and installation of platforms (Claim 2) and
transportation and installation of pipelines and risers (Claim 3) while making
C payments. It is, however, one thing to say that having regard to the nature
of breach on the part of BSCL, MII would be entitled to claim damages, but
it is another thing to say that by reason thereof it would be entitled to full
payment without deduction relating to the BSCL conversion of Indian rupees
to US dollars. It is not in dispute that the initial claim of MII was US \$
D 2881195.03 which was later on revised to US \$ 3330790.94.

E In terms of the agreement, payments were to be made to MII if the
payments were certified by EIL and upon receipt of payments from ONGC
and upon receipt of foreign exchange clearance. For appreciating the
aforementioned disputes, it may be necessary to refer to the general terms
of payment clause:

“1. Fabrication

F Claims for structural fabrication work is to be billed by MII duly
certified by EIL on monthly basis and the payment of the same bills
shall be released after 60 days of receipt of the bill by BSCL.

4. Payments as stipulated above will be subject to the following
conditions:

G (a) Receipt of foreign exchange clearance by BSCL.

H (b) Payments on milestone basis will be made by BSCL to
MII only after payments have been received by BSCL from
ONGC.”

The learned arbitrator held that MII would be entitled to receive the entire amount as BSCL, despite receipt of payment from ONGC, did not pay the amount to MII. For the purpose of applicability of the exchange rates, the same, in our opinion, is irrelevant. The award was required to be made in terms of the contract whereby and whereunder the foreign exchange rate was frozen as was applicable on 9th August, 1994. The parties were bound by the said terms of contract. It may be noticed that the sub-contract was entered into on 1st January, 1986. The execution of the contract had started much earlier, i.e., much before the date of entering into the contract. The purpose for which the Rupee - US Dollar conversion rate has been frozen as on 9th August, 1984 must be viewed from the angle that thereby the parties thought that loss or gain towards the exchange rates would be on account of MII. It is in the aforementioned situation that a letter of intent in the following terms was served:

"M/s. McDermott International Inc.,
P.O. Box 3098
Dubai
United Arab Emirates.

Dear Sirs,

Sub: ED, EE, WI-8, 9, 10 & N3 Platforms
Ref: Minutes of Meeting dt. 9.8.84
Your offer P/M 547 dt. 9.8.84
8/3132 dt. 4.9.84

With reference to the above, we are pleased to issue this Letter of Intent conveying acceptance of your offer for the following:

1.0 FABRICATION

1.1 Fabrication, load-out & sea-fastening of 6 Jackets with Piles including all appurtenances such as boat landing, conductor, riser clamps etc.

1.2 Fabrication, load-out & sea-fastening of 4 main decks, WI-8, 9, 10 & N3 complete with installation of all equipment, process piping, electricals and instrumentation work including all yard test.

A 1.3 Refurbishing of 4 temporary decks to be supplied by ONGC.

2.0 TRANSPORTATION

B 2.1 Transportation, installation, hook-up & commissioning of all above i.e. 1.1, 1.2 & 1.3 and ED, EE Decks and 6 helidecks fabricated by BSCL at Jellingham. Temporary deck will be collected from ONGC and taken to MII yard. Additionally the temporary decks will be removed prior to installation of this deck and handed back to ONGC.

C 3.0 Transportation, installation, hook-up & commissioning of Submarine Pipelines & Risers.

4.0 PRICES

The lump sum price is as follows:-

D	4.1	For 1.1, 1.2 & 1.3 of above	US\$	19,400,000
	4.2	For 2.0 of above	US\$	23,025,000
		TOTAL	US\$	42,425,000

E 4.3 PIPELINES

For 3.0 above pipelines totaling 28 US\$ 3,800,000 L.S. KM in length and installation of 8 risers @ US\$ 91 per metre of pipeline and US\$ 156,485 per Riser.

F 4.4 The above lump sum prices are based on estimated tonnages and flowline length and number of risers. Any variation in the above will alter the prices pro rata.

G 4.5 The above amounts are based on the exchange rate between U.S. Dollars and Indian rupees (as ruling on 9.8.84). Any variation in the above rate will be to MII's account.

5.0 TERMS & CONDITIONS

H 5.1 All terms and conditions other than the payment terms as stipulated by ONGC in their contract with BSCL for the above

platforms will be applicable to MII.

A

5.2 The lumpsum price is inclusive of all engineering required for total scope of BSCL's & MII's work for six platforms as well as all technical service support by provision of expert personnel to BSCL.

B

6.0 TERMS OF PAYMENT

Terms of payment are to be mutually discussed and agreed to. It is however understood that payment on milestone basis will be made by BSCL to MII only after payments have been received by BSCL from ONGC.

C

7.0 DELIVERY

MII will ensure delivery in such a manner that the delivery dates as stipulated by ONGC for the above platforms will be met.

D

8.0 It may be noted that this Letter of Intent is subject to clearance of Import List from DGTD and receipt of sanction from Government of India for release of requisite amount of foreign exchange and import licenses etc. In case Govt's clearance/ approval is not received, this Letter of Intent will be withdrawn without any financial repercussions on either side. We shall however inform you as soon as Govt's approval/ clearance is received by us.

E

Subject to this, we would request you to proceed with the work to ensure completion within the agreed schedule."

F

There might be some delay on the part of BSCL to make payments. We may not go into the aforementioned question, but to hold that the exchange rate clause shall cease to have any application only because of the breaches on the part of BSCL, cannot be accepted.

G

We are not in a position to accept that the exchange variation provision does not relate to the payments in respect of Claim Nos. 1, 2 and 3. The objection raised by the claimant to the said extent is accepted.

H

A SUBSTITUTION

It is not in dispute that MII had substituted heavier material, as material conforming to ONGC specification was not available readily in the market. The matter was referred to EIL. Use of material was found to be technically acceptable to EIL to which ONGC agreed by a letter dated 3rd May, 1985. **B** ONGC, however, made it clear that it would not make payment for the substituted material. BSCL immediately by a telex dated 13th May, 1985 informed the same to MII. ONGC also in its letter dated 6th December, 1984 categorically stated:

C “The subject matter highlighted in your letter mentioned above has been reviewed by us and we have found that payment against increased tonnage on account of material substitutions proposed by M/s. BSCL/MII cannot be agreed to. Based on above we reiterate our view that we will pay the material/ fabrication costs based on the materials shown in the AFC drawings.” **D**

The claim of MII is based on the failure on the part of the BSCL to fulfil its part of the obligation in procurement of the required material. It is true that BSCL agreed to reimburse MII for the same. MII’s claim is partially based on the facts that EIL had recommended payments therefor **E** as stated in a letter to ONGC dated 10 February 1987 and 6 April 1987.

However, it is also not in dispute that ONGC did not accept the said recommendations and refused to take into consideration the substituted tonnage for payment of ‘as fabricated tonnage’.

F There may be a dispute in this behalf between BSCL and ONGC. However, admittedly, ONGC refused payment to BSCL.

In his partial award, the learned arbitrator noticed that ONGC’s involvement was imperative. ONGC had all along maintained its stand that it was not ready and willing to bear the extra costs. The correspondence **G** between the parties was brought on record.

Clause 5 of the contract categorically states that MII was to procure the material which was to be reimbursed by BSCL. The extra amount **H** incurred by MII for procuring materials having extra thickness, therefore,

was not payable. To the aforementioned extent, there has been a novation of contract. MII had never asserted, despite forwarding of the contention of ONGC, that it would not comply therewith. It, thus, accepted in sub silentio. It, thus, must be held to have accepted that no extra amount shall be payable. It is one thing to say that some more amount might have been spent towards fabrication but the learned arbitrator has awarded the exact amount claimed by MII in the following terms:

“I am satisfied that MII is entitled to a payment of US\$ 20, 832.108 for the disallowed tonnage of 19.584 ST at the contractual rate of US\$ 1067 per ST.”

It is in the aforementioned context that the involvement of ONGC was necessary and if it is the accepted case of the parties that ONGC would not entertain any claim of BSCL in this behalf, a fortiori having regard to the tripartite agreement, the learned arbitrator could have no jurisdiction to determine the claim in favour of MII only because at one point of time BSCL had raised its own claim with ONGC. In other words, any reduction of the claim of the BSCL by ONGC had a direct nexus with the claim of MII. It was, therefore, not a case where ONGC was not involved in the matter. The exchange of letters categorically proves that MII had accepted that it would not be entitled to any extra amount in that behalf. MII by necessary implication accepted the said contention. The principle of acceptance sub-silentio shall also be attracted in the instant case. MII was, therefore, not entitled to raise a claim to the extent of fabrication on account of the increased charges for substitution of material used for WI-8, WI-9, WI-10 and N-3 Jackets and piles.

To the aforementioned extent, the claim of MII was beyond the terms of the contract.

INTEREST

The power of the arbitrator to award interest for pre-award period, interest pendent lite and interest post-award period is not in dispute. Section 31(7)(a) provides that the arbitral tribunal may award interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which award is made, i.e., pre-award period. This, however,

A is subject to the agreement as regard the rate of interest on unpaid sum between the parties. The question as to whether interest would be paid on the whole or part of the amount or whether it should be awarded in the pre-award period would depend upon the facts and circumstances of each case. The arbitral tribunal in this behalf will have to exercise its discretion as regards (i) at what rate interest should be awarded; (ii) whether interest should be awarded on whole or part of the award money; and (iii) whether interest should be awarded for whole or any part of the pre-award period.

C The 1996 Act provides for award of 18% interest. The arbitrator in his wisdom has granted 10% interest both for the principal amount as also for the interim. By reason of the award, interest was awarded on the principal amount. An interest thereon was upto the date of award as also the future interest at the rate of 18% per annum.

D However, in some cases, this Court was resorted to exercise its jurisdiction under Article 142 in order to do complete justice between the parties.

E In *Pure Helium India (P) Ltd.* (supra) this Court upheld the Arbitration award for payment of money with interest at the rate of 18% p.a. by the respondent to appellant. However, having regard to long lapse of time, if award is satisfied in entirety, respondent would have to pay a huge amount by way of interest. With a view to do complete justice to the parties, in exercise of jurisdiction under Article 142 of the Constitution of India, it was directed that award shall carry interest at the rate of 6% p.a. instead and in place of 18% p.a.

F Similarly in *Mukand Ltd. v. Hindustan Petroleum Corpn.*, [2006] 4 SCALE 453, while this court confirmed the decision of the division bench upholding the modified award made by the learned single judge, the court reduced the interest awarded by the learned single judge subsequent to the decree from 11% per annum to 7 ½ % per annum observing that 7 ½ % per annum would be the reasonable rate of interest that could be directed to be paid by the appellant to the respondent for the period subsequent to the decree.

H In this case, given the long lapse of time, it will be in furtherance of justice to reduce the rate of interest to 7 ½ %.

As regards certain other contentions, in view of the fact that the same relate to pure questions of fact and appreciation of evidence, we do not think it necessary to advert to the said contentions in the present case. A

CONCLUSION

I.A. Nos. 2 and 3 are allowed in part and to the extent mentioned hereinbefore. The award of the learned Arbitrator is modified to the aforementioned extent. In the facts and circumstances of this case, there shall be no order as to costs. B

V.S. IA's partly allowed. C