GAHC010310192019

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.A./7/2020

THE SPORTS AUTHORITY OF ASSAM
(RUDRA SINGHA SPORTS COMPLEX, DISPUR), SARUSAJAI SPORTS COMPLEX, GUWAHATI- 781034, REP. BY ITS AUTHORIZED OFFICER AND ADMINISTRATIVE OFFICER, SRI KAMALJIT TALUKDAR, ACS, AGE- 46 YEARS.

VERSUS

LARSEN AND TOURBO LIMITED AND ANR
MOUNT POONAMALLE ROAD, MANAPALLAM, POST BAG NO. 979, CHENNAI-600089, TAMIL NADU, INDIA HAVING ONE OF ITS REGIONAL OFFICE AT GODREJ WATERSIDE BUILDING, 11TH FLOOR, TOWER-2, OFFICE-5, PLOT-5, BLOCK DP SECTOR-V, SALT LAKE, KOLKATA- 700091, WEST BENGAL, INDIA.

2:NATIONAL GAMES SECRETARIAT (NGS) OF ASSAM
RUDRA SINGHA SPORTS COMPLEX
DISPUR
GUWAHATI- 781006

Advocate for the Petitioner : MR. S SARMA

Advocate for the Respondent : MR R SHARMA, Caveator

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the appellant	: Mr. S. Sarma, Senior Advocate.
	: Mr. J. Deka, Advocate.
For the respondents	: Mr. R. Sharma, Senior Advocate.
	: Ms. P. Phukan, Advocate.
Date of hearing	: 17.11.2022.
Date of judgment	: 21.12.2022.

JUDGMENT AND ORDER

(CAV)

Heard Mr. S. Sarma, learned senior counsel, assisted by Mr. J. Deka, learned counsel for the appellant. Also heard Mr. R. Sharma, learned senior counsel, assisted by Ms. P. Phukan, learned counsel for the respondent no.1 and Mr. K.K. Bhattacharyya, learned Government counsel, appearing for respondent no. 3.

2. This appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 is directed against the judgment dated 13.09.2019, passed by the learned Addl. District Judge No.1, Kamrup (M), Guwahati in Misc. Arbitration Case No. 5/2018, thereby dismissing the application under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award dated 11.11.2017, passed by the learned Arbitral Tribunal consisting of three learned Members.

3. In this appeal, parties are referred as per their nomenclature in the memo of appeal.

Brief facts leading to dispute between the respondent no. 1 and proforma respondent no.2:

4. Bereft of details, the factual matrix leading to this appeal, is that the State of Assam was to hold National Games of India. Accordingly, bids were invited for the "*Construction of various sport complexes for National Games-2005, Guwahati, Assam Package-I: Sonapur Sports Complex at Tepesia (Sonapur), Hockey Stadium at Bhetapara (Guwahati), New Indoor Stadium at R.G. Baruah Sports Complex and Package-II: Construction of Sarusajai Sports Complex (Main Athletic Stadium, Main Indoor Stadium & Aquatic Complex) and*

Shooting Range at Kahilipara." In the bidding process, Larsen & Toubro Ltd., (hereinafter referred to as the respondent no. 1) had participated. The National Games Secretariat (hereinafter referred to as the proforma respondent no. 2), had issued letter of acceptance dated 13.02.2004 to the respondent no.1 for construction work for combined package-I and II for National Games, 2005 at Guwahati on item rate basis for a value of Rs.139,45,66,938/- (Rupees one hundred thirty nine crore forty five lakh sixty six thousand nine hundred thirty eight only). Pursuant to necessary formalities of providing performance security, etc. and agreement dated 10.04.2004 was made between the proforma respondent no.2 and the respondent no.1.

5. It may be mentioned that in the said agreement dated 10.04.2004, the "National Games Secretariat (NGS), Assam" is referred to as "the employer" and the respondent no. 1 is referred to as "the contractor".

6. The respondent no.1 had completed the contract works and handed over the same to the proforma respondent no.2 on 30.01.2007. Thus, the defect liability period of the said works expired on 30.01.2008. Out of the contract price a sum of Rs.139,45,00,000/- (Rupees one hundred thirty nine crore forty five lakh only) was paid to the respondent no.1. It may be stated that STUP Consultants Pvt. Ltd., Kolkata was appointed as the Engineer-in-Charge in respect of the said contract works.

7. The respondent no.1 projects that it was directed by the Engineer-in-Charge to do some additional works, which was done. The said additional works entailed additional cost and accordingly, the respondent no.1 had submitted a final bill for Rs.1,49,83,65,104/- (Rupees One hundred forty nine crore eighty three lakh and sixty five thousand one hundred four only).

Thus, by deducting the payment of Rs.1,39,45,00,000/- received by the respondent no.1 upto 24th RA bill, the Engineer-in-Charge recommended payment of balance amount of Rs.10,38,65,104/- (Rupees ten crore thirty eight lakh sixty five thousand one hundred four only) due to the respondent no.1 after necessary verification and observation of required formalities. It is projected that vide letter dated 05.03.2007, the Secretary General of the proforma respondent no. 2 had informed the respondent no.1 that the revised contract value of Rs.150.05 crore (approx.) against original contract value of Rs.139.45 crore (approx.) has been certified and submitted by the Engineer-in-Charge for Rs.149.84 crore (approx.), which had been examined by PWD, Assam and is awaiting decision, which will be sorted out soon. Later on, by a letter dated 28.09.2013, the respondent no.1 was informed that the High Power Committee, which was set up for approval of their final bill had rejected the claim as because the works against which the balance amount was due was not backed with formal work order and hence, it could not be considered.

***Appointment of Arbitral Tribunal and its decision**:*

8. In view of the arbitration clause contained in the contract agreement, and Hon'ble former Judge of this Court and a person who was the Fellow of Institution of Engineers (F.I.E. for short) were appointed as Arbitrators by the respondent no.1 and the proforma respondent no.2 respectively to arbitrate their dispute regarding settlement of the claim of the respondent no.1. The said two learned arbitrators had appointed another Hon'ble former Judge of this Court as the learned Presiding Arbitrator. The first sitting of the Arbitral Tribunal was held on 14.03.2015.

9. In course of the arbitration proceedings before the Arbitral Tribunal, the respondent no.1 had filed its statement of claim against which the

proforma respondent no.2 had filed its statement of defence. Both sides filed documents in support of their respective cases and upon hearing both sides, the following issues were framed by the learned Tribunal:-

1. Whether the statement of claim is maintainable?
2. Whether the claim as well as the arbitral proceeding are barred by limitation?
3. *Whether the claimant is entitled to any of the reliefs claimed in this proceedings?*

10. It may be mentioned that in course of the arbitral proceeding, the proforma respondent no. 2, i.e. the National Games Secretariat was winded-up w.e.f. 29.02.2016 and their bank account was closed and its assets and liabilities were handed over to the Sports Authority of Assam (hereinafter referred to as the "appellant"). Accordingly, in the arbitral proceedings, by order dated 23.04.2016, the appellant was impleaded as respondent no.2.

11. In support of their respective stand, the respondent no. 1 had examined one witness, namely, Sri Dilip Kumar Bera as CW-1. The appellant as well as the proforma respondent no. 2 had examined one witness, namely, Smt. Mamoni Permey as DW-1. The examination-in- chief was submitted by way of evidence-on -affidavit and the respective witnesses were cross-examined and discharged. From the records of the Arbitral Tribunal, it appears that the following documents were exhibited:-

Exhibits of the respondent no.1*:*

1. Bidding document Package-I (Ext.A),
2. Bidding document Package- II (Ext.B),
3. Letter of acceptance dated 13.02.2004 (Ext.C),
4. Contract Agreement dated 10.04.2004 (Ext.D),
5. RTI Reply dated 11.06.2015 with annexures (Ext.E),
6. Certificate dated 28.12.2006 issued by Commissioner & Secretary, Govt. of Assam, Sports and Youth Welfare Department (Ext.F),

7. Letter dated 05.03.2007 (Ext.G),
8. Letter dated 14.10.2006 by Engineer-In-Charge (Ext.H),
9. Letter dated 03.06.2011 by Engineer-In-Charge (Ext.I),
10. Certificate dated 30.01.2008 issued by Secretary General (Infra/ Equipt) of proforma respondent no. 2 (Ext.J),
11. Letter dated 19.06.2012 issued by the Under Secretary to the Govt. of Assam, PWD (Bld & NH) (Ext.K),
12. Letter dated 05.08.2013 by respondent no. 1 to Chief Minister, Assam (Ext.L),
13. Letter dated 28.09.2013 by Secretary General (I&E) of proforma respondent no. 2 (Ext.M),
14. Letter dated 09.05.2014 by respondent no.1 (Ext.N),
15. Letter dated 10.07.2014 by respondent no.1 (Ext.O),
16. Letter dated 06.09.2014 by respondent no.1 (Ext.P),
17. Letter dated 20.10.2014 by Secretary General (I&E) of proforma respondent no. 2 invoking arbitration clause (Ext.Q),
18. Letter dated 29.10.2014 by respondent no.1 (Ext.R),
19. Letter dated 20.11.2014 by respondent no.1 requesting appointment of nominee arbitrator (Ext.S),
20. Letter dated 25.11.2014 by the Deputy Director General & SDG-In-Charge of Institution of Engineers (Ext.T),
21. Letter dated 02.02.2015 by an Hon'ble Former Judge of this Court (Ext.U),
22. Letter dated 20.02.2015 by respondent no.1 (Ext.V),
23. Letter dated 14.03.2015 by the two nominee Arbitrators (Ext.W),

Exhibits of the appellant and proforma respondent no.2:

24. Order dated 02.06.2016 issued by Secretary, Sports Authority of Assam (Ext.1),
25. Minutes of the 10th and Final Meeting of the Governing Body of the proforma respondent no. 2 held on 25.02.2016 (Ext.2),
26. Order dated 24.09.2015 (Ext.3),
27. Notification dated 27.10.2003 (Ext.4),
28. Notification dated 31.10.2006 (Ext.5),
29. Minutes of the meeting dated 18.11.2006 of the High Power Committee (Ext.6),
30. Minutes of the meeting dated 10.01.2007 of the High Power Committee (Ext.7),
31. Letter dated 05.03.2007 (Ext.8),
32. Letter dated 26.12.2006 (Ext.9),
33. Letter dated 21.12.2006 (Ext.10),
34. Note dated 23.05.2007 (Ext.11),
35. Note dated 16.10.2009 (Ex.12)

36. Minutes of the 9th Meeting of the Governing Body of the proforma respondent no. 2 held on 17.11.2009 (Ext.13),
37. Letter dated 18.01.2010 (Ext.14),
38. Letter dated 21.04.2010 (Ext.15),
39. Letter dated 26.04.2010 (Ext.16),
40. Letter dated 17.04.2010 (Ext.17),
41. Letter dated 18.08.2010 (Ext.18),
42. Letter dated 03.06.2011 (Ext.19),
43. Letter dated 10.08.2011 (Ext.20),
44. Minutes of meeting dated 08.08.2011 (Ext.21),
45. Letter dated 01.09.2011 (Ext.22),
46. Letter dated 29.02.2012 (Ext.23),
47. Letter dated 24.04.2012 (Ext.24),
48. Letter dated 19.05.2012 (Ext.25),
49. Letter dated 13.06.2012 (Ext.26),
50. Letter dated 28.06.2012 (Ext.27),
51. Letter dated 17.07.2012 (Ext.28),
52. Minutes of the meeting dated 22.03.2013 of the High Power Committee (Ext.29),
53. Letter dated 18.09.2013 (Ext.30),
54. Letter dated 28.09.2013 (Ext.31),
55. Letter dated 22.03.2013 (Ext.32),
56. Letter dated 23.09.2005 (Ext.33),
57. Letter dated 23.02.2006 (Ext.34),
58. Letter dated 02.03.2006 (Ext.35),
59. Letter dated 16.03.2006 (Ext.36),
60. Letter dated 21.06.2006 (Ext.37).

12. In respect of issue no.1, the learned Arbitral Tribunal had observed that nothing has been shown as to why the statement of claims was not maintainable and it was observed that clause 15.1 (2) of the Special Conditions of Contract had stipulated that in case of dispute and difference arising between the employer and contractor relating to any matter arising out or connected with the agreement such dispute shall be settled in accordance with the Arbitration and Conciliation Act, 1996. Accordingly, it was held that the statement of claim submitted by the respondent no. 1 was maintainable.

13. In respect of issue no.2, the learned Arbitral Tribunal was of the opinion that the final decision of rejecting the claim of the respondent no.1 on 22.03.2013 came to the knowledge of the respondent no.1 only when they were communicated of the said decision by letter dated 28.09.2013, which finally sealed the claim of the respondent no.1 and it was further observed that by a letter dated 09.05.2014, the respondent no. 1 had requested the proforma respondent no.2 to decide the dispute by way of arbitration. Accordingly, it was held that the initiation of arbitration proceeding was within the period of limitation from the date of final cause of action which arose on 28.09.2013. Moreover, it was also held that the DW-1 in her statement before the Tribunal had not made any statement relating to the bar of limitation, in noting the scope of alleged additional work, it was held that the additional work was required to be executed to raise the level of area by additional earth filling to protect Sports Complex from rain water. Accordingly, the issue no.2 was decided in the negative and against the appellant.

14. In respect of issue no. 3, relating to the claim of the respondent no. 1, the learned Arbitral Tribunal had observed that the completed works including the additional work completed by the respondent no. 1 was handed over to the proforma respondent no. 2 on 30.01.2007 and the 33rd National Games was successfully held in the year 2007. It also took note of the plea of the respondent no. 1 that due to change in the scope of work, which was executed, the value was increased by Rs.10,38,65,104/- and that the Engineer-in-Charge, by letter dated 14.10.2006, submitted necessary certificate mentioning the final quantity of work executed by the respondent no. 1 and approved payment of Rs.1,49,83,65,104/-, which was confirmed by the proforma respondent no. 2 vide letter dated 05.03.2007. After the end of the

defect liability period on 30.01.2008, the proforma respondent no. 2 had issued final completion certificate. The Arbitral Tribunal also observed that the final bill submitted by the respondent no. 1 was approved by the Engineer-in-charge and forwarded to the proforma respondent no. 2 on 03.06.2011, recommending payment of Rs.10,38,65,104/- due to the respondent no. 1. The Arbitral Tribunal also held that the value of the original contract work amounting to Rs.1,39,45,66,938/- was already paid to the respondent no. 1 and that the balance amount was for the additional work only.

15. The learned Arbitral Tribunal had formed an opinion that certain queries regarding final bill which was raised by the proforma respondent no.2 was also clarified by the respondent no.1 vide letter dated 01.09.2011 which was accompanied with detailed analysis of the bill in the desired format supplied by the proforma respondent no.2. The learned Arbitral Tribunal had referred to the evidence of DW-1 and held that she had admitted that the High Powered Committee in its meeting held on 10.01.2007 had recommended additional work of earth filling for Rs.6,25,50,613/- and in that view of the matter, it was held that the amount recommended by the High Power Committee was Rs.149,63,45,305/-. In light of the letter dated 21.12.2006 (Document no.13), the learned Arbitral Tribunal had observed that the additional work executed by the respondent no.1 was checked by the Assam PWD and that in the said process, the Service Engineer of the Engineer-in-charge and the respondent no.1 was also involved and that the said letter (Document no.13) clearly disclosed that measurement of the additional work was taken by the Engineer-in-charge, and had recommended for the acceptance of the quantity of excess work as recorded by them. The learned Arbitral Tribunal had referred to letter dated 14.10.2006 (Ext.H) by the Engineer-in-charge to the Commissioner and

Secretary of the proforma respondent no.2, intimating execution of work for value of Rs.149,16,17,305/-. The learned Arbitral Tribunal had also referred to the cross-examination of DW-1 wherein she had stated that the additional claim was not rejected due to late submission of bill or delay in execution of project, but the reason ascribed for rejection was not based on any work order and that no other reason was attributed for rejection of the additional claim. Accordingly, the learned Arbitral Tribunal had held that Ext. nos. 6 to 11, 13, 14, 19 and the additional documents filed by the respondent no.1 on 28.11.2015 i.e. Ext.A to Ext.A/17 left no doubt that the respondent no.1 on instructions of the Engineer-in-Charge had executed additional work for an amount of Rs.10,39,65,104/-. Hence, the learned Arbitral Tribunal had held that the respondent no. 1 was entitled to relief under section 70 of the Contract Act, 1872 as the completed works were duly handed over to the proforma respondent no.2 and that they had utilized the same fully and reaped the benefit of the work. In connection with the provision of section 70 of the Contract Act, 1872, the learned Arbitral Tribunal had quoted the relevant portion of the case of (1) *Union of India Vs. Sita Ram Jaiswal, (1976) 4 SCC 505*, and (2) *K.S. Satyanarayana Vs. V.R. Narayana Rao, (1999) 6 SCC 104* and upon considering the same, the learned Arbitral Tribunal had held that the respondent no.1 was entitled to be paid in respect of the additional work executed by them and accordingly, the issue no.3 was answered in favour of the respondent no.1 and against the proforma respondent no.2 and the appellant. The relief granted to the respondent no.1 was as follows:

> A. The respondent no.1 is entitled to realize from the respondent, particularly the appellant:-
>
> (i) an amount of Rs.10,38,65,104/- (Rupees ten crore thirty eight lakh sixty five thousand one hundred four only);

(ii) Interest @ 12% p.a. on the aforesaid amount of Rs.10,38,65,104/- (Rupees ten crore thirty eight lakh sixty five thousand one hundred four only) from 03-06-2011 the date of final bill till the date of award u/s 31(7)(a) of the Arbitration and Conciliation Act, 1996 (as amended);

B. The aforesaid award shall also carry interest @ 2% higher than the current rate of interest prevalent on the date of award from the date of award to the date of payment under Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 (as amended);

C. Cost amounting to Rs.3,50,000/- (Rupees three lakh fifty thousand only) in favour of the respondent no.1 to be paid by the respondent.

The copy of the award was served on the learned counsel for the appellant on 14.11.2017.

16. Aggrieved by the said award, the appellant had preferred an application under section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the Arbitral award dated 11.11.2017. To avoid repetition, the stand taken by the respective parties in the said application is not reiterated herein as those would be covered when the submissions made by the learned senior counsel for both sides is referred to.

17. The learned Additional District Judge No.1, Kamrup (M), Guwahati, vide judgment dated 13.09.2019, had rejected all the contentions of the appellant and the said application was dismissed on the ground that it had no merit and the award dated 11.11.2017 passed by the learned Arbitral Tribunal was upheld.

18. Aggrieved by the said judgment the present appeal has been

preferred.

Submissions by the learned senior counsel for the appellant:

19. The learned senior counsel for the appellant had referred to all the ground nos. (A) to (AJ) and had submitted that the learned Additional District Judge No.1, Kamrup (M), Guwahati (hereinafter referred to as "the learned Court below") had not appreciated that the respondent no.1 had failed to discharge its initial burden to prove the issue of maintainability. It had also failed to appreciate that the claim of respondent no.1 had become barred by limitation much prior to invocation of the arbitration clause and thus, it was stated that the claim was not a live claim. It was also stated that the claim for additional work was not willing to scope of the contract agreement and therefore the Arbitral Tribunal had travelled beyond the terms of contract. It was further submitted that award of pre-reference and *pendente lite* period could not have been granted owing to specific bar contained in Clause 40.1(g) of the Special Condition of Contract.

20. In respect of issue no. 1, it was submitted that while deciding issue no.1, the Arbitral Tribunal proceeded on a wrong premises as the respondent no.1 was bound to prove the existence of the fact and burden of proof was on the respondent no.1 and that while deciding the said issue no.1, the learned Arbitral Tribunal did not discuss any evidence of the witness of respondent no.1. It was also projected that it was perverse because the DW-1 had taken the plea that the claim as well as Arbitral proceedings was barred by limitation but the finding of the learned Arbitral Tribunal was to the effect that there was no whisper in the statement of DW-1 on the plea and that although such plea was taken in the statement of the defence, but at the time of

adducing evidence those were abandoned by the respondent no.2 and in this regard reference was made to paragraph 20 of the evidence-in-affidavit by DW-1 and it was also stated that there was no cross-examination by the respondent no.1 on the said point.

21. It was also urged that the CW-1 had stated in his cross-examination that he was not a Director/ Secretary or Principal officer of the respondent no.1 Company and that he had not exhibited any "Board resolution" or "Power of Attorney" authorizing him to depose on behalf of respondent no.1 and that the CW-1 had also admitted that he had not verified the pleadings made in the statement of claims and that he had also not submitted any document to show that he was associated with the project from 2004 to 2008. Thus, it was submitted that the statement of claim and that the pleadings was not signed or verified by the Director/ Secretary or Principal officer on behalf of the respondent no.1 Company and the person who had signed the verification appended to the statement of claims had not appear before the Arbitral Tribunal to give his evidence. Accordingly, it was submitted that CW-1 was not a credible witness and therefore, the learned Arbitral Tribunal ought not to have been relied on his evidence.

22. Moreover, it was also urged that in terms of section 19 of the Arbitration and Conciliation Act, 1996, the learned Arbitral Tribunal had determined the rules of procedure and had permitted the parties to adduce evidence and therefore, the substantive provision of Evidence Act, 1872 regarding examination of witness was applicable in the instant arbitration proceeding. It was also submitted that Articles of the Limitation Act, 1963 applied to the facts situation of the case. Moreover, by referring to the statement made in paragraph 20 of the evidence-on-affidavit by the DW, it was

stated that the decision of the learned Arbitral Tribunal on issue no.2 was perverse and the said issue was decided on the basis of surmises and conjunctures and without consideration of the relevant pleadings and evidence on record.

23. In respect of issue no.2 it was submitted that the respondent no.1 had not submitted its final bill in terms of clause 57.1 of the General Conditions of the Contract and clause 40.1 (f) of the Special Conditions of Contract.

24. It was further stated that the learned Arbitral Tribunal had failed to consider that the final bill was submitted on 03.06.2011 after expiry of 3 years 3 months 2 days from the date of "defect liability period", i.e. 30.01.2008. Thus, it was submitted that as Article 18 of the Schedule to the Limitation Act was applicable, the claim was barred by limitation. It was further submitted that the learned Arbitral Tribunal had failed to consider that the respondent no.1, in the statement of claim had neither pleaded the date when right to apply for arbitration had accrued and nor the date when Clause-15 of the Special Condition of Contract was invoked had been pleaded. It was also stated that in terms of the provision of section 3 read with Article 18 and 137 of the Schedule to the Limitation Act, 1963 read with section 43(1) of the Arbitration and Conciliation Act, 1996, the claims as well as Arbitration proceedings itself were barred by limitation.

25. In respect of issue no.3 it was submitted that the learned Arbitral Tribunal had decided the said issue by going beyond the terms of the Agreement dated 10.04.2004. Hence, it was submitted that the decision on issue no. 3 amounted to a gross misconduct by the learned Arbitral Tribunal and

it was submitted that the decision on issue no. 3 was without jurisdiction. It was submitted that strong reliance on the Clauses 38.0 and 38.1 of the Special Conditions of Contract was one of the main defence taken by the proforma respondent no.2 before the learned Arbitral Tribunal as well as before the learned Court below. However, neither the learned Arbitral Tribunal, nor the learned Court below had referred or discussed the same in their respective award/order. It was submitted that there was no material to show that the contract price of Rs.139,45,66,938/- was increased on account of variations within the provision of the Contract agreement i.e. within the scope of clause 38.0 and 38.1 of the Special Conditions of Contract. Hence, it was submitted that the award passed by the learned Arbitral Tribunal was beyond the scope of the Deed of Agreement dated 10.04.2004 and it was also submitted that the present dispute was not an arbitrable dispute and the relief, if any, ought to have been claimed elsewhere.

26. It was also submitted that although the High Powered Committee had recommended revised contract value at Rs.149,63,45,305/-, but it was not the authority competent to admit any claim. It was submitted that the competent authority i.e. the proforma respondent no. 2 had neither issued a formal work order to the respondent no.1 nor the respondent no. 1 had carried out the purported additional work with the prior consent or concurrence of the proforma respondent no. 2.

27. Moreover, in order to assail the finding of the learned Court below as well as the Arbitral Tribunal, extensive reference was made to ground nos. (G) to (K) in respect of issue no.1, ground nos. (L) to (T) for issue no.2 and ground nos. (U) to (AH) for issue no.3.

28. In support of his submissions, the learned senior counsel for the appellant had relied on the following cases: *(1) Oil & Natural Gas Corporation Vs. Wig Brothers Builders & Engineering Pvt. Ltd, (2010) 13 SCC 377, (2) Delhi Development Authority Vs. R.S. Sharma & Co., New Delhi, (2008) 13 SCC 80, (3) State Bank of Travancore Vs. Kingston Computers India Pvt. Ltd., (2011) 11 SCC 524, (4) Great Offshore Ltd. Vs. Iranian Offshore Engineering and Construction Company, (2008) 14 SCC 240, (5) Anil Rishi Vs. Gurbaksh Singh, (2006) 5 SCC 558, (6) Sayed Muhammed Mashur Kunhi Koya Thangai Vs. Basagara Jumayath Palli Dharas Committee, (2004) 7 SCC 708, (7) Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, (1993) 4 SCC 338, (8) State of Goa Vs. Praveen Enterprises, (2012) 12 SCC 581, (9) National Insurance Co. Ltd Vs. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267, (10) Choudhary Transport, Mumbai Vs. Hindustan Petroleum Corporation Ltd., (2011) SCC Online Bom 1511, (11) Food Corporation of India Vs. Vikas Majdoor Kamdar Sahkari Mandli Ltd., (2007) 13 SCC 544, (12) Sri Chittaranjan Maity Vs. Union of India, (2017) 9 SCC 611, (13) State of Haryana & Ors. Vs. S.L. Arora and Company, (2010) 3 SCC 690, (14) Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), (2010) 8 SCC 767, (15) M/s. Saloja & Sons Vs. Union of India, 2016 SCC Online Bom 6780, (16) M/s. Angerlehner Structural and Civil Engineering Co. Vs. The Municipal Corporation of Greater Mumbai, (2017) SCC Online Bom 1743, (17) North East Electric Power Corporation Ltd. Vs. Patel Engineering Ltd., (2019) SCC Online Megh 30, (18) Patel Engineering Ltd. Vs. North East Electric Power Corporation Ltd., (2020) 7 SCC 167, (19) Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49, (20) Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Limited, (2022) 1 SCC 131, (21) Secunderabad Cantonment Board Vs. B Ramchandraiah & Sons, (2021) 5 SCC 705, (22) Haryana Urban*

Development Authority, Karnal Vs. Mehta Construction Company and Anr., (2022) 5 SCC 432, (23) Union of India v. Sita Ram Jaiswal, (1976) 4 SCC 505, (24) K.S. Satyanarayana v. R. Naryana Rao, (1999) 6 SCC 104, and (25) Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum, Rajgurunagar & Ors., (2022) 4 SCC 463.

***Submissions made by the learned senior counsel for the respondent no.1**:*

29. The learned senior counsel for the respondent no. 1 has reiterated the stand taken by the respondent no. 1 before the Arbitral Tribunal and he has supported the arbitral award as well as impugned judgment passed by the learned Court below.

30. By referring to the arbitration clauses 15 and 25.3 of the General Conditions of Contract, it was submitted that under sub clause 15.1(a), it is provided that "*In case of dispute or difference arising between the employer and a domestic contractor relating to any matter arising out of or connected with this agreement, such disputes or difference shall be settled in accordance with the Arbitration and Conciliation Act, 1996*. …" Accordingly, it was submitted that in course of the construction under the contract agreement dated 10.04.2004, the Engineer in-charge had directed the respondent no.1 to increase the earth filling level. Thus, it was submitted that the extra earth-filling work as well as increase in the bill of quantities for an amount of Rs.10,38,65,104/- was directly related to the matter "arising out of" or "connected" with the agreement dated 10.04.2004. Therefore, it is submitted that the said extra work cannot be taken out and/or separated from the scope of the contract agreement dated 10.04.2004. It was further submitted that as extra work was done at the same work site, it was not open to the appellant or

the proforma respondent no.2 to project as if the extra work was not connected with the main contract and was outside the scope of the agreement. The learned senior counsel for the respondent no.1 had referred to the Conditions of Contract forming part of the said agreement dated 10.04.2004 and it was submitted that clause 38 thereof prescribed for changes in the quantities. Clause 38 and sub clauses 38.1, 38.2 and 38.3 of the Special Conditions of Contract are quoted below:

> "*38. Changes in the Quantities*
>
> *38.1 If the final quantity of the work done differs from the quantity in the Bill of Quantities for the particular item by more than 25 percent provided the change exceeds 1% of initial Contract Price, the Engineer shall adjust the rate to allow for the change, duly considering:*
>
> *(a) justification for rate adjustments as furnished by the contractor,*
>
> *(b) Economies resulting from increase in quantities by way of reduced plant, equipment, and overhead costs,*
>
> *(c) any additional work.*
>
> *38.2 The Engineer shall not adjust rates from changes in quantities if thereby the Initial Contract Price is exceeded by more than 15 percent, except with the Prior approval of the Employer.*
>
> *38.3 If requested by the Engineer, the Contractor shall provide the Engineer with a detailed cost breakdown of any rate in the Bill of Quantities."*

31. It was submitted that the original contract value was for an amount of Rs.139,45,66,938/-. Hence, the extra work of value of Rs.10,38,65,104/- would be about 7.45% of the value of original contract, which is far below the cap of 15% permissible variation as provided under clause 38.2. Hence, it was submitted that there was no requirement for the Engineer in-charge or for the respondent no.1 to obtain prior approval of the employer.

32. It was further submitted that at no point of time the appellant or the proforma respondent no.2 had ever denied that the respondent no.1 did not carry out any extra earth-filling work in the stadium and that it was not the case of the appellant or the proforma respondent no. 2 that the claim made by the

respondent no.1 was false, fabricated and collusive. In the said regard, by referring to letter dated 21.12.2006, it was submitted that the State PWD was directed to re-verify the additional/extra works of the respondent no.1, and thereafter, the Chief Engineer, PWD (Bldg), Assam vide letter dated 21.12.2006, had informed the Commissioner and Special Secretary, PWD, Assam that they had compared the total quantities of earth-filling work as per record of Engineer in-charge with the quantity of earth-filling work as per PWD verification and it was observed that the quantities recorded by Engineer in-charge was in excess over the PWD verified quantities by only 159.468 cu.m., which was very nominal and hence, it was recommended that the quantity as recorded by the Engineer in-charge may be considered as acceptable for making payment. The chart contained in the said letter is reproduced below:-

LOCATION	Quantity of E/W in Filling as per STUP Consultants Record	Quantity of E/W in Filling as per P.W.D. verification effecting the above excess/less
Kahilipara Shooting Range	37,810.164 cu.m.	37,980.31 cu.m. (0.45% excess)
Bhetapara Hockey Stadium	20,239.390 cu.m.	19,512.80 cu.m. (3.59% less)
Sarusajai Main Stadium	2,57,887.744 cu.m.	2,54,336.63 cu.m. (1.377% less)
Sonapur Stadium	58,751.270 cu.m.	62,699.36 cu.m. (6.72% excess)
Grand Total	3,74,688.568 cu.m.	3,74,529.10 cu.m. (Y)

33. It was further submitted that the entire work, which was inclusive of the extra work was done, was taken over by the proforma respondent no.2 on 30.01.2007. Thereafter, the National Games was held in the said venue and that the defect liability period ended on 30.01.2008. It was also

submitted that vide minutes dated 22.03.2013, the claim of the respondent no. 1 was finally rejected by the High Powered Committee and the said decision was forwarded to the respondent no.1 vide letter dated 28.09.2013, issued by the Secretary General (I&E) of the proforma respondent no.2. Therefore, it was submitted that the cause of action for making the claim and the resultant arbitral proceeding were both within the period of limitation. In the said regard, the learned senior counsel for the respondent no.1 had also referred to the contents of the letter dated 05.03.2007 issued by the Secretary General (I&E) of the proforma respondent no.2 and it was submitted that from the said letter, it was clear that the State Govt. was fully aware of the revised contract value was increased from Rs.139.45 crore (approx.) to Rs.149.84 crore (approx.), which was certified and submitted by the Engineer in-charge, and that the said claim of the respondent no. 1 was duly examined by the Assam PWD and the same was awaiting a Cabinet decision. Hence, it was submitted that the respondent no. 1 was informed that the State Cabinet would be taking a decision and that the matter would be sorted out soon, the claim must be held to be maintainable because the rejection of the claim of respondent no. 1 was communicated to them for the first time only on 28.09.2013, which was the date from when the period of limitation would start and thus, it cannot be said that the claim of the respondent no.1 and the resultant arbitral proceeding was barred by limitation.

34. It was also submitted that the claim of additional amount falls under the purview of the contract agreement and that the arbitration agreement was independent of the contract and that the arbitration clause survives even if the contract came to an end.

35. Apart from making oral submissions, the learned senior counsel for the respondent no.1 has filed a written note of his submissions and has cited

the following cases, viz., (1) *Branch Manager, M/s. Magma Leasing & Finance & Anr. v. Potluri Madhavilata & Anr., (2009) 10 SCC 103,* (2) *Food Corporation of India & Ors. v. Vikash Majdoor Kamdar Sahkari Mandli Ltd., (2007) 13 SCC 544*, (3) *The NHPC Limited v. Oriental Engineers, 2016 (3) GLT 235* and (4) *K.S. Satyanarayana v. V.R. Narayana Rao, (1999) 6 SCC 104*.

***Counter submissions**:*

36. The learned senior counsel for the appellant had made submissions in reply, which was again countered by the learned senior counsel for the respondent no.1.

***Discussions and decision**:*

37. From the submissions made by the learned senior counsel for the appellant and the respondent no.1, the following points of determination arise for decision in this case:-

> 1. *Whether the finding and decision by the Arbitral Tribunal or the three issues framed for trial are perverse having been rendered by misleading and/or non-reading of the evidence on record?*
> 2. *Whether the learned Court below erred in law and on facts in not setting aside the arbitral award on the ground that the award is in conflict with the public policy of India?*

38. At this stage, it would be relevant to mention that the Court is conscious of the scope of judicial interference in respect of the grounds for challenging arbitral award and regarding the approach of the Court in entertaining a challenge to the order of the learned Court below in an application under section 34 of the Arbitration and Conciliation Act, 1996, as elaborately dealt with by the Supreme Court of India in the case of *Delhi Airport Metro Express Pvt. Ltd. Vs. Delhi Metro Rail Corporation Ltd., (2022) 1 SCC 131*.

***Point of determination no.1**:*

39. The following points urged by the learned senior counsel for the appellant, that are covered by the point of determination no. 1 are as follows, viz., (1) the statement of claim was not maintainable; (2) the claim was barred under Article 18 to the Schedule to the Limitation Act, 1963; (3) the extra work purportedly done by the respondent no.1 was not covered by the agreement dated 10.04.2004 containing arbitration clause; (4) interest was granted despite there being a specific bar in the said agreement; and (5) the arbitral proceeding was barred within the meaning of Article 137 of the schedule to the Limitation Act. The said points are discussed as under:-

1. *Statement of claim was not maintainable:* The claim petition was signed and filed by one Shri Sushanta Shah Deo. The evidence-on-affidavit on behalf of the respondent no.1 was sworn and filed by Shri Dilip Kumar Bera (CW-1). In his cross-examination, the CW-1 had stated that he had not exhibited any Board's resolution or power of attorney authorizing Shri Sushanta Shah Deo to file the statement of claim and pleading on behalf of the claimant company. The claim petition, verified on 22.06.2015, does not contain any statement that the person verifying and filing the claim was one of the Directors, or Secretary or Principal Officer of the respondent no.1 Company. Therefore, *ex facie* the respondent no.1 has not been able to show that the claim petition was filed on the strength of any board resolution or power of attorney or letter of authority, authorizing Shri Sushanta Shah Deo to file the statement of claim before the learned Arbitral Tribunal. From the evidence on affidavit as well as from the cross-examination of Shri Dilip Kumar Bera (CW-1), it is clear that Shri

Sushanta Shah Deo, i.e. the person who had filed the claim petition was not examined as a witness. The said point was taken by the proforma respondent no. 2 in its written statement of defence. However, the CW-1 did not prove that Shri Sushanta Shah Deo had the power or authority to file the statement of claim on behalf of the claimant company. Thus, the appellant has been able to demonstrate that Shri Sushanta Shah Deo lacked the power and authority to file the statement of claim on behalf of the claimant company. The case of *State Bank of Travancore (supra)*, cited by the learned counsel for the appellant supports the said proposition. Therefore, the claim petition was not maintainable. Hence, the finding of the learned Arbitral Tribunal that the claim petition was maintainable is perverse.

2. *The claim was barred under Article 18 to the Schedule to the Limitation Act, 1963:*

i. In this regard, the respondent no.1 has not been able to demonstrate that the Limitation Act, 1963 was not applicable in the instant arbitral proceeding. Rather, as per the provision of sub-section (1) of section 43 of the Arbitration and Conciliation Act, 1996, it is provided that the Limitation Act shall apply to arbitrations as it applies to proceedings in Court.

ii. Moreover, as per the provision of sub-section (2) of section 43 of the Arbitration and Conciliation Act, 1996, arbitration shall be deemed to have commenced on the date referred in section 21. Under section 21 of the said Act, it is provided that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commenced on the date on which a

request for that dispute to be referred to arbitration is received by the respondent. In this regard, the learned senior counsel for the appellant has been able to demonstrate that in the statement of claim, there is no statement that the respondent no.1 had made any request to the proforma respondent no.2 for appointment of arbitrator or for referring the dispute to arbitration. However, in para 14 (b) of the rejoinder of the claimant filed on 17.11.2015, a statement has been made that the arbitration clause was invoked vide letter dated 09.05.2014 (Ext.N), which was received by the proforma respondent no. 2 on 20.05.2014.

iii. It would be appropriate to refer to Clauses 55.1, 56.1 and 57.1 of the Conditions of Contract, as well as Clause 40.1(f) of the Special Conditions of Contract, which reads as follows:-

> **55.1** The contractor shall request the Engineer to issue a Certificate of Completion of the works and the Engineer will do so upon deciding that the work is completed.
>
> **56.1** The Employer shall take over the site and the works within seven days of the Engineer issuing a Certificate of Completion.
>
> **57.1** The Contractor shall supply to the Engineer a detailed account of the total amount that the Contractor considers payable under the Contract before the end of the Defects Liability Period. The Engineer shall issue a Defect Liability Certificate and certify any final payment that is due to the Contractor within 56 days of receiving the Contractor's account if it is correct and complete. If it is not, the Engineer shall issue within 56 days a schedule that states the scope of the

corrections or additions that are necessary. If the Final Account is still unsatisfactory after it has been resubmitted, the Engineer shall decide on the amount payable to the Contractor and issue a payment certificate, within 56 days of receiving the Contractor's revised account.

40.1(f) Final bill shall be submitted by the contractor within 30 days from the date of completion and payment shall be made within 90 days on final certification and after completion of all works and on testing/ commissioning/ guarantee.

Therefore, on considering the time limit prescribed under clause 57.1 of the Conditions of Contract read with Clause 40.1(f) of the Special Conditions of Contract, the defect liability period would definitely end on 29.01.2010, being calculated from 30.01.2007, the date on which the completed works was handed over to the proforma respondent no. 2. This date of 30.01.2007 would be the only possible date relevant to the issue because it is not the pleaded case of the respondent no. 1 that the proforma respondent no. 2 had disputed the final accounts. Moreover, out of the agreed contract price of Rs.139,44,66,938/- a sum of Rs.139,45,00,000/- (Rupees One hundred thirty nine lakh forty five lakh only) was paid to the respondent no. 1, which is evident from the contents of the letter dated 03.06.2011 (Ext.I) of the Engineer-in-Charge.

iv. It has been stated herein before that the respondent no. 1, through CW-1 had not proved its final bill before the learned Arbitral Tribunal.

v. Thus, by applying Article 18 of the Schedule to the Limitation Act, 1963, the claim would become barred in three years

from the date the work was done, i.e. from 30.01.2007. Thus, the period of limitation to recover money would end on 29.01.2010.

vi. Under Article 137 of the Limitation Act, 1963, the period of limitation would expire in three years from the date when the right to apply accrues. Thus, if the period of limitation is counted from 30.01.2008, the date when completion certificate was issued, the three year period of limitation would expire on 29.01.2011. Thus, not only the claim was barred by limitation, but the arbitration proceeding must be also held to be barred by limitation because the request for having the dispute settled by arbitration was issued by the proforma respondent no. 2 on 20.10.2014 (Ext.Q), which is after the limitation to make claim had expired on 29.01.2011.

vii. As mentioned herein before, in para 14 (b) of the rejoinder filed by the claimant on 17.11.2015, a statement has been made that the arbitration clause was invoked vide letter dated 09.05.2014 (Ext.N), which was received by the proforma respondent no. 2 on 20.05.2014. Therefore, arbitration clause was invoked in this case after the expiry of the period of limitation.

viii. The various communications referred to by the learned senior counsel for the respondent no. 1 cannot be treated as an acknowledgment of debt by the proforma respondent no. 2 as envisaged under Section 18 of the Limitation Act, 1963.

ix. In this case, the learned Arbitral Tribunal as well as the learned Court below had computed the period of limitation from 28.09.2013. In this regard, the learned senior counsel for the respondent no. 1 has not been able to show from any law in force or from any case law, where the period of limitation in respect of "claim

for money for work done" is permitted to be counted from the date of refusal of the claim.

x. It may be mentioned that the respondent no. 1 had not exhibited its bill before the learned Arbitral Tribunal for the purported extra/ additional work done. There is no pleading in the statement of claim about the date when bill for purported extra/ additional work done was submitted to the proforma respondent no. 2. Moreover, assuming that bills had been submitted to the proforma respondent no.2, but no step was taken to call for the original bill and to prove such bill in accordance with law.

xi. The learned senior counsel for the respondent no. 1 was heavily relying on the forwarding letter dated 03.06.2011 (Ext.I) issued by the Engineer-in-charge in respect of the purported final bill. Even in the said letter dated 03.06.2011 (Ext.I), the date of bill is not mentioned. It has not been shown how the contents of the forwarding letter dated 03.06.2011 or the contents of a purported bill would constitute the proof of earth-filling work done. As mentioned herein before, the request letter dated 09.05.2014 (Ext.N) by the respondent no. 1 for appointment of arbitrator was received by the proforma respondent no. 2 on 20.05.2014. Thus, if work was completed and handed over to the proforma respondent no. 2 on 30.01.2007, and bill was forwarded on 03.06.2011, the claim cannot be said to be within the period of limitation.

xii. Hence, in view of the discussions above, we do not find force in the submissions made by the learned senior counsel for the respondent no.1 that the claim and the arbitration proceeding was within the period of limitation.

xiii. Thus, the learned Arbitral Tribunal as well as the learned Court below had committed patent illegality in computing the period of limitation from 28.09.2013, which is contrary to the principles of the Limitation Act, 1963 and thus, contrary to the public policy of the Country.

3. *The extra work purportedly done by the respondent no. 1 was not covered by the agreement dated 10.04.2004 containing arbitration clause:*

i. The respondent no. 1 has not been able to successfully demonstrate that the extra earth-filling work was within the meaning of variation as envisaged in the scope of the present contract. In this regard, it has already been stated herein before that the respondent no. 1 has not proved any document by which the Engineer-in-Charge had given any direction to the respondent no.1 to do any extra earth-filling work. Moreover, there is no pleading or evidence to the effect that the consent of the Employer was taken either by the Engineer-in-Charge to do extra work and/or by the respondent no. 1 before carrying out such extra earth-filling work.

ii. The learned Arbitral Tribunal had returned a specific finding to the effect that various documents exhibited by the parties, most of which are common, particularly, Exts. 6 to 11, 13, 14 and 19 and the additional documents filed by the claimant on 28.11.2015 i.e. Exts. A to A/17 leaves no manner of doubt that the respondent no. 1 on instruction of the Engineer-in-Charge M/s. STUP Consultancy (P) Ltd. executed the additional work for which an amount of Rs.10,38,65,104/- was still due. The said finding is

perverse because of two factors mentioned below:-

a. In the evidence-on-affidavit filed by CW-1 on 05.04.2016, the "Bidding Document Package-I" is marked as Exhibit-A. No other document is exhibited as Ext.A/1 to A/17. However, the Arbitration record reveals that vide petition dated 28.11.2015, the respondent no. 1 had prayed for leave under Order VII, Rule 3 CPC to bring on record certain documents, which were marked as Annexure- A/1 to A/17. There is no statement in the evidence-on-affidavit by CW-1 regarding any document showing scope of work by the Engineer-in-charge. Some parts of the cross-examination of CW-1 are in question and answer form. The relevant question and answer are quoted below:-

Q. Can you show the written authority of the Engineer in-charge with the concurrence of the authority for execution of additional work?

R. (Witness referring to Document-9) No written confirmation is required as the item executed for increase in quantity within the schedule contract and it is certified by the Engineer-in-charge.

Q. Is there any signature of the employer?

R. There is no signature of the employer, but the signature of Executive Director, STUP Consultant is there. In Ext-I (Document-9), there is no specification of any additional work.

Therefore, when the CW-1 has stated in his cross examination that no written confirmation is required from the 'Employer' and when CW-1 has not exhibited work order by the Engineer-in-Charge, the finding by the learned Arbitral Tribunal

to the effect "*that Exts. A to A/17 leaves no manner of doubt that the respondent no. 1, on instruction of the Engineer-in-Charge, had executed the additional work for which an amount of Rs.10,38,65,104/- was still due"* is erroneous, contrary to the evidence on record and therefore, perverse. Moreso, reliance by the learned Arbitral Tribunal on Ext.A/1 to Ext.A/17 is perverse because the said documents were not exhibited by CW-1 vide his evidence-on- affidavit.

b. The purported dues of Rs.10,38,65,104/- is definitely not the value of extra/additional earth-filling work. As per the contents of letter dated 03.06.2011 of the Engineer-in-Charge, the value of work, inclusive of purported extra/additional earth-filling work was Rs.149,83,65,104/-. The payment made was Rs.139,45,00,000/-. Thus, the payment due was calculated at Rs.10,38,65,104/- (Rs.149,83,65,104/-, less paid Rs.139,45,00,000/-). The contract price was Rs.139,45,66,938/-. Thus, it is apparent that Rs.66,938/- out of contract price of Rs.139,45,66,938/- remained unpaid. Therefore, the value of purported extra/additional earth-filling work must be presumed to be Rs.10,38,65,104/- less Rs.66,938/- which would be Rs.10,37,98,166/-. Thus, a fundamental or elementary mistake has been committed not only by the respondent no. 1, but also by the learned Arbitral Tribunal and the learned Court below that value of extra work was Rs.10,38,65,104/- by omitting to take into account the contents of letter dated 03.06.2011 (Ext.I) that when payment of Rs.139,45,000/- was made, the sum of Rs.66,938/- remained

unpaid out of the contract price.

iii. As already indicated herein before, the price of earth-filling was not included within the contract price of Rs.139,45,66,938/- as mentioned in the Letter of Acceptance dated 13.02.2004, issued by the proforma respondent no. 2.

iv. Therefore, as the prior consent of the proforma respondent no. 2 was not taken to carry out any extra work, the appellant has been able to successfully demonstrate that the extra work purportedly done by the respondent no. 1 was not covered by the agreement dated 10.04.2004 containing arbitration clause. Therefore, such claim was definitely not an arbitrable dispute.

v. In this regard, the learned Arbitral Tribunal had invoked the provisions of Section 70 of the Contract Act, 1872, which provides as follows:-

> "*70.* ***Obligation of person enjoying benefit of non-gratuitous act****.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the latter bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.*
> *Illustrations*
> *(a) A, a tradesman, leaves goods acts house by mistake. B treats the goods as his own. He is bound to pay A for them.*
> *(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.*"

In this regard, the respondent no. 1 has not been able to demonstrate that under the Contract Agreement dated 10.04.2004 there was any clause by which money became payable to the respondent no.1 if they had done any work gratuitously, which was purportedly put to beneficial use by the proforma respondent no.2. Moreover, it could not be shown that under the arbitration clause,

the Arbitral Tribunal had been conferred with the power and jurisdiction to pass and/or make an award on the principle of Section 70 of the Contract Act, 1872. Therefore, if the respondent no. 1 had a claim which was within the meaning of Section 70 of the Contract Act, 1872, the remedy for the respondent no. 1 lied elsewhere and not by way of arbitration.

vi. The case of *Branch Manager, M/s. Magma Leasing & Finance Ltd. (supra)*, referred to by the learned senior counsel for the respondent no. 1 does not help the respondent no. 1 in any manner. The reason for the same is that as per the contract agreement, and clauses unless any work was carried out with prior approval of the 'employer' in writing, there was no scope of carrying out the purported additional/ extra earth-filling work. The said cited case is an authority on the point that even if the agreement containing arbitration clause is repudiated or the contract has come to an end, the arbitration clause survives. However, as the dispute is not within the arbitration clause, there can of course be no arbitration, but the reason for that would not be that the arbitration clause has ceased to exist but that the dispute is outside its scope. [see para 30 of the case of *Heyman v. Darwine Ltd., (1942) All.E.R. 337*, quoted in para-11 of the case of *Branch Manager, M/s. Magma Leasing & Finance Ltd. (supra)*].

vii. The learned senior counsel for the respondent no. 1 had referred to the principle of "*quantum meruit"* and Section 70 of the Contract Act, 1872 and had relied on the decision of this Court in the case of *The NHPC Limited (supra)*. In the said case, the earth work was carried out beyond the lead of 7 kms., and under such

circumstances, it was held that it was not a case where the arbitrators had acted beyond the terms of the contract. The factual matrix in the present case in hand is squarely distinguishable because under the agreement there was a bar to carry out work beyond the scope of the contract without prior written consent of the employer and the contract rate was pre-determined and paid to the respondent no. 1. Therefore, when the agreement did not contemplate any additional or extra work to be done without prior consent of the employer i.e. proforma respondent no. 2 in writing, the Court is of the considered opinion that the principle of *quantum meruit*, implied contract and/or the provision of Section 70 of the Contract Act, 1872 can be invoked in this case in hand. Thus, the cited case of *NHPC Limited (supra)* would not help the respondent no. 1. At the cost of repetition, we may again refer to the case of *Delhi Development Authority (supra)*, for which it must be held that the case of *NHPC Limited (supra)* would have no application in the present case in hand because if the proposition argued by the learned senior counsel for the respondent no. 1 is accepted, then it would amount to adding a new scope of work under the contract agreement dated 10.04.2004, which did not exist and rather, there was prohibition that without prior consent of the employer in writing, scope of work could not be altered. As per the decision rendered by the Supreme Court of India in the case of *Delhi Development Authority (supra)*, it is open to the Court to consider whether the Award passed by the learned Arbitral Tribunal is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

viii. The learned senior counsel for the respondent no. 1 had further submitted that the additional/extra work was done under the instructions of the Engineer-in-Charge and that such work was certified by them. Moreover, it was submitted that as per the terms of the original contract, the Engineer-in-Charge will decide contractual matters between the proforma respondent no. 2 and the respondent no. 1. Accordingly, it was submitted that the appellant and the proforma respondent no. 2 were bound by the letter dated 03.06.2011 issued by the Engineer-in-Charge, thereby recommending the payment of the additional amount. In support of the said contention, reliance has been placed on the case of *Food Corporation of India & Ors. (supra)*. For the reasons assigned in the foregoing paragraph, the Court is of the considered opinion that under the factual matrix of this present case in hand, the case of *Delhi Development Authority (supra)* is required to be followed, because the case of *Food Corporation of India & Ors. (supra)*, was decided in the backdrop of a civil suit, where there is no bar for the civil Court to pass a decree in the suit by invoking Section 70 of the Contract Act, 1872. However, as the learned arbitral tribunal could not have gone beyond the contract agreement, the said case would not help the respondent no. 1 in any manner whatsoever.

ix. In the case of *Delhi Development Authority (supra)*, the respondent therein had procured stone aggregate from Nooh in Haryana and made a claim for extra lead. It was held by the Supreme Court of India that there was no material on record to substantiate the case of the claimant, viz., DDA had insisted upon the claimant for using the stone aggregates brought from Nooh in

Haryana. On facts it was held that the terms and conditions of the Agreement are binding on both the parties and that in the absence of specific clause with regard to payment of extra cartage and in view of clause 3.16, the claimant cannot claim extra cartage on the ground of extra lead involved in bringing the stone aggregates from Nooh in Haryana. It was further held that the Division Bench like the Arbitrator proceeded on the sole basis that DDA had compelled the claimant-Company from bringing the stone aggregates from Nooh in Haryana and committed an error in affirming the erroneous conclusion arrived at by the Arbitrator insofar as the additional claims are concerned.

x. Similar circumstances exist in this case. There is nothing on record to show that the Engineer-In-Charge had issued any written direction to the petitioner to do the work of extra earth-filling. Even assuming that there was a written direction by the Engineer-in-Charge, the said document was not proved and/or exhibited by the CW-1. There is also nothing on record to show that with prior approval in writing by the Employer, i.e. proforma respondent no. 2, such extra earth-filling work was done. Therefore, the inevitable conclusion is that the learned Arbitral Tribunal had erred in allowing claim for work of extra earth-filling, which was beyond the scope of the contract.

4. *Interest was granted despite there being a specific bar in the said agreement:*

i. Under Clause 40(1)(g) of the Special Conditions of Contract, it is provided that "*No interest shall be paid for delayed*

payments." In this context, the Court is of the considered opinion that arbitration is a creature of the statute and therefore, the learned Arbitral Tribunal is bound by the contract between the parties to the arbitration agreement. Thus, when Clause 40(1)(g) of the Special Conditions of Contract bars claim for interest for delayed payment, and there is no agreement for grant of interest on unpaid amount, the learned Arbitral Tribunal could not have awarded interest for pre-litigation and pendente lite period. In this regard, the Court finds support from the decision of *Chittaranjan Maity (supra)*, cited by the learned counsel for the appellant. In the said judgment, by referring to the judgment rendered in the case of *Sayeed Ahmed and Co. v. State of U.P., (2009) 12 SCC 26*, and *Sree Kamatchi Amman Constructions v. Railways, (2010) 8 SCC 767*, it was held to the effect that under the Arbitration and Conciliation Act, 1996, a specific provision has been created under Section 31(7)(a) and that as per this Section, if the agreement bars payment of interest, the Arbitrator cannot award interest between the date of cause of action to the date of award.

ii. Nonetheless, future interest could have been granted in terms of Section 31(7)(b) of the Arbitration and Conciliation Act, 1993.

iii. In this regard, the Court finds support from the case of *Oil & Natural Gas Corporation (supra)*, the Supreme Court of India had held that an award cannot be passed when it is ruled out by the terms of the contract. The case of *Delhi Development Authority (supra)* also supports the said well settled legal position.

iv. Therefore, as there was a negative covenant in the

agreement that no interest would be granted on delayed payment, the award of interest by the learned Arbitral Tribunal is not found sustainable.

5. *The arbitral proceeding was barred within the meaning of Article 137 of the schedule to the Limitation Act:*

i. In this case, the completion certificate was issued on 30.01.2008. Therefore, the period of limitation for money claim would expire on 29.01.2011.

ii. The respondent no. 1 had exhibited the letter dated 20.10.2014 (Ext.Q), by which the proforma respondent no. 2 had made a request for settling their dispute by arbitration. It has already been held herein before that the period of limitation to make claim for purported extra earth-filling work had expired on 29.01.2011. Hence, not only the claim was barred by limitation, but the arbitration proceeding itself has also becomes barred by limitation.

iii. The various communications exhibited by the respondent no. 1 cannot be read to constitute an acknowledgment of debt by the proforma respondent no. 2 within the meaning of Section 18 of the Limitation Act, 1963.

iv. However, in this case, the Arbitral Tribunal as well as the learned Court below had computed the period of limitation from 28.09.2013. In this regard, the learned senior counsel for the respondent no. 1 has not been able to show any provision of substantive law or any case law, where the period of limitation is permitted to be counted from the date of refusal of the claim.

v. It is reiterated at the cost of repetition that the respondent no. 1 had not exhibited its bill for the purported extra/ additional work done.

vi. Accordingly, it is held that the arbitral proceeding was barred within the meaning of Article 137 of the schedule to the Limitation Act.

vii. The mere exchange of communication that the matter was being examined by the Cabinet cannot extend the period of limitation. In the case of *Inder Singh Rekhi v. Delhi Development Authority, (1988) 2 SCC 338*, the Supreme Court of India had observed that "*a party cannot postpone the accrual of cause of action by writing reminders or sending reminders*." The said observation was followed in the case of *Secunderabad Cantonment Board (supra)*, cited by the learned senior counsel for the appellant.

viii. It would be relevant to extract the observations and finding by the Supreme Court of India in the case of *Secunderabad Cantonment Board (supra)*, which reads as under:-

> "*20. Even otherwise, the claim made by the Respondent was also ex facie time barred. It is undisputed that final payments were received latest by the end of March 2003 by the Respondent. That apart, even assuming that a demand could have been made on account of price variation, such demand was made on 8-9-2003. Repeated letters were written thereafter by the Respondent, culminating in a legal notice dated 30-1-2010. Vide the reply notice dated 16-2-2010, it was made clear that such demands had been rejected. Even taking 16-02-2010 as the starting point for limitation on merits, a period of three years having elapsed by February 2013, the claim made on merits is also hopelessly time-barred*."

In para 14 above, the various dates have been referred, which discloses that although the date when payment of Rs.139,45,00,000/- was made to the respondent no.1 has not been

pleaded by the appellant, but it was paid before letter dated 03.06.2011. Therefore, following the ratio of the case of *Secunderabad Cantonment Board (supra)*, the arbitration proceeding as well as the claim made by the respondent no. 1 is held to be barred by limitation.

40. Thus, in view of the discussions made herein before, the Court is inclined to hold that the finding and decision by the learned Arbitral Tribunal on all the three issues framed for trial are perverse, having been rendered either by misreading and/or non-reading of the evidence available on record. Therefore, the point of determination no. (1) is answered in the affirmative and in favour of the appellant and against the respondent no.1.

Point of determination no. (2)*:*

41. The point of determination no. 2 is taken up now. In light of the discussions above, the Court is inclined to hold that the learned Arbitral Tribunal had passed/ made an award despite the fact that the claim of the respondent no. 1 was barred under the provisions of Article 18 of the Schedule to the Limitation Act, 1963. It is further held that the arbitration clause was invoked by the respondent no. 1 beyond the prescribed period of limitation. Therefore, as the request of arbitration was invoked after the claim was barred by limitation, the arbitration was invoked beyond the period of limitation envisaged under Section 43 read with Section 21 of the Arbitration and Conciliation Act, 1993. Therefore, the Court is inclined to hold that the learned Arbitral Tribunal entertained the claim beyond the period of limitation, and therefore, the award is in conflict with the public policy of India.

42. The award was based on finding reached by the learned Arbitral

Tribunal by referring to the provisions of Section 70 of the Contract Act, 1872, which was beyond the scope of the arbitration agreement and therefore, passing of award by invoking Section 70 of the Arbitration and Conciliation Act, 1993 although such a claim was beyond the scope of arbitration agreement, the resultant award is held to be vitiated on being in conflict with the public policy of the Country. In order to justify reliance on the provision of Section 70 of the Contract Act, 1872, the learned Arbitral Tribunal had relied on the case of *Sita Ram Jaiswal (supra)*, and *K.S. Satyanarayana (supra)*. However, on a perusal of the said cases, it is seen that both the cases arise out of a civil suit. However, no material has been placed before this Court to show that under the scheme of the Arbitration and Conciliation Act, 1996, an Arbitral Tribunal is a Court having jurisdiction to decide such civil dispute, which is not covered by the contract agreement containing arbitration clause.

43. In this case in hand, the additional/ extra work of earth-filling was not included in the contract dated 10.04.2004, The appellant has successfully demonstrated that during cross- examination, the CW-1 had admitted that the earth-filling work was done without the employer's concurrence in writing because as per CW-1, as the deviation was within permissible limit. Moreover, the CW-1 had also not proved any written direction by the Engineer-in-Charge to do extra earth-filling as a part of existing contract dated 10.04.2004. Thus, the additional/ extra earth-work was clearly outside the scope of the contract agreement dated 10.04.2004. Hence, in the considered opinion of the Court, the claim for additional/ extra earth-work was not an arbitrable dispute, but subject to law of limitation, such a claim could have been raised elsewhere. Thus, as the learned Arbitral Tribunal had entertained a non-arbitrable dispute, the award is contrary to the Arbitration and Conciliation Act,

1996. Therefore, the resultant impugned award is a result of patent illegality, being against the fundamental policy of Indian laws.

44. As the learned Arbitral Tribunal had awarded interest, though under Clause 40(1)(g) of the Special Conditions of Contract, it was provided that "*No interest shall be paid for delayed payments"*, therefore, the Court is of the considered opinion that the award of interest is contrary to the public policy of the Country. Moreover, the award of interest is vitiated by patent illegality as it is contrary to the terms of the agreement/ contract dated 10.04.2004 between the parties. In the said context, the Court finds support from the ratio laid down by the Supreme Court of India in the case of *Associate Builders (supra)*, cited by the learned senior counsel for the appellant.

45. The learned Arbitral Tribunal had entertained the claim which was not covered by the scope of the Contract Agreement because the Employer, i.e. the proforma respondent no. 2 did not give its prior approval/consent to the respondent no. 1 to carry out the so called extra earth-filling work. Hence, such a work was *ex facie* contrary to the provision of Clause 38.1 of the Special Conditions of Contract. Therefore, the claim was not covered by the Contract Agreement dated 10.04.2004 and thus, the claim for extra earth-filling work cannot be said to be covered within the meaning of "changes in the quantities" as envisaged under Clause 38.0 read with Clause 38.1 of the Special Conditions of Contract. On the conjoint reading of the Clause 38.1(a)(b)(c) along with Clause 39.1, it appears that the additional work done by the respondent no.1 was not proved to be in compliance of the said clauses and moreover, the work done by the respondent no.1 did not receive any prior approval of the proforma respondent no.2. Hence, the Court is constrained to hold that the claim for extra earth-filling work was expressly excluded from the scope and ambit of the

contract agreement dated 10.04.2004 for which the dispute relating to such extra earth-filling work was beyond the scope of arbitration agreement. Hence, the entertaining of claim which was beyond the scope of the arbitration agreement vitiates the award of the learned Arbitral Tribunal, which is squarely in conflict with the public policy of the Country. The claim, if within limitation, could have been made elsewhere. Thus, by entertaining and awarding a time barred claim, the learned Arbitral Tribunal had committed patent illegality, and moreover, the award is contrary to the fundamental public policy of India.

46. Moreover, by showing calculations, it has been mentioned in para 38(3)(ii)(b) above that the claim made for a sum of Rs.10,38,65,104/- could not have been the bill for additional/ extra earth-filling. Therefore, the learned Arbitral Tribunal as well as the learned Court below, without reading the contents of letter dated 03.06.2011 (Ext.I), presumed that the claim for additional/ extra earth-filling was Rs.10,38,65,104/-, without any basis, without taking into account that the bill of the proforma respondent no. 2 was not even exhibited and proved. The reliance on Ext.I to presume the amount mentioned therein was bill amount was contrary to the provision of Evidence Act, 1872, as Ext.I i.e. letter dated 03.06.2011 was neither a piece of primary evidence nor a secondary evidence. Moreover, the author of the said letter was also not examined. Hence, in other words, the learned Arbitral Tribunal as well as the learned Court below, from the contents of the letter dated 03.06.2011 (Ext.I), written by Engineer-in-Charge, had baselessly and erroneously presumed that the amount of Rs.10,38,65,104/-, mentioned therein was the bill for additional/ extra earth-filling work, without appreciating that the payment due, as mentioned in the said letter was calculated by the Engineer-in-Charge at Rs.10,38,65,104/- (i.e. Rs.149,83,65,104/-, less paid Rs.139,45,00,000/-).

Moreover, once the parties are allowed to file evidence-on-affidavit and the witnesses are cross-examined, it cannot be said that the principles of Evidence Act, 1872 in so far as "burden of proof" is concerned, would not be followed. It was the respondent no.1 on whom the burden of proof was cast to prove their bill together with other cogent evidence like measurement books, vouchers, etc. to prove existence of debt, based on documentary evidence. On burden of proof in arbitration cases, the Court finds support from the case of *Great Offshore Limited v. Iranian Offshore Engineering and Construction Company, (2008) 14 SCC 240 (para-46)*, where the Supreme Court of India held that "*burden to prove that a valid contract containing an arbitration clause existed first rested on the applicant, as it was the applicant that was moving this Court*." Thus, the award for a sum of Rs.10,38,65,104/- towards dues and/or value for additional/ extra earth-work is perverse, and therefore, contrary to the public policy of India.

47. The reliance of the learned Arbitral Tribunal on Ext.A/1 to Ext.A/17 is perverse because the said documents were not exhibited vide evidence-on- affidavit filed by CW-1. Thus, reference to and reliance upon the documents in the learned Arbitral Tribunal's judgment and award, which were not proved by the respondent no. 1 in accordance with law is contrary to the public policy of India, being contrary to well established principles of burden of proof.

48. In light of the discussions above, the Court is constrained to set aside and quash the impugned judgment and award dated 11.11.2017, passed by the learned Arbitral Tribunal consisting of three learned Members in the matter of arbitration between *M/s. Larsen & Toubro Limited v. (1) National Games Secretariat (NSG), Assam, (2) Sports Authority of Assam*.

49. Similarly, in light of the discussions above, the Court is constrained to hold that the Court below, while exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 had failed to consider the issues raised by the appellant in the correct perspective. It is apparent that the learned Court below did not take into account the pleadings made by the appellant before it and also failed to correctly appreciate the evidence of CW-1 and DW-1 before the learned Arbitral Tribunal. Therefore, the impugned judgment and order dated 13.09.2019, passed by the learned Addl. District Judge No.1, Kamrup (M), Guwahati in Misc. Arbitration Case No. 5/2018 is also liable to be set aside and quashed.

50. Resultantly, this arbitration appeal is allowed and (i) the award dated 11.11.2017, and order dated 13.09.2019, passed by the learned Addl. District Judge No.1, Kamrup (M), Guwahati, in Misc. Arbitration Case No. 5/2018, are both set aside and quashed. No order as to costs.

JUDGE

Comparing Assistant