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

Judgment reserved on: 25.09.2009
% Judgment delivered on: 17.11.2009

\+ **FAO(OS)No.427 OF 2007**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Appellant
Through: Mr. A.S. Chandhiok and Mr. Chetan Sharma, Senior Advocates with Mr. Tarun Dua, Ms. Geetika Panwar and Mr. Abhishek Kumar, Advocates.

versus

SOM DATT BUILDERS- NCC-NEC(JV) & ORS. ....Respondents
Through: Mr. V.A. Mohatta and Mr. Amit K. Chadha, Senior Advocates with Mr. Arvind Minocha, Advocate.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIPIN SANGHI

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

VIPIN SANGHI, J.

1. This appeal under Section 37 of the Arbitration and Conciliation Act (The Act) has been preferred by National Highway Authority of India (NHAI) to challenge the judgment of the learned single Judge of this Court in OMP 316/2005 dated

29.8.2007 whereby the objections preferred by the appellant under Section 34 of the Act, to the award dated 3.6.2005 made by the Arbitral Tribunal have been dismissed.

2. The appellant awarded a contract to respondent no.1 in respect of Four Laning and strengthening of existing Two Lane Section of NH-2 near Kanpur. The contract was awarded on 27.3.2002 for an amount of Rs.4.961 billion. The contract awarded was a unit rate contract comprising of a detailed Bill of Quantities (hereinafter referred to as the BOQ). The BOQ contained the description of the items of the work to be executed by the contractor and the estimated quantities of each item involved in the execution of the contractor. The rates were to be filled by the bidders/contractors against the estimated quantities provided by the employer i.e. NHAI in the BOQ. During the progress of the work, a dispute arose between the parties in respect of Item No.7.07 (ii) of the BOQ which reads as under:

Item	Description	Unit	Quantity	Unit Rate		Amount
				In figures	In words	
7.07	Providing reinforced earth work as per Technical Specifications clause 703 with precise concrete plain finish facia panel in cruciform					

	shape (grade of concrete M 35, thickness 180 mm) including soil reinforcing geogrid with all approved design & drawing of specialized firm.					
i)	----------	-----	----	-----	----	----
ii)	**Greogrid/geo-textile reinforcement fabric with necessary overlaps jointing or stitching etc. complete as per drawing.**	**Sq. m**	**680000**	**300.00**	**Three Hundred Only**	204,000,000.00
(iii)	**----------**	**----**	**------**	**-----**	**-----**	**------**

3. From the above it would be seen that for the estimated quantity of work of 6,80,000 Sq. Mtrs. Of 'Geogrid/geotextile reinforcement fabric", the respondent contractor quoted a rate of Rs.300/- Sq. Mtrs.

4. The dispute that was referred to arbitration was not really in respect of the quality or nature of work to be performed, but was the consequence of the geogrid/geotextile material exceeding the estimated quantity as indicated in the BOQ contained in the contract. While the appellant claims that under the contractual terms the Engineer is entitled to seek re-negotiation of rates since the quantity of geogrid required to

execute the contractual work exceeded the BOQ quantity by nearly three times, according to respondent No.1 the rates do not call for re-negotiation under the contractual terms in the given fact situation.

5. The relevant contractual terms, which are contained in the General Conditions of Contract (GCC) and conditions of Particular Application (COPA) may be stated before we proceed further.

> **Alterations, Additions and Omissions**
>
> **"51.1 Variations (GCC)**
>
> The Engineer shall make any variation of the form, quality or quantity of Works or any part thereof that may, in his opinion, be necessary and for the purpose, or if for any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following:-
>
> (a) increase or decrease the quantity of any work included in the Contract,
>
> (b) omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor),
>
> (c) change the character or quality or kind of any such work,
>
> (d) change the levels, lines, position and dimensions of any part of the Works,
>
> (e) execute additional work of any kind necessary for the completion of the Works, or
>
> (f) change any specified sequence or timing of construction of any part of the Works.

No such variation shall in any way vitiate or invalidate the Contract, but the effect, if any, of all such variations shall be valued in accordance with Clause 52. Provided that where the issue of an instruction to vary the Works is necessitated by some default of or breach of contract by the Contractor or for which he is responsible, any additional cost attributable to such default shall be borne by the Contractor.

51.2 Instructions for Variations (GCC)

The Contractor shall not make any such variation without an instruction of the Engineer. Provided that no instruction shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction given under this Clause, but is the result of the quantities exceeding or being less than those stated in the Bill of Quantities.

52.1 Valuation of Variations (GCC)

All Variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as “varied work”), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

(COPA)

"Where the Contract provides for the payment of the Contract Price in more than one currency, and varied work is valued at, or on the basis of, the rates and prices set out in the Contract, payment for such varied work shall be made in the proportions of various currencies specified in the Appendix to Bid for payment of the Contract Price. Where the Contract provides for payment of the Contract Price in more than one currency, and new rates or prices are agreed, fixed, or determined as stated above, the amount or proportion payable in each of the applicable currencies shall be specified when the rates or prices are agreed, fixed, or determined, it being understood that in specifying these amounts or proportions the Contractor and the Engineer (or, failing agreement, the Engineer) shall take into account the actual or expected currencies of cost (and the proportions thereof) of the inputs of the varied work without regard to the proportions of various currencies specified in the Appendix to Bid for payment of the Contract Price."

52.2 Power of Engineer to fix Rates (GCC)

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the Works is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

(COPA)

"Where the Contract provides for the payment of the Contract Price in more than one currency, the amount or proportion payable in each of the applicable currencies shall be specified when the rates or prices are agreed, fixed or determined as stated above, it being understood that in specifying these amounts or proportions the Contractor and the Engineer (or, failing agreement, the Engineer) shall take into account the actual or expected currencies of cost (and the proportions thereof) of the inputs of the varied work without regard to the proportions of various currencies specified in the Appendix to Bid for payment of the Contract Price."

(GCC)

Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:

(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or

(b) by the Engineer to the Contractor of his intention to vary a rate or price. (GCC)

(COPA)

"Provided further that no change in the rate or price for any item contained in the Contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent."

52.3 Variations Exceeding 15 per cent (GCC)

If, on the issue of the Taking-Over Certificate for the whole of the Works, it is found that as a result of:

(a) all varied work valued under Sub-Clauses 52.1 and 52.2 and

(b) all adjustments upon measurement of the estimated quantities set out in Bill of Quantities, excluding Provisional Sums, dayworks and adjustments of price made under Clause 70,

But not from any other cause, there have been additions to or deductions from Contract Price which taken together are in excess of 15 per cent of the "Effective Contract Price" (which for the purposes of this Sub-Clause shall mean Contract Price, excluding Provisional Sums and allowance for dayworks, if any) then and in such event (subject to any action already taken under any of Sub-Clause of this Clause), after due consultation by the Engineer with the Employer and the Contractor, there shall be added to or deducted from Contract Price, such further sum as may be agreed between the Contractor and Engineer or, failing agreement, determined by the Engineer having regards to the Contractor's Site and general overhead costs of the Contract. The Engineer shall notify the Contractor of any determination made under this Sub-Clause, with copy to the Employer. Such sum shall be based only on the amount by which such additions or deductions shall be in excess of 15 per cent of the Effective Contract Price.

(COPA)

"Where the Contract provides for the payment of the Contract Price in more than one currency, the amount or proportion payable in each of the applicable currencies shall be specified when such further sum is agreed or determined, it being understood that n specifying these amounts or proportions the Contractor and the Engineer (or, failing agreement, the Engineer) shall take into account the currencies (and the proportions thereof) in which the Contractor's Site and general overhead cost of the Contract were incurred without being bound by the

proportions of various currencies specified in the Appendix to Bid for payment of the Contract Price. (COPA)"

Measurement

55.1 Quantities(GCC)

The quantities set out in the Bill of Quantities are the estimated quantities for the Works, and they are not to be taken as the actual and correct quantities of the Works to be executed by the Contractor in fulfillment of his obligations under the Contract."

55.2 Omissions of Quantities (COPA)

Items of Works described in the Bill of Quantities for which no rate or price has been entered in the Contract shall be considered as included in other rates and prices in the Contract and will not be paid for separately by the Employer."

6. After adopting the procedure prescribed under the contract for settlement of disputes through a Dispute Resolution Board (DRB) (who opined in favour of the respondent contractors' contention), the dispute was referred to arbitration consisting of a panel of three arbitrators- one appointed by each side while the third Arbitrator was appointed by the two Arbitrators so appointed. All the three were technical persons conversant with the nature of the transaction. The limited question raised before the Arbitral Tribunal for adjudication was "*whether as per the provisions contained in the contract, the Engineer has the right to revise the rate for additional quantities of BOQ which are required for actual execution of work of RE Wall as per the approved*

design". The award rendered by the Arbitral Tribunal is a majority Award, with one of the learned arbitrators viz. Shri S.N. Mane giving a dissenting opinion. The Arbitral Tribunal in its award upheld the interpretation advanced by the respondent. It held that variation in terms of Clause 51.1 was not established. The appellant was directed to pay to the respondent for the actual quantity of geogrid required to be executed to complete the work of the RE Wall as per the approved design at the BOQ rate.

7. The Arbitral Tribunal took note of the fact that the design approved by the Engineer requires execution of 19,58,105 sq. meters of geogrid as compared to 6,08,000 sq. meters as estimated in the BOQ. In paragraph 7.5 of the award the Tribunal notes the disagreement between the parties on the point whether in a situation the increase or decrease in quantity is not the result of an instruction, but is the result of quantity exceeding or being less than those stated in the Bill of Quantities, it constitutes a "variation" or not. While the appellant/ claimant contended that it constitutes a "variation" and consequently the rate could be re-negotiated by the Engineer for the excess quantity, the respondent contended that such increase or decrease, where instructions are not required and it is not the result of instructions but is the result of quantity exceeding or being less than those stated in the Bill of Quantities as per proviso in sub-Clause 51.2, it would not constitute a "variation" and provisions made under sub-Clause

52.2 are not applicable to this situation. The respondent also contended that the rates could be re-negotiated only where the "variation" in work is the result of an instruction issued by the Engineer pursuant to Clause 51.

8. The respondent relied upon the stand taken by the petitioner before the DRB which was contained in a question as framed by the appellant/claimant and the answer given by it to the said question. The question framed by the appellant/claimant was "*Would the Engineer be contractually correct to fix a new rate on a variation of quantity over and above the Contract bill of Quantities, which varies from the original design concept?*" Answer given by the appellant/claimant was "*Normally and contractually this practice is not done as Clause 51.1 does not permit a change in rate due to change in quantity as long as the form or character of the line item is not altered or affected, however, because the Contractor's design varies considerably from the original design, a negotiated rate should be considered*".

9. The Tribunal observed that the claimant/appellant had admitted that the design evolved by the respondent's consultants met the specified criteria. Consequently, there was no change in design and no such change was established before the Tribunal. The implication of this finding was that there was no instruction given by the Engineer referable to Clause 51.1 of the GCC. The Tribunal also held that the quantity of geogrid given at the tender

stage has been found to be wrong. Therefore, the increase in quantity is a mere increase to meet the requirement for completion of RE Wall work. The Tribunal further held that "*in a contract of the type in question which is an item rate contract based on the priced schedule of provisional quantities the ultimate contract amount can be ascertained when all the work done in terms of the contract is finally measured and the contract amount computation done on the basis of the prices and rates set out in the Bills of Quantities. The contract between the parties, therefore, is a framework which determines the parties rights and obligations.*"

10. The Tribunal held that the parties knew about the scope of work of RE wall and both the parties knew "*that it was impossible to determine the ultimate contract amount before the completion of RE Wall work and if ultimate quantity exceeds the BOQ quantity, it will be an automatic change and shall be paid at BOQ rate in such type of measurement contracts where the quantities are provisional and ultimate quantities required for completion of the work are to be executed and paid as per the quoted rate.*"

11. The Tribunal further held "*The fact that ultimate measured amount of work performed is different from estimated quantity is irrelevant because both the parties contracted on the basis that the ultimate quantity may increase or decrease.*"

12. In support of its conclusion the Tribunal took into account the fact that the Engineer and the project director demanded funds for the increased quantity of work at the contractual rate. The Tribunal further held that "……*the second para of sub-clause 52.2 clearly provides that the provision in this Sub-clause is applicable only for varied work instructed to be done by Engineer as per Clause 51 and the present case before us is not a case where Engineer's instruction are required as per the provisions of Sub-Clause 51.2. The Engineer who was administering the contract, when the variation became known, did not give any notice of 14 days of any intention to vary the rate; rather he found in his opinion that BOQ rate shall apply being a mere change in quantity and the work including the use of geogrid material was allowed to be executed accordingly, checked at every stage and paid at BOQ rate. The COPA which is continuation of sub para to sub-Clause 52.2 mentioned above accordingly will not apply in the present case. The notices on 28th October, 2003 and subsequently are just after-thoughts and we hold these being of no effect, and not applicable to the present case.*"

13. The Tribunal also placed reliance upon the FIDIC Guide.

14. In his dissenting opinion the Arbitrator Sh. S.N. Mane took note of Clause 67.3 and particularly Clause 67.3(iii) of the contract. According to Clause 67.3 the Arbitral Tribunal had full power to open up, review and revise any decision, opinion, instruction,

determination, certificate or valuation of the Engineer and any recommendation of the DRB. According to Clause 67.3 (iii) neither party was limited in the proceedings before the Tribunal to the evidence or arguments raised before the DRB. He observed that in an item rate measurement contract, each item was an entity by itself with its own nomenclature, specification, rate and quantity and could not be treated as contingent to other items. In a way, in a construction contract each item was contingent upon other to produce the net product i.e. the completed work as a whole.

15. He held that the variation in the quantity of geogrid was a result of an instruction and, even if the same was not an instructed variation, to the extent of the variation, the rates could be revised by the Engineer. He held that the Engineer had given notice to the contractor of his intention to re-negotiate the rate vide letters dated 20.10.2003 and 22.11.2003 even before the commencement of varied work i.e. the work exceeding the quantity set out in the BOQ by more than 25 per cent. Thus the authority of the Engineer to re-negotiate the rate in terms of the contract agreement stood established, according to him.

16. The learned Single Judge while passing the impugned order took note of the appellant's submission that Clause 51.1 refers to all kinds of variations which will include variations arising as a result of issuance of instructions by the Engineer as well as variations which are not the result of any instructions by the

Engineer. After setting out the relevant clauses of the contract agreement the learned Single Judge observed that Clause 52.1 *"deals only with the variations as provided for in Clause 51 which are required to be determined in accordance with Clause 52".* He also noted the respondent's submission that the aforesaid clauses had no application to the case in hand as there were no instruction given by the Engineer — the increase in the quantities of geogrid occurring only on the account of increase in the BOQs.

17. After considering the rival submissions, the learned Single Judge held as follows:

A. That there was little doubt that clause 51.1 read with the other clauses referred to the variations which are instructed variations, i.e. variations which are a consequence of issuance of instructions and clause 52 did not come into play since the same applied only to variations arising as a result of issuance of instructions.

B. It was the categorical finding of the Arbitral Tribunal that the ultimate measured work performed was different from the estimated quantity but the parties contracted on the basis that such quantity may increase or decrease.

C. There was no change in the design in view of the clear admission of the appellant before the DRB that the design was reviewed and found according to the specified criteria and the appellant was not able to establish any change in the design.

D. The Arbitral Tribunal had not held that the Engineer failed in its duty to give the 14 days notice but had, in fact, held that since the matter fell within the domain of uninstructed variations i.e. variations which resulted without the issuance of instructions, the Engineer was not required to give 14 days' notice, that would have been the requirement only in case of variations resulting from the issuance of instructions.

E. He adopted the decision in ***Grinaker Construction (TVL) (Pty) Ltd Vs. Transvaal Provincial Administration*** 1982 (I) AD 78 wherein a somewhat similar contractual clause was interpreted by the Appellate Division of the South African Court. In that case it was held that automatic increases or decreases in quantities did not constitute variation. The learned Single Judge noted the similarities in the relevant clause before the South African Court and the relevant clauses of the contract in question. The learned Single Judge agreed with the observations made by the South

African Court wherein it had been held that the expression "variation/variations" could only refer to the ones made by the Engineer in terms of clause 49(1) (the relevant clause before the South African Court) which are not to include automatic increases or decreases in the quantity.

F. The aspect that the Dispute Review Board and the Arbitral Tribunal had arrived at the same interpretation could not be lost sight of, as the court did not sit as a Court of Appeal over the decision of an Arbitral Tribunal even within the expanded scope of scrutiny of an award as per the judgment of the Supreme Court in ***Oil and Natural Gas Corporation Limited Vs. Saw Pipes Ltd.,*** (2003) 5 SCC 705. So long as the view taken was plausible, though it may not be the only possible view, no interference was called for by the Court. However, the Court was not without jurisdiction to interfere where the view taken by the Arbitrator was such that no reasonable person would have taken the said view. The illegality must go to the root of the matter and if the illegality is of a trivial nature, it could not be held that the award was against the public policy and the award could also be set aside if it is so unfair and unreasonable as to shock the conscience of

the Court. The learned Single Judge also relied upon ***Mcdermott International Inc. Vs. Burn Standard Co. Ltd.*** 2006 (2) Arb. L.R. 498.

G. The interpretation of the contract was a matter for the Arbitral Tribunal to determine. The present contract had been interpreted by technical people who were well conversant with the nature of dispute and for that reason also a great weight had to be given to such a view. Reliance was placed on ***DDA Vs. Bhagat Construction Co. (P) Ltd. and Anr.*** 2004 (3) Arbitration Law Reporter 481.

H. He also referred to the deliberations of the meeting held between the parties on 07.11.2003 wherein the Team Leader had taken the view that this was a case of mere re-measurement under sub-clause 51.2 of the contract agreement and variation was neither ordered nor admissible under Clause 51 and hence application of provisions of Clause 52.2 was out of the question.

I. The understanding of the parties was also that the present matter was not one where the instructions of Engineer were required in terms of Clause 51 and 52 of the GCC between the parties. He also relied upon the guide to the use of FIDIC conditions of contract for work of Civil Engineering construction. By applying the

decision in ***Grinaker*** (supra) and the FIDIC guide he held that it was only in respect of variations arising as a result of issuance of instructions by the Engineer, that there was scope for re-negotiation of rates of the items.

J. The parties were ad idem that the variations are only those, where instructions of Engineer were required and given by him. The disagreement pertained only to the point whether, in a situation where there was increase or decrease of quantity, not as a consequence or the result of any instruction, but of the quantity exceeding or being less than those stated in the BOQs, it constituted a variation or not.

18. As seen from above, the learned Single Judge had proceeded to approve the interpretation given by the Arbitral Tribunal to the contractual clauses and to hold that unless the variations, inter alia, in quantity of works under the contract were the result of instructions, there was no scope for renegotiation of the contractual rates and prices in respect of the items of work done under the contract.

19. The argument of the appellant that the variation in quantity of the geogrid was the result of instructions, and that the Engineer had given the requisite 14 day notice was not at all gone

into by the learned Single Judge, as he held that the Arbitral Tribunal had proceeded on the basis that "*since the matter fell within the domain of uninstructed variations, the Engineer did not give 14 days notice as would have been the requirement in the case of instructed variations*". Therefore, the issues: whether any instructions were issued by the Engineer in terms of Clause 51.1 and if so, whether the variation in the quantity of geogrid was a result of any such instruction, as also the issue whether the Engineer had issued the requisite notice to seek renegotiation of the rates of the relevant item in the BOQ or not, have not been gone into by the learned Single Judge. Though learned senior counsel for the appellant has raised and urged these issues in this appeal, as they have not been discussed by the learned Single Judge, we are also not inclined to go into them in this appeal. It does not, however, mean that we have either accepted or rejected the submissions of the parties on these aspects of the matter. For the present we are proceeding on the foundation that the variation in the quantity of geogrid was not a result of any instruction given by the Engineer, but only on account of the geogrid/geotextile material exceeding the estimated quantity of the BOQ. Accordingly, we proceed to deal with only one submission of the appellant i.e. that under the contractual terms, all variations in quantity beyond the tolerance limits set out in the contract, whether arising a result of issuance of instructions by

the Engineer or arising even without the issuance of instructions, were open to the renegotiation of rates by the Engineer.

20. It is argued by the appellant that the interpretation adopted by the Tribunal violates the contractual terms, Section 28 (3) and Section 31 (3) of the Act and the same is, therefore, patently illegal and opposed to public policy. It is argued that the interpretation adopted by the Tribunal is so unreasonable that no reasonable person would take such a view. It is urged that the view of the Tribunal is so unreasonable and unfair as to shock the conscience of the Court and that the illegality in the award goes to the root of the matter. Consequently, the award is against the public policy of India. It is argued that the Arbitral Tribunal has practically re-written the contract between the parties by substituting the plain interpretation of the contractual terms which emerged on a grammatical reading of the relevant clauses with its self-imposed/assumed interpretation. According to the appellant the only possible interpretation that could be given to Clauses 51 and 52 of the GCC read with COPA was that all variations of quantity beyond the tolerable limits would constitute variation entitling the Engineer to re-negotiate the rates and prices of the concerned items.

21. We are conscious of the fact that primarily it was for the Arbitral Tribunal to interpret the contractual terms and that if the interpretation adopted by the Arbitral Tribunal is a plausible

interpretation i.e. if it is one of the various interpretations that could reasonably be given to the contract, then the Court would not interfere with the award merely because, according to the Court's understanding, another interpretation is preferable. However, it is equally well settled that if the interpretation adopted by the Arbitral Tribunal in respect of the contractual terms is so unreasonable that no reasonable person would adopt, which is so unfair and unreasonable as to shock the conscience of the Court, the illegality is one which goes to the root of the matter and is not merely a trivial illegality and the interpretation of the contractual terms goes contrary to the contractual terms themselves and is patently incorrect, the court while hearing the objections to such an award, would be justified in interfering with such an award and setting aside the same (See ***ONGC Ltd.*** (supra) paragraphs 55 and 56).

22. To examine the submissions of the appellant that the interpretation adopted by the Tribunal is not even a possible interpretation of the contractual terms; that the same is so unreasonable that no reasonable person would adopt the interpretation given by the Tribunal; that the award suffers from illegality which goes to the root of the matter; that the award is so unreasonable and unfair as to shock the conscience of the Court and it is, therefore, opposed to public policy of India; that the interpretation adopted by the Tribunal is contrary to the

contractual terms; and that the interpretation advanced by the appellant is the only interpretation that can be given to Clauses 51 & 52 of the contract, as also to examine the submission of the respondent that the interpretation adopted by the Tribunal is one of the plausible views, it is necessary for us to examine the relevant clauses of the contract and also the basis on which the said interpretation has been adopted by the Tribunal and upheld by the learned Single Judge.

23. We now proceed to examine the relevant clauses of the contract in question. From a reading of Clause 51.1, to us it is clear that the expression "variation" means variation of form, quality or **quantity** of the work or any part thereof. The expression "variation" in the English language, in so far as it is relevant for our purpose means *"something that varies from a standard"; "the extent to which something varies from a standard"* (Chambers 21st Century Dictionary). "Variation", therefore, is the difference between what is provided for or contemplated in relation to the 'work' under the contract, and what is the final effect or outcome. This variation or outcome may or may not be the result of an instruction, or a set of instructions, given by the Engineer to:

(a) Increase or decrease the quantity of any work included in the Contract,

(b) Omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor),

(c) Change the character or quality or kind of any such work,

(d) Change the levels, lines, position and dimensions of any part of the Works,

(e) Execute additional work of any kind necessary for the completion of the Works, or

(f) Change any specified sequence or timing of construction of any part of the Works.

24. The instruction issued by the Engineer to the contractor does not necessarily call upon the contractor to carry out a "variation". The instruction is to carry out one or more of the specific acts enumerated above. When the instructed acts are undertaken by the contractor, it may or may not lead to a variation of form, quality or quantity of the works. In this case, we are concerned with variation of quantity of one of the items in the BOQ. Take for example a case where the Engineer issues an instruction to decrease the quantity of any item of work under the contract in one stretch, or during one phase of the work (which itself may be linked to another instruction covered by clauses (b) to (e) above), while increasing the quantity of the same item of work in another stretch, or at another stage of the work. The net result of the two instructions may not necessarily result in "variation" of quantity, as it is possible that the decrease in the quantity of work in one stretch/stage of work may be made up due to increase of the quantity of work that may be instructed for another stretch or at another stage of the work. Therefore, the result of issuance of any instruction, particularly when it concerns

an instruction to increase or decrease the quantity of any work included in the contract may or may not result in any variation in the quantity of the work. This clearly brings out that an "instruction" as enumerated in (a) to (f) above is distinct from "variation". An "instruction" may, or may not be the *cause* of a "variation". A "variation" may, or may not be the *effect* of an "instruction" or a set of "instructions". A "variation" may be the consequence of an "instruction" under clauses (a) to (f) above, or it may be a "variation" in quantity simplicitor, inasmuch as, the quantity of any item of work estimated in the BOQ may ultimately vary upon actual execution at the site without there being a relatable instruction as the cause of variation. Clause 51.1 empowers the Engineer to issue "instructions" to the contractor of the kind above enumerated, and states that even if such instructions result in any variation in the form, quality or quantity of the work, such variation shall not vitiate or invalidate the contract. The only consequence would be that such "variations" (not instructions) shall be valued in accordance with Clause 52, provided that, where an instruction is necessitated on account of a default or breach of the contract by the contractor, or for which he is responsible, the additional cost, if any, resulting due to the said default is to be borne by the contractor.

25. Clause 51.2 prohibits the contractor from making "*any such variation*" i.e. variation of form, quality or quantity of the

works without an instruction of the Engineer. It further provides that no instruction shall be required for increase or decrease in the quantity of any work, where such increase or decrease is not the result of an instruction under Clause 51, but is a result of the quantities exceeding or being less than those stated in the bill of quantities. Therefore, the variation in quantity which is not the result of an instruction given under Clause 51.1 does not require any specific instruction by the Engineer. In our view, variation in quantity, even when it is not a result of an instruction given under Clause 51.1 by the Engineer to the contractor does not cease to be a "variation" within the meaning of that expression used in Clause 51.1. It is the difference in the quantity of the work which is actually performed or to be performed, and the quantity of work which is expected/estimated to be performed (as contained in the BOQ) under the contract.

26. Clauses 51.1 and 51.2 by themselves do not deal with the aspect of valuation of variations. Clause 51.1 which enlists the instructions which the Engineer may issue to the contractor further states that the resulting variation shall be valued in accordance with Clause 52. When clause 51.2 prohibits the contractor to make any "variations" on his own, without the instructions of the Engineer, in our view, what it prohibits the contractor from doing is to unilaterally i.e. on its own: (a) Increase or decrease the quantity of any work included in the

Contract; (b) Omit any such work; (c) Change the character or quality or kind of any such work; (d) Change the levels, lines, position and dimensions of any part of the Works; (e) Execute additional work of any kind necessary for the completion of the Works; or (f) Change any specified sequence or timing of construction of any part of the Works, which may result in a variation of form, quality, or quantity of the work or any part thereof. Not only can the contractor unilaterally not decide to increase or decrease the quantity of any item of work, but it cannot unilaterally carry out any other change, which the Engineer has the power to instruct. Clause 51.2 further provides that variations in quantity of any work which is not the result of an instruction given under Clause 51.1, but is a result of the quantities exceeding or being less than those stated in the bill of quantities is not required to be instructed. This means that variation in quantity, which may happen on its own, but not as a consequence of an instruction should not result in the contractor either stopping the work (where the actual quantity of any item starts exceeding the quantity in the BOQ) to get specific instructions from the Engineer, nor result in the contractor carrying out wasteful work, until he receives the instructions from the Engineer (where the actual quantity of any item of work be required to be executed turns out to be less than the quantity

mentioned in the BOQ), merely because the engineer has not instructed him not to do the work.

27. Clause 52.1 deals with "valuation of variations". It opens with the words "All variations referred to in Clause 51.....". "All variations" referred to in Clause 51, in our view, would encompass all variations in form, quality and quantity of the work, whether or not the result of an instruction issued by the Engineer. Clause 51.2 specifically deals with "variations" in quantity which are not a result of an instruction issued under Clause 51.1. Therefore, even such variations are variations "referred to in Clause 51".

28. Clause 52.1 defines the expression "varied work" to mean "*All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52*". Clause 52.1, inter alia, states that all "varied work" *"shall be valued at the rates and prices set out in the contract if, in the opinion of the Engineer, the same shall be applicable"*. Therefore, the variation in quantity is required to be valued at the rates and prices set out in the contract, if in the opinion of the Engineer the same shall be applicable. The opinion of the Engineer in this regard can certainly not be his whimsical or arbitrary opinion. The contract itself lays down the guidelines, as to in what circumstances the Engineer may form an opinion whether or not to value the variation at the rates and prices set

out in the contract. In this regard we may refer to Clause 52.2 (GCC) which empowers the Engineer to fix a suitable rate or price where, inter alia, the amount of any "varied work" relative to the amount of the whole of the work or to any part thereof, is such that, the rate or price contained in the contract for any item of the work is by reason of such "varied work" "*rendered inappropriate or inapplicable*". Further guideline in this regard is found in the contract in the Condition of Particular Application (COPA) added to Clause 52.2. The said sub-clause lays down the tolerance limits within which the contractual rates would apply and only when the said limits are breached, the case for renegotiation of rates would be made out. The same reads:

> "*Provided further that no change in the rate or price for any item contained in the Contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent.*"

29. Therefore, the Engineer while forming his opinion in relation to the clause 52.1 would be guided by the guidelines prescribed in Clause 52.2 and the aforesaid Condition of Particular Application. Only when these conditions are satisfied, the Engineer may form an opinion that the rates or prices applicable to the varied work have been rendered inappropriate or inapplicable and, therefore, need to be renegotiated.

30. The second proviso of Clause 52.2 (GCC) lays down a further condition. This condition is in relation to the time within which the renegotiation in rates and prices may be sought owing to a variation. This clause reads as follows:

> *"Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this sub-Clause unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:*
>
> *(a) by the Contractor to the Engineer or (sic of) his intention to claim extra payment or a varied rate or price, or*
> *(b) by the Engineer to the Contractor of his intention to vary a rate or price*."

31. As we look at it, the aforesaid sub-clause is in two distinct parts. The first part of the aforesaid Clause pertains only to the variations arising out of the instructions issued under Clause 52.1. As noticed above, the expression "varied work" has been defined to mean "*All variations referred to in Clause 51* .....". However, the expression "varied work" in the first part of aforesaid sub-clause has been qualified with the words "*instructed to be done by the Engineer pursuant to Clause 51*". Therefore, the first part of the aforesaid sub-clause, regarding the requirement of giving of notice within 14 days of issuance of instructions by the Engineer applies to those variations which would arise as a result of issuance of instructions by the engineer.

It does not relate to variations which are not the result of issuance of instructions by the Engineer to the contractor under clauses (a) to (f) mentioned in Clause 51.1.

32. The second part of the aforesaid Clause deals with the aspect of giving notice by the Engineer/Contractor in the case of variations for which no instructions are required. For claiming renegotiation of rates in such a situation the clause provides that notice has to be given "*before the commencement of the varied work*". Pertinently, unlike the first part of the said clause, in the second part the expression "varied work" has not been qualified. As the first part deals with "*varied work instructed to be done by the Engineer pursuant to Clause 51*", it would mean that "varied work" which is not so instructed to be done by the Engineer is left to be covered by the second part of the aforesaid clause. In case of "instructed variations" the point of time when the period of 14 days begins, obviously, cannot be both i.e. the date of issuance of instructions and the date of commencement of the varied work as it is not necessary that both these dates coincide. Therefore, it is obvious that the aforesaid sub-clause provides different dates for commencement of the period within which notice is required to be given by the Engineer or the Contractor, as the case may be, depending on whether the variation is the result of an instruction by the Engineer or whether the same is not the result of an instruction. The aforesaid sub-clause is a further reaffirmation of

the only interpretation that can logically and reasonably be given to clauses 51 and 52 of the contract that variations, whether they are the result of issuance of instructions or not, would be open to renegotiation of rates and prices if the other conditions set out in the contract are fulfilled.

33. In our view, there is no basis or underlying principle stated either by the Tribunal or in the impugned judgment for the conclusion that only if the variation is the result of instruction given under Clause 51.1, rates and prices of the BOQ item in question would be open to renegotiation, and not otherwise.

34. We may, at this stage, reproduce the reasoning given by the Arbitral Tribunal for its aforesaid interpretation to the contractual clauses in question:

> "8.1 The quantity of geogrid given at the tender stage which was part of the responsibility of the Claimant has been found to be wrong. Therefore, the increase in quantity is mere increase to meet the requirement for completion of RE Wall work which was indicated by the RCC facia quantity at the tender stage.
>
> 8.2 Claimant has admitted the fact that the design evolved by the Respondent's consultant meets the specified criteria. In other words there is no change in design and the Claimant could not establish any change in this regard before the Tribunal.
>
> 8.3 In a contract of the type in question which is an item rate contract based on the priced schedule of provisional quantities *the ultimate contract amount can be*

ascertained when all the work done in terms of the contract is finally measured and the contract amount computation done on the basis of the prices and rates set out in the Bills of Quantities. The contract between the parties, therefore, is a frame work which determines the parties rights and obligations. The scope of work in this case was indicated by RCC Facia quantity as mentioned hereinbefore which determines the length of RE Wall to be constructed for raised carriage way and the quantity of other sub-item i.e. the geogrid quantity to be used is contingent to the facia quantity. *Both the parties knew* about the scope of work of RE Wall in this manner and both knew that it was impossible to determine the ultimate contract amount before the completion of RE Wall work and *if ultimate quantity exceeds the BOQ quantity, it will be an automatic change and shall be paid at BOQ rate* in such type of measurement contracts where the quantities are provisional and ultimate quantities required for competition of the work are to be executed and paid as per the quoted rate. (**emphasis supplied**)

8.4 The fact that ultimate measured amount of work performed is different from estimated quantity is irrelevant because both the parties contracted on the basis that the ultimate quantity may increase or decrease.

8.5 The fact of this case noted by us is also that there is no change in the design in view of the clear admission by Claimant before DRB that the design was reviewed and found according to the specified criteria and the Claimant has not been able to establish before us any change in design which was the main contention of the Claimant before DRB as per answer to question No.1 recorded therein.

8.6 The Engineer and the Project Director at the time when it became known

that the quantity of geogrid are far exceeding the quantity given in the BOQ recommended application of BOQ rate for the excess quantity while demanding the funds and the documents containing these facts duly admitted by the Claimant before the Arbitral Tribunal also support that the change in quantity in this case does not constitute a variation which can attract the provision of Sub-Clause 52.2 including COPA. On the other hand the second para of sub-clause 52.2 clearly provides that the provision in this Sub-clause is applicable only for varied work instructed to be done by Engineer as per Clause 51 and the present case before us is not a case where Engineer's instruction are required as per the provisions of Sub-Clause 51.2. The Engineer who was administering the contract, when the variation became known, did not give any notice of 14 days of any intention to vary the rate; rather he found in his opinion that BOQ rate shall apply being a mere change in quantity and the work including the use of geogrid material was allowed to be executed accordingly, checked at every stage and paid at BOQ rate. The COPA which is continuation of sub para to sub-Clause 52.2 mentioned above accordingly will not apply in the present case. The notices on 28th October, 2003 and subsequently are just after-thoughts and we hold these being of no effect, and not applicable to the present case.

8.7 The interpretation of the Respondent is supported by FIDIC Guide. The relevant portion filed before us in this document which stands admitted by the Claimant also fully supports that mere change in quantity does not constitute a variation. FIDIC organization which is author of the FIDIC conditions have also stated that it will be helpful in understanding the intent of the conditions and according to settled law by the Hon'ble Supreme Court what is intended in the contract is to be followed."

35. A perusal of the aforesaid reasons shows that the Arbitral Tribunal has completely ignored the contractual provision contained in Clause 52.1 (GCC), and after referring to Clause 51.1, the Tribunal has only referred to Clause 52.2 (GCC). The clear and categoric language used in Clause 52.1 which begins with the words "*All variations referred to in Clause 51.....*", has, therefore, been lost sight of by the Tribunal completely.

36. Assuming that the observation of the Tribunal that the appellant had erred in estimating the quantity of geogrid/geotextile while preparing the BOQ is correct, that, by itself, in our view would not lead to the conclusion that even if the actual quantities exceed by over 300 per cent, the appellant cannot seek renegotiation of the rates. The contract does not provide that the appellant/employer should suffer on account of the estimated quantities mentioned in the BOQ turning out to be way off the mark when the contract is actually performed. If the interpretation advanced by the Tribunal is accepted, it would mean that even where the variation from the estimated quantity of an item in the BOQ is on the negative side, and such variation is not the result of any instruction of the Engineer, the contractor would not be entitled to seek renegotiation of the rates. To illustrate the point let us take a case where one or more of the items mentioned in the bill of quantities, at the time of actual execution of the works, is not required to be done to the extent of 95% or even

more and the same is not the result of any instruction given by the Engineer in terms of the Clause 51.1. In this example, let us also assume that the item of work which is not so required to be done constitutes a substantial part of the entire work, lets say, in excess of 70%. Merely because the variation in the quantity of the specific item of work is not the result of an instruction, should it mean that the contractor should be left high and dry without any remedy or compensation? Should the appellant, who is the author of the BOQ, derive the advantage of its own failure to frame a more accurate BOQ? The answer, in our view, is a plain "No". Apart from being inequitable, unreasonable and in defiance of common sense, and an interpretation that no reasonable person would adopt, such an interpretation is not even supported by a plain reading of the contractual terms. In fact the contractual terms clearly state to the contrary.

37. An interpretation of a contractual clause primarily has to be done on the plain reading of the clause. The Supreme Court in ***Delhi Development Authority v. Durga Chand Kaushish*** (1973) 2 SCC 825 held as follows:

> "19. ..... in Odgers' "Construction of Deeds and Statutes" (5th ed. 1967) ..... (at pages 28-29), the First General Rule of Interpretation formulated is: "The meaning of the document or of a particular part of it is therefore to be sought for in the document itself". That is, undoubtedly, the primary rule of construction to which Sections 90 to 94 of the Indian Evidence Act give statutory recognition and effect with

certain exceptions contained in Sections 95 to 98 of the Act. Of course, "the document" means "the document" read as a whole and not piecemeal.

20. The rule stated above follows logically from the Literal Rule of Construction which, unless its application produces absurd results, must be resorted to first. This is clear from the following passages cited in Odgers' short book under the First Rule of Interpretation set out above:

Lord Wensleydale in Monypenny v. Monypenny (1861) 9 H.L.C. 114, 146 said:

> "the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions."

Brett, L.J., in Re Meredith, ex p. Chick [1879] 11 Ch. D. 731, 739 observed:

> "I am disposed to follow the rule of construction which was laid down by Lord Denman and Baron Parke..... They said that in construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used."

21. Another rule which seems to us to be applicable here was thus stated by this Court in Radha Sunder Dutta v. Mohd. Jahadur Rahim and Ors.: AIR 1959 SC 24:

> "Now, it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle

> expressed in the maxim 'ut res magis valeat quam pereat'.""

38. The clause, as interpreted, should be able to withstand the test of reasonableness in all fact situations. It should not lead to unreasonable or inequitable results in some situations. The interpretation of the contractual term cannot change merely because the fact situation may change. It should have the same interpretation and meaning, though it may produce different results in different fact situations.

39. The Tribunal's observation in para 8.3 quoted above that the "*ultimate contract amount can be ascertained when all the work done in terms of the contract is finally measured and the contract amount computation done on the basis of the prices and rates set out in the Bills of Quantities"* is contrary to clause 51 and 52 of the GCC and particularly to Clause 52.3, which provides "*if, ... it is found that as a result of .... All varied work valued under sub-clauses 52.1 and 52.2.....".* The Tribunal has patently erred in proceeding on the basis that all the work done is finally measured and contract amount computation done on the basis of the prices and rates set out in the Bill of Quantities. This is a fundamental flaw and error in the impugned award as the Tribunal proceeds on the assumption/interpretation that after all the work under the contract is completed the contract amount computation is done at the prices and rates quoted in the BOQ. This understanding of the Tribunal militates against the Tribunal's own

finding that if the variations are the result of instructions, the renegotiation of rates and prices can be sought by the Engineer or the Contractor by giving requisite 14 days notice, and thereafter the renegotiated rates or rates fixed by the Engineer shall prevail, unless disputed. This brings out a clear contradiction within the Tribunal's Award.

40. The Tribunal, with respect, has not given any reason at all while making the following observation in Para 8.3:

> ".....**Both the parties knew** about the scope of work of RE Wall in this manner and both knew that it was impossible to determine the ultimate contract amount before the completion of RE Wall work and **if ultimate quantity exceeds the BOQ quantity, it will be an automatic change and shall be paid at BOQ rate** in such type of measurement contracts where the quantities are provisional and ultimate quantities required for competition of the work are to be executed and paid as per the quoted rate." (**emphasis supplied**)

41. There is no basis disclosed for the aforesaid finding of the Tribunal. It is clear that the Tribunal, while interpreting the contract was only focused on, and moved by the fact that in this case the "*quantity exceeds the BOQ quantity*". It did not address the question as to what is to happen if the executed quantity turns out to be far below the BOQ quantity.

42. The Tribunal merely gave the conclusion reached by it without stating the reasons or basis therefor. This finding of the Tribunal is *de horse* the contractual term, particularly that contained in Clause 52.1 (GCC). In our view, the interpretation of

the Contract as adopted by the Tribunal is without any basis and contrary to the only possible interpretation that the same could be given. It is most unreasonable, inequitable, and one which no reasonable person would adopt and one which shocks our conscience.

43. Items of work and the corresponding quantities mentioned in the bill of quantities prepared by the employer at the tender stage, no doubt, is an estimation. However, the same is not expected to be an arbitrary or whimsical estimation. The estimates are worked out after carrying out a scientific study by qualified Engineers. This is essential not only from the point of view of working out the estimated cost of the project for budgetary and financial purposes, but also to enable the contractors/bidders to effectively make their offers while submitting their bids. When the contract provides that the quantities mentioned in the bill of quantities in respect of various items are estimates, it only seeks to ensure that neither party is able to claim that the contract is breached merely because the quantities during actual execution have increased, or are less than those stated in the BOQ. In so far as the quantities of the various items mentioned in the BOQ are concerned, the contract is elastic and permits the change in the quantities of the items, and the items in the BOQ themselves.

44. The expression 'estimate' in the ***Random House Dictionary of the English Language*** has been defined in the following manner:

> "**Estimate 1.** to form an approximate judgment or opinion regarding the value, amount, size, weight, etc., of; calculate approximately : *to estimate the cost of a college education.*
>
> 2. to form an opinion of; judge.
>
> 3. .....
>
> 4. an approximate judgment or calculation, as of the value, amount, time, size, weight, etc. of something.
>
> 5. a judgment or opinion, as of the qualities of a person or thing.
>
> 6. a statement of the approximate charge for work to be done, submitted by a person ready to undertake the work."

45. The ***Webster's Third New International Dictionary*** explains the meaning of the term estimation as follows:

> **"1. a :** to consider or judge to be of a particular character or nature b: to consider or judge to be of value
>
> **2. a:** to judge the value, worth, or significance of; **b** : to fix sometimes accurately the size, extent, magnitude, or nature of; **c : (1)** : to arrive at an often accurate but usu. only approximate statement of the cost of (a job to be done) **(2)** : to arrive at a sometimes only tentative price for which one is willing to undertake (a job to be done)"

46. The process of 'estimation', therefore, requires the formation of an opinion or a judgment by the person doing the estimation. This, obviously, is an exercise undertaken on the basis of relevant data and by application of scientific and recognized principles by a person who is qualified to carry out such estimation. It is not an arbitrary or whimsical determination made by someone who may have no skill or knowledge of the subject he is dealing with, and it is certainly not a *shot in the dark* by the person preparing the estimate. The bidder/contractor possibly could not have quoted their rates in a vacuum without knowing the quantities of the items of work that were estimated to be performed under the contract.

47. The question is, would the respondent/contractor and the other bidders have quoted the same rates for the varied item in question, had the employer/appellant given a better estimate of the quantity in the BOQ? Where the variation in the quantity is within tolerable limits, one may assume that the variation in the quantity of the BOQ item may not have resulted in a difference in the quoted rates. However, where the variation in the quantities is manifold (like in this case, the variation is over 300 per cent in the quantity of geogrid/geotextile), one would assume that it is possible that the quoted rate/price would have been different, and it is in such like situations where the Engineer may form an opinion

that the rates and prices have been "*rendered inappropriate or inapplicable*".

48. The concept of "*economy of scale*" is a well recognized concept. According to Wikipedia, a free encyclopedia on the internet

> **Economies of scale**, in microeconomics, are the cost advantages that a business obtains due to expansion. They are factors that cause a producer's average cost per unit to fall as scale is increased. Economies of scale is a long run concept and refers to reductions in unit cost as the size of a facility, or scale, increases. Diseconomies of scale are the opposite. Economies of scale may be utilized by any size firm expanding its scale of operation. The common ones are purchasing (bulk buying of materials through long-term contracts), managerial (increasing the specialization of managers), financial (obtaining lower-interest charges when borrowing from banks and having access to a greater range of financial instruments), and marketing (spreading the cost of advertising over a greater range of output in media markets). Each of these factors reduces the long run average costs (LRAC) of production by shifting the short-run average total cost (SRATC) curve down and to the right.

49. Wikipedia further states that:

> "Economies of scale refers to the decreased per unit cost as output increases. More clearly, the initial investment of capital is diffused (spread) over an increasing number of units of output, and therefore, the marginal cost of producing a good or service is less than

> the average total cost per unit (note that this is only in an industry that is experiencing economies of scale)."

50. The aforesaid concept, in fact, finds reflection in Clause 52.3, which substantially provides that if the overall contract price (after taking into account the valuation of all varied works and all adjustments permissible under the contract) is more or less by 15% of the "Effective Contract Price", then the Engineer may, in consultation with the Contractor and the Employer, add to or deduct from the contract price such sums as may be agreed to between the contractor and the Engineer, failing which, as determined by the Engineer.

51. The submission of the respondent that the appellant had accepted a rate of Rs.474.00 per sq. meter of geogrid item of same specification as against of Rs.290.40 per sq. meter in the present contract (after 3.2% rebate) can hardly be a reason to deny the authority of the engineer to seek renegotiation of the rates, as the said authority springs from the contractual terms and does not depend on the rate quoted by the respondent in its bid and accepted by the appellant. However, these factors may be relevant at the time of holding renegotiation of rates and prices.

52. We are not suggesting that whenever the quantity of any item in the BOQ increases substantially upon actual performance of the contract, the revision in the rate would always be

downwards. There may be instances where it may either remain unchanged or may even require an upward revision. These would be the aspects to be considered at the time of negotiation between the Engineer and the Contractor in terms of the Contract by taking into account all relevant factors.

53. If we are right in our above understanding, there is no reason why variations in quantity beyond the limits set in the contract, whether or not instructed, should not lead to renegotiation of rates at the instance of either party. That is the only fair, reasonable and equitable way to work the contract. Whether the variation in quantity is in the positive or in the negative direction, in either case, if the variation exceeds the tolerance limits set in the contract, renegotiation of rates would be called for.

54. The learned Single Judge has placed heavy reliance upon the decision of the Appellate Division Court of South Africa in ***Grinaker*** (supra). The clause considered by the South African Court has been set out in para 16 of the impugned order. Though the clause considered by the South African Court is very similar both in letter and spirit to the clauses contained in the contract in question, at the same time, in our view, there are marked, significant and decisive differences in the said clauses. To understand and appreciate the distinction in the clause considered

in ***Grinaker*** (supra) and the clauses in question, we set out below the clause 49 considered in ***Grinaker*** (supra): -

> "Alterations, additions and omissions
>
> 1) The engineer shall make any variation of the form, quality or quantity of that purpose, or for any other reason it shall be in his opinion desirable, shall have power to order the contractor to do and the contractor shall do any of the following:
>
> (a) Increase or decrease the quantity of any work included in the contract.
>
> (b) Omit any such work,
>
> (c) Change the character or quality or kind of any such work.
>
> (d) Change the levels, lines, position and dimensions of any part of the works;
>
> (e) Execute additional work of any kind necessary for the completion of the works;
>
> and no such variation shall in any way vitiate or invalidate the contract provided the total contract amount be not thereby increased or decreased in value more than 20 per cent and provided further that the total quantity of any sub-item whose value in the schedule of quantities is in excess of 7½ per cent of the total contract amount, be not thereby increased or decreased by more than 25 per cent.
>
> (2) No such variation shall be made by the contractor without an order writing of the engineer. Provided that no order in writing shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an order given under this clause, but is the result of the quantities exceeding or being less than those stated in the schedule of quantities. Provided also that if for any reason the engineer shall consider

it desirable to give any such order verbally, the contractor shall comply with such order, and any confirmation in writing of such verbal order given by the engineer whether before or after the carrying out of the order, shall be deemed to be an order in writing within the meaning of this clause. Provided further that if the contractor shall confirm in writing to the engineer any verbal order of the engineer, and such confirmation shall not be contradicted in writing by the engineer, it shall be deemed to be an order in writing by the engineer.

(3) The engineer shall determine the amount (if any) to be added to or deducted from the contract amount in respect of any additional work done or work omitted by his order. All such work shall be valued at the rates set out in the contract, if in the opinion of the engineer the same shall be applicable. If the contract shall not contain any rates applicable to the additional work, the same shall be classed as extra work and payment in respect thereof shall be made as hereinafter provided.

(4) Provided that if such variation or variations shall result in an increase or decrease of more than 20 per cent in the value of the total contract amount or an increase or decrease of more than 25 per cent in the total quantity of any sub-item whose value in the schedule of quantities is in excess of 7½ per cent of the total contract amount and subject to the production of satisfactory evidence that loss or damage has been sustained by the contractor as a result of such variation or variations, the engineer shall fix such other rate or price as in the circumstances he shall think reasonable and proper.

(5) Provided also that no increase of the contract amount under sub-clause (3) of this clause, or variation of rate or price under sub-clause (4) of this clause shall be made unless, as soon after the date of the

> order as is practicable, and in the case of additional work before the commencement of the work or as soon thereafter as is practicable, notice shall have been given in writing:
>
> (a) by the contractor to the engineer of his intention to claim extra payment for a varied rate, or
>
> (b) by the engineer to the contractor of his intention to vary a rate of (or?) price, as the case may be."

55. The first part of clause 51.1 of the GCC is very similar to sub-clause(1) of the above extracted clause 49. Clause 51.2(GCC) is very similar to the substantive part of sub-clause (2) of clause 49 considered in **Grinaker** (supra).

56. The material and decisive difference in the two clauses, in our opinion, arises when one compares clause 52.1 (GCC) with clause(3) of clause 49 considered in **Grinaker** (supra). Whereas clause 52.1 opens with the words "***All variations referred to in clause 51*** *and any additions to the contract price.....*", the aforesaid sub-clause(3) of clause 49 reads "*The engineer shall determine the amount (if any) to be added to or deducted from the contract amount* ***in respect of any additional work done or work omitted by his order***." (emphasis supplied).

57. This, in our opinion, is a marked and very material distinction between the contractual clauses in question and those considered by the South African Court in ***Grinaker*** (supra). A

perusal of the clause considered by the South African Court shows that the said Clause 49 does not contain any sub-clause like Clause 52.1 of the contract in question which begins with the words "*All variations referred in clause 51*....." In contra distinction with the clause in question, sub-clause (3) of clause 49 in the ***Grinaker*** (supra) entitles the Engineer to "*determine the amount, if any, to be added to or deducted from the contract amount in additional work done or work omitted by his order*" (emphasis supplied). It further provides "*All such work shall be valued.....*"(emphasis supplied). Therefore, sub-clause (3) of Clause 49 clearly pertains to variations arising as a consequence of instructions by the Engineer, as the said sub-clause talks about an 'order' and also talks about valuation of "such work". "Such work" in sub-clause (3) of Clause 49 obviously means the work which is done as per the Engineers 'order'. Therefore, the aspect of valuation dealt with by sub-clause(3) extracted above is limited only to all such work as is carried out or omitted to be done under the orders of the Engineer, which has been referred to by the learned single Judge in the impugned order as an "instructed variation".

58. Sub-clause(4) of clause 49 extracted above may be called a "*one way*" clause, inasmuch as, the same can be invoked only by the Contractor, upon the fulfillment of the conditions specified therein including the condition that the Contractor has to produce *"satisfactory evidence that loss or damage has been sustained by*

the contractor as a result of such variation or variations". Sub-clause (4), therefore, is meant only to protect the Contractor and enables him to seek renegotiation of the contract price upwards upon production of satisfactory evidence that he is suffering losses or damages as a result of "such variation or variations". It is not a clause for the protection of the interests of the employer.

59. However, in the contract in question the material difference is that the relevant sub-clauses of clause 52 i.e. 52.1, 52.2 and 52.3 all seek to balance the rights of both the parties i.e. the employer and the Contractor and can, therefore, be described as *two way* clauses. These clauses not only contemplate protecting the rights and interests of the Contractor, but also those of the employer NHAI. Therefore, the revision of rates/prices of the items can be upwards or even downwards.

60. The additional condition introduced by (COPA) as the last paragraph of clause 52.2, which seeks to lay down the pre-conditions (in terms of percentages) for change of rates or price of any item contained in the BOQ of the contract is similar to the conditions laid down in sub-Clause (4) of the clause in ***Grinaker*** (supra).

61. Sub-clause (5) of clause 49 is similar to the second paragraph of Clause 52.2 (GCC) which lays down the time limit within which the notice is required to be given for renegotiation of

rates and prices in the case of variations, which arise out of instructions issued by the engineer.

62. From the above comparison, to us it appears that while Clause 52.1(GCC) deals with all variations referred to in Clause 51, sub-Clause (3), (4) & (5) of Clause 49 in ***Grinaker's*** (supra) deals with only variations which arise as a result of instructions/orders issued by the engineer.

63. We are, therefore, of the view that the learned Single Judge, with respect, failed to appreciate the relevant and material distinction in the Clause considered by the South African Court and the Clauses of the contract in question. The interpretation given by the South African Court could not have been lifted and applied in the face of the materially and decisively different contractual terms between the parties in the present case.

64. The South African Court took the approach of showing its helplessness in interpreting the contractual terms before it in an equitable way by observing that where a party strikes a bad bargain, the Court cannot, out of sympathy for him, amend the contract in his favour.

65. Fortunately, we do not find ourselves in such a bind, for the reason that in our view Clause 52.1 clearly and categorically states that "*All variations referred to in Clause 51.....*" are open to renegotiation provided the conditions stated in the

contract are satisfied. There is no reason to limit the meaning of the words "All variations referred to in Clause 51……." to only those variations which are the result of an instruction. There is no logic behind the interpretation given to the contract by the Arbitral Tribunal and accepted by the learned Single Judge. The same appears to be contrary to the express language used by the parties in their contract.

66. We may also note that the decision of the South African Court was rendered a long time ago i.e. in the year 1982. The parties to the contract in question entered into this contract twenty years later i.e. in the year 2002. If the intention of the parties had been to go along with the interpretation adopted by the South African Court, there was no need for them to use significantly different language in their contract and they could well have adopted language identical/similar to that used in the South African Contract. However, they chose not to do so. In a way, we may say that the Contract in question is a refinement of the contract before the South African Court. It could well be that the parties became wiser upon the rendering of the South African decision and therefore, consciously decided to avoid the same pitfalls in the contract which were noticed by the South African Contract.

67. In our view, there is no magic in the issuance of the instructions by the Engineer under Clause 51.1, so as to trigger the

process of renegotiation of rates of the exceeded/depleted items. Even without issuance of instructions, the rights of the parties could be vitally affected if the quantities of work executed are widely at variance with what was estimated in the BOQ. The mechanism evolved in the Contract to seek renegotiation of rates and prices could be invoked by the concerned party to avoid unforeseen losses and expenses or to prevent unintended gain by the opposite party.

68. We are also of the view that the Arbitral Tribunal was unduly inhibited in its approach by the facts that: the appellants had, before the DRB framed the question above extracted and answered it in a particular way; that the Engineer and the project director demanded funds for the increased quantity of geogrid work at the contractual rate, and; that the FIDIC guide also purportedly supported the interpretation advanced by the respondent.

69. Under Clause 67.3 the Tribunal had the responsibility to interpret the contract. That is why it provides that the Arbitral Tribunal *"shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute"*. It further provides *"Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of*

obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute."

70. Therefore, the parties were free to advance evidence and arguments even beyond those advanced before the DRB. The framing of the question and its answer given by the appellant before the DRB did not bind the petitioner because the appellant was not precluded from advancing an interpretation that it might not have canvassed before the DRB. To our understanding, there is no rigid rule that in all case, without exception, the Tribunal is bound to accept an interpretation of a contractual term which at one point of time may have been propounded by one or both the parties. No doubt, if there are two or more plausible interpretations possible in respect of a contractual term, the Arbitral Tribunal should adopt the interpretation that the parties have themselves ascribed to. However, if the view that the parties may advance, either mistakenly or otherwise is unreasonable or contrary to the plain grammatical meaning of the language used in the contract, the Tribunal is not bound to accept the same. The Tribunal would fail in its duty if it were to succumb to an interpretation which is not borne out from a plain reading of the contractual term, only on account of the consideration that the interpretation has been advanced by the parties, even though, the same may be totally

absurd, unreasonable and/or not borne out of the contract. We may hasten to add that in given cases, other equitable considerations such as estoppel may influence the approach of the Tribunal. However, that is not the case in hand. Interpretation of a contract is a question of law. The same ought to have been considered and answered by the Tribunal on a bare reading of the contractual terms, uninfluenced by the earlier stand taken by the petitioner before the DRB, particularly when only one possible interpretation could be given to the contractual terms in question. Else, there was no point in permitting the parties to advance their arguments uninhibited by the stand taken by them at any earlier stage. The approach of the Tribunal, in our view, was fundamentally flawed.

71. The fact that the appellant Engineer and Project Director asked for funds on the basis of the contractual rate even for the varied quantity is neither here nor there. That was a wholly internal matter of the appellant. The appellant was entitled to make the provision to pay even at the contractual rate for the varied quantity. This action of the appellant has no bearing on the interpretation to be given to the contractual terms.

72. While relying on the FIDIC guide – which does not form part of the contract, the Tribunal does not state as to what is the interpretation given by the FIDIC guide, and how it supports the respondent's contention. Since the award makes a reference to

the FIDIC Guide we have looked into the extract from the said guide filed by the respondent along with its written submissions dated 27.02.2009 as Annexure 'B'. A perusal of the extract from the FIDIC Guide placed on record unfortunately does not, in any way, support the view taken by the Arbitral Tribunal. Pertinently, the relevant extract of the FIDIC Guide pertaining to Clause 51.2 (which deals with variations in quantity which may arise without the issuance of instructions) and Clause 52.1 which opens with the words "*All variations referred to in Clause 51*....." have not been placed on record. From the extract of the FIDIC guide as placed on record, all that can be said with regard to Clause 51.2 is that 'instruction' is not required if actual quantities of work envisaged at the time of tendering proof of measurement is found to be different from those recorded in the bill of quantities. It does not mean that variation in quantity does not result when the actual quantity of an item exceeds or is found to be less upon actual execution of the work when compared to the estimated quantity in the BOQ. Therefore, in our view, the reliance placed by the Arbitral Tribunal on the FIDIC Guide is misplaced.

73. We, therefore, hold that the interpretation to the contractual terms advanced by the learned Arbitral Tribunal and that accepted by the learned Single Judge is an interpretation which cannot be accepted as a plausible interpretation. It is, in fact, an unreasonable and wholly implausible interpretation, which

no reasonable person could advance. The illegality committed by the Tribunal while interpreting the contractual terms is certainly not trivial. It goes to the root of the matter as the said interpretation forms the bedrock of the impugned award. The award is unfair and inequitable and such as to shock our Conscience. The interpretation adopted by the Tribunal goes contrary to the express language used by the parties in their contract. The Tribunal, while interpreting the contract in the way that it did, has been unduly swayed by the stand taken by the appellant before the DRB which was not binding on the Tribunal. The appellant was entitled to advance the interpretation before the Tribunal by virtue of Clause 67.3 of the Contract, as it did. The interpretation advanced by the Tribunal is in complete ignorance of, and in the teeth of the plain language of the Contract as found in Clauses 51 and 52 of the Contract. The impugned award is opposed to public policy of India. The learned Single Judge has heavily relied upon the South African decision of the case of ***Grinaker*** (supra). With respect, in our view, that decision could not have been applied to the contractual terms in question on account of their being significant and material differences in the contractual terms of the two contracts.

74. We have perused the decisions relied upon by the respondent. These are:-

1. U.P.Hotels V. U.P.State Electricity Board, AIR 1989 SC 268.

2. Sudershan Trading Co. V. State of Kerala, AIR 1989 SC 890.

3. Himachal Pradesh State Electricity Board V. R.J.Shah & Co., JT 1999(3) SC 151.

4. Olympus Superstructures V. Meena Vijay Khaitan, JT 1999(3) SC 514.

5. B.L.Sreedhar V. K.M.Munireddy, 2003 (2) SCC 355.

6. Pure Helium India Pvt. Ltd V. ONGC, 2003(8) SCC 593.

7. DD Sharma V. Union of India, 2004(5) SCC 325.

8. Mcdermott International Inc. V. Burn Standard Co., 2006(2) Arbitration Law Reporter 498(SC).

9. Chowgule Brothers V. Rasthriya Chemicals, 2006(3) Arbitration Law Reporter 457 (Bombay).

10. DDA V. Bhagat Construction Co.(P) Ltd, 2004(3) Arb.L.R.481.

75. In our view, none of the decisions cited by the respondent come to its rescue as, in our view, the Tribunal's interpretation of the contractual terms cannot be said to be one of the possible views that could reasonably be adopted. The legal position with regard to the jurisdiction of the Court to interfere with an Arbitral Award in proceedings under Section 34 of the Act has already been noticed by us. We have also dealt with the respondent's submission that interpretation given by the parties to the contract has to be taken into consideration by the Tribunal, while interpreting the contractual terms. So far as estoppel by conduct is concerned, from the impugned award we do not find any consideration of any such argument, if advanced by the

respondent. There is no finding returned by the Tribunal in this respect. As the quantity of geogrid used when the disputes arose between the parties was far below the BOQ quantity, there was no question of "estoppel" being invoked by the respondent. This explains the absence of consideration of this argument by the Tribunal. We find support for our approach in the matter from ***Hindustan Zinc Ltd. V. Friends Coal Carbonisation***, (2006) 4 SCC 445 which follows ***ONGC Ltd.***(supra). Even in ***Mcdermott*** (supra), the Supreme Court examined the contention that one or the other formula should have been adopted for assessing damages, and held that it was for the Arbitrator to adopt one of the established formula for assessment of damages, and the Court could not substitute its view in the matter, as the contract or the law did not specify as to which particular formula should be adopted. As one of the possible views was adopted by the Arbitrator, the challenge to the award on this ground was repelled. The Supreme Court relied upon ***State of U.P V. Allied Constructions***, (2003) 7 SCC 396, which, inter alia, holds:

> "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 vs. Searsole chemicals Ltd.,*** (2001) 3 SCC 397= 2001(1) Arb.LR 531(SC) and ***Ispat Engg. & Foundry Works Vs. Steel Authority of India Ltd.***, (2001) 6 SCC = 2001(2) Arb.LR 650 (SC)]."

76. Therefore, the decision in ***Mcdermott*** (supra) so heavily relied upon by the respondent has not advanced its case. The appellant has demonstrated as to how the Engineer was justified in seeking renegotiation of the rates and prices of the relevant item i.e. geogrid/geotextile reinforcement fabric contained in item no. 7.07 (ii) of the BOQ. According to the appellant this item alone constitutes 4.11 per cent of the contract value. The BOQ item value for the particular item geogrid /geotextile reinforcement fabric contained in item at Serial No. 7.07 (ii) of the BOQ is Rs. 204,000,000.00/-. The contract value is Rs. 4,96,10,00,000/-. Therefore, in percentage terms the relevant BOQ item 7.07 (ii) equals 20,40,00,000 ÷ 4,96,10,00,000 ÷ 100 = 4.11%. Consequently, the said BOQ item values more than 2 per cent of the contract value. Admittedly, the consumption of the said BOQ item has gone up by 300 per cent which is way beyond the limit of 25 per cent change contemplated by the last sub-clause of Clause 52.2 inserted by virtue of COPA. We may notice that there is no dispute raised by the respondent in this regard.

77. The appellants have also argued that in terms of second proviso to Clause 52.2 the Engineer had given the requisite notice to renegotiate the rates and prices of the relevant item well before the commencement of the varied work. The appellant argues that it is the admitted position that even till the stage the arbitration was being held in the year 2005, quantity of geogrid consumption

was less than the BOQ quantity of 6,80,000 Sq. Mtrs. The appellant relies on written submissions made before the Arbitral Tribunal by the appellant which have been placed on record as annexure P-18 in volume 3. On internal page three of this written submission the amount of geogrid/geotextile material consumed at site (as of February, 2005) was shown to be 3,17,000 Sq. Mtrs. Even the respondent had filed its own statement, which is filed as annexure P-19 in volume 3, according to which the quantity of geogrid/geotextile consumed when the said statement was filed before the Tribunal was only 3,50,401 Sq. Mtrs. This document was filed with the title "*Requirement of Geogrid Material and Present Position*". The BOQ quantity 6,80,000 Sq. Mtrs. + 25 per cent, as per the contractual terms is payable at the contractual rate. It is only when variation occurs in excess of the said quantity, that the Engineer can seek renegotiation of the rates/prices. The appellant submits that the Engineer had admittedly given notice to the respondent for renegotiation of rates/prices on 22.11.03 and 28.11.2003. He submits that the Tribunal has refused to look into these notices on the ground that they are afterthoughts. However, no reason has been assigned for the said approach of the Tribunal.

78. From the aforesaid documents, particularly, from the statement filed before the Arbitral Tribunal by the respondent itself stating that the quantity of geogrid consumed at the relevant time,

i.e. when the arbitration was in progress, was 3,50,401 Sq. Mtrs. It is apparent that the Engineer of the appellant had sought renegotiation of rates much before the quantity as per BOQ had been supplied/executed. This is evident from the fact that the dispute arose between the parties on the issue of renegotiation of rates which was first taken to the DRB and thereafter to Arbitration. Even when the proceedings before the Arbitral Tribunal were pending, the contractual quantity of geogrid/geotextile as indicated in the BOQ had not been crossed. In our view, therefore, the condition prescribed by the second proviso of Clause 52.2 stood squarely satisfied.

79. The appellant submits that while relying on the alleged minutes dated 07.11.2003, the learned Single Judge has proceeded on the assumption that the Team Leader is the representative of the appellant. In fact, he is only the representative of the Engineer who is an independent authority. For this purpose the appellant relies upon Clause 2.6 of GCC which states that the Engineer while exercising his discretion shall act impartially within the terms of the contract and having regard to all the circumstances. It is also argued that the same Team Leader, who is alleged to have taken a view in favour of the respondent in the meeting dated 07.11.2003, had expressed his view earlier on 28.10.2003 and even later on 22.11.2003 by issuing the two communications putting the respondent to notice

that the rates / prices of geogrid/geotextile would need to be renegotiated. The appellant argues that the minutes recorded on 07.11.2003 do not contain a final decision which has been accepted by the appellant. These minutes were recorded merely during the course of discussions, and that too by the respondent. Since the issue did not attain finality in terms of minutes dated 07.11.2003, the matter was referred to Arbitration. The learned Single Judge could not have looked into any piece of evidence which was not considered by the Arbitral Tribunal or referred to by it in its award. By referring to and relying upon the self serving minutes as recorded by the respondent, the learned Single Judge has exceeded its jurisdiction.

80. We are of the view that there is merit in the submission of the appellant that the learned Single Judge was not justified in placing reliance on the minutes of the meeting dated 7.11.2003. The said minutes as prepared by the respondent, have been disputed by the appellant. A document which does not form part of the award and which has not even been referred to in the award could not have been looked into by the learned Single Judge particularly when there is a dispute about the contents of the same. In any event the said document could not have come in the way of an independent interpretation of the relevant clauses which the Arbitral Tribunal was obliged to given in view of Clause 67 of the Contract.

81. In view of our discussion above, with respect, we cannot agree with the approach and findings of the learned Single Judge that Clause 51.1 read with other clauses refer to the variations which are "instructed variations" and Clause 52 would not come into play since the same arises only for "instructed variations"; that a similar clause was interpreted in ***Grinaker*** (supra) and that the said decision is applicable to the contractual clauses in question; that the alleged minutes of the meeting held on 07.11.2003 produced by the respondent could be relied upon (when the same had not been relied by the Tribunal); that the FIDIC guide provides that "variation" is not required if actual quantities of work envisaged at the time of tendering proof of measurement is different from those entered in the bill of quantities; that it is envisaged in such international contracts for construction that "variation" is only instructed variation arising from the decision of the engineer and not an uninstructed variation arising from change of quantity; that it is in accordance with general understanding of the clauses that once a contract price is provided and the quantities are held to be tentative, any increase or decrease in quantity must be governed by the same price and it is only in respect of any instructed variation arising from the instruction of the engineer on account of any additional work or less work that there has to be some element of renegotiation and

determination in terms of Clause 51 & 52 of the General Conditions of Contract.

82. For all the aforesaid reasons we are of the view that the impugned order of the learned Single Judge as well as the award passed by the Arbitral Tribunal cannot be sustained. The interpretation adopted by the Arbitral Tribunal in respect of the contractual clauses is patently uncalled for, implausible, unfair, unreasonable, erroneous and illegal. The said interpretation, therefore, shocks the conscience of this Court. It is not even a possible interpretation of the relevant contractual terms. The express terms of the contract have been ignored by the Tribunal and the Tribunal has by giving the interpretation that it has, virtually re-written the contract between the parties. The illegality in the impugned award goes to the root of the matter. The award is, therefore, opposed to public policy of India.

83. Accordingly we set aside both the impugned orders passed by the learned Single Judge as well as the award passed by the Arbitral Tribunal. The appellant would be entitled to costs quantified at Rs. 50,000/-.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

November 17, 2009
dp/rsk/as