AWARD

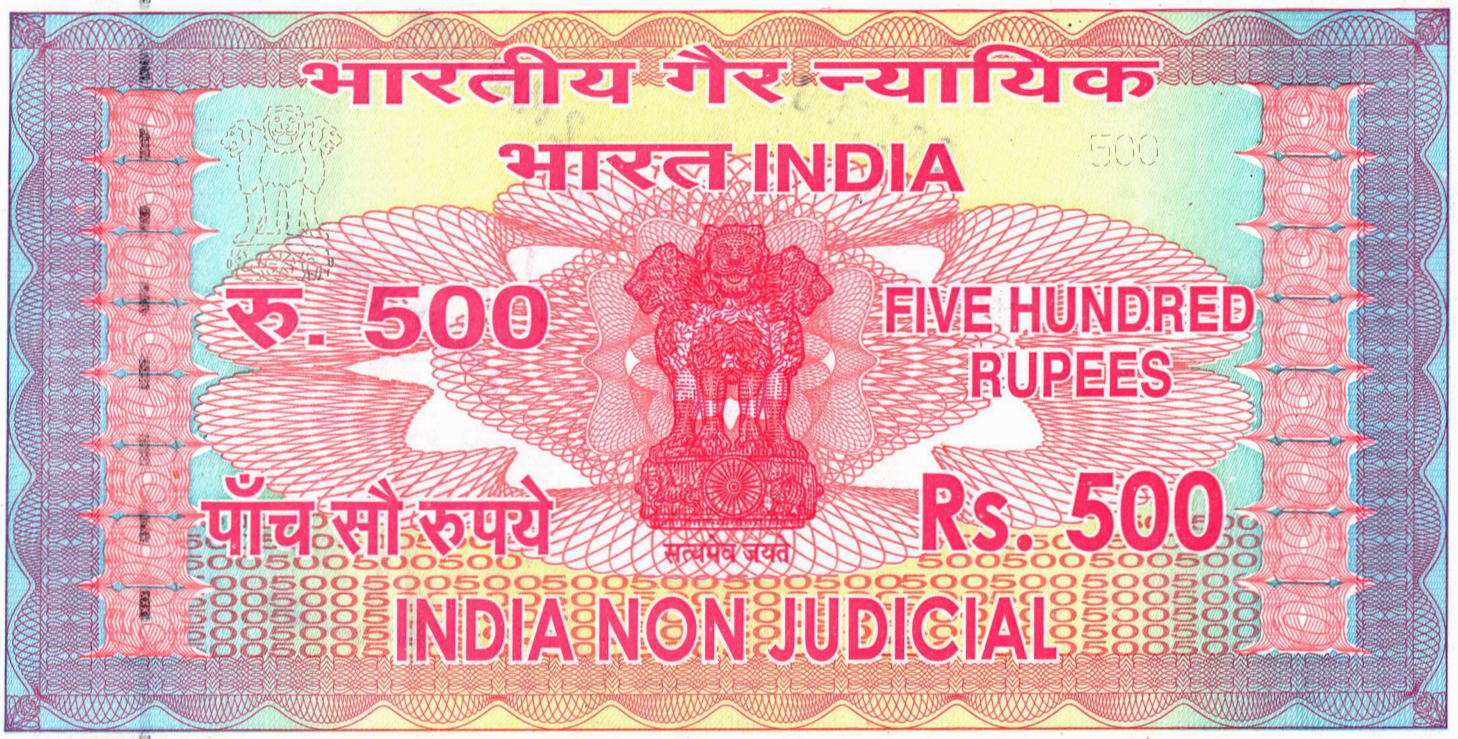
In the matter of Arbitration between

M/s. Sangeeta Aviation Services Pvt. Ltd.

and

Maharashtra Airport Development Company Ltd.

Dated : 10th May, 2022



महाराष्ट्र MAHARASHTRA ◐ 2021 ◐

BL 879686

प्रधान मुद्रांक कार्यालय, मुंबई
प.मु.वि.क्र. ८०००९५
24 FEB 2022
सक्षम अधिकारी

श्री. दि. क. गवई

BEFORE THE ARBITRAL TRIBUNAL

Hon'ble Mr. Justice Abhay M. Thipsay (Retd.)

In the matter of dispute between:

M/s. Sangeeta Aviation Services Pvt. Ltd. …Claimant

And

Maharashtra Airport Development Company Ltd. …Respondent

001596

- 2 MAR 2022

जाडपत्र-१ Annexure - I

फक्त प्रतिज्ञापत्रासाठी Only for Afidavit

मुद्रांक विकत घेणाऱ्याचे नाव Abhay . M. Thipsay

मुद्रांक विकत घेणाऱ्याचे [illegible] पत्ता [signature]

मुद्रांक [illegible] क्रमांक - 2 MAR 2022

मुद्रांक [illegible] सही [signature] परवानाधारक मुद्रांक विक्रेत्याची सही

परवाना [illegible] ०००३०१५

मु [illegible] अंधेरी कोर्ट बार असोशिएशन

एम. एम. कोर्ट, अंधेरी रेल्वे स्टेशनच्या [illegible], अंधेरी (पूर्व), मुंबई - ६९.

[illegible] सादर करणेसाठी मुद्रांक कागदाची [illegible] नाही. ([illegible] आदेश क्र. ०१/०३/२००४) नुसार

ज्या कारणासाठी ज्यांनी मुद्रांक खरेदी केला त्यांनी त्याच कारणासाठी मुद्रांक खरेदी केल्यापासून ६ महिन्यात वापरणे बंधनकारक आहे.

AWARD

Dated this 10th day of May, 2022

1. **The Parties** :

This is a dispute between M/s. Sangeeta Aviation Services Pvt. Ltd., a Company duly registered under the Companies Act, 1956 (hereinafter referred to as "the Claimant") and Maharashtra Airport Development Company Ltd., also a Company registered under the Companies Act, 1956 and established by the Government of Maharashtra (hereinafter referred to as "the Respondent" or "MADC"). The Claimant is engaged in the business of providing various types of Airport Development and Airport consultancy services for various Airports across India and abroad. The Respondent, as aforesaid, is a Government company established for the planning and implementation of the Multi-modal International Cargo Hub and Airport at Nagpur and for development of other airports, which are not managed by the Airport Authority of India or the Indian Air Force, in the State of Maharashtra.

2. **The Background Facts** :

The facts leading to the dispute, may in brief, be stated as follows:

i. The Respondent company has established an Airport at Shirdi, Ahmednagar District. Considering the heavy inflow of visitors / devotees to the Shirdi Sai Baba temple, some of whom would prefer to travel during the night time to reach Shirdi, the Respondent undertook plans to have operations, both day time and night time. In order to make the Shirdi Airport operational during day as well as night time, the Respondent floated a tender dated 28th October, 2016, inviting bids for the work of 'Provision

of Airfield Ground Lightning (AGL) Facilities' at Shirdi Airport, Ahmednagar District, Maharashtra. The Respondent had declared their estimated tender value on the e-portal to the tune of Rs. 5,87,00,000/- (Rupees Five Crores and Eighty Seven Lakhs only) for AGL fixtures and installation of lights on the runway length measuring 2500 meters. The scope of the work to be undertaken under the tender comprised of supply, installation, testing and commissioning of various Airfield Ground Lighting (AGL) systems.

ii. On 09th November, 2016, the Respondent called for a pre-bid meeting and uploaded on the tender portal pre-bid clarifications. The Claimant submitted their bid on 24th November, 2016. The Respondent thereafter, extended the bid submission date to 03rd December, 2016 and then further extended it to 10th December, 2016.

iii. The Claimant was selected as the lowest bidder and therefore, by an e-mail dated 13th January, 2017, the Respondent informed the Claimant that their bid was accepted. However, in the same communication, the Claimant was also informed that the scope of work had been 'slightly increased' due to the extension of the then existing runway by another 700 meters, alongwith isolation bay and apron extension. The Claimant was also informed by the same communication, *inter alia*, that they would need to carry out 'all additional work as required with extended runway, isolation bay and apron, *within the quoted rates and as per the terms and conditions of the contract the deviation so occurred shall be part of the agreement conditions and rates*'. The Claimant was requested to confirm the acceptance and was

further informed that once confirmed, it would be a part of the agreement to be executed with the Claimant. The Claimant, by their e-mail communication dated 16th January, 2017, confirmed and agreed to carry out the lighting work of the runway to the extended portion of 700 meters, isolation bay and extended apron. As to the condition / requirement to carry out all the additional work, as required, mentioned in the Respondent's aforesaid e-mail communication dated 13th January, 2017, the Claimant requested the Respondent to define, as per the tender conditions, the detailed item-wise list of all additional scope of supply, installation, testing and commissioning alongwith other jobs for the Claimant's evaluation.

iv. Upon the same, the Respondent issued a 'Letter of Acceptance' (LOA) dated 24th January, 2017 in favour of the Claimant by an e-mail communication dated 25th January, 2017 and called upon the Claimant to submit performance bank guarantee. The Claimant was further informed about the variation in the Bill of Quantities (BOQ) due to the extension of runway, which was to be executed at quoted rates and upon the same terms and conditions of the agreement.

v. Ultimately, the 'contract agreement' was entered into by the Parties on 06th February, 2017 and on the next day i.e. 07th February, 2017, the work order was issued. In the meantime, there had been e-mail communications between the Parties regarding project milestones, approval of designs and vendor for housing boxes, draft agreement as well as the specifics of increase in quantities, etc. The Respondent, by their e-mail dated

27th January, 2017, had informed the Claimant that a third party – Intercontinental Consultants and Technocrats Pvt. Ltd. – was appointed to be the Project Management Consultant (PMC) and M/s. Creative Group was appointed as the Design Consultant in the project.

vi. In the meantime, as per the requirements, the Claimant had deposited two cheques dated 04th February, 2017 in favour of the Respondent – first, for an amount of Rs. 12,80,864/- (Rupees Twelve Lakhs Eighty Thousand Eight Hundred and Sixty Four only) towards part of performance security and second, for an amount of Rs. 21,83,762/- (Rupees Twenty One Lakhs Eighty Three Thousand Seven Hundred and Sixty Two only) towards additional performance security – before entering into the 'contract agreement'.

vii. The work was expected to be completed within 5 months.

viii. However, the work was not completed within the stipulated time. Disputes arose between the Parties during the progress of the work as seen from the correspondence between the Parties, with each Party blaming the other for the shortcomings / perceived shortcomings in performance of their respective obligations under the contract. On two occasions, 'show cause' notices were issued to the Claimant as to why the contract should not be terminated on the ground of breaches thereof, allegedly committed by the Claimant. Ultimately, a third 'show cause' notice was issued on 20th June, 2019 which was replied by the Claimant on 26th June, 2019. The agreement was, however, terminated by a letter of termination dated 05th July, 2019 and

the performance security, as also the additional performance security furnished by the Claimant was forfeited. Some correspondence followed thereafter also, between the Parties.

The Dispute :

3. The dispute is whether the termination of the contract by the Respondent is proper, valid and justified. According to the Claimant, it is unjust, arbitrary, improper and not in accordance with law. The Claimant claims that it had not committed any breach of the terms of the contract and that actually, it was the Respondent who had breached the terms and conditions of the contract. According to the Claimant, the Respondent and / or their advisors, did not have sufficient knowledge or ability to comprehend the requirements for a successful completion of the project in question and therefore, the terms and conditions, including the quantities of the materials supplied were required to be varied / changed on a number of occasions, creating difficulties for the Claimant in smooth completion of the project. The Claimant even goes to the extent of saying that in the initial tender itself, there were 'many flaws and contradictions'; and that the delay in completing the project within the stipulated time (which has been given as the primary ground for termination of the contract) is due to the incompetence and the inability of the Respondent itself. According to the Claimant, it had completed about 80 per cent of the project work and were ready to do the remaining 20 per cent work, but that at that stage, the contract was abruptly terminated by the Respondent with *mala fide* intentions and without paying the full amount payable to the Claimant for the work already done. The case of the Claimant is that because of the illegal, improper and mala fide termination of the

contract, the Claimant has suffered huge losses and is therefore, entitled to recover compensation / damages to the tune of Rs. 3,58,92,460.41/- (Rupees Three Crores Fifty Eight Lakhs Ninety Two Thousand Four Hundred Sixty and Paise Forty One Only) from the Respondent, as per the particulars of claim at Exhibit '**P**' to the Statement of Claim.

The Respondent, on the other hand, claims that the Claimant, from the inception, did not pay any regard to the contract provisions; and that from the Claimant's own statements, reflected in the correspondence, it is evident that it had no knowledge of the contractual provisions at all. According to the Respondent, though a number of opportunities were given to the Claimant to rectify the wrongs and to adhere to the contractual provisions, and also to complete the work efficiently, the Claimant failed to do so; and that the contract has been properly and validly terminated. According to the Respondent, not only did the Claimant not pay any heed to the terms and conditions of the contract and replied rather aggressively when the terms and conditions were pointed out, but also failed to complete the work within the stipulated time. Apart from the failure to complete, the work done by the Claimant was found to be sub-standard and defective. It is submitted that the Respondent has suffered a loss due to the breach of the contract by the Claimant and is entitled to compensation / damages from the Claimant, to the tune of Rs. 13,15,78,875/- (Rupees Thirteen Crores Fifteen Lakhs Seventy Eight Thousand Eight Hundred Seventy Five Only) as per the particulars of claim at Annexure '**A**' to Statement of Defence and Counter Claim.

4. The Claimant filed a commercial Arbitration Petition in the Hon'ble High Court of Judicature at Bombay, under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), seeking various reliefs. The High Court, with the consent of the Parties, appointed this Tribunal to arbitrate upon the disputes and differences between them by its order dated 13th August, 2019. That is how this dispute is before this Tribunal.

How the matter proceeded :

5. The Claimant filed its Statement of Claim (SOC) on 15/10/2019 and the Respondent filed its Statement of Defence (SOD) and Counter Claim on 15/11/2019.

6. After completion of the procedure with respect to discovery and inspection of documents and filing of statements regarding the admissions and denials thereof, the points for determination were framed on 24/12/2019. The Parties were in agreement that recording of oral evidence would be necessary in the matter. This was duly recorded in the Minutes of the meeting dated 24/12/2019.

7. However, just before commencement of recording of evidence, in the meeting dated 17/02/2020, the Respondent made a request for permitting them to amend their Counter Claim based on some later developments in the matter. The Advocate for the Respondent submitted that for the work which was entrusted to the Claimant and which according to the Respondent was not done satisfactorily, the Respondent was required to issue a fresh tender and the expenses incurred by it for the new contract would form part of the Counter

Claim. The Claimant having indicated its 'no-objection' to the same, the Respondent was permitted to amend the Counter Claim in the said meeting. The Parties were directed / permitted to file additional affidavits of evidence of the witness, whom they proposed to examine in view of such amendment to the Counter Claim and the reply thereto, if so desired. The Respondent amended its Counter Claim on 25/02/2020 and the Claimant filed its reply to the amended Counter Claim on 05/03/2020.

8. With the amendment to the Counter Claim, additional points for determination were framed on 12/03/2020. On the same day, the Claimant began examination of its only witness, Capt. Ammeet K. Agarwal (CW-1) and the same was partially recorded.

9. However, due to outbreak of the COVID-19 Pandemic, 'the lockdown' and the Government advisory / directives even after the lockdown was lifted, it was not feasible to hold physical meetings for proceeding further with the arbitration. The recording of evidence could not have been done by video-conferencing without the express consent of the parties as per the direction given by the Hon'ble Supreme Court of India in Suo Motu Writ (Civil) No.5/2020 - *In Re: Guidelines For Court Functioning Through Video Conferencing During Covid-19 Pandemic*. The possibility of recording evidence by video-conferencing was explored. **The Claimant and the Respondent, in a video-meeting dated 14/10/2020, consented for recording evidence by video-conferencing and as such, the further evidence was recorded by holding video-conferences**. All the necessary arrangements in that regard were properly done to the

satisfaction of the Tribunal and also the Parties and their Advocates; and no Party, Advocate or Witness, at any time, expressed any grievance about any difficulty in giving or recording evidence because it was being done by video-conferencing. It was ensured that the screen of the stenographer / typist was visible to the all the concerned and more particularly, to the witness; and it was ensured that he could read the typed question and also the answer given by him, as typed. The notes of the evidence recorded, from time to time, were being forwarded, from time to time, electronically so as to give an opportunity to the Parties and the witness to point out the corrections, if any; and it is only after the correctness of the record was admitted by the witness and all other concerned, that the notes of evidence were signed and circulated electronically.

10. The Claimant continued examination of its witness, Capt. Ammeet K. Agarwal (CW-1), in support of the claim. The CW-1 was extensively cross-examined by the Advocate for the Respondent. The Respondent examined one witness, Mr. Rajkumar Barrey (RW-1). The RW-1 was extensively cross-examined by the Advocate for the Claimant.

11. Apart from the oral arguments advanced, written arguments were filed by the respective Advocates for the Parties. The matter was closed for Award, with directions to submit an 'agreed compilation' of all the documents tendered in evidence, marked and Exhibited, which was essential particularly because the evidence was recorded by video-conference. The said compilations were filed only on 10/12/2021.

The Points for Determination, Evidence, Arguments, Findings and the Reasons therefor :

12. I have carefully gone through the pleadings of the Parties, the affidavits and additional affidavits of evidence of both the witnesses (C and CA, RW and RW/A), and their evidence in the cross-examination. I have carefully considered the suggestions given to them in their cross- examination and their replies thereto. I have gone through the documents tendered in evidence, marked and exhibited. I have taken into consideration the arguments advanced by the learned Advocates for the Parties, as also the written arguments filed by them. I have also taken into consideration the case law cited by the learned Counsel for the Respondent and a decision cited by the learned Counsel for the Claimant.

13. The points for determination as framed, together with my findings thereon, are as follows:

Points for Determination	Determination
1. Does the Claimant prove that it is entitled to recover from the Respondent a sum of Rs. 3,58,92,460.41 (Rupees Three Crore Fifty-Eight Lakh Ninety-Two Thousand Four Hundred Sixty and Paise Forty-One only) including damages and interest as claimed in the Statement of Claim, or any other sum?	The Claimant is entitled to recover from the Respondent sums as stipulated in the final order.

2. Whether the Respondent proves that the Claimant is liable to pay an amount of Rs.11,60,00,000/- (Rupees Eleven Crore and Sixty Lakh Only) under the contract dated 06/02/2017, as specifically set out in paragraph nos. 46 to 65 and itemised in the Particulars of Claim at Annexure A to the Statement of Defence and Counter Claim, or any other sum?	The Claimant is liable to pay to the Respondent an amount of Rs. 16,06,743/- (Rupees Sixteen Lakhs Six Thousand Seven Hundred and Forty Three Only) received by it in advance from the Respondent towards the repeat order for the purchase of CCRs, unless the Claimant has already paid that amount to the OEM / vendor and makes a declaration to that effect, supporting it by the evidence of such payment.
3. Whether the Claimant proves that the Respondent has breached the terms of the contract?	Yes.
4. Whether the Respondent proves that the Claimant has breached the terms of the contract?	Yes.
5. Does the Claimant prove that the contract work could not be completed within the period of five months due to the extension of runway from 2500 mtrs. to 3200 mtrs., which was unforeseen when the contract was entered into?	This point being based on wrong assumptions, actually **does not arise**.

6. Does the Respondent prove that the Claimant had failed to complete the work in the stipulated time as per the contract and that the Claimant also failed to complete the work till the termination of contract i.e. 05/07/2019, without any valid or lawful excuse?	No. Since the Respondent had been, from time to time, extending the period to complete the work, the Claimant is proved to have had, or is deemed to have had valid and lawful excuses for not completing the work within the stipulated period and till the termination of contract.
7. Does the Respondent prove that it was due to the failure of the Claimant in completing the work by July, 2017 that the night time operations could not commence?	No.
8. Does the Claimant prove that the Respondent did not have 'Instrument Landing System Procedures' in place, certified by International Civil Aviation Organization (ICAO) / Directorate General of Civil Aviation (DGCA) / Airports Authority of India (AAI), without which night landing cannot be permitted?	Yes.
9. Whether the contract work could	

have been substantially completed within the period of five months irrespective of the extension of runway from 2500 mtrs. to 3200 mtrs.?	Does not arise and as such, need not be answered.
10. Does the Claimant prove that as per the terms of the contract, it was not obliged to carry on any additional work out of the scope of the Tender / Bill of Quantity (BOQ) occasioned by the extension of runway from 2500 mtrs. to 3200 mtrs.?	Does not arise and as such, need not be answered.
11. Does the Respondent prove that the Claimant by its e-mail dated 25/05/2019, refused to carry out the work approved by the Respondent by e-mail dated 15/05/2019, and displayed lack of willingness to work?	No.
12. Whether the amount of Rs.1.40 crore as mentioned in paragraph no. 20 of the Statement of Defence and Counter Claim was paid as an advance, or was it by way of payments based on works carried out?	It was <u>not</u> paid as advance but was paid on the basis of works carried out.

13. Whether the Claimant proves that Show-Cause Notices dated 28/07/2017, 31/07/2018 and 20/06/2019 were unlawful?	The legality or otherwise of the notices dated 28/07/2017 and 31/07/2018 is not material, as no further action to the detriment of the Claimant was actually taken pursuant to the show cause notices. The notice dated 20/06/2019 is held to be unlawful.
14. Whether the Claimant proves that the termination of contract dated 06/02/2017 is unlawful and not valid?	Yes.
16. Whether the Respondent proves that the work done by the Claimant was defective and sub-standard?	No.
17. Whether the Respondent proves that the materials supplied by the Claimant were defective and sub-standard, requiring the Respondent to again place an order for the same materials?	No.
18. Whether the materials which are mentioned in clauses (ii), (iv), (vi) and (vii) of paragraph 55B of the Counter Claim were supplied	No.

by the Claimant?	
19. Whether the Claimant proves that repeat orders were placed at inflated rates by the Respondent?	Yes.
15. What order?	As per final order.

14. Before going further, two preliminary objections raised by Mr. Shardul Singh, learned Counsel for the Respondent, challenging the maintainability of the present arbitration proceedings, may be dealt with. No points / issues in that regard have been framed, but since in the course of arguments these preliminary objections were raised, they need to be dealt with and decided. The first objection is based on the fact that the Claimant did not produce the Tender Document in evidence and the Claimant's witness, when confronted, denied that the Tender document constitutes the terms and conditions of the contract between the parties. It is submitted that *since the Claimant denied the existence and validity of the contract, or its terms and conditions, it cannot maintain any claim arising from such contract which it disputes, and which it does not present before the court*. It is contended that since the Claimant has denied the contract, the Arbitration clause (which forms a part of that) also would not survive and would perish; and that therefore, the Arbitral Tribunal would not have jurisdiction to decide the dispute; and thus, the Claimant cannot maintain the claims at all. Reliance is placed on the decision of the Supreme Court of India in the case of ***Damodar Valley Corporation v. K.K Kar, (1974) 1 SCC 141***, in support of this proposition.

15. Indeed, there can be no doubt that the Contract includes the Tender Document and other documents enumerated in paragraph 1 and 2 of the Contract Agreement dated 06/02/2017 [**Exhibit C-12**]. The Tender Document [**Exhibit R-5**] contains the key and detailed terms and conditions of the contract. It is also true that the Claimant did not tender the Tender Documents in evidence and the Claimant's witness when confronted, denied that the Tender document at **Exhibit R-5** constitutes the terms and conditions of the contract between the parties. (see Q/A. 51, 52, 53 & 55).

16. Obviously, such denial by the Claimant is rather ridiculous and contrary to what has been explicitly stated in paragraphs 1 and 2 of the contract agreement (**Exhibit C-12**). In fact, all these documents are annexed to the SOC by the Claimant itself and it is categorically stated in the SOC, by referring to the said documents specifically, that they were to constitute the contract (paragraph 6 of the SOC); but still, they were not tendered in evidence on the ground that they did not constitute the contract, or the terms of the contract between the Parties. The tender documents came on record, were marked and exhibited, only during the cross-examination of the CW-1.

17. Indeed, it was unwise on the part of the Claimant to have taken the aforesaid stand. This is more so, because in the SOC (Paragraph 5) the case of the Claimant is that the tender documents were part and parcel of the agreement and that the terms and conditions thereof were accepted. However, howsoever illogical, untenable and rather ridiculous the denial of the Claimant in that regard may be, that does not automatically support the contention put forth by the learned Counsel for the Respondent for a number of reasons. In the first place,

*the Claimant has not denied that there was any contract between the Claimant and the Respondent; what it has denied is that the tender documents and the other documents referred to in paragraphs 1 and 2 of the agreement (**Exhibit C-12**) constitute the terms and conditions of the contract*. This, by itself, would not amount to denying the existence of contract between the Parties. The decision in the case of **Damodar Valley Corporation (supra)**, does not assist the Respondent in any manner. Apart from the fact that the said decision was rendered under the provisions of the Arbitration Act, 1940, in which a provision similar to the one contained in section 16(1)(b) of the Act of 1996, did not exist, it does not lay down the proposition canvased by the learned Counsel. In fact, this judgment does recognize separability of the Arbitration Clause from the rest of the contract; and all that it says is that in certain cases and in certain circumstances, where the entire contract is put to an end, the Arbitration Clause which is a part of it, would also perish. Now, in view of the said provision. the legal position is clear and does not need the aid of case law to understand it. **Anyway**, further discussion about what the said judgment lays down is not necessary at all, as **the question** *whether the Arbitration clause would perish where a contract is alleged to be void or non-existent, or the doctrine of separability recognized by the judicial precedents which has now been incorporated in section 16(1)(b) would keep the Arbitration clause very much alive in spite of a finding about non- existence or validity of an agreement*, **does not arise for determination in this case**. Just because the Claimant has denied that certain documents form a part of, and do contain the terms and conditions or the contract agreement, it does not mean that the Claimant has denied the existence of the contract. On the contrary, it

would be clearly a dispute regarding, or involving interpretation of the terms and conditions of the contract. Curiously, the witness was not contradicted with the averments in the SOC, in accordance with the provisions of section 145 of the Evidence Act. What the Claimant, perhaps, expects by such denial is that the terms and conditions contained therein should not be brought into play, for deciding the claims; and this obviously cannot be accepted, as clearly, these documents do form a part of the contract containing important and basic terms thereof. In spite of the unreasonableness and untenability of the Claimant's stand, the contention that, '*because of the denial of the Claimant that the said documents constitute the terms and conditions of the contract between the Parties, the Arbitral Tribunal would have no jurisdiction and that the Claimant, therefore, cannot maintain its claim*', cannot be accepted.

18. The second objection is also relating to the untenable stand of the Claimant. The learned Counsel for the Respondent emphasized that the Claimant has taken contrary stands also with respect to the point as to *whether the work to be done on the extended runway was a part of the contract or not. Indeed, it is evident that the Claimant has taken completely contrary stands in that respect. In the SOC (Paragraph 5), the Claimant speaks of acceptance of the initial bid of Rs.5,12,34,567.89/- (Rupees Five Crores Twelve Lakhs Thirty Four Thousand Five Hundred and Sixty Seven and Eighty Nine Paise Only) and the increase in quantities due to extension of runway length by 700 meters. There is a categorical assertion in the SOC that: "The said revised BOQ was accepted by the Claimant and therefore the revised work was agreed between the parties for Rs.7,53,52,263.00*

(Rupees Seven Crore Fifty Three Lakh Fifty Two Thousand Two Hundred Sixty Three Only) and accordingly the Claimant started working on the revised quantities provided by the respondent."

As highlighted by the learned Counsel for the Claimant, surprisingly, the Claimant's witness, in his evidence, claimed that the work of extended runway beyond 2500 meters was not covered under the contract in issue (Q/A. 112). In his written submissions, the learned Counsel for the Respondent, has brought out many contradictions in the SOC and the evidence of the Claimant and tried to show the absurdities or illogicalities in the answers given by the Claimant's witness in his cross-examination, without, however, contradicting the witness with respect to the relevant pleadings in the manner provided by the Evidence Act. Be that as it may, the same need not be gone into deeper, as the propositions that are sought to be advanced on that basis, (as found in the written submissions filed on behalf of the Respondent), are the following:

(i) non-production of the contract and his disputing the terms and the conditions of the contract ensues serious consequences (paragraph 53); and

(ii) a party cannot be permitted to travel beyond its pleadings (paragraph 55).

The consequences of the Claimant's not tendering in evidence the entire contract and disputing the terms and conditions thereof, have already been discussed earlier. Though this would have a bearing in appreciating the evidence of the Claimant, this by itself, would not result dismissing the claims when the relevant documents are annexed to, and constitute a part of the SOC; and have been proved (though at

the instance of the Respondent). Therefore, the practical utility of discrediting the Claimant's witness on these points and emphasizing the aforesaid propositions in the context of the maintainability of the dispute, is not much. The emphasis on the principle '*that a party cannot travel beyond the pleadings and cannot be permitted to prove what has not been pleaded*', does not assist the Respondent much in the context of the fact as to whether the additional work occasioned by the extension of runway also formed a part of the contract or not. It is because, neither does the Respondent benefit in any way by establishing that the contract included such additional work also, nor does the Claimant benefit in any way by establishing that the contract did not include such additional work (rather, it might be to the disadvantage of the Claimant if the additional work is to be treated as not a part of the contract). Therefore, these two contentions, even though accepted, are not very relevant, except for pointing out the conduct of the Claimant, which, however, cannot conclude the matters. They only show how inconsistent and illogical the Claimant's stand has been, but cannot automatically result in dismissing the claims for that reason.

19. Having dealt with the objections which could be termed as preliminary, the points for determination may, now, be discussed and determined one by one together with the reasons for determination. They are however, not being discussed as per the serial numbers given to them, but in the order that is thought to be easier and convenient for a proper understanding of a dispute.

REASONS

As to Point Nos. 3 and 4:

20. It would be proper to discuss these points first, as they are basic and need consideration of a large volume of oral and documentary evidence which would be relevant to the other issues also. It would be convenient to discuss these points together, as not only it would maintain continuity of discussion but also avoid repetition of discussion on the same evidence.

21. One thing may be observed at this stage itself. It is that *both the Parties are alleging the breach of the terms and conditions of the contract by the other, but none of them have been meticulous or seriously concerned about refuting the allegations of the other party regarding the breach of the contract.* Rather, each Party is concentrating on pointing *what violations allegedly the other has done*. The narration of the facts in the pleadings and in the affidavits of the witnesses of the respective Parties, is not full or complete in the sense that though it goes on to attribute wrongs and breaches to the other party, what was the reply of the other party and what it had alleged or claimed in relation to such wrongs or breaches has been avoided dealing with. Even the correspondence produced before the Tribunal, tendered in evidence, marked and exhibited, is selective, inasmuch as each Party has highlighted certain correspondence and documents and given the same in evidence without even referring to the previous communication on, or relevant to, the same subject from the other Party. When a particular communication sent by it to the other Party is relied upon, the reply received from the other Party thereto – or even

the fact that a reply was received – is not always disclosed. It is also rather curious that none of the parties have chosen to advance arguments 'issue wise,' or with reference to points for determination, resulting into lack of precision and clarity on some aspects.

22. The Claimant's case is that the Respondent has arbitrarily terminated the contract. According to the Claimant, the Respondent from the very beginning, exhibited a lack of precision and clarity with respect to the terms of the contract, creating uncertainty about how to proceed with the work. That, the Respondent failed to provide necessary facilities so as to enable the Claimant to commence or complete the work in a proper and expeditious manner. To begin with, according to the Claimant, the Respondent did not give the initial drawings i.e. the GFC drawings, which are stated to be essential for commencing the work. That, even before the formal work order was issued, the Claimant, in its anxiety to complete the work within the stipulated time, had been requesting the Respondent to grant approvals for placing orders for the purchase of material / goods, but that the Respondent had not been responding at all to such requests. That, in the absence of the GFC drawings, the Claimant could not have commenced or continued the work. The Claimant has narrated a number of factors which, according to it, show that the Respondent had not been adhering to the contract provisions, not taking them seriously, *and that the Respondent itself was not aware as to the requirements necessary for enabling the project to be successfully completed*. The Respondent was not aware of the quantities of material that would be required to complete the project. That, the Respondent had been pointing out some defects or faults in the work of the Claimant but was not doing the essential

things which were necessary for the Claimant to successfully perform the contract and was not able to make the work fronts available.

23. The Respondent has criticized the contentions of the Claimant, *inter alia*, on the ground that while alleging breaches of the terms and conditions of the contract by the Respondent, the Claimant has not even attempted to refer to any particular or specific term, or terms, of the contract. The Respondent, on its part, has been more specific about the various alleged breaches of the terms of the contract, allegedly committed by the Claimant. The various contentions of the Respondent in respect of the breaches with reference to the specific terms / clauses in the agreement that have been alleged, may be discussed one by one – *firstly* by examining whether these breaches, in fact, are established, and *secondly,* if so, what is the effect or consequence of such breach / breaches. In doing so, it would be convenient to discuss the alleged breaches which are more specific first, and discuss the breaches of a more general nature, thereafter.

A. That the Claimant did not understand the terms and conditions of the contract and that the Claimant did not carry out the work according to the terms and conditions of the contract.

24. Indeed, it ought to be accepted that the Respondent's claim, that the Claimant throughout exhibited a lack of understanding the contract, is correct. This is evident from a number of factors that are revealed from the oral and documentary evidence that has been adduced. In the cross-examination of the Claimant's witness (CW-1), he has given such replies which themselves, without any further comment, make it obvious that the Claimant did not understand the various terms in the

contract or their implications, *or at any rate, did not give any importance to such terms and treated as if they were immaterial, or of no consequences*. The Claimant has also exhibited ignorance of the tender conditions on several other occasions. The fact that the Claimant went on to deny that the tender documents constitute the terms and conditions of the contract and that increase in work occasioned by extension of runway was part of the contract, contrary to its pleadings (as seen earlier in the context of the preliminary objection), is extremely relevant in this context. Interestingly, the SOC refers to the term "BOQ" and interprets it to be a short form of "Balance Order Quantity" (?), instead of "Bill of Quantities," creating a doubt about the Claimant's knowledge of even the basic terms commonly found in such contracts. Also, the replies given by the CW-1 with respect to the aspect of insurance, indicate that the Claimant was not aware of the relevant provisions regarding insurance, as stipulated in the contract, or at any rate, was determined not to abide by the said condition. The Claimant even challenged the authority of the PMC to give directions or issue a notice to the Claimant. The contract is clear that the PMC would be the 'Engineer in charge' under the contract and had all the right – or rather, a duty – to supervise the work and give appropriate directions. The Claimant's assertion, (in **Exhibit C-21**) that the notice issued by the PMC to them is '*illegitimate*' because '*they had not entered into any contract with them*,' is absurd and exhibits total ignorance of what the contract is, and the role of the 'Engineer' in the contract.

25. The Respondent's contention that the Claimant did not understand the terms and conditions of the contract and that the Claimant did not carry out the work according to the terms and conditions of the contract, is

correct. It is not necessary to illustrate this any further, as the same shall automatically stand further illustrated in the course of discussion on other issues.

B. The Claimant failed to submit the work programme and cash flow estimate and thereby committed breach of sub-clause 8.3.1 and 8.3.2 of the Conditions of Particular Application (COPA).

26. Indeed, the Claimant failed to submit the work programme and cash flow estimate, which was required to be done as per sub-clauses 8.3.1 and 8.3.2 respectively, of the Conditions of Particular Application (COPA). The PMC by its e-mail dated 17/03/2017 (**Exhibit R-6**) requested the Claimant to submit the work programme and the cash flow estimate. The Claimant responded by an e-mail dated 19/03/2017 (**Exhibit R-7**) asking it to *"....kindly mention the tender clauses pertaining to your demand request...."* thereby making it clear that it was not aware of the said requirement. This was replied by the PMC on 20/03/2017, pointing out the relevant clauses relating to submission of work programme (**Exhibit R-15**). However, the Claimant did not do the needful even thereafter. This failure of the Claimant to submit the work programme and cash flow estimate was pointed out to the Claimant by several communications made by the PMC (for instance, **Exhibits R-16 and R-17**). The Claimant, however, still did not do the needful and did not even reply to these communications, if it had any objection or difficulty in complying with the aforesaid requirements. The Claimant's witness was cross-examined on both these aspects; and when questioned as to whether the Claimant had submitted the work programme, gave evasive and illogical answers. The cross-

examination on these aspects makes an interesting reading and may be reproduced here:

> "***The attention of the witness is drawn to clause 8.3.1 of the Conditions of Particular Application at page 310 and contract data at page 352 of Exhibit R-5.***
>
> *Q.56 When did the Claimant submit the work program in accordance with the said clause 8.3.1?*
>
> *Ans. I will have to look into the date when the work program was submitted.*
>
> *Q.57 Are you aware whether the work program contemplated by clause 8.3.1 was submitted within 7 days of receipt of the work order as stipulated therein?*
>
> *Ans. I will have to look into the date.*
>
> ***The attention of the witness is drawn to clause 8.3.2 of the Conditions of Particular Application at page 310 and contract data at page 352 of Exhibit R-5.***
>
> *Q.58 Did the Claimant submit the cashflow estimate within 15 days of the work order as stipulated in clause 8.3.2 read with the entry at page 352?*
>
> *Ans: I will have to look into it."*

27. In view of these answers, he was questioned further on these aspects on the next occasion and this is how the cross-examination went:

> "***Attention of witness is drawn to Q/A. 56 which read as under:***
>
> ***"Q.56 When did the Claimant submit the work program in accordance with the said clause 8.3.1?***
>
> ***Ans: I will have to look into the date when the work program was submitted."***
>
> *Q.91 Can you answer Q. 56 today? If so please answer.*
>
> *Ans. Yes. We submitted the work program along with our bid on 24th November, 2016.*
>
> *Q.92 Do you agree that no work program as contemplated by Clause 8.3.1 was submitted by the Claimant after receipt of the work order?*

Ans. *I do not agree.*

Q.93 *When did the Claimant allegedly submit work program as contemplated by clause 8.3.1 after receipt of the work order?*

Ans. *On 24th November, 2016.*

Q.94 *The Claimant did not submit any work program after receipt of the work order dated 7th February, 2017. Is that correct?*

Ans. *It is not correct.*

Q.95 *If the work order was issued on 7th February 2017, on what basis do you claim that the document submitted on 24th November, 2016 as part of the bid documents is the work program as contemplated by clause 8.3.1 after receipt of the work order?*

Ans. *Since it was submitted along with the tender document, we construed that it was not necessary to be again submitted after the receipt of the work order."*

28. This type of replies required the intervention of the Tribunal and it is only after a question put by the Tribunal, that the witness accepted that no work programme had been submitted after the receipt of the work order. The witness has been extremely evasive and gave illogical answers by claiming the work programme to have been submitted on 24/11/2016, in compliance with the requirement of clause 8.3.1, which required such work programme to be submitted within a week *after* the receipt of the work order which had been issued on 07/02/2017. The answer to Q. 93 indicates how obstinate the witness has been and determined not to accept the Claimant's failure to submit a work programme in accordance with the contract. Surely, what was submitted as 'work programme' alongwith the bid on 24/11/2016, could not have been in compliance of the aforesaid clause 8.3.1. The

witness agreed to the fact – that also, in an indirect manner – of not having submitted a work programme, only when the illogicality of the answers given by him was pointed out; and then, he had the following explanation for not submitting it : "***Since it was submitted along with the tender document, we construed that it was not necessary to be again submitted after the receipt of the work order***" (answer to Q.95).

However, this explanation or justification for not having submitted the work programme has come only after persistent questioning and after the inability of the witness to logically reconcile his answers. A justification has been offered for a fact which itself was persistently denied and this speaks for itself. However, what is further significant is that, in none of the communications between the Parties, the Claimant claimed, or communicated to the Respondent / PMC that *work programme had already been submitted with the tender document and that it was not necessary to submit it again after receipt of the work order*. Evidently, the explanation is an afterthought and apparently, the Claimant had not paid any attention to the said requirement; and at any rate, had not paid any heed to the demands to that effect, which were as per the terms of the contract.

29. Similar is the case with the 'cash flow estimate'. The witness initially expressed his ignorance as to whether a cash flow estimate had been submitted and said that he 'will have to look into it' (answer to Q.58). When, on the next occasion, he was questioned about it, he accepted that the Claimant did not submit any cash flow estimate. He added an explanation by saying that 'there was a constant amendment in the amounts of the contract for various and multiple reasons it was not feasible to submit a cash flow estimate' (answer to Q.98). In further

cross examination, when specifically questioned, he claimed that 'a communication' of the Claimant to the Respondent, in which it had been said that 'it was not feasible to submit a cash flow estimate' was on record; and when asked to point it out, claimed that it was at **Exhibit C-52(Colly.)**. However, as rightly pointed out by the learned Counsel for the Respondent, **Exhibit C-52(Colly.)** are minutes of a meeting dated 29/11/2018 and they do not make any reference to any submission of the Claimant *about the infeasibility of submitting a cash flow estimate*. There is no substance in the claim that the Claimant had communicated to the Respondent that it was not feasible to submit the cash flow estimate. Apparently, the Claimant did not pay any heed to this provision as is revealed from the evidence, more particularly brought on record in the cross- examination.

30. **Thus, it indeed appears that the Claimant committed breach of the terms of the contract, with respect to submission of the work programme and the cash flow estimate.** What is the effect of such breaches on the contract, in the facts and circumstances, shall, however, be discussed later.

C. The Claimant failed to insure the goods and materials which they were bound to do in view of the provisions of the contract.

31. Indeed, it appears that the Claimant had failed to insure the goods and materials as per the terms of the contract. This breach on the part of the Claimant assumes more significance because the Constant Current Regulators (CCRs) that the Claimant had brought and stored in the airport premises, got damaged due to an incident of fire. These CCRs were not insured by the Claimant. Since they were burnt and since

their requirement for the purpose of work could not be dispensed with, a new order for the CCRs was required to be placed; and the Claimant asked the Respondent to pay an additional amount for re-ordering the 10 CCRs. *It is contended that the Claimant's claim for the cost of the re-ordered CCRs was untenable, inasmuch as, had the Claimant insured the material, the Respondent would not have required to pay for the re-order* (as there would have been reimbursement by the insurance company). It is contended that under the contract, the Claimant was under an obligation to insure the goods. Paragraph 3 of the preamble in Volume 3 has been referred to, to show that the offer quoted by the bidder should be, *inter alia*, inclusive of insurance. Clause 18.6 of the COPA provides for the third-party insurance to be taken by the contractor. Clause 27 of the Technical Specifications provided that it was the obligation of the contractor to insure (in joint names of the Parties) material and works, against all loss or damage (page no. 380 of Volume C-3) to the materials brought on the site for its full value. Clauses 28 and 29 provided for the contractor indemnifying the Respondent and for taking third party insurance with respect to all parties and persons during the execution of work.

32. When this aspect was brought out in the cross examination, and when the Claimant's witness, Captain Ammeet Agarwal (CW-1), was asked as to whether he agreed that the Claimant was under an obligation to insure the goods and materials delivered on site, he replied as follows:

> "*If the goods were to be in our possession then we would be under the obligation to insure, but if these goods were not to be in our possession than there was no obligation to insure.*" (Answer to Q.138).

It would be appropriate to reproduce certain further questions and answers in the cross-examination.

"Q.139 Is your above answer based on any provision in the contract?

Ans. I will have to look into the contract to search for the provision.

Q.140 If you are not aware of the provision in the contract relating to insurance, what was the basis on which you answered the Q.No.138?

Ans. It is common sense. If the goods will be in my custody then I would insure otherwise why would I insure.

Q.141 According to you, were CCRs brought at site in the first instance, in Claimant's possession or the Respondent's possession?

Ans. In the possession of the Respondent.

Q.142 Did the Claimant insure the CCRs which were first brought at site?

Ans. No. As answered above, they were in Respondent's possession and as such we were under no obligation to insure.

Attention of the witness is drawn to clause 26 at page 380 in Vol. C-3 of Exhibit R-6, which reads as:

"Delivery of Stores –
All the materials shall be delivered at the Shirdi Airport site.
The Seller shall consign the goods to the Airport / location as given above in a fully packed condition as per requirement of goods and insure the goods fully"

Q.143 In view of clause 26, would you now agree that the Claimant was under an obligation to insure goods brought at site including the CCRs?

Ans. No. I do not agree."

Thus, in spite of further precise questioning, the witness emphatically maintained that *the Claimant was under an obligation to insure goods* ***only if*** *they were to be in its possession* and that *the CCRs brought on site being in possession of the Respondent, the Claimant was not under any obligation to insure the same.*

33. The learned Counsel for the Respondent is right in contending that the Claimant's answer about the requirement to insure the goods were not based on any terms or provisions in the contract but on '*common sense*' (as the witness puts it). Secondly, '*that the goods brought to site would be in possession of the Respondent*' also, does not appear to be a correct proposition, if the relevant provisions in the contract are examined. There is substance in the contention of the learned Counsel for the Respondent that under the contract, the storage and resultant possession and safe custody of the material brought on site was to be with the Claimant and it was to pass to the Respondent only upon the completion of work and taking over certificate (Clause 4.13.1 COPA and 10.3.1, 5.0 of SCC, clause 28 and 36 of Technical Specifications). In fact, according to the Claimant, it had set up a temporary workshop at the site. The answer given by Claimant's witness, claiming that the Claimant was not liable to insure the goods, is contrary to the provisions in the contract and cannot at all be accepted. The Respondent clearly put the responsibility of insuring the goods and materials brought to the site, on the contractor wholly, i.e. the Claimant; and the provisions in the contract in that regard, are clear.

34. Thus, the Claimant has committed the breach of the terms requiring it

to insure the goods.

However, since it is suggested that this failure of the Claimant renders it liable for the loss that has been occasioned by the destruction of the CCRs by fire, the same needs to be discussed briefly. To fasten the liability of the destruction of the CCRs by fire on the Claimant, it is not sufficient, merely to show, that the Claimant had filed to insure the CCRs and there would be a necessity to state about the circumstances in which the fire took place or the cause of such fire. A satisfaction that '*had the CCRs been insured, the insurance company would have reimbursed the value thereof,*' would need to be arrived at if the liability for the loss of CCRs is to be fastened on the Claimant. Such a satisfaction cannot be arrived at in this case, and this may further be discussed while considering the claims and counter claims.

35. Incidentally, the contentions of the Claimant and the replies given by CW-1 in the cross-examination go beyond a specific term in the contract and establish, when considered alongwith the CW-1's answers with respect to the submission of work programmes and cash flow estimate, *that the Claimant generally did not bother to read or understand the contract, or at any rate, did not bother to comply with the terms and conditions of the contract.*

D. The Transformer Housing Boxes (THB) supplied by the Claimant were not of the stipulated dimensions as per the BOQ.

36. It is submitted by the Respondent that as per entry no. 19 in the BOQ (**Exhibit C-4**), the Transformer Housing Boxes (THB), to be supplied and installed were required to be of size 750 mm x 350 mm x 450 mm,

but the Claimant supplied THBs of the wrong dimensions i.e. 750 mm x 300 mm x 400 mm. It is also submitted that though this deficiency was pointed out to the Claimant vide PMC's letter dated 17/05/2017 (**Exhibit C-43 / R-19**), the Claimant still did not take any corrective steps by supplying the THBs as per the BOQ. It is contended that the Claimant had brought the samples of the THB at site, one of which was of 750 mm x 350 mm x 450 mm and other was 750 mm x 300 mm x 400 mm; and that by an e-mail dated 30/03/2017 (**Exhibit C-22**), the PMC communicated to the Claimant its approval with respect to the **bigger size of the THB** by qualifying it 'as per BOQ'. It is contended that, thus that approval was given only to the THB of 750 mm x 350 mm x 450 mm. That, thereafter, drawings were received from the Claimant in respect of the THB and subsequently, samples were again sent on site but they were again not of proper dimensions; and that as aforesaid, on 17/05/2017, the PMC informed the Claimant to supply the THBs of correct dimensions, but the Claimant, as aforesaid, did not take any corrective steps by supplying the THBs as per the BOQ. That, this constitutes serious breach of the contract by the Claimant and the Respondent was required to re-order 253 of the total 254 THBs supplied by the Claimant.

37. The Claimant's clarification in this regard, as given in the written submissions filed by it, is that the Respondent's assertion of the Claimant having brought samples of THBs, one of which was of 750mm x 300mm x 400mm and the other of 750mm x 350mm x 450mm, is false. That the Claimant had brought just one sample which was of the size 750 mm x 300mm x 400mm and that it was duly

approved, but the PMC later on claimed that the boxes were not as per the BOQ.

38. I have considered the matter in the light of the oral and documentary evidence on record. Undoubtedly, from the e-mail dated 30/03/2017 (**Exhibit C-22**) sent by the PMC, it appears that the THBs brought as sample were (at least) of two sizes. Otherwise, there was no occasion to use the plural expression 'samples' and convey the approval to the "bigger size of THB". However, what was the size of the other sample is not clear and it appears only to be a presumption of the Respondent that the other size – smaller size (so to say) – was 750 mm x 300 mm x 400 mm and that the Claimant wrongly supplied the smaller size which was not approved.

39. The Claimant has also contended that the tender document (**Exhibit R- 5**) in scope of work (clause 10 at pg. 370, Volume C-3 of SOC) provides that 'the HDPE DWC pipes shall be laid between the transformer housing boxes (of size 750 mm x 300 mm x 400 mm)'; and that in view of clause 5 at page no. 359, Volume C-3 of SOC which reads as 'in case of any discrepancies between provisions stated in the scope of work and those covered by the technical specification, the provisions of the scope of work shall have preference', there was no fault or deficiency in supplying THBs of the size 750 mm x 300 mm x 400 mm.

40. The provision in the scope of work emphasized by the Claimant as aforesaid, does not specifically deal with the 'size of the THBs' and

the reference to the size is only incidental. Therefore, it is difficult to accept this contention of the Claimant.

41. However, it is clear that the size of the sample available in the PMC office and the size of the THB supplied is the same and they have the same dimensions. In the absence of evidence as to what was the size and / or dimensions of the 'smaller size' of the THBs [as implicit from the communication dated 30/03/2017 (**Exhibit C-22**)] it cannot be said that the 'bigger size' spoken about in (**Exhibit C-22)** was 750mm x 350mm x 450mm. That would not explain *how* the sample available at the PMC office and the THBs installed at site have the same dimensions, which is the admitted position (see **Exhibit C-41**). Further, the Housing Boxes used in the work are least of two sizes – the one of 750 mm x 300 mm x 400 mm and the other of 330 mm x 330 mm x 400 mm. Therefore, the possibility of sample that has been referred to as 'of bigger size' itself being of dimensions 750mm x 300mm x 400mm cannot be ruled out. It is possible that this difference in size was not noticed by PMC at that time and the same was thought of, and referred to, as 'as per BOQ.' This view is strengthened because the communication dated 17/05/2017 (**Exhibit C-43 / R-19**) does not speak about any new samples subsequently having brought to the site (as suggested in the Written Submissions of the Respondent without any supporting evidence) and does not question the Claimant as to *how it had provided a 'sample' of the dimensions of 750mm x 300mm x 400mm when the PMC had, earlier, by e-mail dated 30/03/2017 (***Exhibit C-22***) had approved a sample of the dimensions 750mm x 350mm x 450mm.* **Exhibits C- 43 / R-19** speaks of 'having observed' the difference in size / dimensions, and not about the Claimant having

changed the sample that was brought initially. Thus, though the Claimant's contention that it had brought the sample of only one size cannot be accepted on the face of the contents of **Exhibit C-22**, the Respondent's contention that the 'bigger size' sample was of the dimensions 750mm x 350mm x 450mm, also cannot be accepted. The possibility of the PMC not having noticed that the sample was of 750mm x 300mm x 400mm dimensions at the time when it was brought and only later having realized the discrepancy in the size [and then having written to the Claimant on 17/05/2017 (**Exhibits C-43 / R-19**)] very much exists in the circumstances.

42. The Claimant has referred to **Exhibit C-41,** which records measurements taken during joint inspection on 24/01/2019. In this, it is clearly mentioned – after taking into consideration the difference in the size as per the BOQ – that '*the deviation in size to be examined by PMC for its suitability and performance to decide further course of action*'. This report of joint measurement has been signed by the representatives of the Claimant, of the Respondent and the PMC. Thus, in spite of the THBs being of the size 750 mm x 300 mm x 400 mm, they were not be automatically rejected, unless the PMC, on examination, would conclude or opine that they were not suitable at all. However, there is nothing to show that the PMC thereafter examined the matter from this point of view and found these THBs to be unsuitable, or that they could not perform as per the THBs of the dimensions 750mm x 350mm x 450mm at all.

43. In the circumstances, though there is a breach in supplying the THBs of the correct size as per the BOQ, the same has not been treated by

the Respondent itself as a serious one and it is only after the termination of the contract that this issue is raised emphatically. In my opinion, therefore, the only question would be of the adjustment or recovery of the amount based on the alleged difference in the cost of the THBs of the size of 750 mm x 300 mm x 400 mm and the THBs of the size of 750 mm x 350 mm x 450 mm, as per the counter- claim made.

E. The cable supplied by the Claimant was without Factory Acceptance Test (FAT) in violation of the terms of the contract and further, the supply was delayed.

44. According to the Respondent, the Claimant delivered the cable which was to be supplied under the contract, without carrying out the Factory Acceptance Test (FAT). It is contended that such FAT was necessary as per the conditions of the contract. Reliance has been placed in that regard on clause 31 of the Technical Specifications, which stipulates that the equipment shall be delivered only after pre-delivery inspection has been carried out at the factory premises. It is submitted that the Claimant, in April 2017, without following the above provisions, brought 20 kms of such cable as against the BOQ requirement of 49.5 kms and these 20 kms length of cable were brought at site without pre-delivery inspection. It is also contended that the Claimant tried to confuse the matters by referring to a FAT carried out in January, 2019 which was not with respect to the delivery of cable in April, 2017.

45. The Claimant, in his arguments / written submissions, has not specifically dealt with the delivery of the cable in April, 2017 without FAT. On the contrary, it is contended that the PMC had confirmed the

'acceptance' of the cable on 25/04/2017 (**Exhibit C-25**). This is besides the point. In fact, a perusal of the e-mail dated 25/04/2017 (**Exhibit C-25**) sent by the PMC to the Claimant shows that the PMC only *noticed* the delivery of the cables at site and nothing has been said about the FAT or pre-delivery inspection. What the e-mail 25/04/2017 (**Exhibit C-25**) discloses is that *the delivery of the cable was noticed only after it was delivered at site and there was no previous intimation to, or any communication with PMC, with respect to such delivery*. The communication from the PMC dated 14/07/2017 (**Exhibit R-22**) again refers to an e-mail dated 01/07/2017 from the Claimant, but such e-mail which is supposed to have been sent by the Claimant to the Respondent, is not on record. It is with reference to this e-mail that the communication (**Exhibit R-22**) was made and refers to the cable having been brought at site for incorporation without FAT. This was replied to by the Claimant by an e-mail communication dated 15/07/2017, which has been tendered only as an attachment to the Claimant's reply dated 31/07/2017, given to the Respondent's first 'show cause' notice dated 28/07/2017 (**Exhibit C-20 / R-3**). The Claimant's reply dated 31/07/2017 together with the attachments thereto was marked as **Exhibit C-21 (Colly.)**], subject to the proof of contents and the proof of attachment; which attachments were subsequently marked as **Exhibit C-21/1 (Colly.)**. Interestingly, though the Claimant's contention is that the test report for the cable was already submitted (See serial no. 23, page 8 of the written arguments of the Claimant), the e-mail dated 15/07/2017 takes a stand that FAT was not mandatory as per tender conditions.

46. In the cross-examination, the Claimant's witness referred to the FAT for the AGL cables done on 10/01/2019 for 32.46 kms. while maintaining that it was not necessary that the delivery of AGL cables should have been accompanied by FAT.

47. I find the evidence in this regard rather unclear inasmuch as full truth of the matter has not been put forth by any of the Parties. It does appear that the cable delivered at site in April, 2017 was without FAT but the cable delivered later was accompanied by a FAT, as reflected in the minutes of meeting dated 10/01/2019 (**Exhibit C-37**). However,there is still confusion about a number of aspects. For instance, if the total cable to be supplied originally as per the contract was 38,550meters which was, on revision of quantities, increased to 49,500 meters (See page no. 57 of the written submissions of the Respondent), how did the Claimant initially (in April 2017) supply 20 kms. i.e. 20,000 meters, and how again, in January, 2019 got tested cable of length of 32,454 meters (making the total of 52,454 meters) is unanswered. There is also no clarity on whether the cable that was required to be supplied was to be PVC insulated, or XLPE insulated [**Exhibit C-21/1 (colly.) and Exhibit R-22**].

48. Since there is no clarity on several aspects with respect to the defect and deficiencies in supply of the AGL cables, it is difficult to hold that there has been a breach of the relevant terms of the contract by the Claimant, or that the termination of the contract can be sustained as lawful on this ground.

49. As regards the delay in supply, the same can be viewed in the light of discussion regarding the general delay, that undoubtedly has occurred in completing the project.

F. There were deficiencies in supply and installation of isolating transformers and that the supply was not in accordance with the technical specifications set out in the contract.

50. It is alleged by the Respondent that the Technical Specifications for isolating transformers required a continuous 20 cycle test and that the Claimant did not provide isolating transformers with the said 20 cycle test. Some illogical answers were given by the Claimant's witness in the cross-examination on this aspect – such as first denying that the Claimant did not provide the 20 cycle test of the isolating transformers, then in spite of such denial, claiming that the 20 cycle test was not required at all. When questioned that 'did he maintain that the 20 cycle test was provided by the Claimant, though it was not required at all,' he referred to a document on record (**ExhibitC-42**) and then maintained that both his answers i.e. *that the 20 cycle test was not necessary but (still) was provided by the Claimant,* were correct. I have seen the document at **Exhibit C-42** which are minutes of the FAT conducted on 28/02/2018. These minutes speak of cycle test and the conclusion arrived at is that "*the sample isolating transformers were found to be the characteristics and values of given under the contract agreement, IS 12290 – 1987 and FAA. AC no. 150 / 5345 – 41C and hence are acceptable*". The minutes have been signed by the representative of the Respondent – Mr. Rajkumar Barrey (the Respondent's witness himself), the design consultant and the representative of the Claimant. No objection to the supply of the

isolating transformers after such test, was taken at that time. In view of the certificate about the same being *acceptable,* as was given in respect of the isolating transformers; and the fact that a 20 cycle test was not insisted upon at that time, it is not possible to accept that the alleged breach in that regard, by the Claimant, is sufficient to justify the termination of the contract on that ground. The breach of the requirement to have a 20 cycle test though now emphatically put, (like in the case of several other breaches) was, at the material time, treated as insignificant and of no consequence, (and certainly not sufficient to terminate the contract), by the Respondent itself.

G. The Claimant failed to deploy and maintain staff as per organisation chart submitted in Form 4 and thereby breached the terms of the contract.

51. The learned Counsel for the Respondent submitted, by referring to clause 18.2 of Instructions to Bidders (ITB), stipulating that the bid must contain a "List of technical personnel employed by the bidder and who are likely to be available on this work (Form F4 of Section VI)" and that the bidder was required to give an undertaking that such personnel would be deputed and posted on site throughout the duration of the project. It is not in dispute that the Claimant had filled such form and had given such undertaking [part of **Exhibit R-4 (Colly.)**]. It is contended that in spite of the contractual obligation and the undertaking given, none of the personnel were deputed at site throughout the duration of the project. It is submitted that this was brought to the notice of the Claimant with instructions to comply, by the following communications: PMC's letter dated 17/03/2017 [**Exhibit R-6**]; PMC's letter dated 29/05/2017 [**Exhibit R-20**]; PMC's

letter dated 15/06/2017 [**Exhibit R-21**]; 'Show Cause' Notice dated 28/07/2017 [**Exhibit C-20 / R-3**]; 'Show Cause' Notice dated 31/07/2018 [**Exhibit C-27**]; PMC's Report dated 26.10.2018 [**Exhibit R-8**]; Termination letter dated 05/07/2019 [**Exhibit C-34**]. It is submitted that the Claimant never challenged this contention of the Respondent. That, failure to deploy the staff throughout the duration of the project amounted to breach of the contract and the undertaking. The learned Counsel has also touched the aspect that the employees mentioned in the Form F4 were actually not the employees of the Claimant at all. A lot of cross examination was done on this aspect and undoubtedly, the answers given by the Claimant's witness clearly indicate that he wanted to evade the issue. He, ultimately, answered the question as to whether Mr. S.K. Ravi and Mr. Ramendra Kumar Mondal (mentioned in Form F4) were the employees of the Claimant as *"... it depends on how one defines the term 'employee'."* (Answer to Q.26). When asked about his definition of the term, he answered : "*I would include all types of employees i.e. part time, full time, contract and outsourced, in the definition of the term 'employee'.*"(Answer to Q.27). The witness was not able to state as to whether the aforesaid persons were the employees of the Claimant during the contract period. The answers given by him in the cross examination indicate, among other things, that the person shown as the project manager in Form F4 was actually an 'outsourced employee'.

52. After considering the entire evidence on this aspect, I am of the opinion that the contention that the staff had not been deputed, or was not available at the site, throughout the entire duration of the project,

has to be accepted. The attitude of the Claimant, as reflected from the answers given by CW-1 and the correspondence, is that of trying to contradict the Respondent's claim from his interpretations of the Respondent's contentions, rather than making a positive claim himself. For instance, he disputes the allegation regarding staff not being present by pointing out another contention of the Respondent : *that the work was not done properly or that it was defective; and then arguing as to how the work was done if the staff was not there*. This all is beside the point, and these types of arguments and assertions do not work. The contention of the Respondent is that staff was not present throughout, (which ought to have been throughout the contract period) and this contention cannot be refuted by taking a shelter behind the Respondent's allegation, of the work carried out being of inferior quality by claiming that 'this proves that the staff was very much there' on the basis of an argument as to '*how, otherwise, the work (though of inferior quality) had been carried out*'. In its letter dated 31/07/2017, [part of **Exhibit C-21(Colly.)**] written in reply to the Respondent's notice dated 28/07/2017 (**Exhibit R-3 / C-20**) [apparently, by inadvertence, marked twice], the point made by the Respondent regarding failure to depute staff is replied as follows:

> *"Reference is made to your point regarding failure to deputing staff. Your statement is contradictory because in your points #2.4 and #2.5 you have mentioned that transformer housing boxes and Airfield lighting cables have already been installed on the runway. If the staff was not deputed, how were these works completed?"*

A number of such examples can be given. This way of denial cannot be appreciated. This misses the point made by the Respondent that *viz.*, the staff was not always present as required and undertaken. It cannot be construed as the Respondent having said that 'the staff was never present' and then refuted. It does appear to me that the project prolonged for a very long time and much longer than the time initially stipulated for its completion i.e. 5 months from 07/02/2017 (date of the work order); and that during all this period i.e. till termination of the contract on 05/07/2019, the staff was not *always* present at the site. In the written arguments, the Claimant has submitted that as per the Organization Chart only Mr. Anthony Thomas was to be at site and the others, totally four, including the CW-1, were to be at the Head Office. However, the Chart shows that there were to be seven other members of the staff who were to be at site alongwith Mr. Anthony Thomas. It also appears that the staff mentioned in Form F4 were not regular employees of the Claimant. Be that as it may, I don't think it very significant from the point of view of the contract whether such person was a regular employee or had been 'outsourced'. There would be nothing improper in interpreting the term employee broadly. Of course, the non-availability of such persons at site would be a material factor, but whether he was a 'regular' employee or an 'outsourced' would not be material. Anyway, it does appear that such persons were *not always available at the site till the project was over*, in spite of the stipulated terms of the contract to that effect. However, the effect of this failure of the Claimant and the Respondents' reaction to it at the material time is being discussed and considered along with another – and a more serious – breach as alleged i.e. '*of having abandoned the work on three occasions*' in the latter part of this Award.

H. The Claimant failed to cover open trenches and when called upon to do so, did not respond as a result of which the Respondent had to get the work done through another contractor for an amount of Rs. 12.84 Lakhs.

53. According to the Respondent, the Claimant did not refill the trenches and that it amounts to a breach of terms of the contract. It is also contended that the work of filling of trenches was got done by the Respondent through another agency – SS Constructions – and that a sum of Rs. 12.84 Lakhs was paid to the said agency towards the work. According to the Respondent, this amount is deductible from the amounts payable / paid to the Claimant as the work was done at the risk and cost of the Claimant. A Counter Claim has also been made on that basis (Counter Claim No.6 & 7).

54. It is contented by the learned Counsel for the Respondent that the Claimant did not dispute that the refilling work was done through another agency and did not raise this issue even in the cross-examination, in spite of specific pleadings and evidence adduced by the Respondent to that effect. Indeed, in the written submission of the Claimant also, no attempt is made to deal with this aspect of the matter.

55. There is a communication by e-mail dated 29/08/2017 (**Exhibit R- 25**) from the PMC to the Claimant pointing out that the trench filling work of runway and taxiway should commence before 31/08/2017 and that it should be completed at the earliest. It is also mentioned therein that otherwise the work will be got done through another agency, at the

risk and cost of the Claimant. Admittedly, there is no reply to this communication. At least nothing has been said about such reply and in any case, no such reply is on record. Under the contract, the Claimant was expected to work under the directions and supervision of the Engineer in charge i.e. the PMC, and was supposed to carry out the directions of the PMC with respect to the filling of the trenches. Had there been difficulty in doing so, the Claimant should have discussed the same with the PMC and apparently the same was not done. The case of the Respondent is that an amount of Rs. 12,84,800/- (Rupees Twelve Lakhs Eighty Four Thousand and Eight Hundred Only) was required to be paid to M/s. S.S. Construction for the refiling work causing that much loss to the Respondent. A document which has been referred to as 'final bill' by Mr. Rajkumar Barrey in his evidence has been produced (**Exhibit R-30**) in support of this contention.

56. I have considered the matter. I have also gone through the relevant averments in the affidavit of Respondent's witness and the invoice (**Exhibit R-30**). The Respondent has claimed that an e-mail communication was sent by the PMC to the agency SS Constructions to carry out the bituminous filling work without break, but has not produced any printout of such an e-mail. The invoice is drawn on M/s. Supreme Aviation and opens with the words "As per your requirement at Shirdi Airport site...we are providing the bill for trench filling by bituminous material...". The invoice is for Rs. 27,84,800/- (Rupees Twenty Seven Lakhs Eighty Four Thousand Eight Hundred Only) and shows that an advance of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) as having been paid.

57. This is rather mysterious, inasmuch as there is no evidence that such an amount of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) has been paid to M/s. SS Constructions as advance. What was the work entrusted to SS Constructions is not clear because, as per the invoice, the amount paid to M/s. SS Constructions was of Rs. 23,60,000/- (Rupees Twenty Three Lakhs and Sixty Thousand Only) and with taxes, it came to Rs. 27,84,800/- (Rupees Twenty Seven Lakhs Eighty Four Thousand and Eight Hundred Only). As such, I am unable to hold it to be satisfactorily proved that the Respondent had incurred an expenditure of Rs. 12.84 Lakhs for paying to the agency for getting the work, which the Claimant was supposed to do under the contract, done.

58. Apart from this, what cannot be overlooked is that the Claimant was asked to start the trench filling work and the complete the same at the earliest by an e-mail dated 29/08/2017 at 01.35pm (**Exhibit R-24**). Apparently, on the same day, an e-mail was again sent at 04.29pm in which the Claimant was warned that unless the trench filling work would be completed at the earliest, it would be got done through some other agency at the Claimant's risk and cost. Interestingly, an agency i.e. SS Constructions was appointed to get the work done on 01/09/2017 itself – i.e. within 2 days.

59. Thus, though it appears that the Claimant did not refill the trenches in time, it is not satisfactorily established that the work was therefore required to be got done from SS Construction, who were paid an amount of Rs. 12.84 Lakhs for this work. Moreover, it is difficult to

hold, in the absence of satisfactory evidence, that the refilling work was, in any case, to be done before 31/08/2017, so that not doing it before that date, would amount to the breach of the contract.

I. The Claimant refused to carry out the work on the ground that hard rock was found (while digging at the site) and that under the contractual provisions and in particular, paragraph 4 in the preamble of Volume III and paragraph at sr.no. 21 of the Contract Data, the Claimant was bound and liable to do the work by chiselling of rocks.

60. It is an admitted position that while doing the work of excavation of trenches for laying cable, hard rock was encountered. It is contended that in spite of the fact that the Respondent and the PMC had directed the Claimant to carry out the work of chiselling hard rock, the Claimant refused to carry out the work.

61. According to Respondent *firstly,* under the contract the Claimant was obliged to do the work of chiselling of rock; and *secondly,* that the refusal amounted to *repudiation of the contract.*

62. This work *viz.*, of chiselling of rock, was not within the scope of the contract, and that while digging hard rock would be found, was not expected or contemplated by the parties when the contract was entered into. Any doubt in that regard can be removed by referring to the admission of RW-1 in his cross-examination (Q/A.159). The contention of the Respondent is that, that the Claimant was, nevertheless, required to carry out the work of chiselling of rock in view of some of the clauses in the contract (paragraph 4 in the

preamble of Volume III and paragraph at Sr. No. 21 of the Contract data) which provide *that the contractor was bound and liable to carry out all works including any extra work that is not mentioned in the BOQ; and that such extra items would be paid on the basis of PWD rates, and in case of non-availability of rates, fair market rates to be adopted on the basis of Engineer's rate analysis would be paid.* It is true that the Claimant, on encountering hard rock, did not start chiselling it and raised a number of concerns.

63. A question would arise : *whether by reason of a general clause / clauses in the contract, the Claimant was obliged to undertake the work of chiselling of hard rock as an 'extra item.'*

64. In the view that I am taking, it not necessary to go deeper and minutely examine whether the Claimant was obliged to undertake the work of chiseling hard rock when hard rock was found while digging. It is because, even assuming, that the Claimant was obliged to undertake the said work, at least the volume of that work, by taking measurements, needed to be ascertained before undertaking the work. It could not be that the Claimant, on encountering hard rock, was expected to start the chiselling or breaking thereof without reporting the matter to the Respondent and without ascertaining, by joint inspection and mutual agreement, the volume of the work as also the method and time for completing it. The work of chiselling of hard rock, was unforeseen when the contract was entered into. I have gone through the relevant correspondence which is on record and evidently the Respondent itself has at the material time admitted that 'the contract did not envisage the item of chiselling or breaking.' This is

found in the e-mail dated 15/05/2019 sent by Mr. Rajkumar Barrey (RW-1) to the Director, Civil Aviation *specifically seeking approval for such work.* The Director, Civil Aviation on the same day granted such approval (**Exhibit R-28**). Even thereafter, there was correspondence between the parties, *inter alia*, as to the method to be adopted for measuring the hard rock and deciding the amount to be paid for the work (**Exhibits C-31 and 32**). When such is the position, it is not open for the Respondent now to claim that the Claimant was straight away required to undertake the work of chiselling of hard rock by the provisions of contract itself, without raising any queries or concerns and even before the volume of the work could be ascertained. Had that been the stand of the Respondent at that time, it could have stated so to the Claimant, instead of negotiating with him and contemplating the terms on which the said work was to be carried out.

65. Moreover, I do not find that the Claimant refused to carry on the said work and that he thereby repudiated the contract. Though much emphasis has been led on this aspect as being sufficient in itself for termination of the contract, I do not discuss this any further here because a specific issue in that regard has already been framed (point no. 11) and it would be appropriate to take this discussion further while deciding the said point.

J. The progress of the work was slow.

66. Indeed, the fact that the project has not been completed in the stipulated time is not in dispute. However, according to the Claimant, it was because of the Respondent itself, that the delay was caused. The Claimant submits that out of the Respondent's ignorance about the

requirements for the successful completion of the project and its incompetence, there was no clarity about what was to be done and many changes, modifications in the programme were required to be done from time to time, resulting in delay. The Respondent, on the other hand, claims the delay to be attributable totally to the Claimant. It is also submitted by the Respondent that in spite of some of the difficulties, the Claimant could have easily completed the work much before the time taken by it. Thus that the work was not proceeding as planned, is not in dispute at all. *The only dispute is this, viz., who is responsible for such inordinate delay.*

67. The Claimant alleges that it could not make progress in the work because the Respondent had been, from the beginning, delaying the matter. The first instance, which the Claimant cites is *the delay in giving approval to the Claimant to procure orders for materials*. Indeed, there are e-mails dated 25/01/2017 and 27/01/2017, (See **Exhibits C-46, C-46/1, C-47 and C- 47/1** etc.) wherein the Claimant has requested the Respondent to grant approval for placing orders with the vendors. The Respondent has not even made a reference to these e-mails. It is not in dispute that these e-mails were not replied to. In the course of arguments, what was submitted is that *approvals were not necessary at all, if the orders were to be placed with the approved vendors*. Indeed, this may be so, but the question that arises is : *why did the Respondent not clarify this aspect of the matter, at that stage itself.* The Respondent could have replied, when the Claimant was seeking such approvals / permissions, that such permissions were not necessary and that the Claimant was free to place orders with the approved vendors.

68. It must be understood that the project of this type would require full co-operation of both the Parties for a successful completion. It is not expected of the Party that employs the contractor for carrying out the work, not to bother about the delay if the liability for such delay can be fastened upon the contractor. Even if the Claimant was making unnecessary communications, as has been put forth in the arguments, it would have been appropriate on the part of the Respondent to have clarified the same at that stage itself. Not having done so, the Respondent has also to share the blame for the delay which was caused because of the Claimant's seeking such approvals and non-communication with respect to such approvals by the Respondent. It is only during the meeting held on 09/05/2017 that the Respondent appears to have clarified this aspect *viz., approval from the Respondent was not necessary for placing the orders.*

69. The issue of delay / slow progress is a complex one. It is quite possible that the delay with respect to a specific item of work would be attributable to one party and the delay with respect of another item of work would be attributable to the other. Again, the Party held responsible for the delay in respect of a specific item of work would often attribute the cause of such delay to some previous act or omission of the other party. Consequently, the cause for the 'slow progress' needs to be ascertained, by examining the evidence - oral and documentary. What is ultimately required to be decided is *whether the slow progress of the work would amount to breach of contract by the Claimant and whether termination of contract on that ground would be justified.* In this case the time for completion of the project

was, from time to time, extended by the Respondent, either directly or by necessary implications of its conduct. Till the termination of contract, there was continuous correspondence between the Parties (except for a gap during the period from October, 2017 to February, 2018) about work-related issues and at the time of termination of the contract, there were full discussions between the Parties about the period during which the work should be completed, the terms of payment, etc. and several other aspects. In these circumstances, though the progress of the work was slow, it could not have been by itself, sufficient to justify the termination thereof at the given point of time.

70. Nothing has happened properly in this contract, from the beginning. To begin with, the tender notice was issued only in respect of the work that was supposed to be carried out on the runway of the length of 2500 meters. When the tender was awarded, it was known to the Respondent that there would be an extension to the runway by about 700 meters. Before the formal acceptance was communicated to the Claimant, the Claimant was informed that there would a 'slight increase' in the scope of the work due to the extension of the runway. The assessment of the revised BOQ was also shared before the work order was issued. However, the contract was signed only in respect of the runway length of 2500 meters. In other words, the contract was signed *as if* the work was to be carried out on the runway of 2500 meters only. Even the estimated cost of the project was based on the runway length of 2500 meters. *Though it is agreed by both the Parties that the cost was later on varied and increased to Rs.7,53,52,263/-* (*Rupees Seven Crores Fifty Three Lakhs Fifty Two Thousand Two*

Hundred and Sixty Three Only), it was not recorded in any document. In any case, no such document is on record. Now, the Respondent is a Government Company. When the cost of the work was increased and a particular amount was agreed to be paid for the work done by the contractor i.e. the Claimant, there ought to have been some record of the revised cost and revised programme of work. That was not done. The time for completion of work was stipulated to be of five months from the date of work order dated 07/12/2017 and the Respondent unreasonably maintains that the stipulated period for completion was over on 07/07/2017; in spite of the fact that the work was to be done on extended runway also, which did not exist till then. The evidence shows that the work of extended runway commenced after 12/07/2017 (i.e. after the stipulated period had expired) and it was over only in February, 2019. The contract was executed by taking the figure of Rs. 5,12,34,567.89/- (Rupees Five Crores Twelve Lakhs Thirty Four Thousand Five Hundred and Sixty Seven and Eighty Nine Paise Only). Emphasis has been placed by the Respondent on a general condition in the contract *viz.*, that 'for the extra work undertaken by the contractor, he would be paid as per the Scheduled Rates', and suggesting that, 'therefore, it was not necessary to record to correct measurements and the revised cost in the contract agreement'. The point is not whether the Respondent was entitled to do that, but the point is that the Respondent itself was not sure as to the exact scope of the increased work and the revised amount of the cost to be paid to the contractor i.e. the Claimant, for the additional work. At the time of acceptance of the bid itself, the Claimant had requested the Respondent to define the scope of the additional work, which was not done. When the matter was being handled in such a manner, there were

bound to be difficulties in smooth and efficient handling of the contract. After all, there would be so many aspects which would need clarification; and for want of clarification on those aspects, the Claimant would, at times, be unable to proceed with the work.

71. If one has to go into the causes for the delay, or the slow progress of the work, several aspects will come into picture and the conclusion that can be safely arrived at would be that the delay or slow progress cannot, certainly, be attributed entirely to the Claimant, and the Respondent has also contributed to it by its own acts – or rather its inactions – and lack of precision. Moreover, the most material question that needs to be considered is whether the question of delay could be raked up after the period for completion of the project was extended from time to time. In my opinion, the answer has to be in the negative. The correspondence between the Parties reveals that, from time to time, the matter was being discussed between them and various reasons for not being able to do a particular work, or complete it within time, were being advanced by the Claimant. Such reasons have been accepted by the Respondent on a number of occasions. It is not necessary to go meticulously into every reason advanced by the Claimant for not being able to do a particular item or piece of work within the stipulated time, or to examine whether the Respondent indeed committed any serious defaults in making the work fronts available. *Broadly speaking, it however, cannot be disputed that the Respondent was also not well equipped so as to enable the Claimant to proceed smoothly with the work.* The delay in the completion of the project, or the slow progress of the work, was a matter well within the sight and knowledge of the Respondent. The Respondent either

accepted the reasons for the delay or tolerated such slow progress. In these circumstances, the Respondent cannot benefit by highlighting 'slow progress' and expecting it to be treated as a conclusive indicator of the breach of contract by the Claimant.

72. The following two conclusions emerge from the aforesaid discussion:

i) That the Claimant exhibited ignorance of the terms and conditions of the contract and violated several such terms, is established.

ii) However, such violations, or breaches were treated as insignificant / minor by the Respondent, who, in spite of such breaches / violations and in spite of allegedly noticing them, kept on accepting the performance of the contract from the Claimant.

The conclusion no. ii) being of importance in determination of the dispute and the rights of the parties, needs to be further elaborated. As an illustration, the first and most obvious breach committed by the Claimant is with respect of submission of work programme and cash flow estimate. The Claimant's defiance was just ignored by the Respondent and the performance of the contract was accepted from the Claimant. It is a fact that despite the PMC raising several objections, the Claimant was not only allowed to carry on the work, but was also paid, from time to time, for the work done by it. The PMC had been categorically pointing the various lapses on the part of the Claimant and for the reasons best known to the Respondent, it did not go by the advice of, or the recommendation of, its own PMC. It is not necessary to point out all the relevant communications in that regard, but reference to **Exhibit R-8**, which is a report made by

the PMC to the Principal Secretary, Civil Aviation, GAD, on 26/10/2018, cannot be avoided. Incidentally, this document was brought on record by the Claimant itself, in the cross-examination of its witness. In this document, the PMC has made many serious observations about the failure and breaches committed by the contractor. In fact, the report contains statement, *inter alia*, indicating that the Type Test Reports in respect of Isolating Transformers submitted by the Claimant, which were purportedly signed by one Mr. V.P. Singh, were actually not signed by him at all. It is suggestive of a false document having been relied upon by the Claimant. The PMC has also pointed out that the submission of bills and the payments of amount had not been in accordance with the terms of the contract and that in spite of the PMC pointing out all the relevant short comings in the work, the bills were being cleared by the Respondent (Paragraph 17 of the report). The PMC, apparently, felt so much frustrated that they requested to be relieved from the work of supervision and approval of the AGL work (apparently, this was not done). Clearly, the aspect of submission of bills, obtaining certificate of interim payment from the Engineer and the entitlement to receive the same only thereafter, has been advanced during the arguments, but evidently, the Respondent had been permitting the Claimant to directly submit the bills to them and instead of acting on PMC's recommendation, was directing the PMC to recommend the payment of such bills.

It is clear that the Respondent had been extremely tolerant with the Claimant and had been ignoring even the objections of a serious nature raised by the PMC concerning the work and performance of the contract by the Claimant. Logically, there would

be two possibilities why this was happening : *Either the Claimant had considerable influence over the Respondent and therefore, the Respondent neglected the objections / recommendations of the PMC, or the Respondent did not find any force or substance in the objections / recommendations of the PMC, and therefore treated the breaches / violations as insignificant and minor.* Whatever may be the case, the fact remains that when the Respondent itself was not keen on a strict observance of the various terms and conditions, it does not lie in their mouth to contend now, that the breach of those terms and conditions was serious, was of fundamental terms of the contract and/or that it amounts to *repudiation of the contract. In these circumstances, I am unable to hold that these are breaches of any important or fundamental terms of the contract, inasmuch as the Respondent itself has treated them to be unimportant. Otherwise, the Respondent would not have entertained the performance of the contract by the Claimant, without insisting on the compliance with these requirements and in spite of a clear exhibition by the Claimant that they did not care for these conditions*. The Respondent had, clearly, condoned the lapses on the part of the Claimant and had acquiesced in the breaches, or had waived the performance of the terms and conditions which are now emphatically put forth.

73. In this context, it is contended by Mr. Shardul Singh, the learned counsel for the Respondent that the Claimant has not pleaded that there was acquiescence or waiver of the terms and conditions of the contract by the Respondent, or that the breach was of non-essential or non-fundamental terms of the contract. He submitted that the Claimant's case is that it has not committed any breach of the terms

and conditions of contract, and it is not the case of the Claimant that such breaches were condoned or waived by the Respondent. According to him, therefore, it is not open for the Claimant to allege or argue waiver, or argue that the breaches are not of fundamental or essential terms of the contract. He has relied upon the observations made by Their Lordships of the Supreme Court in the case of ***Bachhaj Nahar vs. Nilima Mandal & Anr., (2008) 17 SCC 491***, in order to support his contention *that a question that does not arise from the pleadings cannot be decided by the court and that the court cannot make out a case for a party which is not pleaded, and that no amount of evidence in support of a fact which is never pleaded, can be looked into*. According to him, therefore, the question of waiver cannot be taken into consideration.

74. It is true that the Claimant has not *specifically* pleaded any case of waiver or acquiescence.

75. However, the aforesaid principle which is well accepted, cannot be construed as laying down any technical rule. It is recognized as a rule of substantive justice. The object and purpose behind the rule are *that the pleadings should ensure that the issues between the Parties are clearly defined so that each Party is fully alive to the questions that are likely to be raised or considered and have an opportunity of placing the relevant evidence before the court for consideration*. Where a case is not specifically pleaded, but the pleadings, in substance, contain the necessary averments to make out that particular case, there is no bar to consider it. In the case of **Bachhaj Nahar (supra)**, the original plaintiffs had filed a suit for

declaration, possession and injunction in respect of the suit property. The case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The suit was partly decreed by the trial court, but the first appellate court dismissed it. The High Court, in second appeal, took a view that the easementary right of the plaintiffs over the suit property was made out and that a case based on such easementary right could be considered even in the absence of the pleadings or issue relating to the easementary right as the evidence available was sufficient to make out such a case. On appeal, the Supreme Court of India, after referring to a number of its previous decisions, held that in the absence of pleadings and an opportunity to the first defendant to deny such a claim, the High Court could not have, while rejecting the plea of the plaintiff, granted the relief of injunction by assuming that the plaintiffs had an easementary right to use the property.

76. If the SOC is examined, the aspect of any waiver or acquiescence has not been specifically touched therein, as the case of the Claimant is that the Respondent had illegally terminated the contract, without any proper reason. However, when the Statement of Defence (SOD) and Counter Claim was filed, while replying thereto, the Claimant has made certain averments which indicate its case that the Respondent had earlier not taken any objection, with regard to the faults which were highlighted in the SOD and Counter Claim. The pleadings *do indicate* the Claimant's case that the Respondent was not entitled to raise such objections after having accepted performance of the contract from the Claimant for a considerable length of time i.e. for a period of about 2 years and when about 80

per cent of the work was completed. Now, the question is whether a finding that the compliance with a number of terms and conditions in the contract was not insisted upon by the Respondent, cannot be arrived at because the Claimant has not specifically pleaded a case of waiver of the relevant terms, or Respondent's acquiescence into the non-performance thereof. In the case of **Bachhaj Nahar (supra)** on which reliance has been placed by the learned Counsel for the Respondent, Their Lordships observed that the principle relating to circumstances in which the deficiency in, or absence of, pleadings should be ignored, was stated by the Constitution Bench of the Supreme Court in ***Bhagwati Prasad vs. Chandramaul, AIR 1966 SC 735***. Their Lordships quoted from paragraph 10 of the said reported judgment (see paragraph 15 of the reported judgment in **Bachhaj Nahar)**. Their Lordships also referred to the judgment of the Supreme Court in ***Ram Sarup Gupta vs. Bishun Narain, AIR 1987 SC 1242***, and quoted from paragraph 6 of the reported judgment. After taking into consideration the principles enunciated in the aforesaid two decisions, in the light of the observations in that regard in the case of **Bachhaj Nahar (supra)**, I am of the opinion that this is a matter where the case of waiver of the terms and conditions of the contract, or the Respondent having acquiesced in alleged breaches thereof, can be considered in spite of the absence of any specific pleading by using the said term. Much documentary evidence, consisting of the correspondence between the Parties, has been annexed to the SOC, SOD and Counter Claim and the Reply to the Counter Claim. In these documents and the correspondence, disputes regarding the alleged failures on the part of the Claimant and the Claimant's reply thereto have been recorded. The

documentary evidence shows that the issues such as submission of work programme or cash flow estimate, which were to be done in the initial stages were given up in the further correspondence after the work had been allowed to progress. This fact is evident from the correspondence. Moreover, the fact of having made payments to the Claimant for the work done, has been specifically raised by the Claimant in the previous correspondence in reply to the allegation of the breach of the terms of the contract, or of the work being delayed, or being of sub-standard quality. *In such a situation, the question as to whether the alleged breaches of the contract on the part of the Claimant had been tolerated by the Respondent and whether in spite of fully being conscious of such alleged breaches, the Claimant was allowed to carry out the work and was paid for the work from time to time, necessarily arises*. **The conduct of the Respondent** in permitting the Claimant to continue with the work in spite of alleging breaches, and in spite of having given 'show cause' notices; and further, making payments to the Claimant from time to time and negotiating with it and discussing about the modalities of further work and the methods of working out the costs and payments till the termination of the contract, **needs to be interpreted in the light of the respective cases as put forth by the Parties**. The various stands of the Parties, having some variations at times, were well known to the Parties when the proceedings commenced and no Party can claim to have been taken by surprise with respect to a particular stand by the other. If the pleadings are given a liberal construction, without adopting any pedantic approach – which would be the right course – then it cannot be said that in the absence of a specific case put forth by the Claimant, regarding the waiver or acquiescence, such a case

cannot be considered. Undoubtedly, the Claimant's pleadings could have been better, dealing specifically with the aspects which are put forth in evidence and in arguments / written submissions. But, in substance, a case is certainly made out that the Respondent never objected to the Claimant's work or performance, which covers the aspect of waiver and having tolerated a particular breach by acquiescing into it.

77. A case is made out from the pleadings that the breaches which are highlighted in the termination notice were either not raised earlier or that they were given up later. In spite of the previous two 'show cause' notices (before the one dated 20/06/2019 – **Exhibit C-33**), no action to the detriment of the Claimant was taken and the issues raised therein were dropped after receipt of replies thereto from the Claimant; and the Claimant was instructed / permitted to carry on the work further from time to time and was also paid for the same from time to time. In these circumstances, the contention that *the question of waiver of the conditions alleged to have been breached or the Respondent having acquiesced in such breaches or the breaches being of non-essential or non-fundamental terms cannot be considered because there is no specific pleading in that regard or that considering this question would amount to making out a new case for the parties*, cannot be accepted.

78. To conclude, the Claimant did commit various breaches of the terms and conditions of the contract; but the Respondent had by its conduct, indicated that it had waived the insistence on said terms and conditions, and / or had treated the breaches as insignificant and

minor – not of any fundamental or essential terms of the contract.

79. So far as the question of the breach of contract by the Respondent is concerned, as already observed, the Claimant has, generally speaking, not alleged breach of the terms of the contract by the Respondent *with reference to any specific terms of the contract*. There is a general grievance that the Respondent lacked the expertise and ability to understand the requirements for the successful completion of theproject. That, it did not, or could not, hand over the work fronts, that it had no answers to legitimate queries raised by the Claimant; and that because of its unpreparedness, it could not make the work fronts available to the Claimant resulting in delay in completion of the project. In this case, the correspondence / documents on record indicate one thing with certainty i.e. *that the work fronts were not always available.* On several occasions, the Claimant was asked / directed to resume work stating that work fronts had been made available so as to enable him to re-commence the work. Such type of communications contain a tacit admission of the fact that at least for some time prior thereto, the work fronts were not available. So far as breach of a particular or specific termof the contract is concerned, it has been alleged in the course of evidence, that the withdrawal of work of the sign boards and Wind Cone Indicator was done in violation of the term of the contract. However, like the Respondent, the Claimant has also not exercised an option to rescind / terminate the contract on account of the alleged breaches and continued to perform the same, and therefore these aspects need not be gone into further deeper. What however, is significant is that the termination of the contract by the termination letter dated

05/07/2019, itself appears to be a breach of the contract. Since a separate point / issue in that regard has been framed, it would be appropriate to elaborate this aspect while discussing that issue, and it is sufficient to record here that *even the Respondent apart from condoning the various lapses on the part of the Claimant and paying him for the work done from time to time – has itself also committed breach of the contract.*

In the result, the point nos. 3 and 4 are answered accordingly.

As to Point No. 5

80. This issue / point has been wrongly framed. This is evident from the issue no. 9, which is to the effect that *whether the contract could have been substantially completed within the period of 5 months, irrespective of the extension (*emphasis supplied*)*. It has been framed on the basis of the submissions made by the Counsel for the Parties at the material time and in view of their agreement that such issue exists. But, in reality, the Claimant's case is not that the extension of the runway was *unforeseen* when the contract was entered into, or that it is *because of the extension* that the work could not be completed within 5 months.

This point therefore, does not arise for consideration / determination.

As to Point No. 6

81. This issue as framed, does not reflect correctly the precise point requiring determination and therefore, the ambiguity in that regard

needs to be removed by clarifying, that that the Claimant did not complete the work within the stipulated time and even till the date of termination i.e. 05/07/2019 the work had not been completed, is not in dispute at all; and the only question is whether the Claimant had any lawful or valid excuse for that. It has already been seen that the GFC drawings were given to the Claimant only in May, 2017 and this has been admitted by Mr. Rajkumar Barrey (RW-1). It has also been seen that the Claimant had been, from time to time, communicating with the Respondent about the progress of the work and the difficulties faced by it, and the Respondent had been from time to time, extending the period of time stipulated for completing the work. A number of ambiguities existed regarding the terms of the contract, or the precise method or sequence in which the work was to be done, because though there were meticulously drafted terms of the written contract, the obvious and oral deviations therefrom were not put in writing. For instance, the revised cost or price was not reduced to writing. The work was expected to be done also on the extended runway which was not in existence, and when it would actually come in existence, was also not known. The scope of work was increased, but the period for completion, in writing, was not extended on record. The work was to be completed by 07/07/2017; and when it was not completed within that time, the Respondent, in spite of issuing 'show cause notices' did not terminate the contract. The Claimant had replied to the 'show cause' notices dated 28/07/2017 (**Exhibit C-20 / R- 3**) and 31/07/2018 (**Exhibit C-27**) by replies dated 31/07/2017 [**Exhibit C-21 (Colly.)**] and 14/08/2018 (**Exhibit C-48**) respectively, and sought to put forth some justification for the delayed progress of the work. When no action has been taken on the notices and the Claimant was allowed to

continue further work, it is clear that the Respondent considered the reasons and justifications put forth by the Claimant as valid. Since the reasons given by the Claimant, were, from the time to time, accepted by the Respondent and the time to complete the project was time and again extended (ultimately, till 31/07/2019), the Claimant is deemed to have had valid excuses and lawful reasons for not being able to complete the work.

In the result, the point no. 6 is answered accordingly.

As to Point Nos. 7 and 8

82. The evidence that needs to be considered with respect to these points is common and therefore, these points may be discussed together. Clearly, there were a number of requirements if the night time operations were to commence and the Respondent had not fulfilled the requirements. That the night landings did not commence was not due to the failure of the Claimant in completing the work by July, 2017, is clear from the evidence. Though the Respondent's witness, Mr. Rajkumar Barrey (RW-1), initially claimed that 'if the Claimant would have completed the work under the tender, then night landing would have started at Shirdi Airport', in further cross-examination, when asked about the requirements for successful provision of night landing facilities, he was unable to answer and replied that 'he would have to check on those aspects.' However, when he was further questioned on those aspects on the next occasion, he had to admit that even after the Claimant completing the work as per the tender, the night landing process could not have been started. **In fact, he had to admit that the quantities mentioned in the tender awarded to the**

Claimant were insufficient for the night landing process to commence (Q/A. 350). Significantly, no arguments have been advanced by the Respondent in respect of this issue.

Resultantly, the point no. 7 is answered in the negative and the point no. 8 is answered in the affirmative.

As to Point No. 9

83. This issue also has been wrongly framed. It is hypothetical and argumentative, and in reality, does not arise for determination. As discussed in connection with determination of some other issues, the period for completion of work was extended from time to time. Nothing turns on whether the work *could have been substantially completed within 5 months.* This point, therefore, does not arise for determination.

As to Point No. 10

84. This point also has been framed on wrong presumptions. In fact, this issue though framed in view of the agreement of the Counsel for the Parties that such issue arises, it actually does not arise at all. The basis on which this point came to be framed is a contention raised by the Claimant *that since the tender was for a particular BOQ and since the agreement was also entered into with respect to the runway 2500 meters, the Claimant could have refused to carry out the additional work* and the contention of the respondent in *reply that the contractual provisions, and in particular Paragraph 4 in the Preamble of Volume III and Paragraph at Serial No. 21 of the Contract Data mandate that*

the contractor was bound and liable to carry out all works including any extra work that is not mentioned in the BOQ (these contractual provisions have been referred to and emphasized by the Respondent, even with respect to the other work, which was not specifically referred to in the contract / tender documents, when a dispute whether a contractor was obliged to do such work or not, has been raised).

85. The Claimant, in the Statement of the Claim itself, has come up with a case that the revised BOQ occasioned by extension of runway by 700 meters was **accepted** by the Claimant and therefore, the revised work was **agreed** between the Parties for Rs. 7,53,52,263/- (RupeesSeven Crores Fifty Three Lakhs Fifty Two Thousand Two Hundred and Sixty Three Only). In fact, the Claimant has claimed that *it started working on the revised quantities provided by the Respondent (paragraph 5 of the SOC)*. As such, the contention of the Claimant is contrary to the pleadings. Even otherwise, what benefit the Claimant would secure by claiming that 'it did the additional work though it was not obliged to do' is difficult to understand. It is surprising that the Parties should have projected that such a point arises for determination. Whether the Claimant was obliged or not, it did, **in fact**, accept the additional work. The Claimant having voluntarily accepted the additional work, the question whether it was obliged to carry it out or not, or whether it could have refused it, does not become a matter necessary to be decided while adjudicating this dispute.

As to Point No. 11

86. This relates to the work of chiselling hard rock, and some discussion in this regard has already been made in earlier part of this award. The issue is specific about the Claimant's refusal, *by its e-mail dated 25/05/2019* to carry out the work approved by the Respondent by e-mail dated 15/05/2019. Undoubtedly, there are assertions to the effect, that by the said e-mail dated 25/05/2019, the Claimant refused to carry out the work as approved by the Respondent on 15/05/2019 and that he thereby displayed lack of willingness to work. However, the e-mail dated 25/05/2019 has not been tendered in evidence at all. When it was the case of the Respondent that the refusal was by a specific e-mail, the Respondent was obliged to tender the print out of that e-mail in evidence, get it marked and exhibited. Thus, for this reason alone, this issue may be decided against the Respondent i.e. in the negative.

87. The e-mail dated 15/05/2019 has, however, been tendered in evidence (**Exhibit R-28**). This e-mail which has been sent by Mr. Rajkumar Barrey (RW-1), speaks of a review meeting held on 14/05/2019 and records, *inter alia*, that the contract did not envisage the item of chiselling or breaking the hard rock and that the contractor was directed to do the said work which would be paid for as an extra item and the rates would be considered from the SSR. This e-mail also seeks approval for the work from Captain Sanjay Karve – the coordinator for the project. The print-out tendered before the Tribunal actually consists of two e-mails, both dated 15/05/2019 – one, as aforesaid by Mr. Rajkumar Barrey, *inter alia*, seeking approval for the work of chiselling hard rock and the other, from Captain Sanjay Karve, granting such approval. As aforesaid, that the Claimant, by its e-mail dated 25/05/2019 refused to carry out work is not proved for

the simple reason that such e-mail is not tendered in evidence and the contents thereof cannot be known. Moreover, if the subsequent e-mail dated 31/05/2019 from Captain Sanjay Karve, which is on record (**Exhibit C-31**), is looked into to see whether there is any reference to the Claimant's alleged refusal to carry out the work (allegedly by the Claimant's e-mail dated 25/05/2019), it does not show that the Claimant had, at any time, refused to do the work. The Claimant, apparently, only wanted clarity in how the quantum of the work would be ascertained / measured, the amount payable to it for this work and the terms of payment. This cannot be called as lack of willingness to work. In fact, it has not been treated as such either by Captain Sanjay Karve when he addressed the e-mail dated 31/05/2019, or by the Respondent.

Hence, the point no. 11 is answered in the negative.

As to Point No. 12

88. The Respondent's claim is that the said amount was paid as an advance. The Claimant, however, states that the said payment was made against pending invoices which were in excess of Rs. 2.06 crores.

89. It cannot be accepted that the amount was paid as an advance. In the first place, on the Respondent's own statement, no amounts were payable as advance, as per the terms of the contract. Therefore, an amount should have been paid as an advance, cannot easily be inferred. Undoubtedly, the Respondent has tried to make out a case that the Claimant had pleaded financial difficulties and had demanded

advance payments and in the interest of the work, the Respondent made such payments though the contract did not provide for such advance payments. Now, it is not possible to accept this. Under the contract, even if advance payments were possible (it seems from the tender conditions that mobilisation advances were possible), still, there were a number of conditions to be fulfilled before making such advance payment – the one significant being providing of a bank guarantee. The payment has not been made on fulfillment of such conditions and admittedly, no bank guarantee had been asked for. It also appears that some payments were made by the Respondent to the Claimant after the payment of the said amount of Rs.1.40 crores, which makes the theory that the said amount was paid as an advance, further difficult to be accepted.

90. Anyway, the matter stands concluded from the contents of the e-mail communication dated 21/08/2018 between Captain Sanjay Karve and the Respondent, (**Exhibit C-51**) a copy of which was marked to the Claimant also. It is evident from this e-mail that the amount of Rs. 1,40,00,000/- (Rupees One Crore and Forty Lakhs Only) has been given after noticing the progress of the work done. Apparently, the Claimant had made a claim for the payment of Rs. 2,06,00,000/- (Rupees Two Crores and Six Lakhs Only) for the works done, but Captain Sanjay Karve, *on reviewing the work*, approved payments only to the extent of Rs. 1,40,00,000/- (Rupees One Crore and Forty Lakhs Only). It is clear that the said amount had been paid towards the work done by the Claimant, and was not paid as an advance.

Hence the point no. 12 is answered accordingly.

As to Point No. 13

91. These two points are somewhat connected, inasmuch as the point No.13 – particularly in so far as it relates to the 'show cause' notice dated 20/06/2019 – cannot be viewed in isolation without touching the aspects relating to the point No. 14 – i.e. as to the termination of the contract. It is, therefore, desirable and convenient to discuss them together. The Point No.13 came to be framed, along with the other points for determination, on the Counsel for the Parties submitting the Draft Issues and on their agreement that such points do arise for determination in the present proceedings; but what is meant by the word 'unlawful' as used here, has not been made clear. The word 'unlawful' is broad and is not capable of a fixed or precise meaning which is given to it in all and different types of situations. Theoretically, the notices could be termed as 'unlawful,' when they are issued without there being any provision in respect of issuance of such notices in the agreement / contract, or when they are issued in contravention of the provisions in the agreement / contract. Sometimes, the word 'unlawful' is also used in connection with an act to denote that it has been done on false, wrong or incorrect grounds, or with *mala fide* intentions. The Claimant's case appears to be that they are based on false grounds and that, at any rate, have been issued with *mala fide* intentions. Apparently, what is expected to be decided by framing this issue is, whether there were justifiable grounds for issuing the 'show cause' notices.

92. The 'show cause' notices dated 28/07/2017 (**Exhibit C-20 / R-3**)and 31/07/2018 (**Exhibit C-27**), were duly replied to by the Claimant by

his replies dated 31/07/2017 [**Exhibit C-21 (Colly.)**] and 14/08/2018, respectively (**Exhibit C-48**). Admittedly, no further action, detrimental to the interest of the Claimant was taken by the Respondent, pursuantto the 'show cause' notices. In other words, the Respondent did not take the action threatened in the 'show cause' notices and allowed the Claimant to continue further with the work. It is evident that first notice dated 28/07/2017 was issued at an early stage, before the commencement of the work and thereafter, the Claimant was allowed to carry on the work and for a period of about 2 years, the work went on. Similarly, after receipt of reply (**Exhibit C-48**) to the second notice, no further steps were taken by the Respondent. Interestingly, the first show cause notice raises several specific issues such as failure to submit the work programme, cash flow estimate, deployment of staff, supply and installation of defective material and a number of other failures and breaches of the terms of the contract. The second notice dated 31/07/2018 (**Exhibit C-27**) on the other hand, speaks only of the delay in completion of the project, reminding the Claimant that it was supposed to complete the work within 5 months, *which period would end on 16/07/2017* and that work fronts were made available to the Claimant as per the e-mail dated 25/05/2018 (**Exhibit R-26**) requesting the Claimant to resume the work from 28/05/2018 and that once again, on 02/07/2018, the Claimant was asked to resume the work. The points regarding defective work, raised earlier, are clearly given up in the second show cause notice. Not only did the Respondent allow the Claimant to further proceed with the work but also made payments to the Claimant from time to time. There are a number of communications between the Claimant and Respondent and Captain Sanjay Karve, from which it is

evident that the issues raised in the 'show cause' notices were given up and were not touched in the subsequent correspondence between the Parties, till the third 'show cause' notice was given. The Respondent has either accepted the explanations of the Claimant, or, at any rate, waived or acquiesced into the wrongs which were alleged in the said notices. When such is the position, the question *viz.*, *whether those 'show cause' notices had been properly issued or not, or whether they were 'unlawful'*, would be purely academic, and does not require determination, and such, need not be answered.

93. The only question, therefore, will be of the notice dated 20/06/2019. It must be observed that this notice refers to the previous 'show cause' notices also and to the alleged unsatisfactory replies given to the said 'show cause' notices. In my opinion, the weight of the previous two notices (and that the replies given to them were unsatisfactory), could not have been thrown by the Respondent in this manner, when that the replies were unsatisfactory was not communicated to the Claimant at the material time; when no action detrimental to the Claimant was taken pursuant to the said 'show cause' notices; when the performance of the contract was accepted thereafter from the Claimant and the Claimant was also paid from time to time for the works done by him. The assertion of the Claimant's witness in his Affidavit of evidence regarding the payments made to the Claimant has not been challenged. This shows that payments of Rs. 85,15,059/- (Rupees Eighty Five Lakhs Fifteen Thousand and Fifty Nine Only), Rs. 71,94,417/- (Rupees Seventy One Lakhs Ninety Four Thousand and Four Hundred Only) and Rs. 86,16,261/- (Rupees Eighty Six Lakhs Sixteen Thousand Two Hundred and Sixty One Only), totalling to Rs.

2,43,25,737/- (Rupees Two Crores Forty Three Lakhs Twenty Five Thousand Seven Hundred and Thirty Seven Only) were made to the Claimant on 23/11/2017, 23/04/2018 and 27/06/2018 respectively. All this was after the show cause notice dated 28/07/2017 and the Claimant's reply dated 31/07/2017. Similarly, after the second notice dated 31/07/2018 (sent about one year after this first 'show cause' notice) also, a number of payments were released to the Claimant. The Claimant's witness has mentioned about such payments – i.e. payments of Rs. 1,40,00,000/- (Rupees One Crore and Forty Lakhs Only), Rs. 63,92,822/- (Rupees Sixty Three Lakhs Ninety Two Thousand Eight Hundred and Twenty Two Only), Rs. 19,31,755/- (Rupees Nineteen Lakhs Thirty One Thousand Seven Hundred and Fifty Five Only), Rs.16,06,743/- (Rupees Sixteen Lakhs Six Thousand Seven Hundred and Forty Three Only) and Rs. 48,00,000/- (Rupees Forty Eight Lakhs Only), totalling to Rs. 2,87,31,320/- (Rupees Two Crores Eighty Seven Lakhs Thirty One Thousand Three Hundred and Twenty Only) – made to the Claimant on 04/10/2018, 04/02/2019, 02/03/2019, 19/03/2019 and 30/04/2019, respectively. There is no challenge to this evidence. Rather, there is no dispute on this at all, and the only dispute that has been raised by the Respondent in this regard is that, some of these payments were made merely as an *advance*. Therefore, throwing the weight of the previous two notices in the third notice and implying, thereby, that the Claimant is liable for the breaches, as alleged in those notices, or suggesting that the continuity of the cause of action remained (though the issues raised by the previous two notices were clearly given up and were not felt to be sufficient to treat the contract as breached by the Claimant and terminate it) was not proper.

94. It may be noted at this stage that the Conditions of Contract for Construction of Building and Engineering Works Designed by the Employer, General Conditions (First Edition 1999) published by the '**Federation Internationale des Ingénieurs-Conseils**' (FIDIC) have been made applicable to the contract, subject to modifications and amendment as shown in Part II of the COPA. The contract clearly says so in the Tender document (**Exhibit R-5**) [See Volume I, Section II (Part I), page nos. 295 and 296 of the SOC, Volume C-3].

95. The 'show cause' notice dated 20/06/2019 does not speak about any particular contract provision under which it has been issued. Since the FIDIC provisions have been made applicable, the 'show cause' notice is supposed to have been issued pursuant to the clause 15.1. The COPA does not show that any amendment has been made to clause 15.1 except that a sub-clause 15.1.1 has been added which speaks of a 'notice to correct' in the event of the contractor failing to furnish a performance bond or guarantee, etc. and clearly, it is not applicable to the situation existing at the time of issuance of the 'show cause' notice. The clause 15.2 deals with the termination of the contract and has been modified by deleting the original sub-clause '15.2 (e)' and substituting it by another. The last paragraph of sub-clause 15.2 at page no.47 has been modified, replacing the same by another. The termination letter refers to the notice dated 20/06/2019 as a notice issued under clause 15.1 of the contract i.e. a 'notice to correct'. However, when the notice dated 20/06/2019 itself is actually examined, it does not refer to the said clause i.e. clause 15.1, or show that it has been treated as a notice under clause 15.1 of the contract, which speaks of a *notice to correct*

(the earlier two 'show cause' notices also did not speak of a *notice to correct*).

96. The third 'show cause' notice dated 20/06/2019 (**Exhibit C-33**) places emphasis on the work having not completed within the period of 5 months from the date of work order i.e. 07/02/2017. Undoubtedly, there is a brief reference to the Claimant not adhering to the contract provisions *since inception of the work* (and the previous two 'show cause' notices, which as discussed aforesaid, is of no consequence), but clearly, the emphasis is on the delay and 'abandoning the site *even after* the work fronts were made available by the Respondent'. It is also alleged that the 61 core control cable for a length of 1 kilometer had been laid in an unprofessional manner, resulting in twists and damage and failure to supply additional CCRs at site.

97. The question about the legality, validity and justifiability of the show cause notice needs to be determined in the light of the position of the project at the material time, and the issues prevailing at that time as revealed from the correspondence between the Parties. As discussed earlier, the aspect of delay – on the face of it – has been raked up after having condoned it repeatedly for a long duration and after having accepted the performance of the contract and having paid to the contractor. Under the circumstances, it was not proper to call upon the Claimant's to 'show cause' about the delay in completing the work. Indeed, it was rather ridiculous to put emphasis on the work not having completed within the period of five months. The show cause notice doesnot raise any new issues and emphasizes the same old issues which had been already given up or settled.

98. Some of the statements made in the notice are contrary to the facts borne out from the record itself. For instance, the question of procurement of additional CCRs arose because CCRs already supplied were destroyed by fire; but it has been suggested in the ' show cause' notice that the Claimant had shown his willingness to procure the additional CCRs, which is rather misleading as this 'willingness' was on the payment of the cost of such CCRs by the Respondent. Moreover, the contract contemplated a 'notice to correct' before termination of the contract; and from the contents of the notice dated 20/06/2019 (**Exhibit C-33**) and its general tenor, it is difficult to construe it as a 'notice to correct', as contemplated by clause 15.1. It does not call upon the contractor / Claimant to carry out any particular work which it has allegedly failed to do, but is merely for the purpose of seeking an explanation as to why, for the past lapses – which were probably beyond repair and correction by the time the notice was issued – the contract should not be terminated.

99. On an overall consideration, I do not think that the issuance of the notice on the grounds mentioned therein, at that point of time, was justified. The notice has been issued at a point of time when, pursuant to much correspondence, the issue of the work of chiselling of hard rock was sorted out and when the modalities of that work were being discussed (See **Exhibits C-31** and **C-32**). Thus, in the circumstances, the notice dated 20/06/2019 must be held to be unlawful.

100. Coming to the aspect of termination of the contract – which is crucial – the contractual provisions in that regard, need to be examined.

101. The contract itself contemplates the manner in which it could be terminated. However, the Respondent, who has been otherwise meticulous in referring to the various provisions of the contract in support of various claims, has not referred to the provisions with respect to the termination of contract. The conditions of the FIDIC are applicable to the contract with such modifications as have been included in the contract, under the head 'Conditions of Particular Application' (COPA). The provision regarding termination of the contract i.e. clause 15.2 of the FIDIC, as modified by the COPA as aforesaid, reads as under:

> *"**15.2** The Employer shall be entitled to terminate the Contract if the Contractor:*
>
> *(a) fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1* ***[Notice to Correct]***
>
> *(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,*
>
> *(c) without reasonable excuse fails:*
>
> *(i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or*
>
> *(ii) to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub- Clause 7.6 [Remedial Work], within 28 days after receiving it,*
>
> *(d) subcontracts the whole of the Works or assigns the Contract without the required agreement,*
>
> *(e) *if the contractor is deemed by law to unable to pay his debts as they fall due or enters into voluntary or*

involuntary bankruptcy, liquidation or dissolution (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or becomes insolvent, or makes an arrangement with, or assignment in favour of, his creditors, or agrees to carry out the Contract values a Committee of inspection of his creditors, or if a receiver, administrator, trustee or liquidator is appointed over any substantial part of his assets, or if, under any law or regulation, relating to reorganization, arrangement or readjustment of debts, proceedings are commenced against the Contractor or resolutions passed in connection with dissolution or liquidation or if any steps are taken to enforce any security interest over a substantial part of the assets of the Contractor, or if any act is done or event occurs with respect to the Contractor or his assets which, under any applicable law has a substantially similar effect to any of the foregoing acts or events, or if the Contractor has Contravened sub clause 1.7, or has an execution levied on his goods, or if the Engineer certifies to the Employer, with a copy to the Contractor.

(As modified by the COPA)

(f) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:

(i) for doing or forbearing to do any action in relation to the Contract, or

(ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract, or if any of the Contractor's Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (f). However,

lawful inducements and rewards to Contractor's Personnel shall not entitle termination.

***In any of these events or circumstances, the Employer may forthwith forfeit the performance security and after giving 14 days notice to contractor enter upon the Site and the Works and terminate the employment of the Contractor without thereby releasing the Contractor from any of his obligations and liabilities under the Contract, or affecting the rights and authorities conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other Contractor to complete the Works.*

*****(As modified by COPA)***

The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.

The Employer shall then give notice that the Contractor's Equipment and Temporary Works will

be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor."

102. The termination letter dated 05/07/2019 (**Exhibit C-34**) apparently, terminates the contract forthwith, which does not appear to be permissible in view of the relevant provisions in the contract. It is evident that the contract could be terminated only *after* giving 14 days' notice to the contractor, in accordance with the sub-clause 15.2 of the FIDIC, as modified by substitution of the last paragraph at page no. 47 of the FIDIC Conditions of Contract for Construction 1999 Edition (the modified paragraph has already been reproduced above). Thus, the Respondent was not entitled to terminate the contract suddenly and without giving 14 days' notice. The relevant provisions indicate that in any of the events or circumstances as enumerated in the earlier part of the Clause 15.2, the employer would be entitled to forfeit the performance security; and after giving 14 days' notice to the contractor enter upon the site and terminate the employment of the contractor. The notice dated 20/06/2018 which has been termed as a 'show cause' notice, cannot be construed as a notice terminating the contract and giving 14 days' time for contractor to vacate. Incidentally, the said notice seeks to give to the contractor 7 days' time to show cause against the termination. That, by itself, might not have been a crucial aspect of the matter, but coupled with other faults in the said termination letter, weighs against the Respondent.

103. The termination letter refers to the Claimant not adhering to the contract provisions such as failure to submit basic work programme and also speaks of correspondence informing about the non-adherence to the contractual provisions, by referring to the alleged breaches or violations, which were already condoned by the Respondent. The termination letter emphasizes on failure of the Claimant to complete the work in the *stipulated time period,* without specifying what was the *stipulated time period* as per the extensions granted from time to time; and apparently refers to the period of 5 months stipulated initially. This is absurd because, admittedly, there was no question of completing the work, as revised, within a period of 5 months when the extended runway did not even exist. The termination letter speaks of the breaches of the contractual provisions by the Claimant, allegedly taken place before issuance of the earlier two show cause notices which were dropped without giving even a warning to the Claimant. On the contrary, on the Respondent's own showing, the Claimant was rewarded by making payments, part of which are alleged to be advance payments by going against the contractual provisions. Taking into consideration the factors which were long buried for arriving at the decision to terminate the contract, would be contrary to sound ethical and legal norms. The termination letter also records an observation 'that the firm's team was absent from site for the *extended durations*, for at least 3 occasions – 25/05/2017 to 24/06/2017, 01/10/2017 to 02/10/2018 and 28/05/2019 till date i.e. 05/07/2019'. It again refers to the firm's failure to commence the work in spite of agreeing upon the availability of work fronts and gives reference of an E-mail dated 19/06/2018 as an example of such failure (interestingly, the said e-

mail has not been tendered in evidence) and emphasizes on such 'unprofessional acts of the firm, coupled with breach of contractual provisions' having resulted in prolonged delay in completion of the project. Apart from this emphasis on delay, a number of failures of the Claimant, as alleged, are mentioned in the said termination letter, most of which have not been mentioned in the show cause notice dated 20/06/2019 (**Exhibit C-33**). Without going into the question as to whether termination on grounds, which are not taken in the 'show cause' notice / 'notice to correct' would be valid and legal in the light of the contractual provisions, it must be observed that termination on the grounds which were given up or not acted upon and that too, when much of the work had been done and accepted thereafter, is not justified. At the point when the termination was done, the Claimant was all set – after a prolonged correspondence regarding chiselling of hard rock – to carry on the work. The last communication in that regard as seen from the documents on record is dated 10/06/2019 (**Exhibit C-32**). This was preceded by the e-mail communication dated 31/05/2019 from Captain Sanjay Karve to the Claimant (**Exhibit C-31**) and further preceded by an e-mail communication dated 15/05/2019 (**Exhibit R-28**) from Respondent. All these communications show that the problems arising out of the finding of hard rock were seriously being considered by the Parties at the material time; and the modalities of the work, the amount to be paid for the work and the manner of payment, all were being considered. When the delay on the part of the Claimant had been repeatedly condoned and the performance of a number of conditions of the contract had been waived, the question of delay and breach of the contractual provisions should not have been made a ground for

termination at that point of time, when the work was nearing completion.

104. Interestingly, the termination letter records that provisional extension of time to complete the work up to **31/07/2019** had been approved vide e-mail dated 13/05/2019 (Page No. 3 of **Exhibit C-34**). Now, the e-mail dated 13/05/2019 is not on record but this assertion is repeated also in the Written Submissions of the Respondent (Paragraph 99, Page 47). Now, if extension of time had been granted till **31/07/2019**, then obviously, the contract could not have been terminated on the ground of delay or failure to complete the work in the stipulated time, before that date.

105. The termination letter also records an observation that 'from the firm's conduct, it appears that the firm has abandoned the work under the contract' (Page No. 4 of **Exhibit C-34**). Now, this is contrary to the oral and documentary evidence which shows that among other things, the problem arising out of the finding of the hard rock was being actively discussed and resolved between the Parties. The termination letter also refers to the absence of the firm's team from the site on at least three occasions and these periods are stated to be:

i) from 25th May 2017 to 24th June 2017;
ii) from 01st October 2017 to 02nd October 2018;
iii) 28th May, 2019 till date of termination i.e. 05th July 2019.

106. Even otherwise, the show cause notice **Exhibit C-20 / R-3** is dated 28/07/2017, and thus, after the period of first alleged abandonment. No action against the Claimant was taken for such alleged

abandonment and he was allowed to work thereafter. In fact, almost all the work done by the Claimant appears to have been done thereafter. The second period during which the work had allegedly been abandoned was of about 1 year. The second show cause notice is dated 31/07/2018 (**Exhibit C-27**). In this, the emphasis is not on abandoning the work, but on *failure to resume the work* from 28/05/2018 i.e. '*even after work fronts were made available to the Claimant*'. A reading of the notice indicates that at least for some period preceding 28/05/2018, the work fronts were not available at all and that the abandonment of work had been caused because of non-availability of work fronts. Further, as already observed, this notice was replied to on 14/08/2018 (**Exhibit C- 48**) and no action against the Claimant was taken and he was permitted to carry further work. Quite interestingly, during the period from 23/11/2017 to 27/06/2018 (i.e. after First show cause notice **Exhibit C- 20 / R-3**) an amount of Rs. 2,43,25,737/- (Rupees Two Crores Forty Three Lakhs Twenty Five Thousand Seven Hundred and Thirty Seven Only) was paid to the Claimant. Similarly, during the period 04/10/2018to 30/04/2019 (i.e. after Second show cause notice **Exhibit C-27**) an amount totalling to Rs.2,87,31,320/- (Rupees Two Crores Eighty Seven Lakhs Thirty One Thousand Three Hundred and Twenty Only) was paidto the Claimant. It is also interesting to note that amounts towards the work done have been paid to the Claimant during the period of his alleged abandonment of the work. After the second period of abandonment which is said to be for more than one year, he was immediately (on 04/10/2018) paid an amount of Rs. 1,40,00,000/- (Rupees One Crore and Forty Lakhs Only). All this emphasized in the context of treating such alleged abandonments as a ground for

termination of the contract. When the Claimant was not penalized for such abandonment and when the communications indicate that he was being asked / requested to resume the work by pointing out that the work fronts had been since made available, it is obvious that such a ground had been given up. Apparently, the Claimant had – or the Respondent thought that he had – some plausible explanation for his staff not being present at the site and for the work having stopped. Whatever the case may be, in the circumstances, the abandonment of the work during the first two periods cannot be taken as a ground to justify or support the termination. So far as the third period of abandonment of work, as mentioned in the termination letter (**Exhibit C-34**) is concerned, the evidence indicates that active discussion as to what should be done on discovery of hard rock, was in progress. When the matter was being resolved and negotiations were in progress, the Claimant cannot be blamed for the stoppage of the work, assuming it was stopped. There is no evidence that the Claimant was asked to do some other work and it was possible to do such other work without solving the issue of hard rock.

107. The termination of contract on the grounds mentioned in the show cause notice dated 20/06/2019 **(Exhibit C-33)** or the termination letter **(Exhibit C-34)** was not at all justified. These grounds did not exist at that point of time as they had already been given up. The option of terminating the contract on those grounds was not exercised at the material time. The only aspect which had not been dealt with earlier by the parties was of chiselling of hard rock, and according to the Respondent the Claimant refused to do the said work and thereby repudiated the contract. It has already been observed that it cannot be said that the Claimant had refused to do the said work. It may be

recalled that right on 10/06/2019, there has been correspondence which shows that there is a chain of e-mails dealing with the work of chiselling of hard rock and the modalities thereof and the payment therefor. It is only on 14/05/2019 that approval to carry on the said work was granted; and it was only on 31/05/2019 (**Exhibit C-31**) that clarification as to the manner in which it should be done was made. Thee-mail dated 10/06/2019 from the Claimant shows that there were further queries and issues which the Claimant wanted to be clarified (**Exhibit C-32**). Thus, when the matter was live and discussions between the Parties were going on, 'show cause' notice on that ground does not seem to be justified. In any case, from the evidence on record, it is not possible to come to a conclusion that the Claimant had refused to do the work and / or had thereby repudiated the Contract. Thus, the termination of the contract on the ground of alleged repudiation is not proper or legal.

108. As a result of the aforesaid discussion, I hold that the termination of the contract dated 06/02/2017 is unlawful and not valid.

Hence, the point nos. 13 and 14 are answered accordingly.

<u>As to Point Nos. 16 and 17</u>

109. These two points can be conveniently discussed together as they are based on the same evidence. These points arise out of the counter claim filed by the Respondent. The termination letter does not make any such allegation. According to the Respondent, after the termination ofthe contract, done *de facto* by the termination letter dated 05/07/2019, the Respondent examined the work done by the

Claimant and found the same to be defective and sub-standard. This was done by the Respondenton its own and without giving any notice to the Claimant. The Claimant was not associated, or made to participate in the process of inspection, which was apparently done for finding out whether the work was proper, or was sub-standard. The records of such inspection have not been produced before the Tribunal. Moreover, the procedure adopted by the Respondent violates the contractual provision, stipulated in clause 15.3 of the FIDIC Conditions of the Contract, as modified by COPA (at page no. 319 of Volume C-3 of the SOC), which, if followed, would have either supported the claim of the Respondent, or would have disproved it. Adverse inference can be drawn against the Respondent for not following the provisions of the said clause 15.3.

110. In these circumstances, that the work done by the Claimant was sub-standard or defective, cannot be accepted. The proof of the alleged fact that it was defective cannot be gathered or accepted from the mere fact that an order for the same materials was later on placed by the Respondent by inviting further tenders. There has to be satisfactory evidence in that regard, particularly because, this allegation does not find a place in the termination letter and the procedure in clause 15.3 was not followed – at least there is no such evidence and no record or memorandum of any such inspection that has been produced before the Tribunal. The work that was being done was continuously being supervised, as is evident from the correspondence between the Parties. Faults or defects noticed in the work were being pointed out by the PMC from time to time, but since no action in respect of such defects, was taken, it is obvious that the

Respondent either did not agree with the PMC, or accepted the quality of the work performed by the Claimant as satisfactory. Payments were also made to the Claimant, from time to time. The Respondent is a Government Company and it is impossible to believe that payments were being freely released without checking or examining the works done. Looking to the nature of work, which cannot be done in few minutes or hours, and which had been, in fact, done in a prolonged span of about two years, could not go unnoticed as regards its quality, or the defects contained in it, when the PMC and the Engineers of the Respondent were on the site.

111. In the circumstances, the 'finding' arrived at by the Respondent, about the work being defective and sub-standard, unilaterally, without notice to the Claimant and without even alleging it in the termination letter, cannot be accepted.

Hence, the point nos. 16 and 17 are answered accordingly.

As to Point No. 18

112. The Claimant has vehemently denied that the materials which were alleged to be defective as mentioned in clauses ii), iv), vi) and vii) of paragraph 55 B) of the Counter Claim were not supplied by the Claimant at all. There is no evidence that the same were supplied by Claimant. The Respondent has not cross examined the Claimant's witness on these assertions. No arguments have been advanced with respect to this point and no evidence in that regard has been offered or produced by the Respondent.

Therefore, the point no. 18 is answered in the negative.

As to Point No. 19

113. Indeed, orders for the same material / work were placed by the Respondent after the termination of the contract with the Claimant and that such orders were at inflated rates. In fact, there is no dispute on this and the Respondent has merely justified this by saying that due to inflation, the rates in the subsequent tenders are more. Really speaking, much does not matter on this. This has been mentioned by the Claimant to show *mala fides* on the part of the Respondent. Other than this, the fact that the subsequent contractor was given the contract at a higher rate, has no relevance. This issue, therefore, does not really arise.

As to Point Nos. 1 and 2

114. These two points can be conveniently discussed together. The entire evidence has been discussed while deciding the other points/issues. The entitlement, if any, of the Claimant and/ or the respondent to receive the amount needs to be examined in the light of the various claims and counter claims. While discussing the matter claim wise / counter claim wise, the following conclusions arrived at by me, need to be kept in mind.

A) The Claimant did commit breaches of some of the terms and conditions of the contract.

B) However, such breaches were condoned by the Respondent and Respondent has waived the performance of the breached terms and conditions; and has acquiesced into the breaches. At any rate, the Respondent treated such breaches as insignificant and / or of minor terms of the contract.

C) The Respondent did not find the breaches in question as sufficient to provide a ground or justification for the termination of the contract and did not terminate the contract at the time when breaches occurred. Instead, the Respondent kept on accepting the performance of the contract from the Claimant.

D) The Respondent terminated the contract at a point of time when there were no new grounds on which the termination would be justified. The Respondent basically terminated the contract on the basis of the alleged breaches which had already been condoned and / or after the performance of the breached conditions had been waived and / or after having acquiesced into the breaches.

E) The Respondent did not follow the contractual provisions for termination of the contract.

F) The Respondent has also committed breach of the contract basically by wrongfully terminating the same, disregarding the contractual provisions regarding such termination.

G) At certain points of time, the Respondent had grounds for putting an end to the contract on the ground of breaches committed by the Claimant, but it did not do so.

H) There existed ambiguities in some of the terms of the contract in view of the extension of runway and the increased scope of work and, *inter alia*, the not changing in writing, the period for

completion of project in spite of non-availability of, *inter alia*, the extended runway.

I) The Claimant, in spite of its case i) that there were various ambiguities in the contract ii) and that work fronts were not made available to it by the Respondent, did not rescind or terminate the contract and opted to continue to perform it.

115. The pleadings, the oral and documentary evidence, and also the arguments advanced leave no manner of doubt that both the Parties have been guilty of the breach of terms and conditions of the contract. Respondent, however, for reasons best known to its officials, did not terminate the contract, but continued to accept the performance thereof, from the Claimant. The Claimant at times, showed an attitude of total defiance when the faults and objections related to its work and performance were pointed out – as if it had, had some sort of assurance that the contract would not be terminated. The Respondent, who showed extreme leniency towards the Claimant's attitude of not caring for the objections raised by the PMC, suddenly terminated the contract by raking up all the issued which were earlier given up. The Respondent was not entitled to terminate the contract on the issues which were earlier given up – for whatever reasons.

116. In my opinion, under the circumstances, the Claimant is entitled for the cost of the work actually done by him, apart from damages for wrongful termination of the contract. <u>As a matter of fact, whether or not the Respondent would be guilty of terminating the contract wrongfully, the Claimant would always be entitled to receive the payment for the work actually done by him. In fact, the position that</u>

'even if a contractor would be guilty of breaches of several terms of the contract, still, the payment of the work actually done by him cannot be refused to him', cannot be disputed. The law in that regard, as also equitable considerations, leave no manner of doubt that the Respondent having accepted the work done by the Claimant, cannot now refuse to pay the actual cost of the work done.

117. In this context, one contention advanced by Mr. Shardul Singh, learned Counsel for the Respondent, needs to be considered. According to him, the Claimant is not entitled to receive any payment from the Respondent for the works actually done by him, as the contract is a 'lump sum contract'. He contended that 'in a lump sum contract, a contractor is not entitled to any payment unless the contractor has substantially completed the work'. In support of this proposition, he has placed reliance on an English case decided by the Court of Appeal - ***Bolton vs. Mahadeva*** *reported in* ***1972 1 WLR 1009***. It is his contention that in the present case, there is no substantial performance of the contract by the Claimant. This is disputed by the Claimant, by stating that he had completed about 80 per cent of the work in spite of the delays or difficulties encountered by him due to lack of knowledge, expertise and incapacity of the Respondent; and that the work had been substantially completed by it. Whether, in a given case, there was substantial performance of the contract, would always be a question of fact. But in the present case, I don't find it necessary to go into that. It is because, the contract does not appear to be a 'lump sum contract'. According to the Claimant, it was what is popularly called as 'item/percentage rate contract'. From the terms of the present contract, where the contractor was to carry out the work as

per the drawings BOQs and specifications in consideration of payment on measurements, it cannot be said to be a lump sum contract, as contended. It is not necessary to go deeper into this aspect and to discuss the features of a 'lump sum contract' and a 'percentage / item rate contract' because the form prescribed for submission of bid, as found in the Volume 3 of the tender document itself makes it clear that it is a form of bid for 'Percentage Rate Bid'. Thus, this contention of the Respondent needs to be rejected.

118. So far as the Respondent is concerned, irrespective of the fact that it condoned the lapses on the part of the Claimant and continued to accept further performance of the contract, it shall be entitled to recover from the Claimant compensation for the loss or damage actually sustained by it because of the breach of the terms of the contract by the Claimant, unless such breaches were expressly, or by necessary implication, condoned.

119. In this light, now the various claims made by the Claimant and counter claims made by the Respondent, be examined one by one.

120. The Claim Nos. 1 to 12 made by the Claimant, except the Claim No. 4, are of similar nature. They proceed on the basis that towards the supply of materials and execution of the works done by the Claimant in accordance with the contract, the Respondent has made only part payments. How much amount has been paid in respect of a particular supply/execution of work and how much is balance, has been mentioned in each claim by giving specific figures. By making these claims, demand for the balance amounts, allegedly due and payable to it for the work actually done, has been made.

121. **<u>Claim No. 1</u>:** This is in respect of supply of lights. It is submitted that for this supply, the Respondent has paid only 90% of the total amount and that the remaining 10% is payable. This amount has been quantified as Rs.17,57,155.74/- (Rupees Seventeen Lakhs Fifty Seven Thousand One Hundred and Fifty Five and Seventy Four Paise Only).

122. Now, in this regard, the objection of the Respondent is that there has / have been no corresponding bill/s showing the expenses actually incurred by the Claimant. It is also submitted, *inter alia,* that 36 of the supplied lights were found defective and had to be replaced by a second tender process (additional affidavit of Respondent) [Paragraph no.3(v) and **Exhibit R-32**]. It is also contended that the item being a 'supply' item as per Clause 38 of the payment terms, the Claimant would be entitled to the 5% of the balance amount only on 'satisfactory installation, testing and commissioning' on pro-rata basis as per the actual work done and 5% of the balance amount upon the handing over. It is contended that since the Claimant has neither done 'satisfactory installation, testing and commissioning' of these items under claim no.1, nor has the Claimant handed over these works, he is not entitled to the last 10% of the amount.

This is apart from the Respondent's contention that 'this being a lump sum contract, the contractor was not entitled to receive any payment unless the work would be substantially completed; and that since the work was not substantially completed, the contractor i.e. the Claimant is not entitled to receive any payment whatsoever' which contention has been discussed earlier and rejected.

123. However, it is a fact that no corresponding bills in respect of the amounts actually spent and the expenditure incurred, have been tendered by the Claimant in evidence. It is also not clear, as to on what basis it has been claimed that 90% of the amount in respect of the supply of lights has been paid by the Respondent. Though the Claimant has given details of various payments made to it by the Respondent from time to time during the subsistence of the contract, the Claimant has not categorized or classified these payments to show as to *for which purpose* they had been given. It is true that there is no specific denial of the total amount payable for supply of lights, as mentioned in this claim, but the fact remains that the bifurcation of the various amounts paid to the Claimant, has not been done either in the SOC or in the evidence. What has been placed before the Tribunal is the evidence in respect of the payments received from time to time without specifying that a particular payment was for a particular item or work.

Under these circumstances, the **Claim No. 1** cannot be allowed and is rejected.

124. **Claim Nos. 2, 3, 5, 6, 7 and 8:** These can be discussed together to avoid unnecessary repetition. All these claims are in respect of supply of various materials as detailed therein. The claim is that 90% of the amount payable towards these supplies has been paid by the Respondent and that the balance 10% is demanded by quantifying the amounts. Thus these claims are similar to the claim no. 1 and the objections thereto, as raised by the Respondent, are also similar. Basically, it is contended that there are no corresponding bills for the amounts claimed or for the amounts already paid; that the items were supplied without testing; that the Claimant would be entitled to the

balance amount only on 'satisfactory installation testing and commissioning' which has not been done, etc. It is not necessary to go into the details of the contentions of the Respondent with respect to each claim, or to go into the correctness of the figures given because these claims fail for same reasons that have been the cause of rejection of claim no 1. To sum up, firstly, there have been no corresponding bills in respect of the amount actually spent and the expenditure, and secondly, there is also no basis to show that 90% of amount in respect of such supplies has already been released by the Respondent.

Under these circumstances, the **Claim Nos. 2, 3, 5, 6, 7, 8** cannot be allowed and are rejected.

125. **Claim No. 4:** This claim is divided in two parts. The first and major part is in respect of the 'repeated order' that was required to be placed for the Constant Current Regulators (CCRs). It may be recalled that the Claimant had earlier supplied the 10 CCRs as per the BOQ, but the said CCRs were got burnt in the fire that took place at the Airport. As already discussed, the Claimant was, therefore, required to place a new order for the supply of the CCRs, out of which, 19 % of the amount was paid by the Respondent as an advance. Since the remaining amount i.e. 81% was not paid, the delivery of the CCRs has not been made. The Claimant is now claiming the remaining 81% amount by this claim.

126. According to the Respondent, it is not liable to pay the amount for the repeated order of CCRs, inasmuch as, the Claimant had failed to insure the goods as per the requirements of the contract. It is contended that, had the Claimant insured the CCRs and complied with the relevant

provisions in the contract, the amount could have been reimbursed from the insurance company. It has already been seen that though the Claimant indeed appears to have committed a breach of the terms regarding insurance of the goods and materials supplied, it is not possible to hold that the loss that has been occasioned by burning of the CCRs, is attributable to the Claimant, or that the Claimant was bound to procure new CCRs at its cost. The reason is that the Respondent has not stated anything about the circumstances in which the fire took place, or the cause therefore – much less has adduced any evidence in that regard. It is significant that such a claim was not made by the Respondent earlier and it had not asked the Claimant to bear the cost of the 'repeat order' on the ground of it having failed to insure the CCRs. The Respondent had, apparently, accepted the position that for reordering the CCRs it would be required to pay again. The correspondence, in that regard, clearly shows that the Respondent had not imposed this responsibility i.e. of procuring the CCRs at their cost, on the Claimant. Significantly, the Respondent has not made any counter claim for the recovery of the amount of the CCRs which were burnt due to fire. The Respondent has got the work completed from two other contractors by issuing fresh tenders after the contract with the Claimant was terminated. Undoubtedly, the CCRs would be required for the completion of the project and the Respondent is obviously bound to pay to the new contractor/s the cost for the supply of CCRs; but as aforesaid, no counter claim in that regard has been made. Thus, the Respondent cannot successfully oppose this claim on the ground that the Claimant had failed to insure the CCRs.

127. This claim, however cannot be allowed – or rather is not maintainable – for a simpler and more obvious reason; and that is that *the CCRs as per repeated order have not actually been supplied or delivered.* The Claimant states that 'on payment of the balance amount of 81% the delivery of the CCRs shall be made'. Thus, this claim – or rather this part of the claim – is not based on the actual supply made and even the 19% amount that has been paid as part payment for the supply has not been paid from the Claimant's pocket.

128. So far as the other part of this claim is concerned, it is for the balance of 1% of the cost the supply of the CCRs originally supplied which got burnt in fire. It said that 99% of the amount towards a such supply has been paid and the balance 1% is remaining which is quantified at Rs 84,916.45/- (Rupees Eighty Four Thousand Nine Hundred and Sixteen and Forty Five Paise Only). Except in the 'particulars of the claim' nowhere else it has been mentioned that 1% of the amount towards the cost of supply of CCRs originally supplied, had not been paid. Anyway, in respect of this claim also, like other claims, there are no corresponding bills and it is also not clear as to on what basis it has been claimed that 99% of the amount of the previous order of the CCRs has been paid and 1% is remaining. As discussed in respect of other claims, the bifurcation of the amounts paid to the Claimant from time to time, has not been given by either the Claimant or the Respondent. Such a claim, therefore, cannot be allowed.

The **Claim No. 4** is rejected.

129. **Claim No. 9**: Even in respect of this claim which is for installation of elevated lights, the objections are similar to the objections raised in

respect of a majority of the claims *viz., short and or defective supply; no installation satisfactory testing and commissioning;* and *no corresponding bill/s for the amounts claimed or for the amounts already paid*. It is also contended, so far as the items involving installation are concerned, that there are no pleadings, much less any evidence, that these items were successfully installed, or erected, or tested, or commissioned or handed over.

130. That this claim also must fail for the reason that there is no evidence that 50.18% of the installation has been paid by the Respondent and balance of 49.82% is payable. There is no evidence of the successful installation of the lights and this is expected to be inferred from alleged fact of am amount to the extent of 50.18% having been paid, for which fact there is no evidence or supporting material.

This claim, therefore, stands rejected.

131. **Claim Nos. 10, 11 and 12**: These claims can be considered and discussed together as they are of similar nature. In fact, the reasoning with respect to the claim No.1 as discussed above applies to these claims also.

132. Claim No.10 is in respect of supply and laying of HDPE Pipes as per BOQ. It is said that the Respondent has paid 98.38% of the amount for these laying of pipes and the balance 1.69%, quantified at Rs.1,03,521.68 (Rupees One Lakh Three Thousand Five Hundred and Twenty One and Sixty Eight Paise Only), is demanded.

133. Claim No.11 is in respect of laying of various cables as per the BOQ.

It is said that 41.44% amount therefor has been paid by the respondent and the balance 58.56%, quantified at Rs.40,57,429.64/- (Rupees Forty Lakhs Fifty Seven Thousand Four Hundred and Twenty Nine and Sixty Four Paise Only), is demanded.

134. Claim No.12 is in respect of laying of GI wires as per the BOQ. It is said that the respondent has paid 57.90% of the amount for laying these GI wires and the balance 42.10%, quantified at Rs.9,66,818.87/- (Rupees Nine Lakh Sixty Six Thousand Eight Hundred and Eighteen and Eighty Seven Paise Only), is demanded.

135. The Respondent's objection to these claims are the same as are in respect of the claim No.1 and the other claims. The relevant aspects have already been discussed while deciding the said claims and therefore it may only be observed in brief, that like in respect of other claims, there are no corresponding bills for the amounts of the claims or even for the amounts said to have been already paid. Further, like in case of other claims, there is no basis for saying that a particular percentage of amount towards the said items has already been paid by the Respondents in as much as there is no classification or bifurcation of the amount received by the Claimant from the Respondent. Not only there is no evidence in that regard but even such assertions are not found anywhere else in the pleadings.

Under the circumstance, the claim Nos. 10, 11 and 12 cannot be allowed and are rejected.

136. **Claim No. 13**: This claim is towards the warranty period of the second year ending. The warranty period is to be reckoned from the date of

acceptance of the system. There has been no acceptance of the work in this case. Whatever may be the reason for non-completion of the work, since the work has not been completed and has not been handed over and accepted, the Claimant cannot seek any amount towards the warranty, The claim, being misconceived, cannot be allowed and is rejected.

137. **Claim No. 14**: This claim is for the return / refund of EMD / Performance Security Amount/Additional Performance Security Amount of Rs.46,38,626/- (Rupees Forty Six Lakhs Thirty Eight Thousand Six Hundred and Twenty Six Only), which has been withheld by the Respondent. The Respondent has submitted that the deposit is in two forms; first being the security deposit submitted at the time of bidding and the second being a performance security which could have been given also in the form of a bank guarantee. The suggestion is that the amount deposited later was akin to 'performance bank guarantee' and therefore is not liable to be returned. It is also expressly stated that the termination being lawful and valid, the forfeiture of the performance security is a consequence of the termination.

138. I find no substance in the contentions/objections of the Respondent with respect to this claim. In my opinion, the Respondent is liable to return / refund the said EMD / Performance Security Deposit Amount / Additional Performance Security Deposit Amount – by whatever name called or described – which has been withheld by it. When the termination has been wrongful and when the contract was abruptly terminated, the Respondent has no right to forfeit the performance

security deposit and the additional performance security deposit. The amount deposited by the Claimant in that respect is not in dispute. The Claimant is therefore, entitled to have the said amount refunded to it.

As such, this claim is allowed.

139. **Claim No. 15:** This claim for Rs.10,95,307/- (Rupees Ten Lakhs Ninety Five Thousand Three Hundred and Seven Only) is in respect of interest on the amounts of various claims calculated for the period from the date of termination till the filing of the claim.

140. In this context, it is contended by Mr. Shardul Singh, the learned Counsel for the Respondent, that there is a contractual bar on awarding interest in the present contract; and that the sub-clause 14.8.1 read with the Contract Data prohibits 'grant of interest on any unpaid sums'. He has relied upon a decision of the Supreme Court of India in the case of ***Jayprakash Associates Ltd. vs. Tehri Hydro Development Corporation (India) Ltd.*** reported in ***(2019) 17 SCC 786*** and has quoted, in his written submissions, paragraph 17 of the reported judgment.

141. I have gone through the said judgment in which the entire law in respect of 'payment of interest' has been discussed in the light of a number of previous decisions of the Supreme Court of India. The question that arose before Their Lordships in the said case was *whether in view of the contractual provisions in that case, which provided that the contractor would not be entitled to interest on omission of the engineer in charge to pay the amount due upon measurement; and that no claim for interest or damage would be*

entertained or be payable to the contractor in respect of any delay or omission on the part of the engineer in charge, etc., the Arbitrators could still award interest to the contractor. Their Lordships referred to a number of previous judgments of the Supreme Court of India laying down that a person deprived of the use of money to which he is legitimately entitled, has a right to be compensated for the deprivation and that, therefore, interest should ordinarily be awarded on amounts found to be due. Their Lordships came to the conclusion that when a provision in the contract prohibits claim or payment of interest, then the Arbitrator cannot award interest while allowing the claims. It was specifically observed that as per the provisions of section 31(7) of the Arbitration and Conciliation Act, 1996, if the agreement prohibits grant of interest, no interest becomes payable right from the date of cause of action until the award is delivered.

142. Thus, the legal position is that if the contract specifically provides that no interest would be payable, the Arbitrator would have no power and jurisdiction to award interest. However, it also appears that interest being compensatory in nature, the court has frowned upon clauses that bar payment of interest and has laid down the test of 'strict construction' of such clauses.

143. I have examined the sub-clause 14.8.1 read with Contract Data, which according to the learned Advocate for the Respondent, prohibits grant of interest on any unpaid sum. Sub-clause 14.8.1 (page no. 317 of the SOC, Volume C3) deals with '*rate of interest on unpaid sums*' and provides that rate of interest on unpaid sums shall be as per Contract Data in Volume II. The Contract Data provides that the said clause has

been **'Deleted'** (page no. 353 of SOC, Volume C3). In my opinion, the deletion of the clause regarding 'Rate of Interest on unpaid sums' does not amount to creating a prohibition to grant interest. At any rate, it cannot be construed as a 'clause creating an express bar against grant of interest'. On the contrary, the result of deletion of the said clause would be not to place any restrictions on the rate of interest (which could have been put by the said clause) and leave the matter to the discretion of the concerned authorities / Arbitrator. Thus, it cannot be accepted that there is contractual bar to award interest on the sums found due.

144. However, most of the claims have not at all been allowed and have been specifically rejected. Therefore, the question of granting interest would arise only with respect to the amounts to which the Claimant is being held entitled to receive and is being separately considered.

This question of grant of interest on the amounts mentioned by the Claimant does not arise.

145. **Claim No. 16**: It is settled legal position that a party who suffers loss on account of the breach of contract committed by the other party is entitled for compensation. Such compensation can be awarded as damages. Interest is also often offered as and by way of compensation / damages.

146. In view of the fact that the contract has been wrongfully terminated, the Claimant is entitled to receive compensation/damages from the Respondent. However, there is no evidence – much less satisfactory evidence – of any loss or damage suffered by the Claimant, or the

extent thereof, by such wrongful termination. *In such types of contracts one measure for calculating the damages would be the loss of profit which the contractor would have made, had the contract not been terminated*. However, there is absolutely no evidence to indicate, even approximately, the profit which the Claimant would have made had the contract not been terminated and had it been allowed to complete the project / work. The conduct and the performance of the Claimant has also not been appropriate. As elaborately discussed earlier, the Engineer in-charge i.e. PMC, had been continuously pointing out the various defaults and defects in the work carried out by the Claimant, but the Respondent did not pay attention towards the advice of their own Engineer / PMC, and permitted the Claimant to carry on further work. The Claimant, as discussed earlier, did not carry out the work in accordance with the terms of the contract, exhibited a complete ignorance thereof or showed complete defiance to the terms of the contract and to the directions of the PMC. The contract could have been validly terminated by the Respondent at certain points of time but somehow the Claimant was treated very leniently by it. Undoubtedly, at the point of time when the contract was terminated there were no new grounds for such termination; and the contract came to be terminated on the grounds which were already given up and that too without complying with the procedural requirements in that regard. Since the contract has been wrongfully terminated i.e. without following the procedure for termination as contemplated in clause 15(2) of the contract agreement, damages must follow, but the conduct of the Claimant and its performance cannot be ignored while assessing the damages. In the circumstances, they should not be much. Keeping in mind all the relevant aspects of the matter, I think it just and proper

to award damages in the sum of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) to the Claimant.

Thus, **Claim No. 16** is partly allowed to the extent of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only).

147. **Claim No. 17**: The Claimant has claimed an amount of Rs. 30,00,000/- (Rupees Thirty Lakhs Only) towards 'legal expenses.' No break up thereof has been given. Obviously, this is towards the cost of the Arbitration proceedings.

148. After considering all the relevant aspects of the matter, I am inclined to allow this claim partially. In my opinion this claim may be allowed to the extent of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) towards costs and legal expenses incurred in connection with the present Arbitration.

Claim No.17 is, therefore, allowed to the aforesaid extent.

I shall now examine the counter claim

149. It is submitted that the counter claim is made on the ground i) repudiation of the contract by the Claimant, ii) breach of the contract by the Claimant, and iii) sub-standard/defective work done by the Claimant (Paragraph 260 of the written submissions of the Respondent).

150. In this regard, it has already been observed that, that the Claimant repudiated the contract is not proved and cannot be accepted. Also, that the work done by the Claimant was sub-standard and defective is not proved and cannot be accepted, in the absence of the procedure prescribed by the terms of the contract for ascertaining the value and quality of the work done having been followed. This has already been discussed earlier.

151. Therefore, the only question would be of the second ground *viz.*, breach of contract by the Claimant. Undoubtedly, even though the Respondent has waived the breaches of the terms of the contracts by not terminating it when the breaches occurred and signified its acquiescence in continuation of the contract, the Respondent would, still, be entitled to seek compensation from the Claimant for any loss or damages actually sustained by it because of the breach of the terms of the contract by the Claimant, unless such breaches were expressly, or by necessary implication, condoned.

152. The counter claims have been made under number of heads but barring the counter claims Nos.1 and 2, the rest of the claims are in the nature of claim for damages suffered on account of loss.

153. We may now first examine the counter claims No.1 and 2 which are of a different nature and then examine the Counter Claim Nos. 3 to 15, one by one.

154. **Counter Claim No. 1:** This claim is based on the supposition that the amount of Rs. 1,40,00,000/- (Rupees One Crore Forty Lakhs Only)

given by the Respondent to the Claimant was 'an advance'. As already discussed, this amount was not given as an advance, but was towards the works actually done. The respondent is, therefore, not entitled to get the amount back. As regards the amount paid as an advance for procuring the CCRs again, the Respondent would be entitled to get the same back as the CCRs have actually not been procured by the Claimant. The Claimant had been asking for the balance amount to be paid before the CCRs could be once again procured. It is, however, not clear as to what is the correct amount that has been paid as an advance to the Original Equipment Manufacturer (OEM) / vendor. In the affidavit of evidence of the RW-1 the amount has been mentioned as Rs. 16,19,308/- (Rupees Sixteen Lakhs Nineteen Thousand Three Hundred and Eight Only). In the counter claim made, however this amount is shown to be Rs. 16,91,308/- (Rupees Sixteen Lakhs Nineteen Thousand Three Hundred and Eight Only). The amount mentioned in the affidavit of evidence appears to be incorrect and a result of a clerical or typographical mistake. The amount actually paid after deducting the statutory taxes, appears to be Rs. 16,06,743/- (Rupees Sixteen Lakhs Six Thousand Seven Hundred and Forty Three Only). The Claimant has claimed that an amount of Rs. 68,49,527.45/- (Rupees Sixty Eight Lakhs Forty Nine Thousand Five Hundred and Twenty Seven and Forty Five Paise Only) was the balance payment towards the CCRs, which is supported by the e-mail communication at **Exhibit-C-55.** Deducting this amount from the total amount of Rs. 84,56,270.45/- (Rupees Eighty Four Lakhs Fifty Six Thousand Two Hundred and Seventy and Forty Five Paise Only) towards the CCRs leaves an amount of Rs.16,06,743/- (Rupees Sixteen Lakhs Six Thousand Seven Hundred and Forty Three Only)

which appears to have been paid to the OEM / Vendor. Since the delivery of the CCRs has not been made, the Claimant is bound to refund / return the said amount which was given to it for a specific purpose. However, it is not clear whether the Claimant has actually paid this amount to the OEM / Vendor. In case, it has been paid, it would not be possible to direct the refund thereof to the Respondent. In the result, the **Counter Claim No. 1** is allowed conditionally as per the final order below.

155. **Counter Claim No. 2:** This counter claim is towards the interest on the amount mentioned in the Claim No.1. Since the Respondent is not entitled for the refund of the amount of Rs. 1,40,00,000/- (Rupees One Crore Forty Lakhs Only) there is no question of paying interest on the said amount. With respect to the amount of Rs. 16,06,743/- (Rupees Sixteen Lakhs Six Thousand Seven Forty Three Only) as aforesaid, it is not clear whether this amount has been retained by the Claimant or whether it has been paid to the OEM/vendor at the time of placing the order for CCRs. Whatever may be the case, the Respondent is not entitled for any interest on this amount inasmuch as the question of paying the remaining amount towards the cost of the CCRs was being discussed and negotiated between the parties. The position as prevailing at that time was that the Claimant was to procure the CCRs once again for which the Claimant wanted full amount towards the cost thereof to be paid in advance by the Respondent. At that point of time, the contract came to be terminated without following the termination procedure. In these circumstances, the claim of interest even with respect to the amount of Rs.16,91,308/- (Rupees Sixteen Lakhs Ninety One Thousand Three Hundred and Eight Only) cannot

be allowed.

The **Counter Claim No. 2** stands rejected.

156. **Counter Claim Nos. 3 to 15**: It was submitted in the course of arguments, that these counter claims which are in the nature of damages, need to be decided keeping in mind two legal principles. The first was said to be that "*once a sum is named in the contract as liquidated damages, the Court cannot award any amount exceeding the said sum*". Thus, this submission is actually a concession made by the Learned Counsel for the Respondent. The second was said to be that "*it is always difficult to prove in a works contract as to how much loss is suffered by the public body and that, therefore, if there is a breach and damages have to follow, the Court must award the sum stipulated in the contract as damages or award up to 10% of the contract price as damages*". Reliance has been placed on the decisions of the Supreme Court of India in ***Kailashnath Associates vs. Delhi Development* Authority and another** *[(2015) 4 SCC 136]* and ***Construction and Design Services vs. Delhi Development Authority and another*** *[(2015) 4 SCC 263*] in support of the first proposition and the second proposition, respectively. It is submitted that keeping these principles in mind, a sum of Rs.75,35,226/- (Rupees Seventy Five Lakhs Thirty Five Thousand Two Hundred Twenty Six Only) (10% of the contract value) be awarded as damages towards the Counter Claim Nos. 3 to 15 as against the sum of Rs.13.15 crore assessed by the Respondent as actual loss, cost and damages suffered by him.

157. *In spite of this concession, the* ***Counter Claims from No. 3 to 15*** *need*

to be considered and it should be ascertained whether any loss or damage has been caused to the Respondent on those counts.

158. **Counter Claim Nos. 3 and 4:** The Counter claim No.3 is in respect of expenses incurred to carry out the Factory Acceptance Test (FAT). The averments in that regard are found in paragraph 47 of the SOD. It is contended that the contract required the Claimant to submit valid tests reports and carry out FAT before dispatch of material but that the Claimant failed to do so. That, as the test reports and the FAT was mandatory the Respondent had to carry in out on account of the Claimant's failure. That, since it was included in the scope of Claimants work the Respondent is entitled to get the amount spent by it for that purpose i.e. Rs.7,68,742/- (Rupees Seven Lakhs Sixty Eight Thousand Seven Hundred Forty Two Only). The claim No.4 is in respect of interest on the said amount for the period from 1st February, 2019 to 13th November, 2019.

159. There is no evidence that such amount was actually paid by the Respondent towards the FAT except the bare assertion to that effect in the Statement of Defense and Counter-Claim. In the Affidavit of Rajkumar Barrey (RW-1) it has been mentioned that these costs are incurred towards the Factory Inspection and meeting the 'Contractor OCEM' to get the said work done by going to Italy. Apparently, Rajkumar Barrey (RW-1) alongwith Mr. Praveen Padalkar of the Respondent had gone to Italy at the cost of the Respondent to get the Factory Acceptance Test (FAT) done. I am not satisfied with the evidence in that regard inasmuch as it has not been shown that it was absolutely necessary to incur the expenditure by going to Italy, and

that it could not have been done in any other way. Further, why the Claimant was not asked at that point of time to get the FAT done at his cost, is not clear. Interestingly, the visit to Italy appears to have been paid in September, 2019 i.e. much after Termination of the Contract. In these circumstances, I am not inclined to allow this Claim.

In the result, the **Counter Claim Nos. 3 and 4** stand rejected.

160. **Counter Claim No. 5**: This is in respect of damages towards the non-completion of work within the stipulated period and the damages are quantified to Rs. 51,23,456/- (Rupees Fifty One Lakhs Twenty Three Thousand Four Hundred Fifty Six Only). This cannot be allowed, as the time for completion of the work was being extended by the Respondent from time to time. The Respondent cannot, in these circumstances, claim any damages towards non-completion of the work within the stipulated period (original contract).

Counter Claim No. 5 is rejected.

161. **Counter Claim Nos. 6 and 7**: The claim No.6 is in respect of the amount of Rs.12,84,000/- (Rupees Twelve Lakhs Eighty Four Thousand Only) allegedly paid by the Respondent to some other agency towards the work of refilling the trenches, which the Claimant failed to do. Claim No.7 is towards interest on the said amount.

162. It has already been discussed that, *that an amount of Rs.12,84,000/- (Rupees Twelve Lakhs Eighty Four Thousand Only) was required to be paid to some other agency towards the refilling of trenches which was to be done by the Claimant, has not been proved.*

As such, **Counter Claim Nos. 6 and 7** are rejected.

163. **Counter Claim Nos. 8 and 9**: The claim No.8 is towards the cost difference between the 254 boxes supplied by the Claimant which were of a smaller size than that stipulated in the BOQ. Claim No.9 is in respect of interest on the said amount which is stated to be Rs. 2,54,000/- (Rupees Two Lakhs and Fifty Four Thousand Only).

164. In the SOD and counter claim it is asserted that 'differential rate calculated based on the market survey is Rs.1,000/- per box.' In his Affidavit of Evidence, Rajkumar Barrey (RW-1) has stated so. The Claimant has not specifically dealt with the alleged cost difference in its reply to the counter claim and has clearly stated appropriate approvals were granted by the Respondent for such boxes and payments were made thereafter.

165. It is true that the Claimant has supplied Transformer Housing Boxes (THB) of a smaller size, but the evidence of the difference in the cost of the THB of bigger size and the THB actually supplied by the Claimant, is not satisfactory as the same is vague, inasmuch as it appears to have been based on 'market survey'; and neither does the RW-1 claim to have personal knowledge of the difference nor does he support it by any documentary evidence or record. However, that is not the crucial aspect of the matter. It has already been observed that the issue of the difference in the sizes of the THBs was raised and is recorded in the memorandum of the joint measurements taken on 24/01/2019 **(Exhibit-C-41)**. It has also been observed that no further steps to ascertain the suitability of the THBs actually supplied, appear to have been taken till the termination of the contract. Payments have been made to the Claimant towards the supply of THBs. It is to be noted that various payments have been made to the Claimant on four

occasions after 24/01/2019, without raising any issue of adjustment of the amounts towards the alleged difference in the cost. Under the circumstances, when the Respondent wrongfully terminated the contract, without raising or resolving this issue, it cannot successfully make such a claim.

As such, **Counter Claim Nos. 8 and 9** are rejected.

166. **Counter Claim No. 9 (Repeated)**: This claim which is wrongly once again numbered as "claim No.9" is towards the penalty on account of the delay caused by the Claimant at the rate of Rs. 2,77,700/- (Rupees Two Lakhs Seventy Seven Thousand and Seven Hundred Only) per week calculated from 6th July, 2017 to 31st October, 2019 and quantified as Rs. 3,36,01,700/- (Rupees Three Crores Thirty Six Lakhs One Thousand and Seven Hundred Only).

167. As discussed earlier, the delay cannot be solely attributed to the Claimant and the Respondent's acts, omissions and/or inability to foresee the requirements for a successful completion, have also contributed – to say the least – to the delay. Moreover, since the period for completion of the work was extended from time to time, the Respondent is not entitled to levy any penalty towards the delay.

Hence, this claim is rejected.

168. **Counter Claim No. 10**: This claim is for the loss allegedly incurred towards awarding the "left over work" to another contractor to complete the project, and is quantified at Rs. 3,90,32,900/- (Rupees Three Crores Ninety Lakhs Thirty Two Thousand and Nine Hundred Only).

169. Since the termination of the contract has not been in accordance with the procedure prescribed therefor in the contract itself, the Respondent is not entitled to make such a claim. Moreover, the procedure prescribed in clause 15(3) of Contract Agreement for assessing the value of the work actually done by the Claimant, was not followed. Simply because a tender has been given to another contractor for a particular amount, it cannot be concluded that loss to that extent has been caused to the Respondent; and that such alleged loss is due to the Claimant.

Hence, this claim is rejected.

170. **Counter Claim No. 11**: This claim is towards depreciation at 10% p.a. on the actual value of the work done which is said to be Rs.3,54,37,245/- (Rupees Three Crores Fifty Four Lakhs Thirty Seven Thousand Two Hundred Forty Five Only) which is quantified as Rs. 70,87,449/- (Rupees Seventy Lakhs Eighty Seven Thousand Four Hundred and Forty Nine Only). There is no substance in this claim and no arguments in support of such a claim have been advanced.

The claim is rejected.

171. **Counter Claim No. 12**: This is towards the alleged revenue losses to the Respondent because of non-availability of night landing facilities at Shirdi Airport and is quantified at Rs.72,00,000/- (Rupees Seventy Two Lakhs Only). It has been admitted that the BOQs items were not sufficient at all for completing the work necessary for starting night landing and that so many such requirements were realized only later on. In any case, it is clear from the evidence that the Claimant could not be blamed for the inability of the Respondent to start night landing

operations at Shirdi Airport, and that revenue losses, if any, caused to the Respondent thereby.

Hence, this claim is rejected.

172. **Counter Claim No. 13**: This is towards the alleged loss incurred allegedly towards the continuation of the service of PMC and is quantified at Rs. 9,71,919/- (Rupees Nine Lakhs Seventy One Thousand Nine Hundred Nineteen Only). There is no substance in this claim in support of which no arguments have been advanced.

Hence this claim is rejected.

173. **Counter Claim Nos. 14 and 15:** These counter claims which were added by an amendment of SOD, are in respect of the total amount of expenditure allegedly incurred in terms of tender dated February, 2020 and the cost of the said tender. These claims are quantified at Rs. 1,53,65,937/- (Rupees One Crore Fifty Three Lakhs Sixty Five Thousand Nine Hundred Thirty Seven Only) and Rs. 25,000/ (Rupees Twenty Five Thousand Only) respectively.

174. There is no substance in these claims in support of which no arguments have been advanced.

These claims are rejected.

175. Having dealt with the claims and the counter claims as aforesaid, the conclusions that emerge are as follows:

a) The Claimant is entitled for the refund the EMD/Performance Security Deposit/Additional Performance Security Deposit of Rs. 46,38,626/- (Rupees Forty Six Lakhs Thirty Eight Thousand Six

Hundred Twenty Six Only) [claim no. 14]. Since this amount has been withheld by the Respondent from the time of termination of the contract by it, which has been held to be wrongful, the Claimant is entitled for appropriate and suitable interest on the said amount.

b) The Claimant is entitled to receive from the Respondent, damages quantified at Rs. 15,00,000/- (Rupees Fifteen Lakhs only) [claim no. 16].

c) The Claimant is entitled to receive from the Respondent, the legal expenses / costs quantified at Rs. 20,00,000/- (Rupees Twenty Lakhs Only) [claim no. 17].

d) The Claimant is also entitled to recover from the Respondent the cost of the work actually done by it.

176. The question that now arises is how to determine the cost of the work actually done by the Claimant. There is evidence to indicate, approximately, how much work had been done by the Claimant till the termination of the contract, but there is no specific evidence as to the cost of the work actually done. The provision in sub-clause 15.3 of the COPA requiring the valuation on the date of termination to be done in accordance therewith, has been breached by the Respondent. There is no evidence that such valuation of the work was done. Even an assertion of such valuation having been made and / or the value of the work, has not been made. Under these circumstances, the cost of the work actually done by the Claimant has to be assessed on the basis of the entire evidence. I have carefully examined the evidence in that regard. In the Claimant's reply dated 26/06/2019 (**Exhibit C-49**) to the Respondent's show cause notice dated 20/06/2019 **(Exhibit C-33)**,

the Claimant has mentioned that as of that day, the Respondent owed to the Claimant an amount of Rs. 62,51,570.32/- (Rupees Sixty Two Lakhs Fifty One Thousand Five Hundred Seventy and Thirty Two Paise Only) for works and supplies completed. By adding the amount of Rs. 46,38,626/- (Rupees Forty Six Lakhs Thirty Eight Thousand Six Hundred Twenty Six Only) held towards EMD / Performance Security / Additional Performance Security to the said amount, a demand for releasing an amount of Rs.1,08,90,196.32/- (Rupees One Crore Eight Lakhs Ninety Thousand One Hundred Ninety Six and Thirty Two Paise Only) was made. In the termination letter dated 05/07/2019, **(Exhibit C-34)** the statement about the Respondent owing to the Claimant an amount of Rs. 62,51,570.32/- (Rupees Sixty Two Lakhs Fifty One Thousand Five Hundred Seventy and Thirty Two Paise Only) for works and supplies completed, has not been dealt with or challenged. Even in the Claimant's Advocate's notice dated 29/07/2019 **(Exhibit C-50)**, it has been specifically mentioned that as of 26/06/2019, the Respondent owed to the Claimant an amount of Rs. 62,51,570.32/- (Rupees Sixty Two Lakhs Fifty One Thousand Five Hundred Seventy and Thirty Two Paise Only) for the works and supplies completed. (Paragraph 9)

177. Thus, the Claimant's case, at the earliest point of time, was that the Respondent was liable to pay to it an amount of Rs. 62,51,570.32/- (Rupees Sixty Two Lakhs Fifty One Thousand Five Hundred Seventy and Thirty Two Paise Only) for the works and supplies completed till 26/06/2019. Though the Claimant in the SOC made claim for a higher amount, the amount of Rs. 62,51,570/- (Rupees Sixty Two Lakhs Fifty One Thousand Five Hundred Seventy Only) should be taken as the

correct figure for a number of reasons. *Firstly*, it was mentioned immediately after the show cause notice and was not likely to be manipulated. *Secondly*, at that stage the Claimant was expecting / hoping that he would be allowed to continue the project and was not likely to quote a false figure. *Thirdly*, in the termination letter (**Exhibit C-34**) this aspect has not been dealt with and in any case, there is no denial of the said assertion.

178. Thus, the cost of the work actually done by the Claimant pursuant to the contract can be safely determined to be the amount already received by it from the Respondent plus the amount of Rs. 62,51,570.32/- (Rupees Sixty Two Lakhs Fifty One Thousand Five Hundred Seventy and Thirty Two Paise Only).

179. The Claimant is, therefore, entitled to receive and recover from the Respondent the said amount, in addition to the amount of Rs. 46,38,626/- (Rupees Forty Six Lakhs Thirty Eight Thousand Six Hundred Twenty Six Only) towards the refund of the EMD / Performance Security Deposit / Additional Performance Security Deposit, an amount of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) towards damages and an amount of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) towards legal expenses. The Claimant should be awarded appropriate interest on the amount receivable towards the unpaid cost of the work done, and on the amount receivable as and by way of refund of EMD / Performance Security Deposit / Additional Performance Security Deposit, as the Claimant has been deprived of use of these amounts due to the abrupt termination of the contract.

180. The Respondent is entitled to recover an amount of Rs. 16,06,743/- (Rupees Sixteen Lakhs Six Thousand Seven Hundred Forty Three Only) as discussed above, unless the same has already been paid by the Claimant to the OEM / Vendor. In that case, the Claimant should be called upon to make a declaration to that effect and submit satisfactory evidence of such payment having been made. The Claimant should be asked to do this within a period of 15 days from the date of this Award.

The point nos. 1 and 2 are answered accordingly.

As to Point No. 15:

As per the final order.

OPERATIVE ORDER

(a) The Respondent is ordered to pay to the Claimant a sum of Rs.62,51,570.32/- (Rupees Sixty Two Lakhs Fifty One Thousand Five Hundred Seventy and Thirty Two Paise Only) towards the unpaid cost of the work actually done by the Claimant, with interest at the rate of 9% per annum from the date of termination of the contract i.e. 05th July 2019, till the date of this Award.

(b) The Respondent is ordered to pay to the Claimant a sum of Rs.46,38,626/- (Rupees Forty Six Lakhs Thirty Eight Thousand Six Hundred Twenty Six Only) towards the refund of the

EMD/Performance Security Deposit / Additional Performance Security Deposit, with interest at the rate of 9% per annum from the date of termination of the contract i.e. 05th July 2019, till the date of this Award.

(c) The Respondent is ordered to pay to the Claimant a sum of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only) towards damages.

(d) The Respondent is ordered to pay to the Claimant a sum of Rs. 20,00,000/- (Rupees Twenty Lakhs Only) as and by way of costs and legal expenses incurred in connection with the present Arbitration proceedings.

(e) The Respondent shall pay all the amounts directed to be paid as above by clauses (a), (b), (c) and (d) within a period of one month from the date of the receipt of this Award by the Respondent, failing which, the amounts shall carry interest at the rate of 12% per annum from the date of Award till the date of payment/realization.

(f) The Claimant shall pay to the Respondent a sum of Rs.16,06,743/- (Rupees Sixteen Lakhs Six Thousand Seven Hundred Forty Three Only) towards the refund of the amount taken in advance towards the repeated order for procuring the CCRs; unless the Claimant has already paid the same to the OEM / Vendor and makes a declaration to that effect and submits

satisfactory evidence of such payment having been made, within a period of 15 days from the date of this Award. Should the Claimant fail to make such a declaration and / or to submit satisfactory evidence of such payment having been made, the Respondent shall be entitled to set off the said amount against the amounts ordered to be paid by it to the Claimant.

Dated this 10th day of May, 2022.

At Mumbai.

JUSTICE ABHAY M. THIPSAY (Retd.)

[SOLE ARBITRATOR]