Reserved On : 09/12/2025
Pronounced On : 30/01/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3732 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2023
In R/FIRST APPEAL NO. 3732 of 2023
With
R/FIRST APPEAL NO. 3804 of 2023
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2023
In R/FIRST APPEAL NO. 3804 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL
and
HONOURABLE MR.JUSTICE D.N.RAY

==

Approved for Reporting	Yes	No
	✔	

==

MADHYA GUJARATI VIJ COMPANY LIMITED
Versus
M/S USHA PRESTRESSED CONCRETE

==

Appearance (**in FA No. 3732 of 2023**):
MR. MAULIK G. NANAVATI FOR NANAVATI & CO.(7105) for the Appellant(s) No. 1
MR PRASHANTH S UNDURTI (10983) for the Defendant(s) No. 1

Appearance (**in FA No. 3804 of 2023**):
MR. MAULIK G. NANAVATI FOR NANAVATI & CO.(7105) for the Appellant(s) No. 1
MR PRASHANTH S UNDURTI (10983) for the Defendant(s) No. 1

==

CORAM:**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL**
and
HONOURABLE MR.JUSTICE D.N.RAY

CAV JUDGMENT
(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

The captioned two appeals have been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (in short ‘the Act, 1996'), to challenge two separate judgments and orders (both dated 31.03.2023), passed by the 4th Additional District Judge, Vadodara in Commercial CMA No. 70 of 2022 and Commercial CMA NO. 71 of 2022. The applications were filed under Section 34 of the Act, 1996 seeking for setting aside of the arbitral award dated 28.12.2018 passed by the learned Arbitrator, where the dispute was with respect to a contract between the appellant, namely Madhya Gujarat Vij Company Limited (MGVCL) and the respondents herein, namely M/s. Usha Prestressed Concrete, a partnership firm (respondent in F.A. No. 3732 of 2023) and M/s. A.K.Patel & Co., a sister concern of M/s. Usha, a partnership firm, (respondent in F.A. No. 3804 of 2023), for supply of Pre-stressed Cement Concrete (PSC) Poles of 10 Mtrs. length for the total quantity of 3000 in number from Santroad factory of the claimant, at the firm rate of Rs. 2425/-.

1.1 As the terms and conditions of both the contracts arrived at between the aforesaid parties are same and the dispute between them are identical in nature, both the appeals have been heard together with the consent of the learned counsels for the parties and are being deciding by this common judgment. For the sake of convenience, the facts of First Appeal No. 3732 of 2023 are noted and dealt with in the entire judgment.

Introduction:-

Facts:-

2. The facts relevant to decide the controversy at hand are that the Gujarat Electricity Board (MGVCL, the successor-in-title) invited a bid from the claimants-respondents herein vide letter dated 22.03.2005, for a limited tender inquiry for PSC Poles of 10 Mtrs.

length to be supplied within a period of eight(8) months. The claimant vide letter dated 02.04.2005 submitted its offer to supply the required quantity stating that the prices would be firm for the original time limit. A letter of intent dated 16.06.2005 to place an order for supply of 3000 Nos. of 10 Mtrs. / 27 kgs. ready made PSC Poles at the firm rate of Rs. 2425/- per pole excluding excise duty and sales tax, was issued by the appellant (MGVCL).

3. The condition stated in the letter of intent is that the price will remain firm during the supply period and there shall be no price escalation during the supply period prescribed. The entire quantity (in the batch of 500 Poles per month) was to be supplied within Eight (8) months wherein two months from the issuance of the letter of intent was the commencement period. The consequences of failure to supply the PSC poles as per the schedule is that short supply quantity will be curtailed from the order. There is no dispute about issuance of the letter of intent dated 16.06.2005 with reference to the limited tender inquiry dated 22.03.2005.

4. It seems that after issuance of the letter of intent, wherein supply was to start within two months, no work order/requisition order for supply of the requisite poles was issued by the appellant. The claimant vide letter dated 19.07.2025 requested the appellant to issue necessary work order/requisition order for supply of the poles intimating that the activity of manufacturing of PSC Poles had been commenced by them. Again on 16.11.2005, a letter was sent by the claimant asking the appellant to issue the work order stating that the claimant had altered and added to its existing factory by investing more than thirty (30) lakhs to meet the urgent requirement of 500 numbers 10 Mtrs. PSC Poles per month, which was a completely distinct production methodology as compared to

the regularly commissioned 8 Mtrs. poles.

5. The work order, however, had been issued by the appellant only on 06.01.2006 wherein the time period for supply of ready made 3000 Nos. of PSC Poles was altered to 12 months or the supply of total 3000 poles, whichever is later. The claimant was asked to manufacture and supply the said quantity as per the lifting schedule and the instructions of the company as and when amended without any prejudice thereof (including the commencement period) with firm price from the date of commencement till the completion of 3000 Nos. of Poles. The price as offered in the letter of intent dated 16.06.2005 is incorporated in the work order in the clause "price" stating further that the price shall remain firm till the completion of the entire order quantity.

6. The clause-3 of the work order dated 06.01.2006 has been placed before us by Mr. Maulik G. Nanavati, the learned counsel for the appellant to submit that no price variation/labour escalation for supply of 3000 Nos. of Poles was allowed under the contract upto 12 months or extended period for the total supply of 3000 Nos. of PSC Poles. It was submitted that the delivery schedule mentioned in clause 4 of the work order was flexible, inasmuch as, the claimant was required to manufacture and supply the ready made PSC Poles of 10 Mtrs. / 270 Kgs. as per the delivery schedule and the instructions of the company as and when given.

7. We may note that the clause-4 of the work order pertaining to "delivery (time limit)" also states that "supply should commence immediately but not later than the date of issue of allotment letter and subject to acceptance of manufactured lot by the inspecting authority". Clause 12 of the work order contemplates penalty for

the late delivery in the following words :-

> “12. Penalty for Late Delivery:
>
> The contractor shall maintain the delivery as per delivery schedule of 500 Nos. of Ready-made PSC Poles per month or as specified by the MGVCL for contractual period. case if you fail to maintain the supply as per the delivery Schedule mentioned in Clause No.4, penalty shall be levied for, less supply of poles will be at ½ (half)% per week with maximum 10% ceiling on the value of undelivered poles. This will be deducted from running bill payable or any amount payable from other running contract or any amount payable from other dues.”

8. The work order dated 06.01.2006 contains an arbitration clause. It requires the claimants to acknowledge the receipt of the said order and confirm acceptance thereof within 15 days, and also provides that in case of failure to acknowledge the receipt of the order within the aforesaid period, the claimant will be deemed to have accepted the same on the terms and conditions set out therein.

9. It is the categorical case of the claimant that inspite of repeated requests made by the claimant after the work order dated 06.01.2006 was issued for supply of 3000 Nos. of 10 Mtrs. PSC Poles within 12 months or so, the appellant did not lift any poles till 31.12.2007, though by the letter dated 01.10.2007 the claimant was directed to start production of 10 Mtrs. PSC Poles immediately so as to maintain stock of at least 200 poles for emergency supply. By the letter dated 31.12.2007, the claimant informed the appellant that as per their letter dated 1.10.2007, 400 Nos. of Poles were already manufactured and available. The appellant were asked to arrange for testing and lifting of the poles at the earliest and release payment.

10. Taking note of the above, we may proceed to record that the appellant had lifted only 437 poles uptil the year 2009/2010 as against the order of total 3000 Nos. of PSC poles (in total), to be supplied over the period of 12 months including the commencement period.

11. By the letter dated 30.01.2010, the claimant requested the appellant to fulfill its contractual obligations, stating that lifting of poles ordered had been abnormally delayed resulting into substantial financial loss to them. The claimant reiterated that they had created special type of infrastructure facilities for 10 Mtrs. long PSC Poles involving lot of financial inputs and with the passage of time, there was a surge in the price of construction materials (since 2006) as well.

12. Vide letter dated 03.05.2011, the appellant, however, informed the claimant that they were in the urgent need of about 100 to 250 poles and the claimant was asked to mobilise its resources in such a way that maximum production of 10 Mtrs. Poles was possible at its factory. In response to the said letter, the claimant sent a communication dated 22.05.2011 reminding the appellant MGVCL that it had placed order for 3000 Nos. of PSC Poles 10 Mtrs. long vide letter dated 06.01.2006 within the time limit of 12 months and till date the MGVCL had lifted only 450 poles. With the long passage of time since placing of the order in January, 2006 there had been considerable increase in the cost of cement and zooming in the price and the cost component towards the infrastructure incurred for very limited quantity of poles, cannot be absorbed in the original fixed price of Rs. 2425/- per pole. However, in good faith with the MGVCL and in the interest of work, the claimant utilised its resources for production of 10 Mtrs. long PSC

Poles as intended vide letter dated 03.05.2011, with the request to consider revised rate.

13. When no response was received, by communication dated 27.09.2012, the claimant sent a request to the appellant to short close the contract and release the performance bank guarantee. The second short closure request was made vide letter dated 13.08.2015 reiterating the issue of non-lifting of the poles inspite of huge investment made by the claimant towards the speciliased infrastructure created since after the work order dated 06.01.2006. The claimant categorically stated in the said letter that the appellant were trying to take undue advantage of the ambiguous clauses as regards the supply period and so called firm price for such indefinite period, which was sought to be extended to indefinite time though the work order dated 06.01.2006 which mentions the supply period of 12 months for 3000 poles. The appellant, however, did not respond to the claimant’s request to short close the order dated 06.01.2006 for supply of 10 Mtrs./270 Kgs ready made PSC Poles until 13/15-10-2015, when its decision to short close the contract and release of the security deposit cum performance bank guarantee, was intimated to the claimant.

<u>Case of the appellant :</u>-

14. It is the contention of the learned counsel for the appellant that with the short closure of the contract while accepting the request of the claimant, the contractual relationship between the parties had come to an end, unconditionally. The result is that the arbitration clause contained in the original agreement, i.e. the work order dated 06.01.2006, stood substituted with the later agreement to short close the contract and the later agreement having no

reference to the arbitration clause contained in the previous agreement, the arbitration clause of the work order dated 06.01.2006 would not survive. The submission is that with the short closure of the contract, the original contract of supply of 3000 PSC Poles between the parties stood substituted to 437 Poles, i.e. the supplied quantity, and the inter se liabilities between the parties beyond the said quantity, no more survives.

15. The submission is that the further question would be that in such circumstances, even if it is assumed that short closure of the contract does not amount to substitution of the contract and the arbitration clause contained in the original contract still survives, whether the supplier (claimant) can make a claim for damages for the non-supply of the balance quantity, in the nature of loss of profit, idling charges etc..

16. It was argued by the learned counsel for the appellant that time was never the essence of the contract. The Letter of Intent (LOI) though indicated the period for supply as eight(8) months, but it was revised to 12 months or such extended period as per the delivery schedule to be provided by the MGVCL (appellant), vide work order dated 06.01.2006, which clearly indicates that the parties during the currency of the contract have understood that there was no definite time for making supply of PSC poles by the claimant or the appellant company, namely MGVCL to lift 3000 PSC poles. The revision of time frame as mentioned in the work order dated 06.01.2006 was duly accepted by the claimant/supplier without any protest. At no point of time, the claimant/supplier has agitated that the tenure of supply (a flexible period) was onerous or unconscionable. In fact, during the period of 8 or 12 months, as sought to be agitated to be the fixed time period for supply or lifting

of the PSC poles, not even a single pole was supplied or lifted. In such a situation, whether a party can contend, for the first time in the arbitration proceedings that time was the essence of the contract. The submission is that such an issue could not have been permitted to be raised before the arbitral tribunal, for the first time, in the face of earlier conduct of the claimant/supplier and express communications between the parties. The claimant/supplier once had agreed to the altered terms of the contract, could not have agitated the issue as appreciated by the arbitral tribunal.

17. It was further argued that assuming that the time was essence of the contract, then a legal right had accrued in favour of the promisee (supplier) (claimant) to make the contract voidable as per the first para of Section 55 of the Indian Contract Act, 1872. However, the claimant chose not to do so, and thus, had waived its legal right by its own conduct, and brought out *novation sub silentio* as per Section 63 of the Indian Contract Act, 1872. As a result of it, the appellant is no longer bound to perform its promise. It was argued that once the promisee, namely the supplier/claimant herein, understood that time was not the essence of the contract and continued to supply PSC poles without demur beyond the period of 8/12 months, the third para of Section 55 would be attracted and the claimant cannot claim compensation for any loss occasioned by non-performance of the promise at the time agreed for the reason that at the time of such acceptance, no notice was given to the appellant/promiser of its intention to claim such damages.

18. It was vehemently argued that the arbitral tribunal has committed a jurisdictional error in holding the time was of essence based upon the LOI while observing that LOI resulted in culmination of the contract and work order was only an administrative

manifestation of the concluded contract. Once this was held, there was no reason for the tribunal to say that the time agreed was 12 months, contrary to its own finding of LOI being the concluded contract. Moreover, the Tribunal has erred in rejecting the plea of novation of the period of contract and, thus, has acted in violation of Section 28 of the Arbitration and Conciliation Act, 1996 in going beyond the terms of the contract while declaring the award. For this reason only, the arbitral award is to be held as patently illegal and is liable to be set aside.

19. It was, thus, argued that 1st & 3rd paras of Section 55 of the Indian Contract Act, 1872 prescribe for compensation on failure to perform at a fixed time mentioned in the contract, in which time is essential. The 3rd para of Section 55 deals with the situation where though the contract is voidable on account of promiser's failure to perform his promise at the time agreed, but the promisee accepts performance of such promise at any time other than that agreed. The result is that the promisee would be barred from claiming compensation for any loss occasioned by non-performance of the promise at the time agreed, if no notice had been given by the promisee to the promiser of his intention to do so at the time of such acceptance of the performance.

20. The submission is that the contract has not become voidable as the promisee/supplier/claimant did not exercise its option. While holding that time was the essence of the contract, the tribunal omitted to notice that the promisee/supplier/claimant continued to make supplies even beyond 8/12 months alleged to be the time fixed in the contract. None of such supplies were preceded by any notice claiming compensation. As a result of it, the award of compensation on any ground for the alleged non-performance of the

promise (appellant) at the time allegedly agreed by it, was impermissible as per the Indian Contract Act.

21. Consequently, as a result of short closure of the contract, both the contracting parties would be absolved of their liabilities and the original contract stood substituted under Section 63 of the Indian Contract Act leading to two consequences; namely, (i) the contract quantity is reduced to 437 PSC poles; (ii) the arbitration clause under the original contract does not survive. The submission, thus, is that the compensation awarded by the arbitral tribunal both under the head of under-utilisation and loss of profit could not have been granted. The submission is that the arbitral tribunal has committed a manifest error of jurisdiction in not making any discussion on the issue of survival of the arbitration clause in the wake of short closure of the original contract by a new agreement arrived at between the parties in the year 2015, though the said issue had been specifically raised by the appellant Company (MGVCL). The learned Arbitrator has also committed a grave error in considering the facts of different contracts in the award impugned.

22. Reliance is placed on the decision of the High Court of Bombay in the case of **Mulheim Pipecoastings GmbH vs. Welspun Fintrade Limited and Another (2013 SCC OnLine Bom 1048)** to submit that with the short closure of the original contract in the year 2015, the parties have put an end to the contract, as if it had never existed. Since the original contract is extinguished and annihilated by the subsequent agreement to short close the contract, the arbitration clause forming a part of the original contract would perish with it. Reliance is further placed on the decision of the Apex Court in **Young Achievers vs. IMS**

Learning Resources Private Limited [(2013) 10 SCC 535] to submit that the sole purpose of short closure was to put an end to the contractual relations between the parties under the earlier contract. The arbitration clause in the original contract, can not survive once it has been superseded/novated by the later agreement of short closing, which admittedly does not contain an arbitration clause. The principle that if a contract is superseded by another, the arbitration clause being the component part of the earlier contract falls with it, would be attracted in the facts and circumstances of the present case.

23. Referring to the judgment of the Delhi High Court in **B.L.Kashyap and Sons Ltd. v/s. Mist Avenue Private Ltd. (2023 SCC OnLine Del 3518)**, it was argued that once the work contract has been substituted/cancelled/closed by a new contract since the terms and conditions of the previous original contract were not capable to be performed due to various reasons, it clearly demonstrated the intention of the parties to bring an end to the previous contact. The submission is that though the original contract was validly executed, but the parties had decided to put an end to it, as if it never existed and substituted it by a new contract by short closure. In such a situation, the original contract extinguishes by the substituted one and the arbitration clause of the original contract perishes with it. The rights and liabilities of the parties would be solely governed by the new contract of short closure which does not contain any terms and conditions for award of compensation for the alleged breach. In fact, both the parties are absolved of their rights and liabilities under the original contract, which became incapable to be performed.

24. Reliance is placed on the decision of the Delhi High Court in

Ansal Housing & Construction Ltd. v/s. Samyak Projects Pvt. Ltd. (2018 SCC OnLine 12866) to further substantiate the aforesaid submissions of novation or cancellation of the original contract, which negates the survival of the arbitration clause post-short closure.

25. Referring to the decision of the Court of Appeal in the case of **Amalgamated Investment & Property Co. Ltd. (in liquidation) vs. Texas Commercie International Bank Ltd. [(1981) 3 All ER]**, it was submitted that evidence of subsequent conduct, if available, though cannot come to aid so as to construe the contract, but it can be seen how the parties themselves have acted on it. If parties to a contract, by their course of dealings, put a particular interpretation on the terms of the contract, on the faith of which each of them to the knowledge of other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. It was submitted that by the course of dealing , once the parties have put their own interpretation of the contract, they cannot be allowed to go back on it.

26. It was further argued that reasonable steps have not been taken by the claimant to mitigate the loss which he claim to have sustained consequent upon the appellant's wrong and due to such failure, he cannot claim damage for any such loss, which he ought reasonably to have avoided.

27. Relying upon the decision of the Apex court in the case of **Kanchan Udyog Limited vs. United Spirits Limited [(2017) 8 SCC 237]**, it was argued that the novation of contract could take place *sub silentio*. Waiver and acquiescence may be express or

implied. The principle to be found in Section 63 of the Indian Contract Act is that if a party entitled to a benefit under the contract, is denied the same, resulting in violation of legal right, and does not protest, foregoing its legal right, and accepts compliance in another form or manner, issues will arise with regard to waiver or acquiescence by conduct. Waiver by conduct is an intentional relinquishment of a known right or advantage, benefit, claim or privilege, which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of right. The doctrine which the Court of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of Courts.

28. In the facts of the present case, the conduct of the claimant in accepting the orders and continuing supply of PSC poles beyond the alleged time period fixed in the contract without recourse to any legal remedies for denial of its legal right to receive timely orders from the appellant for supplies of PSC poles, undoubtedly amounts to waiver by conduct and acquiescence by it to the new arrangement. The plea that it was done under any compulsion or involuntarily, is devoid of any material substance and evidence. It is unacceptable and merits no consideration. Even otherwise, the time period for lifting or supplies of PSC poles was not fixed under the contract and the tenure of the contract being open ended, the short closure by joint consensus of the parties would result in frustration of the contract.

29. Referring to the observations in paragraph No. '30' of the decision in **Kanchan Udhog Ltd. (supra)**, it was next argued that as elaborated in Pollock and Mulla, 14th Edn., Vol.II, p.1174, recovery of both the expectation loss and the reliance loss, is not permissible.

The relevant paragraph No. '30' from **Kanchan Udhog Ltd. (supra)** pressed into service, is to be note hereinunder :-

"30. That leaves the question with regard to reliance loss and the expectation loss. Whether the two could be maintainable simultaneously or were mutually exclusive? In *Pollock and Mulla*, 14th Edn., Vol. II, p. 1174, the primary object for protection of expectation interest, has been described as to put the innocent party in the position which he would have occupied had the contract been performed. The general aim of the law being to protect the innocent party's defeated financial expectation and compensate him for his loss of bargain, subject to the rules of causation and remoteness. The purpose of protection of reliance interest is to put the plaintiff in the position in which he would have been if the contract had never been made. The loss may include expenses incurred in preparation by the innocent party's own performance, expenses incurred after the breach or even pre-contract expenditure but subject to remoteness. The following passage from the same is considered appropriate for extraction:

> "No recovery for both, the expectation loss and the reliance loss.
>
> Although the rules as to damages seek to protect both the expectation and the reliance interests, the innocent party cannot ordinarily recover both expectation loss viz. loss of profit, and reliance loss viz. expenses incurred in reliance on the promise; that would involve double counting. He has to choose between the two measures.
>
> However, he cannot claim reliance losses to put himself in a better position than if the contract had been fully performed: else, the award of damages for reliance losses would confer a windfall on the plaintiff, and would increase the damages in proportion to the claimant's inefficiency in performance, rather than in proportion to the gravity of the breach, and probably of normal principles of causation. In such cases, therefore, the plaintiff can recover the loss on account of the wasted expenditure or outlay only to the extent of the expected gain; and the onus of proving lies on the party committing the breach to show that the reliance costs (or any part of them) would not have been recouped, and would still have been wasted, had the contract been performed."

30. Referring to the decision of the Apex Court in **Transmission**

Corporation of Andhra Pradesh Limited and Others vs. GMR Vemagiri Power Generation Limited and Another [(2018) 3 SCC 716], it was submitted that while construing or interpreting the contract, it would be legitimate to take into account the surrounding facts and circumstances, conduct and post-dealings including correspondences exchanged between the parties. Referring to paragraph No. '19' of the said decision, it was submitted that the terms of contract can be express or implied from what has been expressed. It is in the ultimate analysis upon reading of the document as a whole, coupled with the surrounding facts and circumstances including the conduct of the parties, the question of construction of contract can be answered. The intention of the parties must be ascertained from language they have used and may be construed in light of the surrounding circumstances and object of the contract.

31. Placing Section 74 of the Indian Contract Act and the decision of the Apex Court in **Welpsun Speciality Solutions Limited vs. Oil and Natural Gas Corporation Limited [(2022) 2 SCC 382]**, it was argued that Section 74 dilutes time being the essence of the contract. It is now settled that "whether time is of the essence in a contract, has to be culled out from the reading of the entire contract as well as the surrounding circumstances". Merely having an explicit clause may not be sufficient to make the time essence of the contract as the contract spread over a long tenure. The intention of the parties to provide for extensions surely dilutes time being essence of the contract that too when it is in accordance with the rules of contractual interpretation.

32. It was argued that in order to examine whether the delayed execution of the contract by the appellant makes it liable for

compensation, the arbitral tribunal had addressed itself wrongly, in holding that time was of the essence in the contract, even when not a single pole had been supplied over the period of 8 to 12 months period, held to be the time period agreed in the contract. The learned Arbitrator has committed manifest error of law in applying the second para of Section 55 of the Indian Contract Act, which is applicable in cases where it was not the intention of the parties that time should be the essence of the contract and the contract does not become voidable by the failure to do things at or before the specified time. It was, thus, argued that the impugned award suffers from manifest error of jurisdiction of the arbitral tribunal in interpreting the contractual clauses for awarding damages, both for under-utilisation of infrastructure as well as loss of profit.

33. Lastly, it was argued that the Court while dealing with the application under Section 34 has misguided itself in referring to the facts of a different case, inasmuch as, the various factual statements recorded in the order impugned are indicative of the fact that the order of rejection of Section 34 application is a copy-paste order. The Court while rejecting the application under Section 34 vide judgment and order dated 31.03.2023 has acted in a casual manner and a cryptic order has been passed for rejection of the application, which cannot be sustained in the eye of law.

34. The decision of the Court of Appeal of the Republic of Singapore reported in **DJP and Others vs. DJO [2025] SGCA (I) 2** has been placed before us to vehemently submit that the order impugned under Section 34, which is substantially copied from another source, may implicate either or both of the fundamental rules of natural justice. The task of any adjudicator is to apply his or her mind to the case of both the parties with the requisite degree of

fairness and impartiality. This would typically be reflected in an endeavour to summarise or distill each party's contentions, and to engage with their strength or weaknesses. The material which is lifted from the submissions of one of the parties, will be necessary to consider, whether the way in which this was done gives rise to a reasonable suspicion or apprehension of an unthinking adoption of that party's position. The question to be determined is whether in such circumstances, a fair minded and informed observer would reasonably harbour a suspicion or apprehension that the adjudicator had not approached the matter with the requisite degree of fairness and impartiality. If that is so, the order may be liable to be set aside.

35. The contention is that in an order, where the material is copied from a different source, involving different parties, distinct concerns may arise. The right of due process and assurance of fair hearing are the key rights provided to the parties in a litigation. The finality to the process means that due attention is paid to the integrity of the process by which the decision is arrived. What has been compromised in the present case is impermissible, as it affects the integrity of the process rather than the correctness of the reasoning or the result of the proceedings. The orders impugned while recording the facts of a distinct case during the course of discussion, has rendered its decision in breach of natural justice and, as such, is liable to be set aside outrightly.

Case of the claimant/respondent herein:-

36. Mr. P.S.Undurti, the learned advocate appearing for the respondent, in rebuttal, would argue that after receipt of the work order dated 06.01.2006, the claimant from April, 2006 made

repeated oral and written requests to the appellant, asking them to honour the contract by picking up the required quantity. By communication dated 01.10.2007, the appellant asked the claimant to maintain the stock of at least 200 poles ready to be supplied as per the requirement. Thereafter, vide communication dated 30.01.2010, the claimant intimated that only 437 poles were lifted by the appellant and a sizable quantity of tested and untested poles were lying for requisition. Even by the subsequent letter dated 03.05.2011, the respondent wrote the claimant that it was in urgent need of 500 to 750 poles and directed the claimant to mobilise its resources in such a way that maximum production of the poles could be achieved by the claimant. But, when the claimant wrote the letter on 22.05.2011 asking the appellant to revise the price with effect from 01.06.2011 due to increase in the price of the consumables, there was a lull. The first short closure request was then made by the claimant on 27.09.2012. When no response was received, the second short closure request was given on 13.08.2015. After three years, the appellant vide communications dated 13/14.10.2015 had intimated the claimant about its decision to short close the contract and to release the security deposit-cum-performance guarantee.

37. It is submitted by the learned advocate for the claimant that the learned Arbitrator has awarded the claims on three counts: namely, (a) Rs. 34,78,568/- towards underutilised infrastructure cost incurred with 8% interest (as against 18% interest sought by the claimant); (b) Rs. 4,66,146/- towards loss of profits with 8% interest (as against the claim of Rs. 6,21,527/- with 18% interest); (c) Rs. 4,00,000/- towards arbitration costs (as against Rs. 8,50,000/- demanded).

38. It was submitted that the notice invoking arbitration clause dated 25.05.2016 was sent to the appellant with the categorical statement that the claimant had invested huge sums of money and blocked sizable credit to create special infrastructure for manufacturing of 10 mtrs. long PSC poles, which required different technology and production methodology as against more commonly produced 8 Mtrs. long PSC poles, which was usually availed by the GUVNL and its distributive companies including MGVCL. MGVCL had failed to fulfill its obligation to honour the contract and did not lift the committed quantity of PSC poles from time to time. Over the period of approximately 10 years from 2006 to 2016, MGVCL had failed to lift the committed quantity of PSC poles in a timely manner and hence committed breach of the contract.

39. The attention of the Court is invited to the arbitral award wherein the contention of the claimant had been noted that time was the essence of the contract, inasmuch as, the respondent while placing the order of 3000 PSC poles, in the LOI itself, had categorically provided that the price would remain firm during the supply period of 8 months, contemplated under the limited inquiry tender. The claimant was required to supply the entire quantity requisitioned by the respondent within a period of 8 months (including two months of commencement period). Meaning thereby the entire quantity effectively would have to be supplied within a period of six months in the batch of 500 poles per month. It was, thus, a contract where fixed number of 3000 PSC poles were to be supplied by the claimant at the firm rate of Rs. 2425/- per pole within a fixed period of time.

40. On the issuance of the LOI dated 16.06.2025, by letter dated 19.07.2025 itself, the claimant informed the appellant that it had

commenced its manufacturing activities of PSC poles and the appellant were required to issue necessary order/requisition order for supply. Reminder was sent on 16.11.2005 asking the appellant to issue work order since it had added to and altered its existing factory to meet its urgent requirement of manufacturing 500, 10 Mtrs. PSC poles per month, which had completely different production methodology as compared to routinely commissioned 8 Mtrs. long poles. According to the LOI, the supply was to commence within two months, however, there was delay on the part of the appellant in lifting the poles since the commencement of the contract. The work order was issued only on 06.01.2006 and even, thereafter, the appellant moved at a snail pace.

41. The contention of the claimant before the learned Arbitrator was that since the respondent continued to breach the terms of the contract by not lifting the requisite quantity of poles, the claimant was constrained to write the letter dated 22.05.2011 informing that rates per pole were required to be revised with effect from 01.06.2011. The request for short closure was made on 27.09.2012, when no response of the appellant was received.

42. It was the contention of the claimant before the learned Arbitrator that the appellant had throughout the tenure of the contract, strong-armed the claimant utilising its monopolistic position knowing fully well that the appellant were capable of financially destroying the claimant and that the claimant’s factory was entirely dependent on the appellant. The originally promised quantity of 3000 poles was to be lifted within a period of 8 months as per the LOI/limited tender inquiry, however, the appellant did not requisition any poles during the original contracted period. Only 437 poles, in total, were requisitioned till the month of October,

2007. The appellant have succeeded in unilaterally extending the period of contract for almost 10 years by intermittently writing the claimant to be ready for supply of PSC poles of 10 Mtrs. PSC poles.

43. The reliance is placed on the decision of the Apex Court in the case of **Atlanta Infrastructure Limited vs. Municipal Corporation of Greater Mumbai and Others [(2018) 15 SCC 320]** to assert that the issue Nos. 1 and 2 about the underutilization of infrastructure and loss of profit, are two separate and distinct claims and they cannot be denied looking to the reasoning given by the learned Arbitrator in the impugned award. The said submissions are sought to be further substantiated with the aid of the decision of the Bombay High Court in the case of **Municipal Corporation of Greater Mumbai v/s. Atlanta Construction Company (India) Ltd. (2025 SCC OnLine Bom 2472)**.

Discussion in the Arbitral Award :-

44. From the reading of the award, we may note that the learned Arbitrator has taken note of the contention of the claimant that it had constructed special line-mounts to meet with the requirements of the special 10 Mtrs. Poles and had also created multiple pole castings so that the originally assured quantity of 500 PSC poles per month could be manufactured each month. It was noted therein that considering the 72 hour initial setting time under the contract and the curing bed capacity of the claimant, the daily production capacity of the claimant was sizably enhanced to meet with the speed requisition assured under the contract.

45. It was noted by the learned Arbitrator that though the claimant was not making a claim for the price escalation since the

contract was for a firm price, but the claimant attempted to stop the losses and mitigate them by addressing a letter to the appellant to short close the contract, as the appellant were not lifting the PSC poles. Even thereafter, the appellant had not acted on the request of the claimant and had continued to direct the claimant to extend the bank guarantee and to keep the contract alive. The contractual relationship between the parties could not have been forced upon the claimant for more than 8 months or at the best 12 months, which is the period mentioned in the work order dated 06.01.2006, inasmuch as, the claimant was also assured, at the very outset, that the duration of the contract was only for 8 months, as a result of which the claimant had made huge investment by consciously considering return on investment, i.e. recovery of the entire capital investment plus profit margins within short span of eight months.

46. We may also record that the impugned award categorically records that the learned advocate appearing for the claimant therein had taken the learned Tribunal through the various invoices, challans, payment receipts, delivery notes produced with the Statement of claim to show the actual expenditure incurred for creation of infrastructure for manufacturing 10 Mtrs. long PSC poles. It was submitted before the Tribunal that during the original period of contract, as also after the extended duration, the claimant was only able to utilise the aggregate 14% of its infrastructure which had been created to meet the requirement of 100% of 3000 PSC poles order that had been placed with claimant. Huge investment made in the infrastructure without return has resulted into great financial distress to the claimant and with the passage of substantial time, expense for making of each pole had substantially increased.

47. The claimant had agitated before the learned Arbitrator that the claimant had incurred heavy expenditure from time to time running into 40,44,846/- as per the price levels of 2005-2006 and that was underutilised by 86% and, therefore, the claimant was entitled to the amount of Rs. 34,78,567.56 alongwith added interest. The claimant stated to have also suffered loss of profit on account of breach of contract by the appellant and asserted that the question of mitigation of loss was impossible in the facts of the present case where the only consumer for PSC poles was the appellant and there was no other market or consumer/purchaser of 10 Mtrs. PSC poles. The appellant unilaterally extended the contract period and revised the contract quantity consciously without short closing the contract and continued to ask the claimant to be ready, leading to a legitimate expectation that 3000 PSC poles could be lifted by the appellant, as it was originally assured. The claimant demanded loss and damages caused to it for 2563 PSC poles which were not lifted by the appellant as against the originally assured quantity of 3000 PSC poles by agitating that it was entitled to loss of profit offered by it @ 10%, which was always within the knowledge of the appellant. A sum of Rs. 6,21,527.50 under the head of loss of profit with 18% interest caused on account of breach of contract committed by the appellant was, thus, demanded.

48. The learned counsel for the claimant herein has invited attention of the Court to the written statement filed on behalf of the appellant to demonstrate that apart from bald denial to the contents of the statement of claim, nothing had been stated by the respondent with regard to the claim No.1 of reimbursement of 86% of underutilised infrastructure cost incurred by the claimant and the claim No.2 for loss of profit. It was submitted that all arguments made by the learned counsel for the respondent/appellant herein

about novation of contract or frustration of the original contract of supply of 3000 PSC poles with the short closure of the contract, have been developed for the first time while challenging the arbitral award.

49. The learned Arbitrator has noted in the award that the appellant had contended that for a pretty long time, the claimant had not started any production and had supplied only 238 poles upto January, 2008 and, thereafter, started raising grievance as to the speed of lifting and price rise by writing the letter dated 30.01.2010. The firm price offered by the claimant and flexibility of time agreed for lifting the poles as per the convenience of the appellant was specifically mentioned in the supply order dated 06.01.2006, which was acted upon by the claimant as novatio to the letter of intent (LOI) dated 16.06.2005 of the GUVNL. The claimant had never objected to the said terms and conditions of the contract all along the period of subsistence of the contract or asserted that the said terms and conditions were oppressive, till the contract was actually short closed. The claimant had not raised any grievance with reference to the delay in lifting of poles and it was always open for the claimant to rescind the contract at the relevant point of time, which was not done.

50. The appellant, thus, had argued before the learned Arbitrator that the claimant was deliberately overlooking the novatio having come into existence by the agreement dated 06.01.2006, wherein it was expressly envisaged that the claimant had agreed to the supply of 3000 PSC poles as per the lifting schedule and circumstances of the appellant, with firm price. The appellant were not obliged to short close the contract at any point of time, however, as a pure and simple gesture of the appellant, the contract was short closed at the

instance of the claimant and the performance back guarantee was returned.

51. It was contended before the learned Arbitrator that the claimant itself had decided to short close the contract after more than 10 years and having entered into a contract after offering firm price with no time limit, the claimant was not justified in taking a summersault and plead to the contrary. No amount as pleaded in the statement of claim was recoverable from the appellant. The mere fact of short closure of contract by the appellant vide communication dated 13/15.10.2015 at the request of the claimant, would not furnish any cause of action to the claimant to file Statement of claim.

52. It may be noted that no specific issue was framed by the learned Arbitrator about novation of contract as a result of the short closure. The issues framed by the learned Arbitrator are relevant to be noted hereinunder :-

> "[1] Whether the claimant proves that the reduced the contractual respondent procurement from the claimant, in breach of the contract, between the parties?
> [2] Whether the claimant is entitled to the claim, as prayed for, in the statement of Claim?
> [3] Whether the claimant is entitled to interest on the sum claimed in the Statement of Claim? If yes, at what rate?
> [4] Whether the respondent proves that the claim preferred by the claimant M/s. Usha Prestressed Concrete is barred by period of limitation?
> [5] Whether the respondent proves that the claim does not disclose any cause of action and, therefore, the Statement of Claim should be dismissed?
> [6] Whether the respondent proves that the claimant had

committed breach of the contract?
[7] Whether the respondent proves that time was not an essence of the contract?
[8] What order as to costs?"

Findings with respect to the Arbitral Award :

53. Proceeding further, we may record, at the outset, the reasoning of the learned Arbitrator on issue No.5, that the bundle of facts offered by the claimant in the statement of claim from the issuance of Letter of Intent till the issuance of notice of short closure by the claimant, constitute cause of action. The statement of claim, hence, cannot be rejected on the ground that it does not disclose the cause of action for filling the claim.

54. On the issue of novation of the original contract, namely the letter of intent and acceptance thereof, considering the terms and conditions of the original order dated 06.01.2006, the letter of the Gujarat Electricity Board dated 22.03.2005 referring to the limited tender inquiry, it was noted that the LOI was effectively the acceptance of offer and the crystalization of the contract between the parties. The appellant thereafter on 14.10.2005, relying upon the limited tender inquiry and the LOI, issued the lifting schedule for the next five months, which concluded with the sentence -"also confirm adheres to this Lifting Schedule so that detailed work order can be placed". The learned Arbitrator has further considered that even Clause 1 of the Work order dated 06.01.2006 made a reference to the lifting schedule and was issued with reference to the letter dated 14.10.2005 of MGVCL.

55. A perusal of the work order dated 06.01.2006, at this stage, also indicates that it makes a reference to the letter MGVCL/Civil/10

Mtrs. Poles/7590 dated 14.10.2005, while incorporating in clause 1 that the claimant was required to manufacture and supply readymade 3000 Nos. of PSC poles of 10 Mtrs. / 270 Kgs. as per the lifting schedule and the instructions of the company as and when amended without any prejudice thereof.

56. Taking note of the above, we find that the learned Arbitrator can not be said to have erred in rejecting the argument of the respondent therein, namely the appellant herein, that the Work order dated 06.01.2006 was in the nature of novatio contract which superseded earlier contractual terms between the parties. It was rightly held by the learned Arbitrator that the Work order dated 06.01.2006 was nothing but a detailed order which was drawn up later in furtherance of the contract which was originally concluded by the appellant, by issuance of the letter of intent and the lifting schedule given to the claimant on 14.10.2005. The learned Arbitrator has rightly accepted the contentions of the claimant that the appellant’s own letter dated 14.10.2005 providing lifting schedule would indicate that there was a concluded contract between the parties in the form of the issuance of the letter of intent and the Work order dated 06.01.2006 had not resulted into creation of a new contract as contended by the appellant rather it was only extension of the concluded contract already crystallized by issuance of the letter of intent and lifting schedule.

57. The learned Arbitrator having considered the delivery time mentioned in clause 4 of the work order dated 06.01.2006 has further proceeded to record as under :-

> “24. A reasonable reading of the above quoted term read with LOI would indicate that the respondent had agreed to lift the poles within 8 months or in the alternative within 12 months as per the delivery schedule. Under the circumstances, the Tribunal is of the

opinion that there was no novatio of the contract as contended by the respondent and the respondent was duty bound to lift the PSC Poles within a period of 8 months or in any case within a period of 12 months. If the order dated 06/01/2006 is not so interpreted, it would become bad in law on the ground of vagueness and uncertainty and it is not the case of the respondent that the contract is bad in law because it was vague or was uncertain."

58. On issue Nos. 1,2,3,6 and 7, the relevant findings of the learned Arbitrator can be extracted as under :-

(i) The evidence on record shows that the appellant (respondent therein) was required to lift the quantity of 3000 poles within the fixed time frame envisaged in the contract between the parties. The claimant had invested more than 30 lakhs to develop 10 Mtrs. Poles manufacturing facility. It is not the case of the respondent that it had issued delivery schedule for lifting 3000 poles, but the claimant was unable to manufacture readily available 3000 poles. The respondent failed to lift the poles in a timely manner and hence, funds of the claimant got blocked for a pretty long time of 10 years. The claimant proved that it always possessed a balance of manufactured poles, which were not lifted by the respondent. The infrastructure created by the claimant included fixed assets (mechanical and civil), the equipments, cranes, tension tower, water pumps, block pulleys etc.. On account of breach of contract by the respondent, overall expenditure incurred by the claimant towards maintenance and upkeep of the pole factory, has also increased. The infrastructure of pole factory was subjected to the elements/weather conditions irrespective of the fact whether they were used or not and they required recurring expenditure to be incurred for maintaining them at optimum levels. Some components of the pole factory were single-use components, which could not be maintained/repaired after passage of certain time and required replacement. The claimant had, thus, claimed damages for under utilization of the investment for creating factory as per price levels of 2005-2006, by 86% to the tune of Rs. 40,44,846/-, which comes to Rs. 34,78,567.56 alongwith added interest;

(ii) The respondent was conscious of the fact that the claimant would not have any recourse to the unilateral decision taken by the respondent as far as unilateral extensions of the contract period and reduction of the contracted quantity are concerned. Mitigation of losses was impossible in the facts of the present case since the only consumer for PSC poles was the respondent. and there was no other market or consumers/purchasers for the PSC poles;

(iii) The respondent did not short close the contract inspite of repeated requests made by the claimant and by asking the claimant to be ready with the requisite number of poles for supply, the respondent had given rise to a legitimate expectation that 3000 PSC poles would be lifted by it, as was originally assured. Hence, the claimant, is held entitled to compensation for the loss and damages caused to it on account of creation of infrastructure, which remained underutilised by 86%;

(iv) On the loss of profit, the findings is that total 2563 PSC poles were not commissioned and/or lifted by the respondent from the originally assured quantity of 3000 PSC poles and the contract was extended, as if it was to remain alive for all times to come during the life of the respondent and the claimant;

(v) In response to the letter dated 27.09.2012 & reminder dated 13.08.2015 addressed by the claimant, the respondent had short-closed the contract only on 23.09.2015. The letter dated 23.09.2015 even made a reference of the office note No. 724 dated

15.09.2015 and office note No. 780 dated 09.10.2015, but the said office notes, which were the discussions of the respondent in relation to the detailed letters dated 27.09.2012 & 13.08.2015 of the claimant, were not produced;

(vi) The claimant was a regular supplier of 8 Mtrs. PSC poles to the respondent and the said fact is evident from the limited tender inquiry dated 22.03.2005 addressed by the respondent to the claimant. The respondent had clearly indicated to the claimant that it would lift 3000 PSC poles of 10 Mtrs. within eight(8) months and two (2) months was given to the claimant to set up the brand new facility for 10 Mtrs. poles. Thus, effectively within six months in the batch of 500 poles per month, the procurement of the entire quantity was required to be completed;

(vii) With the investment made by the claimant to create specialised infrastructure for manufacturing 10 Mtrs. poles, the respondent was assured of continuous and uninterrupted delivery and the respondent’s interest was further secured by the fact that the supplies were to be made at the firm rate fixed in the contract;

(viii) What is most critical aspect of the matter is that PSC poles, particularly 10 Mtrs. poles, the subject matter of contract, were speciliased products. Manufacturing of PSC poles was an activity of specialised nature having unique designs. The said poles were requisitioned only by the respondent. This was a case of reverse monopoly where there are many suppliers but there is only one buyer for the PSC poles. It is in this context that the business efficacy and commercial viability of contractual relationship between the parties must be considered;

(ix) Looking to the circumstances of the case, particularly assurance of the respondent that it will lift 3000 PSC poles within fixed time frame for which fixed rate was agreed by the claimant, it was absolutely usual and reasonable for the claimant to expect profit and resultantly, the loss of profit arising out of diminution in return over on account of delay in the matter of fulfillment of the respondent’s obligation;

(x) On the broad evaluation of the conduct of the parties and the merits of the matter about the claim of 10% loss of profit by the claimant, the Tribunal has considered that the claimant would definitely have quoted very competitive rates in the year 2005-2006 at the time of getting the order for manufacturing of mass quantity of 3000 PSC poles in one go. As a prudent businessman, at that time, the claimant would have definitely weighed the huge turn over and sales expectation and calculated its per pole cost by factoring in profit margin, accordingly. Hence, instead of 10% loss of profit, only 7.5% was held to be appropriate, fair, just and reasonable, which comes to Rs. 4,66,145.62 towards loss of profit;

(xi) There were multiple letters of the claimant on record, which corroborate that the claimant was always ready and willing to supply the poles in the batch of 500 poles per month so as to complete the contractual procurement within 6 to 8 months. The respondent neither by way of documentary evidence nor by leading oral evidence could dislodge or disprove this admitted factual position. Similarly, the respondent had not even contested that the claimant had committed breach of contract despite the fact that a specific issue had been framed for the purpose at the instance of the respondent. The Tribunal recorded that it was required to look into the documents placed before it for interpretation, applying the principle of business efficacy in the context of assurance of lifting of massive 3000 poles order within a requisite short span of 6 to 8 months or at the best 12 months as per the order dated 06.01.2006;

(xii) On the issue as to whether the time was essence in the contractual relationship between the parties, it was recorded that limited tender inquiry dated 22.03.2005 is the first document indicating the intention of the respondent while seeking the claimant's quote for 10 Mtrs. poles, wherein itself the period of supply was stated as eight(8) months. Even the letter of intent dated 16.06.2005 issued by the respondent stated that supply of 3000 poles was to be completed within eight(8) months in the batch of 500 poles per month including commencement period. The commencement period, as defined in the LOI was two months, within which time the claimant was required to commence its manufacturing activities. Even the work order dated 06.01.2006 speaks of the tenure of the contract as 12 months. From the said documents, it is held that the respondent wanted to secure its supply of 3000 poles and directed the claimant to be capable of supply of 500 poles per month, which means that the entire 3000 poles quantity would definitely to be exhausted within six months or eight months, if two months commencement period is added to 6 months as supply period;

(xiii) The conclusion is that there is sufficient and satisfactory evidence on record, and particularly from the contents of the letters/communications of the respondent to the claimant to hold that the time was indeed essence of the contract entered into between the parties and it is for this reason that the claimant had invested huge sums of money to create a new specialised infrastructure;

(xiv) All the contentions of the respondent that the letter of intent dated 16.06.2005 was merely an offer and was not a concluded contract and the actual concluded contract was the Work order dated 06.01.2006 was rejected looking to the language, tone, tenor and import of the letter of intent, which indeed envisioned it to be a concluded contract. It was held that the subsequent communication/Work order dated 06.01.2006 was merely a more detailed rendition of the understanding between the parties;

(xv) Resultantly, claim No.1 for reimbursement of 86% of underutilised infrastructure cost incurred by the claimant to the tune of Rs. 34,78,567.56 ps. was allowed by the Tribunal with simple interest @ 8% from 1.10.2012 till the date of realisation of the principal amount awarded alongwith interest. It is clarified by the Tribunal that the interest is granted with effect from 01.10.2012 and not since the year 2006, as claimed by the claimant, looking to the fact that by its letter dated 27.09.2012, the claimant had requested for the short closure of the contract on account of the respondent's failure to lift the contracted quantity;

(xvi) On claim No.2, the loss of profit aggregating to Rs. 6,21,527.50 towards 2563 PSC poles which were never requisitioned and/or lifted by the respondent, was awarded with simple interest @ 8% per month with effect from 01.10.2006 till the date of relaisation on the principal amount awarded for loss of profit. It is clarified by the learned Arbitrator that the interest is awarded from 01.10.2006 (on the loss of profit) looking to the fact that time was of essence of the contract and the respondent had failed to lift the contractually assured quantity within the time fixed for the said purpose.

59. With the above, the issue Nos. 1,2,3,6 and 7 are answered in favour of the claimant and against the respondent.

Analysis:

60. Having noticed the rival contentions of the learned counsels for the parties and exhaustively gone through the findings in the award, it may be noted, at the outset, that the findings of the learned Arbitrator that it was not the case of the appellant (respondent) that the claimant had committed breach of contract, has not been disputed before us. The learned Arbitrator categorically records that the respondent therein/appellant herein had neither pleaded nor proved as to how the contract was breached by the claimant. Much stress has been laid by the learned counsel for the appellant on the plea of novation of the (original) contract sub silentio, during the course of subsistence of the contract by the conduct of the claimant in continuing with the supply beyond the contracted period on the principle of waiver or acquiescence by conduct. The further contention is on the plea of substitution of the original contract by joint consensus of the parties to short close the earlier contract. The contention is that the contract contained arbitration clause which stands superseded/novated by the later agreement of short closure by a mutually agreed document, which admittedly does not contain an arbitration clause. The argument pressed into service vehemently is that once the work contract has been substituted /cancelled/closed by a new contract of short closure, since the terms and conditions of the original contract were not capable to be performed due to various reasons, the intention of the parties to bring an end to the previous contract, is clearly demonstrated. The original contract extinguishes by the substituted one and the

arbitration clause of original contract perishes with it.

61. We may note, at this stage, that the above noted issue about the waiver and acquiescence or the novation sub silentio by the conduct or waiver of the claimant had not been argued or agitated before the learned Arbitrator. Nothing can be borne out either from the written statement of the respondent therein/appellant herein or the issues/points of determination framed by the learned Arbitrator on the basis of the evidence of the parties to even assume that the said issue was agitated before the learned Arbitrator and the award is in ignorance of the same.

62. We find that the only contention of the appellant before the learned Arbitrator was that the claimant had not commenced the production work and had supplied a small quantity upto January, 2008 and had illegally started raising grievance as to the speed of lifting and price by writing letter dated 30.01.2010. The period of supply in the letter of intent dated 16.06.2005 of GUVNL was substituted by the period prescribed in the work order dated 06.01.2006, wherein flexibility of time was accorded to the appellant for lifting of the poles as per its convenience. The contention was that the work order dated 06.01.2006, was acted upon by the claimant as novatio to the letter of intent dated 16.06.2005 and was never objected by the claimant all along when the contract was subsisting. The claimant had never raised any grievance with reference to delay in lifting of poles and had there been delay it was always open for the claimant to rescind the contract, but it was never done. It was the case of the respondent that the work order dated 06.01.2006 would result into an agreement navotio where it was expressly envisaged that the claimant had agreed to supply 3000 poles, as per the lifting schedule and instructions of the

appellant with firm price.

63. It was vehemently argued before us that with the substitution of the time period of supply in the letter of intent, the contract of supply became open ended and the learned Arbitrator has erred in holding that the time was of essence of the contract.

64. Considering the above, we may remind ourselves that the contentions of the learned counsel for the appellant that there was no stipulation of time in the contract and the period of supply was indefinite or at the convenience of the appellant, has to be examined keeping in mind the limited scope of scrutiny under Section 37 of the Arbitration and Conciliation Act, 1996.

65. We may note, at the outset, that the contention of the appellant that as a result of the short closure, the arbitration clause in the original contract cannot be pressed into service, has been rejected by the learned Arbitrator relying upon the law laid down by the Apex Court, wherein it is held that even in the case of termination, the repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

66. The first question which we are called upon to answer is as to whether the findings of the learned Arbitrator that the time was indeed of the essence of the contract, can be said to be suffer from patently illegality. We may remind ourselves that any error of fact or even of law is not a ground to set aside the arbitral award within the scope of inquiry under Section 37 of the Arbitration Act, 1996. It is also impermissible for the Court to adopt an alternative view than

the view taken by the learned Arbitrator on the construction/interpretation of the contract. It is well settled principle in arbitration jurisprudence that the Arbitrator is the best judge in the matter of interpretation/construction of the contract. Once on consideration of the terms and conditions of the contract, the conduct of the parties and the relevant evidence on record, the learned Arbitrator interprets or construes the contract in a reasonable manner, the Court will keep its hands off in forming an alternative view on re-appreciation of evidence or reconstruction of the terms of the contract. Only in a case, where the Court can reach at the conclusion that the view taken by the learned Arbitrator is not even a probable view, which can be taken at the level of scrutiny of a reasonable man and the eroneous view of the learned Arbitrator goes to the root of the matter so as to shock the conscience of the Court, interference on the question of construction/interpretation of the contract, would be permissible. **[Reference: Associate Builders vs. DDA [(2015) 3 SCC 49 (Para Nos. 42.3 to 45)].**

67. Keeping in mind the above legal principles, we proceed to answer the challenge to the correctness of the award on the issue whether time is the essence of the contract. Suffice it to note that the learned Arbitrator on consideration of the documentary evidence on record has reached at the conclusion that the intention of the parties to supply a bulk order of 3000 Nos. of PSC 10 Mtrs. / 270 Kgs. (specialized) readymade PSC poles at the firm rate of Rs. 2425 per pole excluding excise duty and sales tax, can be clearly delineated from the letter of intent dated 16.06.2005 as also the work order dated 06.01.2006. The letter of intent dated 16.06.2005 has a clear expression of the order placed by GUVNL for supply of the aforesaid quantity at the firm rate, which was

required to be completed within the period of eight (8) months in the batch of 500 poles per month (including commencement period). The letter of intent even provided that on failure to supply the poles as per the schedule, short supply quantity would be curtailed from the order. The claimant was asked to send confirmation about the order including the price break-up, to which acceptance letter dated 19.07.2005 was sent to the appellant.

68. The learned Arbitrator categorically records that offer in the LOI, of which the acceptance was communicated by the claimant crystallized the contract between the parties. Even the appellant relying upon the limited tender inquiry and the LOI had issued a lifting schedule on 14.10.2005 concluded with the sentence “also confirm adherence to this lifting schedule so that the detailed work order can be placed”. Even the communication dated 14.10.2005 finds reference in the work order dated 06.01.2006 and clause-1 therein makes a reference to the lifting schedule and. The first clause of the work order dated 06.01.2006 required the claimant to manufacture and supply readymade 3000 Nos. of poles as per the lifting schedule and the instructions of the company, though subject to amendment, if any. The learned Arbitrator, thus, opined that the statement in clause-1 of the work order dated 06.01.2006 was a clear indication of the fact that the contract was concluded with the acceptance of the offer by the claimant, in furtherance of the letter of intent. Further, considering clause-4 of the work order dated 06.01.2006 pertaining to delivery (time limit), it was opined that the work order wherein detailed instructions to manufacture and supply readymade 3000 Nos. of PSC poles of 10 Mtrs. / 270 Kgs as per the lifting schedule and the instructions of the company had been given, cannot be said to be a new contract as contended by the respondent, i.e. novation of the concluded

contract with the offer and acceptance by the parties, resulting into extension of the concluded contract already crystalized by issuance of the letter of intent and lifting schedule vide letter dated 14.10.2005.

69. The learned Arbitrator opined that the appellant/respondent wanted to secure its supply of 3000 PSC poles and, as such, a pre-condition requiring the claimant to be capable of supplying atleast 500 poles per month was indicated in the letter of intent dated 16.06.2005, with a definite period for supply being 8 months including the commencement period of two months. The claimant had accepted the offer to supply the entire quantity within six months of supply period by the acceptance letter dated 19.07.2005. This is sufficient and satisfactory evidence to draw intention of the parties that the time was indeed essence of the contract entered into between the parties.

70. Suffice it to record that these reasonings in the award drawn by the learned Arbitrator that the appellant had agreed to lift the poles within eight (8) months or in the alternative within 12 months as per the delivery schedule, under no circumstance can be said to be bereft of evidence or based on extraneous considerations. Perversity in the award cannot be assumed by this Court on re-appreciation of evidence. This reasoning of the learned arbitrator cannot be held to suffer from patent illegality by substitution of our view by forming of a second opinion in the matter of interpretation or construction of contract, which is impermissible within the scope of scrutiny under Section 37 of the Act, 1996. In the crux, we hold that the reasoning of the learned Arbitrator on the issue of time being essence of the contract and rejection of the plea of novation of the contract by issuance of the work order dated 06.01.2006,

cannot be said to be illegal, shaking the conscience of the Court.

71. On the second issue of extinction of the original contract by the short closure and non-survival of the arbitration clause, we are required to consider the circumstances in which the short closure of the contract was requested by the claimant vide communication dated 27.09.2012. The said communication was sent when the appellant MGVCL had lifted only 437 poles in six years. The appellant was extending the contract as if it was existing for all times to come. Admittedly, 2563 poles were not even commissioned and/or lifted by the appellant out of the originally assured quantity of 3000 PSC poles. The appellant had unilaterally extended the contract period and mitigation of losses by the claimant was impossible in the circumstance where the only consumer for 10 Mtrs. PSL pole was the appellant and there was no other market or consumer/purchaser for such pole. Lifting of PSC poles was intermittent and with the issuance of the letter dated 3.5.2011, wherein the claimant was asked to mobilise its resources for maximum production of 10 Mtrs. PSC poles and to be ready for the urgent need of the appellant about 100 to 250 poles, the claimant was given a legitimate expectation that the entire contracted quantity would be lifted by the appellant.

72. The claimant having invested a huge amount of money to create a specialised infrastructure for manufacturing 10 Mtrs. poles, in good faith and to utilize its resources, made a request for the revised rate to fulfill its contractual obligations, agitating that there was a surge in the price of construction material since 2006. Even after the letter sent by the claimant on 30.01.2010 asking the appellant to fulfill its contractual obligations of lifting of poles ordered on the revised rates (considering the surge in the price of

construction material), no response was given by the appellant. The request of the claimant to short close the contract vide communication dated 27.09.2012 was not responded. The appellant knew that the supply of poles for the bulk order of 3000 in number at the firm rate was a time bound contract that too when the appellant prohibited the claimant from increasing its per pole cost and freezed the rate at which, the procurement was to take place. The appellant offered the claimant to supply 3000 poles within a fixed time frame and it was opined by the learned Arbitrator that while accepting such offer, the claimant must have factored its profit margin and then agreed to the fixed rate stated in the letter of intent itself. The learned Arbitrator has rightly considered it to be a case of reverse monopoly as there was no other supplier for the PSC poles.

73. In the above facts and circumstances of the case, the claimant had left with no option but to request the appellant to short close the contract. The request for short closure of the contract was accepted by the appellant after three years with the issuance of the letter dated 13/15.10.2015, in continuation of the second communication dated 13.08.2015 sent by the claimant reiterating the request. It was also not possible for the claimant to short close the supply on its own under the contract.

74. It is, thus, clear that the appellant is trying to take undue advantage of the words used in the work order craftly, such as "12 months or extended period" and "as per the delivery schedule and the instructions of the company as and when amended". The plea of the learned counsel for the appellant that the contract was open-ended and the price was to remain firm during the supply of the entire quantity of 3000 poles at the convenience of the appellant, is

nothing but an act of arm-twisting the claimant. With the short closure notice accepted by the appellant vide letter dated 23.09.2015, though the rights and liabilities of the parties under the contract need not be performed further, but it cannot be argued that the short closure had resulted in extinction of the original contract itself or novation of the contract so as to reduce the entire contracted quantity to 437 PSC poles only lifted by the appellant.

75. Further, from the sequence of events that led to the short closure of the contract on 13/15.10.2015 and in light of the language of the letter dated 13/15.10.2015 of the appellant MGVCL communicating the decision to short close the order dated 06.01.2006, it cannot be said that the parties had agreed to bring an end to their rights and liabilities under the original contract so as to finally determine the same in the sense that no party would have any claim therein against the other.

76. The letter dated 13/15.10.2015, placed on record, is an internal communication between the officers of the MGVCL (appellant). It reads as under :-

> "MGVCL/Civil/10M PSC Pole/Santroad/622 Dt.13/15.10.15
>
> To,
> The Superintending Engineer,
> M.G.V.C.L.,
> Circle office,
> Bhuravav Road-Power House Godhra,
> Godhra-389001.
>
> Subject:-Supply of 10M/270KG Readymade PSC Pole from Santroad P/F-Short closure of order thereof.
> Reference:(1)W.O.No.MGVCL/Civil/PF/RM/Santroad/20 Dt.6.1.06
> (2) Party's letter dtd. 13-8-15.
> (3) Office Note No. 724 dtd. 15.9.15
> (4) Office Note No. 780 dtd. 09.10.15

In the above subject, the competent authority has decided to short closure the order No.20 dtd. 6.1.06 for supply of 10M/27KG Readymade PSC Poles from Santroad P/F and release the SD cum performance Guarantee paid by the supplier.

This is for your information and necessary action.

Sd/-
(K.N.Parikh)
Chief Enginner (T&O)"

77. A bare reading of the said letter indicates that it refers to the decision of the competent authority to short close the order No.20 dated 06.01.2006 for supply of 10 Mtrs. 270 Kgs. readymade PSC poles and release of the security deposit-cum-performance guarantee paid by the supplier. The learned Arbitrator having gone through the said letter has recorded that there was reference to two office notes dated 15.09.2005 and 09.10.2015, which were not produced in the arbitral proceedings. The said letter of the appellant is an internal communiction between the officers of the MGVCL (appellant) communicating the decision of the competent authority. The copy of the said communication was marked to the claimant. There is nothing on record which indicates the expression of intention of the competent authority about the rights and liabilities of the parties under the original contract. No settlement had been arrived between the parties with regard to the outstanding claims under the original contract.

78. Taking note of the above, we may further proceed to consider the decisions relied on by the learned counsel for the appellant to contend that short closure had resulted in extinction of the original contract and the arbitration clause, a collateral term of a contract, perishes with the contract.

79. In the case of **Young Achievers (supra)**, the parties had

arrived at a mutually consent terms, namely exit paper, to put an end to the contractual relationship between them under the earlier contracts. Under the new contract, which superseded and abrogated the earlier agreements, it was mutually decided by the parties that any violation of the other party's trademark, would entitle the said party to take legal recourse against the second party. It was mutually decided by the parties that the appellant therein shall not be entitled to use the trademark in any form and any breach thereof, entitles the respondents to seek legal recourse on violation of the trademark. In the express terms of the exit paper, which put an end to the contractual relationship between the parties under the earlier contracts, it was held by the Apex Court that the arbitration clause <u>under the original contract perishes with the novation of the original contract by mutual consent</u>, relying upon the decision of the Apex Court in **Union of India v/s. Kishorilal Gupta and Bros.(AIR 1959 SC 1362)**.

80. Coming to the case of **Kishorilal Gupta (supra)** referred in the decision of the Apex Court (relied upon by the learned counsel for the appellant), pertinent is to note that the facts and circumstances of the case in **Kishorilal Gupta (supra)** were that the parties during the subsistence of the original contract, had entered into a fresh settlement in express terms declaring that the previous contracts should be finally concluded in terms of the settlement and no party would have any claim against the other. In the said fact of the case, it was held therein that fresh settlement was a self-contained document and it was not dependent upon the earlier contracts for its existence or enforcement. The liability was ascertained and the earlier contracts were substituted and the rights and liabilities of the parties were regulated under the new contract. Noticing the express intention of the parties gathered

from the words of the new agreement, which were clear and unambiguous, it was held therein that the substituted agreement gave a new cause of action and obliterated the earlier ones. It was held therein that as the document itself did not disclose any ambiguity and the common intention of the parties to enter into the new agreement for substitution of the earlier ones, was clear, no scrutiny of the subsequent conduct of the party was called for to ascertain their intention.

81. Having held that, the Apex Court in **Kishorilal Gupta (supra)** had proceeded to examine as to whether the arbitration clause of the original contract survived after the execution of the settlement contract subsequently. The discussion in paragraph No.'9' of the authoritative statement in the text book and the case under English law, are relevant to be extracted hereinunder:-

> "**9.** We shall now notice some of the authoritative statements in the textbooks and a few of the cases bearing on the question raised : In *Chitty on Contract*, 21st Edn., the scope of an arbitration clause is stated thus, at p. 322:
>
> > "So that the law must be now taken to be that when an arbitration clause is unqualified such a clause will apply even if the dispute involve an assertion that circumstances had arisen whether before or after the contract had been partly performed which have the effect of discharging one or both parties from liability e.g. repudiation by one party accepted by the other, or frustration."
>
> In *Russel on Arbitration*, 16th Edn., p. 63, the following test is laid down to ascertain whether an arbitration clause survives after the contract is determined:
>
> > "The test in such cases has been said to be whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause remains effective and can be enforced."
>
> The Judicial Committee in *Hirji Mulji* v. *Cheong Yue Steamship Company* [(1926) AC 497, 502] gives another test at p. 502:
>
> > "That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain.

> His authority depends on the existence of some submission to him by the parties of the subject-matter of the complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction."

A very interesting discussion on the scope of an arbitration clause in the context of a dispute arising on the question of repudiation of a contract is found in the decision of the House of Lords in *Heyman* v. *Darwine Ltd.* [(1942) 1 All ER 337, 343-345, 350] . There a contract was repudiated by one party and accepted as such by the other. The dispute arose in regard to damages under a number of heads covered by the contract. The arbitration clause provided that any dispute between the parties in respect of the agreement or any of the provisions contained therein or anything arising thereout should be referred to arbitration. The House of Lords held that the dispute was one within the arbitration clause. In the speeches of the Law Lords a wider question is discussed and some of the relevant principles have been succinctly stated. Viscount Simon, L.C. observed at p. 343 thus:

> "An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.
>
> If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly. By the law of England (though not, as I understand, by the law of Scotland) such an arbitration clause would also confer authority to assess damages for breach even though it does not confer upon the arbitral body express power to do so.
>
> I do not agree that an arbitration clause expressed in such terms as above ceases to have any possible application merely because the contract has 'come to an end', as, for

> example, by frustration. In such cases it is the performance of the contract that has come to an end."

The learned Law Lord commented on the view expressed by Lord Dunedin at p. 344 thus:

> "The reasoning of Lord Dunedin applies equally to both cases. It is, in my opinion, fallacious to say that, because the contract has "come to an end" before performance begins, the situation, so far as the arbitration clause is concerned, is the same as though the contract had never been made. In such case a binding contract was entered into, with a valid submission to arbitration contained in its arbitration clause, and, unless the language of the arbitration clause is such as to exclude its application until performance has begun, there seems no reason why the arbitrator's jurisdiction should not cover the one case as much as the other."

Lord Macmillan made similar observations at p. 345:

> "If it appears that the dispute is as to whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate; the greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject-matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated, the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement. All this is more or less elementary."

These observations throw considerable light on the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract. The principle is obvious; if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. The learned Law Lord pinpoints the principle underlying his conclusion at p. 347:

> "I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether

> acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

Lord Wright, after explaining the scope of the word "repudiation" and the different meanings it bears, proceeded to state at p. 350:

> "In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission; but only as far as concerns future performance. It remains alive for the awarding of damages, either for previous breaches, or for the breach which constitutes the repudiation. That is only a particular form of contract breaking and would generally, under an ordinary arbitration clause, involve a dispute under the contract like any other breach of contract."

This decision is not directly in point; but the principles laid down therein are of wider application than the actual decision involved. If an arbitration clause is couched in widest terms as in the present case, the dispute, whether there is frustration or repudiation of the contract, will be covered by it. It is not because the arbitration clause survives, but because, though such repudiation ends the liability of the parties to perform the contract, it does not put an end to their liability to pay damages for any breach of the contract. The contract is still in existence for certain purposes. But where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it. The argument, therefore, that the legal position is the same whether the dispute is in respect of repudiation or frustration or novation is not borne out by these decisions. An equally illuminating judgment of Das, J., as he then was, in *Tolaram Nathmull* v. *Birla Jute Manufacturing Co. Ltd*. [ILR (1948) 2 Cal. 171] is strongly relied upon by the learned counsel for the appellant. There the question was whether an arbitration clause which was expressed in wide terms would take in a dispute raised in that case. It was contended on one side that the contract was void ab initio and on the other side that, even on the allegations in the plaint, the contract was not ab initio void. The learned Judge, on the facts of that case, held that no case had been made out for staying the suit and therefore dismissed the application filed by the defendant for stay of the suit. The learned Judge exhaustively considered the case-law on the subject and deduced the principles and enumerated them at p. 187. The learned Judge was not called upon to decide the present question, namely, whether an arbitration clause survived in spite of substitution of the earlier contract containing the arbitration clause by a fresh one, and therefore we do not think that it is necessary to express our opinion on the principles culled out and enumerated in that decision."

82. The principles culled out in paragraph No. '10' read that :-

"10**.** The following principles relevant to the present case emerge from the aforesaid discussion : (*1*) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (*2*) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (*3*) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (*4*) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (*5*) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (*6*) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

83. The next judgment relied by the learned counsel for the appellant is **Mulheim Pipecoatings Gmbh (supra)** of the Bombay High Court, wherein elaborate discussion is about the doctrine of separability of an arbitration agreement from the underlying contract, recognised by the Courts even before the Arbitration and Conciliation Act, 1996 came into existence referring to the principles of law formulated in paragraph No. '30'

of **Kishorilal Gupta (supra)**. The Division Bench of the Bombay High Court in **Mulheim Pipecoatings Gmbh (supra)** has further referred to the decision of the Apex Court in **Jawahar Lal Barman vs. Union of India (AIR 1962 SC 378**) to note the position of law Pre-arbitration Act, 1996, wherein it is said that while the arbitration agreement constitutes a part of the main contract, it is in essence distinct from it and also a subsequent decision in **Damodar Valley Corporation vs. K.K.Kar (1974) 1 SCC 141,** to observe in paragraph Nos. '33' and '34' as under :-

> "33. The earlier decision in *Kishorilal Gupta* was considered by the Supreme Court in a judgment of two learned Judges in *Damodar Valley Corporation* v. *K.K. Kar.*4 The Supreme Court held as follows:
>
> > "We have adverted to these several aspects merely to show that contracts being consensual, the question whether the arbitration clause survives or perishes would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself. In other words, where the binding nature of the contract is not disputed, but a difference has arisen between the parties thereto as to whether there has been a breach by one side or the other or whether one or both the parties have been discharged from further performance such differences are "upon", "in relation to" or "in connection with" the contract. That a contract has come to an end by frustration does not put an end to the contract for all purposes, because there may be rights and obligations which had arisen earlier when it had not come to an end, as it is only the future performance of the contract that has come to an end."
>
> 34. The Supreme Court held that in *Kishorilal Gupta*, Justice Sarkar did not dissent from the propositions enunciated by Justice Subba Rao, but only disagreed with the majority on the effect of the settlement on the arbitration clause. Noting the view of Justice Sarkar, the Supreme Court in *Damodar Valley* observed that accord and satisfaction which secures a release from an obligation arising out of a contract, is really based on the existence of the contract instead of treating it as non-existent. The contract is not annihilated, but the obligations under it cease to be enforceable. Consequently, it is that when an action is brought for the appropriate remedy for non performance of these obligations that an accord and satisfaction furnishes a good defence. The Supreme Court noted that the defence was not that the contract has come to

an end but, that its breach has been satisfied by accord and satisfaction and the Plaintiff in the action is not entitled to the usual remedy for the breach. It was in these circumstances that Justice Sarkar thought that arbitration clause did survive to settle the dispute as to whether there was or was not an accord and satisfaction. On the other hand, in the case at hand, the Supreme Court in *Damodar Valley* held as follows:

> "Where, however, as in this case, there was a termination of the contract due to non-performance, the existence of the contract has been assumed for the purposes of such termination. Similarly the question whether there has been a settlement of all the claims arising in connection with the contract also postulates the existence of the contract. The principle laid down by Sarkar, J., in *Kishorilal Gupta Bros*'s *case* (supra) that accord and satisfaction does not put an end to the arbitration clause was not dissented to by the majority. On the other hand proposition (6) seems to lend weight to the views of Sarkar, J. In these circumstances, the question whether the termination was valid or not and whether damages are recoverable for such wrongful termination does not affect the arbitration clause, or the right of the respondent to invoke it for appointment of an arbitrator."

84. The decision of the Apex Court in **National Agricultural Coop. Marketing Federation India Ltd. vs. Grain Training Ltd. [(2007) 5 SCC 692]** has been considered therein, wherein the Apex Court while exercising the jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 had decided the question as to whether the arbitration clause comes to an end if the contract containing an arbitration agreement is abrogated by natural termination. While holding that the arbitration agreement survives, Jus. R.V.Raveendran held therein that :-

> "The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes

arising under or in connection with the contract (Vide *Heyman* v. *Darwins Ltd*.,[(1942) A.C. 356], *Union of India* v. *Kishorilal Gupta & Bros.(AIR 1959 SC 13)* and *Naihati Jute Mills Ltd.* v. *Khyaliram Jagannath*.(AIR 1968 SC 522)"

85. It was further noted therein that the Apex Court in **National Agricultural Coop. Marketing Federation India Ltd. (supra)** dealing with the applicability of the principles enunciated in **Kishorilal Gupta (supra),** after the enforcement of the Act, 1996, held as follows :-

> "The principle stated in para (i) is now given statutory recognition in Section 16(1)(a) of the Act. The principle in para (iii) has to be now read subject to Section 16(1)(b) of the Act. The principles in paras (iv) and (v) are clear and continue to be applicable. The principle stated in para (ii) requires further elucidation with reference to contracts discharged by performance or accord and satisfaction."

86. The Bombay High Court has further observed that the doctrine of separability is now an established part of the Indian Law. Considering Section 7 of the Arbitration Act, 1996 in the U.K., the consequence of the doctrine of separability explained in Russell on Arbitration, 23rd Edition Page 33, it was noted therein that :-

> "**Consequences of separability**. The doctrine of separability underlines the potential width of an arbitration agreement because it establishes that an arbitration agreement has a separate life from the matrix contract for which it provides the means of resolving disputes. This enables the arbitration agreement to survive breach or termination of the matrix contract of which it forms part. The consequence of this separate existence is that even if the matrix contract has been brought to an end, for example by accepted repudiation or frustration, the arbitration agreement continues in being in order to deal with any disputes in respect of liabilities under the matrix contract arising before or after termination."

87. The English law on the principle of separability incorporated in Section 7 of the Arbitration Act in the U.K., was further noted in paragraph nos. ‘44’ and ‘45’ and the conclusion in paragraph No. ‘46’ are as under :-

> “44. The leading judgment in the U.K. is the decision of the House of Lords in *Fili Shipping Co. Ltd.* v. *Premium Nafta Products Ltd.*,15 Lord Hoffmann lucidly expounded on the normative principle of separability:
>
> > “The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a “distinct agreement” and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the partners claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, is a “distinct agreement”, was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatsoever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.”
>
> 45. The Learned Law Lord also held that “the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.”16 The doctrine has been elucidated in the judgment of Lord Hope of Craighead in the following words:
>
> > “The doctrine of separability requires direct impleachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do.”
>
> 46. We now formulate the essential features of the doctrine of separability. These are:
>
> (i) The arbitration agreement constitutes a collateral term in the

contract which relates to the resolution of disputes and not to the performance of the contract. Whereas the substantive terms of a contract define the rights and obligations of the parties, an arbitration agreement provides for modalities agreed upon by parties for the resolution of their disputes. Parties agree thereby to have their disputes resolved before an arbitral tribunal as distinct from the ordinary courts of law in the jurisdiction;

(ii) Upon the termination of the main contract, the arbitration agreement does not *ipso facto* or necessarily come to an end;

(iii) The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself;

(iv) If the nature of the controversy is such that the main contract would itself be treated as *non est* in the sense that it never came into existence or was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void. Similarly, though the contract was validly executed, parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities thereunder. Even in such a case, since the original contract is extinguished or annihilated by another, the arbitration clause forming a part of the contract would perish with it;

(v) There may, however, be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to a number of circumstances, in which one or both the parties may be discharged from further performance. Termination of the contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end to for all purposes because there may be rights and obligations which had arisen earlier when it had not come to an end. The contract subsists for those purposes and the arbitration clause would operate for those purposes;

(vi) The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. In other words, arguments for impeaching the arbitration agreement must be based on facts which are specific to the arbitration agreement. There may, of course, be facts which are specific to both the main agreement and the arbitration agreement, but there may well be facts which

> are specific to the main agreement, but not to the arbitration agreement. In the former case, the arbitration clause would perish with the main contract while in the latter case, it would not. Another way of considering the matter is whether it is the further performance of the contract that is brought to an end or it is the existence of the contract which is brought to an end. In the former case, where the further performance of the contract has been brought to an end, the arbitration clause would survive whereas when the existence of the contract is itself brought to an end, the arbitration clause would not survive."

88. From an exhaustive reading of the Bombay High Court decision in **Mulheim Pipecoatings Gmbh (supra),** relied on by the learned counsel for the appellant, it may be noted that it was concluded therein that the issue as to whether the arbitration agreement survives or perishes alongwith the main contract would depend upon the nature of controversy and its effect upon the existence or survival of the contract itself. If in a case, though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities thereunder, the original agreement since extinguished or annihilated by another, the arbitration clause forming part of the contract would perish with it. However, there may be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to number of circumstances in which one or both the parties may be discharged from further performance. Termination of contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end for all purposes because there may be rights and liabilities and obligations which had arisen earlier when it had not come to an end. The contract subsists for those

purposes and the arbitration clause would operate for those purposes.

89. It was observed therein that the doctrine of separability requires for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. In cases where the further performance of the contract has been brought to an end, the arbitration clause would survive. Whereas, when the existence of the contract is itself brought to an end, the arbitration clause would not survive.

90. Applying the above noted legal principles stated in the judgment relied by the learned counsel for the appellant, in the facts and circumstances of the present case noted hereinbefore, it is evident that the present case falls in the category of cases where though the further performance of the contract has been brought to an end, but the arbitration clause would survive for the purpose of the controversy, which has arisen upon or in relation to or in connection with the contract. Though the further performance of the contract is put to an end by the parties with the short-closure, but for the rights and obligations of the parties arising under the original contract, the contract subsists and the arbitration clause would operate for that purpose.

91. The other two decisions of the Delhi High Court in **B.L.Kashyap and Sons Ltd. (supra)** and **Ansal Housing & Construction Ltd. (supra)** relied on by the learned counsel for the appellant, are distinguishable in the facts and circumstances of the present case. The arguments of the learned counsel for the

appellant to assail the opinion drawn by the learned Arbitrator on the survival of the arbitration clause even after short-closure are, therefore, rejected being devoid of merits.

92. Coming to the next submission of the learned counsel for the appellant about novation of contract sub silentio and the applicability of Section 63 of the Indian Contract Act on the plea of waiver and acquiescence by the claimant during the subsistence of the contract, at the cost of repetition, it is reiterated that the said issue was not raised before the learned Arbitrator. Even no argument in that regard was raised before the Court under Section 34 proceedings while challenging the award . The challenge to the award before the Court under Section 34 was on the grounds that the award is patently illegal, opposed to the public policy and contrary to the well settled legal principles. The contention was that the learned Arbitrator had travelled beyond the scope of the contract and acted in a biased manner by recording the findings which are not supported by any evidence and are against the record. The learned Arbitrator, in fact, had completely ignored the documentary evidence on record and the award is contrary to the settled provisions of the Arbitration and Conciliation Act and also the terms of the contract.

93. It is evident that the issue about the novation sub silentio taking aid of Section 63 of the Indian Contract Act has been developed by the learned counsel appearing for the appellant in the present appeal under Section 37 to assail the arbitral award. Though in the present proceedings, we are not required to even consider the submissions of the learned counsel for the appellant made for the first time in the appeal under Section 37, on the premise that the submissions are legal in nature though a factual

inquiry was required to be made into the contentions of waiver or acquiescence on the part of the claimant, however, since extensive arguments have been made to assail the award on the ground of novation sub silentio taking aid of Section 63 of the Indian Contract Act, we proceed to deal with those submissions.

94. Based on Section 63 of the Indian Evidence Act, 1872, it was argued by the learned counsel for the appellant that it was open for the claimant to dispense with or remit the performance of promise made to him either wholly or in part, or to extend the time for such performance or to accept instead of the promise any satisfaction, which he thinks fit. The contention is that even if it is admitted for a moment without accepting that time was the essence of the contract, the conduct of the claimant in accepting the performance of the promise beyond the time prescribed under the contract, would be a relevant consideration.

95. Referring to the first and third paragraphs of Section 55 of the Indian Contract Act, it was argued that if the intention of the parties was that time should be of the essence of the contract, in case of failure of a party to fulfill its promise within the specified times, the promisee has an option to make the contract voidable. However, in the case of contract being voidable on account of promisor's failure to perform his promise at the time agreed, if the promisee accepts performance of such promise at any time other than that agreed, promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance, he gives notice to the promisor of his intention to do so.

96. The contention is that with the extension of time to perform

the promise by the appellant, i.e. with the supplies/delivery of PSC poles beyond the alleged time agreed under the contract (as per own claim of the claimant), the claimant had lost its right to claim compensation, inasmuch as, no notice had been given to the appellant at the time of acceptance of performance by the claimant beyond the time agreed, that it had the intention to claim compensation. All the arguments made by the learned counsel for the claimant before the learned Arbitrator that it was entitled for compensation for failure on the part of the appellant to fulfill its promise under the contract of delivery of 3000 PSC poles within the time agreed under the contract, were required to be rejected by the learned Arbitrator.

97. The contention is that the learned Arbitrator has completely ignored the provisions of the Sections 55 and 63 of the Indian Contract Act, after it reached at the conclusion that time was the essence of the contract. It was vehemently argued by the learned counsel for the appellant that once the learned Arbitrator had reached at the conclusion that time was the essence of the contract and the appellant had not lifted the PSC poles within the specified time of 8/12 months agreed under the contract, it was incumbent upon the arbitrator to consider the fact that the claimant itself extended the time for lifting of PSC poles, by continuing to make supplies beyond the alleged specified time agreed under the contract. At no point of time, the claimant had exercised its option to make the contract voidable on account of alleged failure to perform by the appellant and also did not issue any notice of its intention to claim compensation for any loss occassioned by the non-performance of the promise by the appellant at the time agreed, while proceeding to supply the PSC poles beyond the agreed time.

98. Considering these submissions, suffice it to say that the learned Arbitrator has rightly considered it a case of reverse monopoly, where there was only one buyer for the PSC poles, namely the appellant, and in that context considering the business efficacy and commercial viability of the contractual relationship between the parties, it has noted that the mitigation of loss was impossible in the facts of the present case, since the only consumer for PSC poles was the appellant and there was no market or consumer/purchaser outside for PSC poles. The claimant who was in the regular business relationship with the appellant for supply of 8 Mtrs. PSC poles, had accepted the offer to manufacture and supply readymade 3000 PSC poles of 10 Mtrs., in a batch of 500 poles per month, within the time specified in the letter of intent and at the fixed rate. Having accepted the offer, with the conclusion of the contract, the claimant had also created new facilities at its factory and started manufacturing 10 Mtrs. PSC poles. Inspite of repeated communications made by the claimant asking the appellant to lift the PSC poles in the batch of 500 poles per month, as originally promised, nothing had been moved on the side of the appellant for a long time. The oral and written representations made by the claimant uptill January, 2007 yielded no response. However, on 1.10.2007, the appellant wrote the claimant to maintain the stock of atleast 200 poles for supply when the claimant responded by the letter dated 31.12.2007 that the claimant had already manufactured 400 poles, which could be readily requisitioned and that the appellant had not lifted any poles from one of its factory.

99. Uptill 30.01.2010, i.e. for the period of four years from the date of issuance of the work order dated 06.01.2006, the appellant

had lifted only 437 poles and the claimant intimated vide communication dated 30.01.2010 that sizable quantity of tested and untested poles were lying for being requisitioned. As noted hereinbefore, on 03.05.2011 the appellant again wrote to the claimant that it was in urgent need of 500 to 750 poles and asked the claimant to mobilise its resources.

100. In these facts and circumstances of the present case, it is evident that the claimant had no option but to wait for the appellant to respond and lift the already manufactured PSC poles in its factory, which had been upgraded with new facilities on the promise made by the appellant to lift 3000 poles in a time bound manner. It is not a case where the claimant had extended the time for performance of the contract on its own volition or had expressed inclination to dispense with or remit the performance of the promise made to him either wholly or in part. The present is a case where the appellant had unilaterally extended the contract period and even sought to reduce the contracted quantity originally promised, by arm-twisting the claimant who performed its part of the promise on the legitimate expectation that 3000 PSC poles would be lifted by the appellant, as was originally assured. If the arguments of the learned counsel for the appellant about the applicability of Section 63 of the Contract Act are accepted, it would amount to giving leverage to the appellant for the wrong committed by it.

101. Further, on the issue of Section 55 of the Contract Act that the claimant had an option to make the contract voidable and seek compensation by communicating its intention to do so for the loss occasioned by the non-performance of the contract by the appellant at the time agreed, suffice it to say that the above noted

facts of the instance case are sufficient to turn down the said argument.

102. Keeping in mind the nature of the contract in the present case, it cannot even be argued that the claimant had even an option to make the contract voidable. The loss and damages awarded by the learned Arbitrator are towards the under-utilisation of the infrastructure created by the claimant for the performance of its part of the contract and the loss suffered relating to the infrastructure on account of breach of the contract by the appellant, mitigation of which on the part of the claimant was impossible in the facts of the present case. The claimant had demonstrated by producing cogent evidence before the learned Arbitrator that the infrastructure created by it included fixed assets as well, and on account of breach of contract committed by the appellant, overall expenditure incurred by the claimant towards maintenance and upkeep of the pole factory had increased. Some of the fixed assets being single-use components, could not be maintained after passage of certain time and required replacement. These evidences could not be rebutted by the appellant before the learned Arbitrator. The loss suffered by the claimant on account of under-utilisation of its infrastructure for the breach of the contract by the appellant, cannot be denied to the claimant for the above noted arguments of the learned counsel for the appellant based on Section 55 of the Indian Contract Act, 1972, which in our considered opinion, do not attract in the facts and circumstances of the present case.

103. That leaves us with the question with regard to reliance loss and expectation loss. It was argued by the learned counsel for the appellant that both could not be maintained simultaneously.

Dealing with the same, we may refer to Pollock and Mulla on the Indian Contract Act 14th Edn. Vol.II, p.1163. As explained therein :-

> (i) the expectation interest (also referred to as the expectation loss or the performance interest) concerned;: 'to put the plaintiff in as good a position as he would have occupied, had the defendant performed his promise';
> (ii) the reliance interest (status quo interest) concerned;: 'to put the plaintiff in as good a position as he was in before the promise was made';

104. As stated in Pollock and Mulla, the primary object of damages in the contract is to put the innocent party in the position which he would have occupied had the contract been performed. The interest, thus protected, is known as the expectation interest (expectation loss or performance interest). The general aim of the law is to redress the innocent party's defeated financial expectation and compensate him for his loss of bargain. The expectation interest is, thus, positive interest when the law aims to put an innocent in the same financial position, as if the contract had been performed. A contract may give rise to two expectations :-

> (i) of receiving the promised performance, viz. in a contract of purchase of goods, to receive the goods purchased; and
> (ii) of being able to put it to a particular use, viz. Using the goods for manufacture and earn a profit.

105. An award of damages, subject to rules of causation and remoteness, will protect both the interests.

106. The reliance interest (reliance loss) or status quo interest, is a

negative interest, which of a party to the contract lies in avoiding wasted outlay under a broken contract; and while protecting this interest, the law aims at compensating the parties for the expenses incurred and losses suffered in reliance on the contract, which have been rendered futile by the contract. The innocent party is to be put into the position in which he would have been, if the contract had never been made. Such loss, say for instance, include expenses incurred in preparation for the innocent party’s own performance, and may also include expenses incurred by such party after the breach, or even pre-contract expenditure. The party, in breach, cannot avoid liability simply because a true valuation of the innocent party’s expectation interest is rendered impossible by the breach. An innocent party can claim expenditure even if it may not be reasonable, but it must have been directed towards performance and must satisfy the normal rules of remoteness. Reliance losses are essentially retrospective. Their assessment involves looking at the position which the innocent party occupied before the contractual promise was made (or to the position which he would have occupied had the promise never been made) rather than forward to the position which the innocent party should have occupied had the promise been kept.

107. One of the examples of reliance losses as noted in Pollock and Mulla at p.1165 is the case of **Food Corporation of India v/s. Babulal Agrawal [(2004) 2 SCC 712],** reads as under :

> “In Food Corporation of India v/s. Babulal Agrawal, a lease deed in pursuance of an agreement to hire a plinth area was not executed and registered. In the meantime, the plaintiff constructed a plinth according to the designs given by the defendant. The plaintiff was entitled to compensation.”

108. Further, the rule as to the damages, for recovery of the expectation losses and reliance losses, as stated therein at page No.

‘1165 in Pollock and Mulla is as under:-

> “Although the rules as to damages seek to protect both the expectation and the reliance interests, the innocent party cannot ordinarily recover both expectation loss, viz. Loss of profit, and reliance loss, viz. expenses incurred in reliance of the promise; that would involve double counting. He has to choose between the two measures.
>
> However, he cannot claim reliance losses to put himself in a better position than if the contract had been fully performed; else, the award of damages for reliance losses would confer a windfall on the plaintiff, and would increase the damages in proportion to the claimant's inefficiency in performance, rather than in proportion to the gravity of the breach, and probably offend normal principles of causation." In such cases, therefore, the plaintiff can recover the loss on account of wasted expenditure or outlay only to the extent of the expected gain; and the onus of proving lies on the party committing breach to show that the reliance costs (or any part of them) would not have been recouped, and would still have been wasted, had the contract been performed."
>
> **However, a mixed claim for capital expenditure and for loss of profits (seeking reliance losses and expectation losses) may lie in appropriate cases, for example, where the plaintiff really seeks only the net profits lost by the breach; viz. by deducting from the anticipated gross return, the costs of performance, capital outlay, and the salvage value of capital asset employed. The true principle is also stated that there is no logical objection if the plaintiff combines various types of claims, but the plaintiff cannot combine them so as to recover more than once for the same loss.”**

109. A reading of the above noted paragraphs from Pollock and Mulla, makes it clear that the innocent party can recover the loss on account of wasted expenditure or outlay only to the extent of the expected gain; and the onus of proving lies on the party committing breach to show that the reliance costs (or any part of them) would not have been recouped, and would still have been wasted, had the contract been performed. The principle is that the innocent party cannot claim reliance losses to put himself in a better position than if the contract had been fully performed; else the award of damage

for reliance would confer a windfall on such party. However, where the innocent party seeks only the net profits lost by the breach: viz., by deducting from the anticipated gross return, towards the cost of performance, capital outlay, and the salvage value of capital asset employed, a mixed claim for capital expenditure and loss of profits (seeking reliance losses and expectation losses) may lie in appropriate cases. There can be no logical objection if the innocent party combines various types of claims, however, such party cannot combine two claims so as to recover more than once for the same loss.

110. Testing the facts of the present case in light of the above noted principles, at the cost of repetition, it may be noted that two damages awarded by the learned Arbitrator are :-

(i) the damages for under-utilisation of the investment for creating factory as per price levels of 2005-2006 by 86%; which is nothing but a claim for capital expenditure which was wasted on account of breach of the contract by the appellant;

(ii) the other damages is on the loss of profit, by calculation of the price fixed under the contract for lifting of the remaining 2563 PSC poles which were not commissioned or lifted by the appellant, as against the originally quantity of 3000 PSC poles; which is nothing but the price at which the 3000 PSC poles were promised to be purchased or received by the appellant. It is to redress the innocent party, i.e. the claimant herein, for its defeated financial expectation.

111. Nothing beyond the actual damages caused to the claimant proved by him on account of non-performance of the contract on

the part of the appellant, has been awarded by the learned awarded. It cannot be argued that the damages for under-utilisation of the infrastructure by 86% and the cost of the remaining unlifted 2563 PSC poles would confer windfall on the claimant or are not in proportion to the gravity of the breach and offend the normal principles of causation. The onus of proving that the cost or damages or any part thereof could not have been recouped by the claimant, had not been discharged before the learned Arbitrator.

112. It is most pertinent to note, at this juncture, again at the cost of repetition, that both the damages awarded by the learned Arbitrator were claimed in the Statement of claim itself, submitted by the claimant in the arbitration proceedings. The appellant/the original respondent did not rebut the claims by asserting that the damages cannot be awarded, as they would result in putting the claimant in a better position than if the contract had been fully performed. No such contention was made before the learned Arbitrator. We may reiterate that the arguments with regard to reliance losses and the expectation losses are made for the first time in the present proceedings under Section 37, on the plea that it being purely legal question, can be raised at any stage of the proceedings.

113. In so far as the reliance placed on the decision of the Apex Court in **Kanchan Udhog Ltd. (para 30)(supra)** on the issue of damages is concerned, it was a case where the appellant therein had entered into an agreement in 1985 with the respondent therein for establishment of non-alcoholic beverages bottling plant at the agreed place, and sale under the respondent's trade mark. The respondent therein was to provide technical consultancy for establishment of the plant under the agreement. A separate

bottler's agreement was executed, valid for 10 years, containing the respective rights and obligations of the parties, alongwith the marketing agreement, which provided that the beverages be sold in specified districts of the State of West Bengal. The concentrates (essence) for preparation of the non-alcoholic beverages was to be provided by the respondent under the bottler's agreement. The commercial production commenced in 1987 after the establishment of the bottling plant, however, the bottlers agreement was stated to have been terminated by the respondent after three years in 1988. Commercial production at the plant ceased and the suit instituted by the appellant, was decreed by the Court, awarding damages for loss of anticipated profits, towards costs for installation of the plant, after deducting consultancy charges payable to the respondent; alongwith the interest from the date of suit till payment. The Division Bench in appeal reversed the decree and dismissed the suit.

114. It was the case of the appellant before the Apex Court that the respondent was the domain expert and relying on its assurance, the plaintiff had made a business investment. A reasonable profit was, therefore, naturally expected. The loss of anticipated profits was due to failure of the respondent to provide adequate aggressive marketing and advertisement support under the bottler's agreement, in an extremely competitive market. Believing in the respondent, the appellant had made investments. A party committing breach of contract was liable for such damages as are estimated as not unlikely to result from the breach at the time of making of the contract. The breach by the respondent of the bottler's agreement was the direct cause for loss of anticipated profits. The claim for loss of profitability was based on gross profits, and not net profits, which was clearly in contemplation of the parties

at the time of entering into the contract, and would have covered several heads of claims regarding expenses automatically. The claim for damages was required to be assessed by a broad estimation, taking into consideration all significant factors, evaluating the chances for earning profits, and not determination of actual profitability.

115. The appellant therein contended that it had taken reasonable steps for mitigation of damages as available to it, by exploring alternate use of its bottling plant by other bottlers, including sale of the plant, relying on the Explanation to Section 73 of the Contract Act. The bottling plant set up by the respondent under the Project Services Agreement was specific to their product and needs and, as such, it was not saleable in the open market. The investment in establishment of the plant by the appellant was borne out from its balancesheets. The claim for establishment cost of the plant, and loss of anticipated profitability, do not constitute a double claim for damages. Capital cost was claimed towards cost of the plant, it having become non-operational and stood scrapped. Loss of profitability was confined to loss of net profits that would accrue by operation of the plant. It was argued therein that the claim for costing, including the capital costs of the project, and profitability both were distinct issues.

116. The respondent therein rebutted the claims with the categorical assertion that the bottler’s agreement was not a business partnership agreement. The appellant was unable to run its business for more than one reasons, attributable to it alone. The change in excise regime during the subsistence of the contract made it an economic compulsion to route concentrates through one M/s. VEC to avoid higher excise duty, which in turn would affect the

price and saleability of the product, ultimately to the detriment of the appellant itself. At the Bangalore meeting, twelve out of fourteen bottlers agreed for the new arrangement. New bottlers agreement were entered and the appellant started to place the orders and receive concentration.The appellant also started to place the orders and received concentrates directly from M/s. VEC, but abruptly stopped doing so. The appellant had shut down the plant because of its inability to run the business. The suit was belatedly filed in 1990. There had been no breach by the respondent.

117. The appellant having acquiesced to the new arrangement for supply of concentrates and by its conduct, had waived the claimed legal rights under the bottler’s agreement. There had been no termination of the contract by the respondent in view of clause-5 of the bottler’s agreement, as the appellant had accepted the supply of concentrates from M/s. VEC. Clause-5 of the bottler’s agreement provided for supply of concentrates by the respondent, or from such supplies as shall be nominated by it. It was argued that it was not the case of the appellant based on the evidence that M/s. VEC failed to supply concentrates or that it did not meet standards, or was insufficient to meet its marketing obligations, much less that any other twelve bottlers had complained in that regard. The termination of the contract was not the causation or dominant cause for loss of anticipate profits.

118. The Apex Court therein had observed that the breach by the respondent cannot be said to be the cause, much less the dominant cause for loss of anticipated profits. The appellant therein had failed to take steps to mitigate its losses under the Explanation to Section 73 of the Contract Act and the findings of the Court in that regard being based on the material on record, different conclusions

cannot be arrived at. No reasonable steps had been displayed as taken by the appellant for utilisation of its bottler's plant by negotiation with others in the business.

119. It is in the above facts and circumstances of that case, the Apex Court has discussed the question about the maintainability of reliance losses and the expectation losses, simultaneously or mutually exclusive. It was finally held that the appellant therein had failed to establish its claim that the breach by the respondent was not the cause for loss of anticipated profits, and that the profitability projection in its loan application was not the reasonable basis for award of damages towards loss of anticipated profits. The appellant had failed to abide by its own obligations and lacked adequate infrastructure, finances and manpower to run its business. It also failed to take reasonable steps to mitigate its losses.

120. From a careful reading of the judgment of the Apex Court in **Kanchan Udhog Ltd. (supra)**, it can be safely concluded that the principles discussed therein, cannot be made applicable in the facts and circumstances of the present case.

121. Coming to the last submission of the learned counsel for the appellant about the errors poionted in the impugned judgments of the Court passed in the proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 in rejecting the application seeking to set aside the award, suffice to say that the remedy under Section 37 of the Act, 1996 is the second stage of scrutiny about the correctness or validity of the arbitral award. On an exhaustive consideration of all limbs of the challenge to the arbitral award in this judgment, once we have reached at the conclusion that the outcome of the dispute remained the same, we do not find

any reason to set aside the order passed under Section 34 of the Act, 1996 and to remit the matter back for retrial.

122. We are conscious of the fact that upon reading of certain sentences highlighted from the judgment of the Court dated 31.03.2023 under Section 34 in Commercial CMA No. 70 of 2022, it can be discerned that the Additional District Judge has copied certain facts from another of his own judgments like, “after perusal of the documentary evidence and exhaustive examination and cross-examination of various witnesses”; “the period of limitation would begin from 01.09.2009 when 93 poles were lifted by the respondent”; “thus, learned Tribunal has rightly opined that the applicant-Railway Administration has failed to lift the poles in timely manner, the funds of the claimant was blocked for a pretty long time for 10 years”; “therefore, the arguments of the L&T that perversity is crept into the award is of no force”; “that award passed by the learned Arbitral Tribunal runs into 10 pages”. Similar errors can be seen in the judgment and order of the same date passed by the same Judge (4th Additional District Judge, Vadodara) in Commercial CMA No. 71 of 2022. But, none of these errors do form part of the crucial reasonings of the Court. The above noted errors pointed out by the learned counsel for the appellant seem to be typographical errors, which do not have any bearing on the reasoning or the final outcome of the decision.

123. The elaborate discussion in paragraph Nos. ‘3.5’, ‘3.6’, ‘3.7’ and ‘3.8’ of the judgment under Section 34 of the Act, 1996 read as under :-

> “3.5 Further, it is submitted that the LOI makes reference to the limited tender inquiry dated 22.03.2005. In the LOI, it has been clarified that 3000 poles at firm rate would be lifted from the

claimant within 8 months. Thereafter, respondent issued the lifting schedule for the next five months. Thereafter, from the pole lifting chornological record produced by the claimant, it is evident that the respondent started lifting the PSC Poles. Further, learned Arbitral Tribunal has found that the order dated 06.01.2006 was nothing but, a detailed work order which was drawn up later, in furtherance of contract which was originally concluded by the respondent, by issuance of the letter of intent and also in furtherance of lifting schedule issed / given, to the respondent on 14.10.2005. Further, learned Arbitrator has found that reasonable reading of the LOI would indicate that MGVCL had agreed to lift the poles within 8 months or in the alternative within 12 months as per the delivery schedule. It is furhter stated that under those circumstances, the learned Arbitrator has found that there was no novatio of the contract as contended by MGVCL and that MGVCL was duty bound to lift the PSC Poles within a period of 8 months or in any case within a period of 12 months.

3.6. Further, it is submitted that learned Arbitral Tribunal found that claimant had invested more than 30 lacs to develop the 10 mtr. Pole factory is borne out from the documents produced by the respondent-claimant and no evidence was adduced by the applicant to indicate that it was not knowing that the respondent had invested more than Rs.30 lacs to develop the 10 mtr. pole factory. It is further submitted that the question of mitigation of losses was impossible in the facts of the present case since the only consumer for PSC Poles was the applicant and there was no other market or consumer / purchaser for the PSC Poles. Moreover, the applicant had never short-closed the contract ispite of written requests made by the respondent and had continued to force the claimant to have legitimate expectation that the 3000 PSC Poles would be lifted by it as was originally assured.

3.7. It is further submitted that the applicant committed breach of the contract by not lifting the manufactured PSC Poles within stipulated time and as a direct consequence thereof, the respondent had suffered a sizable loss and the learned Arbitrator has found that instead of 10% loss of profit, as prayed for by the respondent loss of profit at the rate of 7.5% would be an appropriate, fair just and reasonable remedy. It is submitted that it had been clearly recorded by the learned Sole Arbitrator that on the facts, evidence and circumstances of the case in light of the settled legal position, the applicant had not only committed a breach of the contract, but had continued to commit such breach by unilaterally modifying the ordered quantity from time to time in complete violation of the terms and conditions of the tender read with the terms and conditions of the work orders, which comprised of the contract as a whole.

3.8. It is submitted by the respondent that the award does not breach the fundamental policy of Indian Law and the award displays absolute legal fidelity. It was neither whimsical nor arbitrary in nature. The learned Arbitral Tribunal has dealt with the issues at hand in a lucid, fair reasonable and objective manner and the award is not actuated by any extraneous considerations. Further, there is no averment in the present application to the effect that the award has been obtained either by fraud or by corruption and learned Arbitrator, while adjudicating the merits of the matter, has exhaustively considered the comportment of the parties and the correspondence exchanged between them. Therefore, the award has not been vitiated by any form or illegality and applicant has filed the present application just only to delay the realisation of the amount. Thus, respondent lastly prayed to dismiss the present application with cost. To support its case, respondent has relied upon the following case laws:

a. *Associate Builders Vs. Delhi Development Authority, reported in (2015) 3 SCC 49.*

b. *P.R.Shah Vs. B.H.H. Securities Pvt. Ltd., reported in (2012) 1 SCC 594.*

c. *Rashtriya Ispat Nigam Limited Vs. Dewan Chand Ram Saran, reported in (2012) 5 SCC 306.*

d. *G. Ramachandra Reddy & Co. Vs. Union of India, reported in (2009) 6 SCC 414."*

124. Further, the learned Judge referring to the provisions of Section 34 of the Act, 1996 held in paragraph No. '6' as under:-

"6. By considering the above provisions it is necessary to note that the word "Only if" used in Sub-section 2 of Section 34 narrows down the scope of challenges to Arbitral Award inter alia only on the ground mentioned therein. Apart from the grounds mentioned in Sub-section 2 or (2A) of Section 34 no other ground can be said and pleaded for setting aside the arbitral award. Thus, in this limited jurisdiction, this Court has to see above the legality of the impugned arbitral award. A person challenging the arbitral award either has to show the grounds prescribed in Sub-section 2(A) I to V on the basis of the record of the arbitral tribunal or/and has to establish ground envisage in Clause B of Sub-section 2 and/or has to show the patent illegality as contemplated under Sub-section (2A) of Section 34. Further, in plethora of judgments Hon'be the Apex Court has time and again reaffirmed settled principle of law and stated that the scope of Section 34 of the Arbitration Act is very limited. The provision in Section 34 of the Act is definitely very narrow and the same restricts the scope of judicial intervention by Courts and provides an inclusive list of cricumstances in which an arbitral award can be set aside by the Court."

125. The learned Judge has then proceeded to consider the decisions of the Apex Court in paragraph Nos. ‘7’, ‘8’, ‘9,’ ‘10’, and ‘11’ on the scope of judicial interference in Section 34 of the Act, 1996, and noted in paragraph No.’14’, as under:-

> “14. Therefore, in view of the aforesaid settled proposition of the law and Section 34 of the Act, it is clear the the Court could not substitute its view over that of the arbitrtators. Hence, in light of this, let us now deal with the submission canvassed by the rival sides and factual aspects.”

126. The heart of the reasonings are the observations in paragraph Nos. ‘15’ & ‘16’, which read that:-

> “15. This court has considered the arguments of rival sides and also gone through the relevant record of the leanred Tribunal as well as the award of Hon’ble Arbitrator. At the nutshell, it is reiterated to note that the Tribunal has gone through all the documents and heard the arguments putforth by the learned Counsels and after having examined the witnesses, concluded its finding. So far factual aspect is concerned, if we peruse the record and award then it is found that the learned Arbitral Tribunal has dealt with all the arguments which were canvassed by the applicant in this application. The learned Tribunal has framed the nine issues to come for the arrival of the findings. The learned Tribunal has rightly observed and held that by considering the case of State of Goa Vs. Pravin Enterprises, reported in 2011(0) GLHEL SC 5016 that in view of the Section 21 of the Act, the Arbitration proceedings shall be deemed to have commence from the date on which the said dispute to be referred to the arbitration is receieved by the respondent and held that the statement of the complaint never be regarded as barred by period of limitation. It is further observed by the Hon’ble Arbitrator that the short closure of the contract took place on 15.10.2015, on the basis of which the claim is filed by the claimant. If the period of 3 years is counted from 15.10.2015 as stipulated in Article 55 of the Schedule to the Limitation Act, 1963, it becomes evident that the period of 3 years would expire on 14.10.2018 and the statement of claim is filed on 21.04.2018. Therefore, learned Tribunal has rightly dealt with the issue of the limitation. Further, learned Tribunal has observed that the cause of action is required to be seen as constituting bundle of facts which must be averred by the claimant. By considering the bundle of facts in the present case issuance of the letter of intent dated 16.06.2005

pursuant to tender No.SP/PFRM/PSC Poles/2005/10Mtr/270 kgs, response of the claimant dated 19.07.2005 to the tender inquiry, supply order dated 06.01.2006, issuance of no objection certificate dated 21.05.2016, issuance of notice dated 13.08.2015 by the claimant to the respondent and short closure of order NO.20 would constitute cause of action. The learned Tribunal has rightly dealt with the issue of the cause of action also. Further, so far as the for the finding regarding the novatio of the contract is concerned, the learned Tribunal has observed that the applicant's own letter dated 14.10.2005, providing the lifting schedule would indicate that the lifting schedule was issued by the present applicant because there was a concluded contract between the parties in form of issuance of the letter of intent. The order date 06.01.2006 is not a new contract as contended by the respondent-present applicant, but is merely a extension of the concluded contract already crystalised by issuance of letter of intent and lifting schedule. Thus, learned Tribunal has rightly rejected the arguments of the respondent-applicant that the order dated 06.10.2006 is in nature of navation. Further, by considering the record of the case if we read the LOI, then it transpires that the claimant had agreed to lift the poles within 8 months or in the alternative within 12 months as per the delivery schedule. Thus, by plain reading of the above laws, there was no novatio of the contract. The applicant was duty bound to lift the poles within a period of 8 months or in case within the period of 12 months. Thus, Tribunal rightly dealt with the argument of the novatio."

16. So far as the argument regarding the expenditure for the creation of the infrastructure of the 10 Mtr. Poles factory is concerned, the learned Tribunal has observed that applicant has given the assurance to lift 3000 poles within the fixed time and the contractor would not have invested the huge sum of money to develop an entirely different type of factory of the 10 Mtrs Poles. Due to the assurance, the contractor has invested more than Rs.30 lakhs to develop 10 mtr pole factory and which is borne out from the document produced by the contractor along with the statement of claimant. Further, no evidence is adduced by the applicant to indicate that he was not knowing that the claimant has invested more than Rs.30 lakhs. It was not the case of the applicant that the contractor was unable to manufacture readily available 3000 poles. <u>Thus, learned Tribunal has rightly opined that as the applicant-Railway Administration has failed to lift the poles in timely manner, the funds of the claimant had got blocked for a pretty long time for 10 years</u>. Hence, learned Tribunal has rightly reimbursed the under utilised challans, bills, payment receipts and delivery notes produced by the respondent-claimant along with the statement of claim established the actual incurring of the expenditure for the creation of infrastructure of 10 mtr. Poles factory. Moreover, the applicant had never short closed the contract inspite of written request made by the respondent and it had continued to force the

respondent to have legitimate expectation that the 3000 poles would be lifted by it as was originally assured. The applicant committed the breach of contract by not lifting the manufactured 3000 PSC poles within the stipulated period and as a direct consequences thereof, the claimant has suffered sizable loss which is rightly granted as compensation for the loss of damage to the present respondent by Hon'ble Arbitrator. Hence, by considering the factual aspects, the learned Tribunal has rightly considered the each and every aspect and dealt with each and every arguments of the present applicant in details which are in accordance with law and no illegality is found in the finding of the Hon'ble Arbitrator."

127. The conclusion drawn in paragraph Nos. '17' and '18' read that :-

"17. The award disclosed about the legal fidelity it is neither whimsical nor arbitrary in nature and Tribunal has dealt with the issue at had in a lucid, fair, reasonable and objective manner and the award is not actuated by any extraneous consideration. The learned Tribunal has along with the application of mind has also discussed its mind by giving reasonable award as required in law. The award is absolutely reasonable and there is no perversity or irrationality have crept into the award. Further, the Ld. Tribunal has neither ignored nor execluded any relevant material while coming to the conclusion in the matter. Learned Arbitral Tribunal has not considered any irrelavant material or gave a finding which could defy commercial common-sense of the parties. The findings of the arbitrator are based solely on the evidence on record and the credibility and reliability of any of the witnesses or documentary evidence is not in question. It is needless to say that this Court does not sit in the appeal over the award and would not permitted to reassess or reappreciate the evidence already examined by the Arbitrator. <u>Therefore, the arguements of the L&T that perversity is crept into the award is of no force.</u> Further, award is neither against the justice nor against the morality or standards, therefore, accepted under the Indian law and Public Policy. Further, there is not averments regarding fraud or corruption. Additionally, the Arbitrator while adjudicating the merits of the matter has exhaustively considered the comportment of the parties and the correspondence exchanged between them. Hence, there was no illegality or patent illegality found in the award. Further, the construction of the contract is something that within the exclusive domain of the learned Arbitral Tribunal having regard to the wide nature, scope and ambit of the Arbitration agreement in the contract. In construing the contract, the learned Tribunal has considered the correspondence exchanged between the parties and the conduct of the parties. It is the established law that interpretation of the contract is a matter for the Arbitration to

> determined and if it give rise to determination of the question of the law. For the sake of argument if any error may have allegedly committed in the construction of the contract is a essence then also it is the error within the jurisdiction and does not render an award challengable itself. The entire case of the appellant is that another, purportedly, equally efficacious view could have been taken by the learned Arbitrator, instant of the view finally taken in the award which is not possible as it is established law that even other view is possible under Section 34 of the Act, the court cannot take the other view unless there is patent illegality found.
>
> 18. In view of the Section 34 of the Arbitration Act and after having perused the record of this proceeding, it seems that impugned order is passed on the basis of evidence made available to Ld. Arbitral Tribunal on record. At this juncture, it has to be noted that while appreciating the case, Ld. Arbitral Tribunal appears to have taken into consideration cases of both the sides in true perspective. After having perused the order of Ld. Arbitral Tribunal produced on record at Mark 4/2, i<u>t seems that award passed by Ld. Arbitral Tribunal runs into 10 pages in which, each and every minute fact and legal points are discussed at length.</u> Ld. Arbitral Tribunal appears to have taken into consideration entire record consisting large number of documents produced by both the parties for which regard being had to the fact that it is also manifestly noted in the order passed by the Ld. Sole Arbitrator. Ld. Arbitral Tribunal has given cogent reasons to arrive at final conclusion."

128. The underlined sentences in paragraphs '16', '17' and '18' are those, where errors in the factual aspects noted by the learned Judge, were pointed out by the learned counsel for the appellant.

129. Having carefully gone through the judgment of the Court under Section 34 of the Act, 1996, though, we find that there are errors in noting some factual aspects here and there and it seems that the learned Judge has copied certain paragraphs from another of his own judgments rendered on similar point of controversy, but the said errors do not form part of the crucial reasonings of the Court in refusing to set aside the arbitral award. The errors pointed out by the learned counsel for the appellant are clerical/typographical in nature, which could have been corrected had an application been filed by the applicant, without changing the

structure of the judgment, i.e. the reasonsing and the conclusion. These errors are, therefore, of a nature which do not materially alter the reasoning and the conclusion and therefore, can be ignored, subject to the following observations:-

129.1 The judicial process culminates in the delivery of an order or judgment. Sometimes the order may be brief and in other cases there may be an elaborate judgment. The delivery of such order or judgment constitutes the final product of the judge concerned. In our view, the least which may be expected of the Judge delivering the order/judgment is to be diligent and avoid carelessness so that avoidable errors are weeded out before the said order/judgment is uploaded. When such order/judgment contains irrelevant references or contains text which are misquoted, the creditworthiness of such judgment very often tends to get questioned on grounds like non-application/mis-application of mind on the part of the Judge and makes an otherwise worthy judgment being questioned on superficial/tenuous grounds, which would otherwise have not been available to the party challenging the said order/judgment. The instant case provides a great exemplar of exactly such a situation.

129.2 Even otherwise, as the author of the final product of one's judicial consideration culminating upon strenuous hearing and application of a judicial mind on the lis sought to be decided, it will be well expected that the Judicial Officer shall take pride in the final product upon which the said officer eventually appends one's signature before the same is uploaded.

129.3 We are aware that many a time Judges have to work under strict timelines and with limited resources which make the job more compelling than it should be, even under normal circumstances. At the same time, diligence is not something which can be lightly sacrificed at the altar of expedition or even expediency. This is because, we are equally aware that an entire institution can be questioned for creditworthiness due to careless lapses which find their way into the delivery of the order/judgment and the fact that public confidence tends to be shaken by such carelessness/lack of diligence.

130. We would like to add a word of caution for the Judges of the Commercial / Trial Court to be careful in writing their judgments specifically while deciding more than one cases of the similar nature. The learned Judges are required to read the draft judgments carefully, and edit them so as to avoid occurrence of any such mistake.

131. For the above, being the appellate court exercising jurisdiction under Section 37 of the Act, 1996 at the second level of scrutiny, we do not find any error in the reasoning of the Court under Section 34 of the Act, 1996, so as to attach any illegality in the same. The submissions of the learned counsel for the appellant on the errors in the judgments impugned so as to seek remittal, are liable to be turned down.

132. In view of the above discussion, no interference is called for. Both the appeals stand dismissed being devoid of merits. All

pending Civil Applications are disposed of, accordingly.

133. We direct the Registrar General to circulate the observations in paragraph Nos. '129' to '130' of this judgment to all the trial courts at all levels of the District Judiciary in the State of Gujarat through the Principal District Judges/Principal Judges in the establishment.

(SUNITA AGARWAL, CJ)

(D.N.RAY,J)

C.M. JOSHI