IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

ORIGINAL SIDE

The Hon'ble **JUSTICE SANJIB BANERJEE**
And
The Hon'ble **JUSTICE KAUSIK CHANDA**

APO No. 349 of 2017

GA No. 2170 of 2017
with
EC No. 48 of 2017

STATE OF WEST BENGAL

-VERSUS-

BHARAT VANIJYA EASTERN PRIVATE LIMITED

**And**

APO No. 398 of 2017

GA No. 2806 of 2017
with
AP No. 1087 of 2011

STATE OF WEST BENGAL

-VERSUS-

BHARAT VANIJYA EASTERN PRIVATE LIMITED

**And**

APO No. 419 of 2017

GA No. 2988 of 2017
with
AP No. 1087 of 2011

BHARAT VANIJYA EASTERN PRIVATE LIMITED

-VERSUS-

STATE OF WEST BENGAL

For the State: Mr Tilak Bose, Sr Adv.,

Mr Ratul Das, Adv.,
Mr Arindam Mandal, Adv.,
Mr Tirthankar Das, Adv.,
Mr Jishnu Choudhury, Adv.,
Mr Paritosh Sinha, Adv.

For Bharat Vanijya: Mr Dhruba Ghosh, Sr Adv.,
Mr Reetobroto Mitra, Adv.,
Mr Sarajit Mitra, Adv.,
Ms Madhurima Halder, Adv.

Hearing concluded on: November 21, 2019.

Date: November 27, 2019.

**SANJIB BANERJEE, J. : –**

Of these three appeals, two are directed against a judgment and order of January 4, 2017 passed on the State's challenge to an arbitral award of August 26, 2011. The third matter pertains to an order passed on the State's application for a stay of the operation of the award so that the same was not enforced till the conclusion of the State's continuing challenge to the award.

2. The third matter – the appeal from the order passed in the execution proceedings – is rendered irrelevant in the context of the decision on the two principal appeals as made herein.

3. On the State's challenge to the arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996, the amounts awarded by the arbitrator under the second and fourth heads out of the ten heads of claim

were set aside on the ground that no reasons had been furnished in allowing such heads of claim, whether in part or in full. The amounts awarded under the ninth and tenth heads of claim by the arbitrator were also annulled by the judgment and order impugned, on the ground that such two heads of claim overlapped. APO 398 of 2017 is the State's attempt to have the entirety of the award set aside on the ground that no reasons were furnished in making the award and the award betrays a complete non-application of mind and the total absence of any adjudication. APO 419 of 2017 is the contractor's appeal, questioning the propriety of the judgment and order of January 4, 2017 tinkering with the award and setting aside the amounts awarded under four heads of claim.

4. In December, 1991 the State awarded a contract in favour of the contractor for construction of the Falakata to Pundari stretch of NH 31 in Cooch Behar. The contract envisaged the construction of the 22 km stretch to be completed within three years at a cost of just under Rs.10 crore. The State says that though the contractor was paid more than double the contract price over the nearly 10 years that the contractor laboured over the work, only 18 km out of the 22 km stretch had been completed by such time. The State, at the end of its tether, terminated the contract in March, 2001. The State says that even the Comptroller and Auditor General had questioned the State allowing the contractor's claim on account of additional expenses and, despite a substantial portion of the work not being completed ten years after the award of the contract, the contractor purported to lodge a claim and, ultimately, obtained an award for a sum in excess of Rs.15

crore. The contractor, on the other hand, blames the State for the delay in the work and says that the land was not made available to the contractor within reasonable time for the work to be completed within the time stipulated in the contract. The contractor says that it was the State which was to blame for the delay in the work and the failure in the completion thereof some ten years after the work commenced.

5. Before adverting to the key issues involved in the two principal appeals, it is necessary to notice how the State presents its case and the simultaneous objection of the contractor in such regard as, according to the contractor, the grounds of challenge to the award stand circumscribed by the undertaking furnished on behalf of the State following a contempt notice issued by the Arbitration Court upon finding an apparently false case run by the State in its challenge to the award. The contractor maintains that upon a substantial part of the petition filed under Section 34 of the Act – precisely, paragraph 11 to 16 thereof – being expunged pursuant to the order of the Arbitration Court, the wind was taken out of the sails of the State's challenge to the award and the appeal has to be pursued by the State on such truncated grounds. The contractor submits that the two principal grounds left for the State to challenge the arbitral award or to defend the limited order that it obtained are the grounds of the perceived lack of reasons in the award and the award otherwise being opposed to public policy. The contractor says that adequate reasons have been indicated in the award and the matter must be assessed in the context of

the veritable lack of defence to the contractor's claim as carried to arbitration.

6. The State's narrative is recounted before it is assessed, in the context of the expunged grounds, how much of the challenge to the award may be permissible.

7. According to the State, the subject contract pre-dated the post-liberalisation regime and was excused before the National Highways Act, 1956 was overhauled and the Central Government assumed complete control of the national highways and the construction and the maintenance thereof. The State says that prior to the 1997 Amendment to the Act of 1956, the Central Government would entrust State governments to appoint contractors and have national highways within the respective States constructed under the supervision of the relevant State governments. The State narrates that the funds for such construction of national highways in the States would be remitted by the Central Government to the relevant States; but commensurate work did not ensue and, sometimes, contractors would inflate their bills and make huge post-construction claims in arbitral references without the States effectively contesting the claims since the Central Government would bear the costs at the end of the day. The State submits that in such a scenario, from or about the end of the decade of 1980s, the Central Government required the States to enter into agreements with contractors for construction of national highways within the States but for the relevant contracts not to contain any arbitration agreement. According to the State it was in such circumstances that the

contract awarded in this case in 1991 did not contain any arbitration agreement.

8. Continuing with the narrative, the State submits that after it was constrained to terminate the contract in March, 2001, the contractor lodged a claim by way of a suit in this court. The State says that the contractor applied under Section 89 of the Code of Civil Procedure, 1908 in its suit and sought a reference of the subject-matter of the suit to arbitration. By then, the State informs the court, oral evidence in the suit had already been received and two witnesses on behalf of the contractor were examined on commission with, strangely, Advocate for the State playing the role of the Commissioner recording the evidence. The State suggests that it was such Advocate then representing the State who took an initiative on behalf of the State to have the subject-matter of the suit referred to arbitration on the contractor's application under Section 89 of the Code. The State claims that the personnel of the arbitrator was suggested by the contractor and Advocate then representing the State and in course of the reference before the arbitrator continued to represent the State till the conclusion of the reference.

9. The State asserts that upon the award being rendered, the State did not have all the papers pertaining to the reference and, in the circumstances, was constrained to challenge to the arbitral award of August 26, 2011 without being fully aware of what transpired in the reference. The State says that between the time that the reference concluded in March, 2011 and the award was pronounced in August, 2011, there was a change of guard at

the State's headquarters and, it was in such circumstances, that a somewhat messy and uninformed challenge was launched against the award without the State being fully aware of what transpired in course of the reference.

10. In particular, the State claims that even after the records of the arbitral proceedings were brought to this court pursuant to a direction of the Arbitration Court, the State was not aware of any notes of argument having been submitted to the arbitrator by the parties to the reference. According to the State, it was only upon the paper-books being prepared in these appeals that the notes of argument submitted by the contractor before the arbitrator came to be discovered; and, with it, the fact that arbitral award of August 26, 2011 was a substantial reproduction of the notes submitted by or on behalf of the contractor, complete with typographical errors and mistakes as contained in the notes.

11. The contractor objects to the State's narrative. The contractor suggests that since this is not a public interest litigation, it does not behove the State to criticise the agent that it appointed to represent it in the suit and in the arbitral reference, nor to claim that it did not have access to the papers used in the reference since the records had been summoned to this court and the notes of argument submitted on behalf of the contractor before the arbitrator were a part of such records. The contractor submits that in the light of the retraction of a substantial part of the State's case as originally run in its petition under Section 34 of the Act of 1996, it is no longer open to the State to insinuate any kind of misconduct on the part of

the arbitrator or to run an underlying case of corruption or immorality to challenge the arbitral award.

12. To be fair to the State, it fashions its wholesome challenge to the arbitral award on the ground that it is bereft of reasons. Though the State also insists that it is plain to see that the contents of the contractor's notes of argument were substantially reproduced in the arbitral award, the State also maintains that the arbitral award does not reflect the act of assessment or adjudication which is the *sine qua non* of the process of arbitration.

13. Apart from the appeal papers as contained in the paper-books, the State has made over copies of the arbitral award by underlining the portions thereof as have been reproduced therein from the notes of argument submitted by the contractor without the award acknowledging the same. The underlined portions constitute the overwhelming majority of the pages expended in writing the award, though a substantial portion is the reproduction of several paragraphs from the plaint in the contractor's suit which came to be treated as the statement of claim in the arbitral reference. Even if what has been copied in the award from such part of the contractor's notes of argument quoting the plaint or paraphrasing the allegations therein is disregarded, it is also evident that except for a few stray lines here and there and the odd paragraph once in a while, the reasoning part of the award at the business end thereof also borrows copiously from the notes of the contractor, not only chapter and verse but also comma and full-stop.

14. However, before alluding any further to how much of the contractor's notes of argument is churned out in the award rendered by the arbitrator, it is necessary to see the edifice of the claim in the suit and the arbitral reference and the award rendered thereon.

15. The contractor maintains that there was no effective defence to the claim, that the correspondence exchanged between the parties clearly demonstrated that it was the State which was at fault for the delay in the work, particularly after March, 1995, and it would be evident from the minutes of the meetings held in course of the arbitral reference that the submission on behalf of the contractor as reflected in the minutes were substantially reproduced in the notes of argument submitted at the conclusion of the hearing in the reference. The contractor asserts that not only did the two witnesses called by it prove both the factum and the quantum of the claim, but there was no effective cross-examination to discredit what the witnesses had asserted or to shake their testimonies. The contractor submits that if the cross-examination of the contractor's witnesses by the State is looked into, it will be apparent that no defence to the claim had been made out and, as such, the arbitrator reproducing the substance of the contractor's notes of argument amounted to the arbitrator's acceptance of the contractor's case; and nothing more ought to be read into the same. The contractor submits that since the documents exhibited on behalf of the contractor and the contents thereof remained uncontroverted, the mere reference to such correspondence would justify the contractor's claim; and parts of the arbitral award have merely done

that, though the words used may be the same as in the notes submitted on behalf of the contractor.

16. The contractor contends that if a case made out by a claimant in adversarial proceedings is not met by the other party or no defence is put up thereto, it is the claim which has to be accepted and the arbitral award must be read and understood in such light. The contractor submits that though much criticism has been levelled against the arbitrator and the arbitral award for the parsimony in the so-called independent reasoning apparent from the award as to the assessment on the quantification of the damages claimed, the notes of argument submitted on behalf of the State did not embark any exercise in such regard. The contractor points out that the award is in three parts: the narration of the claim from the plaint and the defence from the written statement; the recognition of the issues as framed by court and the discussion thereon; and, the treatment of the several heads of claim including the quantification thereof. The contractor suggests that even if the first of the three parts is seen to have been copied verbatim from the notes of argument submitted by the contractor, it would really be of little consequence. The contractor is at pains to demonstrate that the least underlined portion of the independent copies of the award handed over to court by the State is the second part of the award pertaining to the discussion on the issues. The contractor says that if the arbitrator applied his mind and furnished adequate reasons to answer in favour of the claimant on the issues that arose, the award is substantially justified and it does not call for any interference, particularly in the strict

regime under Section 34 of the Act of 1996. The contractor also suggests that even if the third and final part of the award dealing with the heads of claim slips in an out of the notes of argument submitted by the contractor, the key portions thereof reflect the application of the arbitrator's mind to the matters in issue to arrive at the conclusions in respect of the independent heads of claim recorded therein. The contractor says that once so much is evident, the award should pass muster on any reasonable scrutiny permissible under Section 34 of the Act; for the nature of the authority in this jurisdiction is supervisory and not appellate.

17. There are two approaches open for the purpose of assessing the award, now that it is clear and undeniable that the arbitral award is a substantial reproduction of the notes of argument filed by the contractor at the conclusion of the reference: in the narration of the facts; in most of the reasoning pertaining to the discussion on the issues; and, to a significantly larger extent, while dealing with the heads of claim. The easier option is to bludgeon through the process and hold the arbitral award to lack in the fundamental element of adjudication that ought to be reflected in a document of such kind. However, in adopting such route, it would be the underlying suspicion of misconduct which will be at play; though there is no direct evidence, other than what is reflected in the award, in such regard. Again, the justification for this easier approach may be that acts of misconduct are not carried out openly upon invitation to the other side for there to be any direct evidence in such regard.

18. The other way of dealing with the award is to treat it at face value and assess it on the less unpleasant ground of lacking in reasons. The Act of 1996 commands that an award that is passed in any arbitral proceedings governed by such statute ought to be reasoned. Reasons are the links between the fact and the conclusion and they reveal the application of mind to the matters in issue and trace the journey from the narrative to the directive. Reasons are the lifeblood of any acceptable process of adjudication and, as to whether an award or an order is reasoned or not, it depends more on the quality than the quantity of the words expended. On a set of facts, where the conclusion or the inference is self-evident, elaborate reasons may not be necessary to justify the conclusion; but where even if the factum is established the quantum of compensation requires detailed attention, the reasons furnished call for a stricter scrutiny. Reasons are the plinth on which the edifice of conclusions stands; and the stronger the base, the more difficult it is to dislodge the conclusions.

19. The State refers to the ten basic heads of claim and tries to demonstrate that in none of the cases the arbitrator furnished any reasons to indicate how the arbitrator was impelled to arrive at the conclusion in respect of the individual heads of claim. The ten heads of claim have been arranged in the order they have been treated in the impugned judgment and as they appear at page 9 thereof. The heads of claim, the amounts claimed thereunder, the extent to which the arbitrator allowed each claim and the treatment thereof by the court of the first instance are set out below:

| | Head | Amount Claimed | Arbitrator | Court |
|---|---|---|---|---|
| (i) | Loss and damages | Rs.10,21,23,948 | Rs.7,97,06,496 | Allowed |
| (ii) | Repair and rectification | Rs.36,09,983 | Rs.25,00,000 | Denied |
| (iii) | Wrongful deduction from running account bills | Rs.55,86,670 | Allowed | Allowed |
| (iv) | Overhead expenses | Rs.45,00,000 | Rs.40,00,000 | Denied |
| (v) | Differential royalties | Rs.35,60,180 | Allowed | Allowed |
| (vi) | Differential price of the bill of quantities | Rs.22,09,653 | Rs.15,00,000 | Allowed |
| (vii) | Wrongful realization of security deposit and deduction of performance security from the running account bills | Rs.13,13,553 | Not Pressed | |
| (viii) | Conversion of materials | Rs.12,50,000 | Rs.10,00,000 | Allowed |
| (ix) | Idle labour and idle machining | Rs.4,67,09,823 | Allowed | Denied |
| (x) | Loss of profit | Rs.93,41,965 | Allowed | Denied |

20. The first two heads of claim, pertaining to loss and damages and repair and rectification, are referred to in the discussion under the seventh issue in the arbitral award. It is evident from such discussion that a calculation sheet pertaining to the loss and damage allegedly suffered by the

contractor was furnished by PW-2. In dealing with the basis for the claim – the factum aspect – the arbitrator referred to having "carefully considered and examined the records, papers, pleadings, evidence and the documents pertaining to the claim" and observed that against the compensation sought for 492 days, in respect of a period aggregating to 108 days "I have some doubts as to the proof and maintainability of the claim and as such compensation for the aforesaid period *(108 days)* is disallowed and not granted." The arbitrator then sought to refer to the relevant clauses of the contract, but merely set out pages from the papers filed in the reference over two pages and a bit, the entirety thereof being copied from the notes of argument. The cryptic references – even if it is disregarded that the same were copied from the notes – do not convey any sense and are expressed in the following form in the first two lines of at least 80 lines:

> "PD2, 2-5 PB-1, PD3, 6-11 PB-1, PD4, 12 PB-1, PD5, 13-15 PB-1, PD6, 16 PB-1,, PD7,17-18 PB-1,, PD8, 19 PB-1, PD9, 20 PB-1, PD1-3, 26 PB-1, PD 14, 27 ..."

The arbitrator has also based his subjective finding on the issue on the oral evidence and has referred to several questions by numbers without indicating which part of the answer, or for what purpose or to what extent, helped in the subjective assessment of the arbitrator on the justification of such head of claim.

21. After setting out four pages of numbers and codes, the arbitrator concluded as follows in allowing an amount in excess of Rs.8.2 crore in respect of the first two heads of claim in the following two sentences:

> "Hence, considering the aforesaid evidence, various clauses of the contract, particularly clause no. 20.4 of the General

> Conditions of Contract, I hold this issue in favour of the plaintiff and I also hold in affirmative. However, so far as the quantum of damages mentioned and claimed in para 27 of the plaint is concerned, the same is allowed only to the extent of Rs.79,706.496/- *(sic, Rs.7,97,06,496/-)* only and the claim mentioned in para 28 of the plaint is allowed only to the extent of Rs.25,00,000/- as I am not fully satisfied with regard to some of the claim items."

22. Nothing in how the factum of such heads of claim was assessed or how the quantification in either case was made discloses any rational basis or reasons. It may be noticed that the claim made by the contractor on account of loss and damages was about Rs.10.21 crore which was allowed to the extent of Rs.7.97 crore without indicating how such quantum was justified or even how the balance was liable to be denied. The claim on account of repair and rectification was to the extent of Rs.36.09 lakh of which Rs.25 lakh was allowed, but on a completely subjective basis without any objective grounds made out in support thereof.

23. It is undeniable that there is an element of subjectivity which is always involved but such subjectivity has to stand on some objective footing and, without the fundamental premise of the quantification or the arithmetical basis therefor being indicated, the mere lip service that the arbitrator pays to having read the pleadings, the evidence and the documents would not suffice for the reasons that the statute commands the arbitrator to furnish. After all, a party was being saddled with a liability in excess of Rs.8.22 crore and such party was entitled to know the basis for the same. At any rate, the award does not reveal why and how the arbitrator came to be a finding that 108 out of 492 days claimed were not justified. The material

referred to in support of the conclusion was primarily on the documents relied upon by the contractor and the oral evidence of the contractor. It does not appear – at least it is not recorded in the award – that the contractor abandoned its claim for 108 days. In the circumstances, it has to be concluded that there are no reasons for the arbitrator's finding that 108 of the 492 days ought to be disregarded or, for that matter that any part of the claim was justified. For the sheer lack of reasons, the amounts awarded under the first two heads of claim cry out to be annulled.

24. The third head of claim pertained to the perceived wrongful deduction made by the State from the running account bills submitted by the contractor. The discussion in such regard appears in the award under the fourth issue. After substantially setting out from the notes of argument submitted by the contractor, the award records that the arbitrator had "examined carefully, scrutinized the records, voluminous papers" and considered "the arguments". The arbitrator had this to say on the substance of the claim, thereafter:

> "... I hold that the said sum of Rs.55,86,607/- so deducted by the respondent's engineer on the basis of the alleged draft observation of CAG, is wrongful and/or erroneous and there is no justification to deduct the said sum though there was a contradictory obligation by a Government Order. The plaintiff's work percentage 37.75% subsequently was reduced to 36.25% by Government Order and forming part of the contract was agreed to be paid and, accordingly, over 8 years the said amount was paid to the contractor. But the question – how and on what basis the deduction was made – is beyond my understanding. Hence I hold this issued *(sic, issue)* in favour of the plaintiff and I also hold that the respondent is liable to refund the said amount to the Claimant with interest. ..."

25. The State insists that apart from the conclusion on the relevant claim being bereft of reasons, the same is perverse as it does not refer to the observations of the Comptroller and Auditor General or the copious submission made on behalf of the State in such regard. It may be noticed at this stage that this issue was, perhaps, the most hotly contested of all the issues and the heads of claim carried by the contractor to the arbitral reference. The arbitrator failed to refer to even a solitary ground of objection raised by the State and the conclusion on such account appears to be founded, on the arbitrator's admission, on what is evident from the expression "is beyond my understanding." Again, the arbitrator's conclusion on such aspect and the quantum awarded under the relevant head cannot be sustained since it does not reveal any reasons and is founded on the lack of understanding of the defence by the arbitrator. It may have been possible to accept the lack of understanding of the defence if the defence was summarised even in a sentence or two and the mendacity thereof was self-evident. However, in the arbitrator not alluding to the defence on such aspect though the State's argument from the 49 to the 68th sitting covered the subject, the amount awarded is unacceptable.

26. On the fourth head of claim, dealing with overhead expenses, the entirety of the discussion on issue No. 8(ii) is copied in the award directly from the contractor's notes. After referring to several pages from the papers and several questions from the testimonies of the two witnesses called by the contractor – in similar fashion as was done in the case of the claims under

the first two heads – the arbitrator expressed his opinion on such aspect in the following words:

> "It is significant to mention here that in the entire proceedings seven volumes of documents were disclosed by the parties in one of the volume No. V containing documents disclosed by he *(sic, the)* respondent in the suit. But the documents which were relied were sought to be relied on and referred to by the defendant/respondent. The plaintiff in his evidence deposed that they have relied on most of the documents which have supported the case of the plaintiff/Claimant. Hence, the aforesaid issue is proved and I hold it in affirmative. However, I feel that the assessment of damages have been made by the Claimant on estimate and after considering the matter, I feel that I shall allow this claim on fair estimate only to the extent of Rs.40,00,000/-."

27. Even if the language and the unintelligible expression as evident from what is quoted above are ignored, what is apparent is that an estimate of the damages was disclosed and the arbitrator made an estimation of such estimate without indicating the basis of how the contractor had made its estimation or even how the arbitrator arrived at the "fair estimate" thereof. The nature of reasons that the applicable statute mandates should be furnished in course of assessment, is singularly lacking in the adjudication on the issue and the relevant head of claim. No reasonable authority exercising any degree of supervision as in the present jurisdiction can accept the words quoted above as any modicum of reasons on the matter in issue or as the basis for justifying the quantum awarded. The award clearly falls short of what was required of it in respect of the fourth head of claim.

28. The fifth head of claim was in respect of differential royalties. This matter was dealt with under clauses (iii) and (iv) covered by the eighth issue.

Much like the discussion pertaining to the previous aspects of the contractor's claim, much of what appears in the award in respect of differential royalties has been copied from the notes of argument submitted by the contractor. The arbitrator referred to several questions pertaining to the cross-examination of one of the witnesses, though the references were only to the questions by number without indicating the substance of such questions or the relevance of the witnesses' answer thereto. The justification in allowing the full complement of Rs.35,60,180/- as claimed on such account is found in the following lines:

> "... I am of the view that witness well maintained his earlier testimony. The defendant did not produce any witness to contradict the aforesaid evidence of the plaintiff/Claimant. Hence, the fact stands undisputed. The documents *(sic, defendant)* did not produce any witness to contradict the aforesaid evidence of the plaintiff/claimant. Hence, the fact stands undisputed."

29. The doctrine of non-traverse that applies in civil actions may not be of universal application. In a scenario where there is evidence of money having been lent in advance and a claim is asserted on such account without there being any denial from the adversary, the doctrine may be applied and a decree passed. However, in a claim for damages where the factum has to be established before the quantum can be assessed, a claimant has to affirmatively establish the claim unless the same is admitted by the adversary. There is no reference in this case to any admission of the claim on such head. Indeed, it is evident from the general tenor of the written statement filed by the State, which came to be treated as the counter-statement in the arbitral reference, that the entirety of the

claim had been denied by the State. Even in the opening lines of the notes of argument submitted by the State, it denied the claim in its entirety. In such a scenario, merely because no witness had been called by the State, could not have been the ground or the reason for allowing the claim. Ordinarily, in a claim for damages every bit of the claim has to be demonstrated and earned by the claimant and cannot be allowed in a sweeping manner as has been done in the award in this case. No responsible system governed by the rule of law would accept the conclusion on the relevant head of claim in the absence of any basis therefor being indicated by the arbitrator even for the arbitrator's subjective satisfaction. The amount awarded under fifth head is clearly exceptionable.

30. The sixth head of claim pertained to the differential price of the bill of quantities. Such head of claim is covered under clause (v) of the discussion on the eighth issue in the award. The matter is covered in about 14 lines in the award of which eight are copied from the notes submitted by the contractor. As to the reasons furnished by the arbitrator, the arbitrator recorded that the State did not "contradict the said evidence tendered by the witness of the plaintiff". From this, the arbitrator concluded that the claim "remains undisputed". However, despite finding the claim to be undisputed the arbitrator had this to say:

> "Since the items are based on estimations of the Claimant, and I am not satisfied as to the entirety of the estimation, I allow the said claim only to the extent of Rs.15,00,000/- only as and by way of fair estimation of the claim on the basis of the evidence before me and the arguments of the parties."

31. The most searching of judicial microscopes may not find a nano-bit of reasoning in support of the amount awarded under such head. If the contractor's claim was based on some estimation, the arbitrator's acceptance thereof, in full or in part, had to demonstrate why such extent of estimation was acceptable or justified. There is no discussion at all in such regard and the basis of the claim is not evident from the discussion in such regard. For the same vice as in respect of the earlier heads of claim, the amount awarded under the sixth head of claim cannot be accepted.

32. The seventh head of claim pertained to the withholding of the security deposit. Such amount was paid in course of the reference and is irrelevant in the present discussion.

33. The eighth head of claim was in respect of conversion of materials. The discussion in such regard is found in clause (vii) under the eighth issue in the award. The discussion runs into some 16 lines of which almost 13 lines are reproduced from the contractor's notes without acknowledgment. The contractor's claim in such regard was Rs.12.50 lakh. In the arbitrator allowing a substantial part of the claim, the following is recorded in the award:

> "In cross examination the evidence was not shaken. However since the claim is based on estimation which is difficult to exact verification, I by way fair estimation allow it only to the extent of Rs.10,00,000/-."

34. The discussion does not reveal what was the basis for the estimation adopted by the contractor or the one adopted by the arbitrator. If the

arbitrator was a trained engineer, some value may have been attached to his experienced and expert opinion in such regard. But, in the absence of any basis for the estimation being disclosed, the award under such head has to be regarded as completely devoid of reasons and annulled.

35. The ninth head of claim was on account of idle labour and idle machinery. Such aspect was dealt with by the arbitrator under clause (viii) of the eighth issue. The discussion runs over a page and half and all but six lines are extracted from the contractor's notes of argument without any variation. As to the reasons for awarding the entirety of an amount in excess of Rs.4.67 crore, the arbitrator exercised utmost parsimony and expended only the following sentence to justify the quantification:

> "Hence I hold that the claim is proved and I allow the claim of the Claimant and award a sum of Rs.4,67,09,823/- in favour of the Claimant and direct the respondent to pay the same to the claimant."

36. Though the discussion that preceded the word "Hence" in the above quotation was completely borrowed from the contractor's notes, even if such material had been the independent writing of the arbitrator it would not amount to any reasons in support of the relevant head of claim. The discussion, as copied from the contractor's notes, refers to a delay of three years and a half attributed to the State. It may be recounted that while dealing with the first head of claim, the arbitrator had referred to the contractor's assertion that a total of 492 days had been lost due to the State's laches, apathy or indifference; but the arbitrator, without disclosing any basis, found that 108 days out of the 492 days had to be discounted. It

is obvious that the delay of three years and a half as referred to in the ninth head of claim corresponds to the 492 days that is referred to in the first head of claim. It defies reason and logic that the arbitrator would discount 108 days out of the 492 days of delay under the first of head of claim, but would accept the entirety of the delay of three years and a half attributed to the State in the ninth head of claim. Clearly, the arbitrator contradicted himself. Such contradiction goes to the root of the matter and demonstrates the complete non-application of the arbitrator's mind to the matters in issue. At any rate, the quantification of the damages under the ninth head of claim depended on two variables: the amount per day and the number of days. There is no reference to the amount of damages suffered in respect of idle labour and machinery per day nor is any figure referred to in the award. Even if the figure had been referred to and were found to be acceptable, the quantum of the claim had to be reduced since the multiplier in days would, by the arbitrator's own finding, stand reduced from 492 to 384 after deducting 108 days. Indeed, the award of the full complement of the claim under the ninth head is a clear indication of the mental make-up of the arbitrator and as much as it does not reveal any reasons, it betrays the puerile approach of the arbitrator in assessing the claim and in mechanically allowing the heads of claim without applying his mind thereto.

37. The tenth head of claim pertained to loss of profit and is discussed under paragraph-I at page 52 of the award, apparently as the last limb under the eighth issue. About 15 of the 30 lines expended on such aspect in the

award are reproduced verbatim from the contractor's notes of argument. The independent words of the arbitrator in dealing with such head of claim are found in the following two passages of the discussion:

> "I have carefully examined and considered the above questions which are only by way of suggestions, put to plaintiff's witness. However, no supporting evidence on behalf of the respondent was tendered nor the said evidence was contradicted."
>
> "In my view, the Claimant is entitled to the claimed amount and I am inclined to and make an award in favour of the Claimant for a sum of Rs.93,41,965/- and direct the respondent to pay the same to the Claimant."

38. The claim was on account of loss of profit and the full amount claim was awarded without referring to the basis therefor or examining the same. Again, there is a reference, albeit from the part of the discussion that is copied from the contractor's notes, that "there was a delay of 3½ years" attributable to the State. For one, for the same reasons as indicated in respect of the immediate previous head of claim, the period of three years and a half for which the State has been held liable for the delay contradicts the arbitrator's finding on the same score covered under the first head of claim. Further, loss of profit can be allowed as a percentage of the total profit in the context of the extent of delay in the completion of the work covered by a works contract. For this, the total quantum of profit had to be looked into and the loss of profit assessed only with reference to the total quantum of profit and the number of extra days incurred on account of the delay on the part of the employer. The discussion does not refer to the total quantum of profit for any meaningful assessment to be made of the loss of profit. In any event, the multiplier of three years and a half is clearly

erroneous and appears to be contrary to the finding of the arbitrator in such regard under the first head of claim. Again, for the complete lack of reasons and the obvious non-application of the arbitrator's mind to the matter in issue, the amount awarded under the tenth and final head of claim cannot pass muster.

39. Since the award is found short on every head of claim that it allowed, no discussion is necessary on the award of interest thereunder as there can be no interest if there is no principal amount which is payable.

40. It is, thus, that the arbitral award in this case is liable to be set aside, primarily on the wholesome ground that it is bereft of reasons and does not indicate any – far less, the appropriate degree of – application of mind necessary in any process of adjudication or any judicial or quasi judicial process.

41. In the light of the above, the messy and unpleasant ground of the award being contrary to public policy inasmuch as it merely or substantially parroted the notes of argument submitted by the contractor, pales into insignificance. However, it is evident on a comparison of the notes submitted by the contractor and the award that was rendered that the arbitrator merely copied the same and inserted a few lines or sentences here or there, mostly repeating what had already been quoted in substance from the notes to give the appearance of the independent application of mind to the matters in issue without such exercise being otherwise evident from the award. Indeed, as a proposition, this court suggested to counsel

for the contractor if the underlined portions of the copies of the award as supplied by the State – which reflected what had been reproduced in the award from the contractor's notes argument – could be deleted and what remained in the award could be tested to assess whether the award could pass as a culmination of a process of adjudication. It was appropriately contended, in response, on behalf of the contractor that it would be unfair to delete the narrative, even if such narrative had been reproduced verbatim from the contractor's notes of argument.

42. There is substance in such contention, particularly since the facts are, in judicial or quasi judicial orders, more often than not, reproduced from the pleadings or the words and expressions from the pleadings are paraphrased to recount the facts. However, even if the first of the three parts of the award is disregarded on the copying count since such part contains only the narrative and the facts, the business end of the award would not have any legs to stand on if what has been copied in the award from the contractor's notes is deleted therefrom and the reasoning part of the award is assessed on such basis.

43. Both parties have referred to an oft-cited judgment of recent times reported at (2015) 3 SCC 49 (*Associate Builders v. Delhi Development Authority*) for varying purposes as to the extent of the authority available to a court in this jurisdiction and the scope of the enquiry and assessment under Section 34 of the Act. The contractor maintains that if some reasons are found in support of an award the court will not test an award on its sufficiency of reasoning to the expectation of the court, just as the court

would not look into the sufficiency of the evidence to justify a conclusion based thereon. On the other hand, the State says that it is the duty of the court to discover if an award is patently illegal for it not disclosing any reasons. The State contends that there are certain excuses proffered by the arbitrator to allow the several heads of claim and an illusion of reasoning or aura of justification is created in a sentence or two in respect of each head of claim allowed. The State also asserts that the court is required to read the award meaningfully to ascertain whether the few independent sentences expended by the arbitrator in support of each head of claim could be regarded as reasons.

44. Clearly, the arbitral award in this case falls well short of what was required of it by the governing statute as and by way of reasons. The bases of the claims under the individual heads are not alluded to in any discussion, whether as to the issues or as to the heads of claim. In a few cases the subjective satisfaction of the arbitrator is revealed in the use of the expression “fair estimate” without any objective grounds indicated for such subjective satisfaction. The reasons that the governing statute mandates to be furnished are the objective bases on which the subjective formation of opinion is founded: the subjective opinion matters little and counts for nothing if there is no objective basis thereto.

45. In fine, it need not be speculated as to whether this was a procured award or whether anyone involved or connected with the arbitral reference had acted in a manner unbecoming of such person or whether any corruption was involved in the process. The award cannot stand on the ground that it

does not provide any reasons in support of any head of claim. Such a ground also amounts to the award being opposed to public policy within the meaning of the relevant expression in Section 34 of the Act.

46. As a consequence, the judgment and order impugned dated January 4, 2017 is set aside. The entirety of the arbitral award dated August 26, 2011 is set aside. The contractor is left free to pursue the claim afresh by reviving its suit, if that is possible, or by any other means that may be available to the contractor in accordance with law. The contractor will pay and bear the expenses of the proceedings before the arbitrator and in the court of the first instance and this appeal assessed at Rs.5 lakh. Such costs, if not tendered within a month from date, will carry simple interest at the rate of 6 per cent per annum and will be adjusted first out of any amount that may be awarded in favour of the contractor if it seeks to pursue its claim and is successful therein. At any rate, the award of costs would be executable by the State after a month from today.

47. Accordingly, APO 398 of 2017 is allowed and APO 419 of 2017 is dismissed. In the light of this order, APO 349 of 2017 loses all meaning and stands disposed of along with GA 2806 of 2017, GA 2988 of 2017 and GA 2170 of 2017. Since the contractor has obtained payment of a substantial amount covered by the award, to the tune of Rs.17 crore, inclusive of interest, the contractor should refund the entire amount received together with interest thereon at the simple rate of 6 per cent per annum from the date of receipt of the payment till the date of refund, within four weeks from date, failing which the State will be entitled to

recover the entire amount in accordance with law together with interest at the simple rate of 9 per cent per annum from the date of payment till recovery.

48. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

**(Sanjib Banerjee, J.)**

I agree.

**(Kausik Chanda, J.)**