IN THE HIGH COURT AT CALCUTTA
COMMERCIAL APPELLATE DIVISION
ORIGINAL SIDE

Before:

The Hon'ble Justice Arijit Banerjee
And
The Hon'ble Justice Om Narayan Rai

APOT 76 of 2025
WITH
AP-COM 229 of 2024
AP-COM 255 of 2024
IA No.GA-COM 1 of 2025

M/s. Konarak Enterprise
Vs.
Haldia Development Authority

WITH

APOT 135 of 2025

Haldia Development Authority
Vs.
M/s. Konarak Enterprise

For the Appellant	: Mr. Subhabrata Datta, Adv. Mr. Aranya Saha, Adv.
For the Respondent	: Mr. Swarajit Dey, Adv. Mr. Saptarshi Kar, Adv. Ms. Debarati Das, Adv.
Hearing Concluded on	: 18.08.2025
Judgment on	: 25.09.2025

Om Narayan Rai, J.:-

1. These two appeals under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter referred to "the said Act of 1996") assail a common order dated January 17, 2025 passed by an Hon'ble Single Judge of this Court whereby two applications under Section 34 of the said Act of 1996, being AP-COM No. 229 of 2024 filed by Haldia Development Authority

(hereinafter referred to as "Haldia") and AP-COM 255 of 2024 filed by M/s. Konarak Enterprise (hereinafter referred to as "Konarak") were disposed of. By the order impugned AP-COM No. 229 of 2024 has been allowed in part and AP-COM No. 255 of 2024 has been dismissed.

FACTS OF THE CASE:-

2. Summed up briefly, the undisputed facts of the case, as may be gathered from the material on record, are as follows:-

a) Haldia had floated a Notice Inviting Tender (NIT) for construction of road from Gholpukur to Tekhali Bridge via Amdabad High School at Nandigram (Part- A).

b) Konarak participated in the said tender process and emerged successful, whereafter the work of construction of road from Gholpukur to Tekhali Bridge via Amdabad High School at Nandigram (Part - A) was awarded to Konarak by way of a work order dated February 18, 2009.

c) Certain disputes arose between the parties regarding payments (including refund of security deposit) claimed by Konarak in respect of the work awarded to it by Haldia.

d) As the relevant contract governing the parties (i.e. the work order issued by Haldia in favour of Konarak) and the terms of the NIT provided for resolution of disputes through arbitration, Konarak sought reference of the same to a learned Arbitrator for adjudication. However, as the learned Arbitrator could not be appointed in terms of the arbitration agreement, Konarak approached this Court by filing an application under Section 11 of the said Act of 1996 which was registered as A.P. 235 of 2017.

e) The said application was disposed of by an order dated April 27, 2017 thereby appointing a learned Arbitrator to adjudicate upon the disputes that had cropped up between the parties.

f) Thereafter, Konarak filed its statement of claim before the learned Arbitrator, thereby laying the following three claims: -

   i. Refund of security deposit laying in the custody of the respondent along with interest calculated upto 30.10.2016 at the rate of 12%;

   ii. Delayed interest on the principal amount of the Final Bill upto 30.10.2016 at the rate of 12%;

   iii. Further interests from 01.11.2016 till payment at the rate of 12%; and

   iv. Costs.

g) The respondent contested the claim by filing its counter statement cum counter-claim thereby denying all the material allegations made in the statement of claim and laying a counter claim of Rs.73,09,922/- (Rupees Seventy Three Lakh Nine Thousand Nine Hundred and Twenty Two) on the ground that Haldia had to get the balance work left unfinished by Konarak, by a third party upon the payment of the said sum of Rs.73,09,922/- (Rupees Seventy Three Lakh Nine Thousand Nine Hundred and Twenty Two).

h) The sole learned Arbitrator disposed of the arbitral proceedings by making and publishing an award on February 29, 2020 thereby partly allowing Konarak's claim and rejecting the counter-claim filed by Haldia.

i) After receiving the said award, Konarak filed an application under section 33 of the said Act of 1996 seeking rectification of a few mistakes that, according to Konarak, were apparent on the face of the award.

j) The learned Arbitrator disposed of the said application for rectification by an order dated July 03, 2021 thereby effecting certain corrections in the award.

k) Feeling aggrieved by the said award, both Konarak as well as Haldia approached this Court by filing separate applications under Section 34 of the said Act of 1996 which were registered as AP-COM No. 255 of 2024 and AP-COM 229 of 2024 respectively.

l) The said applications have been disposed of by a consolidated order dated January 17, 2025. While Konarak's application has been dismissed; Haldia's application has been partly allowed. Hence the present appeals by both - Konarak as well as Haldia.

ARGUMENTS ON BEHALF OF THE APPELLANT:-

3. Mr. Datta, learned Advocate appearing for Konarak took us through the order impugned and submitted that the same is erroneous to the extent the same holds that Haldia was entitled to "risk and cost compensation". Mr. Datta invited our attention to the work order dated January 13, 2009 in order to show that the time for completion of the work awarded to Konarak was 180 (One Hundred Eighty) days. He thereafter invited our attention to Clause 1(p) of the said work order to demonstrate that the security deposit that had been furnished by Konarak was to be released in three phases.

4. It was submitted by Mr. Dutta that as the release of security deposit was inextricably linked with the completion of work, once the learned Arbitrator

concluded that the security deposit should be released, he could not have at the same time held that the work remained unfinished.

5. He then invited our attention to page 72 of the paper book and contended that the work awarded to Konarak was only restricted to construction of a road measuring about 6100.0 meters from Gholpukur to Tekhali near Nandigram and that repair work was not the scope of Konarak's work.

6. Mr. Dutta then took us through Clause 6 of the "Conditions of Contract" to show that upon completion of work the contractor was to be provided a certificate by the Executive Engineer/Authorised Officer. Inviting our attention to page 316 of the Volume-III of the stay application (4th and Final Bill), it was submitted that officers of Haldia themselves recorded the date of completion of work by Konarak as September 24, 2010. He then invited our attention to the last page of the same document (at page 359 of the stay application) in order to impress that a certificate of completion of work had been issued in terms of Clause 6 of the "Conditions of Contract".

7. Our attention was then drawn to the Termination Clause in the work order to emphasise that Haldia was obliged to issue a notice of seven days' calling upon the contractor (i.e. Konarak) to complete the unfinished work with a caution that default would attract termination of the contract.

8. Mr. Datta submitted that it was incorrect on the part of Haldia to claim compensation on the basis of "risk and cost principle" by alleging that work had been left unfinished by Konarak.

9. Mr. Datta then invited our attention to a notice inviting online tender (e-tender) dated February 08, 2016 (pages 256 to 260 of the stay application) and submitted that the said notice would make it evident that the work that

had been awarded to the other contractor was different from the one completed by Konarak. He also invited our attention to the scope of work mentioned in the said notice. Referring to the several works mentioned under the caption "Scope of Work", in the said notice, he submitted that most of the works listed there were not in the list of works allotted to Konarak.

10. He thereafter invited our attention to the work order issued by Haldia in favour of the person who had emerged successful in the aforesaid tender (hereafter "new contractor") (at page 276 of the stay application) to drive home the point that the work awarded to the new contractor was different from the work awarded to Konarak. He firstly stressed on the date of issuance of the said work order i.e. March 03, 2016 and submitted that the said date was six (6) years after Konarak had completed the awarded work. It was submitted that the fact that there was a gap of six years between the date of completion of the work awarded to Konarak and the issuance of new work order in favour of a new contractor was evidence enough to conclude that issuance of such tender and work order was necessitated due to the deterioration of the condition of road upon the same being used for six years.

11. Mr. Datta then took us to the "Certificate of Final Completion" (at page 279 of the stay application) and showed us that the said new contractor also did not complete the entire work as would be evident from the fact that the amount put to tender was Rs.78,90,364/- (Rupees Seventy Eight Lakh Ninety Thousand Three Hundred and Sixty Four) and the value of actual work done was Rs.73,09,922/- (Rupees Seventy Three Lakh Nine Thousand

Nine Hundred and Twenty Two). Mr. Datta sought to insinuate that if the new contractor had completed the entire work there would not have been a difference in the value of the quantity of work tendered and the value of the quantity of work actually executed/done. He further sought to project that if it was the case that completion certificate would be issued only upon completion of the entire work then in such case, completion certificate would not have been issued in favour of the new contractor also. He then submitted that variation in the value of the quantity of quantity of work tendered and the value of the quantity of work actually executed/done was a usual feature in such contracts. It was submitted that in cases where it is found that completion of work is impossible given the site conditions, then upon execution of such quantity of work as would be possible to be executed final completion certificate is issued for the value of work actually upon drawing an excess saving statement. By making such submissions Mr. Datta sought to exemplify that execution of work lesser than the contracted work by Konarak could not be held against Konarak once completion certificate has been issued.

12. Mr. Datta next relied on a letter dated August 25, 2009 written by Konarak to Haldia in order to demonstrate that 80% of the works had been completed as on the date of issuance of the said letter i.e. August 25, 2009. He also referred to several other letters dated December 13, 2010, January 05, 2011, February 09, 2011 and March 01, 2011 issued by Haldia and contended that although time had not been extended by Haldia yet Haldia kept on writing letters and pressing for completion of works, which in fact had already been completed by Konarak.

13. He also referred to a letter dated July 22, 2015 written by the Block Development Officer, Nandigram-II, Development Block to the District Magistrate, Purba Medinipur whereby the District Magistrate was informed about the pathetic condition of the road and he thereby sought to insinuate that the subsequent notice inviting tender was in fact a curative action aimed at repairing the damaged roads and not to complete incomplete works allegedly left by Konarak.

14. It was further submitted by Mr. Datta that in any event since time had not been extended therefore the claimant i.e. Konarak had no obligation to do any work after expiry of the contractual period. Mr. Datta submitted that the learned Arbitrator went completely wrong in deciding issue no. 6. It was submitted that once the learned Arbitrator held that Konarak i.e. the contractor was entitled to refund of the security deposit, then in the same breath, the learned Arbitrator could not have held that the employer i.e. Haldia was entitled to compensation based on the risk and cost principle.

15. It was then submitted by Mr. Datta that the Section 34 Court ought to have considered and appreciated that if issue no. 9 had been decided in the negative then security deposit could not have been directed to be refunded in terms of Clauses 3(a), 3(b) and 3(c) of the contract. It was then submitted that the learned Arbitrator had found that Haldia had not imposed any liquidated damages upon Konarak and that itself showed that Konarak had completed the work. It was submitted that both the Section 34 Court as well as the learned Arbitrator had failed to appreciate that the 4th and final bill and the certificate as regards completion of work had been prepared by the

engineers of Haldia and the same constituted clinching evidence of Konarak having completed the work.

16. Mr. Datta was critical of the observations by the Hon'ble Single Judge in paragraph 28 of the order impugned and contented that the same suffered from inherent contradictions. He asserted that if the entire work had been completed then the question of adjusting security deposit or allowing any payment on the basis of risk and cost principle could not have arisen at all. He also took exception to the observation that *"...the measurement books, which are documents admitted by both parties, clearly indicate that a substantial portion of the work was actually completed and final bills raised, passed and paid for such components of the work"* in paragraph 29 of the order impugned and submitted that when the work had been completed the expression *"substantial"* could not have been used by the Hon'ble Single Judge without there being any basis therefor.

17. He challenged various observations as regards the contract being alive till October 31, 2010 and thereafter upto February 2011 made by the learned Arbitrator as being based on no evidence. It was further submitted the Conditions of Contract did not permit any unilateral extension of time and that extension was to be done in the manner indicated in the Conditions of Contract.

18. Mr. Datta submitted that no amount could have been awarded by way of counter claim to Haldia at all and that being so the enhancement of the amount awarded by the learned Single Judge in the order impugned, while correcting a perceived arithmetical error could also not be done. We hasten to put on record that although Mr. Datta challenged the very basis of

awarding the counter claim and hence its enhancement, yet he very fairly steered clear of a ground taken in the Memorandum of Appeal thereby assailing the order impugned for the same having enhanced the counter claim by correcting arithmetical error, in view of the recent enunciation of law by a Constitution Bench of the Hon'ble Supreme Court in the case of ***Gayatri Balasamy vs. ISG Novasoft Technologies Ltd.***[1]**.** It was submitted that in view of the law laid down by the Hon'ble Supreme Court in the aforesaid judgment, the Court had power to rectify computational errors even under Section 34 of the said Act of 1996 but in the case at hand there was no scope for the Court to exercise such power and enhance the counter claim when the counter claim itself was not allowable.

19. Mr. Datta relied on a judgment of the Hon'ble Supreme Court in the case of ***Associate Builders vs. Delhi Development Authority***[2] for the proposition that an award could be interfered with if the same was based on no evidence or by ignoring vital evidence.

20. Mr. Dutta pressed for setting aside that part of the order impugned whereby Haldia's claim for compensation was allowed by the learned Arbitrator and affirmed by the Hon'ble Single judge.

ARGUMENTS ON BEHALF OF THE RESPONDENT:-

21. Mr. Dey, learned Advocate appearing for Haldia at the outset submitted that the scope of interference under Section 34 was very limited and that power of the appellate court under Section 37 of the said Act of 1996 was akin to that of Section 34 of the said Act of 1996. In support of his

[1](2025) 7 SCC 1
[2](2015) 3 SCC 49

submissions he relied on the judgments of the Hon'ble Supreme Court in the cases of ***Dyna Technologies Private Limited vs. Crompton Greaves Limited***[3] and ***MMTC Limited vs. Vedanta Limited***[4]**.**

22. Mr. Dey criticised the award by submitting that the learned Arbitrator erred in allowing Konarak's claim for security deposit. He submitted that the claim for security deposit was barred by limitation. It was submitted that in terms of provisions for release of security deposit contained in the work order, 30% of the security deposit was to be refunded one year after completion of a particular phase of work, the security deposit was to be refunded in three phases. Thus the claimant's entitlement to security deposit, if any, arose immediately after expiry of one year after completion of a given phase. He referred to the several letters issued by the claimant i.e. Konarak and submitted that Konarak had demanded refund of security deposits as early as on March 29, 2011 (Exhibit R-29 at page 236 of the stay application).

23. Mr. Dey took us through paragraph 51 of the Statement of Claim filed by Konarak i.e. the claimant and submitted that it was the claimant's own case that the work had been completed by the claimant on September 24, 2010, that the defect liability period continued till September 24, 2012 and that obligation as regards maintenance remained till September 23, 2013. It was submitted that the terms of the clause read in the light of the said statements made by the claimant would make it evident that the claimant's cause of action for 30% of the security deposit arose upon expiry of one year

[3](2019) 20 SCC 1
[4](2019) 4 SCC 163

from the date of completion of work which would be September 24, 2011, then for the next 30% it arose upon expiry of two years from the date of the completion of work which would be September 24, 2012 and for the balance 40% thereof, it arose upon expiry of three years from the completion of work which would be September 24, 2013.

24. It was then submitted that once a claim was made in the year 2011, limitation began to run from the said year itself and limitation set in three years thereafter i.e. in the year 2014 thereby barring any relief in respect of the security deposit. It was submitted that once limitation had set in the claims for security deposit could not have been entertained in an arbitral proceeding initiated subsequently. He invited our attention to paragraph 23 of the order impugned and submitted that the same was based on an incorrect finding that the claim for refund of security deposit was made on November 11, 2016.

25. He then referred to the various letters written by Konarak to Haldia and sought to demonstrate that in none of the letters had it been written by Konarak that work had been completed or that the same had been measured up. Mr. Dey took this Court through the provisions of Clauses 3(a), 3(b) and 3(c) of the Conditions of Contract and submitted that the contractor i.e. Konarak was not entitled to refund of security deposit as work had not been completed by it.

26. In order to demonstrate that work had not been completed by Konarak, Mr. Dey referred to a letter dated May 04, 2015 written by Konarak to Haldia (page 99 of the stay application) to demonstrate that Konarak itself admitted

that Konarak had been unable to complete the work as its proprietor had met with an accident.

27. Inviting our attention to Clause 3(c) of the Conditions of Contract, it was submitted that while it had been argued on behalf of Konarak that the said Clause had not been invoked at all, there were several letters on record stating that the unfinished work left by Konarak would be got done by other agency upon failure of Konarak to complete the same and in that view of the matter although, Clause 3(c) was not specifically mentioned in the letters, yet it would be evident that the same was definitely invoked. He referred to the letters dated January 05, 2011 (page 232 of the stay application), February 09, 2011 (page 233 of the stay application) to demonstrate that Clause 3(c) had been invoked by Haldia. He also placed reliance on paragraph 44 of the order impugned and drew support therefrom as regards the interpretation of Clause 3(c).

28. It was submitted that the work of maintenance included the work of repair also. Letters dated May 04, 2015 and August 26, 2015 issued by Konarak to Haldia were placed to contend that the aspect that the awarded work had not been completed in entirety was in fact an admitted case. Mr. Dey also invited our attention to the cross-examination of Haldia's witnesses done on behalf of Konarak and placed questions 104 and 105 thereof to demonstrate that no suggestion was given on behalf of the claimant that the second contract was not pertaining to any balance work or that the entire work was completed.

29. In such connection paragraph 36(e) of the award passed by the learned Arbitrator was also placed. It was submitted by Mr. Dey that the findings of

the learned Arbitrator as regards the refund of security deposit and earnest money were not in terms of the contract governing the parties.

30. It was then submitted that both the learned Arbitrator as well as the Hon'ble Single Judge have failed to appreciate that even in terms of clause 3(c) of the Conditions of Contract, forfeiture of the security deposit was possible and permissible. Mr. Dey submitted that by invoking clause 3(c) security deposit had been forfeited and as such there could not have been any direction to refund the same.

31. He, therefore, submitted that such part of the order impugned which affirms the award to the extent the same directs refund of security deposit and earnest money to Konarak should be set aside.

ANALYSIS AND DECISION:-

32. We have heard the learned Counsel appearing for the respective parties and considered the material on record.

33. Since the twin appeals before us entail challenge thrown to an order passed on two applications under Section 34 of the said Act of 1996, therefore abiding by the law governing the field, we would only be required to see as to whether the Hon'ble Single Judge has exercised his jurisdiction under Section 34 of the said Act of 1996 properly or not. That would entail a limited enquiry to find out whether the award impugned before the Hon'ble Single Judge could pass the test of Section 34 of the said Act of 1996 or not. In this context we may refer to the following observations of the Hon'ble Supreme Court in the case of ***MMTC Limited*** (supra):-

> ***"11.*** *As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on*

the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. *It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the learned Arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the learned Arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])*

13. *It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.*

> ***14.*** *As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*
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> [Emphasis Supplied By Us]

34. With our boundaries thus set, we would now test the order impugned in the light of the material on record and the submissions made on behalf of the respective parties.

35. The submissions made before us raise the following issues, any of which if answered in the negative would call for interference with the order impugned and hence the award:-

i. ***Whether the finding of the learned Arbitrator that Konarak had not completed the work awarded to Konarak by work order dated January 13, 2009 which has been affirmed by the order impugned is correct?***

ii. ***Whether the finding of the learned Arbitrator that Haldia was entitled to compensation in the nature of adjustment of excess amount paid to the new contractor (on the basis of risk and cost principle), which has been affirmed by the order impugned and then enhanced by way of correcting arithmetical error, is correct? This issue would include the issue as to whether the work awarded to the new contract was the work left unfinished by Konarak.***

iii. Whether the finding of the learned Arbitrator that Konarak was entitled to refund of security deposit which has been affirmed by the order impugned is correct? This issue subsumes the issue as to whether Konarak's claim of refund of security deposit was barred by limitation.

36. We hasten to add that we have framed the aforesaid issues only for the sake of clarity of reasoning and for ease of dealing with the arguments advanced before us on behalf of the parties while remaining fully conscious that we are not sitting in appeal over the award of the arbitral tribunal. Our enquiry would be confined to determining as to whether upon application of the correct principles under Section 34 of the said Act of 1996 the award and the order impugned can be sustained in the light of the material before us.

37. The aforesaid issues are therefore decided as under:-

Issue No. (i) Whether the finding of the learned Arbitrator that Konarak had not completed the work awarded to Konarak by the work order dated January 13, 2009 which has been affirmed by the order impugned is correct?

38. The case run by Konarak and as presented by Mr. Datta before us was that the contractual work had been completed by Konarak on September 24, 2010 itself. For such purpose the noting in the 4th and Final Bill (page 316 of the stay application) as regards the completion of the work on September 24, 2010 and the certificate issued by the relevant engineer on July 16, 2015 was relied on. Mr. Datta found fault with the learned Arbitrator in not taking into consideration the said two documents. We have noticed that the learned Arbitrator had relied on the various correspondences exchanged

between the parties to arrive at a conclusion that the work remained incomplete till the time of termination of the contract. The following observations of the learned Arbitrator are noteworthy in such context:-

> *"(i) Thereafter from the end of respondent another letter dated 25th August, 2009 is forthcoming (Exhibit R/4) addressed to the Chief Executive Officer, Haldia Development Officer issued by the claimant with prayer for extension of time upto 31st March, 2010. In the said letter the claimant submitted that 80% of the works have already been completed, but culvert and bituminous work were not started due to rainy season. Therefore, she prayed for extension of time upto 31st March, 2010 to complete the entire work.*
>
> *(j) Again in her letter dated 20th April, 2010 (Exhibit C/11), the claimant prayed for extension of time for completion of the tender work upto 31st August, 2010 due to disturbance of local people and suspension of work. In the said letter she has claimed that 90% of the work have already been completed, but bituminous work, bridge and side shouldering work cannot be started due to public disturbance at the road entrance of the Gholepukur Bazar. Since at the approach, structures have not been removed, people of the locality were not allowing her to execute any work and to give entry to her trucks carrying road materials for internal balance works. So all works will have to be closed unless the aforesaid approach is properly made for which the prayer for extension was made.*
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> *(k) From the documents on record, it appears that by letter dated 13th December, 2010 (Exhibit R/28), letter dated 5th January, 2011 (Exhibit R/31), letter dated 9th February, 2011 (Exhibit R/31/1) and letter dated 1st March, 2011 (Exhibit R/31/2), the respondent was repeatedly asking the claimant to complete the work including repairing of the road, but no document is forthcoming from the end of the respondent that they have officially extended the period and disposed of both the aforesaid two applications of the claimant namely Exhibit R/4 and Exhibit C/11."*

39. This provides ample evidence to conclude that work was still remaining incomplete as on March 01, 2011. In such view of the matter the recording of completion of work as on September 24, 2010 as reflected in the 4th and final bill and in the certificate referred to by Mr. Datta cannot be said to be a certificate as regards the completion of the entire contracted work. It is

therefore not in the realm of doubt that the work was not completed by Konarak. The learned Arbitrator has taken a plausible view of the matter. Non consideration of the said two documents by the learned Arbitrator would not have and has not affected the final conclusion reached by the learned Arbitrator. The letters on record including the claimant's own letters scream about the work remaining unfinished at least till March 01, 2011 therefore, non-consideration of the said two documents cannot and does not have any effect on the learned Arbitrator's ultimate decision.

40. The matter can be angulated from another perspective as well. Clause 6 of the "Conditions of Contract" reads thus:-

> "*Clause 6 – In completion of the work, the contractor shall be furnished with a certificate by the Executive Engineer/Authorised Officer (hereinafter called the Engineer-in-charge) of such completion but no such certificate shall be given, nor shall the work be considered to be completed until the contractor shall have removed from the premises on which the work shall be executed all scaffolding, surplus materials and rubbish, and cleaned of the dirt from all wood-work, doors, windows, walls, floors, or other parts of any building, in upon or about which the work is to be executed or of which he may have had possession for the purpose of the execution thereof nor until the work shall have been measured by the Engineer-in-charge/Authorised Officer whose measurements shall be binding and conclusive against the contractor if the contractor shall fail to comply with the requirements of this clause as to removal of scaffolding, surplus materials and rubbish and cleaning off dirt on or before the date fixed for the completion of the work the Engineer-in-charge/Authorised Officer may at the expense of the contractor remove such scaffolding, surplus materials and rubbish, and dispose off the same as he thinks fit and clean off such dirt as aforesaid; and the contractor shall forth with pay the amount of all expense so incurred and shall have no claim in respect of any such scaffolding or actually realised by the sole thereof."*

41. Thus, in terms of the Conditions of Contract, the certificate as regards completion of work was to be issued by the Executive Engineer/Authorised Officer and the measurements were also to be done by the same authority.

However, in the case at hand, the certificate has been signed by two officers designated as S.A.E. (Civil) /HDA [i.e. (Sub-Assistant Engineer) Civil] and A.E. (Civil)/ HDA [i.e. (Assistant Engineer) Civil]. Therefore, neither has the measurement been done by the Executive Engineer/Authorised Officer nor has the certificate of completion of works been issued by the said officer. In that view of the matter, the notings in the 4th and Final Bill do not qualify for a certificate issued in terms of Clause 6 of the Conditions of Contract. This aspect becomes all the more prominent in the light of the Final Certificate dated March 28, 2017 appearing at page 279 of the stay application issued in favour of the new contractor by Haldia upon completion of the work awarded to him. The said certificate captioned as "Certificate of Final Completion" has been signed by "Executive Engineer (Civil)" and the same clearly conforms to the requirement of Clause 6 of the Conditions of Contract. The aforesaid facts taken together make it evident that the notings in the 4th and Final Bill heavily relied upon by Mr. Datta do not in any manner help in proving Konarak's case that Konarak had completed its work and that a certificate of completion had been issued to that effect.

42. Now at this stage a question arises as regards the effect and purpose of the notings in the 4th and Final Bill heavily relied upon by Mr. Datta. The same can be satisfactorily answered in the light of three correspondences exchanged between the parties i.e. letter dated May 04, 2015 written by Konarak to Haldia, Haldia's reply by a letter dated August 10, 2015 and Konarak's counter reply by another letter dated August 26, 2015.

43. By a letter dated May 04, 2015 (page 99 of the stay application) Konarak contended that the *"work was completed in the year 2010 and maintenance period (sic was) also over....."* and thereby requested Haldia *"to make necessary arrangement for preparation of final bill...."*.

44. Haldia replied to the said letter by its letter dated August 10, 2015 contending as follows:-

> *".....You have executed the work leaving few stretches incomplete and with deviation of specified thickness of the road strata for some road stretch. You have rectified part of that road stretch as per instruction of this office but entire road rectification was not done by you. You were directed to complete the balance work along with rectification of the road strata for the balance stretch through several communications from this office but you did not execute the same mentioning the reason for local disturbance and work has been left unattended since October'2010....."*

45. Konarak replied to the said letter of Halida by a letter dated August 26, 2015 (at page 101 of the stay application) stating as follows:-

> *".....the above mentioned work completed on date 24.09.2010 along with major portion of rectification work mentioned in a meeting held with HDA officials and local Panchayat Authority. But accidentally I fall in a major road accident and I took more than one year to recovery myself. But in that way I have no option to stop the work as was as was basis. This was mentioned by me already in my several letters and claimed to declare my work completed on dt. 24.69.2010 (sic 24.09.2010). Accordingly joint measurement was taken after that period."*

46. A cumulative reading of the aforementioned three letters would lead to the inescapable inference that the work could not be completed. Even if we assume that Konarak had completed the work on September 24, 2010 as projected by it in its letter dated August 26, 2015 then also such completion would only refer to the completion of construction and not of rectification which indeed was within the contractual scope of work awarded to Konarak inasmuch as Haldia's letter dated August 10, 2015 reveals that such

rectification was necessitated because of certain deviation from the awarded work done by Konarak. The notings in the 4th and Final Bill heavily relied upon by Mr. Datta, therefore, seem to be notings pertaining to the measurement of the work done or competed in terms of the contract till September 24, 2010. The same do not mean works measured up after completion of entire contractual work.

47. In such view of the matter non-consideration of the notings of the 4th and Final Bill by the learned Arbitrator would not vitiate the award and consequently the order impugned would also remain unaffected.

48. Mr. Datta submitted that it is a usual feature of contracts as that of the present nature that a difference between the value of the quantity of actual work done and the value of the total contractual work awarded remains. For demonstrating the same he had placed the Final Completion Certificate issued by Haldia in favour of the new contractor and shown the relevant figures. He had submitted that oftentimes it happens that due to poor site conditions it becomes impossible to complete the awarded work in full and in such cases the employer measures up the work done upto the extent it was doable and issues completion certificate. He sought to impress upon us that the variation between the value of the quantity of actual work done and the value of the total contractual work awarded in Konarak's case was also explicable. We do not find this submission convincing. In the case of Konarak there are letters on record which show that Konarak has failed to deliver despite timelines being shifted from one date to other. Indeed there is no formal extension of time but then nothing is going to turn on that. The question is whether work was completed or not. We also take note of

Konarak's letters that hint about some local disturbances preventing execution of work but Konarak has not been able to establish such case before the learned Arbitrator that it could not do the work because of disturbances. On the contrary its case was that it had completed the work which is factually incorrect. We therefore answer ***Issue No. (i)*** in the affirmative.

49. We now move to the second issue.

Issue No. (ii) Whether the finding of the learned Arbitrator that Haldia was entitled to compensation in the nature of adjustment of excess amount paid to the new contractor (on the basis of risk and cost principle), which has been affirmed by the order impugned and then enhanced by way of correcting arithmetical error, is correct? This issue would include the issue as to whether the work awarded to the new contract was the work left unfinished by Konarak.

50. The discussion as regards ***Issue No. (i)*** above has made it clear that Konarak had not been able to complete the contractual work awarded to it. The conditions of contract that governed the parties provided that Haldia could get unfinished work completed by another contractor. In this connection Clauses 3(a) to 3(c) of the Conditions of Contract may be noticed:-

> *"**Clause 3** : In any case in which under any clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in lump sum or deducted by instalment). The Executive Engineer/Authorised officer on behalf of the Authority shall have power to adopt any of the following courses, as he may deem best suited to the interests of the Authority.*
>
> *a) To rescind the contract (of which rescission notice in writing to the contractor under the hand of the Executive Engineer/Authorised officer shall be conclusive*

evidence), and in which case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of the Authority.

b) To employ labour paid by the Authority and to supply materials to carry out the work or any part of the work debiting the contractor with the cost of the labour and the price of the materials (of the amount of which cost and price a certificate of the Executive Engineer/Authorised officer shall be final and conclusive against the contractor) and crediting him with the value of the work done, in all respects in the same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract, the certificate of the Executive Engineer/Authorised officer as to value of the work done shall be final and conclusive against the contractor.

c) To measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Executive Engineer/Authorised officer final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by the Authority under the contract or otherwise or from his security deposit or the proceeds of sale thereof or a sufficient part thereof."

51. The learned Arbitrator has in paragraph 36(d) of the award found that Haldia has invoked Clause 3(c) of the Conditions of Contract. After a detailed discussion under the captions *"Mode of payment against tender work"* (paragraph 35) and "*Profit and loss of the parties accounted for*" (paragraph 36) of the award the learned Arbitrator has found in paragraph 36(c) that *"on the one hand by non-payment of the entire contract value of the 1st contractor i.e. the claimant, the respondent authorities was absolved of their liability to make payment of Rs.55,09,759/- which had to be paid to the original contractor if she did the entire work but, for doing the same by a third party contractor, they had to incur total expenses of Rs.73,09,922/-. As such the respondent had to incur extra amount of Rs.18,00,163.".* The learned

Arbitrator has then refined the aforesaid aspect further in paragraph 36(e) of the award where he has found that although the contract awarded to the new contractor was for a sum of Rs.73,09,922/- it included extra works also which accounted for a sum of Rs.11,74,753.44p and thus the value of the work left unfinished by Konarak which was completed by the new contractor was only Rs.61,35,168.56/- (i.e. Rs.73,09,922 - Rs.11,74,753.44). The learned Arbitrator has then held that the excess financial burden on Haldia by reason of engagement of a new contractor for completing the unfinished works of Konarak was to the tune of Rs.6,25,409.56/- only.

52. The learned Arbitrator's reasoning is simple and perfect. He has reasoned that if the contractual work was valued at Rs.1,96,49, 202/- and value of the total work done by Konarak upto the date of measurement was Rs.1,41,39,493/- then the value of the unfinished work in terms of the contract entered into between Haldia and Konarak would be Rs.55,09,759/- (i.e. Rs. 1,96,49, 202 - Rs.1,41,39,493). Since the total contracted work was not executed by Konarak and work valued at Rs.55,09,759/- was left unfinished by it (i.e. Konarak) therefore Haldia had to re-award the said balance work to a third party i.e. new contractor. To put it differently, the learned Arbitrator has reasoned that Haldia had to pay Konarak Rs.55,09,759/- less that it would have to pay if Konarak had completed the contracted work in full.

53. It has been found by the learned Arbitrator in paragraph 36(e) of the award that the said new contractor executed such balance work for a consideration of Rs.61,35,168.56/-. That being so the extra financial burden befalling Haldia in engaging a new contractor for doing the balance work (i.e.

the work left unfinished by Konarak) would be Rs.6,25,409.56 (i.e. Rs.61,35,168.56 – Rs.55,09,759= Rs. 6,25,409.56/-). The learned Arbitrator has found Konarak liable in the said sum of Rs.6,25,409.56/- which became the extra financial burden of Haldia due to non-completion of work by Konarak.

54. The learned Arbitrator has then proceeded to direct that in terms of Clause 3(c) of the Conditions of Contract Haldia was entitled to deduct a sum of Rs.6,25,409.56 from the security deposit withheld by it and release the balance sum of Rs.4,34,431.44 to Konarak.

55. We take note of the fact that Konarak had after passing of the award approached the learned Arbitrator by way of an application under Section 33 of the said Act of 1996 whereupon the learned Arbitrator corrected the award by enhancing the value of the work done by Konarak to Rs.1,74,05,144/- (from Rs.1,41,39,493/-). However, the learned Arbitrator did not carry out the consequential corrections that would have been the natural fall out of such enhancement of the value of the work done by Konarak. The same was noted by the Hon'ble Single Judge and the necessary corrections were done in the following manner:-

> *"47. The Arbitral Tribunal proceeded on the premise that it did not, since the respondent had not filed any such independent application under 14 Section 33 of the 1996 Act, and restricted its correction to the prayer made by the claimant in its application under the said provision.*
>
> *48. However, such view of the Arbitral Tribunal is patently illegal, being in contravention of Section 33(3) of the 1996 Act. The said provision empowers the Arbitral Tribunal to correct any error of the type referred to in Clause (a) of sub-section (1) on its own initiative within 30 days from the date of arbitral award.*

49. *Clause (a) of sub-section (1) of Section 33 provides inter alia that the Arbitral Tribunal may correct any computation errors and the error pointed out by the respondent pertains to simple calculation.*

50. *Admittedly, in the present case, the Tribunal allowed the application of the claimant under Section 33 and altered the second component of the risk and cost claim. This Court is required to delve a bit more into the said aspect of the matter.*

51. *For considering the risk and cost counter claim, the Tribunal enumerated three components.*

52. *The first of such components was the total contract value, which was assessed at Rs.1,96,49,202/-, to which there is no demur from either side.*

53. *The second component was the work actually done by the claimant and paid for. In the initial award, the said amount was computed by the Tribunal to be Rs.1,41,39,493/-. Subsequently, on the application of the claimant, the second component was enhanced to Rs.1,74,05,144/-, to which the respondent did not have any objection.*

54. *Notably, the third component, that is, the unfinished work of the claimant, for which he was obviously not paid, was retained by the Tribunal at Rs.55,09,759/-, as calculated in the original award.*

55. *However, such approach is perverse, since, even by a logical deduction on application of rudimentary arithmetic, the third component ought to have automatically decreased upon the second component being increased, since the third component was the difference between the first and the second.*

56. *If the first component, that is the total contract value, is taken to be of value „A" and the second component, that is, work done by the claimant as "B", then the third component, that is, the unfinished work of the claimant is of value "C", which is equal to the figure: (A – B).*

57. *The value of 'A' was an agreed and fixed amount and remained the same as the original award even after correction. However, "B" was increased from Rs.1,41,39,493/- to Rs.1,74,05,144/- after the original award was corrected under Section 33 at the behest of the claimant.*

58. *By basic mathematics, if figure C = (A – B), and "B" is increased, "C" automatically comes down.*

59. *As per the original award, C = (1,96,49,202 – 1,41,39,493) = Rs.55,09,759.*

60. *However, after correction of the award, „B" was changed to 1,74,05,144. Accordingly, C should have been equal to (1,96,49,202 – 1,74,05,144) = Rs. 22,44,058.*

61. For arriving at such figure, no further correction on merits or reappreciation of any legal or factual facet of the matter was 16 necessary. The said change was a logical and inevitable corollary of the correction effected to component 'B' by the Tribunal.

62. The Tribunal had proceeded to calculate the risk and cost compensation payable to the respondent by deducting the figure 'C' from the total amount paid to the subsequent contractor that is Rs.73,09,922/-.

63. Accordingly, the amount payable to the respondent on such count was calculated to be Rs.18,00,163/- = (73,09,922 – 55,09,759).

64. However, since the figure 'C' would have to be reduced upon the correction from Rs.55,09,759/- to Rs.22,44,058/-, the automatic effect of the correction would be that the amount payable under the head of "Risk and Cost Liability" by the claimant to the respondent would become Rs.(73,09,922 – 22,44,058) = Rs.50,65,864/-.

65. Accordingly, even if the Tribunal merely allowed the Section 33 application of the claimant, as a logical result thereof, the risk and cost amount payable to the respondent would increase to Rs.50,65,864/- even without any further application by the respondent being necessitated."

56. The observations of the Hon'ble Single Judge are impeccably reasoned and unexceptionable. There is no room for interference by us and we therefore approve the same.

57. Mr. Datta had argued that although the Hon'ble Single Judge had power to correct the award under Section 34 of the said Act of 1996 but occasion to exercise such power could have arisen only if Haldia was entitled to any compensation. His submission was that the learned Arbitrator should not have awarded any compensation to Haldia at all. However, such argument lacks appeal inasmuch as the same is premised on the misconceived notion that the contracted work had been completed by Konarak. At the cost of repetition we may mention that the discussion in the preceding section of this judgment has made it amply clear that the contracted work was not completed by Konarak. In fact such position stands admitted by Konarak itself in its letters as already discussed hereinabove. The notings in the 4th

and Final Bill which Konarak perceived to be a completion certificate have been found not to be a completion certificate issued upon completion of the contractual work. In such view of the matter Konarak's argument that no compensation could be paid to Haldia at all cannot be sustained.

58. While on the subject another argument of Mr. Datta needs to be dealt with. It was submitted by Mr. Datta that the contract was never terminated and no notice was given invoking Clause 3(c) of the Conditions of Contract. Such argument does not impress us. Firstly, Clause 3(c) of the Conditions of Contract does not require any express notice to be given by the employer (in this case Haldia) and secondly, even if such a meaning is ascribed to the said the clause, the letters dated January 05, 2011 (page 232 of the stay application), February 09, 2011 (page 233 of the stay application) referred to by Mr. Dey in his arguments and the letter dated March 01, 2011 all of which have been referred to by the learned Arbitrator in paragraphs 34 (m) and (r) of the award fulfil the same. The letters dated January 05, 2011 and February 09, 2011 clearly indicate that Konarak was put on notice that if it failed to complete the full contractual work, the *"balance work"* would be got done through some other agency.

59. Furthermore since Haldia ultimately paid all the amounts due to Konarak in respect of the work executed by Konarak while passing the 4th and final bill what remained with Haldia was only the security deposit that it had deducted from the bills of Konarak. The intention was therefore clear that Haldia intended to impose Clause 3(c) of the Conditions of Contract. This fact has been aptly captured by the learned Arbitrator in paragraph 36(d) of

the award. The Hon'ble Single Judge has assigned his own reasons in support of such conclusion and has confirmed such finding.

60. Mr. Datta was critical of the observations by the Hon'ble Single Judge in paragraph 28 of the order impugned to the effect that "*Secondly, completion certificates were issued for different phases of the work and payments were also made accordingly by the respondent. Thus, the respondent is estopped from arguing that the entire work was not done, only in which case the security deposit could have been forfeited"*. He asserted that there was an inherent contradiction in the observation and contended that if the entire work had been completed then the question of even adjusting security deposit and allowing any payment on the basis of risk and cost principle did not arise. Even if we agree with Mr. Datta that there is a seemingly apparent paradox in the observation of the Hon'ble Single Judge, that by itself would not nullify the conclusion reached.

61. Many a times and oft a judgement is a product of a dialectical process that involves thesis, antithesis and synthesis and the judgment ultimately shapes up upon a vigorous churning of conflicting ideas and arguments. Several reasons are assigned to prop a particular conclusion. A flaw in one of the several reasons given in support of a conclusion would not invalidate the conclusion. Upon having found that the ultimate conclusion is correct we need not be detained by the argument of Mr. Datta any further.

62. Mr. Datta had also argued that there was no basis for the observation that *"substantial"* work had been done by Konarak when in fact Konarak had completed the work. We need not devote any more time to this argument as we have already discussed in detail in the foregoing portion of this judgment

that Konarak had not completed the contractual work in full. Indeed Konarak had done substantial work which would be reflected by the calculations as regards the value of work done and left unfinished by it. Such exercise has already been undertaken by the leaned Arbitrator and we have alluded to it in the previous section of this discussion.

63. Another argument advanced on behalf of Konarak was that as the learned Arbitrator had found that Haldia had not imposed any liquidated damages upon Konarak therefore it could not be said that Konarak had not completed the contracted work in full. The argument though attractive at face lacks sheen. Clauses 3(a) to 3(c) of the Conditions of Contract lists three ways in which Haldia can make good the losses that it suffered due to the failure of Konarak to complete its contractual obligation. It has invoked one of it. None of the said clauses make imposition of penalty/liquidated damages mandatory as rightly held by the Hon'ble Single Judge in paragraphs 37 and 38 of the order impugned. We agree with the same.

64. There was yet another argument made by Mr. Datta that the work awarded to the new contractor was different from the work awarded to Konarak. He sought to differentiate between the two works by relying on the scope of work mentioned in the work order issued to Konarak and in the work order issued to the new contractor. The said issue has been appropriately dealt with by the arbitrator in paragraph 36 (e) of the award where the learned Arbitrator has found that although the contract awarded to the new contractor was for a sum of Rs.73,09,922/- it included extra works also which accounted for a sum of Rs.11,74,753.44p. The learned Arbitrator has then arrived at the amount that was payable/paid by Haldia

to the new contractor for completing the work left unfinished by Konarak. While on this we agree with the Hon'ble Single Judge that the work of maintenance (which was indeed within the scope of work of Konarak) included the work of repair also. We also find substance in the submissions of Mr. Dey that during the cross-examination of Haldia's witnesses done on behalf of Konarak although questions were put as regards the quantity of works and additional works on behalf of Konarak to the said witness no suggestion was given on behalf of Konarak that the second contract was not pertaining to any unfinished work left by Konarak or that the entire work was completed by Konarak. Not giving such suggestion would certainly go against Konarak. (See: ***A.E.G. Carapiet vs. A.Y. Derderian***[5])

65. Issue No. (ii) thus also stands answered positively.

66. This takes us to the third issue.

Issue No. (iii) Whether the finding of the learned Arbitrator that Konarak was entitled to refund of security deposit which has been affirmed by the order impugned is correct? This issue subsumes the issue as to whether Konarak's claim of refund of security deposit was barred by limitation.

67. Mr. Dey was vociferous on the point that as the claim for refund of security deposit was barred by limitation therefore the same could not have been entertained by the arbitral tribunal and affirmed by the Hon'ble Single Judge.

68. The learned Arbitrator has dealt with the aspect of Limitation in great detail. Paragraph 34 of the award is substantially devoted to it, though it

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covers certain other aspects as well. Some of the relevant snippets of the learned Arbitrator's deliberation on the aspect of limitation may be noted:-

> *"34. (m) In this connection, from the Order Book, I find that the respondent alongwith their Officers in Charge of the affairs made site inspection relating to the tender work ..... In their Minutes dated 24th December, 2009 (Exhibit R/5), 2nd March, 2010 (Exhibit R/6), 22nd March, 2010 (Exhibit R/7), 5th April, 2010 (Exhibit R/8), 30th April, 2010 (Exhibit R/9), 1st June, 2010 (Exhibit R/13), 11th June, 2010 (Exhibit R/14), 7th July, 2010 (Exhibit R/15), 19th July, 2010 (Exhibit R/16), 27th July, 2010 (Exhibit R/17) and 28th August, 2010 (Exhibit R/22). ..... Another joint inspection in presence of the claimant was made on 28th August, 2010 (Exhibit R/22) wherein the claimant was directed as follows:-*
>
> *"The contractor brought the kind knowledge of the CEO that the approach to the bridge has to be widen from the normal width of road. .....*
>
> *.....the agency has ..... to complete the pending rectification work .... after rainy season so that total completion of ..... work can be .... by 31st October, 2010..."*
>
> *Therefore, it is on record that to the knowledge of both the parties, the tenure of the contract was alive on the date of joint inspection upto 31st October, 2010.*
>
> *(n) From Exhibit R/28, ... a letter dated 13th December, 2010 from the Executive Engineer ..... to the claimant, it will appear that though the time was running out a lot of work was still pending..... unwillingness to complete the work was viewed seriously .....*
>
> *(o) In the .... correspondence dated 5th January, 2011 (Exhibit R/31) addressed to the claimant, the following directions were given:-*
>
> *"You are directed to start the work within 7 days of receipt of this letter, otherwise HDA will ..... get the balance work done through other agency at your risk and cost..... and any claim ..... from your end will not be entertained."*
>
> *(p) Such warning was not, ... peremptory as in the ..... correspondence bearing No. 2666/HAD/IX-C/201 (Part I), dated 9th February, 2011 (Exhibit R/31/1) from the Chief Executive Officer, ... to the claimant reflected the intention of the respondent regarding the tender work will be reflected as regards continuation of such ..... From the contents of this letter.....respondent has taken a decision .... to terminate the Work Order in terms of Clause 29 and Clause 16 of the General Conditions & Specifications and served the letter in the form of a notice to the*

claimant to start the balance work ….. within 7(seven) days from the date of issue of letter, otherwise the contract will be terminated and balance work will be executed by deputing other agency …… This letter also indicates the intention of the respondent to extend the tenure of the contract.

(q) From their … correspondence ….vide Memo No. 2862/HAD/IX-C/201(Part 1), dated 1st March, 2011 (Exhibit R/31/2), the last notice was served upon the claimant to complete the work in question for 6.10 Kms construction of road. ……

(r) Therefore, in terms of above Exhibit R/31/2 due notice was served by the respondent dated 1st March, 2011 giving 7 (seven) days' time … to show cause why the contract will not be terminated …….. From such document, clear intention of the respondent is explicit …… that they allowed the claimant to continue the work upto 1st March, 2011 and thereafter finally decided to terminate the contract irrespective of the 180 days' time limit mentioned in the work order …….

(s) ……. In the present case, under Clause 5, the claimant submitted written request for extension of time twice, but action taken by the Executive Engineer …….. upon consideration of such prayer has never been conveyed to the claimant ….. from the perusal of the Measurement Book, …. and recorded in the Minutes Book on periodical inspection of the site, …… it appears that the respondent authorities kept the issue of termination of Work Order pending even after expiry of the time fixed by them as well as prayer for extension twice by the claimant……

(t) Then it is to be decided how this Tribunal will come to a conclusion where both the parties did not strictly follow the terms of the contract in respect of the tender work …….. In such case, the intention of the parties reflecting from their conduct and action taken should be the guiding principle for the Arbitral Tribunal to arrive at a just and reasonable conclusion regarding time of completion of the present work and tenure of the Work Order beyond 180 days. …….

(u) Therefore, ……., I hold that in the given facts and circumstances of this case, the tenure of the work order was extended upto 1st March, 2011.

(v) In the meantime the claimant wrote a letter dated 7th March, 2011 as in Exhibit R/30 intimating her inability to continue the work in response to three letters mentioned above received by her from the respondent. ……. This letter is coming from the custody of the respondent as annexure at Page 117 of their SODCC. Therefore, the claimant expressly conveyed that she was not in a position

to execute any further work at the site and as such requested the respondent to terminate the contract but not to impose any penalty as she had no wilful negligence to complete the work due to public agitation and prayed for balance amount of payment for the work done by her. The consequent action taken by the Chief Executive Officer of the respondent on receipt of such intimation dated 7th March, 2011 is not forthcoming though in the subsequent letter dated 29th march, 2011 (Exhibit R/24) the claimant reiterated her earlier grievance and ultimately requested the respondent authorities to terminate the contract honourably and arrange to pay the final bill for the ***"completed work done"*** *and the Security Deposit money lying with the respondent.*

(w) Therefore, the inevitable conclusion from such correspondence will reaffirm that the tenure of the contract expired on the 1st of March, 2011.

(x) If that be so, the period of limitation for the defect liability period of 3 (three) years will commence from 2nd March, 2011 i.e. upto 1st March, 2014. The period of limitation of 3 (three) years in the instant case will be upto 2nd March, 2017. The present claimant resorted to arbitration admittedly on13th December, 2016 (Exhibit C/14) following the demand letter dated 1st July, 2016 (Exhibit C/16) from the end of the claimant to the respondent seeking release of Security Deposit in question."

69. It is therefore clear that the learned Arbitrator has found that by conduct the parties extended the time for completion of the work of construction till March 01, 2011. Adding the defect liability period of three years to the date of completion of the construction work i.e. to March 01, 2011, the learned Arbitrator has reached the conclusion that the contractual period of the entire work (i.e. work of construction as well as maintenance during the defect liability period) ended on March 01, 2014. In terms of the award the period of limitation would begin to run after March 01, 2014 and not prior to it. We may now test the said conclusion.

70. While the limit of time that may have been fixed by a contract governing the parties may be for the benefit of both the parties, in the case at hand since it is Haldia's case that Konarak had failed to complete the contractual

work within the stipulated time and therefore Haldia is entitled to forfeit Konarak's security deposit, we would analyse the case from the angle that time was made the essence for the benefit of Haldia. This is all the more so because Konarak has not made any claim for loss of profit or escalations costs or cost overruns which are usual claims in cases where time is the essence of contract and the employer fails the time-schedule.

71. A reading of the arbitral award, especially paragraph 34 would put it beyond the pale of doubt that both the parties have exchanged correspondences which manifest a clear intent to extend time. Since Haldia itself has written letters asking Konarak to complete the work beyond the time mentioned in the contract it cannot be gainsaid that Haldia extended the time initially agreed for performance of the contracted work. Section 63 of the Indian Contract Act, 1872 clearly provides for such a situation. The same reads thus:-

> *"63. Every promisee may dispense with or remit, wholly or in part, the performance of the promisee made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."*

72. As stated earlier the learned Arbitrator has in paragraph 34 of the award analysed the evidence on record and found that the parties intended to extend the time for completion of the contract. The law of the land provides for the same therefore there can be no hitch in accepting the conclusion that the contract stood extended till March 01, 2011 as found by the learned Arbitrator. The next question would be as to the effect of such extension on the claim for security deposit. Clause (p) of the Work Order issued in favour

of Konarak specifies the manner in which security deposit would be released. The same reads thus:-

> *"p) The bidder shall be required to properly-maintain the road including all its components for a period of 3 years from the date of completion and handing over to HDA in proper format. A Security Deposit of 10% shall be deducted from each RA bill (upto 10% in total). 2% EMD may be adjusted with the Security Deposit. The release of S.D. would be subject to quality and maintenance of the road and its components satisfactorily for entire period of 3 years.*
>
> *The schedule for release would be as below:*
> *i) Completion of 1st year from the date of completion – 30% of SD*
> *ii) Completion of 2nd year from the date of completion – 30% of SD*
> *iii) Completion of 3rd year from the date of completion – 40% of SD"*

73. A meaningful reading of the aforementioned clause would reveal that Konarak's right to get security deposit would mature only after completion of the entire awarded work and not before that. The learned Arbitrator has therefore rightly concluded that limitation would begin to run after expiry of three years from the date of completion of the construction work. Mr. Dey was very vocal on the point that limitation began to run from the date Konarak firstly demanded refund of the security deposit i.e. from the date of Konarak's letter dated March 29, 2011 (Exhibit R-29 at page 236 of the stay application). Such submission does not impress us. It is well known that limitation is a prescription for extinguishment of remedy for enforcement of a right and not of extinguishment of the right itself. For the remedy to a right to be barred by limitation, the right needs to be born first. The letter dated March 29, 2011 relied on by Mr. Dey precedes the date when the right of Konarak as regards release of its security deposit was born. In such view

of the matter, the said letter dwindles to insignificance as regards the defence of limitation.

74. Once it is held that the claim was not barred by limitation, the only other issue that remains to be tested was as to whether Konarak was entitled to refund of security deposit. The discussion made while deciding ***Issue No. (ii)*** hereinabove would reveal that it has been found by the learned Arbitrator as well as the Hon'ble Single Judge that Haldia had invoked Clause 3(c) of the conditions of contract. In fact it was submitted by Mr. Dey as well that the letters dated January 5, 2011 and February 9, 2011, issued by Haldia gave a tacit indication that in case Konarak failed to execute the unfinished work within the time mentioned in the said notices, such work would be got done through a third party. According to Mr. Dey the same was in fact an invocation of Clause 3(c). Mr. Dey sought to insinuate that Clause 3(c) also contemplated forfeiture of security deposit. A reading of Clause 3(c) extracted hereinabove, however, does not give such impression. Clause 3(c), read meaningfully strongly suggests about adjustment of security deposit, which would mean refund of any excess security deposit that may be lying due with Haldia upon the adjustments being fully made. In such view of the matter the finding of the learned Arbitrator that the remainder of the security deposit in the hands of Haldia after adjustment, should be refunded does not call for any interference. The Hon'ble Single Judge has accepted the same and as such the finding of the Hon'ble Single Judge is also beyond question. ***Issue No. (iii)*** too therefore calls for a favourable answer and we answer the same accordingly.

75. As regards the judgment in the case of ***Associate Builders*** (supra) the same is an authority for the proposition that an award can be interfered with if the same is perverse, meaning that it is either based on no evidence or on irrelevant material or if it has been passed ignoring vital evidence. We have found that the award does not suffer from any of the aforesaid infirmities. The only mistake which was there in the award has already been corrected by the Hon'ble Single Judge and as such nothing further needs to be done in the present appeal.

76. As regards the judgment in the case of ***Dyna Technologies Private Limited*** (supra) the same instructs Courts to be cautious of their boundaries under Section 34 of the said Act of 1996 and to respect the finality of the award and party autonomy. The said judgment mandates that the view taken by the arbitral tribunal should be respected even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the said Act of 1996.

77. To conclude, we do not find any reason to interfere with the order dated January 17, 2025 impugned before us. Both the appeals being APOT 76 of 2025 along with the connected application being GA-COM 1 of 2025 and APOT 135 of 2025 stand dismissed. No costs.

78. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(Arijit Banerjee, J.) **(Om Narayan Rai, J.)**