Ph. : +91-79-23227006
E-mail : info@akashinfra.com

Regd. Office:
2, G.F., Abhishek Building,
Sector-11, Gandhinagar-382011.

CIN - L45209GJ1999PLC036003

AKASH
INFRA-PROJECTS LTD.
BUILDERS OF RELIABLE ROADS

Date: 2nd June, 2021

To,
National Stock Exchange of India Limited
Exchange Plaza,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051
SYMBOL: AKASH

Dear Sir/Ma'am,

Sub.: Disclosure in terms of Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015.

With reference to the above captioned subject, please note that in the Arbitration proceedings before the sole Arbitrator, in respect of dispute arose between the Company and Gujarat Industrial Development Corporation, Gandhinagar and Ahmedabad (Respondents) for cancellation of tender after accepting the same related to upgradation of road, the Arbitrator has partially allowed claim of the Company and directed respondents to pay amount of Rs. 49,37,049/- (Rupees Forty Nine Lakh Thirty Seven Thousand Forty Nine Only) within three months to the Company.

A Copy of the Award is enclosed herewith.

Kindly take the same on your records.

Thanking you,

Yours faithfully,

FOR AKASH INFRA-PROJECTS LIMITED

PRIYANKA MUNSHI
COMPANY SECRETARY AND COMPLIANCE OFFICER

Encl: As above

BEFORE THE ARBITRAL TRIBUNAL :
COMPRISING OF
MR.JUSTICE K.S. JHAVERI, FORMER CHIEF JUSTICE, ORISSA HIGH COURT -
ARBITRATOR

ARBITRATION CASE NO. 5 OF 2021

ARBITRATION PROCEEDINGS BETWEEN....

AKASH INFRA PROJECTS LTD.
2, GF, Abhishek Building,
Opp. Hotel Haveli, Sector-11,
Gandhinagar – 382 011 **...CLAIMANT**

VERSUS

1. **GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION, Through Chairman/Managing Director, Block No. 4, 2nd Floor, Udyog Bhavan, Nr.Bank of Baroda, Gandhinagar – 382 010**

2. **The Executive Engineer, GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION, At GF, GMDC Building, Khanij University Ground, New Helmet Circle, Memnagar Road, Ahmedabad – 380 052.** **...RESPONDENTS**

Appearance:

Mr. K.G. Sukhwani & Mr. C.K. Sukhwani, learned Counsel, for the Claimant.

Mr. S.B.Keshvani with Ms. Kinjal Dave, learned Counsel, for the Respondents.

INDIA NON JUDICIAL

Government of Gujarat

Certificate of Stamp Duty

सत्यमेव जयते

Certificate No.	:	IN-GJ48177334620242T
Certificate Issued Date	:	11-May-2021 01:59 PM
Account Reference	:	IMPACC (FI)/ gjelimp10/ GHEEKANTA/ GJ-AH
Unique Doc. Reference	:	SUBIN-GJGJELIMP10322342680380 51T
Purchased by	:	JUSTICE KALPESH JAVERI FORMER CHIEF JUSTICE
Description of Document	:	Article 13 Award
Description	:	ARBITRATION AWARD
Consideration Price (Rs.)	:	0 (Zero)
First Party	:	JUSTICE KALPESH JAVERI FORMER CHIEF JUSTICE
Second Party	:	Not Applicable
Stamp Duty Paid By	:	JUSTICE KALPESH JAVERI FORMER CHIEF JUSTICE
Stamp Duty Amount(Rs.)	:	300 (Three Hundred only)

ELPL ELPL ELPL ELPL ELPL GHEEKANTA

KC 0000345473

K.S. Javeri

Statutory Alert:

1. The authenticity of this Stamp certificate should be verified at 'www.shcilestamp.com' or using e-Stamp Mobile App of Stock Holding. Any discrepancy in the details on this Certificate and as available on the website / Mobile App renders it invalid.
2. The onus of checking the legitimacy is on the users of the certificate.
3. In case of any discrepancy please inform the Competent Authority.

BEFORE THE ARBITRAL TRIBUNAL :
COMPRISING OF
MR.JUSTICE K.S. JHAVERI, FORMER CHIEF JUSTICE, ORISSA HIGH COURT -
ARBITRATOR

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2. **The Executive Engineer, GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION, At GF, GMDC Building, Khanij University Ground, New Helmet Circle, Memnagar Road, Ahmedabad – 380 052.** **...RESPONDENTS**

Appearance:

Mr. K.G. Sukhwani & Mr. C.K. Sukhwani, learned Counsel, for the Claimant.

Mr. S.B.Keshvani with Ms. Kinjal Dave, learned Counsel, for the Respondents.

AWARD

1.0 The present Arbitration proceeding arises out of a dispute between Akash Infra Projects Ltd. - Claimant and the Gujarat Industrial Development Corporation, Gandhinagar and the Executive Engineer of the Gujarat Industrial Development Corporation, Ahmedabad - Respondents, pertaining to breach of Agreement/Contract entered into between them, by cancelling the tender, after accepting the same and also after having accepted the security deposit and performance bond from the Claimant and thereby depriving the Claimant from the work related to the Tender.

2.0 The facts of the case are that: Originally, the Claimant Company was incorporated on 14th May 1999 as Akash Infra Projects Pvt. Ltd., under the provisions of the Indian Companies Act, 1956 (hereinafter referred to as 'the Companies Act') and thereafter, it was converted into a Public Limited Company, under Section 18 of the said Companies Act, as approved by the Central Government

on 27th September 2016 and thereafter, the company is converted to Akash Infra Projects Ltd.

2.1 The Government of Gujarat, by letter No. RGN/60/2017/16/C dated 15th May 2017 approved the conversion of the name and accordingly issued the Circular dated 24th May 2017 and informed all the concerned Departments in the State of Gujarat in that behalf.

2.2 The Claimant is a registered Contractor having Registration as Class "AA" Contractor. The Claimant is provided the key for submitting the tender online by the State of Gujarat approved the conversion of name from Akash Infra Projects Pvt. Ltd., Gandhinagar to Akash Infra Projects Ltd., Gandhinagar, the tenders could not have been filled up in the name of Akash Infra Projects Ltd., and the tenders were filled up in the name of Akash Infra Projects Pvt. Ltd. There are two Managing Directors, namely, Mr. Yoginkumar H. Patel and Mr.Ambusinh P. Gol from the date of inception of the Company and the Claimant is a Government approved Contractor.

2.3 According to the Claimant, Akash Infra Projects Pvt. Ltd. or Akash Infra Projects Ltd., are the same Company having two Managing Directors. Both Companies are the same and legal entity in the eye of law and the rights and liabilities of Akash Infra Projects Pvt. Ltd. are taken over by the Claimant, i.e. Akash Infra Projects Ltd.

3.0 By Tender Notice No. 14/2016 bearing Tender ID No. 252825, the tenders were invited for up-gradation of existing Road, Approach, SWD, Slab Convert and Water Supply at G.I.D.C., Modasa Industrial Estate under A.I.I. Scheme.

3.1 The estimated cost of the work was Rs. 3,44,87,726/-. The Claimant's tender cost was Rs. 3,14,45,280/-, i.e. 8.6876% below the estimated cost which was accepted by letter No. GIDC/Eng/Ex.En./ABD/NRD/AB/2120 dated 4th August 2017.

3.2 As per the direction, the security deposit of Rs.8,60,930/- by way of FDR No. 0176384 dated 23rd August 2017 of Oriental Bank of Commerce as well as

Performance Bond of Rs. 17,21,860/- were furnished along with letter dated 23rd August 2017 and a request was made to issue the Work Order.

3.3 The Work Order was not issued, therefore, by letters dated 27th September 2017, 13th November 2017, 2nd December 2017 and 10th January 2018, the Claimant requested the Respondent No.2 to issue the work order.

3.4 Thereafter, Respondent No.2, by letter No. GIDC/ ENG/XEN/ABD/NRD/AB/248 dated 6th February 2018 informed that the tender for the work of "**Up-gradation of existing Road, Approach, SWD, Slab Culvert and water supply at G.I.D.C., Modasa Industrial Estate under A.I.I. Scheme**" was invited and the claimant stood as L1, based on which, the tender was approved and acceptance was issued vide acceptance Letter No. GIDC/ENG/XEWN/ ABD/NRD/AB/2120 dated 4th August 2017, and accordingly, submitted FDR and Bank Guarantee.

3.5 In the meantime, as per the instructions from the Head Office and Vice Chairman and Managing Director, the

tender was to be treated as cancelled and the acceptance given by the said office was to be treated as cancelled and returned the original copy of FDR No. 0176384 dated 23rd August 2017 of Oriental Bank of Commerce as well as the Performance Bond of Rs.17,21,860/-.

3.6 The respondent No.2 by letter dated 19th February 2018 apprised the Chairman about the black-listing of the Clamant by the Ahmedabad Municipal Corporation and by further letter dated 20th February 2018, requested the Chairman to consider the letter dated 19th February 2018 and to decide the matter accordingly.

4.0 Being aggrieved by the aforesaid action on the part of the Respondents, the matter was carried before the High Court of Gujarat by way of a petition being R/Petition Under Arbitration Act No. 177 of 2018, on 11th October 2018 wherein the High Court had passed an order on 17th January 2020 appointing Hon'ble Mr.Justice H.B.Antani, Former Judge of the High Court to resolve the dispute by Arbitration.

5.0 The Claimant filed the Statement of Claim at Exh.1 on 10th February 2020, contending therein that, the Claimant Company was originally incorporated on 14th May 1999 as Akash Infra Projects Pvt. Ltd., under the Companies Act, 1956 and thereafter, it was converted into a Public Limited Company under Section-18 of the Companies Act, 2013 and approved by the Central Government on 27th September 2016 and from that date onwards, the name of Akash Infra Projects Pvt.Ltd., is converted to Akash Infra Projects Ltd. The Government of Gujarat, by letter No. RGN/60/ 1017/16/C dated 15th May 2017 approved the change of name instead of Akash Infra Projects Pvt.Ltd., Gandhinagar to Akash Infra Projects Ltd., and accordingly, issued the Circular dated 24th May 2017 and informed all the concerned Departments in the State of Gujarat.

5.1 It is claimed that the Claimant Company is a registered Government Approved Contractor, having the Registration as Class "AA" Contractor. The Claimant is provided the key for submitting the tender online by the State of Gujarat approved the change of name from Akash Infra Projects Pvt.Ltd., Gandhinagar to Akash Infra Projects Ltd.,

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Gandhinagar, the tenders could not have been filled up in the name of Akash Infra Projects Ltd., and the tenders were filled up in the name of Akash Infra Projects Pvt.Ltd.

5.2 It is stated by the Claimant that there are two Managing Directors of the company, namely, Mr. Yoginkumar H. Patel and Mr.Ambusinh P. Gol from the date of inception of the Company. The relevant documents such as Memorandum and Articles of Association by Registrar of Companies (hereinafter referred to as "ROC"), dated 27th September 2016 and Circular dated 24th May 2017 are annexed with the Claim Statement at Exh.C-1, C-2 C-3 and C-4 respectively.

5.3 It is further stated that the Claimant caries on business at the address shown in the cause title as a Government Approved Contractor and that the Clamant, Akash Infra Projects Ltd., and Akash Infra Projects Pvt.Ltd., are one and the same Company having two Managing Directors and that there is no separate legal entity in the eye of law and further that the rights and liabilities of Akash Infra Projects Pvt.Ltd. are taken over by the Claimant

Company, i.e. Akash Infra Projects Ltd. The order of Registrar of Companies (ROC) is very clear that it is conversion of Company from Private Limited Company to Public Limited Company.

5.4 It is stated by the Claimant that by Tender Notice No. 14/2016 having Tender ID No. 252825, tenders were invited for Up-gradation of existing Road, Approach, SWD, Slab Culvert and water supply @ GIDC, Modasa Industrial Estate under A.I.I. Scheme.

5.5 The Claimant has stated that the estimated cost of the work was Rs.3,44,87,726/- and the claimant's tender cost was Rs.3,14,45,280/-, i.e. 8.6876% below the estimated cost which was accepted by letter No. GIDC/Eng/Wx.En./ ABD/NRD/ AB/2120 dated 4th August 2017. Copy of the said letter dated 4th August 2017 is produced on record at Exh.C-5.

5.6 It is submitted by the Claimant that, as per the direction of the Respondents, the Security Deposit amount of Rs. 8,60,930/- by way of FDR No. 0176384 dated 23rd August 2017 of Oriental Bank of Commerce as well as

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Performance Bond of Rs.17,21,860/- were furnished along with the letter dated 23rd August 2017 and a request was made to issue the Work Order, copy of which is produced on record at Exh.C-6.

5.7 Further it is submitted by the Claimant that, since the Work Order was not issued by the Respondents, by letters dated 27th September 2017, 13th November 2017, 2nd December 2017 and 10th January 2018, Respondent No.2 was requested to issue the Work Order. Copies of the said letters are marked as Exh.C-7 collectively.

5.8 The Claimant has submitted that, Respondent No.2, by letter No. GIDC/ENG/XEN/ABD/NRD/AB/248 dated 6th February 2018, informed that the tender for the work of Up-gradation of existing Road, Approach, SWD, Slab Culvert and water supply @ GIDC, Modasa Industrial Estate under A.I.I. Scheme was invited and the claimant stood as L1, based on which, the tender was approved and acceptance was issued vide acceptance Letter No. GIDC/ENG/ XEN/ABD/NRD/AB/2021 dated 4th August 2017 and

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accordingly, the Claimant furnished FDR and Performance Bond.

5.9 It is stated that, meanwhile, as per the instructions from the Head Office and VC and MD of the Respondents, the Tender was to be treated as cancelled and the acceptance letter was to be treated as cancelled and returned the original copy of FDR No. -176384 dated 23rd August 2017 of Oriental Bank of Commerce as well as Performance Bond of Rs.17,21,860/-. Copy of the said letter dated 6th February 2018, Performance Bond and FDR are produced on record at Exh.C-8 collectively.

5.10 The Claimant has further stated that, Respondent No.2, by letter dated 19th February 2018, apprised the Chairman about the back-listing of the Claimant by Ahmedabad Municipal Corporation (hereinafter 'AMC' for short) and vide further letter dated 20th February 2018, Respondent No.2 requested the Chairman to consider the letter dated 19th February 2018 and decide the matter accordingly. Copy of the said letter dated 19th February 2018 is at Exh.C-9 on record.

5.11 In the circumstances, the Claimant has claimed an amount of Rs.15,72,263/- by way of Claim No.1 towards overhead establishment charges because at the time of entering into the contract, 10% of tender cost was contemplated towards overhead establishment charges and the Claimant had contemplated Rs.31,44,528/- towards that head for eleven months. Thus, the Claimant had contemplated an amount of Rs.2,85,866/- per month for five months and eleven days i.e. from 23rd August 2017 when the Security Deposit was accepted by the Respondents after issuing L.O.A. till 6th February 2018 when the same was returned without any reason whatsoever, which is absolutely illegal and therefore, the Claimant has claimed an amount of Rs.15,72,263/- together with interest @ 18% per annum from due date till its realization.

5.12 By way of Claim No.2, the Claimant has claimed Rs.31,44,528/- on account of Loss of Profit. It is submitted that, against the tender cost of Rs.3,14,45,280/-, no work could be executed though the Claimant was ready and willing to perform the contract. At the time of entering into

the contract, 10% of tender cost was contemplated towards profit, but no work could be executed due to the fundamental breach of contract committed by the Respondents and therefore, the Claimant is entitled to for Loss of Profit @ 10% on Rs.3,14,45,280/- which comes to Rs.31,44,528/- together with interest @ 18% per annum from the due date till its realization.

5.13 The Claimant has further claimed an amount of Rs.2,58,279/- by way of Claim No.3 due to cancellation of the tender work. The Claimant was directed to pay the Performance Bond in form of Bank Guarantee of a Nationalized Bank to the tune of Rs.17,21,860/- and Security Deposit of Rs.8,60,930/- by way of FDR vide their L.O.A. dated 4th August 2017 which were submitted to the Respondents by giving margin money to the Bank and incurred bank charges of Rs.2,58,279/-, but the Respondents, by committing breach of the contract by cancelling the tender work and hence, the Claimant has claimed the said amount.

5.14 In the Statement of Claim, the Claimant has in a tabular form has summarized the various amounts, i.e. Rs.15,72,262/- on account of overhead establishment charges; Rs.31,44,528/- on account of Loss of Profit; Rs.2,58,279/- on account of Bank charges, the total of which comes to Rs.49,75,070/-. The said total amount is claimed together with interest @ 18% per annum from the due date of realization.

5.15 The Claimant has submitted that, by communication –cum notice dated 1st June 2018, the Respondent No.1 was apprised with the facts of the case with a request to compensate Rs.48,88,977/- together with interest @ 18% per annum within 30 days or Arbitrator may be appointed within 30 days, failing which the Claimant would be compelled to initiate action. The said letter is produced at Exh.C-10. By further communication dated 6th August 2018, the Claimant had asked the Respondents to compensate, failing which the Claimant would be compelled to initiate proceedings for appointment of Arbitrator. The copy of the said letter is at Exh.C-11 on the record.

6.0 It is submitted by the Claimant that, since the Respondents did not take any action on the said notice as aforesaid sent by the Claimant, the Claimant was compelled to file the Arbitration Petition before the High Court of Gujarat for constitution of the Arbitral Tribunal for resolving the disputes between the parties.

6.1 The Claimant has further stated in the Claim Statement that, the disputes which have been arisen between the parties cannot be adjudicated by the Gujarat Public Works Contracts Disputes Tribunal and are required to be resolved by referring the same to the Domestic Arbitrator, as the Respondent GIDC is not a notified undertaking. The Claimant has produced copy of Clause-30 in this behalf, which is produced at Exh.C-12.

6.2 The Claimant has approached the High Court of Gujarat by way of petition in which the High Court has passed the orders on 6th December 2019, 10th January 2020 and 17th January 2020, copies of which are placed on record at Exh.C-13, Exh.C-14 and Exh.C-15 respectively.

6.3 In view of the above, it is submitted by the Claimant that the Respondents have committed fundamental breach of contract by cancelling the Tender after having given accepting the same and also after having accepted the Security Deposit and Performance Bond from the Claimant and therefore, the Respondents have deprived the Claimant from the work related to Tender, which caused great damages to the Claimant. Therefore, the Claimant has prayed for adjudication of the disputes and pass the Award of Rs.49,75,070/- in favour of the Claimant together with interest @ 18% per annum from the due date till its realization from the Respondents.

6.4 The Claimant had filed the Claim Statement before the Arbitrator, Hon'ble Mr.Justice H.B.Antani on **10th February 2020**.

7.0 It may be noted that, however, after the Arbitration proceedings were set in motion, Hon'ble Mr.Justice H.B.Antani expired on 24th August 2020 and therefore, an application being Misc. Civil Application (for Direction) No. 1 of 2020 in the said petition came to be filed before the High

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Court wherein the High Court passed an order dated **12th February 2021** appointing the undersigned as Arbitrator.

8.0 Notice was issued to the parties on 24th February 2021 with regard to First/Preliminary Meeting of the Arbitral Tribunal which was held on **8th March 2021**.

9.0 The Respondents filed their Reply dated 7th March 2020 (Exh.2) dealing with various claims made by the Claimant in the Statement of Claim on first hearing before this Tribunal.

9.1 It is stated by the Respondents that the tender submitted by the Claimant was found to be the lowest, and it was accepted by the GIDC vide their letter dated 4th August 2017.

9.2 It is further stated by the Respondents that, after acceptance of the Tender, the next stage was to issue the Work Order and to execute Agreement (which is popularly known as B2 agreement) and the relationship between the

Contractor and the GIDC comes into existence only after the above stated Agreement is executed.

9.3 However, before the Work Order could be issued, it had come to the notice of GIDC that the Claimant Company is already blacklisted by the AMC, therefore, GIDC had made necessary inquiry with AMC and it was officially conveyed to the GIDC that the Claimant along with two other contractors have been blacklisted for three years by resolution passed in the meeting of the Standing Committee on 10th August 2017 and subsequently, the resolution was also passed in the General Meeting held on 19th August 2017, wherein the resolution passed by the Standing Committee was approved. Therefore, the GIDC also decided not to issue Work Order in favour of the Claimant, and it is absolutely prerogative of the GIDC to allot the work and also to cancel the allotment of the work, which fact is specifically stated at various places in the Tender and the Claimant having accepted the conditions of the Tender, cannot refuse this fact.

9.4 Further, in the interest of GIDC, it was decided to cancel the acceptance of the tender which was earlier accepted by GIDC, GIDC issued communication to the Claimant informing about the cancellation of the acceptance of the Tender and it was well within the legal power of GIDC to cancel the acceptance of the Tender and also returned the original FDR of Oriental Bank of Commerce as well as the Performance Bond of Rs.17,21,860/- to the Claimant.

9.5 The Respondents also relied on the specific condition printed in the Tender itself, i.e., Condition No.1.2 on page-16 which reads as under:

> "GIDC reserves the right, without any obligation or liability, to accept or reject any or all the bid at any stage of the process, to cancel or modify the process or any part thereof or to vary any of the terms and conditions at any time, without assigning any reasons whatsoever.

9.5.1 Similarly Condition No.11.0(1) on page-9 on which reliance was placed by the Respondents, reads as under:

> "Right is reserved by the Tender Inviting Authority to reject any or all Tender(s) without assigning any reason thereof."

9.5.2 In view of the above stated conditions printed in the Tender document itself, it was submitted on behalf of the Respondents that, the Respondent GIDC is entitled to cancel the acceptance of Tender at any stage and for such decision, the Respondents are not required to give any reason whatsoever and thus, the Respondents have acted well within legal limits, when it cancelled the Acceptance of the Tender and no illegality is committed by the Respondents while rejecting the Acceptance of the Tender.

9.5.3 The Respondents have also relied on condition No.9(ii) on page-23 of Technical Bid (Part-I) of the Tender document, which reads as under:

> "The contractor document shall include the original Tender papers of GIDC, submission of contractor negotiation letter, letter of acceptance, agreement in B2 form and the work order."

9.5.4 In view of the above, it was submitted by the Respondents that, it clearly provided in the Tender that before commencement of the work, contractor is required to submit the above said documents which also include agreement in B2 form and also the Work Order and only after submission of the said documents, the contractor

becomes entitled to start the work. It is stated that in the present case, no work order was issued and the B2 agreement is never signed by the Respondent GIDC and therefore, there was neither agreement nor work order with the Claimant and therefore, the Claimant was not entitled to start the work and no contractual relationship had come into existence between the Claimant and the respondent Corporation.

9.6 It was further submitted on behalf of the Respondents that, GIDC normally executes the Agreement (popularly known as B2 Agreement) after the acceptance of the Tender and that there is a provision for the appointment of Arbitrator in the said Agreement. However, in this case, no such Agreement has been executed. The Tender was submitted by the Claimant and the same was accepted by the respondents but no work order was issued and no Agreement was executed between the Claimant and respondents. Thus, in light of the fact that no bilateral Agreement has been executed between the Claimant and the respondents, the question of claiming any amount of the damages by the Claimant does not arise.

9.7 It was further submitted that the Claimant was duly replied on 10th July 2018 by the Corporation through Advocate to the notice dated 1st June 2018 given by the Claimant which is placed on record at Exh.R-10 & Exh.R-11 respectively.

9.8 It was further submitted by the Respondents that the Tender was submitted by M/s.Akash Infra Projects Pvt.Ltd., which was already converted in Public Limited Company on 31st August 2016 when the Tender was submitted. The respondent Corporation has got the Search Report prepared by Bhavik Patel & Associates, Chartered Accountant wherein details of the Claimant Company are mentioned. On the date of submitting the Tender, the Claimant Company was a Public Limited Company, while Tender was submitted in the name of a Private Limited Company. Copy of the Search Report is produced on record at Exh.R-7. Legally speaking, Tender cannot be submitted by the Company which was already converted into Public Limited Company and therefore, the entire process of submission of Tender by M/s.Akash Infra Projects Pvt.Ltd., is illegal and

void-ab-inito and therefore, the Claimant has also no right to file the present application, especially when it was not entitled to submit the Tender and in view thereof, the present application is liable to be dismissed.

9.9 The Respondents have denied the averments made in para-1 of the application. It was submitted that when the Company was incorporated as a Public Limited Company on 31st August 2016 but at the time when the Tender was submitted, the Claimant was a Public Limited Company and despite of that fact, it had chosen to submit the Tender in the name of Private Limited Company and that the Private Limited Company was not in existence on the date of submission of the Tender. Therefore, it was submitted that the entire process of submission of tender by M/s.Akash Infra Projects Pvt.Ltd. is illegal and *void ab-initio* and, therefore the present Claimant has got no right to file the present application.

9.10 The Respondents have submitted that GIDC is a statutory body which has come into existence under the enactment of G.I.D. Act, 1962 and the Rules framed

thereunder and it is functioning for the development of industries and for encouragement of the entrepreneurs and that it takes decisions independently on merits. Further, even if the Claimant is a registered Government approved contractor, it would not entitle to get the contract from the GIDC and GIDC is at liberty to take all its decisions independently which is in the interest of the Corporation.

9.10.1 It is stated by the Respondents in the reply that, in the present case also, the GIDC decided not to entrust any work and not to execute any agreement with the present Claimant and in fact, the present Claimant was already blacklisted by AMC and this fact was conveyed to the present Claimant. In the Standing Committee of the AMC, a decision was taken on 10th August 2017 and subsequently, the resolution was passed in the General Meeting held on 19th August 2017 whereby the resolution passed by the Standing Committee was approved. Thus, it was submitted that, considering various facts and pros and cons of the entire matter, the GIDC decided not to issue any Work Order in favour of the Claimant and it is absolute prerogative of the GIDC to decide to whom to allot the work

and GIDC cannot be compelled that it should allot the work to a particular Company or person or a legal entity. Therefore, as the Respondents have acted impartially, fairly and in the interest of justice, the decision taken by the GIDC cannot be questioned from any angle.

9.10.2 It is submitted by the Respondents that there is no dispute about Tender Notice No.14/16 inviting Tender for "Up-gradation of existing Road, Approach, SWD, Slab Culvert and Water Supply @ GIDC, Modasa Industrial Estate under A.I.I. Scheme" and that the Claimant had submitted the tender which was accepted by the GIDC vide its letter dated 4th August 2017.

9.10.3 However, various facts came to the knowledge of GIDC including the fact that the Claimant was blacklisted by AMC and therefore, GIDC thought it fit not to issue any Work Order in favour of the Claimant and GIDC returned back the original F.D.R. submitted by the Claimant and also Performance Bond of Rs.17,21,860/-. GIDC also informed the Claimant that acceptance of the Tender stands cancelled and therefore, the actions taken by GIDC were absolutely

legal and proper and the same were in accordance with the law; the Claimant cannot ask GIDC to accept its tender and to issue the Work Order in its favour only.

9.10.4 The Respondents have specifically denied that GIDC has committed fundamental breach of the contract by cancelling the tender after having accepted the same and further that the Respondents had deprived the Claimant from the work related to Tender. All the allegations leveled by the Claimant are therefore, baseless, imaginary and devoid of any substance and they are specifically denied by the Respondents.

9.11 Against Claim No.1 of Rs.15,72,263/- of the Claimant as made in the Claim Statement on account of overhead establishment charges, it is contended by the Respondents that, the Claimant has also contemplated Rs.2,85,866/- per month; there is no bilateral contract entered into between GIDC and the Claimant and the Claimant has not done any work related to the contract and in absence of issuance of any Work Order, there is no question of making any

expenses for establishment charges and therefore, the Claimant is not entitled to any amount under the said Head.

9.12 With respect to Claim No.2 of Rs.31,44,528/- on account of Loss of Profit as made by the Claimant, it is contended by the Respondents that, the contemplated profit at the rate of 10% of the tender cost cannot be claimed by the Claimant on the ground that this tender was accepted. No Work Order was ever issued by the GIDC in favour of the Claimant and the Claimant was not required to take one single action in connection with the contractual work and it is also an admitted fact that the Claimant had not done anything even remotely related to the contractual work. Thus, when there is no work of the contract is assigned to the Claimant, there cannot be any question on account of Loss of Profit and such claim is absolutely unjust, unfair and illegal and hence liable to be rejected.

9.13 Regarding Claim No.3 to the tune of Rs.17,21,860/- for submitting Bank Guarantee and Security Deposit of Rs.8,60,940/- by way of F.D.R., as claimed by the Claimant, the F.D.R. is in the form of Fixed Deposit Receipt and

therefore, there is no question of any loss of interest or any expenses to the Claimant and therefore, the Claimant is not entitled to any amount for any expenses for supply the Security Deposit by way of F.D.R.

9.14 Further it is contended by Respondents that, the Claimant cannot be claim Bank charges of Rs.2,58,279/- which it had incurred for furnishing the Bank Guarantee, even if it be so, the Claimant cannot claim the reimbursement of the same because such expenses are to be incurred in normal course of business. If the Claimant is running a business of undertaking the work of project, submission of the tender and submission of the Bank Guarantee are the factors which are considered as normal expenses of business. If any contractor runs the business of submitting the tender and accepting the contractual work, submission of the Bank Guarantee is absolutely normal expense and even if one does not get the work of tender, he cannot claim the expenses which he had incurred after submitting the Bank Guarantee, therefore, the Claimant is not entitled to claim any amount under this Head.

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9.15 The Respondents contended with regard to interest claimed by the Claimant at the rate of 18% per annum from the due date till realization to the tune of Rs.49,75,070/- that the Claimant has not done any work with regard to the contractual work and that no agreement or contract has been executed between the Claimant and the GIDC. Therefore, the Claimant has no *locus standi* even to claim various amounts which it has claimed in the application and hence, the Claimant is not entitled to claim any amount and grant of interest is absolutely irrelevant and improper.

9.16 It was further contended by the Respondents that, providing interest @ 18% per annum is exorbitant which is on a higher side and also against the law laid down by the Hon'ble Supreme Court regarding the rate of interest. Even the prevalent rate of interest by the Nationalized Bank and Financial Institutions is 6% per annum and therefore, no higher interest can be awarded than 6% per annum. Further, the Claimant is not entitled to claim any amount and, therefore, there is no question of granting interest at the rate of 6% per annum without prejudice to all other

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submissions made on the merits of the matter. According to the Respondents, the Claimant is not entitled to claim any amount as made in the Claim application and also in para-12 thereof.

10.0 In the Arbitral meeting held on 25th March 2021, the following Issues were framed, for consideration of the Tribunal:

(1) Does the Claimant prove that the Respondents have committed fundamental breach of the Contract by cancelling the tender after having accepted the same?

(2) Does the Claimant prove that it has suffered damages by way of over-head establishment charges at the rate of Rs.2,85,866/- per month for a period of 5 months totaling to Rs. 14,29,330/- and that the Claimant is entitled to Rs.15,72,263/- towards the over-head establishment charges together with the interest at the rate of 18% per annum from the due date till its realization?

(3) Does the Claimant prove that it is entitled for Loss of Profit at the rate of 10% of

Rs.3,14,45,280/- equivalent to Rs.31,44,528/- together with the interest at the rate of 18% per annum from the due date till the realization?

(4) Does the Claimant prove that it is entitled to recover an amount of Rs.2,58,279/- from the Respondents towards Bank Charges which it had to incur because of cancellation of the Bank Guarantee?

(5) Do the Respondents prove that they are entitled to cancel the contract of the Claimant as per the terms and conditions of the tender?

(6) Do the Respondents prove that no Work Order was issued in favour of the Claimant and no agreement was executed between the Claimant and the Respondents?

(7) Do the Respondents prove that the Claimant was a Public Limited Company on the date of submission of the tender but it had submitted the tender in the name of Private Limited Company which was not in existence on the date of submission of the tender which disentitles it to claim any amount?

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(8) Do the Respondents prove that it was justified in cancelling the tender after having accepted the same from the Claimant?

(9) Do the Respondents prove that the Claimant is not entitled to claim any amount as it had not done any work whatsoever at the suit site and has not taken any action with the work of the tender?

(10) Do the Respondents prove that the present claim is liable to be dismissed?

*(11) Do the Respondents prove that present suit is not maintainable at law and liable to be dismissed for want of service of Statutory Notice as contemplated under Section 55A of GID Act, 1962?

* Added by order dated 11.5.2021.

(12) What Order?"

10.1 Learned Counsel for the Claimant as well as the Respondents have been heard.

10.2 The following documents have been considered by the Tribunal which are exhibited as under:

Sr. No.	Description	Date	Exh.No.	Page No.
1	Claim Statement		1	1-7
1A	Vakalatnama			8
2	Copy of Memorandum & Articles of Association of Akash Infra Projects Ltd.	14/05/1999	C-1	9-35
3	Copy of Memorandum & Articles of Association of Akash Infra Projects Ltd.	27/09/2016	C-2	36-108
4	Copy of Registrar of firms.	27/09/2016	C-3	109
5	Copy of Circular by State of Gujarat	24/05/2017	C-4	110-116
6	Copy of acceptance letter	04/08/2017	C-5	117
7	Copy of letter from petitioner	23/08/2017	C-6	118-123
8	Copies of letters from petitioner	27/09/2017 13/11/2017 02/12/2017 10/01/2018	C-7 Collectively	124-130
9	Copy of letter from Respondent along with performance bond & FDR.	06/02/2018	C-8	131-137
10	Copy of letter from Resp. No.2	19/02/2018	C-9	138-139
11	Copy of letter from Petitioner	01/06/2018	C-10	140-148
12	Copy of letter from petitioner	06/08/2018	C-11	149-158
13	Copy of Clause-30		C-12	159
14	Copy of High Court Order in Petn. Under Arb. No.177/2018	06/12/2019	C-13	160-212
15	Copy of High Court Order in Petn. Under Arb. No.177/2018	10/01/2020	C-14	213
16	Copy of High Court Order in Petn. Under Arb. No.177/2018	17/01/2020	C-15	214-216
17	Affidavit in Reply of Respondent No.2	07/03/2020	Exh.2	217-227
17A	V.P. of Respondent Advocate	06/09/2020		
18	Copy of the letter received from Ahmedabad Municipal Corporation to GIDC Blacklilsting M/s. Akash Infra		R-1	228
19	True Copy of the Resolution passed in the General Meeting held on 19/08/2017 opposing the resolution passed in the standing committee of AMC	29/08/2017	R-2	229
20	Copy of Letter issued by GIDC returning the original FDR of OBC as well as performance bond of Rs. 21,17,860/- to M/s. Akash Infra	6/02/2018	R-3	230
21	Copy of Page No. 16 of the Tender showing condition No 1 -2 (from the original tender submitted by Akash Infra)	-	R-4	231
22	Copy of Page No. 9 of the Tender showing condition No 1 -2 from the original tender submitted by Akash Infra	-	R-5	232
23	Copy of Page No. 23 of the Tender showing condition No.9(ii) from the Technical Bid (Part-1) of tender document submitted by Akash Infra	-	R-6	233
24	Original search report conducted by Bhavik Patel & Associates CA in respect of M/s. Akash Infra	18/09/2017	R-7	234-240
25	Letter received from Dy. Executive Engineer who as in-charge of Modasa Estate stating that no work has been	20/07/2020	R-8	241

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	done			
26	Notice Given by the Advocate of the petitioner to the Respondent dated	09/09/2017	R-9	242-243
27	Office copy of the reply given by GIDC to the Akash Infra against its notice dated 09/09/2017	19/09/2017	R-10	244-248
28	Office Copy of the reply dated 10/07/2017 given by the Advocate of GIDC(against the notice dated 01/06/2016 given by the petitioner)	10-07-2017	R-11	249-255
29	Copy of the tender submitted by the claimant	-	R-12	256-536 (1 to 281)
30	Rejoinder Affidavit	11/03/2020	Exh.3	537-541
31	Issues	25/03/2021	Exh.4	542-544
32	Affidavit in lieu of Chief in Examination of Applicant alongwith cross on 25/03/2021	13/03/2021	Exh.5	545-553
33	Affidavit in lie of examination in chief of Shri Krishnkant I. Patel for respondent dated 22/03/2021 alongwith cross on 30/03/2021	23/03/2021	Exh.6	554-569
34	Affidavit in lieu of examination of chief of Shri M. P. Patel for respondent dated 24/03/2021 with cross on 30/03/2021	-	Exh.7	570-584
35	Affidavit in lieu of examination in chief of Ms.Manali for Respondent 23/03/2021 along with cross on 30/03/2021	-	Exh.8	585-590
36	Production of document by Respondent on 30/03/2021	-	Exh.9	591-594

11.0 Learned Counsel for the Claimant, Mr.C.K.Sukhwani submitted that, three points which are required to be considered by the Tribunal are:

(i) Whether the Agreement/Contract entered into between the parties was concluded or not;

(ii) Which party has committed breach of Agreement or Contract; and

(ii) whether the Claimant is entitled to compensation, and if so, how much compensation?

11.1 It has been submitted by the learned Counsel for the Claimant that the tenders were invited vide Tender ID No. 252825 for up-gradation of existing Road, Approach, SWD, Slab Culvert and Water Supply at G.I.D.C., Modasa Industrial Estate, under A.I.I. Scheme and that the estimated cost of the work was Rs. 3,44,87,726/- and the Claimant's tender cost was Rs.3,14,45,280/-, that is, 8.6876% less than the estimated cost which was accepted by the Respondents vide letter No. GIDC/Eng/ Ex.En/ABD/NRD/AB/2120 dated 4th August 2017 (Exh.C5) wherein the subject was very specific regarding acceptance of the tender. Even in para No.1, the acceptance is referred and it was only for the administrative purpose, the letter was written to the Claimant to sign the Agreement. Para-1 of the said letter dated 4th August 2017 is reproduced hereunder:

> "Your tender for the above work is hereby accepted by the competent authority at your quoted offer of Rs.3,14,45,280.00 (Rupees three Crore Fourteen Lakh Forty Five Thousand Two Hundred Eighty Only) i.e. 8.6876% below the estimated cost of Rs.3,44,37,030.73 for the work of Upgradation of existing Road, Approach, SWD, Slab culvert, and water supply @ GIDC, Modasa Industrial Estate Under A.I.I. Scheme."

11.2 The said letter dated 4th August 2017 was accepted by the Claimant by letter dated 23rd August 2017 at Exh.C6 and was submitted to the Respondents and for that purpose, he has relied upon Page No.123, Para-2, which reads as under:

> "THE CONDITIONS OF THIS OBLIGATION IS SUCH, that whereas the principals have entered into a contract with the employer numbered and dated as shown above and hereto attached for the execution of work **Up-gradation of existing Road, Approach, SWD, Slab culvert, and water supply @ GIDC, Modasa Industrial Estate Under A.I.I. Scheme**."

11.3 Even in para No.4 of the Claim Statement, it is further stated that, since the work order was not given, four reminders were sent by the Claimant, dated 27th September 2017, 13th November 2017, 12th December 2017 and 10th January 2018, but no response was given by the Respondents.

11.4 It was with great shock and surprise to the Claimant, by letter dated 6th February 2018 (Exh.C8), without any cogent reason, the tender was cancelled and therefore, by

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High Court order, as aforesaid, the present matter was referred to the Arbitrator.

11.5 Learned Counsel for the Claimant has referred to **Sections 4, 7 and 10 of the Indian Contract Act, 1872,** as reproduced here-under:

(a) "S.4. **Communication when complete**.-- The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

(b) "S.**7. Acceptance must be absolute.--** In order to convert a proposal into a promise, the acceptance must-

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance."

(c) "S.**10. What agreements are contracts.--** All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

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Nothing herein contained shall effect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

11.6 Learned Counsel for the Claimant has also referred to **Section 18 of Chapter-2 of the Indian Companies Act, 2013**, with regard to conversion of the Companies, which is reproduced hereunder:

> **"18. Conversion of companies already registered.—**(1) A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.
>
> (2) Where the conversion is required to be done under this section, the Registrar shall on an application made by the company, after satisfying himself that the provisions of this Chapter applicable for registration of companies have been complied with, close the former registration of the company and after registering the documents referred to in sub-section (1), issue a certificate of incorporation in the same manner as its first registration.
>
> (3) The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done."

11.7 He has relied upon the decision of the Hon'ble Supreme Court in the case of ***M/s.Unissi (India) Pvt.Ltd. vs. Post-Graduate Institute of Medical Education and Research*** reported in ***AIR 2008 SC (Supp) 407***. He has

relied upon para-8 to 14 of the said decision which reproduced hereunder:

"8. In view of the aforesaid stand being taken by the learned counsel for the parties, let us now examine the merits of this appeal. As noted herein earlier, the learned Additional District Judge, Chandigarh held that their did not exist any arbitration agreement between the parties and, therefore, question of appointing an Arbitrator could not arise at all. Therefore, in order to decide whether the order of the Additional District Judge was correct or not, we have to consider the relevant facts as well as Section 7 of the Act for the purpose of coming to a proper conclusion whether the agreement containing an arbitration clause did exist between the parties or not. Before we proceed further, we may examine Section 7 of the Act which runs as under :

"Section 7 - Arbitration agreement (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

9. We have carefully examined the provisions made under Section 7 of the Act which deals with arbitration agreement. In Smita Conductors Ltd. vs. Euro Alloys Ltd. [2001 (7) SCC 728], Article II Para 2 of New York Convention came up

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for consideration before this Court. The provisions of Article II, Para 2 of New York Convention is in pari materia to the aforequoted provisions of Section 7 of the Act. The provisions of Article II, Para 2 of New York Convention is being quoted herein now. Para 2 runs as under :-

"Para 2 - The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

10. This Court, while interpreting the aforequoted para 2 in the New York Convention held in para 6 at pages 734-735 in Smita Conductors (supra) the following : -

"6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of Article II. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing. In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit addressed to the Bank to which we shall presently refer to. There is no correspondence between the parties either disagreeing with the terms of the contract or arbitration clause. Apart from opening the letters of credit pursuant to the two contracts, the appellant also addressed a telex message on 23.4.1990 in which there is a reference to two contracts bearing Nos. S.142 and S. 336 in which they stated that they want to invoke force majeure and the arbitration clauses in both the contracts which are set forth successively and thus it is clear that the appellant had these contracts in mind while opening the letters of credit in the bank and in addressing the letters to the bank in this regard. May be, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters

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exchanged, it must be held that there is an agreement in writing between the parties in this regard.

11. Again in Nimet Resources Inc. vs. Essar Steels Ltd. [2000 (7) SCC 497 at Para 5], this Court observed as follows:-

"If the contract is in writing and the reference is made to a document containing arbitration clause as part of the transaction, which would mean that the arbitration agreement is part of the contract. Therefore, in a matter where there has been some transaction between the parties and the existence of the arbitration agreement is in challenge, the proper course for the parties is to thrash out such question under Section 16 of the Act and not under Section 11 of the Act."

12. Keeping the aforesaid principles, as quoted hereinabove, in the aforesaid decisions of this Court in kind, in fact what constitutes an arbitration agreement between the parties, we have to examine whether there exists an arbitration agreement between the parties or not in the facts and circumstances of the case. Let us, therefore, consider the gist of the facts involved in this case. A tender enquiry No.2PGI/OGL/2K/6281 dated 21.12.2000 for purchase of Pulse Oxymeters was floated by the PGI. It is an admitted position that the appellant submitted their tender vide their offer No.UIPL/331177/00-01 dated 15.2.2001. The tender of the appellant was accepted by the PGI vide their letter No.PGI/P-61/02/477/11936-51 dated 29.9.2002 for supplying 41 Pulse Oxymeters to their different departments. The tender documents itself contain an arbitration clause and by reason of acceptance of the tender of the appellant by the PGI, it must be held that there was a valid arbitration agreement between the parties. The appellant supplied 41 Pulse Oxymeters and the receipt thereof was duly acknowledged on behalf of the PGI on the delivery challans. The service/installation reports of the aforesaid machines were duly signed on behalf of the PGI. In the letters issued by the PGI, there was an apparent acknowledgement of supply of the aforesaid meters by the appellant and also reference to the aforementioned tender enquiry number. It is an admitted position that the appellant had sent the agreement containing the arbitration clause, as per the format provided by the PGI, after duly signing the same on requisite value of stamp paper for signing of the same by the PGI. The PGI though admittedly received the same, did not send back the agreement to the appellant after signing it as per the agreement between the parties. The PGI admittedly had used the machines for about an year and thereafter returned the same to the appellant. Subsequently, the bank guarantee furnished by the appellant for Rs.2,13,160/- and the earnest money deposit of Rs.45,000/- was encashed and forfeited by the PGI. In view of the aforesaid

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facts and the correspondences between the parties, particularly the tender offer made by the appellant dated 15.1.2001 and supply order of the PGI dated 29.9.2002, and, in our view, to constitute an arbitration agreement between the parties and the action taken on behalf of the appellant and in view of Section 7 of the Act and considering the principles laid down by the aforesaid two decisions of this Court, as noted herein earlier, we are of the view that the arbitration agreement did exist and therefore the matter should be referred to an Arbitrator for decision. That apart, as we have already noted herein earlier that in this case, the documents on record, in our view, apparently show supply of materials by the appellant and acceptance thereof by the PGI in pursuance of the tender enquiry by the PGI, wherein tender of the appellant containing an arbitration clause was admittedly accepted by the respondent. In that view of the matter, it cannot be said that the PGI should now be allowed to wriggle out from the arbitration agreement between them.

13. We may reiterate that in this case admittedly the documents which are on record apparently show supply of the material by the appellant to the PGI and acceptance thereof by the PGI in pursuance of the tender enquiry by them wherein tender of the appellant containing the arbitration clause was admittedly accepted by the PGI. Accordingly, we hold that arbitration agreement did exist and, therefore, dispute between the parties would be referred to an Arbitrator for decision.

14. Therefore, considering the above aspects of the matter in this case, we must come to this conclusion that although no formal agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause. It is also an admitted position that the appellant gave his tender offer which was accepted and the appellant acted upon it. Accordingly, we are of the view that the learned Additional District Judge, Chandigarh erred in holding that their did not exist any arbitration agreement between the parties and, therefore, the order passed by him is liable to be set aside."

11.8 He has also relied upon the Delhi High Court decision in the case of ***Trimex International Fze Limited vs. Vedanta Aluminium Limited, India,*** reported in ***(2010) 3***

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SCC, 1 and more particularly relied upon para-49 to 53 and 57 to 60 as reproduced hereunder:

> "49. In the light of the details which have been extracted in the earlier paragraphs, I am unable to accept the stand of the respondent. It is clear that if the intention of the parties was to arbitrate any dispute which arose in relation to the offer of 15-10-2007 and the acceptance of 16-10-2007, the dispute is to be settled through arbitration. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed.
>
> 50. The acceptance conveyed by the respondent, which has already been extracted supra, satisfies the requirements of Section 4 of the Contract Act, 1872. Section 4 reads as under:
>
> "4. Communication when complete.—
>
> The communication of an acceptance is complete,
>
> *** *** *** ***
>
> as against the acceptor, when it comes to the knowledge of the proposer."
>
> 51. As rightly pointed out by the learned Senior Counsel for the petitioner, when Mr.Swaminathan of Trimex opened the e-mail of Mr.Swayam Mishra of Vedanta at 3.06 p.m. on 16-10-2007, it came to his knowledge that an irrevocable contract was concluded. Apart from this, the mandate of Section 7 of the Contract Act which stipulated that an acceptance must be absolute and unconditional has also been fulfilled. It is true that the first acceptance conveyed by the respondent contained a rider, namely, cancellation after two shipments which made the acceptance conditional. However, taking note of the said condition, the petitioner requested the respondent to convey an unconditional acceptance which was readily done through his e-mail sent at 3.06 p.m. with the words "*we confirm the deal for five shipments*", which is unconditional and unqualified. As rightly pointed out by the learned Senior Counsel for the petitioner, the respondent was wholly aware of the fact that its agreement with the petitioner was interconnected with the shipowner. In other words, once the offer of the petitioner was accepted following a very strict time schedule, the respondent could not escape from the obligations that flowed from such an action.

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52. The Court of Appeal in *Pagnan S.p.A. v. Feed Products Ltd., Lloyd's Law Reports at p. 619* observed as follows:

> "It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, 'the masters of their contractual fate'. Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

The above principle has been consistently followed by the English courts in *Mamidoil-Jetoil Greek Petroleum Co. SA v. Okta Crude Oil Refinery AD, Lloyd's Law Reports at p.89; Wilson Smithett & Cape (Sugar) Ltd. V. Bangladesh Sugar and Food Industries Corpn., Lloyd's Law Reports at p. 386.* In addition, Indian law has not evolved a contrary position. The celebrated judgment of Lord Du Pareq in *Shankarlal Narayandas Mundade v. New Mofusil Co. Ltd.* Makes it clear that unless an inference can be drawn from the facts that the parties intended to be bound only when a formal agreement had been executed, the validity of the agreement would not be affected by its lack of formality.

53. In the present case, where the commercial offer carries no clause making the conclusion of the contract incumbent upon the purchase order, it is clear that the basic and essential terms have been accepted by the respondent, without any option but to treat the same as a concluded contract."

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11.8.1 Learned Counsel further referred to para-57 to 60 of the said decision of ***Trimex International Fze Ltd.***, (supra) which reads as under:

> "57. Both in the counter-affidavit as well as at the time of arguments Mr.C.A.Sundaram, learned Senior Counsel for the respondent has pointed out various differences between the version of the respondent and the petitioner. However, a close scrutiny of the same shows that there were only minor differences that would not affect the intention of the parties. It is essential that the intention of the parties be considered in order to conclude whether the parties were ad idem as far as adopting arbitration as a method of dispute resolution was concerned. In those circumstances, the stand of the respondent that in the absence of signed contract, the arbitration clause cannot be relied upon is liable to be rejected.
>
> 58. *Smita Conductors Ltd. V. Euro Alloys Ltd.* Was a case where a contract containing an arbitration clause was between the parties but no agreement was signed between the parties. The Bombay High Court held that the arbitration clause in the agreement was binding. Finally, this Court upholding the judgment of the Bombay High Court held that the arbitration clause in the agreement that was exchanged between the parties was binding.
>
> 59. In *Shakti Bhog Foods Ltd. V. Kola Shipping Ltd.,* this Court held that from the provisions made under Section 7 of the Arbitration and Conciliation Act, 1996 that
>
> "the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement" (SCC p. 142, para 14).
>
> 60. It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunication."

11.9 Learned Counsel for the Claimant has further relied upon the decision of the Delhi High Court in the case of

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Gaurav Enterprises v. Guru Teg Bahadur Hospital, reported in ***2018 SCC Online Del 9053***, relying upon para 15 to 21 which reads as under:

> 15. It is relevant to note that the Final Award of Contract expressly stated that the award of contract was for period of two years w.e.f. 01.08.2013. There is little doubt that with the issuance of the Final Award of Contract, a binding contract came into existence between the parties. Since the petitioner's bid was based on the Terms and Conditions of the Contract as provided under the Tender Documents, the said terms and conditions clearly formed a part of the contract between the parties.
>
> 16. It is also relevant to mention that Clause 7.1 of the Instructions to Bidders provided for the contents of the Tender Documents. Clause 7.1.1 of the Instructions to Bidders clearly listed out the Tender Documents. The relevant extract of the said clause 7.1.1 is set out below:-
>
> "7.1.1 The Tender Invitation Document has been prepared for the purpose of Inviting tenders for providing Security Services. The Tender document comprises of:
>
> (a) Notice of Invitation of Tender.
> (b) Terms and Conditions.
> (c) Tender form for providing security services (Annexure-I)
> (d) Scope of Work (Annexure-II)
> (e) Details of Manpower required (Annexure-III)
> (f) Method of award of work (Annexure-IV)
> (g) Check list for Pre-qualification/Technical Bid (Annexure-V)
> (h) Check list for Technical Evaluation (Annexure-VI)
> (i) Undertaking (Annexure-VII)
> (j) Form of Bank Guarantee for Bid Security (Annexure-VIII)
> (k) Form of Agreement (Annexure-IX)
> (l) Form of Bank Guarantee of Performance Security (Annexure-X)
> (m) Price Bid for Security Services (Annexure-XI)"
>
> 17. Clause 8.2 of the Instructions to Bidders expressly provided that Tender Documents issued for the purposes of tendering as listed under Clause 7.1 would be deemed as incorporated in the bid. Clause 8.2 of the Instructions to Bidders reads as under:-

"8.2. Documents Comprising the Bid Tender document issued for the purposes of tendering as described in Clause 7.1 and any amendments issued will be deemed as incorporated in the Bid."

18. In view of the above, this Court finds no merit in the contention that the Terms and Conditions of the Contract did not form a part of the contract between the parties. The petitioner's bid included the said terms and the acceptance of the said bid resulted in the contract of which the Terms and Conditions were an integral part. The Arbitration Clause also formed a part of the contract.

19. This Court is unable to accept that merely because the formal agreement was not executed, the terms and conditions of the contract did not form a part of the contract between the parties. The execution of a formal agreement was only a ministerial act and merely because respondent no.1 had failed to execute the same, cannot detract from the fact that the contract between the parties had come into existence.

20. In National Highway Authority of India v. R.S.B. Projects Ltd. (supra), a Coordinate Bench of this Court had considered a similar issue and had observed as under:-

"26. The letter dated 21st December 2000 itself is an acknowledgment by NHAI that there was in fact an award of work to the Respondent. Otherwise, there was no need to cancel such award of work in the first place. Even otherwise, there could be no manner of doubt that a concluded contract did come into existence. The absence of the signing of formal agreement in terms of Clause 34.1 of the bid document would make no difference to that position. In coming to the above conclusion in the impugned Award, the Arbitral Tribunal placed reliance on the decision of the Supreme Court in Banarsi Das v. Cane Commissioner, UP AIR 1963 SC 1417 and the decision of this Court in Progressive Constructions Limited v. Bharat Hydro Power Corporation Limited AIR 1996 Del 1992. This Court finds no error having been committed by the Arbitral Tribunal in this regard."

21. In view of the above, this Court finds no merit in the contention that the Terms and Conditions of the Contract did not form a part of the contract between the parties."

19

11.10 It is submitted by the learned Counsel for the Claimant that, change of name of the Company from Private Limited Company to Public Limited Company was as per the provisions of Section 18 of the Indian Companies Act, for which, he has referred to the Central Government letter at Page. No.109 (Exh.C-3 as well as at page-37), which reads as under:

"GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS

Registrar of Companies, Ahmedabad
RoC Bhavan, Opp. Rupal Park Society, Behind Ankur Bus Stop,
Ahmedabad, Gujarat, India, 380 013.

Corporate Identity Number : U45209GJ1999PLCO36003

Fresh Certificate of Incorporation Consequent upon Conversion from Private Company to Public Company.

IN THE MATTER OF AKASH INFRA PROJECTS PRIVATE LIMITED

I hereby certify that AKASH INFRA PROJECTS PRIVATE LIMITED which was originally incorporated on Fourteenth day of May One thousand nine hundred ninety-nine under the Companies Act, 1956 as AKASH INFRA PROJECTS PRIVATE LIMITED and upon an intimation made for conversion into Public Limited Company under Section 18 of the Companies Act, 2013; the approval of Central Government signified in writing having been accorded thereto by the RoC – Ahmedabad vide SRN G 10886729 dated 27.09.2016 the name of the said company is this day changed to AKASH INFRA PROJECTS LIMITED/

Given under my hand at Ahmedabad this Twenty seventh day of September Two thousand sixteen.

Sd/-
SUDHIR LILADHAR PHAYE
Deputy ROC
Registrar of Companies,
RoC Ahmedabad."

11.11 It was further submitted by learned Counsel for the Claimant that the control of the Company was by the same Managing Directors and even in the Bank, the same Bank Account is operated and the State Government has also approved the conversion of the name and all existing contracts are being considered to be continuous. In this regard, he has referred to the aforesaid letter of Government of India, Ministry of Corporate Affairs, ROC, Ahmedabad, Exh.7 at page-107 of the Paper Book also at page-37.

11.12 Learned Counsel further referred to para-9 of the reply (Exh.2 - page-221) which reads as under:

> "It is most humbly submitted that Tender was submitted by M/s.Akash Infra Projects Pvt. Ltd., which was already converted in Public Limited Company on 31/08/2016 when the Tender was submitted. The respondent company has got the Search Report prepared by Bhavik Patel & Associates, Chartered Accountant wherein details of the petitioner company is mentioned. It is submitted that on the date of submitting the Tender, the petitioner company was Public Limited Company, while Tender was submitted in the name of Private Limited Company....."

11.13 He has also referred to the Search Report (Exh.R-7 - page-234) and submitted that change of name will not make

any difference as the same has been admitted by one of the witnesses at page No.568 in his cross-examination, wherein he has stated that, by change of name, the work of project is not affected.

ISSUE No. 1 & 5:

12.0 Mr.Sukhwani, learned Counsel for the Claimant has, in support of his Issue-wise argument has submitted that, Issue Nos. 1 & 5 are interconnected, therefore, following common submissions are made.

12.1 It was submitted that the claimant was awarded the contract for Up-gradation of existing Road, Approach, SWD, Slab Culvert and water supply @ GIDC, Modasa Industrial Estate under A.I.I. Scheme for Rs. 3,14,45,280/-. The Acceptance of Bid of Claimant for Tender, was issued on 04/08/2017 thus the contract was concluded between claimant and respondents on 04/08/2017. The claimant furnished Bank Guarantee of Rs.8,60,930/- by way of FDR No.0176384 dated 23/08/2017 of Oriental Bank of Commerce and Performance Bond of Rs.17,21,860/- and the same was accepted by the

respondents. The contract agreement was signed and delivered to GIDC as per the requirement of the Acceptance of Tender dated 04/08/2017.

12.1.1 Therefore, it was contended that, there is a concluded contract between the parties as per the provisions of Sections - 4, 7 and 10 of Indian Contract Act, 1872. Since offer of Acceptance of tender was accepted by the Claimant, therefore, in view of provisions of the Contract Act, Agreement was concluded.

12.1.2 On behalf of the Claimant, it was submitted that the Respondents have committed fundamental breach of Agreement by cancelling the tender which has gone to root of the contract.

12.1.3 It was submitted that the respondents ought to have issued the work order as per **clause 1.5 at page 269 (Exh.R-12)** after having accepted the Security Deposit and Performance Bond from the claimant, however the same was not issued by the respondents which clearly shows the breach on the part of the respondents. It is also

pertinent to note that despite several requests made by the claimant to issue the work order vide **(Exh.C-7 Letter dated 27/09/2017 at P.124, Letter dated 13/11/2017 at P.1 25, Letter dated 02/12/2017 at P.127,and Letter dated 10/01/2018 at P.129).** The respondents not only issued the work order, but also did not respond to any of the letters/requests made by the claimant.

12.1.3 It was submitted that the respondents arbitrarily, unilaterally, against the provisions of the contract, wrongfully and illegally terminated the contract on 06/02/2018 without giving any notice to the claimant and without any reason whatsoever.

12.1.4 The claimant submits the respondents stated in their letter dated06/02/2018

> *"..... The tender for the above work was invited and your good self-stood as L-1, based on which tender was approved and acceptance was issued vide above reference letter.*
>
> *Accordingly, you have paid FDR and BG. Meanwhile as per the instruction from head office and VC & MD, the tender was to be treated as cancelled.*

Hence please consider the acceptance given by this office as cancelled."

12.1.5 Thus, without any default on the part of the claimant, the respondents arbitrarily, unilaterally, against the provisions of the contract and illegally terminated the contract of the claimant. It is pertinent to note, that the parties have agreed, that the contract of the claimant can be terminated only in terms of **clause 3 at page 270 (Exh.R-12)** of the contract and that too after issuing the prior notice to the claimant. However, in the present case the respondents have terminated the contract of the claimant without issuing any prior notice and without any reason attributable to the claimant, which is ex-facie illegal and not tenable in law.

12.1.6 It was further submitted that, after the illegal termination of contract by the Respondents, the respondents addressed the internal communication on 19/02/2018 **(Ex h.C-9 Para-1, 2, 3, P.138),** the copy of same was provided to the claimant. The respondents therein admitted that the tender was accepted and necessary security deposit and performance bond were

paid, however since the claimant is blacklisted by AMC therefore the work order is not issued.

12.1.7 It is pertinent to note that the claimant was not blacklisted by AMC when the tender of the claimant was accepted on 04/08/2017.

12.1.8 The standing committee of AMC on 10/08/2017 passed the resolution to blacklist the claimant and on 29/08/2017 during the general meeting of AMC the resolution was passed by AMC to blacklist the claimant; the same was communicated to the claimant on 15/09/2017 by AMC. It is also pertinent to note that AMC has passed resolution without giving any notice or without giving any opportunity of being heard, blacklisted the claimant, the claimant has challenged the said action of AMC by separate legal proceedings which is at the stage of final Order/Award.

12.1.9 It was further submitted that the claimant on 01/06/2018 **(Exh.C-10, P-140 to 148)** requested the Respondents to consider the following submissions of the

claimant and reconsider their decision to cancel the acceptance and get the work executed under the contract or pay damages to the claimant.

12.1.10 The claimant on 01/06/2018 **(Exh.C-10, P-140 to 148)** apprised the Respondents that Ahmedabad Municipal Corporation has not black listed the claimant but the Standing Committee of AMC has passed the resolution which is against standard code, therefore, the decision not to issue work order is illegal.

12.1.11 It was submitted on behalf of the claimant submits that the Respondents invited the tenders from the contractors whose names are born on the approved list of contractors of Gujarat State, R & B Department/Water Resources Development **(Ex.12 Page No. 260 Point No.3)**

12.1.12 It was further submitted that the claimant further apprised the respondents that the Registering Authority, i.e. R&B Department has not black-listed the claimant and AMC cannot black list the claimant.

12.1.13 On behalf of the claimant, it was submitted that even if AMC has blacklisted the claimant then also it does not make any difference to the present tender or the contract as the respondents have specifically invited the tenders from the contractors whose names are born on the approved list of contractors of Gujarat State, R & B Department/Water Resources Development and not of the approved list of contractors by AMC, as submitted earlier the Registering Authority, i.e. R & B Department has not blacklisted the claimant and claimant still is on the approved list of Registering Authority (i.e. R&B Department) from which the tenders were invited.

12.1.14 The claimant by letter dated 01/06/2018 **(Exh.C-10, P-140 to 148)** further apprised the respondents that assuming for the sake of argument that the claimant is blacklisted then also the ongoing works of the claimant are not affected. The respondents however failed to consider the above and gave the reply on 10/07/2018 through their Advocate.

12.1.15 It was submitted that therefore, Issue No. 1 is required to be answered in the affirmative, i.e. in favour of the Claimant and Issue No. 5 is required to be answered in the negative, i.e. against the Respondents.

ISSUE NO. 2:

12.2 The claimant had provided "Standard Data Book for Analysis of Rates", **(Exh.C-10, P.146, Refer Clause-3.1, P.148) which** provides 10% for overheads and 10% for profit and accordingly claimant had filled up the tender. The claimant accordingly claimed the overhead of Rs.15,72263/-.

12.2.1 Learned Counsel for the Claimant submitted that, at the time of tendering had contemplated 10% of tender cost towards overhead establishment charges. Thus, Claimant had contemplated Rs.31,44,528/- towards overhead establishment charges for eleven months. Thus, Claimant had contemplated Rs.2,85,866/- towards overhead establishment charges per month. The Claimant had to suffer damages by way of overhead establishment charges @

Rs.2,85,866 per month for five months and eleven days i.e. from 23/08/2017 when the Security Deposit was accepted by Respondents after issuing L.O.A till 06/02/2018 when the same was returned without any reason whatsoever which is absolutely illegal, hence Claimant is entitled for Rs.15,72,263 towards overhead establishment charges together with interest @ 18% per annum from due date till its realization.

12.2.2 Learned Counsel for the Claimant has relied upon the decision in the case of ***Mcdermott International Inc. vs. Burn Standard Co. Ltd and Ors.,*** reported in ***AIR 2006 SCW 3276(1)*** wherein the Hon'ble Supreme Court has observed in para - 76, 87 and 88 as under:

> "76. MII served a notice on 10th April, 1998 invoking the arbitration agreement. The same would not mean that it should have repudiated the contract as soon as 10 months schedule fixed by the contract expired. Delay and disruptions might have occurred for various reasons. In the instant case, therefore, the matter would be covered by the second part of Section 55 of the Indian Contract Act providing that where the parties did not intend time to be of the essence of contract, the contract was not voidable, but the promise was entitled to compensation for loss occasioned. For the aforementioned purpose, no notice was required to be served. In any event, the contract provided for extension of time as would appear from Clause 27(ii) and the relevant portions of Clause 28 which read as under:
>
> "27(ii) Should the amount of extra work, if any, which Contractor is required to perform under clauses 24 to 26 ante, fairly entitled Contractor to extension of time beyond

the scheduled date for completion of either the whole or part of the works or for such extra work as the case may be, Company and Contractor shall mutually discuss and decide extensions of time, to be granted to Contractor and the revised schedule for completion of the Works.

28(i) Subject any requirements in the Contract Specifications as to the completion of any portion of the work before completion of the whole and subject to the other provisions contained in the Contract, the Works shall be completed in accordance with the agreed schedule as indicated in Appendix-II. Company may, if the exigencies of the works or other projects so required amend the completion schedule and/or phase out completion.

28(iii) .... No extension in completion shall be permitted unless authorized in writing by Company as a "Variation in completion schedule" or as otherwise specified in the Contract. In any case, no portion of the works shall extend beyond the commencement of the 1986 monsoon."

**** **** ****

"87. We, therefore, are of the opinion that in the instant case the second part of Section 55 of the Indian Contract Act would be attracted and not the first part."

"88. The question which, further, arises for consideration is as to whether the Respondents having proceeded on the basis that time was of the essence of the contract, it was bound to issue a notice of repudiating the contract subject to reservation as regards its claim of damages. MII, however, states that it had never raised a contention that the time was of the essence of the contract, but the claim arises in view of the delay caused in completion of the contract for a period of 34 months and consequent escalation of costs. The price payable in terms of the sub-contract did not adequately cover increased costs expended by MII. On a plain reading of the provisions of Section 55 of the Indian Contract Act, it is evident that as the parties did not intend that time was to be of the essence of the contract on the expiry whereof the contract became voidable at the instance of one of the parties, but by reason thereof the parties shall never be deprived of damages."

12.2.3 Reliance was also placed by learned Counsel for the Claimant on the decision in the case of ***Associate***

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Builders vs. Delhi Development Authority, reported in ***(2015) 3 Supreme Court Cases, 49***. In para 51 to 54, the Hon'ble Supreme Court has observed as under:

> "51. Mr Verma argued correctly that there is nothing on record to show that the contractor is a petty contractor and that the only expenses incurred are at the site. He has shown us that the contract itself required execution of the work by a Class I contractor and has further shown us that Class I contractors require to have certain stipulated numbers of works worth large amounts before they can apply for the tender and that their financial soundness has to be attested too by banker's certificate showing that their worth is over 10 crores of rupees. Further, he has pointed out from the statement of claims before the arbitrator that there was evidence for Claims 9, 10 and 11 laid before the arbitrator which the arbitrator has in fact accepted. Also establishment expenses were set out in great detail before the arbitrator and it is only on this evidence that the arbitrator ultimately has awarded these claims. Mr Verma is also right in saying that the Division Bench was completely wrong in stating that the establishment expenses pertained to payments for a site at Mayur Vihar as opposed to Trilok Puri which were where the aforesaid houses were to be constructed. He pointed out that in the completion certificate dated 30-5-1997 given by the DDA to the appellant, it is clear that the houses that were, in fact, to be constructed were in Mayur Vihar, Phase II, which is part of the Trilok Puri Trans-Yamuna area.
>
> 52. It is most unfortunate that the Division Bench did not advert to this crucial document at all. This document shows not only that the Division Bench was wholly incorrect in its conclusion that the contractor has tried to pull the wool over the eyes over the DDA but it should also have realized that the DDA itself has stated that the work has been carried out generally to its satisfaction barring some extremely minor defects which are capable of rectification. It is clear, therefore, that the Division Bench obviously exceeded its jurisdiction in interfering with a pure finding of fact forgetting that the arbitrator is the sole Judge of the quantity and quality of evidence before him and unnecessarily bringing in facts which were neither pleaded nor proved and ignoring the vital completion certificate granted by the DDA itself. The Division Bench also went wrong in stating that as the work completed was only to the extent of Rs.62,84,845,

Hudson's formula should have been applied taking this figure into account and not the entire contract value of Rs.87,66,678 into account.

53. Here again, the Division Bench has committed a grave error. Hudson's formula as is quoted in *McDermott case* is as follows: (SCC pp. 222-23, para 104)

> "*(a) Hudson Formula*: In *Hudson's Building and Engineering Contracts*, Hudson Formula is stated in the following terms:
>
> 'Contract head office Overhead and profit percentage x $\frac{\text{Contract sum}}{\text{Contract period}}$ x Period of delay'
>
> In the Hudson Formula, the head office overhead percentage is taken from the contract. Although the Hudson Formula has received judicial support in many cases, it has been criticized principally because it adopts the head officer overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor."
>
> 54. It is clear that to apply this formula one has to take into account the contract value that is awarded and not the work completed. On this score again, the Division Bench is to be faulted."

12.2.4 Learned Counsel for the Claimant further relied upon the ***"Standard Data Book for Analysis of Rates"***.

12.2.5 In view of the above, it was submitted that Issue No. 2 is required to be answered in the affirmative, i.e. in favour of the Claimant.

ISSUE NO. 3:

12.3 It was submitted by learned Counsel for the Claimant that the Claimant had provided "Standard Data Book for

Analysis of Rates" **(Exh.C-10, P.146, Refer Clause-4, P.148)** which provides 10% for overheads and 10% for profit and accordingly claimant had filled up the tender. The claimant accordingly claimed the Loss of profit of Rs.31,14,528/-.

12.3.1 It was submitted that the Respondents have committed fundamental breach of contract by cancelling the contract which went to the root of the contract. That against tender cost of Rs.3,14,45,280/ -, no work could be executed though claimant was ready and willing to perform the contract. The Claimant at the time of tendering had contemplated 10% of tender cost towards profit. That no work could be executed due to fundamental breach of contract committed by Respondents, therefore, Claimant is entitled for loss of profit @10% on Rs.3,14,45,280/-, therefore, the Claimant is entitled for Rs.31,14,528/- together with interest @ 18% p.a. from due date till its realization.

12.3.2 Learned Counsel placed reliance on the decision of the Hon'ble Supreme Court of India in the case of ***M/s.***

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A.T. Brij Paul Singh and Bros. vs. State of Gujarat, reported in ***AIR 1984 Supreme Court 1703*** wherein in para 9 and 10, it has been observed as under:

> "9. It was not disputed before us that where in a works contract: the party entrusting the work, commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible. Leaving aside the judgment of the trial Court which rejected the claim for want of proof, the High Court after holding that the respondent was not justified in rescinding the contract proceeded to examine whether the plaintiff-contractor was entitled to damages under the head 'loss of profit'. In this connection, the High Court referred to Hudson's Building and Engineering's Contract (1970), tenth edition and observed that 'in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head-office over heads and profit is between 3 to 7% of the total price of cost' which is added to the tender. In other words, the High Court was of the view that the claim under this head was admissible. The High Court, however, addressed itself to the question whether adequate proof is tendered to sustain the claim. In this connection, it was observed that the loss of profit when it is sought to be recovered on the percentage basis has to be proved by proper evidence. Having settled the legal position in this manner, the High Court proceeded to reject the claim observing that the bare statement of the partner of the contractor's firm that they are entitled to damages in the nature of loss of profit @ 20% of the estimated cost is no evidence for the purpose of establishing the claim. The High Court further observed that the appellant has not proved by any primary documents the basis of its pricing for the purpose of quotation in reply to the tender and mom so when it has quoted at 71/2% less than the original estimated cost and in this view of the matter the claim for loss of profit is unsustainable.
>
> 10. Mr.Aneja, learned counsel for the appellant urged that the appellant was placed at a comparative disadvantage on account of his two appeals arising from two identical contracts inter parties being heard on two different

occasions by two different Benches even though one learned Judge was common, to both the Benches. Mr.Aneja pointed out that in the appeal from which the cognate Civil Appeal No.1998/72 arises, the same High Court in terms held that the claim by way of damages fox loss of profit on the remaining work at 15% of the price of the work as awarded by the trial Court was not unreasonable. The High Court had observed in the cognate appeal that 'the basis adopted by the learned civil Judge in computing the loss of profit at 15% on the value of the remaining work contract cannot be said to be unreasonable.' In fact, the High Court had noticed that this computation was not seriously challenged by the State, yet in the judgment under appeal the High Court observed that actual loss of profit had to be proved and a mere percentage as deposed to by the partner of the appellant would not furnish adequate evidence to sustain the claim. In this connection the High Court referred to another judgment of the same High Court in First appeal No.89 of 1965 but did not refer to its own earlier judgment rendered by one of the Judges composing the Bench in First Appeal No. 384 of 1962 rendered on 3/6 July, 1970 between the same parties. When this was pointed out to Mr.Mehta, his only response was that the Court cannot look into the record of the cognate appeal. We find the response too technical and does not merit acceptance. We are not disposed to accept the contention of Mr.Mehta for two reasons: (1) that in an identical contract with regard to another portion of the same Rajkot-Jamnagar road and for the same type of work, the High Court accepted that loss of profit at 15% of the price of the balance of works contract would provide a reasonable measure of damages if the State is guilty of breach of contract. The present appeal is concerned with the same type of work for a nearby portion of the same road which would permit an inference that the work was entirely identical. And the second reasons to reject the contention is that ordinarily a contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case, we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15% of the value of the balance of the works contract would not be an unreasonable measure of damages

for low of profit. We are therefore, of the opinion that the High Court was in error in wholly rejecting the clam under this head."

12.3.3 Learned Counsel further relied on the decision of the Hon'ble Supreme Court in the case of ***Dwarka Das vs. State of M.P. and Another,*** reported in ***AIR 1999 Supreme Court 1031.*** The Hon'ble Supreme Court in para-9 of the said decision has observed as under:

"9. The claim of the petitioner for payment of Rs.20,000/- as damages on account of breach of contract committed by the respondent-State was disallowed by the High Court as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract. In this regard, the appellate Court observed: "It is not his case that for due compliance of the contract he had advanced money to the labourers or that he had purchased materials or that he had incurred nay obligations and on account of breach of contract by the defendants he had to suffer loss on the above and other heads. Even in regard to the percentage of profit he did not place any material on record but relied upon assessment of the profits by the Income Tax Officer while assessing the income of the contractors from building contracts." Such a finding of the appellate Court appears to be based on wrong assumptions. The appellant had never claimed Rs.20,000/- on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract he would have earned profit of 10% on Rs.2 lacs which was the value of the contract. This Court in A.T. Brij Pal Singh v. State of Gujarat (1984) 4 SCC 59 (AIR 1984 SC 1703), while interpreting the provisions of Section 73 of the Contract Act, has held that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages Court should make a broad evaluation

instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed (at p.1707 of AIR):

"What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.....

Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured."

To the same effect is the judgment in Mohd.Salamatullah v. Government of Andhra Pradesh, AIR 1977 SC 1481. After approving the grant of damages in case of breach of contract, the Court further held that the appellate Court was not justified to interfere with finding of fact given by the trial Court regarding quantification of the damages even if it was based upon guess work. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however the trial Court had granted only 10% of the contract price, which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial Court regarding breach of contract by specifically holding that "we therefore see no reason to interfere with the finding recorded by the trial Court that the defendants by rescinding the agreement committed breach of contract." It follows therefore as and when the breach of contract is held to have been proved being contrary to law and terms of the

agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate Court was, therefore, not justified in disallowing the claim of the appellant for Rs.20,000/- on account of damages as expected profit out of the contract which was found to have been illegally rescinded."

12.3.4 In view of the above, it was submitted by learned Counsel for the claimant that Issue No. 3 is required to be answered in the affirmative, i.e. in favour of the Claimant.

ISSUE NO. 4:

12.4 It was submitted by learned Counsel for the Claimant that the Respondents had directed the claimant to pay the Performance Bond in the form of B.G of a Nationalized Bank to the tune of Rs.17,21,860/- and Security Deposit Rs.8,60,930/- by way of FDR vide there L.O.A. dated 04/08/2017, the Claimant got the Bank Guarantee from the Nationalized B ank by giving the margin money to the bank and incurred the Bank Charges of Rs.2,58,279/-.

12.4.1 Learned Counsel has referred to the oral evidence of one of the director of the Claimant at Exh.5 and the

cross examination, the Respondents have not disputed the amount claimed but challenged the entitlement on principle only, also refer Exh.C-10 Para-9, P.143 and Exh.C-11 Para-5, P.151). Therefore, it was submitted that the Respondents have committed fundamental breach of contract as stated above, therefore, claimant is entitled to recover the same from the respondents. Apart from that, this was done only after order of 4.8.2017, which was not part of Tender process.

12.4.2 In view of the above, it was submitted that Issue No. 4 is required to be answered in the affirmative, i.e. in favour of the Claimant.

ISSUE NO. 6:

12.5 Learned Counsel for the Claimant submitted that the agreement was signed and delivered to the office of the Executive Engineer and the required adhesive stamp of Rs.100/- was also provided along with the letter dated 23/08/ 2017 **(Exh.C-6 P.118).** It is further submitted that the contents of the letter dated 23/08/2017 are not disputed by the Respondents. The contract agreement was signed

and delivered to GIDC. Thus, there is a concluded contract between the parties as per the provisions of Section - 4, 7 and 10 of Indian Contract Act, 1872.

12.5.1 It was submitted that, however, the respondents have stated that since the respondents have not signed the B2 agreement therefore no contractual relationship has come into existence between the parties

12.5.2 It is pertinent to note that on 04/08/2017 **(Exh.C-5 P.117)** the tender of Claimant was accepted absolutely and unqualified by the respondents. The same can be seen from letter dated 04/08/2017 **(Exh.C-5 P.117)** the relevant portion reads as under:

> " .....*Your tender for the above work is* ***hereby accepted*** *by the competent authority at your quoted offer of Rs 3,14,45,280/-*"

12.5.3 Thus, there was a concluded contract between the claimant and respondents on 04/08/2017.

12.5.4 It was submitted that the Respondents further directed the Claimant by letter dated 04/08/2017 **(Exh.C-5 P.117)** as follows:

> *(1)You are requested to pay Security Deposit (5%) Rs. 17,21,860.00 as under*
> *(1.1) S.D 2.5 % Rs 8,60,930.00 in the form of small saving or narmada bond or FDR In the Name of Executive Engineer GIDC Ahmedabad within 10 days from thedate of receipt of this letter.*
>
> *(1.2) S.D 2.5 % Rs 8,60,930.00 to be deducted from the R.A.Bill.*
>
> *(2)Also pay performance bond of Rs.17,21,860 (5%) in form of B.G of nationalized bank only or N.S.C/F.D/5.S.N.N.L in favour of Executive Engineer, GID Ahmedabad for validity period of 12(TWELVE) months from date of work order.*
> *(3)A blank 'B2' tender form sent herewith which should be got affixed with Rs.100.00 adhesive stamp & furnish it to this office for getting the agreement executed* "

12.5.5 It was submitted that the claimant received the letter dated 04/ 08/ 2017 **(Exh.C-5)** on 21/08/2017 and immediately complied with the directions of the respondents on 23/08/2017 **(Exh.C-6)** by paying the Security Deposit and Performance Bond, and the same was accepted by the respondent.

12.5.6 It is pertinent to note that the directions given by the respondents to claimant to pay the security deposit and performance bond and deduct the part of security deposit from running account bill is as per clause-1 (at **Running Page-269)** of terms and conditions between the parties and accordingly both have acted on the said terms and condition. Therefore also, there is the concluded contract between the parties by their conduct and there is a legal contractual relationship between the parties as they have acted on the terms and conditions of the contract which is in consonance with Section 8 Indian Contract Act, 1872.

12.5.7 Further it was submitted that assuming for the sake of argument that the respondents have not signed the agreement then also it does not make any difference under the law for the following reason:-

(i) There is an absolute and unqualified acceptance of offer/proposal by the respondents in the present case.

(ii) The parties have acted on terms and conditions of the contract,

(iii) While accepting the tender of the claimant by letter dated 04/08/2017 **(Exh.C-5 P.117)** the respondents have not stated that only upon signature of the respondents or only when the formal agreement has been initialed by the parties or only upon formal agreement is executed between the parties, the contract will come into existence, In absence of any such conditions, the contract has come into existence between the parties and merely because the respondents have not signed the agreement will not affect either the acceptance or the implementation of the contract. The claimant relies on the following judgment for the same.

12.5.8 Learned Counsel appearing on behalf of the Claimant had relied on the decisions : (i) ***AIR 2008 SC (Supp) 407; (ii) (2010) 3 SCC 1;*** **and** (3) ***2018 SCC Online Del 9053,*** to which reference was made to earlier part of this Award.

12.5.9 It was submitted by the learned Counsel for the Claimant that, without prejudice to the above submission, during the Arbitral meeting held on 25/03/2021, Mr. S.B.

Keshvani, learned Counsel for Respondents gave the original Form No.B-2 to Mr. Yoginkumar Haribhai Patel for making the photocopy The claimant submits that accordingly Mr. Yoginkumar Haribhai Patel after making the photocopy returned the original Form No. B-2 on 30/ 03/2021 to Mr.S.B.Keshvani, learned Counsel for Respondents.

12.5.10 It was submitted that the learned Counsel of Respondents Mr. S. B. Keshvani on 05/04/2021 at 3.30 PM served the letter dated 31/03/2021, a copy of which has not been provided to the Arbitral Tribunal, therefore, the same is provided by claimant subsequently along with list of documents to the Arbitral Tribunal.

12.5.11 It was further submitted that in the letter dated 31/03/2021, which was served on 05/04/2021 at 3.30 PM, it is alleged that "Certified Copy of Form No.B-2" was provided to Mr. S. B. Keshvani, learned Counsel by GIDC and GIDC had put its rubber stamp to certify it as true copy and it was meant for internal communication between the GIDC and its Advocate, through oversight, the said copy is provided and request was made to return the same, in

response to that on 06/04/2021 the claimant has informed that there is no endorsement "Certified Copy of Form No. B-2" allegedly certifying it as true copy on the copy of Form No. B-2 provided by Mr. S.B.Keshvani, learned Counsel for Respondents, therefore, there is no question of returning alleged "Certified Copy of Form No. B-2" allegedly certifying as true copy to Mr. S.B.Keshvani, learned Counsel for Respondents. The claimant had however, made photocopy of Form No.B-2 which was copied from Form No. B-2 provided by Mr. S.B.Keshvani, learned Counsel for Respondents during the Arbitral Proceedings held on 25/03/2021, is produced along with the list of documents and served the same to Mr. S.B.Keshvani, learned Counsel for Respondents, which clearly shows that the respondents have signed the Form No.**B-2.**

12.5.12 It was submitted on behalf of the Claimant that the Respondents have not produced the alleged "Certified Copy of Form No. B-2" before the Arbitral Tribunal, though the endorsement is made to that effect by the advocate of the respondents.

12.5.13 Learned Counsel for the claimant further submitted that, the Respondents have committed breach of contract by not issuing the work order which is normally issued after the Security Deposit and Performance Bond is furnished by the Contractor.

12.5.14 Learned Counsel therefore submitted that, in view of the above, Issue No.(vi) is required to be answered accordingly, i.e. no work order was issued but Agreement was executed by and between the parties.

ISSUE NO. 7:

12.6 On behalf of the Claimant, it was submitted by learned Counsel that Akash Infra Project Pvt. Ltd. was incorporated under the provisions of the Companies Act, on 14/05/1999 (**Exh.C-1**, **P-10).** It was further submitted that on 27/09/2016 Central Government approved the change of name of Akhash Infra Projects Pvt. Ltd. to Akash Infra Projects **Ltd. (Exh.C-3, P-109)** and on 15/05/2017, the Government of Gujarat, by letter No. RGN/60/2017/16/C approved the change of name of Akash Infra Projects Pvt. Ltd. to Akash Infra Projects Ltd.

12.6.1 It was submitted that that on24/05/2017 Executive Engineer, Patnagar Yojna, Div. No. 1, Gandhinagar issued Circular (Paripatra) about change of name of Akhash Infra Projects Pvt. Ltd. to Akash Infra Projects **Ltd.(Exh.C-4, P-110).**

12.6.2 Further it was submitted that Akash Infra Projects Pvt. Ltd. **OR** Akash Infra Projects Ltd. is one and the same. As per the provisions of Section - 18(3) of the Companies Act, 2013 the rights and liabilities of Akash Infra Projects Pvt. Ltd. are taken over by Akash Infra Projects Ltd, i.e. the Claimant.

12.6.3 Learned Counsel further submitted that the last date for submission of bid was 07/04/2017 and since the Government of Gujarat by letter No. RGN/60/2017/16/C dated 15/05/2017 approved the conversion of name of Akash Infra Projects Pvt. Ltd. to Akash Infra Projects Ltd., therefore, the bid could not have been submitted in the name of Akash Infra Projects Ltd. and accordingly it was submitted in the name of Akash Infra Projects Pvt. Ltd., however, when the deposit and adhesive stamp were

provided to the Executive Engineer on 23/08/2017 on the letter head of Akash Infra Projects Ltd. accordingly on the Form No. B-2 rubber seal of Akash Infra Projects Ltd. was applied at that time, no objection was raised by the Respondents as the change of name of the company have no adverse effect on the project. The claimant submits that this fact is also accepted by the witness of the respondent during the cross examination. Learned Counsel has made reference to **Answers to Questions No. 25 to 28 at Page-568.**

12.6.4 It was submitted that 75% share holding is with the family members of directors of the company and the control of the company is with the directors only, 25% share holding is with the public. The claimant submits that thus, the control of the public limited company is still with the same share holding members of the directors when it was private limited and there is no change in the share holding of the company. In this behalf, reference was made to **Page-236, 237, 239 & 240).** The control is with the same management.

12.6.5 Learned Counsel further submitted that as per the provisions of Section-18(3) of the Companies Act, 2013 the rights and liabilities of Akash Infra Project Pvt. Ltd. are taken over by the Akash Infra Projects Ltd. therefore, it does not disentitle it to claim any amount.

12.6.7 It was further submitted that the tenders were in two parts i.e. technical bid and commercial bid. That after having qualified technically, the price bid was opened and since the offer of the claimant was lowest, the same was accepted by the Respondents thus, it has no nexus whether the bid was submitted as private limited or public limited. It was submitted that, had there been any nexus between the private limited and public limited the Respondents on 23/08/2017 would not have allowed the claimant to apply the rubber seal of Akash Infra Projects Ltd. on the Form No. B-2 and would have returned the Security Deposit as well as Performance Bond especially when the acceptance letter was issued on 04/08/2017 to Akash Infra Projects Pvt. Ltd.

12.6.8 In view of the above, it was submitted that Issue No. 7 is required to be answered in the negative.

ISSUE NO. 8:

12.7 On behalf of the Claimant, it was submitted that the Respondents invited the tenders from the contractors whose names are born on the approved list of contractors of Gujarat State, R&B Department/Water Resources Development.

12.7.1 It was submitted that there is no justification in cancelling the tender after having accepted from the claimant as the Registering Authority has not black listed the claimant and AMC cannot black list the claimant.

12.7.2 In view of the above, it was the submission of the learned Counsel for the Claimant that Issue No. 8 is required to be answered in the negative.

ISSUE NO. 9:

12.8 The learned Counsel for the Claimant submitted that pursuant to the acceptance letter dated 04/08/2017, the Claimant had provided the Security Deposit as well as

Performance Bond and incurred the overhead expenses, therefore, it is not true to say that the claimant had not taken any action with the work of the tender. The claimant submits that submission of Security Deposit and Performance Bond is nothing but the action taken with the work of the tender in response to the acceptance letter issued by the Respondents. The Claimant submits that overhead expenses are incurred pursuant to the acceptance letter only.

12.8.1 Learned Counsel for the claimant submitted that Issue No. 9 is required to be answered in the negative.

ISSUE NO. 10:

12.9 It was submitted on behalf of the claimant that in view of "**Standard Data Book for Analysis of Rates**" as well as the law laid down by the Hon'ble Supreme Court reported in ***AIR 2006 SCW 3276(1)*** and ***(2015)3 SCC 49*** and ***AIR 1984 Supreme Court 1703*** as well as ***AIR 1999 Supreme Court 1031***, the claims made by the claimant are required to be allowed with interest and cost as claimed.

12.9.1 Therefore, it was submitted that Issue No. 10 is required to be answered in the negative.

13.0 Mr.S.B.Keshvani, learned Counsel appearing on behalf of the Respondents submitted that, **The fundamental point which needs to be adjudicated by this Tribunal is that whether at any point of time any contract had come into existence between Claimant & Respondent** or not?

13.1 It is the submission of learned Counsel for the Respondents that **the Contract never came into existence between Claimant & Respondent at any point of time, and therefore, claimant has got no basis whatsoever to claim the damages or compensation.** In support of this contention, the Respondent relied on **Section 7 of Contract Act which defines the form of Acceptance & specifically says that the Acceptance must be unconditional and absolute. In the instant case, very significantly, letter of acceptance was conditional**

and conditions mentioned therein were never fulfilled by the claimant .

13.1.1 Elaborating the above contention, it was submitted that GIDC had issued letter dated 4.08.2017 accepting the offer submitted by the claimant, but this Letter of Acceptance was conditional and various conditions stipulated therein which were required to be complied with. However, the present claimant grossly & miserably failed to comply with the conditions of Letter of Acceptance. Therefore it was submitted that in absence of compliance of the conditions described in Letter of Acceptance, the contract cannot be said to have come in to existence and in absence of any valid contract in the eyes of law, the claimant is not entitled to claim any compensation or damages.

13.1.2 Learned Counsel for the Respondent invited the attention of this Tribunal to Page No. 117 whereon the Letter of Acceptance issued by Respondent dated 4.8.2017 is produced wherein there are several conditions which were

supposed to be strictly complied with by the claimant and who failed to comply the same, i.e.:

(i) Company was called upon to attend the office of GIDC for signing the Tender Agreement and this condition was never complied with as no Bilateral Agreement was executed between claimant & Respondent at any point of time.

(ii) M/s Akash Infra Project Pvt. Ltd never submitted the Security Deposit in the form of F.D. It is submitted that F.D. was submitted by the public limited Co. namely Akash Infra Project Ltd.

(iii) It was condition No : 4 in the letter of acceptance that "**Contractor shall submit registration certificate and power of attorney**". Claimant has nothing on record to prove that this condition complied with.

(iv) It was condition No. 3 in the letter of acceptance that "**A blank B2 Tender Form sent herewith which should be affixed with Rs. 100 adhesive stamp.** ". Claimant has not produced anything on record to prove that this condition complied with.

(v) Letter of Acceptance was issued in favor of Akash Infra Project Pvt. Ltd who was not in existence and therefore there was no question of compliance of any condition by the non-existing company.

13.1.3 It was submitted that as all the above stated conditions were not fulfilled, the valid contract never came into existence. It must be remembered that in this case, acceptance of the offer was conditional and as per section 7 of the Contract Act, the acceptance must be absolute and unconditional. In this case letter of acceptance (available on running page No : 117) clearly proves that there were various conditions to be complied with and those conditions could not be complied with by the claimant and consequently valid contract never came into the existence and therefore claimant gets no right to claim any compensation on basis of alleged breach of the contract.

13.1.4 Reliance has been placed on the judgment of the Hon'ble Supreme Court dated **5th January 2021** passed in **Civil Appeal No. 7469 of 2008** in the case of ***M/s.Padia Timber Company (Pvt.) Ltd. Vs. Board of Trustees of Visakhapatnam Port Trust, through its Secretary,*** wherein **The Bench of Hon'ble Justice Navin Sinha and Hon'ble Justice Indira Banerjee, has held that when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is**

not complete until the proposer accepts that condition.

The relevant observation made in para-56 of the said decision is reproduced hereunder:

> 56. It is a cardinal principle of the law of contract that the offer and acceptance of an offer must be absolute. It can give no room for 22 doubt. The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition, as held by this Court in Haridwar Singh v. Bagun Sumbrui and Ors. 15 An acceptance with a variation is no acceptance. It is, in effect and substance, simply a counter proposal which must be accepted fully by the original proposer, before a contract is made."

13.1.5 Learned Counsel for the Respondents submitted that in this view of the matter, the claim of the claimant deserves to be dismissed.

13.2 Learned Counsel has argued with regard to Issue No.6 as under:

> ***"Do the Respondents prove that they are entitled to cancel the tender of the Claimant as per the Terms and Conditions of the Tender"?***

(a) It is forceful and emphatic submission of Advocate of Respondents that right from the beginning i.e. from publication of the advertisement

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on the web-site, GIDC had made it clear that it will be its absolute right to reject any or all the tenders without assigning any reasons thereof.

(b) It is submitted that as many as at six different places, GIDC has specifically disclosed and stated that it reserves absolute right to cancel the Tender at any point of time, without giving any reasons. This right of the GIDC was so important that it found its place almost on six different pages on the Tender, loudly informing everybody who is desirous of submitting the Tender that GIDC has prerogative to cancel the Tender at any point of time and that too without giving any reasons. It simply informed everybody that only those persons should submit the Tender who accepts that condition and nobody else.

(c) For this purpose, advocate of the Respondent relies on the document which is produced at **Exh. R-12 (page No. 256 to 536)** and relevant page No. **264** wherein Condition No. **11.0** reads as under:-

"11.0 **RIGHT OF REJECTION OF TENDER:**

(i) Right is reserved by the Tender Inviting Authority to reject any or all the tender(s) without assigning any reason thereof". Thus, this has been made very

clear to all the Bidders, including the present Claimant that **GIDC reserves its right to cancel any tender at any point of time and that too without assigning any reasons.** Therefore, GIDC was well within its right to cancel the tender of the Claimant.

(ii) At this point of time, Advocate for the Respondent also relies on the cross-examination of the Claimant which is recorded at **Exh. 5 (page No. 552 to 553)**. In the cross-examination, it has been specifically admitted by the Claimant as under:

> "Conditions ***which are prescribed in the tender are binding upon all the parties".*** Thus, the Claimant himself has categorically and specifically admitted that **all the Conditions which are prescribed in the Tender are binding upon the Claimant.** Therefore, the Claimant is not in a position to deny that the conditions of the Tender are not binding upon him. Therefore, based on the admission made by the Claimant in the cross-examination which is recorded at page No. **552** Respondent has clearly proved that GIDC was well within its right to cancel the tender at any point of time without assigning any reasons and this right of the GIDC to cancel the tender at any point of time has been specifically mentioned at various places, in the Tender and also in the advertisement given with the tender."

13.2.1 It was submitted that **in the case of the GIDC, that it has got a prerogative** to reject the tender at any time, even after acceptance of the Tender. For this purpose, GIDC relies on the Condition no : 3 of the Tender which is titled as **"MEMORANDUM OF THE WORK IN BRIEF"** and which

is available on Running Page No. 306 wherein it has been specifically mentioned as below:-

> "**GIDC reserves right, without any obligation or liability, to accept or reject any or all the bids, at any stage of the process, to cancel or modify the process or any part thereof, or to vary any of the Terms and Conditions at any time, without assigning any reasons whatsoever**"

13.2.2 Learned Counsel for the Respondents argued that from the above conditions, it becomes clear that respondent - GIDC has got absolute right to reject the tender at any stage of the process, that too without any obligation or liability and, therefore, GIDC has made it very clear, right from the beginning that it has got absolute right to cancel the tender at any point of time and such cancellation would not create any liability or any obligation on the part of the respondent-GIDC.

13.2.3 It was argued on behalf of the Respondents that, at this point of time, it is very significant to submit that when GIDC has reserved its right to cancel the tender at any point of time and that too without assigning any reasons, **then the most natural & logical conclusion which flows from**

such reserving of right is that there is no need to issue any prior intimation or to call for any explanation before cancellation of such tender. Had there been any need for prior communication before cancellation of the tender, then there would have been specific condition in the contract about prior communication or about seeking of explanation before cancellation of the tender. However since it is purely a contract, both the parties are at liberty to add or to exclude any conditions. **Claimant has also never insisted about inclusion of the condition that GIDC shall give prior notice before cancellation. However claimant has signed the tender as it is and therefore it can be safely concluded that claimant had agreed that there was no need on the part of GIDC to give prior notice before cancellation and therefore now claimant is not entitled to argue that GIDC should have given prior notice before the cancellation and that not giving of such notice would vitiate the whole process of cancellation**. Such argument would not befit in the mouth of claimant.

13.2.4 It was further submitted that, it is important to mention that the Claimant has specifically stated in his cross-examination on page 552 that **"Conditions which are prescribed in the Tender are binding upon all the Parties".**

13.2.5 Thus, when the representative of Claimant himself has admitted before this Hon'ble Tribunal that the Terms and Conditions of the Tender are binding upon him and when there is a specific condition that GIDC has got absolute right to cancel the tender at any point of time without creating any obligation or liability, then the present claimant has got no right to challenge the cancellation of the tender or to claim any compensation arising from acceptance of such tender.

13.3 Similarly, the learned Counsel for the Respondents placed reliance on **Condition No. 12** which is available on Page No. 314 which reads as under:-

> **"GIDC reserves the right to reject any or all tenders without assigning any reasons thereof"**

13.3.1 Thus, from the above Condition, it becomes clear that GIDC is also not required to assign any reason whatsoever for cancellation of the tender and **such right is absolute and not attached with any condition** and as mentioned herein above, the Claimant has very specifically stated in his Cross-examination on page 552 to 553 that the Conditions of the Tender are binding upon him. Therefore, now the Claimant cannot take "U" Turn and the Claimant cannot be permitted to say something contrary than what he has admitted in the cross-examination. When the Claimant has specifically admitted before the Tribunal that the conditions of the tender are binding upon him and when there is a specific condition in the tender that GIDC has got absolute right and prerogative to cancel the tender at any point of time, at any stage and without assigning any reasons then nothing is left for the Claimant to challenge the process of cancellation or to claim anything on the basis of either acceptance or cancellation of the tender.

13.3.2 It was argued that it is also important to mention that GIDC has published "Instructions for On-Line Tender to Bidders". In these Instructions, the **Condition No. 10.11 on running page no: 318 reads as under:**

> **"GIDC reserves the right, without any obligation or liability to accept or reject any or all the bids at any stage of the process, to cancel or modify the process or any part thereof or to vary any of the Terms and Conditions at any time, without assigning any reasons whatsoever."**

13.3.2.1 It was argued that from the above condition, it becomes clear that GIDC had specifically intimated to all the bidders that GIDC has reserved the right to accept or reject the bid, **at any stage of the process to cancel or modify the process of tender or any part thereof and that too without creating any obligation or liability".**

13.3.3 In this context, a question was put to the witness of the Claimant that had he read all the conditions of the tender and his answer was, "I have carefully gone through the Notice published by the GIDC. The conditions which are prescribed are binding to all the parties." Thus, the Claimant was possessing the knowledge that the GIDC has got the right to cancel the tender at any stage and that too

without creating any liability. Despite of this knowledge of all the Conditions of the tender, the Claimant had submitted the "Online" tender with digital signature as prescribed in the Condition No. 10.3 and thereafter, he has submitted the physical and hard copy of the tender wherein every page was signed by the Claimant. Thus, having put his signature on every page and after admitting that he has read all the conditions and after admitting that the conditions are binding upon the parties, the Claimant has got no scope to argue that GIDC had wrongly cancelled his tender or any loss has accrued because of such cancellation. The Claimant cannot be permitted to go beyond his pleadings and beyond his cross-examination. On this ground also, present Claim Petition deserves to be dismissed.

13.4 Learned Counsel for the Respondents invited the attention of this Tribunal on the point that in the Tender Notice only / itself, there is a separate page which is titled as "CONTRACTORS TO PLEASE READ THIS CAREFULLY". In these conditions, **Condition No. 1.2 (running page No. 319) reads as under:-**

"GIDC reserves right, without any obligation or liability, to accept or reject any or all the bids at any stage of process, to cancel or modify the process or any part thereof, or to vary any of the Terms and Conditions at any time, without assigning any reason whatsoever."

13.4.1 Thus, right from the beginning, Respondent-GIDC had invited attention of all the bidders including the present Claimant that it is a pre-condition of the GIDC that GIDC reserves the right to cancel the bid at any stage of the process and to cancel or modify the process itself, without creating any obligation or liability and without giving any reasons thereof.

13.4.2 It was submitted by learned Counsel for the Respondents that, as explained hereinabove, the Claimant has accepted this condition of the tender and thereafter only he had submitted the tender and, therefore, the Claimant has lost his legal right to challenge the cancellation made by the GIDC, or to claim any amount because of cancellation of the tender.

13.4.3 Learned Counsel for the Respondents also drew the attention of this Tribunal that there is a separate page in the Tender which is titled as "SPECIAL CONDITION" (relevant Page is 327). On this page, condition No. 14 reads as under:

> **"GIDC reserves the right, without any obligation or liability, to accept or to reject any or all the bids at any stage of the process, to cancel or modify the process or any part thereof, or to vary any of the terms and conditions at any time without assigning any reasons whatsoever."**

13.4.4 It was contended that from the above Condition also, it becomes clear that GIDC had drawn attention of all the bidders even by including the same condition under the Head of "SPECIAL CONDITIONS" clarifying that GIDC has got absolute right and authority to cancel the tender at any stage at any point of time without assigning any reasons whatsoever. Thus, the right of the GIDC is mentioned **at six different places** in the Tender document. Claimant has accepted all the conditions of the Tender and has also admitted that the conditions of the Tender are binding upon him and, therefore, Claimant is not entitled to challenge the

process of cancellation or to claim any amount because of such cancellation.

13.4.5 It was therefore argued by learned Counsel for the Respondents that, in the entire Tender there is a mention at six different places about the same condition, i.e. GIDC has reserved the right to cancel the Tender at any point of time and that too without assigning any reasons. Such specific mention about the right and prerogative of the GIDC at six different places in the Tender clearly proves that there was no need on the part of GIDC to give prior intimation or to seek explanation from the bidder before cancelling the bid. Having agreed with all conditions of the Tender without any reservation, claimant now is precluded from arguing that prior notice before the cancellation was necessary. **Tender needs to be interpreted as it is without any presumptions or without any conjectures.** If there is no condition about previous notice or seeking of explanation before cancellation, now it cannot be stated that such prior notice was necessary.

13.4.6 In view of above submissions, it was submitted that Respondents have proved the issue No.6 and therefore, it is required to be held that the Respondent-GIDC had complete right to cancel the Tender.

13.4.7 Even without Prejudice to all aforesaid contentions, it is submitted that even if Tender is believed to be a contract, then claimant is bound by the conditions of this contract i.e. all the six above stated conditions of the Tender giving absolute right to the Respondent-GIDC to cancel the Tender at any point of time & that too without giving any reasons. In this view of the matter also claimant doesn't get any right to challenge the cancellation of Tender and to claim any compensation. Resultantly the present claim deserves to be dismissed.

13.5 It was argued by Learned Counsel for the Respondents that there was **no need for prior notice before issuance of letter of cancellation.**

13.6 Learned Counsel has contended that the most important point which arises for the consideration of the

Arbitral Tribunal is that whether GIDC should have given any prior notice before issuing letter of cancellation. In humble submission of the Advocate of the Respondent, the answer to this question is No. There was no need on part of the GIDC to issue any prior notice to the claimant or to give any opportunity to hear before issuing letter of cancellation. The reason for the above submission is very clear that GIDC has at 6 places in the Tender specifically stated and has specifically laid down that GIDC reserves the right to cancel the Tender or any part thereof, or the process of the Tender, at any point of time without assigning any reasons. The words **"without assigning any reason"** and **"at any point of time"** clearly suggests that there is no requirement on part of the GIDC to issue prior intimation to the claimant that GIDC is going to cancel the process of the Tender. There was no such requirement on the part of the GIDC.

13.6.1 It was argued that, if GIDC feels that notice must have been given, then such provision is also specifically made in the document of the Tender itself. In this context I would like to draw the attention of the Arbitral Tribunal on

clause no. 15 of the Tender document, which reads as under:

> **"No claim for any payment of compensation for change or restriction of work":-**
>
> **" If at any time after the execution of the contract documents the Engineer-in charge shall for any reason whatsoever, require the whole or part of the work, as specified in the Tender, be stopped for any period or shall not require the whole or part of the work to be carried out at all or to be carried out by the contractor, he shall give notice in writing, stating the fact to the contractor who shall there upon suspend or stopped the work totally or partially, as the case may be."**

13.6.2 Learned Counsel for the Respondents contended that under this clause, there is a provision that GIDC should issue notice upon the contractor but such requirement is prescribed only after execution of the bilateral contract and not before that. Therefore wherever issuance of the notice is necessary, the same is specifically mentioned in the Tender itself. Similarly , when notice is not necessary, the same is not mentioned in the Tender. Therefore if there is no provision in the Tender that prior intimation must be given to the claimant, then no presumption can be made that issuance of the prior letter of intimation was a condition precedent or that it was

mandatory for GIDC to issue such letter to the claimant before cancellation of the Tender.

13.7 On behalf of the Respondents, learned Counsel has stated the **reason for cancellation of Tender of Claimant: (Blacklisting of the company, which submitted the Tender).**

13.7.1 It was submitted that, after acceptance of the Tender, it had come to the notice of GIDC that Claimant Company was already blacklisted by the A.M.C. It is submitted that Standing Committee of the A.M.C had taken such decision on 10.08.2017. Subsequently resolution was passed in the General Meeting held on 19.08.2017 which approved the resolution passed by the Standing Committee. On request of GIDC, this fact was conveyed by A.M.C to GIDC by the letter dated 6.09.2017. Thereafter, GIDC analyzed the information received from A.M.C & also tried to get more information about the claimant company. Accordingly Search with R.O.C was also taken on 6.09.2017. All pros and cons with respect to the claimant company were carefully studied by the Respondent. It is

submitted that as Respondent is a statutory body, there is set pattern for taking the decision where in file moves at different level. After completing the internal procedure, GIDC took the decision to cancel the Tender of claimant and the same was convey to claimant company by the letter of GIDC dated 6.02.2018.

13.7.2 It was submitted that GIDC is public body & is established by the Statue which works for the development of the industry in the state of Gujarat and as such it has to take all its decision in the public interest. After getting all the negative information about the claimant company, it was not possible for GIDC to assign it the work of Tender because particular section of the public was going to be affected with the work of Tender; therefore keeping in view the interest of public at large, respondent took the decision to cancel the Tender of claimant.

13.7.3 Learned Counsel submitted that this decision was well reasoned, logical, and keeping in view the interest of public at large.

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13.7.4 It was submitted that, Respondent-Corporation is falling within the definition of "State" as prescribed in Article 12 of the Constitution of India and therefore it has to act basically and primarily in the interest of public at large. It is submitted that Hon'ble Supreme Court has also held that decision taken by the State should not be subject to judicial review unless it is out rightly with mala fides and with intention to favor someone. Therefore in this case also decision taken by Respondent should not be reviewed by the Tribunal because there is no case canvassed by claimant that GIDC has taken decision of cancellation of Tender with mala fide or partiality or arbitrariness. Therefore present claim petition is not maintainable at Law and hence deserves to be dismissed.

13.8 Mr.Keshvani, learned Counsel for the Respondents submitted **another ground for cancellation of the Tender (Tender Submitted by the company which was not in existence on the date of submitting the Tender.)**

13.8.1 It was contended that Respondents have filed Affidavit-in-reply at Exh.2 wherein in para 9 it is contended

that Tender was submitted by Akash Infra Projects Pvt. Ltd. between 27.03.2017 to 07.04.2017. Now on this date the said Pvt. Ltd Company was not in existence and it was already converted into Public Limited Company on 31.08.2016.

13.8.2 The Certificate of Incorporation of Private Limited Company is produced by the claimant at Running pg No : 10 and its registration Number is 04-36003 of 1999-2000. The claimant has also produced the Certificate of Incorporation of Limited Company on the running page No: 37 where in its registration no is mentioned as U45209GJ1999PLC036003.

13.8.3 In view of the above, it was proved on record that both Private Limited Company and Public Limited Company had different Registration Numbers under the provisions of Companies Act. Admittedly, **the Tender was submitted by Akash Infra Projects Pvt. Ltd., which was not in existence. This fact is also admitted by the claimant during his cross examination which is available on page No : 552 wherein he has admitted that "the document**

which is signed was signed as Akash Infra Projects Pvt. Ltd. but on that date it was Akash Infra Project Ltd." He also admitted in the cross examination that "Corporate Identification Number (CIN) of both the Companies are different. Incorporation certificate of Registration by Registrar of Companies (ROC) are different."

13.8.4 It was argued that, **thus it is proved on record that Tender was submitted by the company which was not in existence on the date of submission of the Tender and this fact was not intimated to GIDC (as admitted by the claimant in cross examination on page : 552)**

13.8.5 Learned Counsel has submitted that it is important to mention that **Performance Bank Guarantee (which is produced at running page No : 133 by the claimant is issued by Oriental Bank of Commerce in favor of M/s. Akash Infra Projects Pvt. Ltd and Fixed Deposit was issued in the name of Akash Infra Projects Ltd. Thus there was basic infirmity in the Tender which came to the notice of GIDC at later stage and when it came to the notice of GIDC, it was fully justified in cancelling**

the Tender because work contract cannot be issued to the company which is not in existence. Similarly it could also not be given to Akash Infra Projects Ltd because it had not submitted the Tender. Therefore Respondent-GIDC was fully justified in cancelling the Tender of the Claimant. And claimant having committed such gross illegality, cannot claim any damages or compensation since the company itself was responsible for its cancellation.

13.8.6 It was submitted that a vague attempt is made by the claimant to prove that **both Pvt. Ltd. Co. and Public Ltd. Co. are one and the same. However , according to the respondents, it is not so.** Claimant himself has produced at running page : 35 to show the name of directors of the Pvt. Ltd Company, which reads as under:

Sr.No	Name of directors	Share
1	Yoginkumar H. Patel	100
2	Ambusinh P. Gol	100

13.8.7 Respondents have produced on running page No : 239 the list of directors which reads as under:

Sr.No	Name of directors	Designation
1	Yoginkumar H. Patel	Managing Director
2	Ambusinh P. Gol	Managing Director
3	Premasinh Gol	Wholetime Director
4	Dineshkumar Patel	Wholetime Director
5	Bhavana Gol	Director

13.8.9 Respondents have also produced the Share pattern of the Public Ltd. company at page 240 which shows that there are 63,21,067 Shares as compared to 200 shares of the Private Ltd. Co. Thus Directors in both the Companies are different and Share pattern of both the Companies are also totally different. Therefore it cannot be even remotely stated that both Private Ltd & Public Ltd companies are the One and the same.

13.9 It was submitted that even faint attempt is also made by the claimant to prove that **majority of the Share in the Public Ltd Co. is retained by the Directors of the Private Ltd Co. Factually it is not so and there were only Two directors in the private Ltd Co. subscribing 100 share each and now they are holding 22,00,000 Shares each which does not give them control of the company. It is**

nowhere stated either in the claim petition or in the affidavit of rejoinder or in deposition of the claimant that the Two directors of the Private Ltd Co. are holding more than 50% of the shares in the Public Ltd Co., with the help of other family members. From bare reading of Share-holding pattern produced on running page No : 240, it cannot be stated that all other shareholders are the relative or family members of the Two directors of the Private Ltd Co. Therefore such contention should not be given any weightage by Tribunal and this was absolutely sufficient ground for the GIDC to cancel the Tender of the Claimant.

13.9.1 Learned Counsel for the Respondents has advanced important arguments on Section 18 of the Companies Act, 2013.

13.9.2 Claimant has produced Certificate of Incorporation of M/s Akash Infra Projects Ltd. which proves that Pvt. Ltd Company has been converted into the public limited Company under Section 18 of the Companies Act, 2013.

13.9.3 The consistent argument of the Respondent is that when Pvt. Ltd co. is converted in to the Public Ltd Co., the original company loses its existence. This point gets fortified by Sub Section (2) of section 18 of the companies Act which says that "Registrar shall on an Application made by the company, after satisfying himself that the provisions of this Chapter applicable for Registration of the companies have been complied with, close the former registration of the company. And after registering the documents referred to in sub section(1), issue certificate of Incorporation in the same manner as its first registration.

13.9.4 Thus, as per Sub Section (2) of section 18 of the companies Act, when private Company applies for the conversion, the first step which R.O.C takes is to close the original Private Company and the second step is that it issues fresh certificate of Incorporation. Thus when R.O.C closes the registration of Private Company, it loses its existence. In this case Private Company was converted on 27.09.2016 as Public Limited Company and after losing its existence , it had submitted the Tender in the name of Private limited Company during period between 27.03.2017

to 7.04.2017. This was gross illegality committed by the claimant because nothing prevented it to apply in the name of Public limited Company. Thus the offer which was made by the company which had no legal status and which had no existence in the eyes of law can be said to be "*void-ab-intio*" and such offer cannot constitute any contract.

13.9.5 It was submitted by learned Counsel for the Respondents, that Sub section (3) of section 18 would not be of any assistance to the claimant as it deals with the liabilities and contract entered into by the Private Ltd Co. before the date of Conversion. In this case date of conversion is 27.09.16 and no offer or acceptance or any contract is made prior to that date. Therefore the said sub section would not be applicable in this case and would not be of any assistance to the claimant.

13.9.6 It was further argued that thus, Section 18 (2) precisely proves the argument & contention of the Respondents and making the claim of claimant liable to be dismissed.

14.0 Learned Counsel Mr.Sukhwani for the Claimant filed Rejoinder at Exh.20 by way of further written submission and contended that: there is no provision for cancelling the contract as per terms and conditions of the contract; that the work can be suspended or stopped totally or partially in terms of Clause 15, however, the contract was not ordered to be suspended totally or partially as per the provisions of Clause-15, which reads as under:

> *"15. "if at any time after the execution of the contract documents, the Engineer In-charge shall for any reason whatsoever required the whole or part of the work as specified in the tender be stopped for any period or shall not require the whole or part of the work to be carried out at all or to be carried out by the contractor, he shall give notice in writing stating the fact to the contractor..."*

14.1 Learned Counsel thus submitted that, in view of the above, the Engineer In-charge had not given any such notice in writing as per the provisions of Clause -15. However, the Engineer In-charge, by letter No. GIDC/ENG/XEN/ABD/NRD/AB/248 dated 6th February 2018 (Exh.C-8, p.131) informed that, *"... as per instructions from head office and VC & MD, the tender was to be treated as cancelled. Hence, please consider the acceptance given by*

this office as cancelled." Therefore, learned Counsel has submitted that from the aforesaid letter at Exh.C-8, it is established that the Engineer In-charge has only conveyed (and not decided by himself) the instructions received from the Head Office and VC & MD about the cancellation of the tender.

14.2 It was further contended by learned Counsel that the provisions of Clause-15 are not attracted to the facts of the present case in view of the fact that no such notice is given at the relevant point of time and there is no such decision by the Engineer In-charge of the respondents.

14.3 Learned Counsel for the Claimant further submitted that the respondents, for the first time, at the stage of final argument was making the submission relying on the said Clause of the contract, but there was no concluded contract or agreement between the Claimant and the Respondents and as such, there is no justification on the part of the Respondents to disown their own case of there being no concluded contract or agreement between the parties and

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that is only an afterthought in taking such contrary stand at different stages of the proceedings.

14.4 Further it was contended by learned Counsel for the Claimant that, even for the sake of arguments, the Respondents rely on Clause-15, it has no application at all because the present case is due to illegal termination of contract by the Respondents and now by way of an afterthought, the Respondents are taking the shelter of the said Clause without even following the mandatory requirement of the said Clause and that, the said Clause does not say, even if there is breach of contract on the part of the Respondents, then also, the Claimant will not be entitled to damages, namely, overhead and loss of profit.

14.5 Learned Counsel further submitted that, once the Tribunal comes to the conclusion that there is breach of contractual terms and conditions by the Respondents by not issuing the work order and by terminating the contract of the Claimant illegally, it is within the jurisdiction of the Tribunal to award damages/compensation to the Claimant

who had suffered due to default on the part of the Respondents and Section 28(1) of the Arbitration and Conciliation Act 1996 mandates that the Tribunal "*shall decide the dispute submitted to the arbitration in accordance with the substantive law for the time being in force in India.*"

14.6 Mr.Sukhwani, learned Counsel further relied upon the provisions of Section 73 of the Indian Contract Act, 1872, which reads as under:

> "73. Compensation for loss or damage caused by breach of contract. – When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

14.6.1 In view of the above, it was submitted that once it is held that there is an illegal termination of contract by the Respondents or there is breach of contract on the part of the Respondents or the contract could not be performed because of the circumstances, grounds or reason attributable to the Respondents, the Tribunal may pass the Award of compensation/damages to the Claimant.

14.6.2 It was further submitted that, if at all there is illegal termination of contract by the Respondents, then even under the general law, the Claimant is required to be granted the relief by awarding compensation/damages as granting the relief will be the resultant effect of the breach of contract, and if no such relief is granted, it would tantamount to allowing the Respondents to take undue advantage of their own wrong which would not be permitted under law of the land.

14.6.3 Learned Counsel for the Claimant has relied upon the decision of the Hon'ble Supreme Court in the case of ***G.Ramachandra Reddy and Company vs. Union of India and Another,*** reported in ***(2009) 6 Supreme Court Cases 414*** wherein the Hon'ble Supreme Court has observed in para-18, 35 & 36 as under:

> "18. The Division Bench, however, set aside in part the award in respect of the aforementioned claims stating as under:
>
> "However, we find some substance with regard to Claim 4, loss of profit, there was an admitted delay in handing over the site and supply of materials. We confirm both the award of the arbitrator and the order

of the learned Single Judge with regard to Claim 4, loss of profit."

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"35. The award of the arbitrator in respect of Claim 4 has been accepted by the Division Bench. Mr.B.B.Singh has drawn out attention to Clause 11© of the general conditions of the contract to contend that in terms thereof, no damages were payable.

36. The question as to whether damages were payable for illegal termination of contract cannot be a subject-matter of contract. The learned arbitrator has categorically held that not only was the termination of contract illegal, the same was mala fide. Furthermore, the contention raised before us by Mr.Singh has not been raised before the High Court."

14.6.4 In view of the above, it was submitted that, the reliance placed by the Respondents on the provisions of Clause-15, for not awarding damages would be fundamentally against the condition of contract is thoroughly misconceived.

14.6.5 Learned Counsel for the Claimant further submitted that, as far as the judgments relied by the Respondents are concerned, they are with regard to matter being at the stage of tendering and/or at the time of awarding the contract or whom not to award the same is with the executive power and not within the judicial review and none of the judgments are attracted to the facts of the

present case as in the present case, the contract is already concluded between the parties. That the judgments are also not attracted to the facts of the present case because there is not even a single judgment which says that party committing the breach of contract is to be protected by not directing to pay the compensation. Similarly, there is also not even a single judgment which says that party committing breach of contract can be given the benefit of clauses of the contract and thereby evading their liability to pay the damages under the law and therefore, the contention of the respondents are required to be rejected and the Claimant is required to be compensated.

14.6.6 It is the contention of the learned Counsel for the Claimant that, the decisions on which the Respondents have placed reliance dated 5th January 2021 in Civil Appeal No. 7469 of 2008 (M/s.Padia Timber Company (P) Ltd. V. The Board of Trustees of Vishakhapatnam Port Trust) is not attracted in the present case because before the Hon'ble Supreme Court of India, there was no concluded contract as in that case both the parties while accepting the tender had

put in new conditions and therefore, there was no absolute and unqualified acceptance of offer to culminate into an agreement. Whereas in the present case, there was unqualified and absolute acceptance of the offer by the Respondents which culminated into the agreement between the parties. Further it was submitted that, assuming for the sake of arguments that the acceptance of the offer was conditional, then also, all the conditions of L.O.A. dated 4th August 2017 were fulfilled and the parties acted on the said conditions and therefore also, there is a concluded contract between the parties in the present case.

14.6.7 Learned Counsel for the Claimant, therefore, submitted that the Tribunal may pass the Award as prayed for by the Claimant in the Claim Statement and award compensation of an amount of Rs.49,75,070/- with interest at the rate of 18% per annum from the due date till its realization.

15.0 After the arguments were over, learned Counsel for the Respondents had sought amendment of the Written Statement and has taken additional ground of amending the

written statement where the issuance of Notice under Section 55A of the GID Act was taken and it was contended that the present proceedings are required to be dismissed on the ground of want of Statutory Notice. Such application dated 5.5.2021 is filed at Exh.14 and the application dated 5.5.2021 for amendment of the Issue is filed at Exh.15.

15.1 Learned Counsel Mr. S.B. Keshvani, for the Respondents further argued that as per the provisions of Section 55A of the GID Act, prior service of the statutory notice is mandatory and no suit or any other legal proceedings can be filed without such prior service of notice and there is no provision of dispense with the same and as such, the claim is not maintainable and deserves to be dismissed.

15.2 It is further contended by the learned Counsel for the Respondents that in the present case, claimant has admitted in the cross-examination that he has not served any notice as required under Section 55A of the GID Act, 1962 and therefore, the present suit is not maintainable at

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law and deserves to be dismissed on this ground also along with the others which are more particularly in the Written Arguments.

15.3 In support of his submissions, learned Counsel for the Respondents has placed reliance on the following three decisions:

(i) Bihari Chowdhary vs. State of Bihar, reported in ***1984 Law Suit (SC) 89;***

(ii) Girdharilal Chadha vs. Union of India, reported in ***1982 Law Suit (Del) 204; and***

(iii) 2014 Law Suit (Gujarat) 2303.

15.3.1 In the case of ***Bihari Chowdhary vs. State of Bihar***, reported in ***1984 Law Suit (SC) 89***, on which reliance has been placed by the learned Counsel for the Respondents, the Hon'ble Apex Court has observed that, the effect of the Section is clearly to impose a bar against the institution of a suit against the Government or a public officer in respect of any act purported to be done by him in his official capacity until the expiration of two months after notice in writing has been delivered to or left at the office of the Secretary to Government or Collector of the concerned

district and in the case of a public officer delivered to him or left at his office, stating the particulars enumerated in the last part of sub-section (1) of the Section and it was further observed that, "There is clearly a public purpose underlying the mandatory provision contained in the section insisting on the issuance of notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. The object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation. It was further observed in para (4) and para (6) as under:

> "[4] When the language used in the Statute is clear and unambiguous, it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the legislature."
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> ****
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> [6] It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80, C.P.C. is attracted cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."

15.3.2 In the case of ***Girdharilal Chadha vs. Union of India,*** reported in ***1982 Law Suit (Del) 204,*** the Hon'ble Delhi High Court has observed in para-5 as under:

"[5] On the pleadings of the parties, the Court framed the issues on May 4, 1982 and issue No. 6 was directed to be treated as a preliminary issue. Issue NO. 6 :

"WHETHER the suit is not maintainable for want of notice under Section 80 of Code of Civil Procedure ?"

Para 21 of the plaint reads as under : "THAT no notice under Section 80 of the Code of Civil Procedure Code has given as relief sought is urgent and immediate. Moreover, in view of the proceedings in C.W. No. 444 of 1981 defendant, have in fact, sufficient notice of the claim of the plaintiffs. However, leave of Court us 80(2) Civil Procedure Code is hereby sought."

The argument of Shri O. N. Vohra, the learned counsel for the plaintiffs is that the order of the Court dated October 20. 1981 directing the issue of the summons of the suit to the defendants and the restraint order restraining them. from taking possession of the property in dispute must be construed as an order impliedly granting leave under Section 80(2) of the Code of Civil Procedure. In my opinion, the agreement runs counter to the statutory provisions contained in Section 80 of the Code of Civil Procedure reading as follows: "80. (1) Save as otherwise provided in sub-section (2), no suit shall be instituted against the Government including the Government of the State of Jammu and Kashmir or against a public office of the appropriate authority specified in done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of (a) in the case of a suit against the Central' Government. except where it relates to a railway. a Secretary to that Government ; (b) in the case of a suit against the Central Government where it relates to railways, the General Manager of that railway ; (bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf; (c) in the case of a suit against any other State Government, a Secretary to that Government or

the Collector of the district : and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left. (2) A suit to obtain an urgent or immediate relief against the Government including the Government of the State of Jammu and Kashmir or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave Of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise; except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit : Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1). (3) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (1), if in such notice (a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and . such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and (b) the cause of action and the relief claimed by the plaintiff had been substantially indicated." Before the amendment of Section 80 by the Code of Civil Procedure (Amendment) Act, 1976, the provisions of unamended Section 80 admitted of no exception whatsoever and are express, explicit and mandatory. The object of the section is to give the Government sufficient notice of the suit which is proposed to be brought against it so that it may reconsider the position and decide for itself whether the claim made would be accepted or not. The purpose is to give an opportunity to the Government to reappraise the factful and legal position and to settle the claim made without litigation in a court of law. The legislative intent is to avoid unnecessary litigation with the Government. The provisions of Section 80 have been construed as mandatory and it is for the plaintiffs to allege and prove that the requirements of this section as to notice have been satisfied. The plaint is further required to show that a notice under Section 80 claiming the reliefs was served in terms of Section 80. If these requirements are not complied with, then the Court is debarred from entertaining the suit. The service of the notice under Section 80 is a condition precedent for the institution of the suit against the Government. If the suit

is instituted without the notice then the plaint must be rejected under Order 7 Rule 11 of the Code of Civil Procedure."

15.3.3 In the case of ***Nayan B. Pandya, Proprietor, Cryoline India vs. Jindal Energy Ltd.,*** reported in ***2014 LawSuit (Gujarat) 2303,*** the Hon'ble High Court, in para 10 & 11, has observed as under:

"10. Now coming to the merits of the case, the question whether the Court below has committed any error warranting admission of this Letters Patent Appeal or grant of interim relief is concerned, we find that the learned Senior Civil Judge in his order dated 30.4.2013 in paragraph 7 has clearly held that notice to GIDC under Section 55 A of the Gujarat Industrial Development Act, 1962 is necessary. Therefore, the suit would not be maintainable if Section 55 A is applicable. The learned Senior Civil Judge though notices provision of Section 55 A as mentioned above, says that its jurisdiction will not be ousted. When the law mandates that suit can only be filed after two months notice, prima facie, it appears that the learned Senior Civil Judge has committed a serious error of law in proceeding with the suit and rejecting the application filed by the appellant – original defendant No.1. The review application was also rejected by the learned Senior Civil Judge on the erroneous assumption and the learned Single Judge did not consider the true import of Section 55 A of the Gujarat Industrial Development Act, 1962.

11. *Prima facie,* we are of the opinion that if any State enactment bars filing of a suit without complying with conditions mentioned therein under the Act, then in such a situation, the Civil Court cannot assume jurisdiction only on the ground that it is a Civil Court and its jurisdiction cannot be ousted by any State enactment. Where the jurisdiction of a Civil Court is totally ousted, even then a writ petition would lie. Where the aggrieved party has to comply with the provisions of an Act, does not want to comply with the statutory provision, there also, he can file a writ petition under Article 226 of the Constitution of India. If he proposed to file a suit, in such a situation, prima facie, in our opinion, he is required to comply with the provisions of the State Act."

15.4 Learned Counsel Mr.Keshvani, for the Respondents, in view of the above arguments and submissions, submitted that that the present claim application deserves to be dismissed and the same be dismissed.

16.0 Controverting the above submissions of learned Counsel for the Respondents, Mr.Sukhwani, learned Counsel for the Claimant has submitted that, it was by way of an afterthought, the Respondents have come out with a case that statutory notice is required under Section 55A of the GID Act and moved an application for addition (Amendment) in written statement.

16.1 Learned Counsel, Mr.Sukhwani has contended that the Tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908), therefore, the application for addition (Amendment) in written statement filed as per the provisions of Order 6 Rule 17 of C.P.Code is not maintainable at law and deserves to be dismissed.

16.2 Further it was contended by learned Counsel for the Claimant that, without prejudice to the above, the Arbitration and Conciliation Act, 1996 is self contended code and as per the provisions of Section 23(3), either party may amend or supplement his claim or defence during the course of the Arbitral proceedings, unless the arbitral Tribunal considers it inappropriate to allow the amendment or supplement having to the delay in making it.

16.3 Learned Counsel further submitted that, the Respondents had concluded their oral arguments and also filed their written arguments on 29/04/2021 and thereafter the Claimant served on the Advocate of Respondents their further written submission on 30/04/2021 at 11.35 A.M. and the Respondents on 3.04 P.M. sent the e-mail raising the argument on the point of Statutory Notice.

16.4 It was contended by learned Counsel for the Claimant that, it was absolutely incorrect to say that under Section 55A of GID Act, 1962, service of Statutory Notice is wholly misconceived under the law. But the present proceedings are filed by the Claimant for illegal termination of contract,

i.e. breach of contract by the Respondents and to recover damages suffered by the Claimant thereof, and such an action (illegal termination of contract, i.e. breach of contract) by the Respondents cannot be said to have been done or purported to have been done in pursuance of the GID Act, and therefore, service of Statutory Notice upon the GIDC cannot be said to be mandatory and the proceedings initiated by the Claimant are maintainable at law and does not deserve to be dismissed as alleged.

16.4.1 It was further contended by learned Counsel that the Respondents were put to notice by communication dated 1st June 2018 (Exh.C-9, p. 140 to 148) and in the last para, the Claimant had called upon the Respondents to compensate various losses together with interest @ 18% and make the payment within 30 days, failing which Claimant shall be compelled to approach the legal forum as well as initiate the Arbitral Proceedings and this communication was to be considered as notice and no further notice will be served and to be considered as final notice.

16.5 Sections 4 and 21 of the Arbitration and Conciliation Act, 1996 are reproduced as under:

> "**4. Waiver of right to object.—A party who knows that—**
>
> (a) any provision of this Part from which the parties may derogate, or
>
> (b) any requirement under the arbitration agreement,
>
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."
>
> "**21. Commencement of arbitral proceedings.**— Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

16.5.1 Learned Counsel argued that, in view of the above clear position, since the Respondents have waived their right to object and since the Hon'ble High Court of Gujarat had referred the dispute for adjudication, therefore, now the Respondents have no right to object that no statutory notice is given under Section 55-A of GID Act and therefore, the present application is not maintainable in law and deserves

to be dismissed on this ground alone, such contention deserved to be dismissed by this Tribunal.

16.6 Learned Counsel, Mr.Sukhwani for the Claimant relied upon an Award dated16.6.2014 declared by Hon'ble Mr.Justice C.K.Thakker in the Arbitration proceedings between ***Rajkamal Builders Infrastructure Pvt.Ltd. vs. The Ahmedabad Urban Development Authority and Anr..*** wherein on Page-25, 26-27 and 34 of Award & running Page-147, 148-149 and 156 on record), the Tribunal has observed as under:

> "The learned counsel for the claimant is right in submitting that this is not a case wherein the Tribunal is awarding any amount on a particular item ignoring or in contravention of clear terms and conditions of the contract. The judgments cited by the learned counsel for the respondents laid down a principle of law that the Arbitral Tribunal has no power, authority or jurisdiction to travel beyond the terms of the contract and it cannot pass an award in violation of such terms. This legal position cannot be disputed and is not disputed by the claimant. It is the duty of the Tribunal to follow substantive law of the land. But once it is held that there was breach of contract by the defaulting party or the contract could not be performed because of circumstances, grounds or reasons referable or attributable to the opposite party, the Tribunal in accordance with law, is also bound to award compensation/damages to party who had suffered. That is what has been laid down in Section 73 of the Contract Act, 1872. Refusal to award damages/compensation to party who had suffered is equally illegal, unlawful and contrary to the law of the land."
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"The learned counsel for the claimant drew the attention of the Tribunal to Section 73 of the Contract Act, 1872, the relevant part of which reads thus:

> **"S.73. Compensation for loss of damage caused by breach of contract.**
>
> When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."
>
> ....

Bare reading of the above provision makes it clear that where a contract has been broken, the party who has suffered by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage sustained by him. In other words, in case of breach of contract, the party who suffers is entitled to receive and the party who has committed breach is liable to pay loss, damage or compensation for such breach. [See ***Pullock & Mulla; "Indian Contract and Specific Relief Acts;*** (Twelfth Edition); Vol.II; pp. 1475-76].

Referring to Section 28(1) of the Arbitration and Conciliation Act, 1996, the counsel submitted that the said provision mandates that the Arbitral Tribunal "shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India."

In the case on hand, the claimant has successfully established on the basis of documentary evidence that substantial delay in execution of work had been caused due to reasons, grounds and circumstances which were attributable to the respondents. If it is so, the claimant is entitled to get and the respondents are liable to pay damages or loss caused by such delay. It is in consonance with the law of the land and in various cases also, the said principle/doctrine has been recognized by various courts including the highest court of country (Supreme Court)."

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"In my opinion, there is an additional reason also which supports the contention of the claimant. Once a competent Court/Tribunal considers the evidence on record and holds by recording a finding that delay had been caused in performance of work due to reasons, grounds or circumstances attributable to the authority/respondent, unless the general law also, the Court/Tribunal must award damages to the Contractor.

Recording of finding that Authority was responsible for delay and rejecting the prayer of the Contractor for escalation which had been there during the intervening period cannot go together. Precisely, in such cases, Section 73 of the Contract Act, 1872 would apply. Denial of relief for escalation of price in such case would mean that the Court/Tribunal allows the respondent to take undue advantage of its own wrong or default which can never be permitted. On that ground also, the claimant is entitled to the relief sought from AUDA."

17.0 Learned Counsel Mr.Sukhwani, for the Claimant, pointed out that this is a case of breach of contract, which is not part of the conditions of the Tender or the Agreement in view of the decision of the Hon'ble Supreme Court in the case of ***Bombay Housing Board (now the Maharashtra Housing Board) vs. M/s. Karbhase Naik and Co., Sholapur,*** reported in ***AIR 1975 Supreme Court 763.*** The Hon'ble Supreme Court in para-23, 30 and 3 of the judgment has observed as under:

"23. The High Court was of the view that Section 64 of the Bombay Housing Board Act, 1948 has no application as the claims were for damages for breach of contract.

Section 64 provides:

"No person shall commence any suit against the Board or against any officer or servant of the Board or any person acting under the orders of the Board, for any thing done or purporting to have been done in pursuance of this Act, without giving the Board, officer, or servant or person two months previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of,

And in the case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amounts

so tendered and shall pay all costs incurred by the defendant after such tender."

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"30. In the Trustees of Port of Bombay v. The Premier Automobiles Ltd., **AIR 1974 SC 923** Section 87 of the Bombay Port Trust Act, 1879, which is in pari materia with Section 64 of the Act fell for consideration and the question was whether short delivery by a statutory bailee was something done or purporting to have been done under the provisions of that Act. In the course of the judgment, Krishna Iyer, J., speaking for the Court, said that a suit for damages for breach of contract would not attract the section (see para 46 of the judgment).

31. As we said, the act complained of in this case was the non-payment of the amount alleged to be due to the respondent on the basis of the breach of the contract between the parties. We do not think that the act complained of could be said to have been done or purported to have been done in pursuance of the Act. By no stretch of imagination could it be said that the breach complained of had any reasonable connection with any duty cast upon the appellant or its agents by the Act."

17.1 It was therefore, submitted by learned Counsel that Section 64 of the Bombay Port Trust Act, 1879 is *pari materia* with Section 55A of the GID Act and in view of the said decision of the Hon'ble Supreme Court, notice is not required for breach of contract.

18.0 Learned counsel Mr.Sukhwani, for the Claimant, had also moved an application for amendment for adding one word, "Managing" before the word "Director" in the Claim Statement, which is filed at Exh.19.

19.0 Mr.Sukhwani, learned Counsel for the Claimant has further submitted that, the reasons which are now canvassed regarding the difference in name of the Company – Claimant and black-listing were not basis for cancellation only and the reason for black-listing is clear from Exh.C-9, dated 19th February 2018.

20.0 Both the applications were opposed by each other, however, to avoid any further multiplicity of litigations between the parties, the same were allowed by an order dated 11th May 2021 passed by this Tribunal.

21.0 After hearing the learned Counsel for both the parties, now, I would deal with the Issues as under:

21.1 **ISSIE NO.1 and 5** :

Issue No.(1) : Does the Claimant prove that the Respondents have committed fundamental breach of the Contract by cancelling the tender after having accepted the same? & **Issue No. (5)** : Do the Respondents prove that

they are entitled to cancel the contract of the Claimant as per the terms and conditions of the tender?

21.2 As per the submission of learned Counsel Sukhwani for the Claimant, the acceptance bid of the Claimant was issued on 4th August 2017; the Claimant had submitted the required Bank Guarantee and the Performance Bond on 23rd August 2018 and the contract agreement was signed and delivered to the respondents and therefore, there is a concluded contract as per the provisions of Sections 4, 7 and 10 of the Indian Contract Act and thus, it was a concluded contract; the Respondents have committed fundamental breach of agreement by cancelling the tender; the Respondents ought to have issued the work order after having accepted the security deposit and the performance bond, however, the work order was never issued, which clearly shows that there is a breach on the part of the Respondents despite several requests being made by the Claimant and therefore, the Respondents have illegally terminated the contract on 6th February 2018, without giving any notice to the Claimant.

22.2.1 Learned Counsel Mr.Keshvani for the Respondents mainly contended that in view of the conditions which are referred in the Tender document, which are not reproduced here again, for the sake of convenience, before considering those terms and conditions, the term 'Bid and Tender' is required to be construed in legal terms.

22.2.2 'Bid' means, offer given by the Tenderer to the Respondents and till it is opened, it is technical or financial Bid and will remain 'Bid', but as soon as it is opened, it becomes an offer given by the Tenderer to the Respondents.

22.2.3 As soon as the Bid is accepted, it ceases to be a 'Bid' and it becomes an offer and therefore, the Respondents have to accept the same or reject the same. As soon as the lowest Bid is finalized, the Tender process has to come to an end.

22.2.4 In this view of legal terminology, clauses which were referred in the earlier part of this Award, the submissions of the learned Counsel for the Respondents is not acceptable

inasmuch as, once the Bid is accepted, it has to be treated as an offer and Tender process is over on acceptance of lowest Bid. All Clauses referred by the Respondents are at Tender stage during Bid.

22.2.5 In that view of the matter, the Clauses which are relied upon by the learned Counsel for the Respondents are not acceptable, since in all clauses, it is either 'Bid' or 'Tender'. The process of Tender was over on 4th August 2017.

22.2.6 Considering the submission made by the learned Counsel for the Claimant that the letter was issued on 4th August 2017 and it was very clear that the lowest Bid of the Claimant was accepted by the Respondents. The documents were tendered on 23rd August 2017, which was responded after 5½ months, and even while rejecting the Tender, no reasons are given except that of blacklisting of the Claimant.

22.2.7 The original order which was passed by the Ahmedabad Municipal Corporation and not by the R&B Department of the State of Gujarat. No other ground was

referred even on the basis on which the order was passed. The original order of black-listing the Claimant Company was subject matter of challenge, but no notice was given by the Ahmedabad Municipal Corporation.

22.2.8 With regard to the difference in name of the Company, it may be clarified that for Government approval was accorded for conversion from Private Limited Company to Public Limited Company. For the purpose of participating in Tender process, experience is a must and if the Claimant is not applying in the name of Private Limited Company or the key is not given in the name of Private Limited Company, it will not be eligible and if the Tender is filled in the name of Private Limited Company, it has to be considered.

22.2.9 In that view of the matter, taking into consideration the conversion of Private Limited Company to Public Limited Company, the Government has passed the order of accepting, the key since its conversion was in the same entity.

22.2.10 Assuming without admitting that, even if it is a ground taken by the Respondents, they ought to have rejected the Bid, but having accepted the Bid, it would not be appropriate defence in the present proceeding. Therefore, the conversion of name of Private Limited Company to Public Limited Company is not a ground for cancellation of the Tender/or Agreement.

22.2.11 The other grounds which are taken by the Respondents for not fulfilling the conditions of acceptance letter dated 4th August 2017 are not referred in the reply to notice dated 10.7.2017 given by the Respondents. In my considered opinion, these grounds are not germane and are not grounds for rejection of the Tender offered by the Claimant. None of the grounds are referred in order while cancelling Tender. In that view of the matter, those grounds are an after-thought and technical ground for sake of arguments.

22.2.12 Even, Clause-15 which has been invoked, is an after-thought and no notice was issued by the Respondents' officers. Therefore, in my considered opinion, the offer

which was given by the Claimant was accepted by the Respondents without any condition on 23rd August 2017 which will amount to a concluded Contract. Merely because the Respondent-GIDC has not signed the agreement, it will not result into non-execution of the contract as the offer which has been accepted by the Respondents is Agreement and the claimant could not have gone back after acceptance of the offer given by the Claimant in this case. Apart from that, B2 is printed standard agreement and contractor cannot change the same, therefore, argument of inclusion of condition by the contractor is not possible.

22.2.13 In that view of the matter, Issue No.1 & 5 are required to be answered in favour of the Claimant and against the Respondents.

ISSUE NO. 6:

22.3 **Issue No.6**: Do the Respondents prove that no Work Order was issued in favour of the Claimant and no

agreement was executed between the Claimant and the Respondents?

22.3.1 By letter dated 4th August 2017, the offer of the Claimant was accepted by the Respondents as the same was the lowest. The Claimant had tendered the Bank Guarantee and the Performance Bond and the agreement was executed by the parties and tendered to Respondents on 23rd August 2017. Merely because of the administrative formality, non-signing of the agreement by the Respondents will not amount to non-execution of the agreement. In that view of the matter, the acceptance of the offer with Bank Guarantee and Performance Bond given by the Claimant on 23.8.2017 which was not responded by the Respondents for a period of 5 ½ months will amount to acceptance of the agreement which is in terms executed.

22.3.2 Therefore, Issue No.6 is answered accordingly that the agreement was executed between the Claimant and the Respondents. No work order was issued in spite of several reminders by the Claimant, nor responded to any letters.

ISSUE No. 7:

22.4 **Issue No. (7)**: Do the Respondents prove that the Claimant was a Public Limited Company on the date of submission of the tender but it had submitted the tender in the name of Private Limited Company which was not in existence on the date of submission of the tender which disentitles it to claim any amount?

22.4.1 The name of the Company was originally in the nature of Private Limited Company registered in 1999, but looking to the expansion of business, the management had decided to convert it into a Public Limited Company under the Companies Act.

22.4.2 For the purpose of Government contract, experience of the earlier Company was required to be taken into consideration except for the purpose of key which was used for the purpose of Private Limited Company. When the Private Limited Company had applied for conversion as Public Limited Company, experience of a Public Limited Company would not be there and will not make it eligible for participating in the Tender process.

22.4.3 In that view of the matter, the defence of the Respondents that the Company is not the same is an after-thought and if at all, if that was the ground, they should have rejected the Bid, but this is not a ground for rejecting the Tender. Even the black-listing order passed by AMC is of Private Limited Company, therefore, argument of respondents is contrary to their own base.

22.4.4 The conversion order of the State Government dated 27.9.2016 is very crucial for the purpose of considering the eligibility of the Claimant for the Tender process and Circular of Government dated 24.5.2017.

22.4.5 In view of that, Issue No.7 is decided in favour of the Claimant.

ISSUE NO. 8:

22.5 **Issue No.(8)** : Do the Respondents prove that it was justified in cancelling the tender after having accepted the same from the Claimant?

22.5.1 The Respondents have cancelled the Tender on the ground of black-listing of the Claimant. If that original order is referred to and taken into consideration, the only ground for black-listing was notified by the Ahmedabad Municipal Corporation and not by the R&B Department.

22.5.2 In that view of the matter, this is not a ground for cancelling the Tender, and at the most, the Respondents could have withdrawn the acceptance letter in legal terms. Therefore, this is not a ground for cancellation of the Tender of the Claimant and the conditions which referred in the Tender will not fall in any of the reasoning given by them. There is no justifiable legal ground for cancellation of Agreement or Tender.

22.5.3 In that view of the matter, this Issue is decided against the Respondents.

ISSUE NO. 11 :

22.6 **Issue No. (11)** : Do the Respondents prove that present suit is not maintainable at law and liable to be dismissed for want of service of Statutory Notice as contemplated under Section 55A of GID Act, 1962?

22.6.1 The Respondents have taken the contention that the Claimant has not given notice under Section 55A of the GID Act and this contention is taken after the arguments were over, however, the same was permitted to be taken.

22.6.2 It was contended that in the notice dated 1st June 2018, there is no reference of Section 55A of the GID Act but it refers to in reply dated 19.9.2018 of Respondents as notice. In that view of the matter, substantially, notice was given by the Claimant, therefore, this is not a ground for rejecting the claim of the Claimant on the ground of want of notice. It is well settled that non-reference of provision of law will not invalidate notice.

22.6.3 Another argument was canvassed by learned Counsel for the Claimant regarding Sections 4 and 21 of the Arbitration Act, which are reproduced again, hereunder:

> "**4. Waiver of right to object.—A party who knows that—**
>
> (c) any provision of this Part from which the parties may derogate, or
>
> (d) any requirement under the arbitration agreement,
>
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."
>
> "**21. Commencement of arbitral proceedings.**— Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

22.6.4 It was rightly pointed out by the learned Counsel for the Claimant that this contention was to be taken at the first opportunity and no such contention was taken at the time when Section 11 application was filed before the High Court. The High Court order runs into several pages, but it

seems that no contention was taken before the High Court. In that view of the matter, this contention cannot be permitted to be taken at this stage. It was not contended by the parties before the High Court.

22.6.5 The contention taken on behalf of the Claimant that the claim is made for breach contract and not for action under the GID Act and in view of the decision of the Hon'ble Supreme Court in the case of ***Bombay Housing Board (now the Maharashtra Housing Board) vs. M/s. Karbhase Naik and Co., Sholapur,*** reported in ***AIR 1975 Supreme Court 763*** (supra), it is very clear that if there is breach of contract and no notice is required and the provisions of this Act is *pari materia* with Section 64 of the Bombay Housing Board Act. Therefore, in view of the said decision, no notice is required for breach of contract. This is an after-thought after the whole matter was over and therefore, this contention is required to be rejected.

22.6.6 In view of that, amended/added Issue No.11 is required to be decided against the Respondents and in favour of the Claimant.

ISSUE NO. 2 (Claim No.1):

23.0 The Claimant has claimed damages for overhead establishment charges. Learned Counsel for the Claimant has submitted that in view of the Standard Data Book for Analysis of Rates,) which has been produced on record, clearly establishes that 10% of the tender value is the expenses for overhead charges.

23.1 In the present case, documents were tendered on 23rd August 2017 and the work order ought to have been issued on receipt of the Bank Guarantee and Performance Bond on agreement being signed by the Claimant, but instead of several reminders, the work order was never issued.

23.2 In view of the conditions of the Contract, the Contractor has to make all arrangements and as the work was to be started beyond which he signed the Agreement. Therefore, learned Counsel for the Claimant has contended that the total expenses which comes to Rs.31,44,528/- and the work was required to be done in 11 months. Therefore, per month the expenses to the tune of Rs.2,85,866/- was claimed and taking into consideration the delay of 5 months

and 11 days, it was contended that the Claimant would be entitled to Rs. 15,72,263/-.

23.2.1 Learned Counsel for the Respondents though contended that there is no breach on merits of this claim, only argument which was canvassed by him on Standard Rates of the State Government will not apply and the Standard Rates of GIDC will apply for Modasa Industrial Estate. But nothing is on record to show that the Standard Rates of GIDC for Modasa Industrial Estate is different than that of the State Government.

23.2.2 In view of the findings of breach committed by the Respondents, the Claimant is entitled to overhead establishment charges for 5 months and 11 days which comes to Rs.15,34,242/- on the basis of Rs.2,85,866 per month, for 5 months 11 days.

23.2.3 In that view of the matter, Issue No.2 is partly decided in favour of the Claimant and against the Respondents.

ISSUE NO. 3:

23.3 The Claimant has claimed profit for illegal termination of the contract. Learned Counsel for the Claimant has contended that in view of the decisions of the Hon'ble Supreme Court in the case of ***G.Ramachandra Reddy and Company vs. Union of India and Another,*** reported in ***(2009) 6 Supreme Court Cases 414*** (supra); ***Mcdermott International Inc. vs. Burn Standard Co. Ltd and Ors.,*** reported in ***AIR 2006 SCW 3276(1)***; and ***Associate Builders vs. Delhi Development Authority***, reported in ***(2015) 3 Supreme Court Cases, 49***, for illegal termination of the contract, the Claimant is entitled to claim damages at the rate of 10% as per the Standard Rates of the State Government, which comes to Rs.31,44,528/-.

23.3.1 Learned Counsel for the Respondents contended that the profit can be given only if the work was done or the Claimant has invested any amount for the work which was required to be done by it. In the present case, there was no site office of the Claimant nor any proof for purchase is shown on record or expenses for the project

required to be incurred by the Claimant. In that view of the matter, on presumption, damages cannot be awarded to the Claimant.

23.3.2 In view of the decisions of the Hon'ble Supreme Court referred to in earlier part of this Award, i.e. ***M/s. A.T. Brij Paul Singh and Bros. vs. State of Gujarat***, reported in ***AIR 1984 Supreme Court 1703*** and ***Dwarka Das vs. State of M.P. and Another,*** reported in ***AIR 1999 Supreme Court 1031,*** I am of the opinion that the claimant is entitled to loss of profit at the rate of 10% of the amount of Rs. 3,14,45,280/- i.e. Rs.31,44,528/- only as claimed by the Claimant.

23.3.3 Therefore, Issue No. 3 is decided in favour of the Claimant and against the Respondents.

ISSUE NO. 4:

23.4 Learned Counsel for the Claimant has submitted that for the purpose of Bank Guarantee and Performance Bond, the Claimant had to spend huge expenses which was

incurred specifically for the present project. He has referred to the "Standard Data Book for Analysis of Rates" of the Government and submitted that the charges on the basis of the same which comes to Rs.2,58,279/- as Bank Charges from the Respondents.

23.4.1 Learned Counsel for the Respondents contended that the said expenses are usual charges and is not required to awarded to the Claimant.

23.4.2 Taking into consideration the order which was issued on 4th August 2017 which was received by the Respondents on 21st August 2017, in two days, the Bank Guarantee and the Performance Bond were submitted with signing of the contract by the Claimant and therefore, the Claimant is entitled to recover the Bank Charges from the Respondents on the basis of Standard Rates of the Government since these expenses are incurred after acceptance letter, not a part of Tender process, and hence, the Claimant is entitled to an amount of Rs. 2,58,279/- from the Respondents.

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23.4.3 In view of that, Issue No. 4 is decided in favour of the Claimant and against the Respondents.

ISSUE NO. 9:

23.5 It is contended on behalf of the Respondents that no amount for damage is required to be granted to the Claimant.

23.5.1 In view of the observations made in above paragraphs for Issue No.1, 2 and 3, this Issue is required to be answered and decided against the Respondents. The Claimant is entitled to recover damages from the Respondents.

ISSUE NO.10:

23.6 In view of the observations made in respect of Issue No.1, 2 and 3 as above, the Claimant is entitled to recover the amount which comes to the tune of **Rs.15,34,242 + Rs.31,44,528 + 2,58,279 = Rs.49,37,049/-** (Rupees Fourty-nine Lakhs thirty-seven thousand and fourty-nine only) from the Respondents.

24.0 On the basis of the overall consideration and findings recorded, the following directions are issued by way of this Final Award:

1. The Claim of the Claimant is partly allowed.

2. The Respondents shall pay to the Claimant an amount of **Rs.49,37,049/-** (Rupees Fourty-nine Lakhs thirty-seven thousand and fourty-nine only) within three months.

3. The Claimant shall be entitled to interest at the rate of 6% per annum and if the awarded amount of **Rs.49,37,049/-** (Rupees Fourty-nine Lakhs thirty-seven thousand and fourty-nine only) is not paid within three months, the Claimant will be entitled to interest at the rate or 9% per annum till payment is made.

4. Both the parties shall bear their own costs of the present Arbitral proceedings.

25.0 The Award is prepared in triplicate. Each copy of the Award is original and is signed by the Sole Arbitrator and each one is prepared on requisite E-Stamping Papers. One

original signed copy of the Award is to be given to each party.

This Award is made at Ahmedabad on **31st day of May 2021** and is ready for delivery.

K. S Jhaveri

JUSTICE K.S. JHAVERI
(Retd.)
(ARBITRATOR)

Received the Original signed copy of the Award:

Advocate and/or authorized representative for the Claimant.

C.K.Sukhwani. dt. 31.5.2021.

Advocate and/or authorized representative for the Opponents:

(S.B. Kesharwani) Adv.