

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 02.08.2010**

% **O.M.P. 227/2004**

REUNION ENGINEERING CO.PVT. LTD Petitioner
Through: Mr. Arun Francis, Advocate.

versus

M/S. NBCC LIMITED Respondent
Through: Mr. Arvind Minocha, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J. (Oral)

1. The present petition has been filed under Section 34 read with Sections 13 & 16 of the Arbitration and Conciliation Act, 1996 (the Act) to seek the setting aside of the award dated 25.03.2004 made by the sole arbitrator Sh. A.K. Palit in respect of the claims made by the respondent M/s NBCC Limited against the petitioner herein. By the impugned award the learned arbitrator has awarded an amount of Rs.1,68,48,585/- to the respondent NBCC.

2. The respondent claimant had filed the aforesaid arbitration claim and its case as per the statement of claim was that the petitioner was one of the sub-contractors appointed by the respondent contractor to do the electrical works in two hotels being constructed by it in Iraq. One was a four star hotel at Mosul and another was a three star hotel at Dokan.

3. According to the respondent, one M/s A.M. Sulaiman & Company, which had dealings with the petitioner in Iraq, had obtained a money decree against the petitioner from the Court in Iraq under the Iraqi law. In execution of the said decree, the accounts of the respondent had been attached and recovery made therefrom as, by the time the decree came to be executed, the petitioner was no longer present in Iraq and, therefore, the decree could not be executed against the petitioner directly. The case of the respondent was that under its contract with the petitioner, if the respondent incurred any liability on account of the petitioner, the petitioner was liable for the same.

4. As aforesaid, the learned arbitrator allowed the said claim. However, no interest was awarded by the arbitrator upto the date of making of the award. From the date of award, till payment, future interest @ 10% per annum was awarded by the learned arbitrator. However, if the payment of the awarded amount was made within three months, no interest was payable.

5. The award is challenged by the petitioner on three grounds. The first submission of learned counsel for the petitioner is that the arbitral tribunal was not duly constituted. He submits that under the arbitration agreement between the parties, the arbitration had to be conducted by the Project Director or by his nominee. However, in the present case it was the Chairman-cum-Managing Director of the respondent who had nominated the arbitrator. He submits that the sole arbitrator was, therefore, wholly incompetent and did not have the authority to conduct the arbitration.

6. Learned counsel for the petitioner submits that in respect of the claims made by the petitioner, the Chairman-cum-Managing Director of the respondent had sought to make appointment of the arbitrator. At that stage also the petitioner had challenged the authority of the Chairman-cum-Managing Director to make appointment of the arbitrator as, under the contractual term, only the Project Director had the power to nominate the arbitrator. He submits that upon the said objection being raised, the respondent had conceded to the arbitrator being appointed by the Court. He, therefore, submits that respondent had virtually conceded the position that the Chairman-cum-Managing Director did not have the authority to nominate the arbitrator under the arbitration agreement. Yet, when the claims of the respondent were to be adjudicated, the appointment of the arbitrator was made by the Chairman-cum-Managing Director of

the respondent. Learned counsel for the petitioner has drawn my attention to some correspondences exchanged between the parties, namely, the communication dated 09.01.1989 of the respondent informing the petitioner that its Director, Brigadier D.K. Gunjal is looking after the Overseas Project and the arbitrator on disputes pertaining to the contract (i.e. in relation to the claims made by the petitioner) would be nominated by him; and the communication dated 13.01.1989 of the petitioner raising an objection that only the Project Director was entitled to nominate the arbitrator and that there was no question of any other person acting as arbitrator or of appointing any person as arbitrator in the matter. Attention has also been drawn to the order dated 06.08.1991 passed in OMP No.50/89, whereby in place of the arbitrator nominated by Sh. D.K. Gunjal, Director, Sh. S.R. Nair, Retd. Chief Engineer, Surveyor of Work, MES & Ex-General Manager was appointed as the arbitrator, with the consent of parties.

7. Learned counsel for the petitioner has also placed strong reliance on the decision of the Division Bench of this Court in ***M/s A.M. Rasool Construction & Engineering Services Pvt. Ltd. v. M/s NBCC Limited*** in FAO(OS) No.40 & C.M. No.639/1997 decided on 25.09.1997, wherein this Court had held, while interpreting a similar clause, that the Chairman-cum-Managing Director did not have the authority to nominate the arbitrator as the said authority was vested in the Project Director under the arbitration agreement. He submits that

the arbitral tribunal, despite being made aware of the said decision, has not followed the dictum of the said decision and disregarded the same on the basis of a fallacious reasoning.

8. The second submission of learned counsel for the petitioner is that the finding returned by the learned arbitrator, that the respondent had paid the aforesaid amounts in satisfaction of the decree obtained by M/s A.M. Sulaiman & Company, is without any basis and there was no evidence produced by the respondent to support the said claim. He submits that the petitioner had specifically disputed the averment of the respondent that it had made any payment in respect of the decretal amount to M/s A.M. Sulaiman & Company. The petitioner had also made a prayer before the arbitral tribunal to direct the respondent to produce documentary evidence in support of their claim that they had made payment of the aforesaid amount to M/s A.M. Sulaiman & Company. However, the said application was rejected by the arbitral tribunal.

9. Learned counsel for the petitioner argues that in the statement of claim, the respondent had stated in paragraph 27 that the amount of US\$ 77338 and Iraqi Dinar 87950 had been recovered from its account with Rashid Bank, Baghdad, Iraq in September 1999, whereas in the letter of invocation of arbitration dated 16.07.2001 addressed to the CMD of NBCC, the respondent no.1 had stated that *"Due to insufficiency of funds in NBCC's Bank Account in Iraq, the*

decree holder the aforesaid M/s. Saad A.M. Sulaiman & Co., has not been able to recover the decretal amount from NBCC's said account. However, it is apprehended that if the decree against M/s. Re-Union Engg. Co., remains unsettled, the said decree holder may attach NBCC's account(s) in India, after getting the decree transferred to this country. In order to forestall the above possibility NBCC has been requesting M/s. Re-Union Engg. Co. to release the amount(s) due to M/s. Saad A.M. Sulaiman & Co., against the decree and to get the attachment of NBCC's Bank Accounts vacated. However despite repeated reminders M/s Re-Union Engg. Co. has failed and neglected to release the decretal amount to the decree holder with the result that the attachment of NBCC's Bank Account is continuing". He, therefore, submits that there was complete lack of clarity both on the point as to whether the said recovery had at all been made from the account of the respondent, and also about the date of the so-called recovery. He submits that in the light of the aforesaid contradiction, the finding of the learned arbitrator based on no evidence cannot be sustained.

10. Reference is also made to the letter dated 06.07.2000 issued by the respondent to the petitioner stating that the amount of US\$ 77338 and Iraqi Dinar 87950 had been paid by the bank to M/s A.M. Sulaiman & Company as per the court order in September 1999. The petitioner also refers to the letter dated 19.10.2000 issued by the respondent to the petitioner, wherein the respondent again

somersaulted from its earlier position and states that the aforesaid amounts had been attached from the bank of the respondent in Iraq, meaning thereby, that the amount had still not been recovered by M/s A.M. Sulaiman & Company at the time of the writing of the letter dated 19.10.2000. Reference is also made to the warrant of attachment dated 16.12.2000 bearing file No.1620/99 thereby attaching US\$ 77938 and stating that if the amount is not paid within three days, the amount will be confiscated.

11. Learned counsel for the petitioner submits that in the communication dated 18.06.1994 issued by M/s A.M. Sulaiman & Company, the said company had acknowledged that it had communicated to the respondent herein that it had no pending matters with the petitioner. It is, therefore, submitted that the award in question suffers from a patent illegality, inasmuch, as there was no evidence to support the finding of the arbitral tribunal on the fundamental issue, that the respondent had made payment of the decretal amount, as aforesaid.

12. Learned counsel for the petitioner submits that the case of the petitioner was that it had already settled the claims of M/s A.M. Sulaiman & Company and there was no outstanding due payable to them. It was also contended by the petitioner that there was collusion between M/s A.M. Sulaiman & Company and the respondent. Learned counsel for the petitioner further submitted that the claim raised by

the respondent was an endeavour to neutralize the arbitral award made in favour of the petitioner in an earlier arbitration proceeding.

13. The third submission of learned counsel for the petitioner is that the claim made before the learned arbitrator by the respondent was barred by the principle of *res judicata*. He submits that in the earlier held arbitration proceedings pertaining to the petitioners claims, the respondent had sought to raise the counter claim on the same premise. However, the counter claim/representation made to the arbitrator was rejected on the ground that the said claim was premature. I may note that the earlier award was rendered on 22.10.1994.

14. On the other hand, learned counsel for the respondent has supported the award made by the arbitral tribunal. Learned counsel for the respondent has submitted that the arbitral tribunal was duly constituted and that the Chairman-cum-Managing Director of the respondent was duly empowered to nominate the arbitrator. He submits that even though under the arbitration agreement it was the Project Director who had to act as the arbitrator or who had the power to nominate the arbitrator, the powers of the Project Director, in so far as the overseas projects were concerned, stood vested in the Chairman-cum-Managing Director of the respondent vide office order No.1686/1990. Since the Project in question was an overseas one, having been executed in the State of Iraq, the powers of the Project

Director stood vested in the Chairman-cum-Managing Director, including the power to nominate the arbitrator. He submits that the decision of the Division Bench of this Court in ***M/s A.M. Rasool Construction*** (supra) was rightly distinguished by the learned arbitrator as it is clear from a reading of the said decision that the Division Bench had proceeded on the erroneous foundation that “Project Director” and “Project Director (Overseas Projects)” are two different posts occupied by different incumbents, whereas in reality there is only one post of Project Director in NBCC. He submits that for administrative reasons, so far as the overseas projects are concerned, the powers of the Project Director stood vested in the Chairman-cum-Managing Director by virtue of the aforesaid office order, who was a higher authority than the Project Director.

15. In answer to the second submission of the petitioner, learned counsel for the respondent submits that the arbitral tribunal is the sole judge of the facts and it is within the domain of the arbitrator to evaluate the evidence produced before him. The sufficiency of evidence is an aspect which also fell within the domain of the arbitrator and so long as some evidence was produced before the arbitrator to justify the finding returned by him, the finding could not be said to be based on no evidence. It is within the power of the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence. He submits that in the light of the overwhelming evidence

produced by the respondent referred to hereinafter, the issue as to whether the amount had been recovered from the account of the respondent or not, stood clinched in favour of the respondent.

16. Learned counsel for the respondent has, in support of his aforesaid submissions, referred to the following documents, which formed part of the arbitral record, and which, according to the respondent, formed the basis of the learned arbitrators finding that recovery of the amount due to M/s. A.M. Sulaiman & Co. had been made from the account of the respondent:

- (i) Letter dated 14.12.1990 written by the petitioner to M/s A.M. Sulaiman & Company recording that M/s A.M. Sulaiman & Company had paid penalty on behalf of the petitioner and also stating that the petitioner would settle the matter.
- (ii) Letter dated 20.07.1994 of the respondent to the petitioner informing the petitioner that M/s A.M. Sulaiman & Company-the liquidator appointed by the petitioner for liquidating its branch in Iraq, had lodged a complaint in the Ministry of Trade for non-payment of its dues amounting to Iraqi Dinar (ID) 15000. The respondent also informed the petitioner that in case the petitioner does not settle the matter with M/s A.M. Sulaiman & Company, the respondent

has been threatened with action by Ministry of Trade. The petitioner was also put to notice that should such a situation arise, the respondent would hold the petitioner responsible in terms of the agreement between the parties.

(iii) Letter dated 23.06.1996 of M/s A.M. Sulaiman & Company addressed to the petitioner recording the promise stated to have been made by the petitioner to set off the dues of M/s A.M. Sulaiman & Company from the contract between the petitioner and NBCC, Iraq Branch. The letter also stated that the representative of M/s A.M. Sulaiman & Company shall be visiting Bombay in the first week of July and it was hoped that the account will be settled. The letter also threatened that in case it is not so settled, M/s A.M. Sulaiman & Company shall take the matter to the Iraqi Court to block the transfer of dues of NBCC in accordance with the Iraqi law.

(iv) Letter of M/s A.M. Sulaiman & Company apparently of May, 1997) addressed to the petitioner recording that the court case lodged by it against the petitioner was in the final stages regarding dues of M/s A.M. Sulaiman & Company and the amount had been ceased from the NBCC, Iraq. A last chance was given to the petitioner to reach at a satisfactory agreement.

- (v) Letter dated 19.05.1999 of M/s A.M. Sulaiman & Company addressed to the respondent, NBCC Ltd., which reads as follows:

"DEAR SIRs,

THIS IS TO INFORM YOU THAT WE WERE THE LIQUIDATOR OF YOUR SUB-CONTRACTOR MESSRS. REUNION ENGINEERING LTD., BOMBAY. IN YOUR PROJECTS MOUSEL & DOKAN HOTELS, WHERE WE COMPLETED THEIR LIQUIDATION IN 1993.

*ACCORDING TO BUSINESS PRACTICES WE HAVE CONTRACTS AND CONFIRMATION FROM THEIR SIDE THAT OUR FEES WILL BE PAID TO US UPON COMPLETING OUR JOB. WE COMPLETED OUR JOB LONG TIME AGO & WE CLAIMED FOR OUR FEES. **WE WERE PROMISED THAT THIS WILL BE ACCOMPLISHED SOON. UNFORTUNATELY MR. KOSHY "THE FATHER" PASSED AWAY & HIS SON REFUSED TO RELEASE OUR FEES. WE WERE COMPELLED, IN THIS CASE TO GO TO THE COURT IN IRAQ & FOR THE LAST FEW YEARS & SUCCESSFULLY OBTAINED A COURT DECISION FROM THE HIGHER COURT, OBLIGING REUNION ENGINEERING TO PAY US AN AMOUNT OF USD77338.00 PLUS COURT EXPENSES & LAWYER FEES TOTALING TO ID 152500.00***

ACCORDING TO THE IRAQI LAW MAIN CONTRACTOR IS RESPONSIBLE FOR ANY SHORT COMINGS BY THE SUB-CONTRACTOR, & SINCE RENUION HAS NO MONEY, OUR LAWYERS HAS OBTAINED COURT ORDER TO INCASH THE IRAQI DINARS FROM YOUR BANK ACCOUNT & THE FOREIGN CURRENCY FROM YOUR LETTERS OF CREDIT.

DUE TO OUR DISTINGUISHED RELATIONS, WE HAVE ASKED OUR LAWYERS TO POSTPONE INCASHING OUR DUES FOR THE TIME BEING TILL WE INFORM YOU GIVING THE LAST CHANCE TO REUNION ENG. LTD. TO PAY OUR FEES, SPECIALLY WE ARE GOING TO INCASH OUR IRAQI DINAR PORTION FROM YOUR SURPLUS CASH LYING IN RAFIDAIN BANK WHICH IS TRANSFERABLE ACCORDING TO THE OFFICIAL RATE OF EXCHANGE 3.2 I.E. OUR EXPENSES OF IRAQI DINAR 152500 WILL BE DEDUCTED FROM PAYMENT EQUIVALENT TO USD488000.00

TO BE FAIR, WE ARE WRITING TO YOU SO THAT WE WILL NOT BE BLAMED FOR ANY FURTHER ACTION TO BE TAKEN IN FUTURE BY OUR LAWYERS AGAINST REUNION ENG. LTD.

WE ARE VISITING INDIAN 2ND WEEK OF JUNE, SHALL BE PLEASED TO MEET REUNION ENG IF THEY ARE CONVINCED TO SOLVE THIS CASE AMICABLY". (emphasis supplied)

- (vi) Letter dated 27.08.1999 of M/s A.M. Sulaiman & Company to the respondent/NBCC enclosing a copy of the High Appeal Court decision confirming the amount due to M/s A.M. Sulaiman & Company from the petitioner. In this letter, M/s A.M. Sulaiman & Company also explained the circumstances in which certain communication, attributed to it, had been issued with regard to its outstanding dues.
- (vii) Warrant of attachment dated 02.09.1999 issued by the Directorate of Karradha Execution to Central Bank of Iraq bearing outward No.1620/99, which reads as follows:

"TO / CENTRAL BANK OF IRAQ

UPON THE REQUEST OF THE ATTORNEY OF THE CREDITOR LAWYER HAZEM MOHAMMD SALEEM, IT IS DECIDED TO PUT SEIZURE UPON BALANCES ON THE DEBTORS SIDE, NATIONAL BUILDINGS CONSTRUCTION CORP. COMPANY LTD. OF INDIA, AGAINST THE DEMAND OF THE CREDITOR SAAD ABID AL MUHAYMEN MOHAMMED AMOUNTS TO US DOLLAR 77338 SEVENTY SEVEN THOUSAND THREE HUNDRED THIRTY EIGHT US DOLLAR & IRAQI DINAR 87950 EIGHTY SEVEN THOUSAND NINE HUNDRED FIFTY, OTHER THAN EXECUTION FEES, PLEASE INDICATE THAT BY YOU & INFORM US.

SEAL & SIGNATURE

*IRAQ REPUBLIC
MINISTRY OF JUSTICE"*

(viii) Communication dated 23.09.1999 issued by Rasheed Bank, Rekheta-26 to Rashid Bank Public Co., Internal Relation Section, which reads as follows:

TO RASHEED BANK PUBLIC COMPANY

INTERNAL RELATION SECTION

SUBJECT : SEIZURE EXECUTION

*REFERENCE YOUR LETTER NO. 2295 OF 15/9/99
SEIZURE EXECUTION MARKS HAS BEEN PUT ON THE NATIONAL BUILDING CONSTRUCTION LTD.'S ACCOUNT NO. 11358 EQUIVILANT TO THE BEBIT AMOUNTING TO ID 87950 (EIGHTY SEVEN THOUSAND, NINE HUNDRED & FIFTY IRAQI DINARS)*

WITH APPRECIATION

*RASHEED BANK
REKHETA/26*

*CC DIRECTORATE KARRADAH EXECUTION RE YOUR
LETTER NO. 1620/99 OF 20/09/99 FOR
INFORMATION". (emphasis supplied)*

- (ix) Letter dated 09.11.1999 of the respondent to the petitioner informing the petitioner of the seizure of its account for the amount decreed in favour of M/s A.M. Sulaiman & Company and requiring the petitioner to settle the claims of M/s A.M. Sulaiman & Company.
- (x) Letter dated 25.04.2000 of M/s A.M. Sulaiman & Company to the Indian Embassy at Baghdad, Iraq, inter alia stating:

"WE ENCLOSE HERewith COPIES OF THE HIGH COURT DECISION ISSUED ON 3/12/1998 FOR YOUR REFERENCE, & STATE HEREUNDER SUMMARY TO THE CASE FOR YOUR INFORMATION

WE WERE APPOINTED BY REUNION ENG. LTD. THE SUB CONSTRUCTOR OF N B C C IN IRAQ TO SOLVE THEIR INCOMETAX CASES & OBTAIN CLEARANCE CERTIFICATES TO THEIR MAIN CONTRACTOR & TO THE IRAQI MINISTRY OF TRADE IN 1989 – 1990 WHICH WE DID & COPIES WERE GIVEN TO REUNION & THEY GAVE THE SAME TO NBCC & TO THE IRAQI MINISTRY OF TRADE & THEY CLOSED THE IRAQ BRANCH & RELEASED THEIR FINAL PAYMENT FROM NBCC.

AFTER ACCOMPLISHING OUR OBLIGATION WE ASKED REUNION TO RELEASE OUR DUES & WE RECEIVE MANY PROMISES & IN FEB 1992 THEY INVITED US TO INDIA TO SOLVE CASE OF OUR FEES & THEY PROMISED THAT OUR DUES TO BE PAID TO US NOT LATER THAN END OF JULY 1992 BEING IN ARBITRATION WITH NBCC IN INDIA & THIS PROMISE WAS NOT KEPT.

IN 1996 THE CHAIRMAN OF REUNION DIED. HIS SON TOOK OVER & HE CLEARLY INFORMED US THAT IT IS NOT THE INTENTION OF THE NEW MANAGEMENT TO RELEASE ANY PAYMENT TO US.

ACCORDINGLY WE WERE RELUCTANT TO USE OUR LEGAL RIGHTS & WENT TO THE IRAQI COURT.

THE HIGHEST COURT IN IRAQ GAVE THEIR FINAL DECISION WHICH WAS THAT "OUR DUES TO BE PAID IN DOLLARS & COURT EXPENSES TO BE PAID IN IRAQI DINARS & ORDERS GIVEN TO RASHEED BANK & RAFIDAN BANK TO PAY ACCORDINGLY (AS PER IRAQI CIVIL LAW THE MAIN CONTRACTOR IS FULLY RESPONSIBLE TO BEHAVIOUR OF THE THEIR SUBCONTRACTOR)

NOW OUR DUES & COURT EXPENSES ARE FROZENED IN OUR FAVOUR

HOPE THE ABOVE WILL CLEAR THE CASE & SHALL BE MORE THAN PLEASED FOR ANY CLARIFICATION MIGHT BE NEEDED OR ANY SUGGESTIONS YOU DEEM SUITABLE TO SOLVE THIS CASE AMICABLY".
(emphasis supplied)

This letter also contained the explanation of M/s. A.M. Sulaiman & Co. for the issuance of the clearance certificate.

- (xi) Warrant dated 16.12.2000 bearing file No.1620/99 issued by the Ministry of Justice, Karradha Execution Department, which reads as follows:

"TO DEBTOR : MANAGING DIRECTOR REUNION ENGINEERING (PRIVATE) LTD. OF INDIA IN ADDITION TO THIS POST (MAIN CONTRACTOR FOR THIS CO. (NATIONAL BUILDING CORPORATION OF INDIA)

ADDRESS : C/O INDIAN EMBASSY

INFORMING YOU THAT IT HAS BEEN DECIDED TO BLOCK YOUR MOVABLE ASSETS IN BLOCK BALANCE PERTAINING TO THE COMPANY (MAIN CONTRACTOR OF THE COMPANY WITH CENTRAL BANK OF IRAQ & RASHEED BANK/REKHATA BRANCH & RAFIDAIN BANK/KIRKUR BRANCH.

UPON THE DEMAND OF THE CREDITOR SAAD ABDUL MUHAMEN MOHAMMED AMOUNTING US DOLLAR 77938

YOU ARE OBLIGED TO PAY THE AMOUNT WITHIN THE PERIOD OF THREE DAYS AFTER THE NEXT DAY OF THE NOTIFICATION, OTHERWISE THE BLOCKAGE BY THIS DECISION WILL BE CONFISCATED IN ACCORDANCE TO THE LAW, AS PER ARTICLE (69) OF EXECUTION LAW".
(emphasis supplied)

17. So far as the argument of learned counsel for the petitioner with regard to the claim being barred by *res judicata* is concerned, the submission of learned counsel for the respondent is that the finding returned in the earlier arbitration was that the claim, at that stage, was premature. The tribunal did not reject the counter claim of the respondent on merits. The amounts were attached and recovered from the account of the respondent in the year 2000 i.e. after the earlier award had been rendered. That recovery gave a fresh cause of action, and on the basis of that cause of action the arbitration had been invoked by the respondent. He, therefore, submits that the claim of the respondent could not be said to be barred by principle of *res judicata*.

18. Having heard the submissions of learned counsels for the parties, perused the award, the documents relied upon by the parties and considered the case laws cited before me, I am of the view that there is no merit in these objections and they are liable to be rejected.

19. The first objection of the petitioner is with regard to the competence and jurisdiction of the arbitral tribunal. The relevant extract of the arbitration agreement between the parties reads as follows:

*"36. Except where otherwise provided for in the Contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship of materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or execution or failure to execute the same whether arising during the progress of the work or after the completion of abandonment thereof **shall be referred to the sole arbitration of the Projects Director, National Buildings Construction Corporation Limited or any person appointed by him.** There will be no objection if the arbitrator so appointed is an employee of National Buildings Construction Corporation Limited and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. **The arbitration to whom the matter is originally referred being transferred or vacating this office or being unable to act for any reason, the Projects Director shall appoint another person to act as arbitrator in accordance with the terms of contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the***

Projects Director, as aforesaid should act as Arbitrator and if for any reason, that is not possible, the matter is not to be referred to Arbitration at all. In all cases where the amount of the claim in dispute is ID 2500 (Iraqi Dinnars two thousand five hundred only) and above the Arbitration shall give reasons for the award"(emphasis supplied).

20. No doubt, from the aforesaid agreement it is evident that the Project Director or his nominee could be the arbitrator, and that if the appointment could not be made by the Project Director for any reason, the parties agreed that there would be no arbitration between them. However, the respondent has relied upon an office order bearing No.1686/90, which reads as follows:

***"NATIONAL BUILDING CONSTRUCTION CORPORATION LIMITED
(A Govt. of India Enterprise)
TEAM IN PURSUIT OF EXCELLENCE***

*NBCC House
Lodhi Road
New Delhi-110003*

OFFICE ORDER NO.1686/90

In supersession of all previous office orders issued on this subject, the Chairman-cum-Managing Director is pleased to decide and direct that all the powers that were vested in the Projects Director (Overseas Projects) shall henceforth be exercised by the CMD himself, provided, however, the Chief Project Manager posted at the foreign projects will continue to exercise the powers separately delegated to them.

*Sd/-
(K.R. Sundaram)
Chief Manager
(Personnel)"*

21. The submission of the respondent is that by virtue of the aforesaid circular, the powers of the Project Director in relation to Overseas Project stood vested in the CMD of the NBCC. Therefore, the CMD was entitled to conduct the arbitration or to nominate the arbitrator.

22. To neutralize the reliance placed on the aforesaid office order by the respondent, learned counsel for the petitioner has placed strong reliance on the order passed by the Division Bench of this Court in ***A.M. Rasool Construction*** (supra).

23. A perusal of the said decision shows that the Court proceeded to decide that case on the foundation that the powers of the “Project Director (Overseas Projects)” had been vested in the CMD. This is evident from the penultimate paragraph of the said judgment, which reads as follows:

“Clause 14 of the agreement between the parties contemplates arbitration by the Project Director and not by the Project Director (Overseas Project). The said office order, therefore, has no application to the facts and circumstances of the instant case”.

24. However, it had been clarified before the arbitral tribunal, and the arbitral tribunal takes specific note of the position that there was only one Project Director in the NBCC, and it is not as if there were two Project Directors with the designation “Project Director” and

“Project Director (Overseas Projects)”. The correct reading of the aforesaid office order bearing No.1686/90 was that the powers of the Project Director, in relation to Overseas Projects, stood vested in the Chairman cum Managing Director. The expression ‘Overseas Projects’ did not qualify the expression “Project Director” but qualified the powers of the “Project Director”.

25. Pertinently, it is not even the case of the petitioner that there are two different authorities, one with the designation “Project Director” and the other with the designation “Project Director (Overseas Projects)”. In this respect, my attention has been drawn by learned counsel for the respondent to the communication addressed by the petitioner to Sh. O.P. Goyal dated 09.09.1982 addressing him as “Director to the Projects” and not as “Director Projects (Overseas Projects) or as “Project Director (Overseas Projects)”.

26. In my view, therefore, the arbitral tribunal rightly distinguished the judgment in ***M/s. A.M. Rasool Construction*** (supra), as it had not been clarified before the Hon’ble Division Bench while deciding that case that there was only one Project Director in the NBCC and there was no such post as “Project Director (Overseas Projects)”. Pertinently, in its decision, the Division Bench did not conclude that the power to make the appointment of an arbitrator could not have been taken over by the CMD from the Project Director on the basis of an office circular. It has not even been argued before

me by learned counsel for the petitioner that the office order No.1686/90 relied upon by the respondent was illegal for any reason whatsoever.

27. From the aforesaid office order, it is evident that the powers of the Project Director in relation to Overseas Project, which included in the projects in question (as they were executed in Iraq), stood taken over by the Chairman cum Managing Director of the NBCC. This transfer of power of the Project Director cannot be described as a “delegation of power” inasmuch, as, the power has been taken over by a higher authority in the hierarchy of the organization of the respondent. The transfer of powers of the Project Director to the CMD in respect of Overseas Projects took place on 06.08.1990, whereas the appointment of the arbitrator in the present case was made by the CMD only on 06.08.2001.

28. By virtue of the aforesaid office order, for all intents and purposes, in respect of Overseas Projects, the CMD could be said to be wearing two hats, one as the CMD of the respondent, and the second as the Project Director of the respondent in relation to the Overseas Projects being carried out by the respondent. The CMD of the respondent, therefore, could exercise all the powers and discharge all the obligations which vested in, and were to be performed by the Project Director, albeit, in relation to Overseas Projects, including the contract between the petitioner and the respondent.

29. The mere fact that in earlier proceedings challenging the appointment of the arbitrator made by the CMD (in respect of the claims made by the petitioner), the respondent did not oppose the appointment of another arbitrator by the Court, cannot be taken to mean as a waiver of its rights by the CMD to appoint the arbitrator in the future. It also cannot be taken to mean that the respondent had conceded that, in law, the CMD did not have the power to nominate the arbitrator by virtue of office order No.1686/90. A perusal of the order dated 06.08.1991 passed in OMP No. 50/1989 shows that there was no adjudication of the issue as to whether, in the light of the office order No.1686/90, the CMD was, or was not empowered to act as an arbitrator or nominate the arbitrator. The aforesaid correspondence and order are of no avail to the petitioner.

30. I am, therefore, of the view that there is no merit in the first objection raised by the petitioner challenging the competence and jurisdiction of the arbitral tribunal on the ground that he had not been appointed by the Project Director, but had been appointed by CMD of the respondent.

31. Turning to the second submission of the learned counsel for the petitioner, I again find that there is no merit in the same. Though it is submitted by learned counsel for the petitioner that it had already settled the claims of M/s A.M. Sulaiman & Company and that there was no outstanding amount due or payable to them, and also that there

was collusion between M/s A.M. Sulaiman & Company and the respondent, however, in support of none of these submissions, the petitioner placed any material on record before the arbitral tribunal.

32. The so-called discrepancies pointed out by learned counsel for the petitioner in the respondents letter of invocation dated 16.07.2001, and in paragraph 27 of their statement of claim does not appear to be conclusive of the fact that no amount had been recovered from the account of the respondent in the banks at Iraq. The sequence of correspondence placed on record shows that the amounts due under the decree stood attached and, in the normal course would have been realized by the decree holder. There was no reason to draw a conclusion to the contrary. The conclusion drawn by the learned arbitrator cannot be said to be unreasonable or perverse. The respondent had taken the stand that it had filed whatever documents it was possessed of. Vide order dated 11.04.2002 passed by the learned arbitrator on the petitioner's application for a direction to the respondent/claimant to file the documents in its possession. The learned arbitrator while directing the respondent to file few documents, rejected the request made by the petitioner to seek a direction to the respondent/claimant to file other documents in support of its claim. Pertinently, the learned arbitrator recorded the statement of the respondent that it had filed whatever documents were in its possession. The interpretation sought to be given by the petitioner to

the communication dated 19.10.2000 is also not convincing. It appears that the expressions 'attachment' and 'recovery' were used interchangeably by the respondent. Moreover, these aspects fell in the exclusive domain of the learned arbitrator, and it is not for this Court to interpret the correspondence between the parties.

33. The Supreme Court in ***State of Rajasthan v. Puri Construction Co. Ltd. & Anr.***, (1995) Vol.22 All India Arbitration Law Reporter, has held that the arbitrator is the final arbiter of dispute between the parties and that it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. The Supreme Court held that the courts cannot substitute their own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid is a decision within the competence of the arbitrator. If a view taken on the contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not only the correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award, the court cannot examine the reasonableness of the reasons. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator.

34. In paragraph 26 of its decision, the Supreme Court made reference to another decision in ***Municipal Corporation of Delhi v. M/s. Jagan Nath Ashok Kumar & Anr.***, (1987) 4 SCC 497, wherein it had been held that the appraisal of the evidence by the arbitrator is ordinarily never a matter which the court questions and considers. It may be possible that on the same evidence the court arrive at a different conclusion than the one arrived at by the arbitrator, but that by itself is no ground for setting aside the award. The following extract of paragraph 31 is relevant and the same are reproduced herein below:

"The contentions about factual errors and omissions apparent on the face of record as raised in the written argument are essentially errors and omissions in not properly considering the materials on record, in misreading and misconstruing such materials and consideration of some documents and statements out of their contexts. The arbitrators have given the award by referring to various documents and statements available on record and indicating the reasons for basing the findings. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. Judicial decisions over the decades have indicated that an error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award. It does not appear to us that the findings made by the arbitrators are without any basis whatsoever and are not referable to documents relied upon and such findings are so patently unjust or perverse that no reasonable man could have arrived at such findings. Hence, on the score of alleged misreading, misconstruction, mis-appreciation of the materials on record or failure to consider some of the materials in their proper

perspective, the impugned award is not liable to be set aside."

35. In my view, in the light of the documents referred to by the respondent, and detailed by me hereinabove, there was sufficient evidence produced on record by the respondent to substantiate its claim that in the execution of the decree obtained by M/s A.M. Sulaiman & Company, the account of the respondent had been attached and the amounts recovered therefrom. In view of the aforesaid discussion, the second objection of the petitioner is also meritless and is rejected.

36. Turning to the last ground raised by the petitioner, to say that the earlier award rendered in the arbitral proceedings in which the petitioner was the claimant operated as *res judicata*, qua the claim made by the respondent in the arbitration proceedings in question, is also wholly meritless and is therefore rejected. Admittedly, when the respondent had made its counter claim in the earlier held arbitration proceedings, by then the recovery from the account of the respondent had not taken place. The sole reason for rejection of the counter claim was that it was premature. However, the present claim was preferred by the respondent before the arbitrator after the recovery of the amount from its account in satisfaction of the decree obtained by M/s A.M. Sulaiman & Company had been made. There is, therefore, no question of the earlier award constituting *res judicata* as the issue with regard to the liability of the petitioner for the amount recovered from

the account of the respondent in execution of the decree obtained by M/s A.M. Sulaiman & Company, was never addressed or gone into by the sole arbitrator Sh. S.R. Nair.

37. In the light of the aforesaid discussion, the present objection petition is dismissed.

VIPIN SANGHI, J

AUGUST 02, 2010
rsk/sr