

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Reportable)
CS (OS) 1574 of 2005 & I.A. Nos. 1570 of 2006, 7761 of 2012
and 15233 of 2012

Reserved on: 23rd August, 2012
Decision on: 5th October, 2012

M/S KIRAT CHAND JAIN FAMILY TRUST Plaintiff
Through: Mr. Sandeep Sharma, Advocate.

versus

STATE BANK OF INDIA Defendant
Through: Mr. R.K. Sanghi and Mr. Utpal
Prasad, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
05.10.2012

1. This judgment disposes of the objections by State Bank of India ('SBI') under Sections 30 and 33 of the Arbitration Act, 1940 ('1940 Act') by way of I.A. 1570 of 2006 to an Award dated 5th August 2005 passed by the learned sole Arbitrator in the disputes between the Plaintiff M/s. Kirat Chand Jain Family Trust ('Trust'), i.e., the Contractor and the SBI arising out of an agreement dated 8th September 1992 executed between the parties in terms of which the Trust was entrusted with the task of constructing the pile foundation work in the Zonal Office Building of the SBI at Plot Nos. 59/4 and 61/4 at Sanjay Place, Agra.

Background facts

2. SBI invited tenders from intending Contractors for participating in the bid for the aforementioned work and after negotiations the Trust was issued the award letter on 1st July 1992 through SBI's Architect M/s Kuldeep Singh & Associates ('Architect'). The Trust was put in possession

of the site on 17th July 1992. A formal agreement was executed on 8th September 1992. The value of the contract was Rs. 92,39,316.70. The Trust was to construct 590 piles and the period for completion was 7½ months from the date of the commencement which was to be ten days from the date of receipt of the work order, i.e., 1st July 1992.

3. In terms of Clause 4 of the agreement, prior to the commencement of the piling operation, the Contractor was to make four bore holes of approximately 12 m depth at his own cost. Extra boring beyond that depth was to be paid extra. The tenderer had to obtain necessary information for making his offer and he had to examine the drawings, inspect the site of the work and acquaint himself with all local conditions, means of access to the work, nature of the work and all matters pertaining thereto. Clause 13 provided that the work had to be carried out “under the directions and overall supervision of and subject to the approval in all respects by the architects”. Clause 2 of the agreement defined the scope of the contract. The Contractor had to complete the work “with the directions of and to the satisfaction of the employer and architect”. The employer, i.e., SBI “with the concurrence of the architect from time to time” could issue “further drawings and/or written instructions details, directions and explanations” which were collectively referred to as ‘Employer’s Instruction’ with regard to the design quality or quantity of works, discrepancy in the drawings, removal and/or re-execution of works, amending and making good of any defects etc. Written instructions were to be given and where verbal instructions were given, they were to be confirmed in writing by the Contractor within a period of seven days. If they were not dissented by the Employer within a further period of seven days, they would deemed to be the Employer’s instructions.

4. Under Clause 47, drawings were to be kept in the office of the SBI for

reference of the Contractor, and were to act as guidelines for the Contractor to prepare a statement. For the actual construction separate working drawings were to be issued during execution from time to time. Clause 2.4 described Item of Work as under:

- “a. Driving work for reinforced concrete piles.
 - b. Fabricating and placing of all reinforcing steel bars as specified/ shown in the drawings.
 - c. Placing all work furnished by other traders in forms before casting the concrete.
 - d. Cast-in-situ concrete in piles.
 - e. Chipping and building of pile heads.
 - f. All other miscellaneous concrete and related work shown in the drawings and/or called for in the schedule of items.
- The work included consists of all necessary services and furnishing of all labour, materials, tools, equipments and related items for full performance of the contract items as shown in the drawings, or as specified or reasonably implied or incidental to constructions, developments between the traders”.

5. Clause 2.5 related to Setting Out Works and reads as under:

“The contractor shall set out the works as set out the works as indicated in the relevant drawings. He shall construct suitable masonry pillars for temporary bench marks. All the pegs for setting out works and fixing the levels for the execution thereof shall be checked if desired by the Engineer-in-charge or as he may direct. The contractor shall carefully protect and preserve all Bench marks and other marks used in setting out of works. The above works will be done by the contractor at his own cost.”

6. In terms of Clause 4.1, subsoil data in the form of soil investigation report by Geotech Consultants Pvt. Ltd. (‘Geotech’) was made available in the Architect’s site office. The Contractor had to satisfy himself that the pile length indicated therein was adequate for the stipulated safe capacity of the piles. After bore hole tests, the Contractor had to submit complete

IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005

calculations to reconfirm the pile length stipulated for the approval of the Engineer In-charge ('EIC'). Under Clause 4.5, the safe pile capacity was indicated as 33 metric tonnes ('MT') for a pile diameter of 400 mm. Soil properties were mentioned in Clause 5 and Clause 12 dealt with load tests and the procedure.

7. On 9th October 1992, the Trust submitted its report on soil investigation and pile length design. It was stated therein that on the basis of laboratory investigations as revealed from the 4 boreholes conducted up to a depth of 16.45 m, "the sub-strata in general appears to be of a uniform nature, but with a major difference in the extent of filled up soil which varies from 3.4 m (in case of borehole No. 1) to 4.5 m (in case of borehole No.4)". It was stated that a 5.25 m long pile (below cut off level which is 3.5 m below the average surface level), 40 cm dia Driven-Cast-in-Situ RCC piles were sufficient to take the safe capacity of 33 MT in the initial as well as routine load tests.

8. The first pile was to be cast on 28th October 1992 for which a meeting was held on 12th October 1992. On 21st October 1992, the Architect informed the Trust that till that date it had not completed the field work for the four bore holes locations and submitted the data report. It was also pointed out that the testing of first initial test pile and 2nd initial test pile, construction of a large number of working piles and some pile caps and grade beams "should have been completed by now". On 23rd October 1992, the Trust enclosed the set calculations for the purposes of capacity and on 24th October 1992 it sought for the lay-out plan, detailed drawings of the schedules and also for payment of Rs. 8,21,398.

9. The minutes of meeting held on 28th October 1992 showed that the first piling rig was erected on site but was not functional till 2 p.m. The Trust

wrote to the SBI on 29th October 1992 stating that it was ready to drive the pile by 10 p.m. but that the SBI's officers were not ready. On 30th October 1992, the Trust sent the Piling Daily Report ('PDR') about Test Pile No. 2. On 2nd November 1992, it sent the PDR in respect of Test Pile No. 1. Meanwhile, it appears that the Trust kept writing to the SBI about release of payment on 5th, 7th and 10th November 1992.

10. A report was given by M/s R.K. Aggarwal & Associates, Structural Consultants ('Structural Consultants') on 12th November 1992 about the calculations submitted by the Trust. The Structural Consultants opined that only 12 m length piles should be used. On 20th November 1992, Architect of SBI informed the Trust that the pile driven on 2nd November 1992 was not made according to the contract and would not be considered as test pile. On the same day, the Contractor wrote a reply pointing out that despite twenty-one days having elapsed after casting of the first pile even the payment of mobilization was not made till then and the SBI had not finalized the building position and that this would affect the work. This was reiterated on 22nd November 1992. It was requested that the SBI should give the Trust a final decision for building position by 28th November 1992 so that it could start the pile construction soon after the results of the first initial pile load tests were made available. This was scheduled on 27th, 28th and 29th November 1992.

11. On 26th November 1992, the Architect issued a phonogram asking the Trust not to proceed with the load tests scheduled to be held on 27th, 28th and 29th November 1992. By a letter dated 27th November 1992, the SBI specifically informed the Contractor that "...you are not permitted to conduct the load test that you have unilaterally scheduled on 27th, 28th and 29th November 1992 on 5.25 m pile..... You are also directed not to start any working piles till such time as you prove the capacity of a pile of 12

IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005 *Page 5 of 27*

m length as provided in the contract”. Reference was made to the earlier letter dated 25th November 1992 and the phonogram wherein the SBI directed the Contractor “to drive a test pile of 12 m with a single tube on 4th December 1992”.

12. The Architect wrote to the Contractor on 27th November 1992, giving the detailed comments on the soil report. It was pointed out that “there is no provision for the use of reaction piles for conducting the initial load test in the contract”. Both the piles made till then “are not to be tested at all”. The Contractor was reminded that it had “to construct kentledge, suitable pile head etc. complete as per item 3 of schedule of quantities of the Agreement as and when a 12 m pile is approved for testing”.

13. The Contractor in its letter dated 28th November 1992 addressed to the SBI and the Architect, sought to justify its stand and stated that piles would be driven as per the Modified Hiley’s Formula only for piles under Item Nos. 2, 5, 6 and 7 and that if the capacity of the piles, was not achieved in load tests, the Contractor would be responsible for the same. It was sought to be pointed out that the pile length even in terms of the contract could be less or more than 12 m and for Item 2, the length of the pile was variable to achieve the capacity of the 33 MT. It gave details about the payments due to the tune of Rs. 13,15,911.

14. It appears that the Architect nevertheless maintained that the calculations given by the Contractor were not in order and that the lay-out plan finalized would be issued only after the Contractor conducted load test on 12 m pile. The Architect maintained that the piles driven on 30th October 1992 and 2nd November 1992 were not as per the contract. The Contractor on its part kept pointing out that the building position could not have been finalized and, therefore, it could not proceed with the work.

Secondly, huge payments were outstanding. The mistakes pointed out in the Architect's drawings had not been clarified.

15. The Contractor sought a meeting to resolve the outstanding issues, and also requested for payments by letter dated 28th December 1992. The Architect maintained that the Contractor had not cast the test piles as per the contract. On 19th January 1993 the Contractor gave the PDR in respect of Test Pile No. 3. On 23rd January 1993, the Contractor enclosed a bill of Rs. 8,18,252.60. On 21st April 1993, the Contractor gave an interim report on initial pile load test report. However, the Architect by its letter dated 26th April 1993 requested the Contractor to commence the working piles for standard length of 12 m with a cut-off level of -2.6 m subject to the approval of plinth level at +1.2 m by the Agra Development Authority ('ADA').

16. The dispute between the parties as to the length of the pile persisted. Even on 5th July 1993, the Architect wrote to the Contractor as under:

“Sub: Construction of SBI Zonal office building at
Sanjay Place, Agra – Pile Foundation work.

Please refer to the copy of your letter KC/SBI-Agra-369/Camp-RK-Pc/Hard drive/93 dated 14.6.93 along with a copy of ordinary telegram dated 14.6.93.

As per the contract, you have to drive piles of 12 m approximately. So during the process of driving the tubes and taking it out, if anything happens you are fully responsible. In this connection, your attention is drawn to our letter KSA/10034/93 dated 16th June 1993.

It is obvious that the construction of 5 to 5.5 m deep piles will take less time than that of 12 m deep piles but we regret to inform you that 5 to 5.5 m piles are not as per contract.

The length of the pile is decided not arbitrarily, it is clearly mentioned in the contract that piles of 12 m length are to be

driven. In the item 2 of schedule of quantities also, we have specifically mentioned that you should quote for piles of 40 cm dia effective standard length 12 m.”

17. On its part, the Contractor kept reminding the SBI and the Architect about the pending bills and about the change of decisions throughout the work. By a letter dated 22nd July 1993, the Contractor asked for extension of time. The Consultant’s report furnished to the Contractor by the Assistant General Manager (‘AGM’) with the letter dated 27th October 1993 concluded as under:

“Hence considering the tests TP3 and TP 4 results, it can be concluded that a 12 m long pile below cut-off level would only be regarded as safe for a working load of 33 MT, as assigned to it during design consideration.”

18. The impasse could not be broken and the Contractor on 15th January 1994 invoked Clause 36 of the contract and terminated the contract. The SBI by its letter dated 21st January 1994 terminated the contract invoking Clause 35 of the contract.

Arbitral proceedings

19. In the statement of claim, the Contractor claimed a sum of Rs. 3,41,98,268 as set out in the schedule of claims together with interest at 2.4% per month compounded quarterly till the actual date of payment. On its part the SBI, apart from filing its statement of defence, preferred eleven counter claims, including the cost of getting the balance work completed at the risk and cost of the Contractor.

20. On behalf of the SBI, Mr. P.L. Pathak, the Chief Manager (Civil Engineering) was examined as RW-1, Mr. Kuldeep Singh as RW-2. Mr. M.P. Jain was examined as a witness of the Contractor. The Structural Consultants were not examined as a witness.

21. On 21st February 1995 the learned Arbitrator framed the following issues:

- “1. Whether the contract was rescinded properly, either by the claimant or by the respondent. If not to what effect?
2. Whether or not the preliminary depth of the pile with 40 cm. Dia and 33 tons safe capacity (Driven cast-in-situ piles) was to be fixed as per fresh soil investigation?
3. Whether or not there was delay in execution of the work on the part of the claimant or was due to non-performance of contractual obligations of the respondent. If so, to what effect?
4. Whether or not the design given to the claimant by the respondent Bank in regard to shuttering, slab, beam and cap was correct. If not to what effect?
5. Whether the claimant are entitled to claims as per their schedule of claims?
6. Whether the respondents are entitled to counter claims as per their schedule of counter claims?
7. Whether the claimant/respondents are entitled to interest? If so, at what rate and for what period?
8. Whether or not any of the party is entitled to cost?
9. Relief.”

The impugned Award

22. The learned Arbitrator has, in the impugned Award, been critical of both witnesses on behalf of the SBI. According to him, RW-1 had not acquainted himself either with the work or clauses of the contract, and had absolutely no knowledge about the initial pile load tests. The learned Arbitrator commented that the answers given by RW-1 to several questions showed that he had not been able to appreciate the technical aspects of the matter. About RW-2, the learned Arbitrator commented as

under:

“I have perused the evidence of R.W.2 and I don’t find anything relevant spoken by R.W.2 in his Affidavit by way of evidence. In the cross-examination R.W.2 stands out as a person who has absolutely no technical knowledge about the pile foundation and the other items of work carried out by the Claimant. He would also admit that he had not been visiting the site regularly.”

23. The learned Arbitrator further commented as under:

“The witness did not know what was failure load. When he was apprised that failure load for soil consideration is ultimate load capacity depending upon the soil, the witness would state that this is a detailed engineering matter and he was not a qualified Civil Engineer. When asked about the difference between safe load and working load on a pile, he frankly stated that he was not a qualified Civil Engineer and he did not answer the question. This demonstrates the equipment of an Architect for construction of pile foundation of this magnitude.”

24. The Report of M/s R.K. Aggarwal & Associates (Ex. RW2/14) enclosed with the letter dated 5th October 1993 was found by the learned Arbitrator not to have been signed by anybody from M/s R.K. Aggarwal & Associates. On the other hand, RW-2 had signed it, and no steps had been taken to get anyone examined from M/s R.K. Aggarwal & Associates to speak about the contents of that document. Accordingly, it was held that the said report could not be relied upon.

25. Apart from holding that RW-2 Mr. Kuldeep Singh was unable to speak of the technical aspects of the matter with any expertise, the learned Arbitrator noted that nothing of substance had been elicited in the cross-examination of PW-1 Mr. M.P. Jain to demolish his evidence. The learned Arbitrator noted that although RW-2 stated that two footprints of drawings mentioned in the letter dated 18th June 1993 (Ex. RW2/7) were on the record of the Arbitrator, there were in fact no such drawings.

Consequently, it has been concluded that the assertion of RW-2 that the drawings were given to the Contractor, was not acceptable. The specific findings of fact returned by the learned Arbitrator in paras 173-174 read as under:

“173. A perusal of the records would point to the fact that right from the day of the award letter the Claimant has been trying its best to fulfill the terms of the contract and had following not only the provisions of the contract and had acted in accordance with the established Engineering Practice.

174. R.W.2 the Architect, who is not equipped with proper knowledge of the construction of pile foundation, had created all sorts of hindrances and had made the Claimant work more than that was necessary without even considering the interest of the Bank.”

26. Further the findings in paras 192-193 and 198 read as under:

“192. As per the provisions of the contract, the main reason for pile foundation was to have a four storeyed building on the foundation which could bear a set capacity of 33 Tons. The report of the Geotech Consultant is not of any help because the report itself says soil investigation has to be done and none from the Geotech has been examined to prove what exactly was done by the Geotech. In the absence of any such evidence the report by itself cannot be taken to be substantive evidence.

193. On an interpretation of the terms of the contract the position that emerges with reference to the length of pile is that it should achieve 33 Tons capacity. If the soil condition is such that if the safe load capacity is achieved at a lesser depth it will suffice. It is only for that the contractor has to drive the pile. And it is for that the Respondent itself has fixed the value of the contract in the agreement. In other words, if the Claimant could work to achieve 33 Tons capacity and it drive pile length for achieving that, it has acted in accordance with the terms of the contract.

.....
.....

198. The Respondent without appreciating the terms of the

contract through R.W.2, who is not a competent person to supervise the work of pile foundation of this magnitude insisted on 12 MTS pile length and that made the Claimant to employ material and men which costs the increase in the value of the work. That is the reason why the Claimant had to make separately for the work done beyond the terms of the contract at the instance of the Respondent, the Claimant has come forward with the claim for the work done in Part B.”

27. Dealing with the individual items of claim, the learned Arbitrator held that the Contractor was entitled to Rs. 14,20,818.09 towards the claim in Part A; Rs. 40,00,000 towards the claim in Part B and Rs. 5,000 towards the claim in Part C. All the counter-claims of the SBI were rejected. Accordingly, the learned Arbitrator directed SBI to pay the Trust a sum of Rs. 54,25,818.09 with interest at 12% per annum with effect from 1st March 1994 till the date of payment and directed the Contractor to claim refund of sales tax as permissible in law from the Sales Tax Department and further directed SBI to pay the Trust a sum of Rs. 7.15 lakhs as costs.

28. The learned Arbitrator filed the original impugned stamped Award dated 5th August 2005 and the entire arbitral record in this Court on 25th October 2005. Thereafter CS (OS) 1574 of 2005 was registered by the Registry in terms of Section 14 of the 1940 Act. On 18th November 2005 notice was directed to issue to the parties. Notice of the filing of the impugned Award was served on SBI on 13th January 2006.

Present proceedings

29. SBI filed its objections to the impugned Award by way of I.A. No. 1570 of 2006 under Sections 30 and 33 of the 1940 Act. The said application was filed on 24th January 2006. In para 2 of the said objections, SBI has stated that the “present Objection Petition/Application is being filed within the stipulated limitation period of 30 days from the

date of receipt (13.01.06) of court notice.” The objections were entirely on the merits of the Award. No objection as to the filing of the Award or service of notice of such filing of the Award was taken. Reply to the objections were filed by the Trust/Contractor.

30. On 9th November 2011 the case was listed for final hearing. None appeared for the parties. Accordingly it was dismissed for non-prosecution. Thereafter on 19th April 2012 SBI filed I.A. No. 7759 of 2012 for restoration of its objections along with I.A. No. 7760 of 2012 for condonation of the delay of over 4 months in filing the application for restoration. In I.A. 7761 of 2012 SBI sought stay of Execution Petition No. 5 of 2012 filed in the meanwhile by the Contractor seeking enforcement of the impugned Award.

31. An adjournment was sought by SBI and granted by the Court on 30th April 2012. Despite none appearing on its behalf on the next date i.e. 21st May 2012, SBI's applications were not dismissed. On the next date, 24th July 2012, the Court granted yet another adjournment to SBI subject to it paying costs. On the next date i.e. 23rd August 2012 the restoration application filed by SBI was allowed after condoning the delay in filing the application. Consequently the main suit was also restored. Arguments were heard on the same date and judgment was reserved. Parties were permitted to file their written submissions within three weeks. While the Contractor filed written submissions on 12th September 2012, SBI filed its written submissions only on 21st September 2012. Nevertheless, the said submissions have been examined.

32. It must be mentioned that at the fag end of the proceedings SBI filed I.A. No. 15233 of 2012 for a direction to the learned Arbitrator to “file the contract dated 8th September 1992” entered into between the SBI and the

Trust. Apart from the fact that this was a tactic to delay the proceedings as there was sufficient time during the period over six years for which the case was pending, there was no issue concerning the said document which required its production and that too by the learned Arbitrator who had already filed the entire arbitral record. I.A. No. 15233 of 2012 is accordingly dismissed.

SBI's preliminary submissions

33. SBI has filed an exhaustive written note of submissions, raising objections that have not been raised in the I.A. 1570 of 2006. Under Article 119 of the Schedule to the Limitation Act, 1963 ('LA') objections under Sections 30 and 33 of the 1940 Act have to be filed within 30 days of the service of the notice of filing of the Award. Consequently, objections to the impugned Award not urged by SBI in the first instance in I.A. No. 1570 of 2006, which was within limitation, cannot be permitted to be urged for the first time in written submissions filed more than six years later. Such additional grounds of objections as are mentioned below are barred by limitation and are liable to be dismissed on that ground alone.

34. As part of its written submissions, SBI has urged the following 'preliminary submissions':

(i) That the Award has not been filed before the Court within the prescribed period of limitation under the LA. Reliance is placed on the decisions in ***Vidarbha Paper Mills v. Union of India* 185 (2011) DLT 682; *Union of India (UOI) v. Rajesh Kumar Pradeep Kumar* 2002 (65) DRJ 217 and *Seth & Associates v. Steel Authority of India* AIR 1998 Cal 208,**

(ii) No application has been filed under Sections 14 and 17 of the 1940 Act. Reliance is placed on the decisions in ***Koneru Venkata Subbaiah v. Koneru Venugopal* 2001 (6) ALD 213** and ***Amod Kumar Verma v. Hari Prasad Burman* AIR 1958 All 720**

(iii) The notice to be issued by Court is a statutory requirement and the period of limitation for the filing of objections under Sections 30 and 33 has not yet begun; no notice has been issued by the Court informing of the filing of the Award; no notice has been issued by the Court in respect of the arbitral proceedings/depositions/orders/ minutes of arbitral records. Reliance is placed on the decisions in ***Secretary to Government of Karnataka v. V. Harishbabu*, AIR 1996 SC 3421; *Deo Narain Choudhury v. Shree Narain Choudhary* (2000) 8 SCC 626; *Union of India v. Vishkarma Shilpi* 1975 (1) ILR Delhi 788; *Union of India v. M/s. Balaji Bros.* 1998 (2) CTC 137; *Union of India v. Surinder Kumar Khosla and Co.* 152 (2008) DLT 782**

(iv) Award and proceedings must be filed by a duly authorized person. Reliance is placed on the decisions in ***Kumbha Mawji v. Dominion of India (Now the Union of India)* AIR 1953 SC 313; *Oriental Fire and General Insurance Company Ltd. v. Hindustan Agro Agencies* 2003 (1) ALLMR 80.**

(v) The Suit has been dismissed for non-prosecution. No application for restoration has been filed by the Plaintiff. Reliance is placed on the decision in ***National Projects Construction Corporation Limited v. NEC Engg Pvt. Ltd.* 2010 (3) Arb.LR 313.**

35. Apart from the fact that the above 'preliminary submissions' have not been urged in I.A. No. 1570 of 2006, and have been urged for the first
IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005

time in the written submissions filed after the conclusion of arguments, each of the above ‘preliminary submissions’ is factually and legally misconceived. The documents on record show that the learned Arbitrator himself filed the original arbitral Award as well as the entire arbitral record (including the arbitral proceedings) running into 5431 pages in over twenty volumes on 25th October 2005. The Registry’s date stamp of that date is visible on the filing index. The question of the Contractor having to file a petition under Sections 14 and 17 of the 1940 Act did not arise. As noted by the Calcutta High Court in ***Seth & Associates v. Steel Authority of India***, “...though there is no period of limitation so far as the arbitrator in filing the award before the court, but in a case where the arbitrator at the instance of the party filed the award before the court it has to be construed as an application by the party concerned and if that be so, Article 119 (a) of the Limitation Act squarely apply.” The Arbitrator has not filed the Award in this case at the instance of any party but on his own. That is perfectly possible under Section 14 of the 1940 Act. The decisions relied upon by SBI have no application to the facts of the present case and are distinguishable as such.

36. Secondly, notice of the filing of the Award and the record was indeed issued to the parties by the Registry and received by SBI on 13th January 2006 on its own admission in para 2 of I.A. No. 1570 of 2006. The question of such objections being time barred does not arise since they were filed on 24th January 2006 within thirty days of the service of notice of filing of the Award. The above submissions have been made without noticing what SBI has itself averred in its application. The question of the Award and arbitral record (including the arbitral proceedings) having to be filed by a duly authorized person does not again arise with the learned Arbitrator having himself filed them on 25th October 2005. Again, the decisions cited by SBI are distinguishable on facts.

37. The suit was registered by the Registry with the learned Arbitrator filing the Award in the Court on his own. The objections filed by SBI in I.A. No. 1570 of 2006 which were dismissed for non-prosecution on 9th November 2011 were restored on SBI's application on 23rd August 2012. The suit was in fact restored on that date as without the suit being restored the application I.A. 1570 of 2006 could not have been restored.

SBI's next set of objections

38. The next set of objections, again not urged in I.A. 1570 of 2006 but urged for the first time by SBI in the written submissions filed by it after conclusion of arguments, are as under:

(i) The Award is invalid as it deals with 'excepted matters' not covered by the arbitration clause. Reliance is placed on the decisions in ***Rajasthan State Mines & Minerals Limited v. Eastern Engineering Enterprises AIR 1999 SC 3627*** and ***General Manager, N.F. Railway v. Nasim Khan 2003 (3) Arb.LR 572 (Gau)***.

(ii) The impugned Award has been passed beyond the period of four months. Without an application being filed under Section 28 of the 1940 Act, and Court extending the time for making and publishing the Award, the learned Arbitrator could not have proceeded in the matter. Reliance is placed on the decisions in ***State of Punjab v. Hardyal AIR 1985 SC 920***; ***Pesticides India v. Union of India 45 (1991) DLT 646*** and ***Andhra Pradesh State Trading Corporation v. S. G. Sambandan and Company 2006 (2) ALT 139***.

(iii) The Award is liable to be set aside as there is undue delay of over 11 years in delivering the Award.

(iv) The order of reference arises out of a suit valued at Rs. 92,39,316.70 but claims to the tune of Rs. 3,41,98,268 along with interest @ 2.4% have been entertained by the Arbitrator. Reliance is placed on the decision in ***Natwar Lal Shamal Das & Co. v. Minerals and Metals Trading Corporation of India Ltd. AIR 1982 Del 44.***

39. It requires to be reiterated that objections that are not raised in the first instance in the application under Sections 30 and 33 of the 1940 Act cannot be permitted to be raised for the first time in the written submissions filed after the final arguments are concluded. If a party seeks to urge additional grounds of objections then it would have to seek leave of the Court to amend its application under Sections 30 and 33 of the 1940 Act and if such amendment is sought after the statutory period of limitation under Article 119 of the Schedule to the LA, the party will have to seek condonation of the delay in seeking amendment. With SBI not seeking to amend I.A, 1570 of 2006, the objections sought to be raised for the first time in the written submissions cannot be permitted to be urged and are liable to be rejected on that ground alone.

40. As regards the plea that the learned Arbitrator did not discuss the 'excepted clauses' of the agreement, a perusal of the Award shows that in para 194, the learned Arbitrator has adverted to the said contention and returned a finding in para 197 that "in the instant case, it has not been established by the Respondent that the claims made by the Claimant come within the excepted clause." The Court is not persuaded to hold that the said finding suffers from an error apparent from the face of the Award.

41. As regards the contention regarding the Award being passed beyond the period of four months, SBI participated in the arbitral proceedings without objecting to its continuance beyond the said period. SBI did not

raise any objection even after a copy of the Award was served on it. It obviously waived any objection it may have had on this score. The said objection cannot be entertained at this stage, six years after I.A. No. 1570 of 2006 was filed. For the same reason, the objections as to the delay in pronouncement of the Award and the entertainment of claims beyond the value of the claims referred to the Arbitrator are rejected.

Objections to the Award on merits

42. On merits, is submitted by SBI that in terms of the recommendations in the report of Geotech, a 12 m length pile with a diameter of 40 cm was necessary considering the safe load carrying capacity of 33 MT. In case during soil exploration for foundation work, the actual site soil conditions were found substantially different from what was contained in the report of Geotech, they were to be referred to the Architect for suggestions. It is submitted that since it was clear from the various provisions of the contract that whatever be the system, the termination point of the safe piles would be approximately 12 m below the cut-off level. The Contractor was bound to carry out the construction on the basis of such report. It is submitted that without any prior permission or approval from SBI or the Architect, the Contractor laid down TP-1 and TP-2 as test piles for a length much lesser than 12 m which was specifically rejected by the SBI. It is submitted that the Contractor “misconstrued the contract and wanted to lay the piles with the shorter length so as to suit its own pocket”, and that in allowing the claims of the Contractor, the learned Arbitrator had overlooked the specific provisions of the contract as well as the evidence on record.

43. It is submitted by SBI that the learned Arbitrator failed to consider the role of the Architect in terms of the decision in ***M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd. 2003 (8) Scale***
IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005

424. In support of the submission that the learned Arbitrator could not have travelled beyond the clauses of the contract, reliance is placed on the decisions in ***Bharat Coking Coal Ltd. v. Annapurna Construction (2003) 8 SCC 154***; ***W.B. State Warehousing Corporation v. Sushil Kumar Kayan (2002) 5 SCC 679***; ***Associated Engineering Co. v. Government of Andhra Pradesh (1991) 4 SCC 93***; ***Continental Construction Co. Ltd. v. State of M.P. (1988) 3 SCC 82***; ***Alopi Parshad & Sons Ltd. v. Union of India AIR 1960 SC 588*** and ***The Naihati Jute Mills Ltd. v. Khyaliram Jagannath AIR 1968 SC 522***.

44. Before beginning to examine the above contentions, the Court would like to recapitulate the settled law as to the scope of interference with an Award under Sections 30 and 33 of the 1940 Act. In ***U.P. Hotels v. U.P. State Electricity Board AIR 1989 SC 268*** the Supreme Court held that even “an error of construction of the agreement or even that there was an error of law in arriving at a conclusion” was “not an error which is amenable to correction even in a reasoned award under the law.” In ***M/s. Arosan Enterprises Ltd. v. Union of India AIR 1999 SC 3804*** it was held that “the Courts have no right or authority to interdict an award on a factual issue.” In ***State of Rajasthan v. Puri Construction Co. Ltd. (1994) 6 SCC 485***, the Court cautioned: “...in the anxiety to render justice, to the party to arbitration the Court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the Court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act.” In ***M/s. Sudarsan Trading Co. v. The Govt. of Kerala AIR 1989 SC 890***, the Court reminded: “The arbitrator is the sole Judge of the quality as well as the quantity of evidence and it will not be for the

IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005

court to take upon itself the task of being a judge on the evidence before the arbitrator.”

45. As has been pointed out by the learned Arbitrator in the impugned Award, the report of Geotech itself stated that the soil investigation had to be undertaken. Moreover, nobody from Geotech was examined as witness to prove its report. The learned Arbitrator accepted the contention of the Contractor that the essential condition was that the depth of the pile required to be driven was to ensure that it could withstand a load of 33 MT. The second aspect noted by the learned Arbitrator was that the SBI allowed the Contractor to put up 513 working piles, apart from other test piles. If indeed, according to the SBI the Contractor had not acted in accordance with the terms of the contract, the SBI should have given proper explanation why it allowed the Contractor to perform the work to a substantial extent. The case of the Contractor that in terms of the Overriding Clause Tech Note 11 it had strictly followed Hiley’s Modified Formula in arriving at the pile length that was adequate for safe bearing capacity of piles, was unable to be countered by SBI by the evidence led before the learned Arbitrator. The witnesses produced on behalf of the SBI were found to be technically incompetent to speak on these matters. The learned Arbitrator accepted the submission of the Contractor that “what is to be done by the Claimant is to achieve 33 Tons capacity which is safe and the pile length has to be maintained for achieving that load”.

46. The Court while examining the objections under Sections 30 and 33 of the 1940 Act is not performing an appellate function. It is not expected to interfere with the Award even if there is an error in the interpretation of the clauses of the contract. It is the learned Arbitrator, who is in the best position to appreciate the evidence led before him. There were several technical aspects of the disputes between the parties which required the

IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005 *Page 21 of 27*

evidence of expert witnesses. A very detailed cross-examination of the witnesses has taken place before the learned Arbitrator. The learned Arbitrator has referred to the answers given by the Architect (RW-2) as well as the witness (Mr. P.L. Pathak) on behalf of the SBI to be the only technical person and concluded that he had no working knowledge on several technical issues that arose. It is not possible for this Court to re-appreciate that evidence only with a view to come to a different conclusion. They are all technical aspects on which SBI was unable to produce expert evidence to substantiate its case. It cannot be said that the learned Arbitrator decided the issue contrary to the evidence on record. The interpretation of relevant clauses in the contract as placed by the learned Arbitrator also cannot be faulted. Consequently, the conclusion of the learned Arbitrator on Issue No. 1 that SBI was not justified in terminating the contract whereas the Contractor was justified in doing so, does not call for interference. The conclusion in Issue No. 2 that on interpretation of the terms of the contract piles had to be driven to achieve the safe capacity of 33 tonnes was a plausible view to be taken by the learned Arbitrator and does not call for interference.

47. The finding on Issue No. 3 that it was the SBI which was responsible for delay in execution of the work was based on the evidence and was a factual finding. Detailed reasons have been given by the learned Arbitrator to come to the above conclusion. The finding on Issue No. 4 that SBI had not acted in terms of the contract was also based only on the evidence led by the parties before the learned Arbitrator. It may also be noted here that the learned Arbitrator has also referred to the technical literature which showed that the design of piles was the responsibility of the Contractor and that the application of the test results to the conclusion of the safe load bearing is both empirical and dependent on the experience and any uncertainty should be tested in a piling load test. Consequently,

IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005 *Page 22 of 27*

there is no merit in the objection of the SBI to the above findings in the impugned Award.

48. It was then contended that the SBI made payments that had been certified by the Architect and if any payment was not made it was because the Architect had not certified the bills submitted by the Contractor which could clearly be an explanation for not making payments. If indeed the Contractor was unable to persuade the Architect to certify its test piles, it could not be remediless and had to *inter alia* prefer its claims before the learned Arbitrator. It is then claimed that the SBI had paid the Contractor up to his running account ('RA') Bill No. 11 and it was the Contractor who had restricted his claim during the course of the arbitral proceedings after final measurements were taken on 8th August 1994. It was contended by the SBI that the bills prepared by the Contractor, were signed by the SBI under protest.

49. An analysis of Part-A of the claim of the Contractor by the learned Arbitrator showed that as against the claim of Rs. 56,13,436.40, the SBI had paid Rs. 43,44,705.06. After accounting for deduction in respect of the quantity of 528.02 mm on account of shorter length pile, the amount payable worked out to Rs. 9,91,623.64. In para 184, the learned Arbitrator recorded the submission of counsel for the SBI that as against the aforementioned claim of Rs. 56,13,436, the Contractor was entitled to Rs. 52,94,860.90 and, therefore, the amounts in dispute were Rs. 2,77,107.70 in respect of the quantity of 528.92 mm., refund of security deposit in the sum of Rs. 1,90,984.95; the excess amount recovered as sales tax in the sum of Rs. 34,511; the refund of bank charges in the sum of Rs. 8,332.50; deduction of liquidated damages ('LD') in the sum of Rs. 1,79,877 and return of earnest money deposit ('EMD') of Rs. 50,000.

50. The learned Arbitrator found that the deduction of Rs. 2,77,107.70 was not justified. In para 234, he noted that he had asked the parties to explain the details and while the Contractor furnished the details, the SBI did not. This was a purely factual aspect and therefore the finding of the learned Arbitrator is not interfered with by the Court. The learned Arbitrator also allowed the refund of Rs. 8,332.50 towards bank charges and Rs. 50,000 towards EMD. As regards the sales tax, the Contractor was permitted to approach the Sales Tax Department for the excess tax paid by the SBI since SBI had no objection to it. The recovery of LD of Rs. 1,79,877 by the SBI was unjustified since it was SBI which was in breach of contract.

51. This Court finds that detailed reasons have been given by the learned Arbitrator for allowing the claims of the Contractor under Part-A. This Court is unable to find any error in the said reasoning.

52. Part-B claim pertained to the claim for the work done by the Contractor as per the directions issued by the Architect but not accepted by the SBI. The basis for the claim of Rs. 80,10,130 was on account of the SBI insisting on a 12 m length of the pile instead of the criteria achieved, the Contractor had to incur a cost of Rs. 22,000 per pile instead of Rs. 6,446 and was, therefore, entitled to the dues of Rs. 15,555 per pile. The SBI was refuting the above claim on the ground that the work had to be performed in accordance with the contract. In para 200 of the impugned Award, the learned Arbitrator noted that the Site Engineer, Capt. Puri had not objected to the quantity of work done and if he had been examined “the whole truth could have come out”. The learned Arbitrator therefore drew an adverse inference and proceeded on the footing that “the Respondent has not disputed the total quantity of the work done”. However, the learned Arbitrator did not fix the quantity stating that he

IA No. 1570 of 2006 in CS (OS) No. 1574 of 2005 *Page 24 of 27*

would deal with it after considering the other individual items under Part-B.

53. In paras 201 to 229 of the impugned Award, the learned Arbitrator considered the twenty-three individual items of claims in Part-B and rejected some of the individual items for instance Item No. 6/6, Item No. 15/15, Item No. 16/16, Item No. 17/17, Item No. 17A/17A, Item No. 18/18, Item No. 19/19, Item No. 21/21 and Item No. 22/22. However, he did not fix the exact quantum on these items. After concluding in para 230 that total claim under Part-B was Rs. 1,86,73,841.57, the learned Arbitrator in paras 231 to 232 gave the following reasons:

“231. On the materials available on record, I am satisfied that the Claimant has proved its claim. The Respondent is a Government Organisation. One cannot ignore the fact that R.W.1 and R.W.2 had not discharged their duties and obligations with any sense of responsibility which has resulted in a situation where the Respondent Bank has to be held responsible for the claim made by the Claimant. If the officers of the Respondent having the grip of the relevant points with reference to the construction of pile foundation and have applied their minds with the requisite knowledge about the pile foundation, things would have been different. Even while fixing the value of the contract, the Respondent had not been advised by competent persons in the field of pile foundation. The Respondent had not appreciated the scope of the terms of the contract proposed by it that is why even while drafting the terms of the contract there had not been the necessary and sufficient bestowal of thought over technical aspects by pile foundation. Therefore, I am of the view that owing to various acts of commission and omission on the part of the officers of the Respondent it should not be burdened with heavy amounts. The Respondent without any justification prevented the Claimant from completing the work and have had to engage some other contractor and get the balance of work done which could have been avoided if the Respondent had engaged competent officers.

232. Having regard to the work done which is established by the materials placed on record and the breach committed by the

Respondent, I fix a consolidated sum of Rs. 40 lakhs (Rupees Forty Lakhs) payable by the Respondent towards Part B claim of the Claimant.”

54. The criticism of the aforementioned finding is that the learned Arbitrator has not given any reasoning in arriving at the figure of Rs. 40 lakhs. The above criticism is not correct. If the entire Award is examined as a whole, it is seen that detailed reasons have in fact been given against the various issues framed by the Arbitrator. Even in respect of individual items of works under Part-B, the learned Arbitrator has discussed each of them and explained why he has rejected some of them while accepting the others. The distinction between Part-A and Part-B was that Part-A claims comprised of undisputed payments whereas Part-B comprised the disputed ones. As pointed out earlier the rate analysis submitted by the Contractor with its letter dated 30th July 1993 was not responded to by the Architect. Since the Architect neither certified the payment nor rejected it, this led to the Contractor submitting the 9th RA Bill in two parts. The approach of the learned Arbitrator in drawing an adverse inference for non-examination of the Site Engineer cannot be faulted. Less than 25% of the total claim in Part-B has been allowed. This cannot be said to be erroneous or contrary to the provisions of the contract.

55. As against the claim of Rs. 5,20,000 under Part-C for loss of profit, the learned Arbitrator has awarded Rs. 5,000. This also, therefore, does not call for interference.

56. On the question of interest it is contended by SBI that in the present case, the agreement contains no clause for granting interest and the Interest Act, 1978 does not apply since the contract predates the enactment of the Interest Act, 1978. Reliance is placed on the decisions in

Engineer v. B. Subba Reddy 1999 (2) Arb.LR 304 (SC). The point to be noted is that there was no prohibition in the agreement between the parties on the payment of interest. Consequently, the learned Arbitrator could have validly awarded pre-reference and *pendente lite* interest. The award of simple interest at 12% per annum was reasonable.

57. None of the counter-claims of the SBI were tenable in light of the findings of the learned Arbitrator which as has been pointed out above, is consistent with the clauses of the contract and evidence led by the parties.

Conclusion

58. This Court finds no grounds having been made out for interference with the impugned Award. The objections of SBI are hereby rejected and I.A. No. 1570 of 2006 and I.A. Nos. 7761 and 15233 of 2012 are dismissed. The impugned Award dated 5th August 2005 is made rule of the Court.

59. CS (OS) No. 1574 of 2005 is disposed of in the above terms. Decree sheet be drawn up accordingly.

S. MURALIDHAR, J.

OCTOBER 5, 2012

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