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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. 426/2011

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Judgment dated 25.01.2012

SAJJAN KUMAR BANSAL

..... Petitioner

Through : Mr. Harish Malhotra, Sr. Adv. with
Mr.R.K. Modi, Adv.

versus

INDIA TOURISM DEVELOPMENT CORP LTD Respondent

Through : Mr. Amitabh Marwah, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S. SISTANI, J. (ORAL)

1. Petitioner has filed the present petition under Section 34 of The Arbitration and Conciliation Act, 1996 (26 of 1996), assailing the award dated 08.02.2011 rendered by Learned Sole Arbitrator, Prof. R.K. Agarwal.
2. The facts necessary for disposal of the present objection petition, in a nutshell, are as follows - that the respondent issued a notice inviting tender on 31.05.2004 for development of Quila Rai Pithora Fortification Wall, (Sanjay Van) earthwork phase II, in response to which the petitioner submitted his tender on 15.06.2004. After various negotiations between the parties the work was awarded to the petitioner by the respondent vide letter of award dated 23.09.2004. It is specifically stated by the petitioner in the present objection petition that at the time of agreement the rates per cubic meter were fixed.
3. Learned Senior Counsel for the petitioner submits that after the award of

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running bill on 22.11.2004 for an initial claim of 30,000 cubic meters of earth work in excavation of Rs. 12,30,000/-. After retaining the security deposit of 10% of the said amount and deducting therefrom the sales tax and other statutory deductions, the balance payment of Rs. 10, 40,000/- was released to the petitioner. Learned Senior Counsel for the petitioner submits that the entire work was done under the supervision of the employees of the respondent, namely, Mr. Vinod Madan, V.P. (Ingg.) and Mr. V.K. Nehru, Manager (Civil). It is next submitted by the Learned Senior Counsel for the petitioner that after the submission of first running bill further work was carried out and completed by the petitioner by December, 2004, and the second and final bill for the said work for Rs. 55, 49,940/- was raised and after giving due credit of the payment released against the first bill, which also included in it the retained security amount the balance amount recoverable of Rs. 43, 35,499.50/- was claimed. Learned Senior Counsel for the petitioner also submits that admittedly the final bill was received by the respondent. Learned Senior Counsel for the petitioner next submits that the entire work executed by the petitioner was duly entered in the measurement books maintained at site, which are in the custody and control of the respondent.

4. It is contended by the Learned Senior Counsel for the petitioner that there is an error on the part of the Learned Arbitrator in rejecting the claims of the petitioner despite the fact that respondent had entered the entire work done by the petitioner in the measurement books for which no payments were released by the respondent. It is next contended that while entering the work in the measurement books only the work of schedule items was entered but the work which was done for extra items at serial nos. 1, 2 and 3 was not entered in the measurement books despite protest raised by the petitioner. Petitioner sent various letters to the respondent for release of

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the payment and even submitted the initial and final bills to the respondent which are with the respondent, however, the respondent did not consider the same. It is next contended that since Mr. V.K. Nehru, Manager (Civil) employee of the respondent, was arrested by CBI on 28.12.2004 for involvement in some criminal case Mr. Sanjeev Gupta, Senior Manager (Civil), was appointed in place of Mr. V.K. Nehru. Subsequently, Mr. Sanjeev Gupta, Senior Manager (Civil) and Mr. Madan, recorded the measurements and scrutinized the second bill of the petitioner and forwarded the case of the petitioner to the respondent for approval to the tune of Rs. 23.08 lakhs. Since these amounts were not released by the respondent to the petitioner, the arbitration clause was invoked.

5. Mr. Harish Malhotra, Learned Senior Counsel for the petitioner, submits that the sole Arbitrator has failed to Appreciate the fact that the final bill dated 15.12.2004 was given to the respondent in December, 2004, itself, and the receipt of the same was acknowledged by the respondent and despite several communications no objection to the same was ever raised by the respondent till the arbitration proceedings were invoked in the year 2006. Learned Senior Counsel for the petitioner further submits that the Learned Arbitrator has also failed to appreciate the fact that it was categorically mentioned in the first bill dated 22.11.2004 that it was the first running bill and the site was still with the petitioner under the supervision of the employees of the respondent. Learned Senior Counsel for the petitioner next submits that the arbitrator has failed to appreciate the fact that it is an admitted case of the respondent that the work done by the petitioner was satisfactory but even then the security deposit was not released to the petitioner meaning thereby respondent never wanted to release the rightful and lawful dues of the petitioner. Senior Counsel for

the petitioner also submits that the Sole Arbitrator has also failed to appreciate the fact that if, as per the respondent, the quantum of work was excavation of 30, 000 cubic meters of earth material then there was no necessity of the measurement book, there was no reason why the measurement book was not closed nor possession of the site was taken by the respondent when in the first very running bill petitioner had charged excavation of 30, 000 cubic meters of earth material. There is also a failure on the part on the Learned Arbitrator to appreciate the fact that the Measurement book was even not closed after the receiving of second and final bill dated 15.12.2004 which was maintained by respondent.

6. Learned Senior Counsel for the petitioner contends that the Arbitrator has failed to appreciate the fact that Mr. V.K. Nehru, one of the employees of the respondent and incharge, who entertained the final bill and did not object to the said bill. It is next submitted by the Learned Senior Counsel for the petitioner that there is also a failure on the part of the Learned Arbitrator to appreciate the fact that respondent themselves sought for level sheets vide letter dated 02.02.2005 from the petitioner and after due diligence and survey, respondent passed the bill of Rs. 23.08 lakhs meaning thereby that even respondent are in agreement of the fact that a substantial amount is due after the payment of the first running bill. It is next contended the Learned Arbitrator has also erred in not appreciating the fact that if the scope of the work awarded was only 30,000 cubic meters, then why no objection was raised qua placing the first bill in the category of running bill. Learned Counsel for the petitioner further submits that there is a grave failure on the part of the Learned Arbitrator in discharging the duties cast upon him by allowing the respondent to file approximately 187 pages of documents particularly after the conclusion of final arguments by the petitioner (Claimant in the impugned award), by

which the Learned Arbitrator has transgressed the principles of natural justice. It is next contended that there is also a failure on the part of the Learned Arbitrator to appreciate the fact that if the employees of the respondent responsible for site are charge sheeted by the department qua the site then it is the responsibility of the respondent to inform the petitioner but the same was not done neither any criminal proceedings were initiated against them by the department.

7. Mr. Malhotra submits that there is a grave error on the part of the Learned Sole Arbitrator in placing reliance on FSL report filed by respondent as the same was not proved. Senior Counsel for the petitioner further submits that the Sole Arbitrator has failed to appreciate the fact that the measurement books maintained, when in the possession of the Department, was not produced before the tribunal on the basis of which running bills were raised. Learned Senior Counsel for the petitioner next submits that no cogent and valid reason has been given by the Arbitrator for rejecting the claims of the petitioner (that is, the Claimant in the impugned award).
8. Mr Amitabh Marwah, learned Counsel for the respondent, has opposed the present petition and refuted the submissions made by Learned Senior Counsel for the petitioner. Learned Counsel for the respondent submits that the work of Development of Quila Rai Pithora Fortification Wall (Sanjay Van) – Earth Work (II Phase) was awarded to M/s Bansal Enterprises that is, the Petitioner, vide Work Order No. Engg/QRP/ Earth 2/04 dated 23.9.04 for Rs.12,30,000/-. The Work Order was duly accepted by the petitioner in terms of which the work was to commence from the 7th day of issue of the said Work Order that is, by 28.12.2004 or handing over of the site whichever is later. It is next submitted that the work executed by the petitioner started from 29.9.2004 after the layout for the

work has been identified and pointed out. Counsel for the respondent has drawn the attention of the Court to the Work Order which is reproduced as under:-

“SUB: Development of Quila Rai Pithora Fortification Wall
(Sanjay Van) Earth Work-2nd phase

Sl.No.	Description	Unit	Qty	Rate	Amount
01.	Earth work in excavation over areas for all lead & lift by mechanical means. The earth comprises of vegetation, malba stones kanker, etc etc. The work also includes stacking of serviceable material like stone etc. at site and disposal of earth by agency at his own destination. The work to be completed as per direction of engineer-in-				

	charge			Rs.41.00 (Rupees forty One only)	Rs.12,30,000/-
		Cum 30000			
				Total	Rs.12,30,000/-
(Rupees twelve lacs thirty thousand only)					

9. Attention of the Court was also drawn to Clause 9 of the Notice inviting tender which forms a part of the agreement between the parties, and the same is reproduced as under:-

“Tenderers are advised to inspect and examine the site and its surroundings and satisfy themselves before submitting their tenders as to the nature of the ground and sub-soil, the form and nature of the site, the means of access to the site, the accommodation they may require and in general shall themselves obtain all necessary information as to risks, contingencies and other circumstances which may influence or effect their tender. A tenderer shall be deemed to have full knowledge of the site, whether no inspects it or not and no extra charges consequent on any misunderstanding or otherwise shall be allowed.”

10. Mr. Amitabh Marwah, learned Counsel for the respondent submits that the petitioner vide communication dated 22.09.2004 confirmed that it had visited the site before tendering. It is further submitted that at the time of tendering and inspection of the site the petitioner was aware of the tender amount of Rs. 12,30,000/- which was not disputed as being underestimated and the petitioner signed the contract and execute the work under the contract. It is next contended that the petitioner is now estopped in law from claiming that the quantity of work was grossly underestimated and that the petitioner had to execute three times the work issued under the work Order. Counsel for the respondent next submits that the Contract was for a consolidated amount Rs. 12,30,000/- and there

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was no rate fixed per cubic mtr. as would be evident from a perusal of the Work Order.

11. Learned counsel for the respondent submits that as per Office Order No. VP(Engg)/O.Order/03 dated 26th December, 03 issued by then VP(Engg), Shri Vinod Madan, then DGM(E&M) and Shri V.K. Nehru, then Manager(Civil) were the officials responsible for the project works at Quila Rai Pithora. He next submits that the entire work was executed under the supervision of Mr. V. K. Nehru and no work was executed thereafter. It is categorically stated that during the tenure of Shri Sanjeev Gupta, the petitioner did not execute any work whatsoever and as such he had no knowledge of the work executed. It is also submitted that Shri Nehru was arrested by the Central Bureau of Investigation in the evening of 28.12.04 allegedly while accepting a bribe from a contractor and was suspended from service immediately and in his place Shri Sanjeev Gupta, Sr. Manager (Civil) was appointed on 05.01.05, whereas the work already stood completed on 28.12.2004.
12. Learned counsel for the respondent further submits that the Petitioner submitted its first RA Bill for Rs. 12.30 Lakhs on 23.11.04 which was recommended / paid by Shri V. K. Nehru to the extent of Rs. 12,14,440/-. The total work executed at the time of submission of the first RA Bill was 29,643 cubic meter. He next submits that an amount of Rs. 10.40 Lakhs was paid to the Petitioner which was accepted by the Petitioner without any protest or demur. It is further submitted that the extra items claimed by the Petitioner in the Final Bill were not claimed in the First RA Bill. If the claims for the extra items were genuine they would have been claimed in the First RA Bill itself as the extra items claimed are required to be executed at the initial stage and not subsequently.

13. It is submitted by Mr.Marwah that the execution of the work was completed on 20.12.04. However, for some strange reason, the Petitioner furnished the Final Bill on 15.12.04. It is further submitted that in the Final Bill, the Petitioner claimed that it had executed work from 21.11.04 to the tune of 90,000 cubic meters and accordingly claimed an amount of Rs. 36,90,000/-. No details had been furnished by the Petitioner in support of the claim along with the Final Bill. The Petitioner also raised a demand for the extra items. However, it is submitted that it is evident that the extra item No. 1 claimed on account of carriage of material and earth by mechanical transport including loading and unloading and stacking is covered under the scheduled item. Extra Item No. 2 claimed was not required to be executed under the contract and the said item has not been executed by the Petitioner. Extra item No. 3 is included in the Agreement item as per CPWD's specifications. It may be mentioned here that the final bill discloses no details as to how the Respondent excavated 90,000 cubic meters. In fact, there is no documentation on record to show that the Petitioner has executed any work whatsoever.
14. Mr.Marwah, learned counsel for the respondent, submits that in Extra item No. 3, the details of measurements shown by the Petitioner are for 23,954 cubic meters whereas in the bill the Petitioner has claimed for 29,954 cubic meters. This shows that the claim is fraudulent. For extra items 1 & 2 no details have been furnished by the Petitioner along with the Final Bill which again shows that the Claims are fabricated and the Learned Arbitrator was justified in disallowing the same.
15. It is further submitted that it is significant that at the time of commencement of the work on 29.09.2004 till the date of the First Running Bill i.e. 22.11.2004, there is a difference of 55 days wherein the Petitioner claimed that it had executed work to the tune of 30,000 cubic

meters which was corrected to 29,643 cubic meters and payment made accordingly, whereas in the second Running Bill for a period starting from 23.11.2004 to 20.12.2004 which is a period of only 27 days, the Petitioner claimed that it had executed work to the tune of 90,000 cubic meters which was allegedly corrected by Shri Sanjeev Gupta to 89,981.85 cubic meters. The estimated quantity at the time of issuance of work order was 30,000 cubic meters which was more or less executed at the time of the first Running Bill. It is inconceivable that such a large deviation would occur i.e. to the tune of 199.4% of the original estimated quantities and that a contractor could take nearly two months to excavate nearly 30,000 cubic meters suddenly, in a very efficient manner, excavates nearly 90,000 cubic meters in less than a month especially in view of the fact that the Petitioner had inspected the site. This clearly shows that the claim is fabricated. Learned counsel for the respondent further submits that the measurements entered into the Measurement Book by Shri Sanjeev Gupta were entered by him on the basis of some documents i.e. Level Sheet submitted by the Petitioner vide letter dated 02.02.2005 which contained a forged signature of Shri V. K. Nehru the engineer at site who had supervised the work, whereas Shri Sanjeev Gupta had not supervised any execution of the work. It is significant that not only Shri V. K. Nehru has denied his signatures on the aforesaid purported Level Sheet but an independent body, namely Government Examiner of Questioned Documents, Directorate of Forensic Science, Ministry of Home Affairs, Government of India has also stated that the signature is forged.

16. Mr. Amitabh Marwah, learned counsel for the respondent submits that after the suspension of Shri V. K. Nehru, Shri Sanjeev Gupta, recorded the measurements in respect of 2nd and Final Bill on the basis of certain documents / drawings prepared by the quantity surveyor the services of

whom were not hired by ITDC and accordingly recommended a payment to the tune of Rs.23.08 lakhs (approx.) in favour of M/s. Bansal Enterprises, Contractor, the Petitioner herein. These documents / drawings were not part of the inventory of files (in the charge of Shri Nehru) that was made by a duly constituted Committee, after the arrest of Shri Nehru and were brought on record by Shri Sanjeev Gupta. Under these circumstances, it was the bounden duty of Shri Gupta to get the aforementioned documents / drawings authenticated from Shri Nehru as Shri S. Gupta had not supervised the work and the contractor had submitted a final bill including disproportionately high quantity of work executed viz-a-viz the quantity awarded (199.4% deviation). Further, though the initial levels were not brought on record by Shri Nehru and were unverifiable, final levels could have been verified / checked by Shri Gupta. The signatures of Shri V. K. Nehru had been forged on the aforesaid documents / drawings which formed the basis of recommending payment. Hence, Shri Sanjeev Gupta indulged in conspiracy to unduly benefit the contractor (the Petitioner herein) monetarily at the cost of the Respondent. It is significant that none of the documents / drawings on the basis of which Shri Sanjeev Gupta recorded the measurements and recommended payments were in the custody of Shri V. K. Nehru and in fact contained forged signatures of Shri V. K. Nehru.

17. It is next submitted that Shri Gupta deliberately and with an intent to favour the contractor (the Petitioner herein) brought on record letter dated 27.03.2007 of the contractor (the Petitioner herein) addressed to the Arbitrator lodging his claim. The afore-cited letter was not marked to Shri Gupta but he processed the matter and forwarded the said letter to Sr. VP (Engg.) vide his note dated 07.04.2007. Accordingly Shri Sanjeev Gupta was charge sheeted, an enquiry was held which now stands concluded.

Shri Sanjeev Gupta has been removed from service. It is submitted that Shri Nehru never received the Final Bill dated 15.12.04 and as such, the question of him raising any objection to the same cannot and does not arise.

18. It is further argued by learned counsel for the respondent that the Petitioner has failed to provide any cogent evidence in support of his claim. There is no evidence on record to show that the Petitioner had executed the work as claimed. No details have been given as to how after inspection of the site and even after the submission of the First RA Bill, the Petitioner never made any objection regarding the quantity of work. It is only after Mr. Nehru who was the Site Engineer having full knowledge of the site was removed that the Petitioner in connivance with Shri Sanjeev Gupta tried to fabricate the record and make illegal gain at the cost of the Respondent. The whole claim is based upon the fraudulent documents. As such, the Award passed by the Learned Arbitrator is liable to be upheld.
19. Mr. Marwah submits that a perusal of the record would demonstrate that the Learned Arbitrator had correctly come to the conclusion that there is no supporting document furnished by the Petitioner that he was asked to do the total quantity of the scheduled item to the extent of 90,000 cubic mtr. and also extra work against extra item Nos. 1, 2 & 3. There is no evidence on record to show that the Petitioner was required by the Respondent to execute the extra items. It is further submitted that the respondent has paid to the petitioner the awarded amount and the same has been accepted within the stipulated time as prescribed by the learned Arbitrator. Accordingly, the learned counsel for the respondent prays for the dismissal of the present objections as the same are barred by law of estoppel.

20. Learned Counsel for the respondent submits that the award of an arbitrator can be set aside by a Court only on the grounds indicated in section 34 of the Arbitration and Conciliation Act, 1996 (for short "the said Act") and as such the present objections assailing the impugned award are not maintainable under law as they do not satisfy the ingredients of the said section in any manner what-so-ever neither any proof has been furnished in this regard by the petitioner. It is further submitted that a bare reference to the existing law on this aspect, and the findings of the learned arbitrator, as is apparent from a simple reading of the award, without weighing various possibilities or investigating further facts, will cogently establish that the said award is in perfect harmony with the law and the learned arbitrator has conducted himself judiciously and honourably. Mr Marwah further submits that learned senior Counsel for the petitioner has argued the matter as if this is a Court of Appeal whereas the law with regard to Section 34 of the said Act is well settled that the jurisdiction of the Court to interfere with an award of an Arbitrator is a limited one and this Court is not entitled to hear the arguments as a Court of Appeal as the same has been held in a number of decisions. In support of his arguments Learned Counsel for the respondent places reliance on Bijendra Nath Srivastava (Dead) through LRS. Versus Mayank Srivastava and Others reported in (1994) 6 SUPREME COURT CASES 117 the relevant portion of paragraph 20 is reproduced as under:-

"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."

21. In support of his arguments Learned Counsel for the respondent also places reliance on National Hydro electric Power Corporation Ltd

Versus M/s. Karam Chand Thapar and Bros (CS) Ltd. & Anr.

reported in **2011 (1) R.A.J. 131 (Del)** wherein it has been held that

“Where the reasons have been given by the Arbitrator in making the award, the Court cannot examine the reasonableness of the reasons”.

22. Further elaborating his arguments reliance is also placed on Mc Dermott International Inc. Versus Burn Standard Co. Ltd and Others reported in (2006) 11 Supreme Court Cases 181, more particularly in paras 55 and 56, which are reproduced below:

55. A question may invariably arise as to what would be meant by a reasoned award.

56. In Bachawat's Law of Arbitration and Conciliation, Fourth Edition, pages 855-856, it is stated:

"... 'Reason' is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration In Re, "proper, adequate reasons". Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons.

The meaning of the word "reason" was explained by the Kerala High Court in the contest of a reasoned award...

‘Reasons are the links between the materials on which certain conclusions are based and the actual conclusions...’

A mere statement of reasons does not satisfy the requirements of s.31(3). Reasons must be based upon the materials submitted before the arbitral tribunal. The tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored...

Statement of reasons is mandatory requirement unless dispensed with by the parties or by a statutory provision."

23. On the merits of the matter, learned Counsel for the respondent submits that Learned Arbitrator has passed a reasoned award taking into consideration the facts of the case and the evidence placed on record. It is further submitted that a bare perusal of the said award will establish that this is indeed a case where the learned Arbitrator has passed a properly reasoned award after considering all aspects in the matter, including the contract between the parties, the evidence on record and the pleadings/submissions of the parties.
24. I have heard the Counsel for the parties and considered their rival contentions. In the case of **Mc Dermott International Inc. (supra)** the Apex Court has held as under:

"52. The 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc."

25. Further reliance is also placed on **Delhi development Authority versus R. S. Sharma and Company, New Delhi** reported in **(2008) 13 Supreme Court Cases 80** the relevant portion of paragraph 21 is reproduced as under:-

“the principles for the interference with an arbitral award under Section 34 (2) of the 1996 Act are as follows:-

(a) An Award, which is

- (i) Contrary to substantive provisions of law; or
- (ii) the provisions of the Arbitration and Conciliation Act, 1996 ; or
- (iii) against the terms of the respective contract ; or
- (iv) patently illegal, or
- (iv) prejudicial to the rights of the parties,

is open to interference by the Court under Section 34(2) of the Act.

(b) the Award could be set aside if it is contrary to :

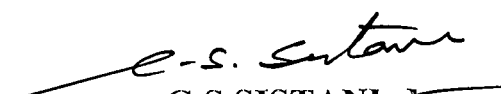
- (a) fundamental policy of Indian Law; or
- (b) the interest of India; or
- (c) justice or morality;

(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India”.

26. I have heard counsel for the parties and carefully examined the award and considered rival contentions of both the parties. The dispute between the parties arises out of the work order by which the petitioner was to carry out the earth work in excavation over areas for all load & lift by mechanical means. The earth comprises of vegetation, malba stones

kanker, etc etc. The work also includes stacking of serviceable material like stone etc. at site and disposal of earth by agency at his own destination. The work was to be completed as per the directions of engineer-in-charge. The work order also limits the area which was 30000 cb. mtrs. The work order has also specified the rate and the total amount payable. It has been clearly established on record that prior to the commencement of the work, the contractor, petitioner herein, had inspected the site. Accordingly, the contractor must have estimated the area which was to be excavated. The work order does not leave any scope for increase in the unit area on account of the fact that the rate and the total amount fixed was Rs.12.30 lacs. The reliance of learned counsel for the petitioner on the measurement book can be of no help to the petitioner for the reason that the petitioner never claimed for any extra item in the first bill which was submitted by the petitioner. The stand taken by the petitioner that Mr.Sanjeev Gupta had however supervised the work is factually incorrect as no work was carried out by the petitioner during the tenure of Mr.Sanjeev Gupta. The Arbitrator has also factually disagreed with the petitioner. There is also a finding that the signatures of Sh.V.K.Nehru were forged on the document which formed the basis of recommending payment. Having regard to the work order, in fact no payments could have been recommended in favour of the petitioner. The learned Arbitrator has rendered a well reasoned award based on the material placed before him and it cannot be said that the award is perverse. There are no grounds to interfere in the award passed by the learned Arbitrator. Accordingly, objections are dismissed.


G.S.SISTANI, J

JANUARY 25, 2012 msr PPF