

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

% Order delivered on: 24th November, 2014

+ **O.M.P. No.550/2011**

GOVERNMENT OF THE NATIONAL CAPITAL TERRITORY
OF DELHI Petitioner

Through Mr.Yogesh Saini, Adv. for
Mr.V.K.Tandon, Adv.

versus

M/S MUNSHI RAM & ASSOCIATES PVT LTD Respondent

Through Mr.Sudhir Nandrajog, Sr. Adv. with
Ms.Risha Mittal, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this petition, the petitioner has challenged the Award dated 20th March, 2011 made and published by the sole Arbitrator whereby the respondent has been awarded a total sum of Rs.2,18,67,168/- along with interest amounting to Rs.1,53,42,959/- up to 20th March, 2011 and future interest on Rs.3,72,10,127/- @ 12% per annum w.e.f. 21st March, 2011 till date of payment and the decision dated 20th March, 2011 of the sole Arbitrator rejecting the application moved by the petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act").

2. The award is challenged by the petitioner who submitted in the petition that the impugned Award is patently inconsistent and is contrary to law and public policy, in disregard of the agreement

between the parties and contrary to the evidence on record, and is, therefore, liable to be set-aside. The learned Arbitrator has acted in a perverse manner by allowing the claims of the respondent which are patently time barred under Article 18 of the First Schedule of the Limitation Act, 1963 in view of the fact that the work was completed on 31st December, 2004 and the respondent for the first time raised its claims on 9th March, 2009, i.e. after more than four years of the last date of cause of action, the stipulated period of limitation being three years. The claims of the respondent which are based upon delay and latches for loss of profit, interest, loss of overheads, loss due to idle men & material and T&P, Market Rate etc., are totally fraudulent and fabricated and not permissible in law and are liable to be rejected.

3. The main grounds by which the petitioner has challenged the Award are as under:-

- (i) The respondent has never questioned the measurements recorded in the Measurement Books nor has the respondent ever questioned the rates for the executed work as recorded in the measurement books. All measurements and rates as recorded in the Measurement Books have been accepted as authentic since neither party has challenged the same as per Clause No. 7 of the Agreement. The respondent had never raised any running bill during execution of the work even though it was obligated to do so under Clause 7 of the Agreement. As such, the petitioner was constrained to prepare the running bills based upon the measurements and rates as recorded in the Measurement Books and made payment to the respondent

accordingly, which payment was accepted by the respondent without any protest or demur. If the respondent had any grievance, the respondent ought to have invoked Clause 7 of the agreement and recorded his protest, which admittedly the respondent did not do. Thus, the claims raised by him are fabricated. The mere writing of vague letters without crystallizing his Claims as required under Clause 7 of the Agreement is contrary to the express terms of the Agreement. In any event, the said letters were replied to by the petitioner refuting the purported claims of the respondent.

- (ii) Even the letters addressed to the petitioner by the respondent raising various fictitious claims were beyond the 15 days period as stipulated in Clause 12 of the Agreement which pertains to payment of extra items and deviated items. In fact, no analysis as required under the Agreement was furnished and was furnished only before the Arbitrator at the stage of rejoinder to overcome the objection raised by the petitioner. As such, nothing is payable to the respondent.
- (iii) On merits, it is averred in the grounds that for commencement of the work, various items are required to be mobilized; for instance, arranging for cement, steel, aggregates, mix design batch mix plant, concrete mixtures, other T & P and labour. However, the respondent for reasons best known to it, initially delayed execution of the work and did not make the aforesaid arrangements in time as would be evident from a perusal of the measurement books which are not disputed between the parties, having been duly accepted by the parties who have appended

their signatures to the same. The delay on the part of respondent as well as the faulty work executed by him has also been highlighted in various communications addressed by the petitioner to the respondent which have also not been effectively rebutted by the respondent.

Despite being handed over the site on 20th September, 2001, the batch mix plant which should have been brought to the site within one month of the site being handed over to the respondent and calibrated for the RCC work accordingly was not done and was finally done on 10th January, 2002, nearly after three months delay. This critical lapse on the part of the respondent delayed the execution of the entire work. Similarly, the concrete mix design, the procurement of which was upon the respondent and should have been procured within a month of the site being handed over was finally procured by the respondent after a delay of three months. This clearly demonstrates that it was the respondent who is guilty of the delay and not the petitioner.

The foundation drawings for all the buildings were handed over between 24th September, 2001 and 20th April, 2002 as per the drawings register duly signed by the respondent. As such, if the respondent had diligently executed the work, the foundation work should have been completed by 10th May, 2002, whereas the respondent completed the same by 24th October, 2002 after a delay of approximately five months. It may be mentioned here that completion of foundation work, once the drawings have been made available, should not take more than 15 days in the

type of building specified in the contract. This shows the negligent attitude of the respondent.

The drawings for the roof slabs for all the blocks were handed over to the respondent by 26th August, 2002 despite the respondent not having reached the position of being able to cast the roof slabs in any of the blocks. As such, the work of casting of the roof slabs should have been completed by 26th September, 2002, whereas the respondent casted the roof slabs by 16th April, 2003 as recorded in the measurement books. In the circumstances, there is total delay of several months approx. on the part of the respondent and which is not ascribable to the petitioner.

The drawings pertaining to the brick work in the superstructure were handed over to the respondent at the very initial stage i.e. 24th September, 2001. In view of the schedule of the contract, the same should have been completed by 20th October, 2002 whereas the same was completed by 16th April, 2003 as recorded in the measurement books.

The plaster work is divided into two parts i.e. internal and external for which no drawings are required. The internal plaster work should have been completed by 20th November, 2002 whereas it was completed by the respondent on 10th March, 2004. Similarly the external plaster work should have been executed by 30th November, 2002 whereas the respondent completed the same by 20th October, 2003. As such there is a total delay of eleven months.

Further the work for flooring as per the contract schedule

should have been completed by 25th December, 2002 whereas the respondent completed the same by 18th December, 2003, entailing a delay of approx. twelve months. No drawings were required for the said work.

For the works of distempering, whitewashing and painting on the one hand and cleaning and handing over on the other, for which no drawings were required, the same should have been completed by 20th February, 2003 and 20th March, 2003 whereas the same were completed by 14th October, 2004 and 31st December, 2004 respectively, entailing a delay of approx. twenty two months.

As such it would be evident that the petitioner is not guilty of any delay and any claim on account of delay is misconceived and is liable to be set aside. The respondent cannot take advantage of his own wrong. Reliance made by the respondent upon the extension of time is totally misconceived as condonation of delay does not amount to admission of delay on the part of the respondent. It may be mentioned here as would be evident from a perusal of the evidence that the petitioner had given all decisions in a timely manner and no delay can be ascribed to the petitioner on account of giving of decisions. In any event, the main grievance of the respondent regarding giving of decisions pertains to providing the requisite drawings which, as would be evident from what has been stated hereinbefore, had been provided to the respondent well in time and as such the contention of the respondent that the work was delayed on account of alleged non furnishing of drawings is totally

misconceived, incorrect and without any substance.

- (iv) On the other hand, the respondent never submitted the CPM/PERT along with the resource schedule as required under the contract and despite repeated requests. The time given was more than sufficient to complete the work of a G + 3 storied RCC frame building. The bar chart only specifying mild stones is not a CPM / PERT chart. As such, there is a clear breach of contract by the respondent and mismanagement of the work leading to delay in execution of the work beyond the stipulated date of completion. The respondent had not submitted its programme for construction as per Agreement Special Condition No.2 at Page 99 of the Agreement in the form of CPM / PERT, descriptive note explaining sequence of various activities, programme for procurement of material, programme of mobilization of machinery/equipment and its deployment. The respondent never made and submitted a detailed programme of particular activities with start date and end date along with details of critical activities for different block of the building. The respondent had not even done preparatory work like procurement of aggregates, cement, steel, batch mix plant, concrete mix design etc. upto the start of January 2002. The respondent, by making evasive, baseless & hypothetical excuses tried to linger on the work. In fact the respondent executed the work as per availability of his spare resources and never made any concrete program for execution of work, nor put the resources on the work as proposed by the petitioner. But to shift the responsibility of delay on the petitioner, the respondent made enormous excuses and efforts by way of

challenging the adequacy of structural design and drawings, asking for fake Extra Items, Changing the modus operandi to execute RCC work by Batch mix plant to ready mix concrete and vice-versa frequently. The respondent did not have adequate resources for the work which is the reason why he delayed the start of the work and further completion of work. Due to the absence of adequate resources available with him, the respondent neither could make any planning nor could execute the work in time. Therefore actual delay occurred due to lack of resources and mismanagement of the respondent. The delay in completion of the work was purely on the part of respondent and it was condoned by the petitioner very leniently considering the extra work done and on the basis of undertaking of respondent that they had not suffered any loss due to delay in the work and neither they would claim for the same.

- (v) The respondent despite being repeatedly requested by the petitioner to attend meetings regarding his claims and furnish proper analysis of rates and material particulars along with the supporting documentation failed to do so. Even before the Arbitrator no supporting documentation regarding any of the claims had been filed by the respondent along with his claims but filed subsequently fabricated documents after two months of filing of his rejoinder in response to the submissions of the petitioner. Letters written by the respondent do not constitute proof of his claims, which in any event have been refuted by the petitioner.

(vi) It is stated that there is no evidence of any steps taken by the respondent to mitigate his alleged loss. There is not a shred of evidence nor any averment on the part of the respondent that he had taken steps to mitigate the alleged losses incurred by him, As such, nothing is payable. Nothing is payable under Section 73 of Indian Contract Act, 1872 as the respondent has not set out any steps taken by him to mitigate the alleged losses suffered by him as mandatorily required under Section 73 of the Indian Contract Act before any damages can be awarded. The respondent had not set out any proof of damages allegedly incurred by him.

The claims of the respondent are fabricated. The respondent after allegedly sustaining the alleged loss, admittedly, kept quiet for a period of nearly five years. If the loss had been genuine, the respondent would not have kept quiet for so long.

(vii) After receipt of the final bill and the payment in lieu thereof, the respondent never raised any objection within the stipulated period of three months as set out in Clause - 9 of the Agreement. For the first time the respondent raised his objection on 9th March, 2009, whereas the payment was made on 9th April, 2007. No contractor sustaining such a huge loss would keep quiet for a period of more than two years. This proves that the claim is fabricated and also that the respondent did not suffer any loss.

(viii) Grant of extension of time was on the basis of an undertaking furnished by the respondent that he had not suffered any loss on account of the delay in execution of the contract and neither he

would claim any amount in lieu thereof. As such, the respondent is estopped in law from claiming anything from the petitioner. The respondent had clearly stated in the Application for extension of time (R32) that "I have not suffered any loss due to delay in completion of the work & I shall not claim anything extra on this delay."

4. The respondent in its reply has denied all the grounds raised by the petitioner. The case of the respondent is that as the petitioner failed to finalise the bill of the respondent even after repeated requests, the respondent therefore was constrained to approach the Chief Engineer for appointment of Arbitrator vide letter dated 25th June, 2009. The Chief Engineer even after 30 days were over did not appoint any Arbitrator. The respondent then filed the petition under Section 11 being AA305/2009 on 3rd August, 2009 in the Court for appointment of independent and impartial Arbitrator. It is submitted that the Court after due consideration of all the facts and circumstances of the case appointed Mr. R.J.Bakhru, retired CPWD Chief Engineer as sole arbitrator in the present matter vide its orders dated 30th October, 2009 with the consent of both the parties.

5. As far as the issue of limitation is concerned, the said objection was rejected by the Arbitrator. It also appears from the order dated 27th July, 2011 passed in the present case that the objection on limitation was rejected. The order is not challenged by the petitioner. Thus, the same has attained finality between the parties. The same cannot be re-agitated again.

6. The Arbitrator has allowed claim No.1 being the balance due in final bill for work done. The Arbitrator has also allowed claims No.2,

3, 5 - 7, 9 - 16. The Award for the claims No.3, 5, 6, 13, & 14 has been made under Section 73 of the Indian Contract Act in terms of which if a breach has been committed, the other party has to be compensated. The Arbitrator has given finding of the fact that the petitioner was responsible for delay and therefore the respondent was entitled for consequential losses/damages and has allowed the claim No. 3 for loss on account of T & P, loss on account of staff, loss on account of overheads, claim 5 for loss on account of increase in prices of labour and material and claim No. 6 for watch and ward for the delayed period. The Arbitrator also reimbursed the insurance charges and bank guarantee charges after stipulated date of completion under claims No. 13 & 14. All the above five claims are for the delayed period. The claims No.2 & 7 are for illegal deductions made from the amount of the respondent on account of testing charges and non employment of graduate engineer. The Arbitrator also allowed claim no. 9 on account of loss on account of scrapping of shuttering of columns due to change in design on column by the petitioner later on. Claims no. 10 to 12 are the interest on the claims No.2, 7 & 9. The Arbitrator has allowed interest @12% per annum and also allowed litigation cost.

7. The Arbitrator has made detailed speaking award claimwise:

- i) Claim No.1 - Award of Rs.1,51,45,773/- against Rs.2,44,40,370/- for balance due in final bill. The Arbitrator is a technically expert person being Retd. Chief Engineer of CPWD. It is settled law that the Court while dealing with objection under Section 34 of the Act is not sitting in appeal, thus the Court cannot re-appreciate the evidence on merits. Reliance in this regard is

placed on ***Himachal Pradesh State Electricity Board Vs. R.J. Shah & Co.***, reported in 1999(2) Arb.LR 316.

The claim No.1 in the award was divided into sub-parts being Part B, C, D, E & F.

Part B:- is for Market rate for deviated quantities. The claimant's claim for revision of rates for the agreement items whose quantities deviated more than the prescribed limit as laid down in clause 12.2. There is no dispute in regard to the quantities as the quantities of the petitioner as well as the respondent are the same. The only dispute is in respect to the rates. During the execution of the work the respondent intimated the petitioner in regard to the revised/market rates supported with proper analysis in regard to its rate for the deviated quantity of the items. The respondent made its categorical submission that respondent is proceeding with the deviated quantities. The case of the respondent is that in view thereof, it is clear understanding that the market rates submitted, by the respondent stand accepted. The petitioner was at the liberty to cancel the order for excess, however even after submission of rates and analysis the petitioner did not cancel the order of excess and directed the respondent to carry on with the deviated quantities. Therefore, the claim was raised by the respondent for its entitlement for revised/market rates for the deviated quantities. The petitioner admitted that the respondent is entitled for revision of rates. But the petitioner only paid the agreement rates for the deviated quantities in its alleged final bill. The Arbitrator has given cogent reasons for his award. Even otherwise the Arbitrator is a retired

Chief Engineer and an expert in his field and has reached to his conclusion after perusal of submission of both the parties. Moreover, the objections against this award do not come into the ambit of Section 34 of the Act. The Arbitrator has allowed an amount of Rs.32,17,164/- against claim of the respondent of Rs.46,50,274/-. The objections of the petitioner are not tenable under Section 34 of the Act. Only dispute was what rates are payable for the deviated quantities and the Arbitrator has only decided the rates for the deviated quantities. It was within the jurisdiction of the Arbitrator to decide the rates payable for the deviated quantities.

This Court in ***Arora Construction Co. (Pvt.) Ltd. Vs. Bharat Sanchar Nigam Limited*** in O.M.P. 521 of 2006 vide order dated 26th September, 2012 in para 7 & 8 has stated as under :

"7. It is submitted by Ms. Anusuya Salwan, learned counsel appearing for the Contractor, on the strength of the decision of the High Court of Himachal Pradesh in *S.M. Sareen v. State of H.P.* 1991 *Law Suit (HP)* 187 that once a rate analysis was submitted at the initial stage by the Contractor and was not disputed by BSNL, then such rate analysis submitted by the Contractor had to be accepted.

"8. In the instant case the learned Arbitrator was presented with two rate analysis. One by the Petitioner in the form of letter dated 1st October 2002 (Annexure C-73) and the other of BSNL dated 26th March 2003 (Annexure R-69). It was within the jurisdiction of the learned Arbitrator to opt for the rate analysis of BSNL. It cannot be said that by accepting the rate analysis of BSNL, the learned Arbitrator committed a patent illegality within the scope of Section 34 of the Act."

Part C:- is for less paid in EI/Sl. The only dispute under this head was in regard to the rate payable for the extra and substituted items. There is no dispute in regard to the quantities or admissibility of items. The Arbitrator has given cogent reasons for his award and therefore the same cannot be challenged. The objections of the petitioner are not tenable under Section 34 of the Act. Only dispute was what rates are payable for the Extra/Substituted items and the Arbitrator has only decided the rates for the items. It was very well within the jurisdiction of the Arbitrator to decide the rates payable for Extra/Substituted items.

The objections are therefore, in no way, covered within the ambit of Section 34 of the Act and therefore cannot be entertained under Section 34 of the Act and are to be dismissed out rightly.

Part D: is for reduction Items. The Arbitrator after perusal of the records has held that no notice was served on the respondent before making the recovery only in the final bill and has therefore held the recovery to be illegal and after hearing both the parties , Arbitrator has allowed an amount of Rs.1,13,930/- against claim of the respondent of Rs.1,13,930/-.

Part E: - is for extra items not paid. These are extra work/items. The respondent submitted its rates along with analysis and the work was executed with the clear understanding that the work done as per the rates submitted by the respondent stand payable. No payment was made. The Arbitrator allowed 10 items with an amount of Rs.9,85,698/- against claim of the respondent

for 19 items with claim of Rs.58,26,894.23. The Arbitrator has given cogent reasons for his award and therefore the same cannot be challenged. The objections against this award do not come within the ambit of Section 34 of the Act .

Part F: - is for less paid in Agreement items. The claim of the respondent was that the petitioner herein did not pay some of the agreement items. After reading of the submission of both the parties, the Arbitrator has allowed 3 items with an amount of Rs.1,41,724/- against claim of the respondent for 6 items with claim of Rs.2,16,934.23/-. The Arbitrator has given cogent reasons for his award and therefore the same cannot be challenged.

8. Claim No. 2 - is for refund of testing charges. The Arbitrator has awarded an amount of *Rs.36,460/-* against *Rs.37,650/-* claimed by the respondent.

Claim No.7 - is for refund of amount deducted by petitioner for non employment of graduate engineer. The Arbitrator has awarded an amount of *Rs.38,533/-* against *Rs.38,533/-* claimed by the respondent.

The petitioner has made deduction from the R/A bills of the respondent for testing charges and also on the plea for non employment of graduate engineer. The Arbitrator has given cogent reasons for his award and therefore the same cannot be challenged.

Claim No. 3 - Arbitrator awarded *Rs.37,51,225/-* against *Rs.8,00,00,000/-* for loss on account of T&P, Staff, material and overheads for delayed period.

Claim No. 5 - Arbitrator awarded Rs.20,53,009/- against Rs.83,40,138/- for escalation in prices of material and labour for delayed period.

Claim No. 6 - Arbitrator awarded Rs.3,51,600/- against Rs.13,04,000/- for watch and ward for delayed period.

Claim No 13 - Arbitrator awarded Rs.6,610/- against Rs.6,610/- for insurance charges for delayed period.

Claim No. 14 - Arbitrator awarded Rs.33,958/- against Rs.50,000/- for bank charges for extension of Bank Guarantee for delayed period.

9. The award under these claims has been made under Section 73 of the Contract Act in terms of which if a breach has been committed the other party has to be compensated. The Arbitrator after having gone through the documents on record held that there was delay in issue of drawings, decisions and slow progress by other agency of electrical work. The Arbitrator also held that as per hindrance register maintained by respondent there was net delay of 577 days in addition to extra time of about 180 days due to increase in cost of work. The Arbitrator also held that respondent has lodged its claim immediately after the stipulated date of completion and served notice to the petitioner herein asking for payment of its claim for delay due to various lapses on the part of the petitioner (Exhibit C/37). It is alleged by the respondent that the said letter of the respondent was never replied by the petitioner. The requests for payment of respondent's claim was reiterated by the respondent vide exhibit C/47, C/48, C/49 and many more letters. The Arbitrator also held that the remarks given by claimant on application for extension

of time were obviously under duress and coercion. During progress of work respondent had written many letters requesting petitioner to make payment for losses incurred by them due to default of petitioner. The Arbitrator also held that prolongation of work for 651 days has been fully due to failure on part of the petitioner to perform reciprocal contractual obligations. Therefore, respondent is entitled to compensation for extra expenditure on staff, T&P and other items consequent to delay in completion.

The Arbitrator has meticulously calculated the losses for main items of T&P required for delayed period. Similarly for the staff the Arbitrator has allowed for salary of staff for delayed period. The overheads have been allowed @ 3% only. Even the calculation with details has been given by the Arbitrator in the award.

This Court in ***Union of India Vs. Pt. Munshi Ram & Associates (P) Ltd.*** in O.M.P. 432 of 2011 vide judgment dated 21st December, 2012 in para 34 & 35 while dealing with the same nature of dispute has held as under :-

"34. As regards the machinery and T&P, the learned Arbitrator has given cogent reasons for assessing the rental value for a period of 22.3 months at Rs.1,40,000 per month which was actually far less than the DSR. For the remaining period up to 30th January 2001, i.e., 18 months, it was assessed at Rs.80,000 per month. The above determination can hardly be said to be suffering from any patent illegality. Likewise, as far as staff is concerned, he assessed it for 40 months at Rs.43,000 per month.

35. This was a satisfactory method of disposing of Claims 2 and 5 and cannot be faulted."

10. Against claim no. 5 the Arbitrator has allowed only 15% against 40% increase for the work done after stipulated date of completion/delayed period. The Arbitrator while awarding this claim has also deducted the amount of market rate allowed for item under claim no. 1 (part B).

Against Claim No. 6:- The Arbitrator allowed wages only for four chowkidars against 10 for each 12 hour shift i.e. 20 nos. claimed by the respondent.

This Court in ***Delhi Development Authority Vs. Amita Nand Aggarwal Associates*** in OMP No. 115/2007 decided on 8th May, 2009 in para 28 while dealing with the same nature of dispute has held as under :-

"28. With regard to claim No. 10 the Arbitrator rightly awarded Rs.30,000/- towards watch and ward expenses of departmental materials from the date of completion on 30.06.1993 till it was taken over by the petitioner i.e. from 30.06.1993 to 18.06.1996 which works out to 36 months and not 33 months as alleged in objection petition. The claim No.8 was for the period beyond stipulated period of completion till actual date of completion i.e. 26.09.1990 'to 30.06.1993 whereas the claim under claim No. 10 was for the period after completion of the work beyond 30.06.1993 till the date of taking over departmental materials i.e. 18.06.1996."

11. With regard to Claim No 13 - The Arbitrator has awarded insurance expenses borne by the respondent for insuring the building during the delayed period.

12. Against claim no 14 - the Arbitrator has awarded bank charges for extension of Bank Guarantee for delayed period.

The above two claims are reimbursement for losses suffered due to delay on the part of the petitioner and cogent reason have

been given by the Arbitrator and the same cannot be challenged under Section 34 of the Act.

13. Claim No. 4 - Loss of Profitability. Award of Nil against Rs.48,78, 125/-. The Arbitrator has not allowed this claim.

14. Claim No.8 - Award of Nil against Rs.97,80,702/- claimed by the respondent. The Arbitrator has not allowed this claim as the payments in R/a Bills are advance payments.

15. Claim No.9 - Award of Rs.2,50,000/- against Rs.4,00,000/- claimed by the respondent. The claim is for loss caused to the respondent for scrapping of shuttering material already manufactured for the columns whose drawing was later on changed by the petitioner and cogent reason have been given by the Arbitrator and the same cannot be challenged under Section 34 of the Act.

16. Claim No.10, 11, & 12 - are for interest on claim no. 2, 7 & 9. The Arbitrator has awarded interest on claim no. 2, 7 & 9.

With respect to Claim No.16 & 17 - The Arbitrator has awarded presuit, pendent lite & future interest at 12% per annum against 24% per annum claimed by the respondent. The respondent has also enclosed exhibit C-171 being the certificate from the bankers of the respondent, certifying that the interest being charged by the bankers from the respondent was 16%. Further it is stated that in clause 10 B (iv) the petitioner is charging interest at 18% per annum against the mobilization advance provided by it to the respondent against plant and machinery. Therefore if the petitioner wants to recover interest at 18% on the mobilization advance given to the contractor, there could hardly be any justification in its grievance that rate of interest at 12%

as awarded by the Arbitrator is excessive, exorbitant and unsubstantiated.

17. It is the admitted position that the Arbitrator is the final Judge of all questions both of law and fact. The Arbitrator is a retired Chief Engineer of the CPWD, a technical expert in the field. It is settled law that the Arbitrator is the sole Judge of the quality and quantity of evidence. It is not open to the Court to re-examine and re-appreciate the evidence considered by the Arbitrator to hold that the conclusion reached by the Arbitrator is wrong. The Court cannot sit in appeal over the view of the Arbitrator by re-examining and reappraising the materials. Where two views are possible, the Court is not justified in interfering with the award by adopting its own interpretation.

18. It is settled in many decisions that the Arbitrators are not supposed to give actual arithmetical computations of the amount awarded by them under different heads. As required under the relevant provisions of the arbitration clause, the Arbitrator is required to only give reasons for coming to their decisions in respect of points of issue before them in other words, it is enough if they give reasons for either allowing or disallowing the objections raised to the respective claims of the parties. The interpretations of the terms of the Agreement lies with the Arbitrator and his interpretations will not be interfered with.

19. In order to determine whether the Arbitrator has acted in excess of jurisdiction, what has to be seen is whether the Claimant could raise a particular dispute or claim before an Arbitrator. If the answer is in the affirmative then it is clear that the Arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the

arbitration clause or a specific term in the contract or the law does not permit or give the Arbitrator the power to decide or to adjudicate on a dispute raised by the Claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the Arbitrator in respect thereof would be clearly in excess of jurisdiction. Regard may be had to the judgement of Supreme Court titled ***Himachal Pradesh State Electricity Board Vs. R.J. Shah & Co.*** reported in 1999 (2) Arb.LR 316.

In ***Tarapore & Co. Vs. Cochin Shipyard Ltd.*** reported in AIR 1984 SC 1072 it was held that even if the decision of the Arbitrator does not accord with the view of the Court, the award cannot be set aside on the sole ground that there is an error of law apparent of the face of the award.

20. The Supreme Court in the case titled ***Arosan Enterprises Ltd. Vs. Union of India & Anr.*** reported in (1999) 9 SCC 449 has clearly stated -

"In any event, the issues raised in the matter on merits relate to default, time being the essence, damages - these are all issues of fact, and the Arbitrators are within their jurisdiction to decide the issue as they deem fit - the Court have no right or authority to interdict an award on a factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have."

It has been further held in the aforesaid Judgement-

"The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact cannot substitute its evaluation and come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. If the view of the

Arbitrator is a possible view the award or the reasoning contained therein cannot be examined."

It has also been held –

"The Arbitrators have, in fact, come to a conclusion on a closer scrutiny of the evidence in the matter and reappraisal of evidence by the Court is unknown to proceedings under Section 30 of the Arbitration Act."

21. The Constitution Bench of the Supreme Court in a leading Judgement titled ***Goa Daman and Diu Housing Board Vs. Ramakant V.P. Darvotkar*** reported in (1991) 4 SCC 293 has held-

"There is nothing to show in this case that the Arbitrator misconducted himself or the proceedings in any other manner nor there is anything to show that the awards have been improperly procured. There is no allegation, far less any finding that the Arbitrator was biased or unfair or he has not heard both the parties or he has not fairly considered the submissions of the parties in making the awards in question. It is evident from the awards that the Arbitrator has considered all the specific issues raised by the parties in the arbitration proceedings and came to his finding after giving cogent reasons."

22. In the case of ***Sanyukt Nirmata vs Delhi Development Authority*** (2005) 125 DLT 550 the judgment of ***Delhi Development Authority v. Bhagat Construction Co. (P) Ltd. And Anr.***, 2004 (3) Arb.LR 548 was referred wherein it was observed that specially where a technical man like retired Chief Engineer of CPWD is called upon to act as an Arbitrator, all that is required to be seen is that the Arbitrator has applied his mind before awarding the claims and the Arbitrator is not required to disclose the mathematical calculations in the award. Thus, until and unless the decision of the Arbitrator is

manifestly perverse or has been arrived at on the wrong application of law, the award would not call for any interference."

23. The Division Bench of this Court in ***Pt. Munshi Ram & Associates (P) Ltd. Vs. Delhi Development Authority*** FAO (OS)147/2002 decided on 12th August, 2011 has held-

"We also agree with the submission of the learned counsel for the appellant that the very purpose of having an arbitrator (who is the chosen judge of the parties) and that too a specialist in the field, being a retired Director General of Works, CPWD, would be defeated if this Court was to scrutinize the mode and manner of calculations of all such claims".

24. In the recent case, the Division Bench of this Court in ***State Trading Corporation of India Ltd. vs. Toepfer International Asia PTE Ltd.*** in FAO (OS) 242/2014 has held as under-

"6. In our view, mere erroneous/wrong finding of fact by the Arbitral Tribunal or even an erroneous interpretation of documents/evidence, is non-interferable under Section 34 and if such interference is done by the Court, the same will set at naught the whole purpose of amendment of the Arbitration Act."

"17. The Supreme Court in *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.* (2009) 10 SCC 63 even while dealing with a challenge to an arbitral award under the 1940 Act reiterated that an error by the Arbitrator relating to interpretation of contract is an error within his jurisdiction and is not an error on the face of the award and is not amenable to correction by the Courts. It was further held that the legal position is no more *res integra* that the Arbitrator having been made the final Arbiter of resolution of dispute between the parties, the award is not open to challenge on the ground that Arbitrator has reached at a wrong conclusion."

25. There is no infirmity in the finding of the Arbitrator so far as merit of the case is concerned. The objections filed by the petitioner are accordingly dismissed, however the impugned award is modified with regard to grant of future interest. The Arbitrator has awarded a total sum of Rs.2,18,67,168/- along with interest amounting to Rs.1,53,42,959/- upto 20th March, 2011 and future interest on Rs.3,72,10,127/- at 12% per annum w.e.f. 21st March, 2011 till the date of payment. The said findings are modified to the extent that the respondent would be entitled for future interest at 6% per annum w.e.f. 21st March, 2011 till the date of payment.

26. The award is modified only to this extent, in view of the above, the objections are otherwise dismissed/disposed of as there is no merit in the matter. Petition is accordingly disposed of.

27. No Costs.

(MANMOHAN SINGH)
JUDGE

NOVEMBER 24, 2014