

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

% *Judgment delivered on: May 19, 2014*

+ **O.M.P. No.735/2012**

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through Mr.Rajiv Kapoor, Adv. with
Mr.Anil Kumar, Adv.

versus

PROGRESSIVE CONSTRUCTION LTD

..... Respondent

Through Mr.Amit George, Adv. with
Ms.Rajshree Ajay, Adv.

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has preferred the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the arbitral award dated 21st March, 2012.

2. Brief facts are that:-

- (i) The petitioner (NHAI) entered into a contract agreement with the respondent, Progressive Constructions Ltd., for the work of four laning of Km. 410.000 to Km. 419.000, and Km. 470.000 to Km. 476.150 of Purnea-Gayakota Section of the National Highway (Package EW-4), in the State of Bihar on 12th August, 1999.

- (ii) During the course of execution of the work, due to certain site conditions and the decision to construct an additional 4 Km. of service road, the quantities of some items of the BOQ increased substantially compared to the original provision in the BOQ. The Engineer, by four separate letters dated 26th March, 2003 issued Variation Orders ('VOs') for changes in the quantities of items 3.01, 3.02, 3.03 and 4.04 of the BOQ. The rate for quantities of these items which amounted to 1% of the contract price was kept the same as was quoted by the contractor while tendering. It was also stated by the Engineer that the Variation Order for balance quantity beyond 1% of the Contract Price which has to be approved by the petitioner, will be issued separately after getting concurrence of the competent authority.
- (iii) The respondent asked for a revision in the rates of the BOQ items in question owing to the large scale variations that were instructed as also keeping in mind the massive increase in cost by the time the variations were issued as compared to the prevailing cost at the time of tendering. However, the petitioner rejected the demand of the respondent and stated that it was not agreeable to the revision of rates for the BOQ items.
- (iv) A dispute having accordingly arisen between the parties, the respondent invoked the dispute resolution procedure as contained in the contract agreement and the disputes were referred for the purpose of final adjudication of the claims of the respondent to a three member arbitral tribunal, comprised of three retired

engineers, which was jointly constituted by the parties as provided for under the contract agreement.

- (v) After completion of pleadings of the parties and considering submissions of the parties, the arbitral award dated 21st March, 2012. The Arbitral Tribunal allowed the claims of the respondent.

3. The respondent submits that the petition filed by the petitioner under section 34 of an Act is completely devoid of merits and deserves to be dismissed as the Court has limited jurisdiction. In the objections to the award, the petitioner has not placed any material facts nor made out any grounds whatsoever that are relevant under the above Section for setting aside the award, as in the present case, the arbitral award is a comprehensive and well-reasoned award which is in consonance with the contract between the parties.

4. Parties were heard on 27th March, 2014. Time was granted for filing the written submissions. The petitioner has not filed the same. The matter, therefore, is kept for orders on 19th May, 2014.

5. Coming to the case of merit, the second submission of the petitioner is that the claim of the respondent is not meritorious and not supported by the conditions of the contract. In the way, the submission is that there is no provision in the contract for the revision of the rate. The Arbitral Tribunal, however, came to the conclusion contrary to the submissions of the petitioner, as there are specific clauses in the contract between the parties where respondent is entitled to seek a revision in the rates. The relevant clauses 38.1 and 40.2 of the contract are as under:-

“38. Changes in Quantities

38.1 If the final quantities of the work done differs from the quantity in the Bill of Quantities for the particular item by more than 25% provided the change exceeds 1% of the initial contract price, the Engineer shall adjust the rate to allow for the change.

“40. Payments for Variations

40.2 If the work in the Variation corresponds with an item description in the Bill of Quantities, and if, in the opinion of the Engineer, the quantity of work above the limit stated in Sub Clause 38.1 or the timing of its execution do not cause the cost per unit of quantity to change, the rate in the Bill of Quantities shall be used to calculate the value of the variation. If the cost per unit of quantity changes, or if the nature or timing of work in the variation does not correspond with the items in the Bill of Quantities, the quotation by the Contractor shall be in the form of new rates for the relevant item of the work”. (Emphasis supplied)

6. The Arbitral Tribunal on interpretation of the aforesaid clauses held as under:

“9.02 The contract GCC Clause 38.1 stipulates that if the final quantity in the BOQ for a particular item by more than 25% provided the change exceeds 1% of the initial contract price, the Engineer shall adjust the rate to allow for the change. In the present case, the Claimant has claimed that there are four such items viz. BOQ items 3.01, 3.02, 3.03 and 4.04. These items would be examined for these tests as to whether they qualify for revision of rates as per the above clause or not. Item 3.01 for GSB as catered for in BOQ is 28793 cum against which the final executed quantity is 61394 cum which is 113.25% more than the original quantity of BOQ and 3.17% of the contract price, and as such passes the requisite tests. Similarly item 3.02 for WMM as catered for in BOQ is 40907 cum against which the final executed quantity is 56491 cum which is 38.1% more than the

original quantity of BOQ and 2.26% of the contract price, and as such passes the requisite tests. Also item 3.03 for WMM PCC as catered for in BOQ is 2000 cum against which the final executed quantity is 8673.388 cum which is 833.67% more than the original quantity of BOQ and 2.69% of the contract price and as such passes the requisite tests. As regards item 4.04 for DBM, the quantity as catered for in the BOQ is 30768 cum against which the final executed quantity is 36996 cum which is 20.24% more than the original quantity of BOQ and 2.91% of the contract price. It can be seen that while the percent of contract price condition is satisfied in this case, the 25% excess quantity condition is not satisfied, as such it does not qualify revision of rates as per clause 38.1. Therefore, the AT keeps its further discussions limited to only the three BOQ items 3.01, 3.02 and 3.03.

9.03 The Claimant had submitted revised rates of Rs. 1872.70, Rs.2121.43 and Rs.2321.43 per cum for BOQ items 3.01, 3.02 and 3.03 respectively; as per its letter No.PCL/KANKI/EW4/685/6857/2004 dated 5.4.2004 (Exh C-24). But he has claimed for these items at the rates of Rs.1360, Rs.1494 and Rs.1694 per cum in the quantification of the claim, whereas the Engineer has recommended rates of Rs.1510, Rs.1650 and Rs.1650 per cum these items to NHAI along with the details analysis vide his letter No. SS/99101/3321 dated 21 December 2004 (page 129 of R-8). The AT has examined the analysis of the rates submitted by the claimant and considers the rates claimed to be reasonable. It is also observed by the AT that the rates claimed by the Claimant for two items 3.01 and 3.02 are lower than the rates worked out by the Engineer. As regards BOQ item 3.03, which pertains to WMM to be used in PCC it is a work executed in small area/ items and its rate cannot be at the same as that for WMM work in large quantities (item 3.02). A reasonable approach is to keep the rate in the same proportion as was quoted originally by the Claimant at the time of tendering. The rates for BOQ items 3.02 and 3.03 as quoted in the tender are Rs.810 and Rs.900 per cum. The revised rate for BOQ item 3.03 thus would work out to $\text{Rs.}1494 \times 900 / 810 = \text{Rs.}1660$ per cum.

9.05 The contract clause 40.2 which stipulates “If the work in the Variation corresponds with an item description in the Bill of Quantities, and if, in the opinion of the Engineer, the quantity of work above the limit stated in Sub Clause 38.1 or the timing of its execution do not cause the cost per unit of quantity to change, the rate in the Bill of Quantities shall be used to calculate the value of the variation. If the cost per unit of quantity changes, or if the nature or timing of work in the variation does not correspond with the items in the Bill of Quantities, the quotation by the Contractor shall be in the form of new rates for the relevant item of the work”.

The Engineer had not decided that the rates for the varied items would be kept same, on the contrary he himself worked out new rates and recommended to the Employer for approval. As such, it is clear that the Engineer was of the view that rates were to be revised.”

7. The Arbitral Tribunal has meticulously dealt with the relevant terms of the contract and thereafter applied the percentage benchmarks in the contract to finally come to a conclusion as to whether the respondent is entitled to a rate revision or not. On applying the parameters of Clause 38.1 and 40.2, the Arbitral Tribunal has found that only three BOQ items 3.01, 3.02 and 3.03 satisfy the same and has accordingly rejected the claim towards BOQ item 3.04. In fact, the contention of the petitioner that the respondent is not entitled to the claim has been rejected by the Arbitral Tribunal by assigning the reasonable findings. Therefore, in view of settled law, the said view cannot be interfered with even on merits.

8. With regard to the issue of revised rate to the BOQ item in question, the same is answered by the Arbitral Tribunal. The Arbitral Tribunal has arrived at a unanimous interpretation that the contract envisages alteration of the existing BOQ rate or price as a whole. The Arbitral Tribunal has also

noted the conduct of the parties during the performance of the contract and particularly, the intention of the petitioner and the Engineer to alter the existing BOQ rate or price as a whole.

9. The relevant findings of the Arbitral Tribunal in this regard are as under:

“9.06 An important point raised during the course of hearings was whether the revised rates are to be applied to the whole of the executed quantity of an affected item or only to the quantity beyond the original BOQ quantity. The AT has considered this point carefully.

The conduct of the Engineer and the Respondent indicates that they were of the view that the revised rates were to be applied to the entire executed quantities and not just the varied quantities, Clause 38.2 of the contract agreement states.

“The Engineer shall not adjust rates from changes in quantity, if thereby the initial contract price is exceeded by 15% except with the prior appeal of the Employer.”

In the present case, if the change in cost is worked out with only varied quantities of the four items, the contract price does not exceed 15%. As such, the approval of the VOs would fall within the competence of the Engineer.

But if the cost of the four items with full executed quantities is worked out with the revised rates, the Contract Price would increase by more than 15% of the Contract Price and in this case, as per Clause 38.2, prior Approval of the Employer would be required.

The Engineer sought the Employer's approval to the revised rates for quantities of each item exceeding 1% of the Contract price. This was necessary only if he considered that revised rate would be payable for the entire executed quantity of each item.

Further, Employer's letter dated 19.08.2008 (page 107 of RD-8) also speaks of approval of rates for the entire quantity of the BOQ items and not just for the varied quantities. It says "In reference to the above letter, it is intimate that the variation proposal was approved by the Variation Committee in year 2003, for entire quantity of three BOQ items namely GSB(3.01), WMM (3.02) WMM-PCC (3.03) on the basis of recommendations made by the Engineer on BOQ rates....."

Considering the above, the AT is of the view the Contract Clause 38.1 addresses not only the rate applicable to the varied work but alteration of the existing BOQ rate or price. It talks of a rate or price contained in the contract which, by reason of such varied work, is rendered inappropriate or inapplicable. Thus, if a variation comprised, say a 30% difference in quantities of an item, this clause requires that the rate for that item, should be adjusted, and not just the rate for the additional work. This Clause is for adjustment of rates or prices and provides for changing the rates or prices of entire items of the work and not only for the varied work.

9.08 Further the AT has observed the following regarding the conduct of the parties. The Engineer proposed variations for some items of the BOQ but has issued VOs for quantity amounting to only 1% of the original contract price and for balance quantity stated that the VO would be issued later after getting the concurrence of NHAI. Later, he directed the Contractor to send his new rates and reminded him also. When the revised rates are received he makes some observations and asks the contractor to amend them as per certain procedure. On receipt of the amended rates, he of his own works out the rates which are nearly the same as submitted by the contractor or slightly more. These rates are sent to the Employer who feels that these are high and asks for revising the same. For revision, a Committee is formed which works on parameters other than the site conditions and no disposal of the committee report is out coming. When the proposal is sent to NHAI again, it is rejected on

the plea that it would not be possible to consider the revision of rates at such belated stage. This shows that the intention of the Respondent all along was to revise the rates but as the process took unduly long time due to some reason or the other, the revision was eventually not done.”

10. The Arbitral Tribunal has discussed Clause 38 and has rightly held that for a change in the rate of the item as a whole and not only for the varied work and noted the conduct of the petitioner and the Engineer at the relevant time which would show the intention of the petitioner and the Engineer.

11. The second plea raised by the petitioner is that the Arbitral Tribunal should not have awarded escalation to the respondent. The said plea that the claim of escalation could not be awarded was not specifically taken by the petitioner before the Arbitral Tribunal. Thus, the petitioner cannot be permitted to raise such a plea at this stage.

The settled law in this regard has been recently reiterated by a Division Bench of this Court in the case of ***KEI Industries Ltd. v. D.V.B. and Ors.***, MANU/DE/0852/2012 as under:

“22. There can be no quarrel with the proposition that a plea not taken before the arbitrator cannot be raised in a challenge to the award. (See the decision of the Supreme Court reported as *J.G. Engineers Pvt. Ltd. v Calcutta Improvement Trust* AIR 2002 SC 766 and a decision of a Division Bench of this Court in FAO (OS) No. 27/2007 titled as "*Union of India v TRG Industries Pvt. Ltd.*" decided on 27.10.2009.)”

12. The Arbitral Tribunal has given detailed reasons for allowing the claim of escalation. The same reads as under:

“9.10 As regards the escalation, it is part of the contract and if the market rate at the time of execution of the work are not paid, the escalation has to be paid to compensate the market rate which affects the contract cost. The rates for the aggregate were ascertained in the year 2003 and machinery and equipment rates have been adopted from the Standard Data Book as in the year 2002. Hence, the Claimant is entitled for escalation on the above rates. The average escalation has been worked out by the Claimant as 26.8258% which is consonant with the amount of escalation paid under the contract as per details given in Appendix ‘B’ (Revised) in the Rejoinder and not disputed any time during the hearing. This has not been contested by the Respondent. As such, the amount of Rs.2,86,01,800 i.e. 26.8258% of Rs. 10,66,20,494 towards escalation is considered payable on account of reasons stated hereinabove.”

13. The contract between the parties contains a price adjustment clause, namely clause 47.1. This clause provides that the contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants. As per Clause 47.1, the prices escalation on the variation items is to be paid and the terms of determining the same can be worked out between the petitioner and the respondent. As the petitioner refused to pay the price escalation to the respondent, the respondent was entitled to approach the learned Arbitral Tribunal which awarded the escalation.

14. The relevant portion of clause 47.1 extracted as under:

“47.1 Contract price shall be adjusted for increase or decrease in rates and price of labor, materials, fuels and lubricants in accordance with the following principles and procedures and as per formula given in the contract data.

(a) The Price adjustment shall apply for the work done from the start date given in the contract data upto end of the

initial intended completion date or extension granted by the Engineer and shall not apply to the work carried out beyond the stipulated time of reasons attributable to the contractor.

(b) The Price adjustment shall be determined during each month from the formula given in the contract Data.

(c) Following expressions and meanings are assigned to the work done during each month.

R= Total value of work done during the month. It would include the value of materials on which secured advance has been granted, if any, during the month, less the value of materials in respect of which the secured advance has been recovered, if any during the month. It will exclude value for works executed under variations for which price adjustment will be worked separately based on the terms mutually agreed”.

15. The Arbitral Tribunal has held that the revised rates sought by the respondent were un-escalated in as much as the rates for the aggregate were ascertained in the year 2003 and machinery and equipment rates have been adopted from the Standard Data Book as in the year 2002, whereas the work was executed across the entire duration of the contract. Thus, there is no obvious error in the award of escalation. The contention of the petitioner in this regard cannot be accepted.

16. The contentions of the petitioner in the present objections is that instead of the interpretation arrived at by the Arbitral Tribunal, another interpretation of the contract terms is possible.

Law on this aspect is well settled that even if two interpretations are possible and in case the interpretation given by the Arbitral Tribunal is a possible view, even though the Court may have a different view, the Award

will not be interfered with by the Court under Section 34 of the Act. The Supreme Court in the case of *M/s. Arosan Enterprises Ltd. v. Union of India*, (1999) 9 SCC 449, has held as under:

“39. 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.”

17. It has also been held that an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction. The Hon’ble Supreme Court in the case of *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 has summarized the law on this point, in paragraph 26 of the said judgment, as under:

“26.(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.”

18. Lastly the contention of the petitioner is that the claims were barred by limitation. The submission of the petitioner is that the cause of action for the respondent to initiate arbitration arose on 26th March, 2003 when the variation orders for changes in the quantities of items were issued, therefore the petitioner contends that the period of limitation would have to be counted from 26th March, 2003. As the invocation of the dispute resolution procedure by the respondent was done beyond a period of three years from the aforesaid date, the claims were barred by limitation.

19. The findings of the Arbitral Tribunal in this regard are read who has considered the said plea of the petitioner in detail in the award, and has opined as follows:

“(c) It is thus amply clear that the Engineer had not issued the VOs for the entire quantity but only for additional quantity amounting to 1% of contract price above those in the original BOQ. For the balance quantity he has clearly stated that the same has to be approved by the NHAI and the VO would separately be issued for the same after getting the approval from the Competent Authority. It means that the cause of action did not start on 26.3.2003 as the VOs for the entire quantity had not been issued on 26.3.2003. The Claimant had not agreed to the VOs with only existing rates and wrote to the Team Leader vide his letter dated 20.3.2003 Exh C-18 that the VOs with only existing rates are not acceptable to them as these are prepared by not considering the Clause 38.1 of the GCC making them to forego right for revised rates in such cases and also requested for the review the rate of the VOs.

(d) The Engineer wrote to the Contractor vide his letter dated 3.4.2003 (Exh C-9) to submit revised rates for the BOQ items as per Clause 38.1 for his scrutiny verification and onward submission to the Competent Authority. He again reminded the Contractor vide his letter dated 24.5.2003 to submit the revised rates for BOQ which have exceeded in quantity by 25% or 1% of original contract price as per the provisions of Clause 38.1 of the GCC. Thereafter, the Claimant submitted revised rates vide letter dated 29.5.2003 (Exhibit C-21) for the BOQ item 3.01 – GSB , BOQ item 3.02 – WMM, BOQ item 3.03-PCC with WMM and BOQ item 4.04-DBM stating that the anticipated quantities of above work was exceeding BOQ provision and satisfied Clause 38.1 and Clause 40.2 of General Condition of Contract. The Claimant vide letter dated 9.3.2004 Exhibit C-22) brought out that the revision of rates required in conformity with the provisions of

Clauses 38.1 and 40.2 of GCC has been discussed with CGM (EW) during his site visit at Islampur on 28.2.2004 who instructed all concerned to review and reconsider all such cases and to send all such eligible cases for rate revision to NHAI, New Delhi for necessary approval. Accordingly, the Term Leader was requested by the contractor to process the case of revised of rates to obtain approval from NHAI immediately.

(e) The Team Leader raised certain observations on revised rates submitted by Claimant, vide his letter dated 15.3.2004 (Exhibit C-23). He agreed that there is an increase in GSB quantities (BOQ item 3.01) and PCC with WMM (BOQ item 3.03) which had crossed the threshold limit as specified in Clause 38.1 of GCC, but he expressed that the other items 3.02, 3.03 and 4.04 of BOQ, the revised quantities had not crossed the threshold limit as specified in Clause 38.1. He also raised certain observations and wanted the analysis should be based on latest Standard Data Book of 2003.

(g) The Claimant vide letter dated 20.02.2009 (C-45) informed the Respondent that project has been completed on 30.04.2008 and completion certificate issued by Engineer on 28.08.08 but the revised rates had not been approved till then by the Respondent. The case for approval of competent authority had been sent by the Engineer to HQ NHAI vide letter dated 21.12.2004 (Exh. RD-8, page 129).

(h) In the meantime, not having received any decision from the Engineer, the Claimant vide Letter bearing No. PCL/ND/EW4/2009/7261 dated 30.03.2009 (Exhibit C-46), referred the dispute to the Dispute Review Expert in terms of the provisions contained in condition 24.1 of the Contract. Vide the said letter, the DRE was requested to give his decision within the time frame set out in the said Condition 25.1 of the Contract i.e. within 28 days of receipt of notification of the dispute. As no decision was received from the DRE (During the course of hearing it was also brought out that the DRE was non-existent at that time)

within the time frame stipulated in condition 25.1 of the Contract Agreement and even thereafter, the Claimant referred the dispute for adjudication to arbitration as provided in Condition 25.3 of the Conditions of contract and condition 3 of the Special Conditions of Contract.

(i) The Engineer vide Letter No.SS/99101/378 dated 27.04.2009 (Exhibit C-47), finally conveyed that the competent authority in the NHAI has not agreed with the revision of the rates of GSB, WMM, PCC with WMM and DBM. It is observed by the AT that the revision of rates was turned down by the Respondent on 27.04.2009 after nearly 6 years of submission of the revised rates by the Claimant vide letter dated 29.05.2003 (Exhibit C-21). During that long period, the Engineer asked for the revised rates based on Standard Data Book 2003, the Respondent formed a Committee for revising the rates and forwarding the revised rates to NHAI for approval. The conduct of the Engineer and the Respondent shows that the Claimant's request for revision of rates had remained under consideration of the Respondent for a very long time from 29.05.2003 to 27.04.2009. Since the present dispute was undeniably under consideration by the Respondent, the limitation for arbitration cannot be deemed to have commenced before the date of issuance the Letter dated 27.04.2009 (Exhibit C-47).

(j) The cause of action did not start on 26.3.2003 as stated by the Respondent in view of the fact that the VOs for the entire increased quantity was not issued on 26.3.2003. The Engineer issued VO for a small additional quantity with a specified statement that the case for the increased quantity would be separately sent to the competent authority for their approval. Final rejection of the proposal for revised rates came only on 27.4.2009 and the cause of action accrues on this date. Therefore, it is clear that the limitation for the case starts not from 26.3.2003 but from 27.4.2009. The case was to be referred to the DRE before 11.5.2009 and in this period, the DRE was non existent; as such processing the

case through the pre-arbitration mechanism was not possible.

(k) Moreover, the contractor's final bill was not paid by then and as per GCC clause 57.1 the contractor is entitled to claim the total amount that it considers payable under the Contract before the Defect Liability Period. This in other words means that the amount for the disputed items, if not claimed earlier, can be claimed by the Contractor up to the end of Defect Liability Period and the case would become time barred after a period of three years thereafter."

20. On reading of the findings of the Arbitral Tribunal it would disclose that the arguments of the petitioner on the issue of limitation are without any force, as there is a finding of fact by the Arbitral Tribunal that the Variation Orders for the entire increased quantity were not issued on 26th March, 2003, and yet further the issue as to the revision of the rates was under the active consideration of the respondent for a very long time from 29th May, 2003, to 27th April, 2009, as the respondent had formed a Committee for revising the rates and forwarding the revised rates to NHAI for approval, and the respondent had also appeared before the Committee in an attempt to amicably resolve the issue. The respondent rejected the proposal for revised rates only on 27th April, 2009, and therefore the contention of the petitioner is that the cause of action began on 26th March, 2003, cannot be accepted. It is settled law that when the parties are actively trying to resolve the disputes, then the cause of action for resorting to arbitration cannot be said to have commenced. In this regard, the Hon'ble Supreme Court has held in the case of *Hari Shankar Singhania and Ors. v. Gaur Hari Singhania and Ors.*, (2006) 4 SCC 658, as under:

“21. Where a settlement with or without conciliation is not possible, then comes the stage of adjudication by way of arbitration. Article 137, as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/arbitration even where there is serious hope of the parties themselves resolving the issues.”

The said principle was further reiterated by the Hon’ble Supreme Court in the case of *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599 wherein it was held that if the disputes under a contract are under negotiation or consideration, then the limitation for arbitration purpose would be deemed to not have commenced.

21. Even otherwise, Clause 57.1 of the contract between the parties permits the respondent to demand any amount it considers payable under the Contract up to the end of the Defect Liability Period in its ‘final statement’ and the present claim was raised before the submission of the final statement by the respondent. Clause 57.1 of the contract is as under:

“57 Final Account

57.1 The Contractor shall supply to the Engineer a detailed account of the total amount that the Contractor considers payable under the Contract before the end of the Defects Liability Period. The Engineer shall issue a Defect Liability Certificate and certify any final payment that is due to the Contractor within 56 days of receiving the Contractor’s account if it is correct and complete. If it is not, the Engineer shall issue within 56 days a schedule that states the scope of the corrections or additions that are necessary. If the Final Account is still unsatisfactory after it has been resubmitted, the Engineer shall decide on the amount payable to the Contractor and issue a payment certificate, within 56 days of receiving the Contractor’s revised account.”

Clause 57.1 provides that the intention behind the final bill is to avoid a situation where for each minor dispute or difference which may arise at different stages of the contract, the parties are forced to immediately invoke arbitration with the result that by the time the work is completed multiple arbitrations would already be ongoing between the parties. In a similar vein, a learned Single Judge of this Court in the case of *M/s. Naraindas R. Israni v. Union of India*, AIR 1993 Delhi 78 has also taken the view that the right to recover the claims survives till the stage of the final bill, and has held in this regard as under:

16. ...I am supported in my above view by the observations of P. C, Mallick, J, as made in AIR1963Cal 277, *M. L. Dalmiya and Co. v. Union of India*.... "If any payment is made on a running bill, such sum will be deducted from the final bill as being an advance payment on account of the final bill. If one or more of the running bills submitted by the contractor has or have not been paid and the cause of action for the realization of the same has become time barred due to the passage of time, nevertheless, the contractor will be entitled to recover the same as a part of the final bill. Failure to pay the final bill constitutes a new cause of action and the starting point of limitation for payment will arise from the date of default in the payment of the final bill."

22. In view of the aforesaid, it is apparent that the issue of limitation has become a mixed question of law and facts for the abovementioned reasons and as per Clause 57.1, if read in meaningful manner. The finding of the Arbitral Tribunal cannot be interfered in view of settled law on this aspect.

23. The Supreme Court, in the similar situation, has held in the case of ***Maharashtra State Electricity Board v. Sterilite Industries (India) and Anr.***, (2001) 8 SCC 482, as under:

“9. the arbitrator's award both on facts and law is final; that there is no appeal from this verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it.”

24. It is settled law and not necessary to repeat that the Court is not expected to sit in appeal over the findings of the Arbitral Tribunal or to re-appreciate evidence as an appellate court. Even if the additional grounds under Section 34 of the Act, as laid down by the Supreme Court in the case of ***Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.***, AIR 2003 SC 2629 are considered, which are patent illegality arising from statutory provisions or contract provisions or that the award shocks the conscience of the Court, no such facts are narrated in the petition. The endeavor of the petitioner is thus to convert the challenge to the arbitral award into an appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence, and which endeavor as per the consistent dicta of the Supreme Court is impermissible in law. A recent observation of the Supreme Court in the case of ***P.R. Shah, Shares and Stock Brokers Private Limited vs. B.H.H. Securities Private Limited and Others***, (2012) 1 SCC 594, is apposite in this regard and is reproduced as under:

“21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-

examine the facts to find out whether a different decision can be arrived at”.

25. The Supreme Court has further expounded the said scope in the case of *Markfed Vanaspati and Allied Industries v. Union of India*, (2007) 7 SCC 679, wherein it was observed as under:

“17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honour and support the award as far as possible”.

26. The limited scope of interference under Section 34 of the Act has also been succinctly elucidated by a Ld. Single Judge of this Court in the case of *Bhagwati Contractors v. Union of India (UOI) and Anr.* 2009 Indlaw Del 3647 wherein it was held as under:

“7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand the decision under review only may be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is

found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.”

27. In view of the abovementioned reason, the findings of the learned Arbitral Tribunal are on the basis of facts and interpretation of various clauses of the contract. The Arbitral Tribunal has given valid reasons by discussing the relevant clauses of the contract. The objections, thus, are without any merit and are dismissed.

28. No costs.

(MANMOHAN SINGH)
JUDGE

MAY 19, 2014