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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.500 OF 2010

M/s.Valecha Engineering Limited &
M/s.AMA Private Limited (Consortium)
having their Office at Valecha
Chambers, 4th Floor, Plot No.6,
Andheri New Link Road,
Andheri (West), Mumbai – 400 053.

...Petitioner

...Versus...

Airports Authority of India (I.A.D.),
a statutory Corporation of the
Government of India, having their
office at Mumbai Project,
Santacruz, Mumbai – 400 099.

...Respondent

Mr.D.B. Singh with Ms.Manali Khut i/b Mr.Sudheer Phadke for the
Petitioner.

Mr.Gaurav Joshi with Ms.Lopa Munim and Ms.Shubhada Salvi i/b
Rajesh Kothari & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 17TH JULY, 2015
PRONOUNCED ON : 8TH SEPTEMBER, 2015.

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the said Act), the petitioner has impugned the arbitral award dated 24th September, 2009 and supplementary award dated 3rd November, 2009 made by the learned arbitrator rejecting some of the claims made by the petitioner. Some

of the relevant facts for the purpose of deciding this petition are as under :-

2. Sometimes in the year 2002, the petitioner invited tenders for the work of re-surfacing of main runway 09/27 at C.S. International Airport, Mumbai at an approximate estimate of Rs.14.00 crores. The petitioner submitted its tender on 15th November, 2002. The respondent accepted the petitioner's tender on 6th January, 2003 and issued Detailed Acceptance Letter on 8th January, 2003. under the said agreement, the time for completion was to be 150 days reckoned from 6th January, 2003. The stipulated date of completion of the work was 4th June, 2003. The value of the work as per accepted tender was Rs.9,79,44,000/-.

3. The respondent granted extension of time to the petitioner upto and including 25th June, 2003. It is the case of the petitioner that the petitioner completed the said work on or before the extended period and executed more than double the original accepted value of work, including various extra items, extra quantities, substituted items etc. as ordered by the respondent from time to time.

4. The dispute arose between the parties. The respondent appointed the learned arbitrator. Pursuant to the liberty granted by the learned arbitrator, the petitioner submitted the statement of claim and made about 27 claims before the learned arbitrator. The claims made by the petitioner were opposed by the respondent by filing the written statement. None of the parties led any oral evidence before the learned arbitrator.

5. On 24th September, 2009, the learned arbitrator rendered

an arbitral award and allowed few claims made by the petitioner and rejected substantial part of the claims. The petitioner has impugned the entire award in the present proceedings. The respondent has not impugned any part of the award allowing some of the claims made by the petitioner.

6. Learned counsel appearing for both the parties have addressed this court on some of the claims, which were pressed by the petitioner across the bar and were forming part of the grounds raised in the petition. I will deal with those claims which are rejected by the learned arbitrator and which are pressed by the petitioner and submissions are made thereon claim-wise.

7. It is submitted by the learned counsel for the petitioner that though the written arguments were filed by the petitioner on 18th April, 2007 before the learned arbitrator, the impugned award has been rendered on 24th September, 2009, which is after more than 29 months and on the ground of this gross delay committed by the learned arbitrator, the award rendered by the learned arbitrator deserves to be set aside. He submits that the learned arbitrator ought to have delivered speedy justice to the parties, whereas the award has been rendered after gross delay. He submits that though this ground is not raised by the petitioner in arbitration petition, in the interest of justice the petitioner should be allowed to urge this ground across the bar. Learned counsel for the petitioner placed reliance on the following judgments of the Supreme Court :-

- (1) In case of **R.C. Sharma vs. Union of India and others** **(1976) 3 SCC 574** and in particular paragraph 12.

(2) In case of **Bhagwandas Fatechand Daswani and others vs. HPA International and others (2000) 2 SCC 13** and in particular paragraph 3.

(3) In case of **Anil Rai vs. State of Bihar (2001) 7 SCC 318** and in particular paragraphs 9 and 10.

8. In reply Mr.Joshi, learned senior counsel for the respondent submits that the petitioner cannot be allowed to urge this ground across the bar in view of the petitioner not having raised the same in the arbitration petition. He submits that in any event, no prejudice is caused to the petitioner due to the alleged gross delay on the part of the learned arbitrator in rendering the arbitral award. In support of this submission, learned senior counsel for the respondent placed reliance on the following judgments :-

(1) The judgment of this Court in case of **Shakeel Ahmed Fateh Mohd. Sundke vs. Aziz Ahmed Khan, 2008 (6) Mh.L.J. 418** and in particular paragraph 14.

(2) The judgment of Supreme Court in case of **Ketki Research Institute of Medical Sciences Ltd. and others vs. Dr. Ashok P. Arbat, 2007 SCC OnLine Bom. 1145** and in particular paragraph 11.

9. It is not in dispute that the petitioner has not raised this ground in the arbitration petition for setting aside the impugned award on the ground of alleged gross delay on the part of the learned arbitrator, the petitioner thus cannot be allowed to urge this ground across the bar. Be that as it may, the petitioner is not able to

demonstrate any prejudice alleged to have been caused to the petitioner in view of the alleged gross delay on the part of the learned arbitrator in rendering the impugned award. I am thus not inclined to permit the petitioner to raise this ground across the bar and thus this submission of learned counsel for the petitioner is rejected.

Claim No.2 : P/L BM using CRMB-55 :

10. The petitioner had made this claim due to the difference in rate on the ground that the petitioner had used different quality of bitumen and was thus entitled to a different rate and not the schedule rate. Learned counsel for the petitioner states that though the petitioner had used different quality of bitumen, the learned arbitrator has rejected this claim and has rendered a perverse finding of fact and thus this part of the award is contrary to the terms of the contract and deserves to be set aside.

11. Mr.Joshi, learned senior counsel for the respondent on the other hand supported the findings rendered by the learned arbitrator. It is submitted that the petitioner had accepted the difference in the rate for the work carried out. In the final bill sanctioned, the said work carried out by the petitioner was not considered as a different item. He submits that in any event in view of the provisions of contract at page no.527, the petitioner could claim reimbursement of the difference on production of voucher which the petitioner had failed. He submits that the petitioner had made this claim for the price difference only after eight months of completion of work and the same was afterthought. It is submitted that the finding of fact rendered by the learned arbitrator is not perverse and thus no interference is permissible.

12. A perusal of the award indicates that the difference in price of bitumen as per the actual area laid at site was already paid by the respondent to the petitioner and the same was accepted by the petitioner without any protest. As per provisions of the contract, the petitioner did not produce any documents in respect of this claim for the quantity of 487 Cum of BM laid with CRMB 55 bitumen, despite the direction of the learned arbitrator. On the contrary the respondent had produced the document in support of the actual qualities of bitumen laid with CRMB 55.

13. The learned arbitrator has also considered the minutes of various meetings and the correspondence between the parties, in which it was clarified to the petitioner that the cost difference of CRMB and the ordinary bitumen would be paid. The petitioner never objected to the same either in the meetings or in any other manner while carrying out the work or even till the expiry of eight months from completion of work. The petitioner had demanded only the difference in price of bitumen.

14. Insofar as the rates demanded by the petitioner is concerned, the learned arbitrator has rendered a finding that the analysis of rates submitted by the petitioner was not based on any basis in respect of the material and labour component, market rate of CRMB 55, higher charges of machines and mix design charges etc. and all were on higher side. The learned arbitrator had also considered the fact that the claim was made after expiry of eight months of completion of such work and accordingly rightly rejected the claim of the petitioner.

15. The learned arbitrator also considered the contract

condition on page no.529 and footnote, para 2 for all bituminous item which stipulated that where ever the Engineer In-charge specifies the use of rubber/polymer modified bitumen, the difference in the price of modified bitumen and bulk bituminous shall be adjusted on production of vouchers and nothing extra shall be paid.

16. In my view the learned arbitrator has referred to all the relevant correspondence between the parties and has rendered a finding of fact that the petitioner was not eligible to make this claim in accordance with the terms and conditions of the contract and the claim was made after expiry of eight months from the date of completion of work. The learned arbitrator has also interpreted the contract of work on page no.529, footnote para 2, while rejecting this claim made by the petitioner. In my view the finding of fact rendered by the learned arbitrator is not perverse. The interpretation of contract by the learned arbitrator is a possible interpretation and cannot be substituted by another interpretation by this court. In my view the claim of the petitioner was afterthought and has been rightly rejected by the learned arbitrator for various reasons recorded by the learned arbitrator. In my view, the challenge to this claim by the petitioner is devoid of merits and thus this part of award is upheld.

Claim No.3 : SDAC with CRMS 60 :

17. Both the learned counsel for the parties have submitted that this claim was identical to claim no.2 and have reiterated their submissions made on claim no.2 for this claim.

18. A perusal of the award indicates that the learned arbitrator has rejected this claim also based on similar findings rendered in respect of claim no.2. I have already upheld the award in respect of

claim no.2 for the reasons recorded aforesaid. The said reasoning would also apply in respect of claim no.3. The award in respect of claim no.3 is accordingly upheld.

Claim No.5(a) : For providing and laying DAC using CRMB-60:

19. Learned counsel for the petitioner states that though the learned arbitrator had rendered a finding that the petitioner had laid 7083 Qmte of DAC with CRMB-60 which was only slightly less than the quantity claimed by the petitioner, the learned arbitrator has rejected the entire claim.

20. Mr.Joshi, learned senior counsel for the respondent on the other hand supported the findings rendered by the learned arbitrator and submits that the findings of the learned arbitrator are not perverse. The petitioner had failed to produce any evidence before the learned arbitrator in support of this claim and the same was thus rightly rejected by the learned arbitrator.

21. A perusal of the award indicates that the learned arbitrator has referred to various letters relied upon by the petitioner and found the same as irrelevant and has rejected the said claim on the ground of lack of evidence. The petitioner did not make this claim till completion of work and upto 29th April, 2004. In my view, the claim made by the petitioner was as and way of afterthought and was based on no evidence. The learned arbitrator has thus rightly rejected the said claim. The findings rendered by the learned arbitrator are not perverse and cannot be interfered with in the present proceedings.

Claim No. 8 : Difference in rate of HDD for laying HDPE pipe in rocky strata :

22. The petitioner had made this claim on the ground that HDPE pipe were to be laid by the petitioner by HDD method, including all operation, but the item was silent about the type of soil in which the horizontal drilling was required to be done. The learned counsel for the petitioner invited my attention to some of the correspondence exchanged between the parties and submits that the respondent had recommended matching of a particular specification to the petitioner for carrying out the operation of the said item. The decision of the respondent in the minutes of the meeting held on 27th February, 2003 that no extra items would be paid was disputed by the petitioner on 4th March, 2003. The petitioner also disputed the correctness of item no.8. He submits that the petitioner had though submitted the rate analysis on 21st March, 2003, the respondent however had kept the decision pending.

23. Learned counsel for the petitioner submits that on 14th May, 2003 the petitioner had submitted quotations from M/s.Michigan Engineers (P) Ltd. and from M/s.S.N. Mathur & Co. The work was carried out by the said two agencies on behalf of the petitioner. The petitioner vide its letter dated 16th May, 2003 had placed on record that the work was carried out by the petitioner at the instance of the respondent and called upon the respondent to finalize the rates. On 20th May, 2003, the respondent informed the petitioner that the rate payable to the petitioner was being worked out. On 6th July, 2003, the respondent rejected the claim made by the petitioner. On 25th June, 2003, the petitioner completed the work. On 14th July, 2003, the petitioner submitted its invoices to the respondent.

24. On 6th November, 2003, the respondent appointed a Committee. The petitioner appeared before the said Committee. The

Committee was of the opinion that the work carried out by the petitioner was not extra work. Learned counsel for the petitioner submits that the report of the Committee was not binding on the petitioner. It is submitted that since the respondent did not stop the petitioner from continuing extra work at the rates quoted by the petitioner, the rates quoted by the petitioner were deemed to have been accepted. He submits that there could not be any conditional acceptance of the offer made by the petitioner. In support of this submission, learned counsel for the petitioner placed reliance on the following judgments :-

- (1) **Hyderabad Municipal Corporation vs. M. Krishnaswami Mudaliar and Mudaliar and another, (1985) 2 SCC 9** and in particular paragraphs 1 and 2.
- (2) **Food Corporation of India and another vs. Ram Kesh Yadav and another, (2007) 9 SCC 531** and in particular paragraph 12.
- (3) **Bharat Petroleum Corporation Ltd. vs. Great Eastern Shipping Co. Ltd., (2008) 1 SCC 503** and in particular paragraphs 19 and 20.

25. Mr.Joshi, learned senior counsel for the respondent on the other hand submits that in the description of the bill of quantity no.7, noted particular type of strata was provided. It is submitted that the petitioner was advised to inspect and examine the site and its surroundings as per the tender documents, stipulated dates, page 311 of the agreement before submitting the tenders so as to assess the nature of ground/e-soil/nature of site/access to the site and

circumstances which might influence the tender. He submits that the rates quoted by the petitioner were inclusive of all such contingencies.

26. It is submitted by the learned senior counsel that the petitioner had appeared before the Committee and had made the submissions. The Committee had not agreed to the contention of the petitioner and did not recommend for revision of rate accordingly. He submits that the petitioner thus cannot be allowed to urge that the petitioner was not concerned with the recommendation of the Committee. He submits that the learned arbitrator has rendered various findings of fact and has allowed the extra rate over the agreement in item no.7 and has allowed this claim at Rs.68,80,378/-. He submits that the learned arbitrator has taken a reasonable view in the matter and the finding of the learned arbitrator being not perverse, this court cannot re-appreciate the evidence.

27. In rejoinder, the learned counsel for the petitioner submits that the respondent itself has considered the item as extra item and did not accept the recommendation of the Committee. He submits that the learned arbitrator has not considered the rates for extra items properly and ought to have allowed the claim in *toto* as claimed by the petitioner.

28. A perusal of the contract document clearly indicates that the petitioner was advised to inspect and examine the site and its surroundings before submitting the tender so as to assess the nature of ground/e-soil/nature of site/access to the site and circumstances which might influence the tender. It was provided in the contract that the rates quoted by the tenderers were concluded and inclusive of all such contingencies. A perusal of the record indicates that the

respondent had already rejected the claim of the petitioner as extra item on the ground that the petitioner was aware of the fact that the petitioner had to carry out drilling in all type of strata at the rate quoted by it. The learned arbitrator has observed that since the respondent was unable to reach to a final calculation for deciding the rates for this item and since lot of correspondence and meetings had taken place between the parties for revision of rates of this item., the E.D. (Engineering) had constituted a Committee comprising of three members i.e. DGM (Engineering) General Manager (Str.), Incharge, Head of Str. Engineering Department, VJTI and GM (Engineering) as Chairman of Committee.

29. The said Committee after giving opportunity to the parties did not agree to the contention of the petitioner that rock drilling was done actually at site and did not recommend revision of the rate due to various reasons recorded in the said report. The learned arbitrator has recorded that the petitioner had admitted that strata below run way, was of varying nature. The respondent released a sum of Rs.68,80,378/- which was inclusive of extra rate over the agreement item no.7 in the final bill. The learned arbitrator has found that the said payment was in order and rightly rejected the larger claim. In my view the finding rendered by the learned arbitrator is based on the pleadings and documents filed by both the parties and the same being not perverse, this court cannot interfere with such finding of fact. A perusal of the record indicates that though the Committee did not recommend any revision of rate, the respondent still considered the extra rate over the schedule rate. The learned arbitrator has accepted the said payment as reasonable. In my view, there is thus no merit in the submission of the learned counsel for the petitioner and the award in respect of this claim is upheld.

30. Insofar as the judgments relied upon by the learned counsel for the petitioner in support of the submission that the respondent not having denied the rate demanded by the petitioner and accepted the work carried out by the petitioner is concerned, a perusal of the record indicates that the respondent had rejected the claim made by the petitioner. The judgments relied upon by the learned counsel for the petitioner thus does not assist the case of the petitioner.

Claim No.11 : Extra work for conducting PC & N test in 7 lanes instead of 5 lanes:

31. The petitioner made this claim for conducting PC & N test in 7 lanes. Learned counsel for the petitioner submits that though the petitioner had carried out the said test for seven lanes, the respondent had paid to the petitioner only in respect of such test for five lanes. He submits that the said two extra tests were carried out on the instructions of the respondent and thus the respondent was liable to pay for the said two extra tests. The learned arbitrator has erroneously rejected the said claim for two extra tests.

32. Learned senior counsel for the respondent on the other hand submits that the respondent had never instructed the petitioner to carry out the two extra tests. The petitioner had carried out the tests in five lanes and had submitted its reports in respect of which the respondent had already made payment to the petitioner. He submits that the learned arbitrator has rendered a finding of fact that nothing prevented the petitioner in submitting the reports for the test in seven lanes along with the report submitted for five lanes, if any

such extra test was carried out by the petitioner. He submits that no interference with such finding of fact is permissible.

33. A perusal of the award indicates that the petitioner could not produce any record before the learned arbitrator that the petitioner had conducted PC & N test in seven lanes instead of five lanes and that also on instructions of the respondent. The respondent had refuted this claim on the ground that no such instructions were issued by the respondent either in writing or verbally. Even the alleged test reports in respect of two additional lanes were submitted much after completion of work.

34. A perusal of record indicates that though the work was completed on 25th June, 2003, the petitioner had made this claim on 1st December, 2003. The petitioner could not produce any instructions before the learned arbitrator from the respondent in writing for carrying out test in two additional lanes. The petitioner also could not prove any alleged oral instructions from the respondent to carry out those two tests in additional lanes.

35. A perusal of the award indicates that there was inconsistency in the statement of claim and in the submission advanced before the learned arbitrator about the distance at which the petitioner had alleged to have carried out the additional PC & N tests. The learned arbitrator has accordingly rendered a finding that the petitioner was not even aware of the exact location of PC & N test. It is also held that if according to the petitioner, the said PC & N test was conducted on seven lanes in June 2003, the petitioner should have submitted a report for additional two tests along with the report submitted on 4th August, 2003 for five lanes. It is held that the

copies of PC & N test for additional two lanes were submitted by the petitioner only on 9th January, 2004 i.e. almost six months after completion of the said work. It is held that there was nothing on record in writing which could substantiate that the directions were given by the respondent for conducting the test for two additional lanes.

36. In my view, the finding rendered by the learned arbitrator is based on the pleadings and documents filed by the parties. The petitioner had failed to prove the additional tests alleged to have been carried out on the instructions of the respondent. In my view the claim was as and by way of afterthought and was made much after completion of work. The finding of the learned arbitrator that the petitioner should have submitted report for additional two lanes along with the reports submitted for five lanes, is a correct and not a perverse finding and thus cannot be interfered with. The challenge to this part of award is thus devoid of merits and is upheld.

Claim No.19 : Extra for using vibratory rollers :

37. The petitioner had claimed this amount on the ground that the petitioner had deployed five additional vibratory rollers. He submits that the deployment of five additional vibratory rollers was due to site requirement and thus the respondent was liable to pay for the said extra work.

38. Mr.Joshi, learned senior counsel for the respondent on the other hand submits that as per quality requirement, the petitioner was required to deploy minimum two numbers of vibratory roller or bituminous works as per paragraph 2(vi)(A)(c) of the agreement. Learned senior counsel invited my attention to the undertaking

referred by the learned arbitrator in the impugned award rendered by the petitioner by which the petitioner had confirmed that the petitioner would deploy minimum machinery asked in the short listing notice of the work and other machinery and equipment for completion of work in time. It is submitted that the petitioner never claimed for such alleged extra work during the currency of contract and only by way of afterthought, the petitioner demanded this amount by its letter dated 22nd April, 2004 i.e. after expiry of nine months from the date of completion of work. He submits that the respondent accordingly rightly rejected the said claim. It is submitted that the learned arbitrator has rendered a finding of fact which is not perverse and cannot be interfered with.

39. A perusal of the award indicates that the petitioner had given an undertaking while submitting the tender and confirmed that the petitioner would deploy minimum machinery asked in the sort listing notice of the work and other machinery and equipment for completion of work in time. The learned arbitrator has interpreted the terms of the contract has held that the rates quoted by the petitioner were for finished item of work which did not attract any additional equipment deployed by the petitioner to carry out work as per specification. The learned arbitrator has also referred to the minutes of the meeting held on 27th February, 2003 recording that the petitioner was made clear that the rates quoted by the petitioner was for finished project and no extra cost would be paid on account of deployment of the additional equipments.

40. A perusal of the award also indicates that this position is not disputed by the petitioner that the petitioner had made this claim only after expiry of nine months from the date of completion of work

and was by way of after-thought. In my view in these circumstances the learned arbitrator has considered the pleadings and documents on record and has rendered a finding of fact which is not perverse and cannot be interfered with. The learned arbitrator has also interpreted the terms of the contract and has held that the rates quoted by the petitioner were of finished item of work and it did not attract any extra payment for additional equipment deployed by the petitioner to carry out work as per specification. In my view the challenge to this part of award is totally devoid of merits and is accordingly rejected. This part of award is accordingly upheld.

Claim No.20 : Abandonment of bore due to non available of NOTAM :

41. The petitioner had made this claim in respect of three bore holes alleging that the complete bore holes of 135 mtrs. had to be abandoned because of collapse due to impact of aircraft movement on runway 09/27. Learned counsel for the petitioner submits that there was no delay on the part of the petitioner in carrying out the work.

42. Learned senior counsel for the respondent on the other hand submits that there was no provision in the contract agreement for payment of abandonment of bore holes. He submits that the petitioner was solely responsible for the gross delay in completion of the work. He submits that the learned arbitrator has considered several documents in the impugned award while considering his claim and has rendered the findings of fact which cannot be interfered with by this court.

43. A perusal of the award indicates that there is no provision

in the contract for payment of abandonment of bore holes. The respondent had clarified that NOTAM was available upto 07.06.03 and the petitioner was aware of the availability of NOTAM but could not complete the work during the NOTAM period. The petitioner had also not informed the respondent about the abandonment of bore holes and did not obtain any consent of the respondent. A perusal of the record indicates that the learned arbitrator has dealt with the correspondence entered into between the parties and has rendered a finding of delay in completion of the said work by the petitioner and that if the petitioner would have taken timely action, the said item of work could have been completed within the NOTAM period. It is held that all those three bore holes which had been abandoned were of no use and the total performance was defeated. The learned arbitrator therefore rightly rejected the said claim. In my view the findings of fact rendered by the learned arbitrator are not perverse and cannot be interfered with. This part of the claim is accordingly upheld.

Claim No.22 : Claim for Bonus :

44. The petitioner had made a claim for bonus for 264 days, including for a period of five days on the ground of earlier completion of work i.e. for the period 30.06.03 to 25.06.03. Learned counsel for the petitioner submits that under the provisions of the contract, the petitioner was eligible to claim bonus if the work was complete before the stipulated date of completion. He submits that due to gross delay on the part of the respondent, the petitioner could not complete the work 264 days prior to the date of stipulated period. He submits that if there would not have been any delay on the part of the respondent, the petitioner could have completed the work 264 days prior to the date of completion and was thus eligible for bonus for the said period. He submits that in any event, the learned arbitrator has rejected the

claim also for five days which were claimed by the petitioner for the early completion of the work.

45. Learned senior counsel for the respondent on the other hand submits that the original date of completion was 6th June, 2003. The petitioner delayed the completion of work by 21 days and was solely responsible for the delay. He submits that the learned arbitrator has rendered a finding of fact that the petitioner was responsible for the gross delay and therefore the claim for bonus was totally untenable and frivolous. He submits that the learned arbitrator has rightly rejected the claim for bonus also in respect of five days claim for the alleged earlier completion of work. He submits that the period of contract was extended by the respondent at the request of the petitioner. It is submitted that the learned arbitrator has rendered a finding of fact that the petitioner had delayed completion of work by 21 days which was on account of hindrance faced by the petitioner during the execution of the work and accordingly extension of time was generated by the respondent upto and inclusive of 25th June, 2003, without levy of compensation.

46. A perusal of the record indicates that the learned arbitrator after considering the correspondence exchanged between the parties has rendered a finding that the petitioner could not complete the work and there was delay of 21 days in completion of work. The learned arbitrator has held that the extension of time was accordingly generated by the respondent upto and inclusive of 21 days without levy of compensation. The learned arbitrator also noticed that the petitioner had revised its claim for bonus from time to time and calculation of number of days were misleading. It is held that the claim of the petitioner was not consistent and the claim was only after

thought and not a genuine claim. In my view since the petitioner was held responsible for the delay, the claim for bonus has been rightly rejected by the learned arbitrator. The findings of fact rendered by the learned arbitrator are not perverse and thus cannot be interfered with. The challenge to this part of the award is without merits and is accordingly rejected.

Claim No.24 : Recovery of amount for abandonment of bore hole :

47. The petitioner had made this claim for recovery of the amount deducted by the respondent for abandonment of bore hole for Rs.6,10,000/-. It was the case of the petitioner that the petitioner could not lay HDPE pipes as per item due to failure of drilling operation at the location I and III and left the holes below the active runway as it was for a period of more than one month without refilling the holes with suitable material such as concrete or any other material. The petitioner could not take any action to re-verify the drilling holes. It was the case of the respondent that since the petitioner did not arrange concrete pump and instead of that it simply poured the material and closed only the opening of bore hole and since the monsoon/rain was already started, the respondent had to take necessary action. In view of the operation requirement the bore holes were to be closed by grouting with concrete material and had got the work done through some other agency and incurred the expenses of Rs.6,10,000/- on the said work. Learned senior counsel for the respondent submits that the said recovery by the respondent was justified and the finding of fact rendered by the learned arbitrator cannot be interfered with by this court.

48. Learned counsel for the petitioner in rejoinder however submits that the respondent had not produced any proof in respect of the alleged expenditure of Rs,6,10,000/- and the learned arbitrator has allowed the said claim without evidence.

49. A perusal of the record indicates that the learned arbitrator has rendered findings of fact after considering the pleadings and documents. In the affidavit in reply filed by the respondent and in particular paragraph 22, the respondent has alleged that during the course of hearing, the entire file pertaining to the award of work to M/s.Michigan Engineers (P) Ltd. was shown to the learned arbitrator. The learned arbitrator has after perusing the entire file was satisfied of the said work awarded and the expenses incurred. Learned senior counsel for the respondent invited my attention to the rejoinder filed by the petitioner and submits that there was no denial to this averments made by the respondent in paragraph 22. In my view, this court cannot re-appreciate the evidence considered by the learned arbitrator, the correctness of which was not disputed by the petitioner. There is thus no merit in the submission of the learned counsel for the petitioner and the award in respect of this claim is accordingly upheld.

Claim No. 26 : Claim for less payment received in RA Bill due to less quantity recorded:

50. The petitioner had made a claim for interest on the alleged less amount paid by the respondent by recording measurement in the RA Bills in respect of three items. The petitioner also claimed difference in quantities produced by them at plant and brought to site on the basis of its challan etc. Learned counsel for the petitioner submits that since there was major difference in the quantities

recorded by the respondent in RA Bills, the respondent had not made payment for the quantity of work actually done and the learned arbitrator thus ought to have allowed the said claim. He submits that there is inconsistency in the findings rendered by the learned arbitrator.

51. Learned senior counsel for the respondent on the other hand submits that the contract entered into between the parties provided for mode of measurement of the work done. The respondent has paid to the petitioner for the quantity measured in accordance with the said mode of measurement. He submits that since the petitioner did not submit running account bill, the respondent had prepared seven running account bills and five advance bills and had paid the same to the petitioner. The respondent had also paid two bills in respect of cost difference of bitumen. He submits that the measurement for bituminous item were based on 11 computation as per the mode of measurement specified in specification of bituminous items. It is submitted that the petitioner had checked and verified the quantities recorded by the respondent in running account bills and also final bill.

52. A perusal of the record indicates that the petitioner had not disputed that since the petitioner did not submit running account bill, the same were prepared by the respondent including advance bill and two bills in respect of cost difference of bitumen and were paid to the petitioner. The learned arbitrator has rendered a finding that the petitioner was not clear in its mind about the claim made by the petitioner. The learned arbitrator has found inconsistency in the claim made in the statement of claim and in the argument advanced before the learned arbitrator. On one hand, the petitioner had claimed

interest on the alleged less amount paid by the respondent and on the other hand it made the alleged claim less the quantity recorded in the measurement books. The learned arbitrator has rendered a finding that all the exhibits produced by the petitioner were totally irrelevant. In my view the findings rendered by the learned arbitrator are proper and not perverse and thus no interference with such finding of fact is permissible. This part of the award is accordingly upheld.

Claim No.27 : Interest on delayed payment :

53. Learned counsel for the petitioner states that there was delay in payment of four running account bills i.e. RA Bill Nos. 8 to 11 and thus the learned arbitrator ought to have awarded interest on delayed payment of running account bills. He submits that the payment under the final bill was released on 19th April, 2004. The respondent was liable to make payment within six months. There was however gross delay in making payment and thus the respondent was liable to pay interest.

54. Learned senior counsel for the respondent on the other hand submits that under clause 8(1) of the Conditions of Contract, it was obligatory on the part of the petitioner to submit running account bills. He submits that since the petitioner did not submit monthly bills, the respondent was required to prepare those bills and had made payment to the petitioner from time to time. It is submitted that the respondent had prepared seven running account bills and five advance bills and had paid to the petitioner. The respondent had also paid for two other bills in respect of the cost difference of bituminous items. It is submitted that the petitioner was paid 14 times various amounts in 150 days. It is submitted by learned senior counsel for the respondent that the petitioner never made this claim during the

currency of the contract and had made only after the appointment of the learned arbitrator. No notice was given by the petitioner to the respondent that due to the alleged delay on the part of the respondent, the petitioner would charge interest.

55. A perusal of the award indicates that it is not in dispute that the obligation to prepare the running account bills as well as final bill was of the petitioner. It was not the case of the petitioner that the respondent had directed the petitioner not to prepare any running account bills or final bill. The petitioner was paid various payment under the running account bills from time to time in 150 days. It was the case of the respondent that the petitioner had submitted computation of quantities of bituminous only on 17th November, 2003 and even in the absence of such bills, the respondent had released various payments to the petitioner.

56. Learned arbitrator has held that the petitioner had submitted the levels computation of quantities of bituminous items in full respect only on 17th November, 2003 which resulted in delay in release of payments. It is held that the delay in making payment in respect of extra items was in view of the report of the Committee. A perusal of the award indicates that the learned arbitrator has also rendered a finding that the petitioner had never made this claim during the currency of the contract and had made only for the first time after the appointment of the learned arbitrator. This claim was not even demanded in the notice invoking the arbitration or in any other correspondence prior to the date of appointment of the learned arbitrator.

57. In my view since the petitioner never submitted any

running account bills, the respondent was required to prepare the running account bills. Various details which were required to be submitted by the petitioner, were not submitted on time which resulted in payment of running account bills delayed. The respondent was not responsible for such alleged delayed payment. In my view the findings of fact rendered by the learned arbitrator are not perverse and thus no interference with such findings of fact is permissible. The award in respect of this claim is accordingly upheld.

58. Mr.Joshi, learned senior counsel for the respondent has placed reliance on the judgment of the Supreme Court in case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49** and in particular paragraphs 33 and 34 and submits that the findings of fact which are not perverse, cannot be interfered with by this court while deciding the petition under section 34 of the Arbitration Act. In my view the said judgment squarely applies to the facts of this case. I am respectfully bound by the said judgment.

59. In my view there is no merit in any of the submissions made by learned counsel for the petitioner. In respect of some of claims which are though rejected by the learned arbitrator, the petitioner has not raised any grounds and/or not urged before this court and are accordingly not dealt with. I, therefore, pass the following order :-

(a) Arbitration Petition No.500 of 2010 is dismissed. There shall be no order as to costs.

(R.D. DHANUKA, J.)

arbp500-10

“Certified to be true and correct copy of original signed Judgment .”