

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 408 OF 2005**

Indian Oil Corporation Ltd.,)
Gujarat Refinery, P.O. Jawaharnagar,)
Vododara 391320) **..... Petitioner**
(Orig. Respondent)

Versus

Artson Engineering Ltd.,)
Plot No.426, M.L.Aggarwal Bldg.,)
1st Floor, Waman Tukaram Patil Marg,)
Opp.Shatabdi Hospital, Chembur,)
Mumbai 400 071) **..... Respondent**
(Orig.Claimant)

Mr.Manish R.Bhatt, Senior Advocate, a/w. Mr.D.Brijesh, Mr.Karan Sanghavi,
i/b.M/s.Bhaishankar Kanga & Girdharlal for the Petitioner.

Mr.Sharan Jagtiani, a/w. Mr.Rohan Lavkumar, Mr.Mihir Nerurkar, Mr.Mutahhar
Khan, i/b.M/s.Mulla & Mulla & Craigie Blunt for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 7th SEPTEMBER, 2015

PRONOUNCED ON : 30th OCTOBER, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 30th June, 2005 rendered by the sole arbitrator allowing some of the claims made by the respondent. The petitioner herein was the original respondent in the arbitral proceedings and the respondent herein was the original claimant. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. On or about 4th September, 1997 Engineers India Ltd. floated a tenders on behalf of the petitioner for Crude Distribution System. The respondent submitted their bid in response to the said tender. On 23rd February, 1998, the petitioner by a fax letter accepted the bid of the respondent and awarded work at Rs.14,03,30,247/-. The said contract was governed by the provisions of General Conditions of Contract (GCC) and Special Conditions of Contract (SCC). The contractual completion date was within 8 months from the said letter dated 23rd February, 1998.

3. On 6th March, 1998, a kick off meeting was held between the respondent and the said consultant EIL wherein the design and engineering of the said project was to be approved as per the provisions of the Special Conditions of Contract. It is the case of the respondent that on 23rd March, 1998 a meeting was held between the said EIL and the respondent and as per the minutes of the meeting, the respondent was to procure approval from the said consultant and if such approval was not given by the said consultant within two weeks, the respondent could proceed without approval.

4. On 26th March, 1998, the respondent established two bank guarantees for Rs.35,08,260/- towards security deposit and for Rs.1,40,33,000/- towards mobilization advance and performance of contract. On 3rd April, 1998 petitioner issued a Letter of Acceptance which included certain terms and conditions. According to the said Letter of Acceptance, the contract was to be completed within a period of eight months of the issue of fax of acceptance dated 23rd February, 1998. The fax and letter of acceptance along with the tender document, the contract agreement etc. all formed the part of the contract document.

5. Correspondence was exchanged between the parties from time to time during the progress of the work. On 6th September, 2000, the respondent completed the work under the Crude Distribution System. On 3rd October, 2000 the petitioner issued its completion certificate. On 3rd October, 2000 the respondent submitted a final bill for Rs.2,37,87,663/-.

6. It is the case of the respondent that the bank guarantees as per the last extension were in force till 1st February, 2002 with a claim period upto 30th June, 2002. The petitioner however sought further extension of bank guarantees. It is the case of the respondent that only on 15th September, 2001, the petitioner for the first time contended that the final bills raised by the respondent would not be paid since the increased quantities had resulted in a change of tender status.

7. By letter dated 25th September, 2001, the respondent requested the petitioner to make payment of the final bill and also the increased quantities in accordance with the schedule of rates. On 31st October, 2001, the respondent by their letter informed the petitioner of the financial implication of seeking extension of the bank guarantee without settling the final bill.

8. On 12th November, 2001, the petitioner requested the respondent to depute an authorized person to their office to take commercial decisions in respect of the negotiations/finalization of the final bill. The representative of the respondent met the representatives of the petitioner regarding the payment of the final bill on 19th November, 2001.

9. It is the case of the respondent that the petitioner vide their fax dated 23rd November, 2001 informed the respondent that they would ex-parte levy the

lowest rate in respect of the increased quantities. The respondent vide letter dated 20th December, 2001 refused to accept the lowest rates in respect of the increased quantities and called upon the petitioner to make payment of Rs.2,37,81,663.80 against the final bill together with interest within seven days of the receipt of the said letter.

10. On 20th December, 2001 the petitioner called upon the respondent to extend the bank guarantee upto 30th September, 2002. It is the case of the respondent that the petitioner by their letter dated 2nd January, 2002 addressed to the respondent arbitrarily reduced the aggregate value of the contract and claimed further recovery towards advance paid, material cost, accommodation and other charges.

11. The petitioner vide their letter dated 3rd January, 2002 addressed to M/s.United Western Bank, Mumbai sought further extension of the bank guarantee with a condition that if the same was not extended, then the said letter may be treated as an encashment of the bank guarantee. On 10th January, 2002 the respondent filed petition (31 of 2002) under section 9 of the Arbitration and Conciliation Act, 1996 against the petitioner and obtained an interim stay preventing the petitioner from encashment of the bank guarantee.

12. On 24th January, 2002, the respondent was informed by the petitioner that the petitioner shall also file its counter claim as and when the arbitration was initiated. On or about 1st April, 2002, the petitioner and the respondent filed consent terms in the said arbitration petition filed under section 9 of the Arbitration and Conciliation Act, 1996. The parties agreed that the arbitration between them shall be time bound and shall be concluded within a period of eight months

following the month of appointment of the arbitrator. The respondent agreed to furnish a fresh bank guarantee for an amount of Rs.65 lacs in lieu of the bank guarantee for Rs.35,08,260/- and for Rs.1,40,33,000/- to the petitioner and to keep the same in force till the final determination of the dispute by the arbitral tribunal by an award.

13. Under the said consent terms, the parties agreed that the guarantee for Rs.65 lacs shall be kept in force upto 31st December, 2002 unless the arbitral tribunal otherwise decides. It was further agreed that in the event, the arbitral tribunal decides that guarantee for Rs.65 lacs was required to be extended, the respondent herein undertook to extend the same for such period as determined by the arbitral tribunal.

14. The petitioner appointed Mr.H.Parekh as an arbitrator. The respondent herein filed statement of claim. The petitioner filed its written statement craving leave to make a counter claim. On 6th November, 2003, the written statement was amended by the petitioner and the counter claim was lodged. On 31st December, 2002, the tenure of the arbitrator came to an end. The petitioner requested the respondent to extend the time for completion of the arbitral proceedings. The respondent however refused to consent to extension of time and filed Arbitration Petition No.248 of 2003 for a declaration that the mandate of the arbitrator had come to an end and also filed Arbitration Application No.68 of 2003 under section 11(6) of the Arbitration Act for appointment of a new arbitrator.

15. On 7th July, 2003 the learned Designate of the Chief Justice appointed a former judge of this court as a sole arbitrator. The said order was impugned by the petitioner by filing an appeal (653 of 2003) in this court. On 26th August, 2003

the petitioner withdrew the said appeal and sought liberty to raise an objection to the jurisdiction before the learned arbitrator. The learned arbitrator allowed the application of the petitioner to amend the written statement in order to make a counter claim subject to the payment of costs and other conditions.

16. Both the parties led oral evidence before the learned arbitrator. The learned arbitrator framed 22 issues. By an arbitral award dated 30th June, 2005, the learned arbitrator directed the petitioner herein to pay a sum of Rs.3,12,74,444/- to the respondent herein with interest at the rate of 18% per annum on Rs.2,99,77,688/- w.e.f. 1st November, 2000 till realization and to pay simple interest at the rate of 18% per annum on Rs.13,96,756/- w.e.f 1st February, 2002 till realization and cost of Rs.10,00,000/-.

17. The petitioner filed this petition under section 34 of the Arbitration and Conciliation Act, 1996 and impugned the said arbitral award dated 30th June, 2005 on various grounds. This court by an order and judgment dated 9th November, 2006 in this petition allowed the said arbitration petition and set aside the arbitral award dated 30th June, 2005 on various grounds. The said order dated 9th November, 2006 was subsequently corrected by this court on 21st December, 2006 to some extent.

18. The respondent herein filed an appeal (307 of 2007) before the Division Bench of this court against the said order and judgment dated 9th November, 2006. By an order and judgment dated 9th January, 2015 passed by the Division Bench, the Division Bench held that since claims (a), (b), (c) and (g) were distinct and independent claims from clause (b), the entire arbitral award could not be set aside merely on the ground that claim (b) would not be arbitrable. It is held

that the learned single judge ought to have dealt with each individual claim separately and ought to have come to the finding as to which claim would be upheld and which claim ought to have been disallowed. The Division Bench took a view that the impugned order thus shall be set aside and the matter be remanded back to the learned Single Judge for consideration afresh.

19. Insofar as claim (g) is concerned, the Division Bench was of the view that the said claim also ought to be remanded back along with the claims (a), (b) and (c). The Division Bench also remanded claim (d) for consideration afresh by the learned Single Judge. By the said order, the Division Bench has allowed the said appeal and has set aside the order dated 9th November, 2006 and 21st December, 2006 and restored the arbitration petition to file of the learned Single Judge for hearing and final disposal afresh. The Division Bench clarified that the Division Bench had not expressed any opinion on the merits of the matter and the learned Single Judge shall decide the matter on its own merits and in accordance with law without being influenced by any observations made in that judgment.

20. Pursuant to the said order passed by the Division Bench remanding the matter in respect of various claims for consideration afresh, the learned counsel appearing for both the parties have addressed this court at length on those claims which are being dealt with by this court in later part of this judgment.

Claim (a) Claim on account of items in SOR amounting to Rs.82,19,114/-

21. Learned senior counsel appearing for the petitioner invited my attention to the issues framed by the learned arbitrator. Insofar as this claim is concerned, issue nos. 3 and 6 were framed by the learned arbitrator which are answered by the learned arbitrator in paragraphs 100 to 116 and in paragraph 123

of the impugned award. It is submitted by the learned senior counsel that for executing any extra items, prior approval of the petitioner was required to be obtained under clause 6.6.1.0 which was admittedly not obtained by the respondent. He submits that the learned arbitrator has totally overlooked and decided contrary to the said clause 6.6.1.0 while allowing the said claim (a). He submits that though internal notes were generated into remains that the contemplated under the said clause has not been granted by the petitioner to the respondent.

22. It is submitted by the learned senior counsel that even if the respondent was asked to proceed with the execution of such work pending approval, the financial impact was only Rs.20,12,621/- as noted by the learned arbitrator himself in paragraph 123 of the impugned award. He submits that the respondent did not substantiate as to how the said amount of Rs.20,12,621/- had been increased to Rs.82,19,114/-. Learned arbitrator however allowed the said claim of Rs.82,19,114/- without any quantification proved by the respondent. He states that though the petitioner had demonstrated such lacuna in the claim of the respondent and had opposed this claim vehemently on various grounds setout in the written arguments filed before the learned arbitrator, in the impugned award the learned arbitrator has not dealt with such submission made by the petitioner. He submits that the entire award in this claim is solely based on the internal notes of the petitioner which were never issued in writing to the respondent. He placed reliance on clause 2.0.3.0 of the General Conditions of Contract which provided that unless any document was specifically given by the petitioner in writing and signed by the Engineer-in-Charge to the respondent, the same would not bind the petitioner. He submits that the learned arbitrator has considered those internal notes in violation of and contrary to clause 2.0.3.0 of the General Conditions of

Contract. He submits that the award in respect of this claim thus deserves to be set aside.

23. Learned counsel for the respondent on the other hand submits that this claim was arising out of increased quantities in respect of star marked items purchased in excess of the quantities described in schedule of rates which were essentially to complete the work and were purchased under the directions of EIC. The respondent had called upon the petitioner to release the amount towards star marked items i.e. letters dated 15th September, 1998, 19th November, 1998 and 21st November, 1998. He submits that the respondent was given an internal note by the petitioner seeking approval for supply by the respondent of increased quantities which indicated that the final impact of the extra quantity to the petitioner would be Rs.1,46,03,000/-. He submits that only after one year after submission of the final bill, the petitioner by its letter dated 15th September, 2001 had informed the respondent that the increased quantities had resulted in a change of tender status from L-1 to L-3 and that the payment for increased quantities would be calculated at the lowest rates quoted by the bidders.

24. It is submitted by learned counsel that the petitioner had never disputed that the increase in the quantities was done after obtaining necessary approval and that the said increase was necessary and essential.

25. Learned counsel invited my attention to the findings rendered by the learned arbitrator holding that the present contract was an item rate contract. The respondent had no control over the quantities fixed by the petitioner. The learned arbitrator has held that the quantities were mere estimated and were not fixed according to clause 2.6.10 of the General Condition of Contract and clause 45 of

the Special Conditions of Contract. He submits that the petitioner had given repeated assurance for payment of star marked quantities and had provided a copy of the internal note seeking approval dated 2nd January, 1999.

26. Learned counsel for the respondent states that the learned arbitrator has rightly held that no reference had been made to L-1 arrangement in any document nor was any evidence adduced by the petitioner to support the said plea. The petitioner could not refuse to make payment at agreed rates.

27. Learned counsel for the respondent submits that the learned arbitrator has considered various correspondence and also oral evidence of the witness examined by the respondent and has held that the petitioner could not complain regarding the rates which had already been settled upon through several negotiations and concluded that it was obligation of the petitioner to pay the said dues under contract and failure to do so amounted to breach of the terms of the contract.

28. It is submitted by the learned counsel that the petitioner was entitled to make various deductions from the final bill of the respondent under clause 4.4.0.0. The impugned award on the claim challenging deductions and more particularly the paragraph 79 thereof, is contrary to clauses 4.3.3.0 and 4.4.0.0.

REASONS AND CONCLUSION

29. This claim pertains to amount of Rs.82,19,114/- which was withheld by the petitioner in respect of the ** marked items. A perusal of the contract documents indicates that the bid of the respondent indicated value of Rs.14,03,00,247/- as estimated value of contract based on schedule of rates. The

petitioner had estimated those quantities. The construction drawings were subject to approval by EIL and actual quantities were to be on the basis of AFC drawings. As per the contract, the respondent was to be paid as per rates provided in the schedule. The contract was awarded to the respondent by the petitioner on L1 basis. There was however no reference to L1 in any part of the contract. In my view the issue raised before the learned arbitrator by the petitioner that once the respondent was awarded the contract on the basis of the L1 status, it would remain throughout as L1 status irrespective of the actual quantities of work was not in accordance with contract. The petitioner placed reliance on oral understanding in support of this submission which has been rejected by the learned arbitrator since the same was without any evidence and without any provisions in the contract.

30. A perusal of the award indicates that there was no dispute that the quantities in respect of various items which was subject matter of this claim had acceded even to the extent of 400%, 500% and 12,500% as reflected in paragraph 112 of the impugned award. It appears that the petitioner however by taking shelter of L1 status of the respondent all throughout the contract applied the lowest rates for the items offered by other bidders and deducted an amount of Rs.82,19,114/- without examining the basis of such deduction. The petitioner could not demonstrate before the learned arbitrator as to how such L1 status of the respondent could continue all throughout irrespective of the additional quantity executed by the respondent to the extent of 400%, 500% and 12,500%. The learned arbitrator has in my view rightly rendered a finding that there was no document to support the concept of L1 status to be maintained all throughout.

31. Insofar as quantification of the additional quantities and approval is concerned, the learned arbitrator placed reliance on various internal notes of the

petitioner. The petitioner had objected to the respondent placing reliance on the internal note on the ground that the same were secured by the fraud or unfair means by the respondent. It was however the case of the respondent that such internal notes which were sent to the higher officer of the petitioner, for approval in respect of the payment required to be made to the respondent in respect of the ** marked items. The learned arbitrator has also rendered a finding that such internal notes were handed over to the respondent by the officer of the petitioner and was not obtained by the respondent by fraud or unfair means. The learned arbitrator has also held that even if such internal notes are obtained by the respondent by internal means, it does not lose its evidentiary value. In my view this court cannot go into the finding of fact rendered by the learned arbitrator holding that such internal notes were handed over by the officer of the petitioner to the respondent in view of the respondent having applied for payment in respect of such extra quantities and such issue was pending before higher officials of the petitioner. It was not the case of the petitioner that such internal notes relied upon by the respondent were fabricated or tampered with by the respondent. The petitioner could not dispute the case of the respondent that the same were handed over to the respondent by the officer of the petitioner. The learned arbitrator has dealt with this issue at great length in the impugned award and rejected the contention of the petitioner that no reliance on such internal notes could be placed by the respondent or by the learned arbitrator.

32. Insofar as submission of the learned senior counsel that the learned arbitrator could not have allowed the claim of Rs.82,19,114/- on the ground that the same was without any proof of quantification is concerned, a perusal of the record indicates that the learned arbitrator has relied upon the examination in chief of Mr.Chopde who was examined by the respondent to prove the quantity. I am

thus not inclined to accept this submission of the learned senior counsel that the said claim had been allowed without any proof of quantity by the learned arbitrator. The impugned award on this claim is upheld.

33. I am also not inclined to accept the submission of the learned senior counsel that the entire award is based on the internal notes of the petitioner or that the same was not issued to the respondent. There is no merit in the submission of the learned senior counsel that the learned arbitrator relied upon the said internal notes in violation of and contrary to clause 2.0.3.0 of the General Conditions of Contract. The respondent had proved before the learned arbitrator that the copies of such internal notes were given by the officer of the petitioner to the respondent. The petitioner has not disputed the correctness of such internal notes.

Claim (b) Claim of Rs.1.40 crores withheld and deducted as liquidated damages.

34. The learned arbitrator has dealt with this issue in this claim while discussing on issue nos. 2, 3, 4 and 5. It is submitted by the learned senior counsel for the petitioner that though the contractual completion date was 22nd October, 1998, the work was completed by the respondent on 6th September, 2000 i.e. after delay of 23 months of contractual completion date which was solely attributable on the part of the respondent. He submits that under the provisions of contract, the respondent was required to submit planning documents, overall project schedule, detailed network, functional schedule, progress measurement methodology and project time control procedure. He submits that the respondent had also agreed to submit execution methodology for design and engineering by 15th March, 1998, procurement by 15th March, 1998 and construction by 25th March, 1998. The respondent had also agreed to report their monthly progress report by 18th of every

month which were to be renewed in the monthly progress review meeting.

35. It is submitted that there was gross delay on the part of the respondent in procuring various items which was major portion of the job awarded to the respondent. He submits that the petitioner had already issued all necessary clarifications from time to time to the respondent, however the respondent failed to comply with in its primary obligation under clauses 2.2.1.1, 2.2.3.0, 2.4.0.0, 2.5.0.0, 2.3.0.0, 2.3.1.0, 3.0.0.0, 3.1.5.0 and also of the Special Conditions of Contract clauses 8.0, 15.0, 30.0 and the relevant clauses of the Letter Inviting Tender i.e. clauses 9.1.2, 10, 18.4, 18.5 amongst others.

36. It is submitted by the learned senior counsel that there was gross delay on the part of the respondent in submitting drawings and modifications and from getting approval of the petitioner as per clause 2.3.1.0 of the General Conditions of Contract, in making availability of free issue materials which were to be supplied by the petitioner and due to several other reasons which were solely attributable on the part of the respondent. He invited my attention to some of the correspondence exchanged between the parties and would submit that the learned arbitrator has neither discussed those correspondence exchanged between the parties nor the provisions of the contract in the impugned award and has rendered a perverse finding of fact that the respondent was not responsible for delay but the delay was attributable on the part of the petitioner. He submits that the impugned award is contrary to the terms of the contract and the evidence produced by the petitioner on the record. Learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Steel Authority of India Limited vs. J.C.Budharaja, Government of Mining Contractor, AIR 1999 SC 3275*** (paragraphs 15 to 22), judgment of Supreme Court in case of ***Oil and Natural Gas Corporation vs. Saw Pipes,***

2003(2) Arb.L.R.5 (SC) and judgment of Gauhati High Court in case of ***Union of India (UOI) and anr. vs. J.G.Engineers Pvt. Ltd., 2005(2) Arb.L.R.412 (Gauhati) (DB)*** (paragraphs 23, 26 and 31).

37. It is submitted by the learned counsel that in the minutes of the meeting forming part of the record before the learned arbitrator, it was agreed that the consultants shall approve drawing within two weeks and if not approved, the contractor shall go ahead with the work. The respondent was to prepare drawings and to get it approved which the respondent failed. He submits that the obstruction occurred if any was after completion date for which the petitioner was not responsible. He submits that the claims thus made by the respondent were not payable. The respondent had increased the quantities which have been illegally granted by the learned arbitrator.

38. Learned counsel appearing for the respondent on the other hand submits that the petitioner had not provided information of data to the respondent on which the respondent was required to base its designs / drawings and had also failed to issue essential certificate for Electrical Heat Tracing. The petitioner had also not provided requisite approval for drawings submitted by the respondent and had not sorted out the issues relating to the work fronts where other contractors were operating. The petitioner had failed to issue various materials for pipeline and had substantially altered the scope of work. He submits that the contractual obligation of the respondent was not contingent upon the petitioner fulfilling its reciprocal obligation. Learned counsel placed reliance on clauses 4.4.0.0, 4.3.4.0, 4.3.2.0, 2.3.1.0 to 2.3.3.0 of General Condition of Contract and clause 30 of the Special Conditions of Contract.

39. Learned counsel placed reliance on the minutes of the meeting dated 23rd March, 1998 which recorded that the drawings submitted by the respondent were to be approved by the consultants and if the drawings for information were not approved within two weeks, the respondent was to proceed with the same. He submits that the learned arbitrator has rendered various findings of fact after considering large number of correspondence exchanged between the parties and has rightly held that delay was attributable to the petitioner on account of various reasons. He invited my attention to paragraph 98 of the impugned award in which the learned arbitrator has summarized his findings on various breaches and delays attributable to the petitioner.

40. It is submitted by learned counsel for the respondent that the petitioner had illegally deducted the said amount of Rs.1.4 crores from the final bill of the respondent and notified to the respondent about such deduction from the final bill only after one year of submission of the final bill by the respondent. It is submitted that this Court cannot re-appreciate the evidence considered by the learned arbitrator and cannot interfere with the findings of fact rendered by the learned arbitrator.

REASONS AND CONCLUSION

41. A perusal of the award indicates that the learned arbitrator has rendered various findings of fact against the petitioner and in favour of the respondent about the gross delay on the part of the petitioner due to various reasons setout in the award while dealing with issue nos.2 to 5 in the impugned award. It is held that the petitioner did not perform its part of reciprocal obligation of making available AFC drawings material, work fronts and put various holds and hindrances including hold on EHT and also made substantial changes in respect of

power supply to sub-section 19 and total change in the EHT location. The learned arbitrator has accordingly held that there was no question of claiming any liquidated damages by the petitioner from the respondent. It is further held that there was no provision in the contract for levying any liquidated damages by the respondent.

42. The learned arbitrator has also considered the contention of the petitioner that even if the said recovery was not towards the liquidated damages but was price reduction on the ground of delay as per General Conditions of Contract, no attempt had been made by the petitioner to point out how the figure was arrived at and that the petitioner had just taken maximum of 10% of the contract value of Rs.14.22 crores. The learned arbitrator held that the inconsistency in the stand taken by the petitioner was not explained by the petitioner. It is held that the petitioner had claimed deduction of Rs.1,42,23,724/- twice and could not explain the said double deduction. It is held that the twice reduction clause has no application to the fact of this case and the same was illegal and impermissible.

43. In my view, a perusal of the contract clearly indicates that there was no provision for liquidated damages. The petitioner however had deducted the sum of Rs.1.40 crores as and by way of liquidated damages. Insofar as deduction purported to be made as and by way of price reduction on the ground of alleged delay is concerned, a perusal of the award clearly indicates that the learned arbitrator has already rendered a finding of fact holding that the delay was attributable to the petitioner and not the respondent. The petitioner has ex-facie claimed double deduction. Since the petitioner was responsible for gross delay and not the respondent, the petitioner in my view could not have recovered any amount as and by way of even price reduction on the ground of alleged delay on the part of

the respondent. The petitioner has failed to prove the delay on the part of the respondent and also the actual loss suffered by the petitioner because of such alleged delay. In my view the learned arbitrator was thus right in allowing this claim of the respondent and thus this part of the award does not warrant any interference.

44. Insofar as submission of the learned senior counsel for the petitioner that the respondent was responsible for gross delay in procuring various items and due to various other reasons is concerned, in my view the said submission is contrary to the evidence produced on record. In my view the findings rendered by the learned arbitrator on this issue are not perverse and thus no interference with such finding of fact is warranted.

45. Insofar as judgment of Supreme Court in case of ***Steel Authority of India Limited (supra)***, judgment of Supreme Court in case of ***Oil and Natural Gas Corporation vs. Saw Pipes, 2003(2) Arb.L.R.5 (SC)*** and judgment of Gauhati High Court in case of ***Union of India (UOI) and anr. vs. J.G.Engineers Pvt. Ltd., (supra)*** is concerned, there is no dispute about the proposition laid down by the Supreme Court in the aforesaid two judgments and also the judgment of Gauhati High Court. The petitioner however could not demonstrate before this court as to how the said judgments could assist the case of the petitioner in the facts of this case.

46. Insofar as issue of deemed approval of writing raised by the learned senior counsel for the petitioner is concerned, the learned arbitrator has interpreted the term of the agreement and has rightly rejected this contention raised by the learned senior counsel for the petitioner. Interpretation of the agreement is a

possible interpretation and cannot be substituted by another interpretation by this court.

47. A perusal of the record indicates that the said amount of Rs.1.4 crores deducted by the petitioner was only after one year of the submission of the final bill from the respondent and was by way of after thought. The petitioner could not justify as to why such recovery was made after one year after submission of the final bill by the respondent. In my view the submission of the learned senior counsel for the petitioner insofar as this claim is concerned, is devoid of merits and is accordingly rejected.

Claim (C) Claim on account of amounts appropriated on the ground of other recoveries amounting to Rs.16,58,574/-.

48. The learned arbitrator has discussed this claim while deciding the issue no.8. The petitioner had deducted this amount from final bill of the respondent towards various recoveries i.e. against materials, power supply, water, land, labour, machineries and equipments, account of damage against labour related issues, cleaning etc. It is submitted by the learned senior counsel that under various provisions of the General Conditions of Contract and Special Conditions of Contract, the petitioner was entitled to withheld various amounts from the final bill which were recoverable by the petitioner from the respondent under various heads. He submits that the learned arbitrator has totally overlooked the relevant provisions of the contract and has allowed this claim without any basis.

49. Learned counsel for the respondent on the other hand submits that the completion certificate had already been issued along with final bill pursuant to clause 6.2.3.0 of the General Condition of Contract. No claim certificate which

was a pre-requisite for final bill clearly listed out that there was nothing due from the respondent. He submits that the fact that the petitioner had admitted that the final bill was processed on 6th October, 2000 clearly indicates that the process of final bill could be proceeded only if no dues certificate was issued in accordance with clause 42.0 of Special Conditions of Contract. He submits that the petitioner itself relied upon various internal documents to show that it had a purported claim against the respondent without making any specific reference to any document and the proposed recoveries were in separate form called “recovery statement” annexed to the statement of defence filed before the learned arbitrator.

50. Learned counsel invited my attention to the findings of the learned arbitrator on this issue holding that the petitioner had not given any opportunities in respect of recoveries proposed in the annexure to the written statement showing two deductions of 10% and no evidence in support of such recovery had been adduced by the petitioner. The learned arbitrator held that there was no justification for recoveries proposed. The burden of proof was on the petitioner which the petitioner had failed and thus the respondent was entitled to the amount wrongly deducted by the petitioner.

REASONS AND CONCLUSION

51. A perusal of the record indicates that the learned arbitrator has rendered a finding that the deduction of 10% shown in the Annexure I of the written statement was shown twice. The petitioner had not given any details and/or evidence in support of the said deduction. It is held that since the petitioner has not justified the recoveries at the time of final bill and as the deduction has not been justified, the respondent herein was entitled to the amount wrongly deducted. The burden was on the petitioner to justify the deduction as the final bill was prepared

after measurement which was not disputed.

52. Insofar as submission of the learned senior counsel for the petitioner that the learned arbitrator has totally overlooked the relevant provisions of the contract and has allowed this claim without any basis is concerned, he could point out the basis on which the recovery of Rs.16,58,574/- was made by the petitioner from the bill of the respondent. Learned senior counsel also could not rely upon any evidence alleged to have been produced before the learned arbitrator in support of this recovery made from the bills of the respondent.

53. In my view, the learned arbitrator has after considering the material on record has rightly rendered a finding that the recovery made by the petitioner from the bill of the respondent in the sum of Rs.16,58,574/- was without any basis and without producing any evidence in support of the said recovery. The petitioner had not discharged the burden or could not give any justification before the learned arbitrator in respect of the said recovery made from the bill of the respondent. In my view the findings rendered by the learned arbitrator is not perverse and thus no interference with such finding of fact is permissible under section 34 of the Arbitration Act.

Claim (d) Claim of Rs.13,96,756/- towards the cost incurred in keeping the bank guarantees in force.

54. The learned arbitrator has discussed this claim while deciding issue nos. 4, 9 and 15. It is submitted by the learned senior counsel for the petitioner that under clause 6.2.1.1, 6.2.1.2, 6.2.2.0, 6.2.3.0, 6.2.5.0 and 6.6.4.0 of the General Conditions of Contract the procedure for preparation and submission of final bill was provided. After the submission of the account as per final bill, a final

completion certificate is required to be issued as per clause 6.8.0.0. He submits that as per clause 13.1.2 of the Special Conditions of Contract, the bank guarantee is required to be kept valid till three months after the defect liability period i.e. 12 months from the date of completion of the job. He submits that the completion date was 6th September, 2000 and thus the final completion certificate could be issued not before 6th September, 2001.

55. It is submitted that as per the Special Conditions of Contract, if the final completion certificate is issued, the bank guarantee was to be renewed upto 6th December, 2001. He submit that even according to the respondent final bill was prepared on 3rd October, 2000 which was signed by the Project Department only on 6th October, 2000. The said bill was not certified since various issues were pending for determination. The respondent was called upon to attend various meetings for settlement of the accounts. It is submitted that in accordance with clause 13.1.2, the bank guarantee was required to be kept valid till the issuance of final completion certificate which was admittedly not issued at all. The learned arbitrator has totally overlooked the mandatory requirement of the aforesaid provisions in the impugned award.

56. It is submitted by the learned senior counsel that the respondent did not produce any proof of payment of any expenditure in keeping the bank guarantee alive. He placed reliance on the oral evidence led by the respondent and would submit that even in the oral evidence, the respondent has failed to prove the alleged payment. He submits that the learned arbitrator has given a complete go-bye to clause 2.1.8.0 of General Conditions of Contract which prohibited payment of interest on security deposit. The respondent had furnished the bank guarantee in lieu of security deposit. The award of interest on this claim was thus without

jurisdiction and in conflict with public policy. He submits that since this claim was not notified to the petitioner by the respondent, the same was not arbitrable. Though this issue was specifically raised by the petitioner before the learned arbitrator, the learned arbitrator has overlooked the said provision of contract and not dealt with this submission of the petitioner.

57. It is submitted by the learned counsel for the petitioner that admittedly the final completion certificate was not issued in this case. He submits that the internal memos relied upon by the learned arbitrator were signed by the two officers. The respondent had not signed any such internal memo. He submits that no reliance on such internal memo could be placed upon since the same were admittedly not issued to the respondent. He submits that the respondent was under an obligation to keep the bank guarantee alive till the defect liability period of one year was over and till the date of issuance of final completion certificate.

58. It is submitted that the respondent had submitted final bill. There were however several queries in the said final bill submitted by the respondent. The final certificate was actually not received. The respondent was thus under obligation to and ought to have kept the bank guarantee alive at their own costs.

59. Mr.Jagtiani, learned counsel for the respondent on the other hand submits that the learned arbitrator has awarded this claim regarding the bank guarantee charges for the period 6th September, 2001 to 31st January, 2002 which was for the period post completion of the contract. He submits that the respondent had also produced evidence in support of the said claim i.e. letter issued by SICOM showing the amount of bank commission being charged by the SICOM on furnishing such bank guarantee. It is submitted by the learned counsel that since

the final bill itself was dated 3rd October, 2000, the respondent in no circumstances could have included the said claim for reimbursement of the bank guarantee charge in the final bill or could have notified the same to the petitioner.

60. It is submitted by the learned counsel that the bank guarantee amount was reduced in the consent terms filed by the parties in the arbitration petition filed under section 9 of the Arbitration and Conciliation Act, 1996 which was agreed to be kept alive till the arbitration proceedings were disposed of. He submits that the bank guarantees were renewed in view of the order passed by this court. The jurisdiction of the learned arbitrator was thus novated in view of the order passed by this court in the petition filed under section 9 and thus the alleged mandatory procedure as canvassed by the petitioner for the purpose of invoking arbitration would not apply to this claim. He submits that the claim for reimbursement of the bank guarantee was incidental and consequential to the consent terms filed by the parties in the arbitration petition filed under section 9. He submits that the learned arbitrator has rightly held in paragraphs 136 and 137 of the impugned award that he had jurisdiction to decide the said claim and the claim was arbitrable.

61. Learned counsel for the respondent submits that the principles of Order 41 Rule 24 of the Code of Civil Procedure would also apply to the proceedings under section 34 of the Arbitration and Conciliation Act, 1996. In support of this submission he placed reliance on the judgment of this court in case of **Satpal P. Malhotra & Ors. vs. Puneet Malhotra & Ors.** in Arbitration Appeal No. 12 of 2010 delivered on 14th June, 2013.

62. It is submitted that under the consent terms filed between the parties, the parties had agreed that the learned arbitrator would decide the issue of duration

of the bank guarantee. The learned arbitrator had directed the respondent to keep the bank guarantee alive till 30th June, 2005. He submits that since the delay was attributable to the petitioner, the learned arbitrator had rightly awarded the payment of commission charges incurred by the respondent in renewing the bank guarantee. The learned arbitrator has rightly referred to the consent terms in the impugned award while rejecting the plea of jurisdiction raised by the petitioner.

63. Insofar as evidence in support of this claim produced by the respondent is concerned, it is submitted by the learned counsel for the respondent that the learned arbitrator has rightly considered the letter of SICOM and applied common knowledge that the bank guarantee could not have been issued without payment of commission charges.

64. Learned counsel appearing of the respondent distinguishes the judgment of this court in case of ***Bombay Intelligence Security (India) Ltd. vs. Oil & Natural Gas Corporation Limited*** in case of Arbitration Petition No. 822 of 2012 delivered on 21st August, 2015 on the ground that in the said matter the material was relied upon by the respondent for the first time in the High Court whereas in this case the parties had referred to the consent terms before the learned arbitrator which was noticed and relied upon by the learned arbitrator in the impugned award.

65. In rejoinder, learned senior counsel for the petitioner submits that this claim was not a part of the final bill and was not a notified claim and thus, the learned arbitrator did not have jurisdiction to entertain this claim. The respondent cannot be allowed to supplement the reason rendered by the learned arbitrator at this stage while opposing the petition under Section 34 of the

Arbitration and Conciliation Act, 1996 in support of this submission.

66. Insofar as the reliance placed by the respondent on the consent terms filed by the parties in the petition filed under Section 9 of the Arbitration Act is concerned, learned senior counsel placed reliance on paragraphs 2 and 4 of the said consent terms and would submit that even if there was any novatio under the said consent terms, there was a consensus between the parties that the learned arbitrator had to decide as to what period the bank guarantee was to be kept alive. He submits that no agreement was entered into in the said consent terms that the learned arbitrator has to decide the claim arising out of keeping the said bank guarantee alive by the respondent. Without prejudice to the earlier contentions, learned senior counsel submits that even if there was novatio, the said novation took place on 1st April 2002 when the consent terms were filed and thus the learned arbitrator could not have awarded any claim for bank commission for the period prior to 1st April 2002.

67. It is submitted by the learned senior counsel that clause 2.3.1.0 of the General Conditions of the Contract is not contrary to paragraph 9 of the Minutes of meeting. If the petitioner did not approve the drawings by a particular period, there was a deemed approval. He submits that presumption drawn by the learned arbitrator on the issue of drawings in paragraph 72 of the impugned award is out of record. The learned arbitrator did not consider the effect of paragraph 9 of the Minutes of meeting.

68. Insofar as the material for Electrical Heat Tracing brought to the site of the respondent is concerned, the said material was brought to the site by the respondent after stipulated completion date which the learned arbitrator

totally overlooked in the arbitral award. The learned arbitrator did not consider various documentary evidence produced by the petitioner on the issue of delay attributable on the part of the respondent.

REASONS AND CONCLUSION

69. The learned arbitrator has allowed this claim towards the cost incurred by the respondent in keeping the bank guarantee in force in the sum of Rs.13,96,756/- on various bank guarantees including security guarantee. Under clause 13.1.2 of the General Conditions of Contract, the bank guarantee was required to be kept valid till three months after the defect liability period i.e. 12 months from the date of completion of the job. After submission of the account as per final bill, final certificate was required to be issued as per clause 6.8.0.0.

70. The date of completion was 6th September, 2000. According to the petitioner, as per the Special Conditions of Contract, if the final completion certificate was issued, the bank guarantee was renewed upto 6th December 2001 by the respondent at their own cost. The final bill was prepared on 3rd October 2000 which was signed by the project department on 6th October 2000. It was the case of the petitioner that the said final bill however was not settled in view of the various queries and issues pending for determination. The final completion certificate was admittedly not issued at all.

71. The learned arbitrator allowed a sum of Rs.2,54,442/- on the guarantee of Rs.1,40,33,000/- at the rate of 4.5% per annum from 6th September 2001 to 31st January 2002 i.e. for four months and 23 days. Insofar as security guarantee of Rs.35.08 lacs is concerned, the learned arbitrator has allowed the claim of Rs.64,098/- at the rate of 4.5%. The learned arbitrator has also allowed the claim

of Rs.9,99,375/- at the rate of 4.5% from 1st February 2002 to 30th June 2005 on a sum of Rs.65 lacs thereby allowing the total claim of Rs.13,96,756/-.

72. Clauses 6.2.1.1, 6.2.1.2, 6.2.2.0, 6.2.3.0, 6.2.5.0 and 6.6.4.0 of the General Conditions of Contract provided for procedure for preparation and submission of final bill. The learned arbitrator has not dealt with the issue raised by the petitioner as to whether there was any delay on the part of the petitioner or the respondent in finalization of the final bill in view of various queries raised.

73. Insofar as submission of the learned senior counsel for the petitioner that the claim in respect of the commission on the bank guarantee was not arbitrable on the ground that the said claim was not notified to the petitioner by the respondent and was not made in the final bill is concerned, a perusal of the arbitral award indicates that the learned arbitrator has not allowed the claim for bank commission charges on the bank guarantees prior to the date of preparation of the final bill. The final bill was already prepared much prior to the period the learned arbitrator has allowed the claim for payment of commission charges on bank guarantee. In my view the respondent thus could not have notified any such claim before submission of final bill. There is thus no merit in this submission of the learned senior counsel that the claim for reimbursement of commission on bank guarantees was not arbitrable.

74. Insofar as submission of the learned senior counsel for the petitioner that the learned arbitrator could not have decided the claim for reimbursement of commission charges on the ground that in the consent terms filed before this court in the petition filed under section 9, no such issue was referred to the learned arbitrator is concerned, in my view there is no substance in this submission of the

learned senior counsel since under the said consent terms, parties had agreed that the learned arbitrator had to decide the period for which the bank guarantees were to be kept alive. The learned arbitrator accordingly directed the respondent to keep the bank guarantee alive till 30th June, 2005. The claim arising out of renewal of such bank guarantees was thus arbitrable.

75. A perusal of the arbitral award however indicates that the witness examined by the respondent in his evidence did not produce any proof of payment of any bank guarantee charges made to bank who had furnished the bank guarantee on behalf of the respondent.

The learned arbitrator has allowed the entire claim at the rate of 4.5% of the amount of the bank guarantee merely on the basis that the SICOM was charging commission at the rate of 3% upto 30th September, 2001 and at the rate of 4.5% thereafter. The learned arbitrator has drawn inference that in a commercial transaction and for taking the risk such charge of small amount of about 3 to 4.5% is reasonable. The learned arbitrator has held that SICOM would not have given counter guarantee without charging anything and commission at 4.5% was normal and reasonable. In my view the claim allowed by the learned arbitrator for commission charges on the bank guarantee at the rate of 4.5% merely on the basis of the letter produced by the respondent through their witness that SICOM was normally charging commission at the rate of 3% upto 30th September, 2001 and at the rate of 4.5% thereafter and without respondent producing any proof of payment of actual commission charges on such bank guarantee is without any evidence.

76. The learned arbitrator could not have drawn any inference while allowing the said claim for reimbursement of commission charges. In my view the said claim for payment of commission charges on renewal of bank guarantee was a

claim in the nature of reimbursement of all the expenses alleged to have been incurred by the respondent on renewal of such bank guarantee. The term 'reimbursement' pre-supposes that the respondent had incurred such expenditure and had produced a proof in support of such expenditure' for the purpose of making such claim for reimbursement.

77. The award in my view is based on presumption and surmises and is by drawing inference and is not based on the evidence. This part of the award is thus set aside.

78. Insofar as submission of the learned counsel for the respondent that the jurisdiction of the learned arbitrator was novated in view of the order passed by this court in the petition filed under section 9 is concerned, in view of the fact that this court has taken a view that the learned arbitrator had jurisdiction to entertain such claim of commission of bank guarantee, this court need not go into the issue whether the jurisdiction of the learned arbitrator was novated in view of the order passed by this court in the consent terms filed under section 9 or not.

79. Insofar as submission of the learned counsel for the respondent that the principles of Order 41 Rule 24 of the Code of Civil Procedure would also apply to the proceedings under section 34 of the Arbitration and Conciliation Act is concerned, in my view the said provision applies to an appeal and not to the original proceedings i.e. the petition filed under section 34 of the Arbitration and Conciliation Act, 1996 on this case. Reliance placed by the learned counsel for the respondent on the judgment of this court in case of **Satpal P.Malhotra & Ors. vs. Puneet Malhotra & Ors. (supra)** is thus misplaced.

80. Insofar as submission of the learned counsel for the respondent that the learned arbitrator has rightly considered the letter of SICOM and applied common knowledge allowing the said claim is concerned, in my view the said letter of SICOM produced by the respondent would not prove actual payment of commission charges alleged to have been made by the respondent on such bank guarantee. The learned arbitrator could not have applied his common knowledge when the claim was for reimbursement of the expenses alleged to have been incurred for payment of commission charges in respect of such bank guarantee. There is thus no merit in this submission of the learned counsel for the respondent.

81. Learned counsel for the respondent sought to supplement reasons rendered by the learned arbitrator in this claim by placing reliance on various correspondence and would submit that the learned arbitrator had while allowing this claim had dealt with all such correspondence and other piece of evidence and thus this court cannot set aside the said award. In my view the reasons rendered by the learned arbitrator itself should indicate what pleadings, documents and evidence has been considered by the learned arbitrator while rendering a particular finding. This court cannot look into the documents, pleadings and evidence for the first time in this proceeding under section 34 and cannot probe into the mind of the learned arbitrator and come to the conclusion that the learned arbitrator must have considered all such pleadings, documents and the evidence while taking a particular view though the same was not reflected in the award itself. The judgment of this court in case of ***Bombay Intelligence Security (India) Ltd. vs. Oil & Natural Gas Corporation Limited (supra)*** applies to the facts of this case.

82. A perusal of the record indicates that the learned arbitrator has awarded interest on the security deposit amount which is prohibited under the

terms of the contract. This part of the award was thus not arbitrable and is set aside on that ground also.

Claim (g) Claim of Rs.61,00,000/- on account of extra work.

83. It is submitted by the learned senior counsel that the said claim made by the respondent before the learned arbitrator was based on the allegation that during the execution of the contract, the respondent was required to execute the work quantified as extra work which did not form part of the schedule of rates (SOR). The respondent had made the said claim in 3 heads i.e. sum of Rs.18,00,000/- towards redesign/detailed engineering for relocation of heat tracing system, Rs.29,00,000/- for installation of thermal wool, removal/disposal of wool mattresses etc. and Rs.14,00,000/- towards supply and installation of additional alluminium cladding made necessary due to dual type insulation.

84. It is submitted by the learned senior counsel that none of these extra items were forming part of the final bills. These extra claims were not notified by the respondent that as per contract clauses 6.8.3.0 of the General Conditions of Contract. He submits that as per clauses 6.6.0.0, 6.6.3.0 and 6.6.4.0, these claims for extra items were not arbitrable. Learned senior counsel placed reliance on clause 9.0.1.0 which provided for arbitration agreement and submits that the said clause has to be read with clauses 6.6.3.0 and 6.6.4.0. He submits that the learned arbitrator has exceeded his jurisdiction by entertaining these claims and the findings thus rendered by the learned arbitrator that these claims were arbitrable is contrary to the provisions of the contract and perverse.

85. It is submitted that the consent terms did not supersede clause 9 of the General Conditions of Contract. He submits that the learned arbitrator has

travelled beyond the scope of contract by allowing this claim. In his alternate submission, he submits that the respondent had already signed no claim and no due certificate at the time of final bill which was annexed at Ex.C-79. He submits that on that ground also, this claim was not arbitrable. The learned arbitrator has overlooked the said no claim and no due certificate duly signed by the respondent at the time of final bill.

86. It is submitted by the learned senior counsel that these extra items were executed at the instance of the respondent themselves in view of the delay caused by the respondent in supplying various items, as a result of which the petitioner had decided to drop those items. He submits that the fact that the respondent did not make claim on this account in the final bill conclusively proves beyond reasonable doubt that there was gross delay on the part of the respondent. The material procured by the respondent was agreed to be utilized in other work and was accordingly not claimed in the final bill.

87. It is submitted by the learned senior counsel that in any event, the rates for these items were not fixed in 'schedule of rates' and were accordingly required to be decided by the consultant as per clause 6.2.1.1 of the General Conditions of Contract and since the said mandatory procedure was not followed, the respondent could not have seek adjudication of the rates for such extra items for the first time in the arbitral proceedings. In support of this submission, learned senior counsel placed reliance on judgment of this court in case of ***the Board of Trustees of Jawaharlal Nehru Port Trust vs. Three Circles Contractors*** decided on 1st April, 2015 in Arbitration Petition No.648 of 2009 and in particular paragraphs 112 to 114, 116.

88. It is submitted by the learned senior counsel that for carrying out any extra work by the respondent contractor, the instructions of the consultant was mandatorily required as per clause 6.6.1.0 and in absence of such instructions, the respondent could not have carried out such work. The respondent did not produce any proof before the learned arbitrator of having received any such instructions for carrying out extra work from the consultant. In support of this submission, learned senior counsel placed reliance on judgments of Delhi High Court.

89. Mr.Jagtiani, learned counsel appearing for the respondent on the other hand submits that the respondent had to execute certain work which were classified as extra work which did not form part of Schedule Of Rates (SOR). He placed reliance on the internal letter of the petitioner dated 12th May, 1999 and submits that according to the said letter, Electrical Heat Tracing of the crud line was to be on hold on account of the reasons attributable to the petitioner and it was directed that instead of new lines, existing lines would be Electrical Heat Tracing. He submits that in view of the said directions redesigning of service system, review of existing insulation and subsequent material alterations in the work was required to be done. The respondent had asked for clarification on this issue from the petitioner which was put on hold by the petitioner for four months as per the directions of the petitioner.

90. It is the case of the respondent that the petitioner had conveyed to the respondent that there was change in the scheme and installation work for the Electrical Heat Tracing which was to be done for different pipe lines. The respondent had accordingly made the claims pertaining to the said work by Electrical Heat Tracing on 23rd January, 2002 as a part of its arbitration notice.

91. Learned counsel for the respondent invited my attention to some of the findings rendered by the learned arbitrator holding that the respondent was entitled to Rs.61.00 lacs for extra work of re-designing, re-engineering and re-location of the Electrical Heat Tracing component of the contract. He submits that the learned arbitrator has considered minutes of the meeting dated 9th July, 1999 and also evidence of the witness examined by the respondent showing calculating that the respondent was entitled to be reimbursed as claimed. He submits that the learned arbitrator has also rendered a finding that the petitioner had not led any evidence and there was hardly any cross-examination of the witness examined by the petitioner. He submits that the learned arbitrator has rightly held that there was neither any pleadings nor any evidence to support the claim of the petitioner's that the said work of Electrical Heat Tracing was delayed on account of the respondents. He submits that the learned arbitrator has also considered internal note dated 12th May, 1999 and rightly concluded that if the change in the said Electrical Heat Tracing was attributable to the respondent, internal note of the petitioner would have said so.

92. Insofar as the issue of jurisdiction raised by the petitioner is concerned, it is submitted by learned counsel that the petitioner had not pleaded any ground of "notified claims" in the statement of defence and even if it was pleaded, it was vague and generic. It is submitted that the petitioner had thus waived its right to object to the said claim on the ground of jurisdiction and cannot be allowed to raise that ground in this petition filed under section 34 of the Arbitration Act.

93. It is submitted by leaned counsel for the respondent that since extra work carried out by the respondent was not under the contract, the procedure under

clause 6.6.1.0 which applied to the work within the original scope of work was not required to be followed by the respondent while making a claim for extra work. He submits that in any event the procedure even if was required to be followed, such procedure had to be raised equitably and not to be construed as mandatory. He submits that claim (g) was not made in the final bill and thus the question of waiver under clause 6.6.4.0 did not arise. He submits that in any event clause 6.6.4.0 is not mentioned in clause 9.0.1.0 which applies to all the disputes to arbitration. He submits that since the claim for extra work which did not require a particular procedure to be followed under clause 6.6.1.0, it could be referred to arbitration without following the said procedure. He submits that in any event no hardship was caused to the petitioner even if the said claim was not made in the final bill or was not notified to the petitioner.

94. In rejoinder, learned senior counsel for the petitioner submits that if according to the respondent, extra work was not carried out under the contract, then there would be no reason to invoke arbitration agreement for the purpose of referring such dispute to the learned arbitrator for adjudication. He submits that the argument of the learned counsel for the respondent that the extra work was carried out not under the contract but outside the contract is self destructive and on that ground itself, the learned arbitrator could not have entertained that claim being not arbitrable.

95. It is submitted by the learned senior counsel for the petitioner that even if the extra work was carried out by the respondent under the same contract which was awarded to the respondent by the petitioner, the respondent was required to notify the said claim in accordance with clause 6.6.3.0 of the General Conditions of the Contract and various other provisions which were

mandatory. It is submitted that the said claim was not admittedly included in the final bill or was not notified to the petitioner which was mandatory before referring such dispute to the arbitration in accordance with the arbitration agreement. He submits that the respondent had submitted 'no claim certificate' and even on that ground, the learned arbitrator could not have exercised his jurisdiction.

96. It is submitted by the learned senior counsel that the learned arbitrator has not rendered any such reason whether the claim was arising out of the extra work or the same was outside the contract awarded to the respondent by the petitioner and thus no notification was required to be followed by the respondent. He submits that the respondent thus cannot be allowed to supplement the reason rendered by the learned arbitrator in the impugned award by making submissions across the bar at this stage. He submits that the award itself shall speak the reasons for allowing or rejecting the claim and cannot be supplemented by oral arguments across the bar at the stage of hearing of the petition under Section 34 of the Arbitration Act. In support of this submission, learned senior counsel placed reliance on paragraphs 67, 83 and 86 of the judgment of this Court in the case of *Bombay Intelligence Security (India) Ltd. (supra)* again.

97. Reliance is placed on Section 31(3) of the Arbitration and Conciliation Act, 1996 and on the passage from the commentary of Dr.P.C. Markanda, senior advocate on the Arbitration and Conciliation Act, 1996. Reliance is also placed on the judgment of the Supreme Court in the case of *East Coast Railway and Anr. Vs.Mahadev Appa Rao & Ors.*, reported in *(2010) 7 SCC 678* and in particular paragraph 10 thereof.

98. Learned senior counsel also placed reliance on the judgment of the Delhi High Court in the case of ***A.B.G. Heavy Industries Ltd. Vs. Indian Oil Corporation***, reported in ***1998 (2) Arb. L.R. 393*** and in particular paragraphs 8 to 10.4 thereof in support of his submission that since the respondent had not notified the aforesaid claim and had not followed the agreed procedure, the learned arbitrator did not have jurisdiction to entertain this claim.

99. Learned senior counsel also placed reliance on the judgment of the Supreme Court in the case of ***Natural Resources Allocation, in Re, Special Reference No.1 of 2012***, reported in ***2012 (10) SCC 1*** and in particular paragraph 73 thereof in support of his submission that the ratio laid down in the judgment will have to be considered on the facts of each case and is restricted to the facts of that case. He distinguishes the judgment of this Court in the case of ***Satpal P. Malhotra & Ors. (supra)*** on the ground that the said judgment delivered by this Court while dealing with the appeal under Section 37 of the Arbitration and Conciliation Act, 1996 and the provisions of Order XLI Rule 24 of the Code of Civil Procedure, 1908 cannot apply to a petition under Section 34 of the Arbitration Act.

REASONS AND CONCLUSION

100. A perusal of the award indicates that the learned arbitrator has allowed this claim in the sum of Rs.61 lacs towards extra work by placing reliance on the minutes of the meeting dated 9th July, 1999 and the examination in chief of Mr.P.S.Chopde who was examined by the respondent who had alleged to have made reference to the said minutes of the meeting and the quantities that had been worked out in the cases in which the schedule of rates did not contain the rates.

The learned arbitrator has held that the said expenditure was incurred during execution of extra work on the requirement of the petitioner and thus the respondent herein was entitled to compensated for the actual expenses. The learned arbitrator drew an inference that the petitioner having not led any evidence to disprove the statement in examination in chief of the witness examined by the respondent, the claim will have to be allowed.

101. A perusal of clause 2.4.1.2, 2.4.2.0, 2.5.3.0, 2.5.4.0, 2.6.1.0, 2.8.1.0, 2.8.2.0, 3.1.5.0 (ix), 4.3.3.0, 4.3.6.0, 4.6.2.0, 6.6.3.1, 6.6.4.0 indicates that in respect of certain claims the decision of the engineer-in-charge is final and the matter cannot be arbitrated upon. Clauses 6.6.0.0, 6.6.3.0, 6.6.4.0 and 9.0.1.0 of the General Conditions of Contract have to be read together. There was no dispute that the alleged extra work carried out by the respondent was not provided in the schedule of rates. The instructions of consultant was mandatory as per clause 6.6.1.0 before carrying out any such work. The respondent did not produce any proof before the learned arbitrator of having received any such instructions of carrying out extra work for the consultant. It was the case of the petitioner that since the respondent could not supply specified material within the time, in substitution of those items, the respondent had alleged to have brought certain other items which were not used. A perusal of the award indicates that the learned arbitrator has not dealt with this crucial issue raised by the petitioner in the impugned award at all.

102. Under clause 6.2.1.1 of the General Conditions of Contract, the rates in respect of such alleged extra work could be decided only by the consultant. The respondent never made this claim before for adjudication of the rates as per clause 6.2.1.1 of the General Conditions of Contract made this claim for the first time in

the statement of claim. These claims were also not included admittedly in the final bill submitted by the respondent. These claims were not even notified to the petitioner under above referred provisions read with clause 9.0.1.0.

103. A perusal of the aforesaid provisions clearly indicates that unless claims were included in the final bill by the respondent and were notified to the petitioner, the learned arbitrator could not have adjudicated upon the said claim being not arbitrable. In my view the procedure provided in the aforesaid provisions for the purpose of making claims for referring the dispute to the arbitration was a mandatory procedure. The learned arbitrator has not considered the effect of these mandatory provisions and has not dealt with this submission at all in the impugned award. In my view the learned arbitrator has thus exceeded this jurisdiction in entertaining this claim.

104. Since the rates in respect of the alleged extra work was not decided by the consultant, the learned arbitrator could not have decided the rates for the first time in the arbitral proceedings. The award is contrary to the agreed mandatory procedure provided in the contract and thus deserves to be set aside.

105. In my view, the judgment of this court in case of ***the Board of Trustees of Jawaharlal Nehru Port Trust vs. Three Circles Contractors (supra)*** squarely applies to this case insofar as this claim is concerned.

106. A perusal of the record indicates that though the petitioner had raised a plea that this claim was not arbitrable also on the ground that the respondent had signed no claim and no due certificate at the time of final bill, the learned arbitrator has not dealt with this issue in the impugned award.

107. Insofar as submission of the learned counsel for the respondent that since the extra work was necessitated due to various changes in the schedule and installation work in the Electrical Heat Tracing and due to various other reasons attributable on the part of the petitioner and thus the respondent was entitled to make such claim for extra item is concerned, a perusal of the arbitral award does not indicate that the said claim has been allowed by the learned arbitrator on the ground of such alleged changes. Be that as it may, the rates in respect of such extra items could be decided only by the consultant and since the respondent did not apply for adjudication of the rates in accordance with the terms of contract, the learned arbitrator had no jurisdiction to decide the rates on his own.

108. In my view, the learned arbitrator could not have cast burden of proof on the petitioner to disprove the entitlement of the respondent in negative. The respondent had admittedly made this claim for extra item for the first time in the statement of claim and thus the entitlement of the respondent as well as the quantification and proof in respect thereof was to be proved by the respondent and not by the petitioner. The award shows patent illegality. A perusal of the record indicates that the petitioner had raised an issue of jurisdiction before the learned arbitrator including on the ground that the claim was not notified to the petitioner by the respondent in accordance with mandatory procedure, there was thus no waiver on the part of the petitioner to raise such object on the ground of jurisdiction.

109. Insofar as submission of the learned counsel for the respondent that since the extra work was not carried out under the provisions of the contract and thus the procedure under clause 6.6.1.0 was not required to be followed by the respondent is concerned, in my view this submission is contrary to the provisions

of the contract. Even if any extra work was carried out by the respondent, the respondent ought to have included the claim for such extra work in the final bill and ought to have notified the said claim to the petitioner. The said alleged extra work was carried out by the respondent for the completion of the work awarded to the respondent by the petitioner and was alleged to be in substitution of some of the items. It is not in dispute that the respondent had invoked the said arbitration agreement in respect of such alleged extra work. In my view if the argument of the respondent is accepted that since the said work was carried out by the respondent was not under the provisions of the contract and thus the procedure which was required to be followed while making claim for the work within the original scope of work was not required to be followed for extra work, in that event the respondent could not have even invoked the said arbitration clause for making such claim for extra work. In my view the submission of the learned counsel for the respondent is contrary to the provisions of the contract.

110. Be that as it may, the learned arbitrator has not dealt with this submission in the impugned award and thus the reasons recorded by the learned arbitrator cannot be supplemented by the respondent in the present proceeding filed under section 34 of the Arbitration Act. I am not inclined to accept the submission of the learned counsel for the respondent that since clause 6.6.4.0 is not mentioned in clause 9.0.1.0, the claim arising under the said clause was not required to be notified to the petitioner and therefore the said claim was arbitrable. In my view the submission of the learned counsel for the respondent is thus self destructive.

111. Insofar as reliance on the minutes of the meeting in the impugned award by the learned arbitrator is concerned, the said minutes of the meeting does not prove the entitlement of the respondent to claim any amount for extra work or

to shows that the approval of the work quantity and the rate claimed by the respondent was approved. In my view the award in respect of this claim is contrary to the terms of the contract and shows patent illegality and is accordingly set aside. Judgment of Delhi High Court in case of ***A.B.G. Heavy Industries Ltd. Vs. Indian Oil Corporation***, (supra) relied upon by the learned senior counsel for the petitioner applies to the facts of this case and supports the case of the petitioner.

COUNTER CLAIMS :-

112. It is submitted by the learned senior counsel for the petitioner that the learned arbitrator has dealt with the counter claims while dealing with issue nos. 14, 16 to 21 and has been simply brushed aside counter claim on wholly untenable grounds. He submits that the counter claims made by the petitioner had arisen against the respondent due to delayed performance and also on account of actual receivables in the nature of subsidized canteen facility, land user, use of power, water etc., use of CISF gate passes and requirement of additional manpower resources on the part of the respondent. He submits that the entire counter claim has been mainly rejected by the learned arbitrator on the ground of limitation and not being arbitrable.

113. Insofar as issue of limitation in making a counter claim is concerned, it is submitted by the learned senior counsel that the contractual completion date was 22nd October, 1998 whereas the actual completion date was 6th September, 2000, the defect liability period ended on 6th September, 2001. The accounts between the parties were not settled including the final bill. During the period between 27th January, 2001 and 15th November, 2001 there were correspondence exchanged between the parties. On 24th August, 2001 the petitioner had informed

the respondent that the final bill submitted by the respondent was not correct. The petitioner thereafter had called upon the respondent to depute the representative of the respondent to sign the final bill on 15th September, 2001. Vide letter dated 15th November, 2001, the respondent had repudiated the request made by the petitioner which according to the petitioner was the commencement of cause of action to maintain the claim. He submits that the petitioner thereafter made a demand vide letter dated 2nd January, 2002 which was not complied with by the respondent. The arbitration proceedings commenced on the respondent issuing notice under section 21 on 24th January, 2002. The petitioner while nominating the arbitrator, vide its advocates' letter dated 21st February, 2002 had informed the respondent that apart from the alleged claim put forth by the respondent, the petitioner shall also file its counter claim as and when the arbitration was initiated. The respondent had selected Mr.H.Parekh to act as the learned sole arbitrator on 1st April, 2002 to decide the disputes between the petitioner and the respondent.

114. The learned senior counsel for the petitioner submits that while filing written statement, the petitioner had reserved their rights to quantify its counter claim and had crave leave to make a counter claim at an appropriate stage. The counter claim was quantified by the petitioner and the written statement was amended on **6th November, 2003**. The learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Voltas Limited vs. Rolta India Ltd., 2014(4) SCC 516*** and the judgment of Supreme Court in case of ***Steel Authority of India vs. Gupta Brothers Steel Tubes Ltd.*** reported in (2009) 10 SCC 63 and in particular paragraph 33. He submits that all the disputes between the parties were referred for the adjudication of the learned sole arbitrator Mr.H.Parekh and thus the counter claim could not have been rejected on the ground that the same were not arbitrable.

115. It is submitted by the learned senior counsel that in respect of the issue raised by the petitioner that some of the claims were not arbitrable in view of the clauses 2.4.1.2, 2.4.2.0, 2.5.3.0, 2.5.4.0, 2.6.1.0, 2.8.1.0, 2.8.2.0, 3.1.5.0(ix), 4.3.3.0, 4.3.6.0, 4.6.2.0, 6.6.3.1 and 6.6.4.0, the learned arbitrator had framed issue no.15. The petitioner had contended that in respect of certain claims where the decision of the Engineer-in-Charge was final, the matter could not have been arbitrable. He submits that it was further contention of the petitioner that the arbitration could be held only in respect of the notified claims included in the final bill as per the mandate contemplated in the arbitration clause 9.0.1.0 which issue was though framed by the learned arbitrator, he has not answered the said issue.

116. Insofar as rejection of the counter claim made by the petitioner by the learned arbitrator is concerned, it is submitted by learned counsel for the respondent that the learned arbitrator has rejected the said counter claim not only on the ground of limitation but also on merits. He submits that the work was admittedly completed on 6th September, 2000. The final bill was submitted on 10th October, 2000 by the respondent. On 3rd October, 200, completion certificate was issued. He submits that the cause of action, if any, for making a counter claim thus arose when the alleged delay on the part of the respondent took place according to the petitioner which could be prior to the date of completion of work i.e. 6th September, 2000. The petitioner had lodged its counter claim before the learned arbitrator only on 6th November, 2003 on which date the counter claims were *ex-facie* barred by law of limitation.

117. It is submitted by learned counsel for the respondent that when the learned arbitrator allowed the amendment to the written statement filed by the

petitioner on 18th December, 2003, the issue of limitation was kept open. The application for amendment was made by the petitioner on 7th November, 2003.

118. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in case of **Voltas Limited vs. Rolta India Limited, (2014) 4 SCC 516** and in particular paragraphs 23, 25, 28 and 31.

119. Learned counsel for the respondent submits that the learned arbitrator in any event has rightly rejected the counter claim even on merits and has rendered various findings of fact which cannot be interfered with by this Court under section 34 of the Arbitration Act.

REASONS AND CONCLUSION

120. A perusal of the award insofar as counter claim is concerned, indicates that the learned arbitrator has rejected this claim on the ground of limitation and also on merits. It is not in dispute that though the stipulated date of completion of contract was 22nd October, 1998, the contract was completed on 6th September, 2000. The defect liability period was 6th September, 2001. The counter claim was lodged on 6th September, 2003. The entire counter claim is based on the alleged delay and breaches on the part of the respondent. The learned arbitrator has also rejected this claim on the ground that the claim being not arbitrable on the ground that when this court had appointed the arbitrator as a substituted arbitrator in place of the erstwhile arbitrator, this court had referred to the learned arbitrator only the disputes which were referred to the erstwhile arbitrator. There was no counter claim made by the petitioner before the earlier arbitrator.

121. Insofar as merits of the counter claim is concerned, the learned arbitrator has placed reliance on the examination in chief of the witness examined by the petitioner and has held that the said evidence was totally vague and was a mere reproduction of the figures. The learned arbitrator has held that he had already rendered a finding against the petitioner insofar as issue of delay was raised by the petitioner against the respondent. While dealing with the counter claim, the learned arbitrator reiterated the said finding against the petitioner and in favour of the respondent.

122. Insofar as submission of the learned senior counsel for the petitioner that since the petitioner had informed the respondent on 24th August, 2001 that the final bill submitted by the respondent was not correct and had thereafter had exchanged various correspondence with the respondent disputing the claim made by the respondent and pointing out that the petitioner also would made the counter claim at the appropriate stage, the counter claim could not be treated as time barred by the learned arbitrator. In my view correspondence would not extend the period of limitation.

123. It is not in dispute that the counter claim was in the nature of the damages based on the alleged breaches committed by the respondent during the course of carrying out work by the respondent. It is not in dispute that the work was actually completed on 6th September, 2000. The cause of action for claiming damages arising out of alleged breaches on the part of the respondent had already arisen much prior to 6th September, 2000. The counter claim was admittedly filed by the petitioner before the learned arbitrator only on 6th November, 2003. Merely because the petitioner had reserved their rights to make the counter claim would not stop limitation. The petitioner had not issued any notice for referring their

claim to the arbitration under section 21 of the Arbitration and Conciliation Act, 1996. The limitation in respect of such counter claim thus would not stop on the date the receipt of the notice was issued by the respondent in respect of their claims. In my view the limitation would stop in this situation only on 6th November, 2003 when the counter claim was actually filed before the learned arbitrator by the petitioner. The judgment of Supreme Court in case of ***Voltas Limited vs. Rolta India Ltd.***(supra) and in case of ***Steel Authority of India Limited (supra)*** relied upon by the petitioner would not assist the case of the petitioner.

124. Be that as it may, a perusal of the record before the learned arbitrator clearly indicates that the respondent had not produced any proof in support of such huge counter claim made by the petitioner. The pleadings filed by the petitioner was also totally vague and without particulars. Learned arbitrator in my view has rightly dealt with the pleadings and evidence produced by the petitioner and has rightly come to the conclusion that the counter claim made by the petitioner was without any particulars, vague and without any proof. In my view the counter claim which was even otherwise in the nature of damages was required to be pleaded and proved and in absence thereof, the learned arbitrator could not have allowed such counter claim. In my view the learned arbitrator has rightly rejected the counter claim and thus this part of the award does not require any interference by this court and the award on this claim is accordingly upheld.

INTEREST

125. It is submitted by the learned senior counsel that the learned arbitrator could not have awarded interest at the rate of 18% p.a. by considering the same as reasonable in case of commercial transaction. He submits that the respondent did

not prove any evidence in support of their submission that the rate of interest of 18% was reasonable in case of commercial transaction. He submits that interest is also illegally awarded by the learned arbitrator on the claim of security deposit which interest was specifically prohibited under clause 2.1.8.0 of General Conditions of Contract. In support of this submission, learned senior counsel placed reliance on judgment of this court in case of *V/O "Tvazhpromexport' vs. Mukand Limited*, 2005 (3) Arb.L.R.406(Bom.).

126. Insofar as claim of interest awarded at the rate of 18% p.a. by the learned arbitrator is concerned, it is submitted by learned counsel for the respondent that under section 31(7)(a) and (b) of the Arbitration & Conciliation Act, 1996, the learned arbitrator has ample power to award interest at such rate as the learned arbitrator may deem reasonable. He submits that the learned arbitrator has rightly awarded interest at the rate of 18% p.a. and no interference with that part of the award is warranted.

127. In rejoinder, learned senior counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of *MSK Projects India (JV) Limited Vs.State of Rajasthan and Anr.*, reported in (2011) 1 SCC 573 and submits that the Supreme Court had reduced the rate of interest awarded by the learned arbitrator in the said judgment substantially. Reliance is also placed on the judgment of this High Court in the case of *Central Warehousing Corporation Vs. M/s.Pharmex Builders & Anr.*, reported in 2014-(AR2)-GJX-0234-Bom in which this Court had reduced the rate of interest to 10% p.a.

REASONS AND CONCLUSION

128. A perusal of the award indicates that the learned arbitrator has awarded interest at the rate of 18% per annum w.e.f. 1st November, 2000 till the date of award and at the same rate till realization of award on the principal amount of Rs.13,96,756/- w.e.f 1st February, 2002 till realization. The learned arbitrator has also awarded interest on the security deposit which was specifically prohibited under clause 2.1.8.0 of the General Conditions of Contract. The learned arbitrator while allowing this claim at the rate of 18% per annum has held that the same was reasonable in case of commercial transaction.

129. In my view under section 31(7)(a) of the Arbitration and Conciliation Act, 1996, the learned arbitrator is empowered to award interest at such rate as it deem reasonable on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. In my view, the rate of interest awarded by the learned arbitrator for the period from 2000 onwards at the rate of 18% p.a. is not a reasonable rate of interest. The respondent did not lead any evidence to show that the rate of 18% per annum was a commercial rate of interest as considered by the learned arbitrator while awarding interest at such rate. In my view interest @ 12% p.a. in the facts and circumstances of this case is reasonable.

130. In my view, since the award in respect of claims (d) and (g) are set aside by this order, the claim for interest awarded by the learned arbitrator on those two claims also has to be set aside. Similarly award in respect of the interest on security deposit which is prohibited under the terms of the contract and thus could not have been awarded in view of the bar under section 31(7) (a) of the Arbitration Act also deserves to be set aside.

Arbitration Cost :

131. Learned senior counsel for the petitioner submits that the learned arbitrator has awarded the arbitration cost of Rs.10 lacs in favour of the respondent though no evidence was led by the respondent in support of the said claim. He submits that in any event, since the claims awarded by the learned arbitrator are patently illegal, the learned arbitrator could not have awarded any arbitration cost in favour of the respondent but ought to have dismissed the claim with cost in favour of the petitioner.

REASONS AND CONCLUSION

132. Insofar as claim for arbitration cost awarded by the learned arbitrator at Rs.10 lacs is concerned, the respondent had made a claim of Rs.11,70,000/- under various heads. The learned arbitrator has rendered reasons as to why he had awarded the said claim at Rs.10 lacs. The learned arbitrator found that the fees of the learned arbitrator borne by the petitioner, cost of arranging venues of the meetings as well as traveling expenses incurred by the respondent and the cost of the expert evidence was reasonable. In my view there is thus no merit in the submission of the learned senior counsel for the petitioner that the said claim was based on no evidence and thus the said submission deserves to be rejected. No infirmity is found with that part of the award.

133. I, therefore, pass the following order :-

- (a) The impugned award dated 30th June, 2005 is set aside insofar as claim nos. (d) and (g) are concerned.

- (b) Interest awarded on the security deposit is set aside.
- (c) Interest at the rate of 18% per annum awarded by the learned arbitrator is reduced to 12% per annum which shall be payable for the period as awarded by the learned arbitrator.
- (d) Interest awarded on claim nos. (d) and (g) is set aside.
- (e) Rest of the award is upheld.

134. Arbitration petition is disposed of in the aforesaid terms. No order as to costs.

(R.D. DHANUKA, J.)