

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

Judgment reserved on February 10, 2015

Judgment delivered on April 29, 2015

+ **O.M.P. 301/2007**

M/S BSES YAMUNA POWER LTD.

..... Petitioner

Through: Mr. Deepak Kumar, Advocate

versus

M/S TALUPULA ENGINEERING CO.

..... Respondent

Through: Mr. Vaibhav Gaggar, Advocate
with Mr. Abhimanyu Chopra,
Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act' in short) is to the award dated December 26, 2006 passed by the learned Arbitral Tribunal ('Tribunal' in short) consisting of three Members, whereby the Tribunal allowed eight claims out of eleven claimed by the respondent with interest @ 12% p.a and rejected the counterclaim of the petitioner herein.

Facts:

2. On November 27, 2002 the respondent submitted its bid for the

work of supply, erection and commissioning of 66KV 4 CKT tower line from 220KV South of Wazirabad Grid Station, 66KV to Shastri Park Grid Station. On December 20, 2002 the purchase order for supply of material and a work order for erection and commissioning respectively of the tower line for a lump-sum of Rs.1,74,50,000/- was placed on the respondent. The work was to be completed within a period of 3 months. It appears that an amendment was issued to the work order whereby the completion period was increased to 4 months.

3. It is not disputed that the responsibility to design the work was that of the petitioner. It is also noted from the award that after casting one foundation it was found that the design as specified would not suit the riverbed and the work was stopped by the petitioner. It is also noted that after four months the petitioner awarded a consultancy contract to Power Grid Corporation of India Ltd. (PGCIL) vide its work order dated April 28, 2003. The PGCIL took four months to finalize the design. In view of the changes in the design, the petitioner issued fresh amendment to the purchase order and work order on September 22, 2003 with a completion period of 20 days and October 15, 2003 respectively. On October 01, 2003 a communication was sent by the petitioner to the respondent to expedite the work. The respondent vide its letter dated October 01, 2003 had expressed its inability to complete the work by October 15, 2003 and

had requested for completing the work by January, 2004. A further intimation was sent to the respondent on October 14, 2003 for completing the work. In fact, a meeting was proposed on October 03, 2003 for the following details:-

- (i) Detailed planning to complete the job by October 30, 2003
- (ii) Resource Requirement and Mobilization
- (iii) Progress Plan versus Actual
- (iv) Weekly Progressive Report

4. On November 05, 2003 a communication from the petitioner to the respondent to expedite the pending work by November 30, 2003 was sent. It is noted that various letters were sent from time to time i.e. November 03, 2003, January 05, 2004 and March 20, 2004. On May 31, 2004 the respondent filed a Bar Chart promising to complete the work by July 15, 2004. It is noted that the petitioner noting that despite final discussion held in May 2004, no further communication as received from the respondent for completion of the project by July 15, 2004, it issued letter dated June 6, 2004 terminating the contract and awarding the balance unexecuted job to another contractor at respondent's risk and cost. On July 7, 2004, the respondent invoked the arbitration clause seeking reference of the disputes to arbitration. The claim was filed by the respondent pointing out certain acts of omission and commission on

the part of the petitioner. The respondent pointed out the hindrances put forth by the farmers whose land was acquired for the purpose of the work. The respondent pointed out the non-supply of tor steel by the petitioner and non-payment of the bills for the work done which according to the respondent had crippled its financial arrangement. The respondent made the following eleven claims:-

1	<i>Forfeiture of payment on account of other contracts executed by the Petitioner.</i>	3.1	<i>Rs.5,08,749.00</i>
2	<i>Illegally and wrongfully encashment of Petitioner's 4 Nos. BGs of Rs.5.00 lakhs each.</i>	3.2	<i>Rs.20,00,000.00</i>
3	<i>Amount due to the Petitioner on termination of the subject contract.</i>	3.3	<i>Rs.32,30,109.00</i>
	<i>Interest on payments wrongfully withheld.</i>	3.3.1	<i>Rs.1,32,124.00</i>
4	<i>Petitioner's material and P&T not paid by respondent and seized by the respondent from sub-station premises.</i>	3.4	<i>Rs.4,79,475.00</i>
5	<i>Advances paid by the Petitioner against the contract but not retrieved from the suppliers.</i>	3.5	<i>Rs.2,00,000.00</i>
6	<i>Idling of labour, machinery, watch & ward and administrative expenses.</i>	3.6	<i>Rs.59,36,000.00</i>
7	<i>Interest charges on finance blocked by the Respondent.</i>	3.7	<i>Rs.12,02,619.00</i>
8	<i>Loss of profit.</i>	3.8	<i>Rs.23,70,000.00</i>
9	<i>Dislocation of Petitioner's other works due to dislocation of financial arrangement, loss of reputation, creditworthiness of the Petitioner with bankers and harassment imposed by the Respondent.</i>	3.9	<i>Rs.80,00,000.00</i>
10	<i>On account of litigation and arbitration.</i>	3.10	<i>Rs.20,00,000.00</i>
11	<i>Reimbursement of sales tax</i>		<i>Rs.20,67,683.57</i>
<i>TOTAL</i>			<i>Rs.2,81,26,759.57</i>

5. The petitioner herein filed a reply to the claim petition wherein the

petitioner's stand was that the respondent had deliberately and mischievously kept the pace of work extremely slow. It had also alleged the lack of financial capacity of the respondent to procure material and complete the work. It had also averred lack of interest on the part of one of the partners to ensure completion of work. The petitioner denied that it did not have the government clearance to construct the tower line. It was also averred that major portion of the land route was clear and wherever some problem was there it was sorted out. The petitioner's stand also was that all material which was sought, was supplied to the respondent. They had denied any delay in making the payment. It was the stand of the petitioner that number of times the respondent had sent wrong and false bills. Some parts of the bills were even not payable.

6. The Tribunal before discussing the individual claims considered the aspect of termination of the contract. It held that the rescission of the contract was arbitrary, unjust and illegal. The reasoning given by the Tribunal was: (i) no notice was given to the respondent before terminating the contract; (ii) The Tribunal examined the note in which the due date for completion of the work of 15th July, 2004 was fixed by noting the following:-

(a) Bar Chart (revised) to be submitted by TEC, with a completion of job by 15th July, 04.

(b) Weekly Progress Report to be verified from GM (EHV) and same is only to be submitted to Director (Operations).

(c) TEC representative has to attend the weekly meeting at BSES Delhi, Head Office.

(d) BSES suggest to have a penalty of Rs.50,000/- for each day of delay effective from 16th July, 04.

(e) TEC to confirm the same by 29/05/04.

7. The Tribunal was of the view that there was no mention of termination of the contract in the note. There was only a suggestion of penalty of Rs.50,000/- per day. The Tribunal was also of the view that the termination was unjust, arbitrary, illegal and against the provisions of the contract. According to the Tribunal, such abrupt and arbitrary recession of the contract was without any notice given to the respondent and despite alternate remedies, the contract was rescinded during extended validity. The Tribunal was also of the view that, the conduct of the petitioner was unrealistic inasmuch as against 20 days permitted by the petitioner to the respondent, it took five months for the petitioner to get the work executed through other agencies inasmuch as, as per the testimony of the petitioner's witness, Sh.D.R.Gautam, the line was energized only on February 27, 2005 i.e. 8 months after the recession of the contract. The Tribunal had also concluded that the allegations of negligence and deliberate mischief by the respondent are not

substantiated, and accordingly, held that the respondent was entitled to compensation for monetary loss suffered by it, refund of security deposit withheld/forfeited and bank guarantees encashed by the respondent, amount due for the work actually done and not paid by the petitioner, refund of the sums due to the petitioner under other contracts yet forfeited by the respondent and the loss of profit, which would have accrued to the respondent had the contract been allowed to stay on and run its actual course as also the interest for the time for which, the amounts due to the respondent have remained wrongly held up with the petitioner.

8. In the above background, the Tribunal has awarded the following claims in favour of the respondent and rejected the counterclaim of the petitioner:

Claim No.	Awarded Amount in Rs.
1	5,08,749/-
2	20,00,000/-
3	13,33,194/-
4	2,91,320/-
5	2,00,000/-
6	33,93,600/-
8	12,98,733/-
10	4,50,000/-

9. The Tribunal against claim No. 7, granted interest pendente lite and future interest. The pendente lite interest granted is as under:

<i>Claim No.</i>	<i>Award (Rs.)</i>	<i>Period</i>	<i>Interest (Rs.)</i>
1	5,08,749.00	30 months	1,52,624.00
2	20,00,000.00	29 months	5,80,000.00
3	13,33,194.00	29 months	3,86,626.00
4	2,91,320.00	-	NIL
5	2,00,000.00	30 months	60,000.00
6	33,93,600.00	-	NIL
7	NIL	-	NIL
8	12,98,733.00	-	NIL
9	NIL	-	NIL
10	4,50,000.00	-	NIL
11	NIL	-	NIL
Total	94,75,596.00		11,79,250.00

10. The final award of the Tribunal was for a sum of Rs.1,06,54,846/- to be paid within a period of 30 days of receipt of the award. In the event of the non-payment of the amount, the petitioner was directed to pay the amount along with interest of 18% p.a. from the date of the award till the date of actual payment.

11. The learned counsel for the petitioner would submit that the award is based on no evidence and as such perverse. It is his case that the Tribunal has overlooked the evidence and not considered the evidence and the detail reply submitted by the petitioner in proper perspective. He would state, that the Tribunal ignored the relevant clauses of the agreement like clause 11 of the purchase order and work order as well as clause 8 and 21 of the work order. He would state that the plea of pending bills raised by the respondent for the work done failed to justify

the factum of work done since no work was done by the respondent and also it was incorrect to state that the Electricity Act was not complied with as no such provision of the Act has been cited by the Tribunal. It was his case that the so called plea of farmers' protest taken by the respondent was a non-existent as no such protest had caused hindrance to the work done by the respondent, as the respondent carried out the work at 20 sites out of 21 sites and no police complaint was ever lodged by the respondent in that regard. He would also substantiate that the compensation was paid only to two farmers with respect to tower No. 9 & 10 and for towers 7 & 8. Unfortunately, the respondent claimed the bills as under, that shows the bills were dated even prior to payment of compensation, which fortify the stand of the petitioner that some of the bills raised by the respondent were incorrect:

<u>"Bill dated</u>	<u>Tower(s) involved</u>
31.3.2004	5 and 10
22.9.2003	8 and 9
22.9.2003	7
5.4.2004	5 and 10"

12. He would also state that the respondent claimed a delay of 15 days attributable to the non availability of 25 MM Tor Steel vide communication dated January 22, 2004 but the delay could not justify the delay of 9 months which the respondent made in completion of the work.

He would concede to the fact that even though notice was not sent, in the given facts, notice was not warranted. He would state that the petitioner had necessary permission from the competent authority to run the tower line. According to him, the reliance placed by the Tribunal upon the communication of the respondent dated May 31, 2004 of completing the work by July 15, 2004 was not a firm commitment. The termination of the contract was not an abrupt one but owing the delay of 9 months that the respondent had caused and according to him, the reliance placed by the Tribunal that the third party contractor took 5 months time to complete the same work, is of no consequence and no reliance should have been placed on the said aspect. He would also submit, the finding recorded that 20 days' time given were unrealistic, was not correct, as the actual delay was of 9 months. On forceful dispossession, he would submit that after the termination of the contract, the petitioner was within its right to prevent the respondent from using the godown. He would also challenge the procedure followed by the Tribunal in allowing the respondent to place on record the documents which the Tribunal considered while giving the award as contrary to the principles of natural justice. Learned counsel for the petitioner would rely upon the following judgments in support of his contentions:

(i) Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.,

AIR 2003 SC 2629

(ii) Associated Engineering Co. Vs. Government of Andhra Pradesh and Anr., (1991) 4 SCC 93

(iii) Steel Authority of India Ltd. Vs. J.C.Budharaja, AIR 1999 SC 3275

(iv) Rajasthan State Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises and Anr., AIR 1999 SC 3627

(v) State of Maharashtra Vs. Digamber B Kulkarni, AIR 1979 SC 1339

(vi) Sikkim Subha Associates Vs. State of Sikkim, AIR 2001 SC 2062

13. On the other hand, learned counsel for the respondent would justify the award. According to him, the Tribunal has rightly held that the termination of the contract before the last date of completion of the work was illegal as no notice terminating the contract was even given. That apart, he would state, that the delay in execution of the work was clearly attributable to the petitioner inasmuch as the contract having been granted on December 20, 2002, could not be performed for want of design. It was only in the month of September 2003 that the designs were approved by PGCIL. By that time, the actual period of work had expired. Further, he would state, that even by the amended work order, the period of 20 days/October 15, 2003 fixed for completion of work was impossible to be achieved for such a large scale of work. He would also

highlight the different impediments which the respondent had to face because of which the execution could not be carried out, like the farmers' protest, non supply of 25 MM Tor Steel and the delay in making the payments by the petitioner which effected the financial arrangements of the respondent. He would state that there was a delay also in the inspection of the material. It is his case that on May 31, 2004, the respondent had called upon the petitioner to compensate for the rise in the price of the steel and the conductors from the past 6-7 months. He would state, there was violation of different provisions of the work order. According to him, the award rendered was with proper application of mind and a reasoned one and this Court, in exercise of power under Section 34 of the Act, would not like to interfere with the same. He seeks the dismissal of the petition.

14. Having considered the submissions made by the learned counsel for the parties, the first and foremost question that need to be considered is whether the Tribunal was justified in holding the termination of the contract, as arbitrary, unwarranted and illegal. Admittedly, the petitioner had placed the purchase and work order on the respondent on December 20, 2002. A common stipulation existed in both the orders, whereby the supply and commissioning was to be completed in three months. A clause for liquidated damages existed in both the orders with a stipulation

that in the eventuality of delay in supply of material/delay in commissioning, a liquidated damages of sum equivalent to 0.5 % of the order value was to be imposed for every week's delay subject to a maximum of 5% of the total order value. Once the maximum is reached, the petitioner was within its right to consider termination of the contract. The purchase and work orders were amended. The design of the work was faulty. The petitioner had to approach the PGCIL for designing the work. The PGCIL had designed the work, which led to the final amendment to both the orders on September 22, 2003, which stipulated that the material was to be delivered in 20 days and the commissioning was to be completed in all respect on or before October 15, 2003. It may be noted here that by this time, 9 months had elapsed. In any case, the period of 20 days/October 15, 2003 was an unachievable period given the magnitude and nature of work. Despite expiry of 20 days/October 15, 2004, the petitioner had not terminated the contract. The petitioner has been writing to the respondent for expediting the work. The petitioner has referred to many letters in that regard. It is also a conceded position that the petitioner had agreed to increase in the total cost of the project subject to completion of project by July 15, 2004. On May 31, 2004, the respondent filed a bar chart promising to complete the work before July 15, 2004.

15. Regrettably much before the date of July 15, 2004 could be reached, on June 04, 2004 the petitioner terminated the contract that too, as noted by the learned Tribunal, without notice to the respondent. Once the petitioner has confirmed the date as July 15, 2004 as the date of completion of work, there was no reason to terminate the contract. No doubt, vide the amendment to the work order dated September 22, 2003, October 15, 2003 was the last date to complete the work which this Court is also of the view was not possible to achieve but still it is noted that from September, 2003 till June, 2004 even after lapse of 9 months the work could not be completed but that would not entail the petitioner to cancel the contract abruptly without notice. The learned Arbitral Tribunal was right in its conclusion, whereby it has held the recession of the contract as arbitrary, unjust and illegal.

16. That apart, clause 11 of the work order contemplates the consequences in the eventuality of delay in supply/commissioning beyond the stipulated delivery date due to reasons solely attributable to the contractor, i.e. it contemplates, the petitioner shall without prejudice to its other remedies under the contract deduct as liquidated damages a sum of equivalent to 0.5% of the order value for each week or part thereof delay until the actual date upto a maximum deduction of 5% of order value. Once the maximum is reached, the petitioner could consider

termination of the contract without any liabilities to it. None of the letters written by the petitioner between October 15, 2003 till May, 2004 refer to any claim being made by the petitioner, in that regard. The conclusion of the Tribunal to hold the termination of the contract as arbitrary, unwarranted and illegal cannot be faulted.

17. Insofar as the claims as awarded by the Tribunal are concerned, claim No.1 relates to withholding/forfeiture of the amount due to the respondents for the work executed by it relating to 66KV Towers line work at Pappankalan, 220KV sub-station. The amount was a security deposit given by the respondent for the said contract and was due to be refunded on successful completion of the work. When the petitioner rescinded this contract it refused to refund the security deposit on the ground of pendency of disputes relating to this contract. There is a finding by the Tribunal that there is no stipulation in the agreement which entitles the petitioner to withhold the money due to the respondent under some other contract. The Tribunal has held that withholding of this amount was extra contractual penal measure unjustly enforced by the petitioner. It has also concluded that since the recession of the contract was held to be arbitrary, unjust and illegal the petitioner would liable to pay for loss and damage to the respondent besides outstanding dues of the respondent and accordingly granted the security deposit due for

refund under another independent contract. I agree with the above conclusion of the Arbitral Tribunal. The petitioner could have justified the withholding of the security deposit of a separate contract if there was any stipulation in the present contract in that regard. Nothing has been pointed to me by the learned counsel for the petitioner during arguments. The award against this claim is justified.

18. Insofar as claim No.2 is concerned, the same relates to refund of the amount of bank guarantees encashed by the petitioner. The Tribunal came to conclusion that a recession of the contract during extended validity and without any notice was arbitrary, unjustified and illegal besides failure of the petitioner to discharge its contractual obligations, on several counts. The Tribunal held, the encashment of bank guarantees was not justified. It is a financial punishment inflicted by the petitioner upon the respondent. The petitioner justified the invocation of bank guarantees on the ground of liquidated damages, which according to the Tribunal was never an issue between the parties. The Tribunal had accordingly awarded the refund of Rs.20 lacs realized by the petitioner through encashment of four bank guarantees.

19. The Tribunal having already held the termination of the contract was illegal, unjust and unfair, the invocation of the bank guarantees could not have been justified. It necessarily follows that the respondent would

be entitled to Rs.20 lacs against the bank guarantees so invoked. The Tribunal has precisely held so and granted the refund of Rs.20 lacs under this claim, which is justified.

20. Claim No.3 is a claim for actual work done. The claim was for Rs.32,30,109/-. It was the case of the respondent that on the date of the recession of the contract, mobilisation advance to the tune of Rs.18,96,915.24/- was yet to be adjusted from the payment due to it. It was also its case that an amount of RS.32,30,109/- was due for payment for the work actually done by it, which was withheld by the petitioner.

21. In reply to the claim statement the petitioner had only made a bald averment that the said amount is not payable to the respondent. The Tribunal proceeds on a premise that the respondent has done a work for Rs.32,30,109/-, which amount was withheld after recession of the contract. The Tribunal accordingly adjusted the amount of Rs.18,96,915.24/-, which is the mobilisation advance and granted Rs.13,33,193.76/-. It is noted that the petitioner was called upon to furnish statement of account relating to the contract. The petitioner had accepted before the Tribunal that some bills have not been received by its accounts branch and were with the field unit. In the absence of any information forthcoming from the petitioner, the Tribunal relied on the details furnished by the respondent and considering the gross value of the

work executed by the respondent and adjusting the mobilisation advance against the bills for the work done, Tribunal granted Rs.13,33,194/-. The petitioner in para (xxx) of the petition, has not disputed the work done/bills raised. If that be so, the conclusion of Tribunal cannot be faulted.

22. Insofar as claim No.4 is concerned, the same was on account of material forcibly taken away by the respondent from sub-station premises. The reply filed by the petitioner before the Arbitral Tribunal was as under:-

“4. That the contents of para 4 of the claim petition are wrong and denied. It is denied that any material belonging to the claimant was confiscated by the respondent as falsely alleged. The list given by the claimant is a make belief, false and without any basis whatsoever.”

23. The Tribunal was of the view that the petitioner despite being given various opportunities to produce original record of inventory of the materials taken over by it, it had not submitted. The Tribunal also concluded, while seizing the depot no independent witnesses were associated and it was done in the absence of the respondent's representative even after their vehement protest. The Tribunal relied upon the respondent's submission with circumstantial evidence and proof. The

respondent had in fact produced a list of materials worth Rs.1,04,320/- and T&P worth Rs.3,75,155/-, which were lying in the depot at the time of forcible seizure by the petitioner. The Tribunal awarded full cost of Rs.1,04,320/-, towards materials and Rs.1,87,000/- for T&P being depreciated cost of T&P at 50% of the amount claimed, the total of which comes to Rs.2,91,320/-.

30. It is noted, the aforesaid finding of the Tribunal is a finding of fact. In the present petition, the petitioner has conceded that the petitioner was within its right to prevent the respondent from using the depot. An inference can be drawn that the respondent was forcibly dispossessed from the depot. Even if the petitioner was within its right to take over the possession of the depot, it could have taken it in the presence of the representative of the respondent by preparing the inventory i.e. the list of articles/material present in the depot. It appears, this procedure was not followed. In the given facts, the Tribunal was justified in awarding the amount.

24. Insofar as claim No.5 is concerned, the same relates to the advances paid by the respondent to the suppliers. The case of the petitioner in the petition is that the claim as awarded is contrary to Section 73 of the Contract Act. It is also stated that the respondent had nowhere in the claim petition stated that advance was paid to M/s. Equip

Tech Pvt. Ltd. The compensation for a remote and an indirect loss or damages sustained by reasons of breach of contract cannot be granted. The Tribunal relied upon the payment of Rs.2 lacs made by the respondent vide cheque No.132317 dated 25.05.2004 on IDBI Bank Ltd. There is no finding that the payment made by the respondent was for purchase of the equipment to be supplied against the purchase/work orders. A perusal of the claim would show that the respondent has not named M/s Equip Tech Pvt. Ltd. in the claim petition. An impression was given in the claim petition that the amount of Rs.2 lacs was paid to various suppliers and not one. A perusal of the claim petition would also show that no attempt was made by the respondent to retrieve the amount from the suppliers. The amount granted by the Tribunal was without any evidence. The Tribunal could not have awarded this amount. The same need to be set aside. I order accordingly.

25. The claim No.6 relates to idle labour, machinery and plants, watch and ward and administrative expenses. Against the amount of Rs.59,36,000/- claimed, the Tribunal awarded Rs.33,93,600/-. The break-up of the claim was Rs.28 lacs for payment of salaries and wages to various staff engaged by the respondent for a period of 14 months. The 14 months appears to relate back to the initial work order and purchase order. For idling of machines, the claim was for Rs.21 lacs and

Rs.7,56,000/- as expenses of watch and ward and Rs.2,80,000/- as administrative expenses. The Tribunal denied the administrative expenses. Against the other three heads of payment of staff salaries and wages, idling of machines, expenses of watch and ward the Tribunal granted 60% of the claim amount i.e. Rs.33,93,600/-. There is no denial to the fact that the initial work order/purchase order was placed in the month of December, 2002, which were replaced by new orders on September 22, 2003. No work was carried out at least till September 2003, except relating to one tower. During the period, the men and machinery, surely would be lying idle. The respondent has produced evidence in support of the payment made to the workers and for machinery. The Tribunal has confined the award to 60% of the amount claimed, the amount coincides with the period of 9 months, during which period no work was carried out. In the facts, claim allowed by the Tribunal is justified and cannot be interfered with.

26. Against claim No.7 the Tribunal has awarded interest, 12% p.a. The awarded amount (along with interest) was directed to be paid within 30 days, otherwise interest @ 18% p.a. was to accrue. The 12% interest granted is higher than the normal banking interest prevailing. Even though the difference may not be much, I note that this Court has been granting interest between 9% to 10%, I deem it fit that the interest be

reduced from 12% to 10% in view of the judgments in the case reported as *(2005) 6 SCC 678 Rajendra Construction Co. vs. Maharashtra Housing & Area Development Authority and Ors.* & *166 (2010) DLT 99 Mittal Estates Private Ltd. vs. Delhi Development Authority & Ors.*].

In view of this, the interest of 18% awarded by the Tribunal in the final award on failure to make payment within 30 days is also reduced to 10%.

27. Claim No.8 was for loss of profit which has been quantified as 10% of the total contractual amount, which in the facts of this case is justified.

28. The claim No.10 was for reimbursement of expenses on arbitration and litigation, the Tribunal has awarded Rs.4,50,000/-, which included an amount of Rs.2 lacs paid to the three Arbitrators and the amount of Rs.2,50,000/- as expenses incurred by the respondent in pursuit of arbitration, cannot be interfered with being discretionary and plausible.

29. The rejection of the counterclaim of the petitioner in the facts moreso when the recession of the contract was held to be unjustified and illegal cannot be faulted with.

30. Insofar as the judgments relied upon by the learned counsel for the petitioner are concerned, the same are primarily on two propositions; (i) that the Tribunal cannot go beyond the terms of the contract; (ii) that in terms of clause 11 of the purchase/work orders the petitioner was within

its right to terminate the contract.

31. On the first proposition, reliance placed by the learned counsel for the petitioner on the judgment of *ONGC Ltd.* (supra), *Associated Engineering Co.* (supra), *Steel Authority of India Ltd.* (supra) and *Rajasthan State Mines and Minerals Ltd.* (supra), suffice to state the judgments are not applicable to the facts of the case. Nothing has been brought to the notice of this Court which would demonstrate that the Tribunal has gone beyond the terms of contract. Rather I note, the conclusion of the Tribunal holding the recession of the contract was unwarranted was by placing reliance on clause 11 of the contract.

32. Insofar as the judgments relied upon by learned counsel for the petitioner in *Digamber B. Kulkarni* (supra) and *Sikkim Subha Associates* (supra) to contend, that the default committed by the respondent was sufficient to effect termination, are concerned, the same would also be not applicable in view of the facts available on record. Clause 11 of the work/purchase orders stipulates a procedure before termination can be effected. There is a conclusion of the Tribunal that such procedure was not followed. That apart it is also the conclusion of the Tribunal that no notice was given to the petitioner before effecting the termination much before the last date agreed to for completion of the work. No doubt the petitioner may be right in contending that the

respondent had considerably delayed the execution of the work, still nothing precluded the petitioner to follow the procedure laid down in the contract and the principles of natural justice before rescinding the contract.

33. In the end, it is summed up that the award of the Tribunal, except to the extent, conclusion to claim No.5 and the interest of 12% under claim No. 7 is reduced to 10% and the interest of 18% payable after the expiry of 30 days is also reduced to 10%, is justified.

34. The contours of challenge in a petition under Section 34 are very restricted, and note for benefit that this Court in a recent judgment in the case reported as **217 (2015) DLT 678 National Highways Authority of India vs. Oriental Structural India Pvt. Ltd.** has held as under:-

“16. Thus, it is not every inference drawn or not drawn by the Arbitral Tribunal from the material before it and which the Court finds to have been wrongly drawn or not drawn, which could be held to be resulting in miscarriage of justice. Such inference / failure to interfere by the Arbitral Tribunal, even if in the opinion of the Court wrong, would permit interference under Section 34 of the Arbitration Act only if it results in a grossly unfair outcome.

17. There is another aspect of the matter. A detailed inquiry into the correctness of the inference drawn / not

drawn by the Arbitral Tribunal would require the Court not only to go through and dissect the arbitral record which is often voluminous in cases as the present but to also give an opportunity to the parties / their counsels to address on the inferences drawn / not drawn by the Arbitral Tribunal and to only thereafter form an opinion. The same would again make a proceeding under Section 34 of the Arbitration Act and hearing thereof akin to an appeal from original decrees of the Court and would be an antithesis to the very concept of judicial review of arbitral award, even if the Court at the end of such a marathon hearing were to conclude that there has been no miscarriage of justice. It is thus for the contracting party challenging the Arbitral Tribunal to, in the memorandum of challenge itself, make out a case of miscarriage of justice within the parameters aforesaid. No such case has been made out in the petition in the present case. Without any such case having been made out in the memorandum of petition, this Court would not embark upon an exercise of requisitioning the arbitral record and giving an opportunity to the parties / their counsels to address on the correctness of the inference drawn / not drawn by the Arbitral Tribunal and on the aspect of whether there has been a miscarriage of justice.

18. Mention may also be made of another recent dicta in Associate Builders Vs. DDA MANU/SC/1076/2014

where on conspectus of plethora of cases including Western GECO International Ltd. supra, the judgment of the Single Judge of this High Court dismissing the petition under Section 34 of the Arbitration Act was restored and the judgment of the Division Bench in appeal there against interfering with the award was set aside holding that the Division Bench exceeded its jurisdiction in interfering with the pure finding of facts forgetting that the arbitrator is the sole Judge of the quantity and quality of evidence before him and that the Division Bench has no business to enter into the pure question of fact to set aside the award. It was further held that the same cannot be done by any Court under jurisdiction exercised under Section 34 of the Act. The Supreme Court further held that the expression 'justice' when it comes to setting aside an award under the public policy ground can only mean that the award shocks the conscience of the Court and that it cannot possibly include what the Court thinks is unjust on the facts of a case for which the Court then seeks to substitute its own view for the arbitrator's view and does what it considers to be 'justice'. The Supreme Court observed that the Division Bench had lost sight of the fact that it is not a first Appellate Court and cannot interfere with errors of fact. The Supreme Court held that if the arbitrators have decided the dispute with a sound head and a good heart and after hearing both

sides, the Courts should not interfere with their award, even if the Court disagrees with the reasons assigned by the arbitrator.”

35. With the above modification to the award the petition is disposed.
36. No costs.

(V.KAMESWAR RAO)
JUDGE

APRIL 29, 2015
km/akb