

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

+ **O.M.P. No.410/2007**

% **2nd September, 2015**

DELHI STATE INDUSTRIAL DEVELOPMENT CORPORATION

..... Petitioner

Through: Ms. Biji Rajesh, Adv. for Mr.
Gaurang Kanth, Adv.

Versus

MOHAN CONSTRUCTION COMPANY

..... Respondent

Through: Mr. Gaurav Duggal, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') is filed against the Award of the Arbitrator dated 21.3.2006. The impugned Award is passed by the Arbitrator with respect to disputes which had arisen between the petitioner/DSIDC/owner and the respondent/contractor with respect to

contract dated 21.4.1995 for construction of Co-Ed. Polytechnic at Rohini, Delhi for the petitioner by the respondent.

2. The following are the salient dates and amounts with respect to the contract in question:-

“Salient features of the work are:

Agreement No. : DSIDC/PME(NP)/A/C/Aggt./95-96/25
Dated 21.4.1995.

Tendered amount : Rs.4,36,65,400/-

Stipulated date of start : 30.4.1995

Stipulated date of completion : 28.4.1997

Actual date of completion : 30.4.1998

Extension of time (EOT) was granted upto actual date of completion without levy of compensation.

Final bill paid on : 8.12.2003”

3. Respondent before the Arbitrator filed a total of 28 claims. Some of the claims have been allowed and some of the claims have been dismissed. It is with respect to the claims which have been allowed and the counter claims of the petitioner which have been dismissed that the petitioner has filed the present petition. Petitioner had filed 9 counter claims in the arbitration proceedings and which were dismissed and against which part of the Award also the petitioner has filed objections challenging the

dismissal of the counter claims. In terms of the impugned Award, the respondent has been awarded a sum of Rs.1,09,08,393/- alongwith the interest at the rate of 12% per annum from the date of the Award till the date of actual payment. If the petitioner was to make the payment of the awarded amount within 90 days then no future interest was to be paid.

4. Let me take up each of the claims as allowed by the Arbitrator and objected to by the petitioner, but before doing so let me turn to the two preliminary objections which were raised by the petitioner herein before the Arbitrator and which were rejected by the Arbitrator.

5(i). The first objection which was raised by the present petitioner was that the respondent herein had given an undertaking on 14.8.2001 that the respondent will not claim any damages from the petitioner and therefore the arbitration claim could not have been filed for damages.

(ii) The second objection was that the respondent received the payment of the final bill on its issuing a No Claim Certificate dated 8.12.2003 and therefore the respondent after taking the amount of Rs.4,78,710/- in full and final settlement cannot now file arbitration proceedings with respect to the amounts in question.

6(i). With regard to the first preliminary objection, the Arbitrator has rejected the same by observing that admittedly the petitioner herein gave extension of time without levy of compensation upon the respondent herein upto 30.4.1998, and once that is so, it shows that the petitioner accepts that the respondent was not guilty of delay in performance of the contract upto 30.4.1998, and hence the undertaking issued on 14.8.2001 i.e well after the completion of the contract in question on 30.4.1998 would be under coercion.

(ii) With respect to the second preliminary objection, the Arbitrator has similarly held that the respondent herein was forced to give a No Claim Certificate in order to get its moneys, which were for a long period held up with the petitioner, released from the petitioner, and once the payment was received, then, immediately on 12.12.2003 (i.e just after four days of accepting the final bill on 8.12.2003), the respondent withdrew its No Claim Certificate on the ground of duress and coercion.

7. The Arbitrator has given the following reasoning, and which I accept, for dismissal of the two preliminary objections raised by the petitioner herein:-

“Preliminary objections of the respondents

The respondents in their counter statement dated 9.8.2004 have raised following preliminary objections and a decision on these issues is required before proceeding further in the matter.

- i) The Respondents submitted that the stipulated date of completion was 28.4.1997 and time allowed was 730 days whereas the claimant completed the work on 30.4.1998. The extension of time was granted to the claimant without levy of compensation only because the claimant had issued undertaking on 14.8.2001 stating that no liquidated damages have been suffered by them. Copy of this undertaking was marked as Annexure R-1.

The claimant submitted that the said undertaking was given under pressure and the language of the said undertaking starts with “As requested by you.....” itself clarifies that the said undertaking was given by the claimant under pressure from the respondents as their payments were blocked and they had no other option but to give that undertaking.

I see no reason in the submissions put forward by the respondents as the extension of time without levy of compensation clearly proves that the work was not delayed due to claimants. I find it hard to believe that the officers of DSIDC grant levy of compensation because the claimant gave an undertaking as mentioned above. The granting of EOT (extension of time) is a process wherein the officer in charge evaluates all factual events and a complete EOT case is filed, reviewed and then decision is taken whether to grant EOT or not and whether compensation is to be levied or not. I believe the same procedure was followed by the officers of DSIDC and decision to grant EOT without levy of compensation was taken based on facts and figures and keeping the interest of department in mind. The EOT has been granted without levy of compensation, the claimants cannot be blamed for any delay in work. This issue is therefore decided in favour of the claimants.

- ii) The respondent submitted that the entire claim of the claimant is not maintainable as on 8.12.2003 the claimant accepted the final bill and furnished a “No Claim Certificate” and accepted Rs.4,78,710/- in full and final settlement and thus cannot claim anything more now.

The claimants stated that the said “No Claim Certificate” was given under duress and coercion and the same was withdrawn on 12.12.2003 (Exhibit C-153). The claimant submitted that the “No Claim Certificate” was given as the respondents were not releasing their

legitimate payments and it had been six years since they were waiting and they had no option but to do as the respondents wanted so that whatever amount was possible was released. The claimant submitted that as the “No Claim Certificate” was withdrawn, this matter should be of no consequence.

After going through both parties submissions and also after going through the court citations submitted by the respondents and claimants and their respective replies to them, I decide that the “No Claim Certificate” does not bar them from demanding their legitimate payments. The final bill of the claimants had not been paid for more than 5 years after completion of work. The claimants had no option but to sign the No Claim Certificate as desired by the Respondents to get whatever amount was possible for them. In the above mentioned “No Claim Certificate” the claimants have not unequivocally stated that they will not demand anything in the future and thus the claimants are within their rights to raise any further genuine claims. In the light of the above the said “No Claim Certificate” should be deemed to be of no consequence. I give my decision on this issue in favour of the claimants. (underlining is mine)

8. Once two views are possible, this Court cannot substitute its view for that of the arbitrator and Arbitrator in my opinion in the aforesaid paragraphs has given possible and plausible reasons that the respondent on account of coercion was forced to give the undertaking on 14.8.2001 and the No Claim Certificate on 8.12.2003. Accordingly, the preliminary objections of the petitioner were rightly rejected by the Arbitrator.

9. Now let us take each of the claims and counter claims decided by the Arbitrator and with respect to which objections have been filed by the petitioner before this Court.

10. The first objection of the petitioner is with respect to the Arbitrator under Claim no.1 awarding an amount of Rs.2,18,327/-. Claim no.1 was for payment of the security deposit which was retained by the petitioner. Once the work is completed by the respondent, and in fact a final bill has also been released by the petitioner to the respondent of the amount of Rs.4,78,710/- as discussed while deciding the preliminary objections, surely, the retention money which is retained by the petitioner has necessarily to be refunded to the respondent. The petitioner could have retained this amount only if it was entitled to deduct the same for any defective work which is discussed below, petitioner is not entitled to retention of this amount for defective work and therefore this Claim no.1 has been rightly allowed by the Arbitrator.

11(i). So far as Claim no.2 is concerned, this is a claim for interest payable with respect to retention of the retention money/security deposit of Rs.21,83,270/- by the petitioner. In this regard, the claimant claims three amounts for three periods as under:-

- “1. On whole amount for an amount of Rs.21,83,270.00 i.e 5% of the contract price of Rs.4,36,65,400.00.

A detailed examination for an amount of Rs.3,53,719.46 on account of interest @ 18% ON Rs.21,83,270.00 from 9.6.95 to 8.11.96 (517 days) was submitted by the claimants.

2. On the balance amount of Rs.10,91,635.00 in shape of cash still remains outstanding with the respondents as on 8.11.96.

The claimant submitted that the work was finally completed on 30.4.98, EOT was granted without levy of compensation and the maintenance period of 180 days expired on 30.10.98. However, an amount of Rs.8,73,308.00 was released on 18.4.2002 by DSIDC and thus the claimant claimed interest @ 18% P.A. on Rs.10,91,635.00 for the period 9.11.96 to 18.4.2002 (1986 days) which amounts to Rs.10,69,144.33.

3. On the balance amount of Rs.2,18,327.00 yet not released

The claimant claimed interest @ 18% P.A. on Rs.2,18,327.00 for period 19.4.2002 to 31.12.2003 (tentatively) the day when the invocation of the arbitration was made i.e for 622 days which amounts to Rs.66,060.56.

Total Rs.3,53,719.46 + Rs.10,69,144.33 + Rs.66,060.56 = Rs.14,88,924.35

The amount was restricted to Rs.12,38,981.00 only by the claimants.”

(ii). Arbitrator has rejected the first claim but has awarded the second and third claim by making the following observations:-

- “2. Against “On the balance amount of Rs.10,91,635.00 in shape of cash still remains outstanding with the respondents as on 8.11.96.” After considering all facts and going through records and submissions I agree with the claimants contention that the remaining amount of retention money should have released earlier. In my view the claimant is entitled to interest from the date when the maintenance period expired i.e. 30.10.98 till 18.4.2002 i.e. when a part of the said amount was released. Therefore, I award an interest @ 12% on Rs.10,91,635.00 for period 1.11.98 (expiry of maintenance period) to 18.4.2002 (date when part retention money was released) i.e. 1264 days which amount of Rs.4,53,641/- only.
3. Against “On the balance amount of Rs.2,18,327.00 yet not released”. I award in favour of the claimants as in Claim No.1 the said amount of Rs.2,18,327.00 was found justified to be paid to the claimants. Also in my view the interest period should be from 19.4.2002 i.e.

(the date this amount was left withheld by respondents) to 23.12.2003 (invocation of arbitration) rather than the period asked by the claimant.

I award an interest @ 12% on Rs.2,18,327.00 from 19.4.2002 to 23.12.2003 i.e. 416 days which amounts to Rs.44,072/- only.

I award a sum of sum of Rs.4,97,713.00 (Rs.4,53,641.00+ Rs.44,072.00) in favour of claimants against claim No.2.”

12. I agree with the reasoning given by the Arbitrator because admittedly the petitioner could have retained the retention money only for a period of six months after completion of work on 30.4.1998 i.e up to six months defect liability/maintenance period. This defect liability/maintenance period ended on 30.10.1998 and consequently after 30.10.1998 retention by the petitioner of the amount which was payable to the respondent would be illegal and therefore respondent has been rightly entitled to interest for this period beyond 30.10.1998 more so because even the final bill for an amount was released and which final bill would not have been released if payment under the alleged head of defective work was due to the petitioners. This part of the Award is therefore sustained including for the reason that the petitioner is not entitled to any amount towards any alleged defective work, and which aspect is also discussed below while dealing with the relevant counter claim of the petitioner which has been dismissed by the Arbitrator.

13. Claim no.3 which has been objected to by the petitioner pertains to a claim for a sum of Rs.2,97,200/- of the respondent on account of the respondent having illegally and wrongly recovering/withholding amounts for insurance policy, steel etc. Arbitrator has awarded this amount in favour of the respondent by holding that respondent had taken all the insurance covers even before entering into the contract and had duly supplied the insurance covers to the petitioner and that it was only thereafter that the contract was awarded to the respondent and hence petitioner now cannot claim that insurance policies were not taken by the respondent. The Arbitrator has also rightly held that there does not arise any issue of recovering of an amount towards insurance cover of a period of 14 months after actual completion of work. To the reasoning given by the Arbitrator, I may add that if the respondent had not taken insurance covers then the consequence would have been that if there was loss by an accident in the site then at best petitioner would not be liable for that loss and respondent would have been liable to reimburse the loss, but admittedly no event occurred during the performance of the contract for invocation of the insurance policy on account of loss caused and therefore there is no reason why the petitioner can withhold any amount for allegedly not taking any insurance policy/cover. Also, it may be noted that the Arbitrator has rightly held that

petitioner could have withheld the amount of insurance policy/cover if the petitioner had taken out the insurance policy/cover but admittedly petitioner did not file anything on record before the Arbitrator that the petitioner had taken any insurance policy/cover as the respondent had allegedly not done so. In my opinion therefore the Arbitrator has rightly awarded this claim to the respondent herein of an amount of Rs.2,97,200/- retained by the petitioner for the work done by the respondent under the subject contract.

14. The next claim is the Claim no.4 with respect to interest to be awarded on the Claim no.3 which has been allowed, and since Claim no.3 has been allowed holding that there is illegal retention of money by the petitioner belonging to the respondent for the work done by the respondent, petitioner has rightly been burdened with interest for the pre-reference period but which pre-reference period is after 30.10.1998 i.e after the six months' defect liability period. I may note that respondent has only been paid interest by the Arbitrator from 11.6.1999, and not from 1.11.1998 when it was due to the respondent, but since the respondent has not objected to the Award, I need not consider grant of interest to the respondent from 1.11.1998 instead of 11.6.1999 as has been done by the Arbitrator. I also note that there may be a minor issue with respect to interest on Rs. 20,000/-

from 21.3.1997 but since with respect to two other sub-claims interest has been awarded only from 11.6.1999 and not from 1.11.1998, I am not interfering with the Award for a minuscule amount of possibly around of Rs.2,000/- with respect to interest of Rs.20,000/- under sub claim (c) of this Claim no.4.

15. The next issue which has been dealt with by the Arbitrator is Claim no.5 for the amount paid by the respondent for using consumables of diesel and lubricants for running of DG set which provided electricity to the petitioner. In this regard, Arbitrator notes that it is because the subject premises were handed over prematurely to the petitioner because the Chief Minister of Delhi wanted to inaugurate the same, therefore the electrification was done by means of generators and for which the respondent provided the diesel fuel and lubricants. The Arbitrator notes that the sub-station for electricity had only to be provided at the time of completion of the contract viz 30.4.1998 but since the polytechnic started running from 26.9.1997 and for which electricity was provided by means of generators and since it is not the case of the petitioner that it had provided the diesel fuel and lubricants for running of the DG set, in my opinion, the Arbitrator has rightly awarded the amount under this Claim no.5 of the respondent herein.

16. Claim no.6 is again for interest on that amount awarded under Claim no.5 and therefore once Claim no.5 is awarded, Arbitrator has rightly awarded interest at 12% per annum and which I note is again only w.e.f 1.11.1998 i.e six months after completion of contract on 30.4.1998.

17(i). The next claim dealt with by the Arbitrator is Claim no.8 and which was for a total amount of Rs.50,62,070/-. This claim was made on account of the claim with respect to balance payment agreed to be made to the respondent towards actual work done for civil and electrical works. Arbitrator has allowed this claim by awarding an amount of Rs.28,98,278/- against the claim of Rs. 50,62,070/-.

(ii). Though a total of 7 sub-claims were part of this Claim no.8, Arbitrator has awarded only the first three claims of filling of earth, diluting and injecting emulsion with chlorophyrifos and for extra expenditure incurred by the respondent for double stage centering and shuttering. Arbitrator has awarded the first three claims by making the following observations:

“As for my decision regarding items mentioned in this claim, it is as under:

- a) Filling of Earth: The respondents were not able to prove that they procured 6228.95 cu.m. of earth from 1&FC Department against 10,000 cu.m of earth as claimed by the claimant. Even after repeated requested of the claimant and

my orders, the respondents were not able to submit any purchase vouchers, payment details, level books or any other record to show what quantity of earth was procured by them. The respondents contention that it being an old record is not available with them does not seem justified as they being a government department should have all details of payments and records of work. Letter dated 1.3.1996 (exhibit RH-2) was submitted by respondents during hearing held on 6.6.2005. This letter for supply of 10,000M3 was written to 1&FC Deptt. On 1.3.1996 when 8167M3 of earth had already been paid for and used for filling at site. The respondents were not able to provide any further proof of actual earth purchased by them and thus were not able to counter the claimant's contention convincingly. I, therefore, award this item in favour of the claimant and award Rs.103260/- against this to the claimant.

- b) Diluting injecting emulsion with chlorophyrifos: After carefully studying the contract agreement item no. 12.74, submissions and documents of both the parties I decide this claim in favour of the claimants. I find that the claim in this item is for spraying of chlorophyrifos emulsifiable concentrate 1% concentration for anti termite treatment and the rate quoted is Rs.30/- per litre. The rates have been accepted by the respondents and I don't accept their stand that this is high rate as the contract once finalized is supreme. I find that the rates are per litre of sprayed quantity and the claimant is entitled to be paid for the exact quantity in litres of chlorophyrifos emulsifiable concentrate 1% concentration injected by the claimant and not according to quantity of chlorophyrifos 20% concentrate supplied by the claimant under agreement item No.12.75. I find both items are different and are separately payable and according to language and scope of the signed contract the claimants are entitled to be paid for the exact quantity in litres as sprayed by them of chlorophyrifos emulsifiable concentrate 1%

concentration. The real quantity payable to claimant is calculated by multiplying 4788.86 (quantity paid by the respondents) with 20 which gives quantity of 95777.20 litres. The calculation submitted by the claimant are justified and I find that a total of 95777.20 litres of chlorophyrifos emulsifiable concentrate 1% was injected by the claimants and they were paid only for 4788.86 litres. I decide that the claimants are entitled to be paid for remaining 90988.34 litres @Rs.30/- per liter which is the quoted rate in contract. Therefore, I award Rs.27,29,644/- in favour of the claimants against this claim.

- c) Extra for double staging C & S: Against this item the respondents did not object that total of 6674.44 sq.m. of shuttering was done beyond 3.5 metres height. The respondent's contention that telescopic props were used finds no favour as the respondent never challenged the means used by the claimant during the work though the work was being supervised by respondent staff. The claimant is entitled to be paid for executing double stage shuttering for height beyond 3.5 metres as per contract and thus the remaining amount against this item is justified to be paid to the claimant. I award Rs.65,374/- against this item to the claimant."

(underlining is mine)

18(i). I completely agree with the findings of the Arbitrator inasmuch as, once the petitioner herein only gave proof with respect to the Cu. Meters of earth filling supplied by it, and once the work of earth filling was done, then the part of the material supplied for earth filling would have been procured by the respondent herein. Once the material for earth filling was

procured by the respondent, then the respondent was entitled to payment of the amounts towards earth filling.

(ii) With respect to spraying of emulsion etc on the wood work by the respondent, Arbitrator rightly notes that item no. 12.74 of the contract cannot be incorporated in item no. 12.75 of the contract especially because concentrate of item no. 12.74 was 1% and concentrate of chlorophyrifos was 20% in item no. 12.75. Arbitrator therefore rightly held that the respondent is entitled to the quantity and which he arrived at by multiplying the quantity admitted by the petitioner by 20 times and which quantity of the respondent was wrongly taken by the petitioner with concentrate at 1% instead of 20% as was found under item no.12.75 of the contract.

(iii) With respect to double stage centering and shuttering, the Arbitrator has rightly awarded this claim by noting that actual double stage centering and shuttering was done and there was no objection as to the nature of work done by the respondent and hence the respondent was entitled to the payment.

19. I may at this stage note that the scope of challenge to an Award under Section 34 of the Act is limited and once the Arbitrator has given reasons which are one of the plausible and possible reasons for deciding the

claim, this Court cannot even if it is of another view interfere with the Award.

20. Claim no.9 awarded by the Arbitrator is with respect to the claim of interest on Claim no.8 which is allowed and once Claim no.8 has been allowed, pre-reference interest on this amount has also been rightly awarded by the Arbitrator, again noting that interest has been granted only from 1.11.1998 ie after six months of the maintenance period under the contract which was completed on 30.4.1998.

21. Claim no.10 which was awarded by the Arbitrator was with respect to civil and electrical works done by the respondent under the contract and with respect to which payment was not made by the petitioner. With respect to the civil work, the Arbitrator has noted that the same was a claim for escalation during the extended period of contract and that the contractor/respondent had submitted cost indices which were exhibited as Ex.CH-2 and using this cost indices by the escalation formula provided under the contract, the respondent was held entitled to the escalation amount of Rs.6,38,145/-. I cannot disagree with this claim awarded including the awarding of the related claim of escalation for electrical work and it has

been rightly allowed by the Arbitrator by making the following observations:-

“On careful study of all records and documents and on hearing oral submissions of both the parties, I decide that the claimant is entitled to be paid as per clause 27. I find that the respondents contention of not making this payment as claimed had furnished a rebate of Rs.6,04,125/- is not justified, as the said rebate was withdrawn before awarding of work and did not become a part of signed contract. I, further disagree with the respondents that it is duty of the claimants to provide cost indices. It is also seen from claimants letters that the demand for payment was made by them time and again. The respondents did not comment on the calculations provided by the claimants and also did not provide cost indices during the oral hearings. I have seen the calculation given in SOF and my decision on this claim is as follows:

- i) For civil work)9th & final quarter Feb. 98 to April 98) only on balance payment of work done yet not made. As claim No.8 has been found to be justified to an amount of Rs.28,98, 278 for civil work I decide that the claimant is entitled for an amount under clause 27 on this amount. The calculation as per formula given in contract document is as under:

$$VM=2898278 \times 0.85 \times 0.75 \times \frac{(338.2-273.33)}{273.33} = 4,38,507/-$$

$$VL=2898278 \times 0.85 \times 0.25 \times \frac{(416.67-314.67)}{314.67} = 1,99,638/-$$

Total: VM+VL=Rs. 6,38,145/-

- ii) For electrical work. As no payment has been found to be justified for electrical work under Claim No.8, I decide that for payment under clause 27 for electrical work nothing is payable for final quarter to the claimant. Remaining calculation being as they have been shown in S.O.F. as per formula given in contract and verified by me, I deduct Rs.97,419/- from the claimed amount of Rs.5,66,765/- by claimant. Therefore, payment of Rs.4,69,346/- (5,66,765-97,419/-) is justified against this claim.”

22. However, I note that the Arbitrator even after allowing the escalation charge for civil and electrical works as above, seems to have duplicated awarding of the claim by awarding the third claim under the joint head of civil and electrical works, and therefore, this third sub-claim under Claim no.10 of Rs.1,05,402 is wrongly awarded by the Arbitrator because once escalation has already been allowed for civil and electrical works under sub-claims no.(i) and (ii) of Claim no.10, there cannot be a duplication by again granting escalation for civil and electrical works. This part of the Award of Rs. 1,05,402/- is therefore set aside and this amount will be reduced from the awarded amount.

23. Claim no.11 is once again a claim of interest on Claim no.10, and therefore this claim also has been rightly awarded by the Arbitrator but this will be reduced on account of the reduced amount being awarded under Claim no.10, again noting that the Arbitrator has awarded interest only from 1.11.1998 i.e six months after completion of work on 30.4.1998 and after the completion of six months maintenance/defect liability period.

24. Claims no. 12 and 13 are the claims of interest on 19th R/A bill and 20th R/A bill. The Arbitrator under Claim no.12 has allowed an amount of Rs.1,35,223/- being interest at 12% per annum from 1.11.1998 till

10.6.1999 and a sum of Rs.2,90,045/- with respect to Claim no.13 of interest at 12% per annum from 1.11.1998 to 8.12.2003. I have already in the earlier part of this judgment referred to the fact that the final bill was cleared for an amount of Rs.4,78,710/-. This final bill would have been cleared only after deductions which would have been made by the petitioner herein for its claim towards defective works. Once therefore net amount of Rs.4,78,710/- becomes due and payable as on 30.10.1998 to the respondent, for delay in release of this amount, the respondent will be entitled to interest at 12% per annum from 1.11.1998 till the date of payment being 8.12.2003 i.e for 1862 days. This amount comes to Rs.2,90,045/-. Since the Arbitrator has allowed this specific amount claim under Claim no.13, therefore this amount of Rs.2,90,045/- will be payable amount against both the Claims no. 12 and 13 awarded i.e putting it in other words Claim no.12 cannot be allowed in addition to Claim no. 13 and Claim no. 12 is disallowed and the claim awarded has to be taken as satisfaction to both the Claims no. 12 and 13.

25. Claim no.16 is the claim made for a sum of Rs.1,65,498/- on account of renewal charges paid for the bank guarantees. In this regard, Arbitrator has awarded a sum of Rs.1,22,808/- at Rs.3,000/- per lakh/per year for 15 months from 30.10.1997 upto 31.1.1999 and at the same rate for

15 months from 30.10.1997 to 31.1.1999. It may be noted that the bank guarantees were extended upto 31.1.1999 as per the case of the respondent. In my opinion, Arbitrator has allowed the claim rightly to one extent and wrongly to another extent and the reasons for saying so are as under:-

In my opinion, the bank guarantee charges cannot be to the account of the respondent during the period of extension of time which was granted without levying of compensation and which aspect has been otherwise dealt with in the earlier part of the judgment. Once the respondent is not guilty of any delay and extension of time is granted without levy of compensation upon the respondent, and it is already held that the petitioner had taken the undertaking on 14.8.2001 by means of coercion, the respondent was therefore entitled to the claim of renewal charges of the bank guarantee from the original date of completion of the contract on 28.4.1997 and upto the actual date of completion on 30.4.1998 i.e the period of roughly one year and which period of one year of delay was not on account of the respondent. Therefore, for both the bank guarantees for this period from 28.4.1997 till 30.4.1998 i.e Rs.6,000/- per month/per lakh i.e a sum of Rs.72,000/- would be payable by the petitioner to the respondent and not a sum of Rs.1,22,808/-

which has been awarded under this Claim no.16. Claim no.16 is therefore reduced from Rs.1,22,808/- to Rs.72,000/-.

26. The next claim under dispute is Claim no.20 and under which claim the Arbitrator has awarded to the respondent a sum of Rs.2 lacs on account of loss suffered due to collapse of the roof of the M.P. Hall. The issue in this regard was that whether the roof collapsed on account of defective structural drawings provided by the petitioner or collapse of the roof was on account of lack of workmanship or negligence of the respondent's labourers. While discussing this claim, it is noted that the Arbitrator has not given a categorical finding that the roof collapsed on account of the giving by the petitioner of defective structural drawings. Arbitrator has also not discussed the defence of the petitioner that the roof collapsed because the labour of the respondent climbed at 9.35 levels immediately after casting of the slabs and which was therefore not able to take the load. In the operative part of Claim no.20, the Arbitrator holds that collapse of the roof was not due to the *malafide* intention of either of the parties, yet, the Arbitrator has awarded a sum of Rs.2 lacs to the respondent against the petitioner. In my opinion, once no fault is found attributable to the petitioner, there cannot be awarded any damages to the respondent and

against the petitioner. Such an Award is therefore clearly perverse because there cannot be awarding of amount on account of loss unless there is first a finding of guilt against a person and without finding of any guilt, the petitioner hence could not have been burdened with an Award of Rs.2 lacs under Claim no.20. The Award with respect to Claim no.20 being perverse is set aside.

27. Claim no.25 is the claim awarded to the respondent for a sum of Rs.20,000/- and which was on account of penal recovery for cement used in excess by the respondent in such project. In this regard, I may note that besides the amount not being a large amount, it is noted that the petitioner received benefit of this amount because the structure owned was constructed by the respondent by using extra cement, and therefore once it is not as if the cement was misappropriated by the respondent, hence in my opinion the Arbitrator has rightly awarded a sum of Rs.20,000/- to the respondent by directing that this amount was wrongly recovered by the petitioner from the respondent under the contract as a penal recovery for cement allegedly not accounted for.

28. The next claim is Claim no.26 and which was a claim for a sum of Rs.10 lacs on account of claim of the respondent towards infructuous

expenditure and damages sustained because of various lapses attributed to the petitioner herein. The Arbitrator under this head has awarded a sum of Rs.6 lacs to the respondent and against the petitioner. In my opinion, the Award under Claim no.26 against the petitioner of Rs.6 lacs is clearly perverse because with respect to the extended period, the respondent has been paid actual amount for the actual work done alongwith escalation charges which have been awarded under Claim no.10 as discussed above. Once the contractor is paid actual charges for the work done including escalation charges for the work done, there remains no other claim of the respondent/contractor for the same work allegedly on account of any further charges incurred and allowing of such a claim will amount to duplication of claim and the petitioner being put to double liability payment with respect to the same work which is done by the respondent and for which petitioner has made payment to the respondent for this work done alongwith the escalation charges. Accordingly, the Award with respect to Claim no.26 is wholly perverse and is accordingly set aside.

29. Next claim is Claim no.27 and which is the claim of interest on the claims which have been awarded by the Arbitrator and in this regard this portion of the Award will stand subject however to the fact that interest will

not be payable with respect to those heads for which Award has been set aside as stated above.

30. That takes us to the counter claims which were raised by the petitioner against the respondent and these counter claims are as under:-

“COUNTER CLAIM No.1

The Respondents claim a sum of Rs.40,00,000/- on account of defects in the execution of works.

COUNTER CLAIM No.2

The respondents claim a sum of Rs.25,00,000/- on account of costs, damages, loss of goodwill and harassment caused as a result of the criminal case filed against the respondents due to the fault of the claimant.

COUNTER CLAIM NO.3

The respondents claim a sum of Rs.10,00,000/- on account of the failure of the claimant to complete the works within stipulated period of time.

COUNTER CLAIM NO.4

The respondents claim a sum of Rs.15,00,000/- on account of the loss suffered because of the failure of the claimant to commission the sub-station and get the building electrified.

COUNTER CLAIM NO.5

The respondents claim a sum of Rs.2,00,000/- on account of the damage caused to the Diesel Generator Set by the claimant by its unauthorized use.

COUNTER CLAIM NO.6

The respondents claim a sum of Rs.2500/- on account of failure of

the claimant to submit the completion plan.

COUNTER CLAIM NO.7

The respondents claim a sum of Rs.10,00,000/- on account of defamation caused to the Respondent.

COUNTER CLAIM NO.8

The respondents claim a sum of Rs.50,000/- on account of legal expenses and other costs incurred by the Respondent in defending the frivolous claims of the claimant.

COUNTER CLAIM NO.9

The respondents claim a sum of Rs.1,00,000/- on account of pendente lite and future interest.”

31. Counter Claim no.1 is the claim for defective execution of the works, and under this claim an amount of Rs.40,000,00/- was claimed by the petitioner.

The Arbitrator has rejected this counter claim by giving the main reason that the petitioner failed to produce any evidence to show that the amount claimed was in fact expended by the petitioner for rectification of defective works. In my opinion, though reasoning is not correct, however, the conclusion of rejecting the Counter Claim no.1 is correct, and this is for the reason that evidence had to be produced not with respect to actual rectification but of the value of the defective works. This value of the defective works has not been proved by leading evidence and therefore this

counter claim has rightly been rejected by the Arbitrator. One additional reason for rejecting the Counter Claim no.1 with respect to the defective works is also that admittedly the petitioner cleared the final bill of Rs.4,78,710/- on 8.12.2003, and before the release of the final bill, petitioner would have ensured that whatever are its claims towards defective works would have been deducted from the payment to be made under the final bill. Therefore, once the final bill is cleared for an amount of Rs.4,78,710/-, petitioner could not have contended that there were any further defects remaining and for which the counter claim was maintainable. Therefore, the Arbitrator has rightly rejected the Counter Claim no.1.

32. Counter Claim no.2 was for Rs.25,00,000/- allegedly on account of costs, damages, loss of goodwill and harassment caused on account of collapse of the roof of the M.P. Hall. In this regard, Arbitrator has rejected the claim by holding that petitioner itself did not hold the respondent guilty and did not take any action against the respondent to have consequential monetary effect. In addition to this finding, I may note that no evidence whatsoever was filed by the petitioner that what was the expenditure incurred by the petitioner under this counter claim and therefore howsoever valid the claim, unless the evidence is led to substantiate the

same, the same could not have been awarded. For this additional reason also, the Arbitrator in my opinion rightly rejected the Counter Claim no.2.

33. Counter Claim no.3 was the claim of the petitioner for a sum of Rs.10,00,000/- on account of failure of the respondent to complete the work within the stipulated period of time. Arbitrator has rightly rejected this counter claim by observing that once extension of time was granted by the petitioner without levy of any compensation/damages, obviously petitioner itself agreed that the respondent was not guilty of any delay and once the respondent is not guilty of delay, this Counter Claim no.3 for damages on account of delayed completion of work was not maintainable and hence rightly rejected by the Arbitrator.

34. Counter Claim no.4 was a claim for a sum of Rs. 15,00,000/- for alleged loss suffered by the petitioner on account of failure of the respondent to get the sub-station commissioned for electrifying the building. In this regard, it has already been discussed above that this claim was on account of non-electrification by non-installing of the sub-station, but, the claim pertained to the period prior to the actual date of completion on 30.4.1998, and therefore, once the actual date of completion agreed by both the parties is 30.4.1998, there was no requirement of electrification by

commissioning of the sub-station before 30.4.1998 and hence the claim with respect to any loss suffered on account of non-commissioning of a sub-station prior to 30.4.1998 was without any merit and rightly rejected by the Arbitrator.

35. Counter Claim no.5 of the petitioner herein was on account of a sum of Rs.2,00,000/- for damage caused to the Diesel Generator (DG) set by the respondent. Arbitrator has in my opinion rightly rejected this counter claim by observing that petitioner did not show any vouchers for payments made by the petitioner for getting the DG set repaired. Putting it in other words, no proof was filed as to what was the amount of damage to the DG set and in the absence of any proof of quantification of damage to the DG set, Arbitrator has rightly rejected this claim of Rs.2,00,000/-.

36. Counter Claim no.7 was a claim for defamation and a sum of Rs.10,00,000/- was claimed under this head. It was alleged by the petitioner that petitioner is a reputed government undertaking and its image was tarnished by making defamatory statements in industrial circles. Arbitrator has rejected this claim by observing that internal correspondence between the petitioner and the respondent did not fall under the head of defamation. Also, the Arbitrator notes that approaching a competent authority for

arbitration does not constitute defamatory action, and therefore, this claim was rejected. In my opinion, the Arbitrator has rightly rejected this counter claim not only for the reasons recorded by the Arbitrator, but also for an additional reason that defamation must be proved by means of leading of evidence of how the petitioner was brought down in estimation of the right thinking people of the society by the alleged defamatory statements, and petitioner admittedly led no evidence whatsoever in this regard. In the absence of evidence qua this counter claim for defamation, the same could not have been allowed and thus has been rightly dismissed.

37. Counter Claim no.8 was the claim of Rs.50,000/- for costs and which has been rejected by the Arbitrator inasmuch as, certain claims of the respondent were found to be justified. I agree with the Arbitrator and hold that this claim of Rs.50,000/-has rightly been rejected by the Arbitrator.

38. The final counter claim is the claim towards interest and Arbitrator has awarded interest of Rs.2,500/- which was awarded to the petitioner under Counter Claim no.6. No discussion is required under this counter claim inasmuch as in the final analysis, Award is for a sum of Rs.1,09,08,393/-, after giving necessary adjustment to the petitioner, and now even this amount of Rs. 1,09,08,393/- will stand reduced on account of

certain objections of the petitioner being accepted by this Court as discussed above.

39. In view of the above, the net position which will emerge is that the amount of Rs. 1,09,08,393/- will be reduced on account of reduction of the amount of Rs.1,05,402/- (sub-claim no.3 of Claim no.10), and an amount of Rs. 1,35,223/- on account of rejection of Claim no.12 for this amount which was allowed by the Arbitrator and is rejected by this Court, the amount under Claim no.16 as awarded will stand reduced from a sum of Rs.1,22,808/- to Rs.72,000/-, Rs.2 lacs on account of rejection of Claim no.20 as allowed by the Arbitrator, and proportionate reduction of Claim no.27, and Rs.6,00,000/- awarded under Claim no.26. All these amounts are to be reduced from the amount of Rs.1,09,08,393/- as awarded by the Arbitrator as this Court has accepted the objections of the petitioner herein by rejecting the said claims awarded by the Arbitrator. Also the amount under Claim no.11 as awarded will stand reduced from a sum of Rs.7,48,871/- to Rs.683,428. Claim no.27 being the claim of interest on the awarded amount will also now get proportionately reduced.

40. With the assistance of the counsels for the parties, and as per their consent, it is agreed that on account of acceptance of some of the

objections of the petitioner, the figure of the awarded amount of Rs. 1,09,08,393/- will stand reduced by Rs.11,56,876/- and hence the net awarded amount to the respondent will come to Rs.97,51,517/-. On this amount respondent will be entitled to interest at 12% per annum from the date of the Award till the date of actual payment by the petitioner.

41. In view of the aforesaid discussion, the objection petition is allowed to the limited extent by reducing the net awarded amount to the respondent herein and against the petitioner to a sum of Rs.97,51,517/- alongwith interest at 12% per annum simple from the date of the Award viz. 21.3.2006 till the date of payment of this amount by the petitioner to the respondent herein. Parties are left to bear their own costs.

SEPTEMBER 02, 2015
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VALMIKI J. MEHTA, J.