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IN THE HIGH COURT OF DELHI AT NEW DELHI

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OMP No. 447/2007

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14th September, 2015

NATIONAL BUILDINGS CONSTRUCTION CORPORATION LIMITED
..... Petitioner

Through: Mr. Arvind Minocha, Advocate.

versus

INDIAN RAILWAYS CONSTRUCTION COMPANY LTD.

..... Respondent

Through: Mr. Sanjay Goswami and Mr.
K.Bhimraj Acharay, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this judgment, the subject petition filed by the petitioner National Buildings Construction Corporation Limited under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugning the Award of the Arbitration Tribunal dated 4.5.2007 is being decided. By the impugned Award certain claims of the claimant, petitioner in this petition, have been allowed whereas other claims have been rejected. The impugned Award also allows one counter claim of the

respondent herein and dismisses rest of the counter claims. The summary with respect to the claims awarded and dismissed and the counter claims awarded and dismissed is contained at pages 7 and 8 of the Award which reads as under:-

“NOW THEREFORE

We do make and give our Award as follows, namely:

I.). Claims of Contractor

I.1. Claims Accepted

Claim no.	Amount Awarded (Rs.).
1	8,57,804.
4	16,249.
6	3,557.
10	89,526.
11	1,43,402
12	1,19,183
18	3,74,076.
21	2,500.
23	1,616
35	1,24,95,000
36	6,35,454
Total	1,47,38,367

I.2. Claims Rejected

Claim Nos._2, 3, 5, 7, 8, 9, 13, 14, 15, 16, 17, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39, 40, 41 are rejected.

II. Counter claims of IRCON

II.1 Counter Claims Accepted

<u>Counter Claim No.</u>	<u>Amount Awarded (Rs.)</u>
3	2, 12,36,044.00

II.2 Counter Claims Rejected

Counter claims Nos. 1, 2, 4, 5, 6 and 7 are rejected.”

2. The net position therefore would be that a sum of Rs. 64,97,667/- with interest at 9% per annum simple from the date of the Award has been awarded in favour of the present respondent, and who was the respondent in the arbitration proceedings.

3. The disputes between the parties arose under the Agreement dated 16.7.1990 whereby the petitioner was awarded by the respondent the work of “Construction of Railway Station cum Commercial Complex at Belapur-Superstructure work” in Navi Mumbai. Respondent rescinded the contract on account of the stated breach of the petitioner in failing to adhere the time schedule provided under the contract.

4. For the purpose of the present petition and the judgment I have to examine only two claims which as per the petitioner have been wrongly dismissed by the Award and one Counter Claim no.3 of the respondent which as per the petitioner has been wrongly allowed by the Award. The claims

objected to as being wrongly dismissed by the Arbitration Tribunal are Claim no. 32 with respect to refund of security deposit, Claim no. 33 with respect to refund of bank guarantee amounts encashed by the respondent and Counter Claim no.3 of the respondent which has been allowed pertaining to interest payable on the amount of bank guarantee amounts encashed by the respondent.

I will hereinafter take up each of the three aspects of security deposit, bank guarantee amounts and interest on the bank guarantee amounts one by one.

5. Before I turn to each of the three aspects, it will be necessary to examine as to whether the respondent had rightly rescinded the contract on 11.2.1992 and if the contract is rightly rescinded then the same is to what effect, and that if the contract is not rightly rescinded then to what effect. Included in the three aspects will be the discussion that even if the contract has not been rightly rescinded by the respondent, what would be the entitlement of the claimant essentially under the head of *quantum meruit* i.e entitlement to payment for the work done. I may also note that the effect of deciding the three aspects/issues/claims/counter claims could have had an impact possibly on some other claims and counter claims, but, since

objections have not been filed by either of the parties with respect to any other portion of the Award, I am only required to deal with the three aspects of security deposit, bank guarantee amounts and interest on the bank guarantee amounts and only which have been seriously argued before me.

6. The first issue is as to whether the respondent had rightly rescinded the contract on 11.2.1992. In this regard, it is noted that the Arbitration Tribunal has given a finding of fact that both the parties were responsible for various delays in performance of the contract, and which finding being a finding of fact, this Court cannot interfere as the finding of the Arbitration Tribunal ordinarily is to be taken as final so far as findings of facts are concerned once there is no perversity in the said finding. This Court notes that the Arbitration Tribunal has considered in detail the evidence led by both the parties before it, and on the basis of such evidence; both oral and documentary; it is held by the Arbitration Tribunal that both the parties were guilty of breach of contract in failing to perform their respective obligations within the time frame as specified under the contract. These detailed findings are given by the Arbitration Tribunal while dealing with Claim nos. 32 and 33 of the petitioner/claimant and also Counter Claim no.1 as filed by the respondent. Some of the relevant discussions and the conclusions of the Arbitration Tribunal in this regard read as under:-

“31.3 Discussion and conclusions:

The Claimant has mainly attributed the work delay and idling to (i) Delay in release of mobilization advance; (ii) Delay in handing over of adequate working fronts; (iii) Delay in supply of drawings; and (iv) Delay in change in design. The Claimant has claimed lossess on account of idling of plant and machinery, additional overheads and loss of profit. The facts of the case presented show that there have been delays on part of Respondent in releasing 1st installment of M.A., handing over of full site and drawings.

The Respondent has however, pointed out that even after mobilization of machinery after grant of advances the Claimant was not able to complete the work even in the areas made available to him and was not able to progress in the work due to insufficient labour strength. Some of the plant and equipments could not be used because of want of adequate staging, shuttering and cranes. While one crane was commissioned in December 1990 and second crane could be commissioned only in December 1991. Thus, only one crane was available and there was no question of idling since additional front was made available from January 1991 onwards. The Claimant has not furnished reliable figures about details and cost of idling machinery. The Claimant was apparently unable to show progress due to their own financial crunch, as admitted by the Directors during the meeting held on 19/10/91 (RD/B-I/IV-PAGE RM/68). The loss of profit calculations are based on the assumption that they could have done work in time which is not supported by the facts of their performance at site. He was asked to submit profit and loss account, balance sheet which they have not submitted.

The actual performance of the Claimant has been poor despite the fact that there were some delays on part of the Respondent in granting MA, handing over full site and drawings. The Claimant has consciously accepted the condition (without reservation) in the LOA dated 5/4/1990. Even in the portions of the site handed over and after mobilization advance was given and some machinery was available, the progress of Claimant was unsatisfactory. It cannot be said that idling of plant and machinery and additional overheads, if any, were entirely on account of Respondent's default. The calculations of loss and profit are also very hypothetical. The exact details and documentary evidences in respect of losses have not been furnished by the Claimant.

32.3 Discussions and Conclusions:

- a) The clause 20 of Addl. SCC refers to S.D. refund as per clause 49.2.1 and 49.2.2. of GCC. The Clause 49.2.1 & 49.2.2 of GCC refers to S.D. on completion of work and maintenance period which is not strictly applicable here. The clause 59.2 of GCC about payment on determination of contract is included as "Excepted Matter", but the determination referred therein is under Clause no.59.1 of GCC.
- b) The Respondent has not, in his reply, disputed Exh c-31 & c-35.
- c) The Respondent's reference to clause 60.1(a) & 61.1(c) of Addl. Spl Conditions of contract appears out of place. The Determination of Contract is provided under clause 59.1 & 60.1 of GCC. The clause & sub clause which the contract is rescinded quite clearly mentioned as 60.1 and 62.2 (b) in the final notice dated 11.02.1992. The reasons quoted by Respondent's notice to the Claimant refers to clause no.60.1 (vii) of GCC. But other than qualitative statement, the Respondent has not given quantitative data-such as agreed program including its own modification and exact shortfall, in support of their say.
- d) The Respondent has pleaded that Claimant would have taken 91 years to complete the work. This appears to be grossly exaggerated but it is obvious that substantial time would have been required by the Claimant to complete the work.
- e) The clause no.8 of Letter of Acceptance provides that the claimant has to organize execute the work in co-operation & co-ordination with other working contractor and in manner as would cause least hindrance to on-going work and claimant shall guard against dispute, complaints, counter complaints from any quarters at all times. Thus it refers to complaints regarding non co-operation and smooth simultaneous working and not to delays in handing over possession of sit, as no other clause regarding completion of the contract is modified. It is also seen that on the date of rescission of contract the Respondent had not given possession of 38% site to Claimant.
- f) As regards grant of Mobilisation Advance, there appears no justification for delaying the same particularly when the Respondent was aware that Claimant was hard pressed financillay.

- g) The work of subsequent contractors was also delayed.
- h) The Clause no.17.4 of GCC about time being essence of contract provides that if IRCON is not satisfied that the works can be completed by the contractor and in the event of failure on the part of the contractor to complete the work within the further extension of time allowed, IRCON shall be entitled, without prejudice to any other right or remedy available in that behalf, to appropriate the contractor's Security Deposit and rescind the contract. The Respondent has recorded the apprehension about capability of Claimant to complete the work within reasonable time. Hence the work has been rescinded by the Respondent (Though such an action under clause 60.1 is not upheld as correct by the AT vide discussion on counter claim no.1-para 42 here); and the circumstances under which action clause 17.4 can be taken being in existence, the Respondent is entitled under clause 17.4 to appropriate the contractor's Security Deposit and rescind the contract.

Hence the claim is rejected.

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33.3 Discussion and conclusions:

- a) As brought out by the Claimant the total amount of Rs.2,28,96,470=00 comprises of following components:
- i) Security Deposit (in form of Bank Guarantee)- Rs.65,41,470
 - ii) Bank Guarantee for Mobilisation Advance- Rs.1,63,55,000
- b) The Respondent is harping on slow progress based on contract schedule of physical progress. But the impact of non fulfillment of his own obligation is not accounted for. The contract provided (clause 17.2 of GCC) that if the contract is delayed at any time by any act or neglect of Respondent or any cause beyond the contractor's control,----then the time of completion of completion may be extended for such reasonable time as the Project Manager may decide.
- c) The clause 17.3 of GCC stipulates that---in the event of any delay by the Company (Respondent) to hand over the contractor possession of land necessary for the execution of the works-----, then such delay shall in no way vitiate the contract----or entitle the contractor, the compensation thereof but in such case the Respondent may grant such extensions of completion dates as may

be considered reasonable, without increase in rates. It is seen from the available record that no such extension was granted by the Respondent to the Claimant and no rescheduling of work was done, even though this was required to be done under the above clause.

d) Clause 17.4 provides that that completion of works by the date or extended date fixed for completion shall be deemed to be essence---, and if contractor shall fail to complete the works----the Company be entitled to recover liquidated damages @ 1% of value of contract for each work-----. If the Project Manager is not satisfied that the work can be completed by the contractor-----, without prejudice to any other right or-----, to appropriate SD and rescind the contract.

e) The clause 15.4 of GCC regarding Forfeiture of SD provides that in case of any claim against the contractor for the payment of a sum of money arises out of contract---the Company (Respondent) shall be entitled to recover such sum by appropriating SD

f) In this case, the contract has been determined under clause 60.1 of GCC. The Clause 60.2 outlines right of company (Respondent) after rescission of contract owing to default of contractor. The clause stipulates that in such event the Respondent to work out payment due to the contractor after ascertaining all costs.

g) The available records do not reveal that an exercise as enumerated above has been done. The exercise under Clause 60.1(viii) would have been needed to conclusively justify the applicability of the clause. In the case under consideration-where the Respondent has failed to handover 38% of site even on the date of determination of contract. The detailed exercise would have been essential to decide the choice of option provided for determination as in clause 50.1 or 60.1 of GCC.

h) The Clause no.17.4 of GCC authorizes the IRCON, if it is not satisfied that the works can be completed by the contractor and in the event of failure on the part the contractor to complete the work within the further extension of time allowed IRCON shall be entitled to appropriate the contractor's Security Deposit and rescind the contractor whether or not actual damage is caused by such default. The Respondent has recorded the apprehension about capability of Claimant to complete the work. And hence the Respondent is entitled to appropriate the Security Deposit as discussed under preceding claim 32 (para 32.3).

i) As regards Mobilisation Advance, as per the clause 12 of Addl. Spl. Conditions of contract the advance is bearing interest @ 18% per annum. The clause 12.2.2 stipulates mode of recovery of interest & principal amount. Clause 12.2.3 provides that in case of a defaulting contractor, IRCON may recover entire outstanding amount from pending account bills or any other dues. Thus the Mobilisation Advance with interest is recoverable by the Respondent.

j) In view of the above contract provision the Respondent has right to encash BG for recovery of principal of Mobilisation Advance and interest thereon as per agreement.

So the claim is rejected.

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42.3 Discussion & conclusion:

(i) For considering this claim, the contract provisions in respect of rescission of contract, forfeiture of S.D., bearing of cost of the balance work completed at risk and cost and levy of the liquidated damages have to be examined.

(ii) The Respondent has taken actions of rescission of contract, forfeiture of S.D. and carrying out work at risk and cost of the contractor due to poor performance of the contractor and has highlighted the following points:

(a) The contractor (claimant) had not employed adequate resources (Refer details of Claim No.31).

(b) The contractor could not completed the work or progressed even in the areas made available.

(c) Insufficient labour deployed by the contractor.

(d) The machinery deployed could not used for want of shuttering.

(e) The contractor's progress in the Grid 55-71(23% of the area) is hardly 50 lacs from April 1992.

(f) The contractor had admitted paucity of funds during the year 1991 which were responsible for their poor performance.

(iii) The Claimant contractor has attributed his slow progress to the breaches of the contract by the Respondents who have not kept up their promise and cited the following:

(a) Non-Handing over of site and the work fronts in piecemeal delayed the work of contractor. (The Respondent's contractor could not complete foundation work timely and the contract was rescinded and work got done through other agencies).

(b) Delay in giving working drawings.

(c) Delay in providing mobilization advance.

(d) Cutting of access to the site by other agency.

(e) The site for installing batching plant given only on 19-10-91

(f) Only 38% of the site was given for working upto the time of termination.

(g) Part work of profitable items was withdrawn.

iv) The contractor has quoted extensively the figures at relevant time as to how the work started and proceeded. He has pleased that there is no term in the contract agreement for late handing oversite and also that the time was not the essence of the contract because there was provision of giving extension for time limit for completion of work. In this context the IRCON's reliance on condition no.8 of Letter of Acceptance dated 5th April, 1990, (Exh no. RD/B-I/V/PAGE 431) does not seem to be relevant because that condition only pertains to co-ordination and co-operation with other agencies working at site (which if at all stretched to mean slight adjustment in working programme to suit each others need). This does not imply that the handing over of site can be delayed indefinitely. The phrase used "some more time" cannot mean unreasonably long time in relation to time limit of this contract.

v) The Claimant has also pointed that after the contract was terminated, that work was got completed by the Respondents from multiple agencies during the period from 1991-92 to 1998 i.e 6 years against the 30 months time limit in this contract. The rates of the new agencies are also very high(in some cases even three times those in this contract). The rates of new agencies are different in different contracts. The award of work to the said agencies after termination was spread over from 1992 to 1994. Some items were changed, some were removed and quantities of some were altered in the new item. The claimant was not informed of the action of the inviting tender for the balance work at the risk and cost of the contractor or the certificate was issued in 1998 i.e. after 7 years. He has further argued that if the work is to be carried out at the risk and cost of the contractor after termination, no changes should be made

in the new documents which has to be a 'clone' image of the earlier tender

vi) **From the above it is seen that if the Claimant had defaulted in performance of the contract, the Respondent also had not kept up his reciprocal promise. Non availability of the site or initial advance and drawings etc. must have had adverse effects on starting the work and also resulted in adverse cascading effects on the follow up activities, though the overall performance of the contractor in the given area is not at all satisfactory. Both the parties are seen to be at fault which has resulted in delaying the work. It is not possible to attribute the exact proportion of blame to each and the no. of days lost on each count at this stage. It is difficult to accept either the Claimants say or the Respondent's say that only the other party is to be blamed for poor performance.**

vii) The clause No.60.1(c) of GCC authorizes the Respondent to complete balance work at risk & cost of Claimant. The clause becomes applicable if determination of contract is as per Clause 60.1. So it is necessary to examine, whether the contractor has defaulted in any of (i) to (xii) events mentioned in the clause. It is seen that the Respondent in his submission has not alleged any specific events out of (i) to (xii) of clause 60.1 to have occurred, except mentioning event no.(viii), namely failure to adhere to the agreed programme by a margin of 10% in the notice of 7 days under letter dated 24/1/92. The Respondent has not pin pointed anywhere the sub clause(s) under which he is determining the contract, except saying that it is done under clause 60.1 of GCC, vide letter dated 31/1/92 of 48 hours. In the final notice dated 11/2/92 of rescission, a mention is made of clause 60.1 and clause 60.2(b) of GCC.

viii) The reasons for Rescission of contract mentioned are slow progress which in turn allegedly to paucity of funds, paucity of resources-men, machinery, materials- and lack of planning. The Respondent has alleged that "left to the Claimant, he would have taken 91 years to complete work." These reasons to point to sub clause vi,vii,viii, and x of clause 60.1 of GCC. The Claimant denies that he abandoned the work, disregarded the instructions, failed to take steps to employ competent staff and labour. The Claimant, in his submissions, pointed out that his machinery, staff, labour contractor, equipment etc. were used by the Respondent for completing the work. He submitted that the foundation work which

was abandoned by Respondent's foundation contractor was got completed by Respondent through one of the Claimant's labour contractor. This is also confirmed by Respondent in his pleadings.

ix) Both parties agree that financial progress of work was only 2% of contract value and thus much below expectation. The Claimant attribute it to Respondent's failure to give timely possession of site (even on the day of rescission of contract 38% site was not made available), failure to give timely Mobilisation Advance, failure to give drawings in time, withdrawal of profitable items of work, disproportionate increase in quantities etc. In the defence, the Respondent has referred to various provisions of contract and Indian Contract Act. In short, the Respondent's contention seems to be that he is empowered to handover site on piecemeal basis, to supply drawings as the work proceeds, change the specifications etc. and still insist on Claimant to adhere to their obligations.

x) It is seen that reference made to clause no 51 of Indian Contract Act (page 63 of exh no RD/B-I/I) is equally applicable to Respondent also. The clause stipulates that when the contract consists of reciprocal promises to be simultaneously performed, the promiser need not perform his promise unless the promised is ready and willing to perform his promises.

xi) The Contract provided stage completion and specified milestones. As per clause 10.1(c) of Spl. Conditions, if contractor fails to complete each part of item before specified time, the contract becomes voidable at the option of IRCON. The Respondent did not make use of the provision and continued with the contract even without acting on option provided by clause 10.2 to recover compensation @ 0.25% of contract value per week with a limit of 5%. There is nothing on record to show whether an exercise was done to see if the Claimant failed to adhere to agreed programme of work by a margin of 10% of stipulated period. A modified programme has been prepared only on 11.11.1991 (Exh.no.RD/B-1/III PAGE R3/405)i.e. just before termination.

xii) As pointed out by the Claimant, the full details of cost incurred are not given as some of the bills are not available.

xiii) In view of the above, the applicability of clause 60.1 for determination of contract is not clearly proved and so rights of Respondent under Clause no.60.1(c) do not get established.

xiv) In the situation when IRCON was unable to hand-over the complete site to the contractor (21% by May, 1990, 7% by January, 1991, further 8% by February, 1991 and further 26% by September, 1991 i.e 62% when, contract was terminated) due to delay in completion of work of foundation and substructure by their another contractor, the correct and proper course would have been to terminate the contract under clause 59.1 of GCC instead of under Clause 60.1. The former would have been more appropriate also because time limit was allowed to lapse, no action to levy liquidate damage or extension of time limit was taken, IRCON's other agencies delayed this contractor's work. IRCON had financial difficulty in giving mobilisation advance in two stages as per contract provision. Clause 60.1 is applicable when default is only of the contractor. In our view therefore the action under clause 60.1 was improper.

(xv) The recovery from the Claimants of extra cost in completing balance work under clause 60.1 will also not be proper in view of following:

(a) There are failures on the part of the Respondent in keeping up his reciprocal promises. (giving site in time, delaying first instatement of mobilisation of advance, delay in working drawings, access, withdrawal of profitable items and getting them done from other agencies etc.)" (emphasis is mine)

7. Once the Arbitration Tribunal has held both the parties guilty of delays in performance of the contract, and time was thus no longer of the essence of the contract, the respondent could not have rescinded the contract for the alleged breaches of the petitioner of delays in performance of the contract, without first having made time of performance as the essence of the contract. Under the contract though time was mentioned to be of the essence of the contract, however, there was a clause of liquidated damages being Clause 17.4 with respect to 1% of the value of the contract to be recovered

as liquidated damages for each delayed week. Once such a clause exists in the contract, in spite of the fact that the time of performance is written to be of the essence of the contract, the time of performance is not of the essence of the contract in view of the judgment of the Supreme Court in the case of *Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs. Vs. State of Maharashtra, AIR 1979 SC 720*. Also, as per this very judgment, once time of performance is not of the essence of the contract, then it is necessary that a specific date is fixed by the employer making time of performance of the essence, and in the absence of making time of performance as the essence it cannot be said that the time of performance was of the essence, and thus for the employer to hold that the contractor is guilty of delay in performance for entitling the employer/respondent to rescind the contract. It is also noted that the Arbitration Tribunal has specifically given a finding in para 33.3(c) as reproduced above that no rescheduling of the work was done by the respondent though this was required under Clause 17.3 of the Contract. The Arbitration Tribunal in para 32.3 (c) also holds that the respondent has not given quantitative data such as agreed program including its modification and exact shortfall in support of its stand of the alleged delays on the part of the petitioner/claimant. Therefore, though there is some issue with respect

to under which clause the respondent was entitled to rescind the contract, but even taking that there was in fact another clause in the contract which entitled the respondent to rescind the contract, however, in the facts, respondent has not correctly rescinded the contract because the time of performance was not of the essence of the contract even originally, and even if the same was of the essence originally, the same was waived and no fresh time was fixed for making the time as the essence of the contract.

8. Having held that time of performance was not of the essence of the contract and the respondent was not entitled to rescind the contract, the issue is what thus follows as to such effect on the two claims raised by the claimant/petitioner of the refund of security deposit and recovery of the bank guarantee amounts encashed by the respondent and interest awarded on the bank guarantee amounts to the respondent under Counter Claim no. 3.

9. In law, once it is held that respondent was not entitled to rescind the contract, the petitioner would be entitled to value of the work done on the principle of *quantum meruit*. Though petitioner could also have been entitled to loss of profit and no substantive objection giving exact and specific loss of profit is found to be raised by the claimant, and thus I am not required to go into the aspect of any alleged entitlement of the claimant to

loss of profit as no serious arguments were urged in this regard. It is noted that claimant has only raised a general objection and has not stated as to what would be the balance work and what would be the percentage of profit on such balance work and how such percentage of profit is proved. Counsel for the petitioner also could not point out to me evidence led before the Arbitration Tribunal with respect to any proof of percentage of loss of profit with respect to the balance portion of the work under the contract. As already stated above, the case has essentially been only argued under the three heads of refund of security deposit, the bank guarantee amounts encashed by the respondent and interest awarded on the bank guarantee amounts. All the three aspects are taken together, in view of the discussion as stated hereinafter, because, these three issues/heads/claims/counter claims will really be sub-heads of the amount claimed of the total entitlement of the petitioner under the head of *quantum meruit*.

10. Before dealing with the two disputed claims and one counter claim, it is also required to be noted that petitioner with respect to its claim for the balance amount due for the value of the work done, under the relevant Claim no.1, the petitioner/claimant has been awarded a sum of Rs.8,57,804/- as the amount due as per the joint measurement recorded of

the work done. This Claim no.1 as decided by the Arbitration Tribunal reads as under:-

“1. Claim No.1:

Balance payments due as per work done for civil and electrical work.

1.1 The Claimant's contention

The Claimant has claimed Rs.17,82,506/- on the basis of bill prepared by them as per joint measurements. Claimant says that the bill for balance payment is as per Exh. CD/B I/ III/ C-39 & 46. The bills submitted are in two parts. Part I is as per contract items and part II is for extra items.

Amount Claimed is Rs.17,82,506/-.

1.2 Respondent's defence

- a) The Respondent says that no joint measurements were taken for earthwork as the same was not done by claimant.
- b) The Respondent further says that there was no fabricated reinforcement lying in the yard. But the fabricated reinforcement was lying on deck slab which was jointly measured and paid for. The measurements for item 3(ii) are incorrect.
- c) The Respondent says that the bill claimed under electrical work consists of extra items which Respondent has not approved.
- d) The Respondent, however, says that the amount payable in the final bill works out to Rs.8,57,804/- only as per the joint measurements. The amount claimed by the Claimant includes extra items which are not sanctioned by the concerned authority.
- e) Moreover, according to the Respondent, the amount is adjusted against risk and cost (additional cost incurred by the Respondent in completing the work) amount payable by the Claimant.
- f) The Respondent has also pointed that as per the Clause 43a of General Conditions of Contract and in terms of provisions of Clause 61 of Additional Special Conditions of Contract, the measurements recorded by the Project Manager are final and binding on the Claimants.

1.3 Discussion & Conclusions

- a) As per the contract the measurements are recorded by the Project Manager of Respondent.

b) Since the final amount computed by Respondent is Rs.8,57,804/-, the A.T. holds that the amount payable will be that much only and the same is due for payment to the Claimant.

c) Claim Awarded --- Rs.8,57,804/-.”

11. In law at the stage of applying the principle of *quantum meruit*, the total entitlement of a contract is seen for the work done and also simultaneously taking into account any advance paid by the employer lying with the petitioner/claimant/contractor as also any amount which has been withheld by the respondent/owner under the running bills of the petitioner/contractor. All these aspects are put in a common kitty so as to arrive at a net figure of amount payable because ultimately the final aspect is that petitioner must get the value of his work done and nothing more. Once in my opinion, the Arbitration Tribunal has determined the value of the work done payable to the petitioner at Rs.8,57,804/- by awarding Claim no.1, accordingly, there does not remain any other entitlement of the petitioner against the respondent because the only entitlement of the petitioner/contractor is for the value of the work done by applying the principle of *quantum meruit*. If the petitioner/contractor has amounts with it which were much beyond its entitlement of Rs.8,57,804/-, and lying with the petitioner as mobilization advance amounts being the advance price received by the petitioner/claimant or there is withholding of amounts by the

respondent payable to the petitioner beyond the amounts due and payable to petitioner for the value of work done, then, the petitioner will not be entitled to any amount in excess of Rs.8,57,804/- being the value of work done, and the respondent will not only be entitled to retain the security amount with it but also will be entitled to encash the bank guarantee amounts as both these amounts are in excess of the amount due and payable to the petitioner for the work done ie *quantum meruit*. It may be noted that respondent paid advance price to the petitioner for the work which was to be done by the petitioner under the contract by giving mobilization advance. Mobilization advance is nothing but monies received in advance by the petitioner/contractor for the work it had to do in future by performance under the contract, and therefore, the mobilization advance available with the petitioner cannot be beyond the value of the work which the petitioner is entitled to as per the principle of *quantum meruit*. When a final account is drawn up, on the one hand it will be seen as to what would be the amount to be awarded to the contractor under the principle of *quantum meruit* and after such amount is awarded, any amount extra lying with the petitioner/contractor belonging to the respondent/employer has to be refunded by the petitioner/contractor to the respondent, and thus the security deposit and the bank guarantee amounts (reflecting advance price lying with the petitioner/contractor) being in excess

of dues payable to the petitioner, therefore such amounts have necessarily had to be refunded to the respondent or retained by the respondent; and hence the Arbitration Tribunal rightly rejected the claim for security deposit amounts and also the bank guarantee amounts.

The rationale and reasoning for entitlement of the respondent to the bank guarantee amounts will apply equally with respect to security deposit amounts because once again the security deposit lying with the respondent is only an amount to be taken into account while determining the final amount to be payable to the petitioner/contractor for the value of the work done on the principle of *quantum meruit* ie once petitioner has been paid on the principle of *quantum meruit*, the petitioner/contractor can claim no other amounts from the respondent.

Also, it may be noted that under Counter Claim no.3, respondent has been awarded interest on the bank guarantee amounts, and there is no dispute that the rate of interest awarded is at 18% per annum as per the agreed term under the contract and with the related/further aspect that the calculation of interest is not disputed by the petitioner as noted in para 44.3(d) of the Award of the Arbitrator. Petitioner to the contrary had sought to urge before this Court that the Arbitration Tribunal has wrongly recorded

the consent of the petitioner with respect to interest calculations, however, this objection is not available to the petitioner in view of the Supreme Court judgment in the case of *State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another (1982) 2 SCC 463* and which holds that what is recorded in a judicial order is final and if a factual aspect is wrongly recorded, then the concerned judicial forum must be immediately approached to correct the so called factual error, and if the judicial forum is not approached for correcting the alleged factual error, the matter must necessarily rest there and no one can argue against the judicial record in an appeal filed against the order of the judicial forum. Applying this principle of the judgment in the case of *Ramdas Shrinivas Nayak (supra)*, once the petitioner/contractor has not moved an application before the Arbitration Tribunal that the Arbitration Tribunal has wrongly recorded its no objection for interest calculation with respect to interest awarded on the bank guarantee amounts, petitioner cannot now before this Court object to the agreed calculations by raising an objection under Section 34 of the Act.

12. In view of the aforesaid discussions, the objections filed by the petitioner with respect to dismissal of claims of security deposit and bank

guarantee amounts are wholly misconceived. Objection to allowing Counter Claim no.3 also is similarly misconceived.

13. In view of the above, there is no merit in the objections, and the same are therefore dismissed, leaving the parties to bear their own costs.

SEPTEMBER 14, 2015
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VALMIKI J. MEHTA, J.