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

ARBITRATION PETITION NO. 455 OF 2007

Madhu Construction Company,
A partnership firm registered under
The Indian Partnership Act, 1935,
and having its office at
312, Kalbadevi Road, 3rd floor,
Mumbai – 400 002.

... Petitioner.

V/s.

1. Bagwe Housing Pvt. Ltd.
A Company registered under the
Companies Act, 1956 having its
Registered Office at 15 D, MIDC
Central Road, Andheri (East),
Mumbai – 400 093 and office at
102, Gajalaxmi, Old Nagardas Road,
Andheri (East), Mumbai – 400 069.

2. Shree Construction Company,

A firm registered under the

Indian Partnership Act, 1932

Having its office at Neelashri,

3rd floor, Aarey Marg, Goregaon (East),

Mumbai – 400 063 and at

102, Gajalaxmi, Old Nagardas Road,

Andheri (East), Mumbai – 400 069.

... Respondents.

Mr. Vinit D. Jawle for the Petitioner.

Mr. Shailesh Shah, Senior Advocate, Prakash Ganwani, Mr. Jonathan Soloman, Ms. Soniya Putta i/b. Soloman & Co. for Respondent 2.

Coram : N.M. Jamdar, J.

Reserved on : 19 July, 2017.

Pronounced on : 29 August 2017.

Judgment :-

The Petitioner, by this Arbitration Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 has challenged the award of the Arbitrator dated 8 August 2007

rendered in the arbitration proceedings between the parties. The learned Arbitrator granted some of the claims of the Petitioner - Claimant and rejected the remaining. Against the refusal to grant some of the claims, the Petitioner has approached this Court.

2. A dispute that arose between the parties from the construction over a property bearing City Survey Nos. 182/1 to 5 situated at Mogra, Taluka Andheri, District Mumbai, has led to the present arbitration proceedings.

3. One Rajdulari-widow of Ramdulari Bhagwan Pande, and others were the owners of the said property. On 15 July 1994, the Owners entered into an agreement with Bagwe Housing Pvt. Ltd.- Respondent No.1. Under this agreement, the Owners granted development rights of the property to Bagwe Housing. Pursuant to the agreement, a Power of Attorney was executed in favour of Bagwe Housing. On 13 January 1999, a building contract was executed between Bagwe Housing and Shree Construction Company- Respondent no.2. Under this contract, Bagwe Housing, - styled as 'Developer', - gave the work of development and construction to Shree Construction Company – the 'Principal Contractor'. As per the contract a residential building of ground plus seven upper floors including a balcony as per the sanctioned plan, was to be

constructed. Bagwe Housing and Shree Construction Company encountered difficulties while carrying out the construction. They then decided to enter into an agreement with Madhu Construction Company – the Petitioner. An agreement was executed on 5 November 1999, between Shree Construction Company as the First part, Bagwe Housing Pvt. Ltd. as the Second part and Madhu Construction Company - 'the New Contractor' as the Third part. This agreement is the genesis of the present dispute.

4. The agreement dated 5 November 1999 between the Developer, Principal Contractor and the New Contractor, provided the modalities as to how to carry out the work. It was agreed that the Developer - Bagwe Housing and the Principal Contractor - Shree Construction will pay to the New contractor - Madhu Construction, as and by way of part consideration, the construction cost of Rs.800/- per square feet. How to make payment to the New Contractor – Petitioner, was specified in clause 8 of the agreement dated 5 November 1999.

5. A supplementary agreement was executed between the Developer, Principal Contractor and the New Contractor on 19 December 1999 wherein certain further terms were agreed upon. Another agreement was signed on 29 May 2001 between the three

i.e. the Developer, the Principal Contractor and the New Contractor. Details in respect of the construction were provided for.

6. On 4 July 2001, the Respondent no.1 wrote to the Petitioner referring to discussions in respect of quality of material, time schedule, quality of R.C.C. work and the supervision on the site. Grievance was made by Respondent no.1 regarding the manner of functioning of the Petitioner. The Petitioner responded on 16 July 2001 and stated that it has been carrying out the work properly. On 31 October 2001, the Respondent again wrote to the Petitioner and pointed out that there has been a delay on the part of the Petitioner because of which they are put to serious inconvenience. Another letter was addressed on 8 February 2002 calling upon the Petitioner to perform the remaining work. One more letter was addressed on 16 March 2003.

7. The Petitioner made a grievance that it has been prohibited from carrying out the work and could not therefore be blamed for any delay. Further that the Respondents did not make payments of the amount incurred by the Petitioner towards the construction already carried out and substantial amount was withheld. According to the Petitioner, the Petitioner arranged a loan from the investors and accordingly entered into a financial

agreement on 22 March 2002. According to the Petitioner, further finance was also infused at the instance of the Petitioner. The Petitioner raised certain claims for the dues ,which were not paid by the Respondents.

8. In this manner, a dispute arose between the parties, which resulted in arbitration proceedings. The Petitioner filed a statement of claim on 29 July 2004 before the learned Arbitrator Mr. Roshan H. Namavati. The Respondents filed their reply and a counter-claim. The learned Arbitrator Mr. Roshan Namavati pronounced his Award on 2 January 2006, directing the Respondents to pay an amount of Rs.1,84,83,662/- By Arbitration Petition No. 162 of 2006, the Respondents challenged the Award dated 2 January 2006 under Section 34 of the Act of 1996 in this Court. By order dated 16 October 2006, the learned Single Judge allowed the Arbitration Petition and by consent,the dispute was referred for sole arbitration of a retired learned Judge of this Court.

9. Before the new learned Arbitrator so appointed, both the parties filed the same claim statement and reply and counter-claim, as filed before the earlier Arbitrator, without any further additional evidence. The learned Arbitrator framed nine points for determination. The learned Arbitrator published his final Award on

8 August 2007. The learned Arbitrator in respect of claim Nos.1,2 and 3 awarded an amount of Rs.33,31,892/- in favour of the Petitioner along with interest at the rate of 12% from 15 July 2004. Aggrieved by the Award of the Arbitrator refusing to grant the total amount claimed the Petitioner – claimant has filed the present Arbitration Petition.

10. Mr. Vinit Jawle, learned Counsel advanced oral arguments for the Petitioner and Mr. Shailesh Shah, learned Senior Advocate for the Respondents. The learned Counsel have also filed their written submissions.

11. Mr. Jawle, learned Counsel for the Petitioner in short submitted as follows :-

(a) The Petitioner has challenged the finding of the learned Arbitrator on points for determination Nos. 1,5,6,7 and 8 as framed by the learned Arbitrator.

(b) The learned Arbitrator has passed an award contrary to the contract between the parties and therefore, the award passed is beyond the jurisdiction of the Arbitrator.

(c) The main point of dispute was in respect of interest. As per Clause 8(iii) of the agreement dated 5 November 1999 the

Petitioner is entitled to interest at the rate of 24% per annum on the amounts certified by the Architects. In view of Clause 8(iv), if the Petitioner was to complete the construction on or before 30 June 2001, without claiming any escalation then over and above construction costs and interest thereon, the Petitioner was entitled to an amount of Rs.100/- per square feet of saleable built up area. In view of Clause 8(v), since the completion of the work was delayed beyond the stipulated or extended date because of the actions of the Respondents, the Petitioner would be entitled to the claim. The learned Arbitrator has given go by to the scheme provided in the aforesaid clauses.

(d) The entitlement of the Petitioner for interest at the rate of 24% per annum has nothing to do with the delay in completion of the construction work. The learned Arbitrator misread the clauses of the agreement and did not appreciate that if there was a delay in execution of the work, at the most the Petitioner may not get price escalation, but it's right to get interest at the rate of 24% of the certified bills remains.

(e) The learned Arbitrator has failed to award even the sums admitted by the Respondents in their correspondence i.e. the interest on the certified construction bills up to 31 March 2002 amounting to Rs.30,57,548/-. This amount was also admitted by the Respondents in the proceedings before the previous Arbitrator.

The Respondents had accepted that they would pay interest at the rate of 24% per annum on certified construction bills.

(f) Even assuming the Petitioner was not entitled to interest at the rate of 24% beyond 31 March 2002, the Petitioner was entitled to the sum of Rs.30,57,548/- payable to the Petitioner upto 31 March 2002, which was admitted by the Respondents themselves.

(g) The learned Arbitrator erroneously rejected the claim for interest on construction bills based on figure of Rs.97,87,338/- which, according to the learned Arbitrator, was the work done by the Petitioner for which no bills were raised by them. This finding is contrary to the evidence on record. The Petitioner never raised any claim for any work done which was not paid. The Petitioner never claimed an amount of Rs.97,87,338/-. The finding of the Arbitrator is based on a factual position which does not exist.

(h) The learned Arbitrator rejected the case of the Respondents for refund of interest and while rejecting the case of the Respondents for refund of interest, the learned Arbitrator has categorically come to the conclusion that there is no merit in the case of the Respondents that the Petitioner is not liable to any interest after the stipulated date, since the Arbitrator could not have rejected the claim of the Respondents otherwise.

(i) The learned Arbitrator has failed to consider the admitted figure of Rs.4,57,53,186/- which were admitted certified bills. The

learned Arbitrator on equitable consideration, awarded 12% interest to the Petitioner even though the agreed rate of interest was 24%. In view of the stipulations in the contract regarding the rate of interest, the learned Arbitrator had no discretion in deciding the rate of interest.

(j) The learned Arbitrator has referred to the award of the previous Arbitrator however, while referring the figures, the learned Arbitrator has erroneously incorporated the figures which never existed in the earlier award.

(k) While considering the prayers for interest, the learned Arbitrator has erroneously deducted the payments made to the material supply agencies as the payments were made to the Petitioner. The Petitioner was entitled to the interest thereon.

(l) As per clause (9) of the Building Construction Contract dated 29 May 2001, if the contract is sub-let to other agencies and the responsibility of the Petitioner would be reduced to that extent and the only consequences there would be that instead of 10% profit the profit would be 5%, however, the Petitioner would be entitled to 5% overheads.

(m) Before the learned Arbitrator, as regard the amount paid to the agencies engaged in the work, there was a difference of Rs.19,50,000/-, While deciding this issue, the learned Arbitrator did not consider the evidence produced by the Petitioner such as

signed vouchers. The learned Arbitrator did not consider that the labour contract was given by the Petitioner to one Mr. Lalji Solanki, who in the cross-examination had admitted that the amount stated to have been paid by the Respondents to him was a loan from the Respondents yet this vital admission has been over-looked by the learned Arbitrator.

(n) The delay was not due to the fault of the Petitioner but it was since the Respondents did not make any payment to the Petitioner and the Petitioner had to obtain funds from the market for the Respondents. The Respondents took over the control and supervision of the work from the Petitioner from July/August 2001, which is clear from the evidence produced by the Respondents themselves. The learned Arbitrator has not come to any categorical conclusion that the delay was due to the fault of the Petitioner. The findings of the learned Arbitrator on this issue is self-contradictory and contrary to the evidence on record.

(o) As laid down by the Apex Court in the case of *Associated Engineering Co. v/s. Government of Andhra Pradesh & Anr.*¹, the Arbitrator cannot act contrary to the provisions of the contract. In the case of *Rajasthan State Mines & Minerals Limited v/s. Eastern Engineering Enterprises & Anr.*² and *State of Haryana v/s. S.L.*

1 1991(4) SCC 93

2 1999 (9) SCC 283

*Arora & Co.*³ it was held by the Apex Court that the Arbitrator has to adjudicate within the terms of the contract and cannot grant rates on equitable grounds. The Award being without jurisdiction needs to be quashed and set aside.

12. Mr. Shailesh Shah, learned Senior Advocate for the Respondent No. 2 submitted in short as follows :-

(a) The scope of Section 34 of the Act is extremely limited and even assuming some errors are committed by the Arbitrator it does not lead to setting aside of the Award.

(b) The arguments advanced by the Petitioner in this Petition are different than the ones which are advanced before the learned Arbitrator.

(c) The Petitioner must show that he had complied with his obligation under the contract. The Petitioner did not complete the construction work even by 30 August 2002, assuming the time was so extended. The Petitioner failed to provide finance after March 2002 because of which the Respondents had to enter into an agreement with the outsiders giving security of some flats. The Arbitrator has recorded a finding of fact that the construction work was not completed by 31 March 2002.

3 2010 (3) SCC 690

(d) The case of the Petitioner, as advanced in this Court that the Petitioner could not complete the work because the Respondents started to appoint other agencies, is a completely new case, not taken in the statement of claim nor in the correspondence.

(e) There is no evidence that the Respondents appointed agencies before March 2002, on the other hand, the Petitioner appointed outside agencies. The correspondence would show that the Petitioner failed to appoint even supervisors on the site. The Petitioner failed to appoint the civil engineer and that work had to be done by the Respondents.

(f) Even assuming the time was extended to 31 August 2002 as contended by the Petitioner, nothing was done by the Petitioner and all the steps had to be taken by the Respondents. The Respondents had to incur an amount to the extent of Rs.97,00,000/- in spite of this position the Respondents paid the amount due as per contract to the Petitioner.

(g) The contentions of the Petitioner that an amount of Rs.30,57,548/- as admitted by the Respondents, is entirely incorrect. This amount was agreed to be paid by the Respondents provided the Petitioner would complete the construction as per the contract and the letters dated 15 May 2002 and 12 May 2002 issued were prior to August 2002 were based on this understanding. Even in the award of the earlier Arbitrator, there is no admission on the part of

the Respondents. In fact, as against the claim of interest, it is stated that the claim is 'adjudicated' and not 'agreed'.

(h) The learned Arbitrator has not taken any wrong figures as sought to be alleged. In paragraph 14(b) of the Award, the learned Arbitrator has clarified that reference is made to paragraphs 7(a) and 7(d) and if these paragraphs are taken together, a correct amount is reflected.

(i) The claim of the Petitioner for 10% profit is entirely baseless and a needless confusion is sought to be created. The relevant clause stipulates 10% profit and 5% overheads. It is stipulated that in case the Respondents appoints outside agencies, profit is reduced to 5%. The Petitioner have sought to mix up the aspect of overheads with profit.

(j) The finding of the learned Arbitrator that the amount was paid to the outside agencies, for which witness was examined, is a factual finding rendered after considering the evidence on record, and cannot be interfered with.

(k) There was no further cross examination of the witness Mr. Lalji Solanki after he had stated that the amount was received as loan and on this ground the finding of the Arbitrator cannot be faulted.

(l) The finding of the Arbitrator regarding entitlement of the Petitioner, under Clause 8(iv) of the agreement, is a purely a factual

finding based on interpretation of the clauses of the agreement and it is for the Arbitrator to interpret clauses of the agreement contract.

(m) There is no merit in the challenge raised by the Petitioner to the impugned award.

13. I have considered the rival contentions.

14. Though Mr.Jawale, the learned Counsel for the Petitioner has argued the matter in great detail and has submitted detailed written submissions, one cannot lose sight of the fact that the challenge has been brought under Section 34 of the Arbitration Act. An arbitration petition filed under Section 34 of the Act is not to be heard and tried like a first appeal under Section 91 of the Code of Civil Procedure. Section 34 (2) states that the arbitral award may be set aside by the Court only if the grounds enumerated thereunder are satisfied. The grounds on which a award may be set aside are : if the parties under some incapacity; the arbitration agreement is not valid under law to which parties have been subjected to it; the party was not given proper notice of the appointment of an arbitrator and the proceedings and was otherwise unable to present its case; the award deals with a dispute not contemplated by or not falling within the terms of the submissions of the arbitration; and the composition of the arbitral tribunal or the procedure was not in accordance with

the agreement. The Court may set aside an award if the arbitral award is in conflict with public policy of India. Explanation to Section 34(2)(b)(ii) clarifies that the award is in conflict of public policy of India if the making of award was induced or affected by fraud or corruption; it was in conflict with basic notions of morality or justice and is in contravention with the fundamental policy of Indian law. Thus the bare perusal of Section 34 reveals the extremely narrow jurisdiction conferred on the Court.

15. The Apex Court in the case of *Associated Builders v/s. Delhi Development Authority*⁴ took review of the development of law as regard the concept of fundamental policy of Indian Law indicated in Section 34 of the Act. The Apex Court has laid down that the Arbitrator must apply judicial mind to the facts and circumstances. Non application of mind is a defect that is fatal to any adjudication. A decision of the Arbitrator which is perverse and so irrational that no reasonable person would arrive at the same, would lead to setting aside the award. However, the Apex Court has emphasized that mere errors in assessing the evidence cannot lead to a perversity in the award. If the approach taken is so irrational that no reasonable person would take it then a ground may be made out. The award based on a evidence which does not measure up the quality of legally trained mind would not be held to be invalid.

4 (2015) 3 SCC 49

Furthermore, it is within the domain of the Arbitrator to construe the terms of the contract and unless the construction is so perverse that no reasonable person would construe to a contract in the said fashion, it is not to be interfered with.

16. The Petitioner had undertaken to construct the property for which it had entered into a contract. The contract stipulated certain terms for developments and construction work and also as regard providing finance. It was agreed that the construction would be carried out on or before the date assigned. Since dispute arose between the parties, the matter was referred to the Arbitrator. The construction has been completed and the payments have been made to the Petitioner. Upon a query to Mr. Jawale during the course of hearing, on instructions, he confirmed that the dispute raised in this present Petition is primarily towards the additional amount such as the profits and interest and not for the principal amount, which has been paid.

17. The learned Arbitrator framed nine issues for consideration. The issues were pertaining to the following : Claims of the Petitioner for an amount of Rs.2,43,28,618/- for the work executed by various agencies at the rate of 5% or 10% whether an amount of Rs.10,96,986/- to be reduced from amount of

Rs.3,75,54,760/-. Credit claimed by the Petitioner for an amount of Rs.7,48,646/- by way of interest, brokerage, etc. Amount paid by the Respondents account of the Petitioner to agencies at the rate of Rs.1,57,57,711/- or Rs.1,38,07,711/-. Whether the Petitioner was required to give credit to the Respondents for an amount of Rs.3,46,525/-. Claim of the Petitioner for an amount under Clause 8(iv) of the agreement dated 5 November 1999 and whether any amount in excess of Rs.21,41,276/- is payable by the Respondents to the Petitioner. The learned Arbitrator having gone through the agreements interpreted the clauses and held that the Petitioner are entitled to some of the claims and negated the remaining claims. The Petitioner has restricted their claim and the arguments on the point for determination Nos.(i),(v),(vi),(vii) and (viii). Point for determination No.(ix) relates to cost. These points for determination, the findings of the Arbitrator on which the Petitioner is aggrieved by, are as under :-

“(i) At what rate the Claimants are entitled to payment of profit on the amount of Rs.2,43,28,618/- being the amount of works executed by various Agencies, whether at 5% as claimed by the Respondents or at 10% as claimed by the Claimants.

(ii)

(iii)

(iv)

(v) *What is the amount paid by the Respondents on account of the Claimants to Agencies engaged in the works, whether Rs. 1,57,57,711/- as claimed by the Respondents or Rs.1,38,07,711/- as claimed by the Claimants.*

(vi) *Whether the Claimants are required to give credit to the Respondents for the amount of Rs.3,46,525/- claimed to have been paid by the Respondents on account of Departmental Labour.*

(vii) *Whether the Claimants are entitled to receive any amount from the Respondents under Clause 8(iv) of Agreement dated 5 November 1999 by way of profit.*

(viii) *Whether any amount in excess of Rs.21,41,276/- is payable by the Respondents to the Claims on account of interest and if yes, the amount thereof.”*

18. Mr. Jawle, in his oral arguments, and written submissions which have exceeded the number of pages stipulated, have sought to assail the findings in the award in great detail. However, as stated earlier the Court cannot be unmindful of the limited jurisdiction available under Section 34 of the Act to set aside the arbitral award. Not every erroneous finding or every error of the learned Arbitrator can result in setting aside the award. As rightly

contended by Mr. Shah, the sum and substance of the Petitioner's claim is the enforcement of contractual terms. It will thus have to be seen whether the Petitioner was rightly held to be not entitled to the claims made.

19. Clause 8 of the agreement dated 5 November 1999 lays down the methodology of payment of consideration to the Petitioner. The clause is reproduced as under -

“8. IT IS AGREED BY AND BETWEEN THE PARTIES HERETO THAT the consideration payable by the Developers and/or Principal Contractors to the New Contractors shall be as follows :-

(i) the amount of Rs. 15,00,000/- (Rupees Fifteen Lacs only) and/or other lesser amount that may be paid by the New Contractor to the MCGM for the purpose of obtaining of Commencement Certificate as aforesaid, shall be reimbursed with simple interest thereon at the rate of 24% per annum, first as more particularly stated in Clause 9A(c)(i) herein;

(ii) the New Contractors shall raise Bill/s for construction costs at the rates as provided in Clause 7 hereof per square foot of areas of Plinth and Balconies, after completion of each stage of construction as per the schedule of progress of work, from time to time as per the progress of the

works and as per Schedule of Payment as provided in Annexure 'C' hereto Each of the said Bills of the New Contractors shall be certified by the Architect Shri Jayant Vaidya of M/s. D.R. Vaidya & Co. within 7 days from the date of submission of such Bill by the New Contractors to the said Architect for certification;

(iii) the New Contractors shall be entitled to interest at the rate of 24% per annum on such amounts as may be certified for payment by the Architects, M/s. D.R. Vaidya & Co. to the New Contractors in respect of each of the Bills for construction costs submitted by the New Contractors, from the date of each such Certificate to the date of receipt of payment. The New Contractors shall submit to the Developers and Principal Contractors Debit Notes for the amount of interest that may become due to the New Contractors for every quarter at the agreed rate of 24% per annum on the amounts certified for payment by the Architects;

(iv) subject to the provisions of sub-clause (v) hereof, in consideration of the New Contractors completing the works as provided herein and in the Building Contract, on or before 30th June, 2001 or within such extended period as may be approved by the Architect under the Building Contract to be executed between the parties hereto as provided in Clause 7 hereof, without claiming any escalation, even if sales of premises on the said land and realization of price thereof and payments of construction costs, interest and

other amounts to the New Contractors may be delayed, besides the construction costs and interest thereon as aforesaid, the Developers and/or Principal Contractors shall pay to the New Contractors an amount of Rs.100/- per square foot of saleable built up area in respect of the building constructed/to be constructed on the said land by the New Contractors hereunder;

(v) In case completion of the works as provided herein and in the Building Contract is delayed beyond 30th June, 2011 or such extended period as may be approved by the Architect under the Building Contract to be executed between the parties hereto as provided in Clause 7 hereof, by reason of any act or default on the part of the Developers or the Principal Contractors or the Architects, the New Contractors shall be entitled to receive such amount on account of escalation in prices of material and labour after 30th June 2001 in respect of works extended by the New Contractors after 30th June 2001 as may be certified by the Architect.”

Sub-clause 8 (iii) lays down the entitlement of the Petitioner for interest at the rate of 24% per annum on the amount certified by the Architects from the date of each certificate till receipt of payment. Sub-clause (iv) lays down that, for consideration of the Petitioner completing the works on or before 30 June 2001 without claiming any escalation, the Petitioner will be entitled to Rs.100/- per square feet. Sub-clause (v) lays down that in case the completion of the works is delayed beyond 30 June 2001 or such extended period as

may be approved by the Architects by reason of any default on the part of the principal contractor or developer, the Petitioner shall be entitled to an amount of escalation in prices. The learned Arbitrator has interpreted the clauses to hold that the entitlement of the Petitioner is not absolute and is subject to the Petitioner completing the works within the stipulated period.

20. It is the contention of the Petitioner that Sub-clauses 8(iii),(iv) and (v) operate independently and the claim of 24% interest on the construction bill was not connected with the time period in completion of the construction work and assuming there was a delay in the construction, it would affect only the claim of the Petitioner of bonus of Rs.100/- per square feet. The learned Arbitrator has construed the clauses as not independent and has held that the claim of 24% interest cannot be said to be unconnected with the completion of the work. Though Mr. Jawle may be justified in contending that there is no detailed discussion, reading the award in its totality, from which the approach of the Arbitrator is discernible, it is clear that the learned Arbitrator has construed the agreement in such manner. It is seen from the record that the Petitioner could not complete the construction work even by 30 August 2002. The finance as stipulated in the memorandum of understanding was not provided by the Petitioner after March 2002. The legal position is that the construction of the agreement is within the domain of the

Arbitrator chosen by the parties. The interpretation of the agreement by the Arbitrator in the present case is in consonance with principles of equity that, one who seeks benefit of a contract must demonstrate that he has adhered to his part of the promise.

21. Thus shorn of all intricate factual details, figures and statistics put forth by the Petitioner, the underlying premise of the Award is that the Petitioner is not entitled to certain benefits accruing under the contract since the Petitioner did not perform its part of the contract. The learned Arbitrator interpreted the Agreement to hold that the entitlement claimed by the Petitioner was not an absolute one but dependent on the Petitioner performing its obligation. The learned Arbitrator as well within his domain to construe the terms of the agreement. The interpretation is also fair and equitable. It cannot be said that the interpretation of the agreement by the learned Arbitrator is perverse and no reasonable person would come to such a conclusion. It is an admitted position that the Petitioner has been paid its principal dues and what is sought to be claimed is the interest and additional benefit under the contract. Mr. Shah is right in contending that since the Petitioner was seeking, in that sense, a specific performance of the contract, it was incumbent on the Petitioner to demonstrate that it had performed its part.

22. It was contended by Mr. Jawle that there is no finding by the learned Arbitrator that the Petitioner has not completed the construction within the stipulated period. It was contended that in fact by rejecting the counter-claim made by the Respondents, the learned Arbitrator has held it otherwise, since if there was a delay on the part of the Petitioner, there was no necessity to dismiss the counter-claim. This submission cannot be accepted. The argument that the learned Arbitrator has not given any finding that the work was not completed as stipulated, is entirely incorrect. As pointed out by Mr. Shah in paragraph 9(a) while considering the point of determination No.3, the learned Arbitrator has observed that by agreement dated 29 May 2001 the construction work was to be completed by 31 March 2002, however, by that time only 40% work had been done which was found by the earlier Arbitrator and was also found on record. Again the learned Arbitrator in paragraph 13(c) observed that it was an admitted position that no time was extended beyond 30 March 2002 and that the Petitioner did not do any work after 31 March 2002 and construction of building was not completed on or before 31 March 2002. These findings are categorical and there is no substance in the grievance that no factual findings have been recorded by the learned Arbitrator. The Respondents have not filed any Arbitration Petition challenging the rejection of its counter-claim.

23. Thus two positions emerge. One, the interpretation of the agreement holding that entitlement of the Petitioner for the claim of 24% interest was dependent on the Petitioner to perform its part of the contract ,is a possible view. Second, a factual finding is rendered that by 31 March 2002 the Petitioner did not complete its part of the contract on both counts. It is settled law that the Arbitrator is master of the facts and is entitled to record the factual findings from the material on record.

24. It was then contended by Mr. Jawle that the learned Arbitrator failed to give effect to the admitted position and failed to award an amount of Rs.30,57,548/-. He submitted that this amount was admitted by the Respondents in the earlier arbitration award and also in their correspondence. Mr. Jawle submitted that, inspite of these admissions, the learned Arbitrator did not grant this amount. Mr. Shah on the other hand submitted that there were no such admissions and the statements will have to be seen in their context.

25. It is clear from the reading of the earlier award the Advocate for the Respondent No.2 had produced a chart on the assumption that there is no breach by the Petitioner - claimants and

the figures given on the premise that if there was no breach the Petitioner would be entitled to interest as stated. Furthermore, in the earlier award the tables which were reproduced indicating the figures, there were two remarks. One “agreed” and the second “adjudicated”. As regard the claim of interest, the remark was not “agreed” but “adjudicated”. In any case, the earlier award wherein the figure of Rs.33,31,892/- has been referred to will have to be read in the light of the endorsement of the Advocate for the Respondent No.2 that they were on the premise that the Petitioner had not committed any breach. Heavy reliance was placed by Mr. Jawle on two letters which were issued by the Respondent No.2 on 15 May 2002 and 12 June 2002 to contend that the amount of Rs.30,57,548/- was an admitted amount. These letters are part of the record. The letter dated 15 May 2002 does refer to interest on construction bill upto 31 March 2002 as Rs.30,57,548/-. Similar is the position as regard the letter dated 12 May 2002. However, both these letters were issued prior to 31 June 2002 and the Petitioner was to complete the contract by 31 June 2002. At that point of time, the Respondents had taken into consideration the obligation of the Petitioner under the contract and had calculated the amount accordingly. Therefore, the Respondents had calculated the amount on the assumption that the parties will abide by the terms and conditions.

26. Furthermore, it has been pointed by Mr. Shah that this ground was not urged before the Arbitrator. The perusal of the Award does not indicate that the arguments based on these two letters and earlier award as an admitted position, was urged before the learned Arbitrator. In the present Arbitration Petition also a ground is not taken that, inspite of arguing that the two letters constituted admissions on the part of the Respondents, the learned Arbitrator failed to give the amount of Rs.30,57,548/- as an admitted figure. In fact in para 41 of the petition, Petitioner itself has pleaded that the rate was stated by the Respondent on the assumption that there will be no breach. The contention of the Petitioner regarding the amount of Rs.33,31,892/- therefore cannot be accepted. There is no error committed by the Arbitrator.

27. It was further contended by Mr. Jawle that there is a complete confusion as regard the figure of Rs.2,55,45,049/- in paragraph 14(d) of the Award. He submitted that though the learned Arbitrator had relied upon the figures of the previous arbitrator, he had taken into consideration the incorrect figures. It was submitted that the Arbitrator committed multiple errors in the impugned award. This submissions cannot be accepted. Such submission could be advanced at the most in the appellate jurisdiction. Even otherwise, the amount of Rs.2,55,45,049/- consist of Rs.2,42,65,978/- as being payment made to the agencies,

Rs.62,640/- an amount spent on pest control and Rs.12,16,431/- as 5% profit. Though the learned Arbitrator has mentioned paragraph 8, pointed out by Mr. Shah, in fact refers to paragraphs 7(a) and 7(d). The amount of Rs.2,55,45,049/- is a correct amount if it is tallied with paragraphs 7(a) and (d).

28. It was contended by Mr. Jawle as regard the claim of payment of profit on the amount of Rs.2,43,28,618/- as to whether should have been 10%, which was wrongly not granted by the Arbitrator. It was submitted that as per clause 9 of the building construction contract dated 29 May 2001, the part of the work is sub-let to other agencies, at the most the Petitioner's responsibility will be reduced but the Petitioner would still be entitled to 5% overheads. It was submitted that the learned Arbitrator has disallowed the claim of the 5% overheads contrary to the terms of the contract and the Petitioner would be entitled to 10% profit and 5% overheads.

29. The learned Arbitrator has dealt with the above claim of the Petitioner and has held that the agreement dated 5 November 1999 provided for break-up of rate of Rs.900/- per square feet, to be paid to the Petitioner. The amount included R.365/- as a rate of construction, Rs.90/- towards profit and Rs.45/- as 5% overheads.

In case the Respondents proceeded to appoint outside agencies, profit would be reduced to 5%. Mr. Shah submitted that it is clear from the record that substantial part of the work was given to the other agencies. The issue framed by the learned Arbitrator clearly indicates that the claim of the Petitioner was towards profits and not towards overheads. After the claim of the Petitioner for 10% profit was negated argument is sought to be advanced that the Petitioner is entitled to 5% overheads, which is completely distinct concept. The interpretation of clause 9 regarding the reduction in the profit from 10% to 5% is within the domain of the learned Arbitration. There is no perversity in the same as the view taken is a possible view.

30. The next issue is sought to be contended by Mr. Jawle was regarding the finding of the Arbitrator and the Issue No.(vi) regarding the credit to be given to the Respondents for an amount of Rs.3,46,525/-. It was argued by Mr. Jawle that the witness of the Respondents, Mr. Solanki had admitted in evidence in the cross-examination that the amount was a loan amount and therefore, there was no question of giving the credit to the Respondents. I do not find any substance in this submission. The witness was examined by the Respondents in support of their submission that the amount of Rs.2,62,500/- was paid towards labour charges. He had categorically deposed that he had received these amounts towards labour charges.

Merely by one line in the cross-examination, which was not taken any further, that it was a loan amount, the entire deposition of the witness and the case of the Respondents could not have been negated. Assessment of evidence, is the prerogative of the arbitrator. The learned Arbitrator has found that, a single statement in the cross-examination, without any further elaboration, is not sufficient to dislodge the case of the Respondents. The learned Arbitrator was well within its jurisdiction to assess the evidence. Again by advancing such arguments, the distinction between a first appeal and an arbitration petition is sought to be blurred.

31. As regard the point for determination No.7 regarding the claim of the Petitioner to receive an amount by way of profit as per Sub-clause 8(iv) of the agreement, Mr. Jawle contended that the delay was not due to any default on the part of the Petitioner. It was submitted that the Respondents had taken over the work and therefore the Petitioner could not be faulted with. He submitted that the learned Arbitrator has not gone in the merits of the delay. This submission also cannot be accepted. Sub-clause 8(iv) was clear that the amount of Rs.100/- per square feet was an incentive. It was to be given only if the Petitioner completed the construction on time. The learned Arbitrator held, as a finding of fact, that no time was extended beyond 31 March 2002 and the claimant did not do any work after 31 March 2002 and the construction was not

completed before 31 March 2002. The learned Arbitrator held that in view of this fact the Petitioner cannot claim any amount under Clause 8. The learned Arbitrator held that this clause is only an incentive and has nothing to do with negligence, contributory or otherwise. The learned Arbitrator held that if the claimants were unable to complete the construction due to any act of default on the part of the Respondents, there was claim in escalation under Sub-clause 8(v), which was not claimed. The learned Arbitrator therefore interpreted Sub-clause 8(iv), to hold that it was independent of any negligence. The learned Arbitrator has held that it is only an incentive and therefore, question of fault of any party did not arise. As stated earlier, it is within the jurisdiction of the Arbitrator to interpret the agreement. This interpretation adopted by the learned Arbitrator cannot be stated to be perverse. In view of the fact that the learned Arbitrator construed this claim as only an incentive independent of other aspects, further enquiry was found unnecessary.

32. As regard the point for determination No.5 regarding the payment to outside agencies, Mr. Jawle contended that the Petitioner had examined all the concerned agents as witnesses and also documents were produced, however, the learned Arbitrator has ignored the evidence, such as the vouchers. He submitted that only on the ground of some questions not being asked in the cross-

examination, the entire evidence in favour of the Petitioner was discarded. Mr. Jawle submitted that the evidence produced by the Petitioner regarding an amount of Rs.19.50 lakhs was completely discarded by the learned Arbitrator. Again this aspect is in the realm of assessment of evidence. The Respondents examined the witnesses who had deposed that they were paid an amount of Rs.1,57,57,711/-. In the cross-examination the Petitioner did not confront the witness with a case that the amount was not paid by the Respondent No.1 but by the Petitioner. The learned Arbitrator therefore concluded that the Respondents had proved their case as there was no effective cross-examination. The learned Arbitrator was well within its jurisdiction to rule on the sufficiency of evidence and to come to a conclusion that the evidence produced by one party was more cogent than the other. The finding of the learned Arbitrator on this issue therefore cannot be interfered with.

33. The learned Arbitrator, after rejecting the claim of the Petitioner for the interest at the rate of 24%, proceeded to grant interest at the rate of 12% with effect from 31 December 2003. Mr. Jawle submitted that the learned Arbitrator cannot go beyond the contract and since the rate agreed between the parties was 24%, there was no question of grant of 12% interest which would be against the terms of the contract. He submitted that the Arbitrator has no discretion in awarding interest when there is an agreement between

the parties, which will prevail. He relied upon the decisions in the cases of *Associate Engineering Co. v/s. Government of Andhra Pradesh & Anr.*⁵, *Rajasthan State Mines & Minerals Limited v/s. Eastern Engineering Enterprises & Anr.*⁶ and *State of Haryana v/s. S.L. Arora & Co.*⁷

34. The above argument advanced is without any substance. In fact, in view of the findings rendered in the earlier part of the judgment such submission would be against the Petitioner itself. The learned Arbitrator has found that though the Petitioner was not entitled to 24% interest entirely as claimed, it was equitable to grant some interest to the Petitioner and had proceeded to grant 12% interest for the period specified in the Award. If the foundation of the Award that the Petitioner is not entitled to the interest since the Petitioner did not adhere to the time schedule under the contract, is upheld, then the Petitioner will be dis-entitled to claim the amount as sought. If the learned Arbitrator has granted interest at the rate of 12% for a certain period, which is not challenged by the Respondents, I do not deem it necessary to set aside the award on that count.

5 (1991) 4 SCC 93

6 (1999) 9 SCC 283

7 (2010) 3 SCC 690

35. Thus the learned Arbitrator has considered the claims raised by the Petitioner, assessed the evidence on record, interpreted the contract, upheld some claims of the Petitioner and rejected the other claims, by a reasoned award.

36. This Court cannot examine the merits of the award as an appellate Court by re-examining and re-appreciating the evidence. The award is not liable to be set aside merely because some of the conclusions drawn could be stated to be erroneous. The award rendered by the arbitrator chosen by the parties is ordinarily final and conclusive. Legal position is settled that the arbitrator having made the final arbitration of resolution of dispute between the parties, his award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion. If the arbitrator has taken a possible view of the construction of a contract, the court do not interfere with a conclusion of the arbitrator. It is also settled that the reasonableness of the reasons given by the arbitrator cannot be challenged. The arbitrator is not obliged to write a detailed speaking award akin to a judgment of a civil court. Merely because detailed reasons are given, a conclusion cannot be drawn that there are no reasons in the award. The arbitral tribunal is master of the factual aspects and unless something grave is manifest from the face of the record which shocks the conscience of the court, the error in assessment of facts cannot be a ground to set aside the award. The

view taken by the Learned Arbitrator is a possible view and there is nothing grave that is manifest from the record.

37. Considering the above legal and factual position, no case is made out to set aside the award. The Arbitration Petition is dismissed. No costs.

(N.M. JAMDAR, J.)