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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 20/2008

Reserved on : January 2, 2017

Date of decision: March 21, 2017

**THDC HYDRO DEVELOPMENT CORPORATION
LIMITED**

..... Petitioner

Through: Mr. Sachin Dutta, Senior Advocate with Ms.
Pritya Sharma, Advocate along with
Mr. Sushhil Kumar, Law Officer.

versus

**M/S. BHAGIRATHI BUILDERS ENGINEERS
AND CONTRACTORS**

..... Respondent

Through: Mr. Sandeep Sharma with Ms. Devyani
Sharma, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

21.03.2017

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1. This is a petition by Tehri Hydro Development Corporation Limited (THDC) against the Respondent, M/s Bhagirathi Builders Engineers and Contractors, under Section 34 of the Arbitration & Conciliation Act, 1996 ('the Act') challenging an Award dated 22nd September, 2007 passed by the Sole Arbitrator.

Background facts

2. THDC invited tenders for construction of 100 houses for economically weaker sections including civil and electrical works. By a letter dated 22nd

June, 1995, the said work was awarded to the Respondent. The work was to be completed in 9 months i.e., by 25th March, 1996. Later, the period was extended to 15 months and it was to be completed by 25th September, 1996. The total value of the work was revised to Rs.1,96,05,639.

3. When disputes arose between the parties during execution of the contract, the Respondent filed Arbitration Application No. 70 of 1998 in this Court under Section 11 of the Act. In the said application, *inter alia*, the Respondent set out Section 20.1 of the terms and conditions applicable to the contract between the parties which reads as under:

“20.0 Settlement of disputes and arbitration

20.1 It is specifically agreed so and between the parties that all the differences or disputes arisen out of the contract or touching the subject matter of the contract shall be decided by process of settlement and arbitration as per clause 56.0 of General Conditions of Civil Works and Provisions of Indian Arbitration Act 1940 shall apply and Delhi/Lucknow Court only shall have jurisdiction over the same. The arbitration shall give reasoned award.”

4. The said application also set out the summary of the claims of the Respondent. There were 10 claims aggregating to Rs.61,10,537/- together with interest @ 24% compounded quarterly from 26th September, 1997 till the date of payment. It was stated in the said application that the Respondent had invoked arbitration clause by a letter dated 8th October, 1997 and a further reminder dated 18th December, 1997 but that THDC had not responded thereto. The said petition was disposed of vide order dated 24th July, 2000 and a former Judge of this Court was appointed as the Sole Arbitrator.

The First Award

5. The said Sole Arbitrator passed an Award on 24th September, 2003 (hereafter the 'First Award'). The summary of the First Award is as under:

<i>S.No.</i>	<i>Claim Number</i>	<i>Details of the Claim</i>	<i>Award of Ld. Arbitrator</i>
1.	Claim No.1	Rs.11,76,338 on account of the work force and machinery that remained unutilized for 2 months due to delay on the part of THDC in supplying cement, steel and CC blocks.	Rs.10,04,600/- towards Claim Nos. 1,2 and 3 and Rs.99,000/- for transport of 330 tankers of water
2.	Claim No.2	Rs.5,88,169/- for delay in supply of drawings and designs, payment on account of work force and machinery remained idle	
3.	ClaimNo.3	Rs.3,93,084/- - Rs.2,94,084/- towards delay due to non supply of water, Rs.99,000/- towards transport of 330 tankers of water @ Rs.300/- per tanker	
4.	Claim No.4	Rs.40,000/- for non-arrangement of supply of electricity	
5.	Claim No.5	Rs.3,96,711/- on account of the escalation	Rs.2,64,474/-
6.	Claim No.6	Rs.12,000/- per year from 25 th September, 1996 for extra insurance	Held premature with liberty to raise it after finalization of the account.
7.	Claim No.7	Rs.4,50,000/- towards damages/ losses as security money not released	Held premature with liberty to raise it after finalization of account.
8.	Claim No.8	Rs.19,05,500/- towards losses suffered on account of	Rs.1,92,000/-

		contractor remained idle at site from 25 th September, 1996	
9.	Claim No.9	Interest @ 24% compounded quarterly	Simple Interest @ 12% per annum from 1 st January, 1998 till the date of payment
10.	Costs of arbitration		Rs.50,000/-

6. It was further ordered by the learned Arbitrator that if the awarded amount was not paid within 90 days from the date of the First Award, interest @ 15% per annum would be payable from the date of the First Award till date of payment.

7. According to the Respondent, after the 23rd RA bill for extra and substituted work in respect of which there was no measurement undertaken, no final bills were signed. This led the Respondent to seek reference of the disputes to arbitration. The Respondent then filed Arb. Application No. 22/2003 in the High Court of Uttarakhand at Nainital. An order was passed in the said application on 23rd December, 2003 appointing a former Judge of the Allahabad High Court as the Sole Arbitrator.

Second round of arbitration proceedings

8. Before the said Sole Arbitrator, the Respondent filed a statement of claim raising the following claims:

Claim No.	Amount claimed Rs.	Grounds
Claim No. 1	20,00,000	For left over extra and substituted works and the amount of escalation
Claim No. 2	12,50,000	Refund of the security deposited

		by the claimant
Claim No. 3	8,04,060	Amount paid by the claimant to watch and ward during the period when the work was stopped.
Claim No. 4	5,02,500	Paid by the claimant as salary to Assistant Engineer, Junior Engineer and the Store Keeper during the period the work was stopped
Claim No. 5	2,60,000	For removal of the loose earth etc from the site of the work during the period when the work was stopped
Claim No. 6	1,99,997	For washing, painting etc.
Claim No. 7	15,14,498	Interest at the rate of 2% per month on the amount which was withheld by the Corporation
Claim No. 8	16,50,000	Compensation for loss of profit
Claim No.9		Interest at the rate of 2% per month on the amount awarded from 1 st July 2002 till the date of payment.
Claim No. 10		Costs of the arbitration proceedings

9. THDC filed a statement of defence in which, *inter alia*, it was stated that the Respondent had executed the work to the extent of Rs. 2,15,61,000 (vide the 23rd RA Bill) and payment thereof had been made by THDC. It was stated that nothing further was due to the Respondent.

10. By an order dated 21st January, 2005, the following issues were framed by the Arbitrator:

“Preliminary Issues

1. Whether the present reference made to the arbitrator by the Hon’ble Uttranchal High Court is contrary to law in view of Section 42 of the

Arbitration and Conciliation Act, 1996?

2. Whether Claim No. 7 for Rs. 15,14,498.00 is barred by Order II Rule 2 of the Code of Civil Procedure for the reasons set out in paragraph 2 of the statement of defence?

Issue on Merits

3. Whether the claimant is entitled to get the amount of compensation, as set out in clause (i) to (xiv) of the statement of claim? If the answer is in the affirmative then what is the exact amount to be awarded to him?"

11. The above preliminary issue No.1 was decided against THDC by the learned Arbitrator on 31st January, 2006. Preliminary Issue No.2 was directed to be decided along with Claim No.7.

12. During the pendency of the above arbitration, an application was filed by THDC in 2007 under Section 32 of the Act stating that an agreement (known in local language as '*Farkhati*') had been reached between the parties whereby the claims of the Respondent had been 'fully and finally settled and payment made to the contractors in pursuance thereof.' A copy of the said *Farkhati* was enclosed with the said application.

13. Separately, THDC also questioned the locus and status of the Respondent to initiate arbitration and make the claims as it was an unregistered partnership. It was pointed out that it was mandatory for all the partners to be impleaded as 'co-claimants'. In an application filed on 7th February, 2007 by THDC before the Arbitrator, it was prayed that the statement of claim be rejected on account of it having been 'invalidly instituted'. It was prayed that all the partners of the Respondent - M/s

Bhagirathi Builders Engineers and Contractors should be impleaded as the 'co-claimants'.

14. On 14th September 2007, an affidavit was filed by the following partners:

1. Shri Prem Singh Kateth
 2. Shri Mor Singh Kateth
 - Both s/o Late Shri T.S. Kateth
 3. Shri Baital Singh s/o Shri Sunder Singh
 4. Shri Naresh Kateth s/o Shri G.S. Kateth
 5. Shri Ram Singh s/o Shri T.S. Kateth
 6. Shri Matwar Singh s/o Shri T.S. Kateth
 7. Shri Sher Singh s/o Inder Singh
- All partners of M/s. Bhagirathi Builders, add: Kailash Gate Muni Ki Rethi, Rishikesh, District Dehradun."

15. It was stated therein that each of the above persons was partner in the firm M/s Bhagirathi Builders and that apart from the said partners there were no other partners. It was further stated as under:

"2. That the claim petition on behalf of the partnership firm was presented with the consent of all the partners. Shri P.S. Kateth has presented the instant reference on behalf of all the partners which is pending hearing before the Hon'ble Arbitrator."

16. It was pointed out by THDC that there were differences in the partnership deed submitted by the Respondent/claimant at the time of signing the agreement and the one filed subsequently before the Arbitrator. The number of partners and their names were different. The entity M/s Bhagirathi Builders had no privity of contract with THDC.

17. This led THDC to file a further application before the learned Arbitrator on 15th September, 2007 wherein it was stated that some of the alleged

partners had not signed the verification and no particulars about the deponents of the above affidavit were provided. THDC reiterated its submissions that “the claimant has no capacity to initiate the present arbitration. It is quite evident that there has been reconstitution of the firm and there is no privity of contract between THDC and the alleged partnership firm. The affidavit is conspicuously silent as to the details of the partners as on the date of signing of the contract.” THDC further prayed that it was imperative that “all the alleged partners be produced before the Hon’ble Arbitrator and an opportunity be given to the Respondent to establish that the identity of the firm cited in the affidavit is completely different and a separate juristic entity, distinct from the firm with which the contract was entered into.”

18. The above pleas were elaborated in an affidavit dated 19th September, 2007 filed by THDC before the Arbitrator. *Inter alia*, it was pointed out that the affidavit dated 14th September 2007 was verified by only 5 of the 7 alleged deponents. Further, it also appeared from a comparison of the signatures on the said affidavit, with the signatures on the partnership deed submitted at the time of signing of the contract, that there was "forgery/falsification of the record". It was pointed out that the claims were made by 'Bhagirathi Builders' which was alien to the contract between Bhagirathi Builders Engineers and Contractors and THDC. It was accordingly prayed that the arbitration should be terminated forthwith "and stern action should be taken against the entity describing itself as the claimant." A copy of the partnership deed dated 1st April 1993 was annexed to the affidavit. A separate application was filed on 19th September, 2007

before the learned Arbitrator praying that contempt proceedings be initiated against the Respondent.

19. According to THDC, the Arbitrator did not consider the above affidavit and application and proceeded to pronounce the impugned Award on 22nd September, 2007 (hereafter 'the impugned Second Award').

The impugned Second Award

20. In the impugned Award the learned Arbitrator noted that Claim No.1 was for Rs.20 lacs in respect of the work done and on account of escalation. The Arbitrator noted that in the reply filed by THDC it had been stated that the final bill for the leftover works done by the Respondent after 23rd RA bill had been prepared. Therefore, on 24th April 2006 itself Claim No.1 was disposed as not pressed.

21. As regards THDC's application under Section 32 of the Act, the learned Arbitrator discussed the contents of *Farkhati* (agreement) and concluded that it neither contained a date nor had the signatures of any witness. The signature on it was illegible. The learned Arbitrator rejected the application under Section 32 of the Act for the following reasons:

(a) THDC in its application under Section 32 of the Act did not mention about the THDC's reply dated 10th November, 2005 to the claimant's application dated 10th March, 2005 and the letter dated 7th September, 2005 of the Executive Engineer and the letter requesting that the Respondent's Claim No.1 be deleted.

(b) Further, there was no application seeking recall of the order dated 24th

April, 2006 which recorded that the Respondent was not pressing Claim No.1, there was no request of THDC for recall of the said order.

(c) There was no explanation offered by THDC why it refunded the security of Rs. 11 lakhs qua which was the subject matter of Claim No.2, after signing the *Farkhati*. It was held that the *Farkhati* covered only Claim No.1 and did not deal with the other claims of the Respondent. Accordingly, THDC's application under Section 32 of the Act was rejected.

22. The learned Arbitrator proceeded to discuss the merits of the claims. In respect of Claim No. 2 for Rs. 12,50,000/- on account of refund of the security deposit, it was noted that the Respondent was fully satisfied with refund of Rs. 11 lacs and, therefore, did not press for the above recovery. Consequently, Claim No.2 was dismissed as having become infructuous.

23. As regards the interest on the refunded security amount, the learned Arbitrator went by Clauses 5.2.0, 55.6.0 and 55.7.0 of the General Conditions of the Contract (GCC) and in particular Clause 55.6.0 which prohibited grant of interest as damages in respect of any money lying with the Government. Therefore, no interest could have been awarded by the Arbitrator. Reference was also made to decisions in *Steel Authority Of India Limited v .J.C. Budharaja, Government and Mining Contractor (1999) 8 SCC 122*; *Rajasthan State Mines & Minerals v. Eastern Engineering Enterprises (1999) 9 SCC 283*; and *Food Corporation of India, v. Surendra, Devendra & Mahendra Transport Co. (2003) 4 SCC 80*, to urge that since the payment of interest on the security was barred by the Agreement, it cannot be awarded. Accepting the plea of THDC, the

Respondent's prayer for interest on the security amount was rejected.

24. As regards Claim No.3 for Rs.8,04,060/- being the amount paid for the watch and ward during the period when the work had stopped, the learned Arbitrator set out in a tabular form the details of the expenditure incurred on that score which was accepted as being fair and reasonable. Rejecting the prayers made for cross examination of the Respondent's witnesses, its two applications were dismissed. It was held that against Claim No.3, the Respondent was entitled to Rs.8,04,060/-.

25. Claim No.4 was for Rs.5,02,500/- being the salary paid by the Respondent to the Junior Engineer (JE), Assistant Engineer (AE) and store keeper during the period when the work was suspended. While the claim of salary of the AE was rejected, the claim for the salary of the JE and store keeper was allowed. Thus, the Respondent was awarded Rs.2,73,700/- under Claim No.4.

26. Claim No.5 was for Rs.2,60,000/- for removal of loose earth etc. from housing complex and work site between September, 1997 to October, 2000 when the work was stopped. The learned Arbitrator discussed the clauses of the contract and allowed the said claims of the Respondent *in toto*. The Respondent had filed an affidavit verifying the corrections of the vouchers and the amount paid to the sub contractor for removing the water and mud. This claim amount of Rs.2,60,000/- was allowed in its entirety.

27. Claim No.6 was for a sum of Rs.1,99,997/- for white washing and painting etc. Claim No. 6 was allowed for the same reasons for which Claim

No. 5 was allowed.

28. Claim No. 7 was for Rs. 15, 14, 498 for interest @ 12% p.m. This was heard with the preliminary objection whether Claim No. 7 was barred by Order II Rule 2 CPC. The learned Arbitrator after discussing the relevant clauses and the submissions of the parties rejected the claim. It was held that interest on the withheld amount was barred under the condition of the contract. Therefore Claim No.7 was rejected.

29. As regards Claim No. 8 for loss of profit in the sum of Rs.16,50,000/- it was held that if THDC had rescinded the contract, the Respondent could have calculated the loss of profit @ 10% per annum on the said sum of Rs.35 lakhs. However, THDC had not done so. At the highest the Respondent could claim loss of profit when no work was executed and the labourers and the machinery were lying idle. Consequently, this claim was rejected.

30. Claim No.9 was for interest. After referring to Clause 54.1.0 of the GCC and the decision in ***Bhagwati Oxygen Ltd. v Hindustan Copper Ltd. AIR 2005 SC 2071***, the learned Arbitrator held that the Respondent was entitled to interest @ 16% per annum from 1st January, 2003 till the date of payment. Claim No.10 was for costs of arbitral proceedings. A sum of Rs.50,000 was awarded as costs in favour of the Respondent.

31. The learned Arbitrator thereafter dealt with the issue of maintainability of the claims of the Respondent. It was noted that the claim of the Respondent that it was a registered partnership had not been disputed by

THDC in its statement of defence. The objection in that regard was raised long thereafter. The learned Arbitrator rejected the plea regarding the lack of jurisdictional status of the Respondent to maintain the claim. It was held that THDC ought to have raised such an objection at the threshold and not after the entire work had been executed. If THDC's request was accepted it would have "serious consequences adversely affecting the parties" and that "such a situation cannot be allowed." Further, "merely because there is some change in the names the partnership deed, it cannot be necessarily assumed that the claimant is entity altogether different".

32. As a result, by the impugned Second Award Claim Nos.3, 5 and 6 were wholly allowed and Claim No.4 was allowed in part. Interest @ 16% per annum was awarded from 1st January, 2003 till the date of payment.

Preliminary objection as to jurisdiction

33. A preliminary objection is raised in the reply filed by the Respondent that since both the parties are located within the jurisdiction of the High Court of Uttarakhand (earlier Uttaranchal) and the arbitral proceedings in the second round were initiated by the order dated 23rd December 2003 passed by that High Court, the Award in question was pronounced in Allahabad, thus this Court has no territorial jurisdiction to entertain the present petition. It is stated that THDC indulged in forum shopping by approaching the High Court of Uttarakhand or this Court at its own will. It is pointed out that no objection to the jurisdiction of the Uttarakhand High Court was taken by THDC when suddenly a reference was made by that Court.

34. In its reply, THDC pointed out that the Respondent had conveniently chosen to not advert to the fact that the Respondent did not make any reference to the earlier Arbitration Application No. 70 of 1998 in this Court under Section 11 of the Act where it was averred that the contract agreement was executed after discussions between the parties at the head office of the Petitioner in Delhi. It is clear that the genesis of the grievance against the Award arises out of the order dated 24th July 2000 passed by this Court in the aforementioned petition filed by the Respondent.

35. The Court has perused the Arbitration Application No. 70 of 2008 filed in this Court by the Respondent seeking reference of the disputes to the arbitration. The Respondent has itself sought relief under Section 11 of the Act before this Court for reference of the disputes between the parties to arbitration. The Court therefore, finds no merit in this contention and it is rejected.

Merits of the award

36. As far as merits of the impugned award are concerned, Mr. Sachin Dutta learned Senior counsel first submitted that the learned Arbitrator erred in interpreting the plea of THDC regarding lack of privity of contract between the Petitioner and the Complainant i.e., M/s. Bhagirathi Builders.

37. As already noticed, although the contract between the parties was entered into by THDC with the Respondent, M/s. Bhagirathi Builders Engineers and Contractors, the claimant before the learned Arbitrator was described as 'M/s. Bhagirathi Builders'. This is even more strange

considering that Arbitration Application No. 22 of 2003 before the High Court of Uttaranchal, was by M/s. Bhagirathi Builders Engineers and Contractors (registered partnership) through its partner Mr. P.S. Kathait at New Tehri, District Tehri Garhwal.

38. The claim before the learned Arbitrator was filed in the name of M/s. Bhagirathi Builders Engineers and Contractors. The application filed by THDC on 7th February 2007 before the learned Arbitrator contained the following prayers:

“(a) reject the statement of claim on the ground of its having been invalidly instituted;

Alternatively

direct that all the partners of the alleged partnership firm – M/s. Bhagirathi Builders Engineers & Contractors be impleaded as co-claimants in the present arbitration; and/or

(b) pass such other or further orders as may be deemed fit and proper in the interest of justice.”

39. It is contended by THDC that the arbitration proceedings have not been properly instituted inasmuch as all the partners of the registered firm have not been impleaded as claimants. It was further pointed out that there was a variance in the partnership deed filed by the claimant before the learned arbitrator on 15th September 2007. The learned Arbitrator pointed out that during the pendency of the arbitration, the Petitioner prepared a final bill of the remaining work and paid to the claimant i.e., M/s. Bhagirathi Builders a sum of Rs. 5,73,216. The entire amount upto 2006 was paid to the said firm as was the refund of the security amount of Rs. 11 lakhs. In all, THDC had

paid more than Rs.2.30 crores to M/s. Bhagirathi Builders without raising any objection. A reference has also been made to the agreement dated 28th June 2005 which was entered into between THDC and M/s. Bhagirathi Builders.

40. THDC contends that the fact that an application was filed by it raising the above objection belied the observance of the learned Arbitrator that the Petitioner had not chosen to raise a challenge to the proper institution of the claim. A reference has also been made to the affidavit dated 19th September 1995 of THDC to the same effect.

41. Mr. Sandeep Sharma, learned counsel for the Respondent refers to the decision of the Punjab and Haryana High Court in ***Lakshmi Energy and Foods Limited v. Punjab State Civil Supplies Corporation Limited & Ors*** [decision dated 26th March 2015 in FAO No. 891 of 2010 (O&M)] to urge that the partnership firm is the successor-in-interest of the previous partnership firm, M/s. Lakshmi Rice Mills, and under Section 37 of the Act an appeal is maintainable on behalf of the reconstituted partnership firm. In ***Birla VXL Limited v. DLF Universal (2003) 43 SCL 153 (Del)*** it was held when a partnership firm is reconstituted and a new firm succeeds to the assets of the old firm with the intent of being entitled to all its rights and liabilities, the new firm is entitled to take all steps for the purpose for enforcement of the contract and the arbitration agreement will bind the parties. In the present case, since some of the former partners continued as members of the reconstituted firm, M/s. Bhagirathi Builders, the contract with THDC continued.

42. It is seen that THDC had no answer to the submission of the Respondent that the payments were made to M/s. Bhagirathi Builders. Even the statement of claim was filed only by M/s. Bhagirathi Builders. THDC also has no answer to the fact that the agreement dated 28th June 2005 was entered into with THDC.

43. As pointed out in the impugned Award by the learned Arbitrator, the entire payment appears to be made by THDC pursuant to the bills raised by M/s. Bhagirathi Builders. It cannot be claimed that the firm filing the claim was entirely different from the firm executing the contract. The decision in ***Birla VXL Limited v. DLF Universal*** (*supra*) does appear to support the Respondent in this regard. Consequently, the Court negatives the plea of THDC that because of a change in the name of the firm, the entire claim must fail. THDC itself never raised an objection to making payment to M/s. Bhagirath Builders

44. It was next submitted by Mr. Datta that the learned Arbitrator erred in holding that the *Farkhati* entered into between the parties had nothing to do with the rest of the claims that were filed in the second round of litigation. The learned Arbitrator found that there is no mention of the pending arbitration proceedings in the *Farkhati* dated 5th August 2006 or anything to the effect that the claims raised by the Respondent in those proceedings would stand settled at the time of signing of the *Farkhati*. Mr. Sharma refers to the decision in ***Delhi Development Authority v. Bhardwaj Builders 213 (2014) DLT 675*** to urge that the Court should not sit as a court of appeal and substitute its own views that may be contrary to the findings of the AT.

45. On the issue of *Farkhati*, the learned Arbitrator has examined the matter in a great detail and referred to the deposition of *Farkhati* in 'Hindi' which has been reproduced in the impugned Award by him. The fact that it did not bear the date nor contain any signature of the witness has not been denied by THDC. There was a dispute between a photocopy of the *Farkhati* produced by THDC which contains the illegible signatures of some witnesses and the photocopy of the *Farkhati* that was filed along with the stay application under Section 32 of the Act. This document also did not bear any date or signature of the witnesses.

46. On the interpretation of the two documents it was concluded that if the intention was that by the *Farkhati*, all the claims raised before the learned Arbitrator should be taken to have been settled, it should have been clearly mentioned in the *Farkhati* itself. On the other hand, Claim No. 1 was dismissed as not pressed on 24th April 2006 passed by the learned Arbitrator. At the time of *Farkhati* was signed, i.e., on 5th August 2006 the arbitration proceedings were still pending and yet all the claims raised by the claimant in the arbitration proceedings had been settled finally. The affidavit of Mr. S.K. Gupta working as Assistant Engineer in the Tehri Dam Division -22, Irrigation Department also stated that the final bill was finalised on 5th August 2006.

47. However, it was not explained why it was not mentioned in the *Farkhati* that all the claims raised by the Claimant in the arbitration proceedings were fully and finally settled. The learned Arbitrator held that the *Farkhati* covered claim No. 1 only and it did not deal with other claims raised by the

claimant in its statement of claim. The learned Arbitrator proceeded to reject the application under Section 32 of the Act filed by the Petitioner.

48. In the considered view of the Court, the opinion of the learned Arbitrator that the *Farkhati* covers Claim No. 1 only and not others is a plausible view to take and does not call for any interference by this Court.

49. It is next urged by Mr Datta that the arbitral Award deals with the disputes which are beyond the scope of submission to arbitration inasmuch as certain claims raised by the claimant were barred in terms of the principle embodied in Order II Rule 2 of the CPC. In other words it is sought to be pointed out that the Award dated 24th September 2003 covered some of the claims of the Respondent which had matured on the date of filing of statement of claim before the earlier Arbitrator. Yet, they were sought to be belatedly and illegally raised in the second round of arbitration proceedings.

50. As far this plea is concerned, it is pointed out by Mr Sharma that Claim No. 7 had been rejected on merits. Claim No. 7 specifically dealt with the contention of the claim being barred under Order II Rule 2 CPC. The view of the Arbitrator appears to be a plausible one.

51. It was then pointed out by Mr Datta that a request was made to the Arbitrator to direct the Claimant to file original documents in respect of the claims and to adduce evidence in support thereof. However, without any original documents on record and without any evidence being led, the learned Arbitrator proceeded to decide the claims. He submitted that if the learned Arbitrator had permitted THDC to cross-examine the representative

of the claimant it would have become clear that each and every one of the claims was bogus and fabricated. He submitted that as regards the amounts allegedly paid to the watchmen employed by the claimant during the period September 1997 to October 2000, no proof or original documents of payment having ever been made to any watchmen was ever filed by the claimant.

52. Mr Sharma in reply pointed out that the stand of the Respondent on this aspect was that the first arbitration Award dated 24th September 2003 also dealt with the Respondent's claim for provision of salary of staff employed at the site after 25th September 1996. However, the learned Arbitrator had rejected the claim of the Respondent for staff employed at the site beyond 25th September 1997. Reference is made to an affidavit filed by the Respondent in support of Claim No. 3, which also verified the correctness of the vouchers.

53. The Court notes that in the impugned Award a reference has been made to Claim No. 2 where it was noted that the claimant was fully satisfied with the refund of Rs. 11 lakhs only and he, therefore, did not press for recovery of Rs. 12.50 lakhs. As regards Claim No. 3 for the amounts paid by the Claimant to watch and ward during the period when the work was stopped, the learned Arbitrator noted that THDC had not denied the employment of watch and ward for protection of the buildings constructed by the claimant during the period the work was stopped.

54. The bare denial of the expenditure without anything more cannot dislodge the claim of the Claimant. Secondly, the claim was not based on the

extension of time but for protection of the buildings. The learned Arbitrator set out the details of expenditure given by the claimant in Annexure A. The affidavits were filed by the partner of the claimant and its Assistant and Junior Engineers. It is pointed out by the learned Arbitrator that despite the time granted to it, THDC failed to file a reply/counter-affidavit.

55. As regards cross-examination, the learned Arbitrator referred to an order passed on 5th April 2004 “the dispute shall be decided on the basis of the pleadings, documentary evidence or such other materials, as may be produced by them, written and oral arguments and the oral evidence will be taken only if found necessary.” It is on this basis that the request for cross-examination was not allowed.

56. It is not possible to accept the plea of THDC that there was absolutely no documentary evidence or oral evidence in support of the claims. Two affidavits were in fact filed which were not replied to by the Petitioner despite an opportunity being granted by the learned Arbitrator. The mere denial of an opportunity to cross examine the Respondent would not be a good ground to disallow the said claim. The Court is, therefore, not satisfied that the Award in respect of Claim No. 3 suffers from any legal infirmity.

57. As regards allowing Claim No. 4 in part on account of salary to staff it is submitted that this was an item rate contract and payment had to be done under Clause 51 of the GCC. It is submitted that not a single witness to whom the so-called salary was paid was produced in evidence.

58. A perusal of the impugned Award in respect of Claim No. 4 shows that the learned Arbitrator had rejected the claim as far as salary of the Assistant Engineer (AE) was concerned. It was found that the services of the JE were necessary to keep watch on the constructions and save them from deterioration. Here again affidavit of the partner of the Respondent placed details on record and no counter-reply was filed to the said affidavit. Details of the salary paid to the JE and the store keeper were enclosed as annexure to the affidavit. It is on this basis that the said payment was partly allowed. The Court is of the view that the Award in respect of Claim No. 4 to the extent that it has allowed partly does not suffers from legal infirmity.

59. As regards Claim No. 5 for removal of the loose earth etc., the criticism of THDC is that this scheme pertains to the same period as Claim Nos. 3 and 4 in the first arbitration and is unacceptable since the work in this regard was continuing even beyond the date of first arbitration. The work had been stopped by THDC under instructions to restart the work only in October 2000. In fact the learned Arbitrator has dealt with this objection in great detail. It is also pointed out by the learned Arbitrator that Clause 20.0.0 of the GCC does not apply in a situation where the work has been stopped for non-default. Moreover, the Respondent filed an affidavit in support of this claim which was not responded to by THDC. The said affidavit verified the correctness of the vouchers and the amount paid for the purpose of removing the water. In the circumstances, the Court finds no error was committed by the learned Arbitrator in allowing this claim.

60. Claim No. 6 was for white washing, painting etc. Details in this regard had been given by the learned Arbitrator in the impugned Award. For the same reasons, the Court finds no infirmity in that regard.

61. As far as interest is concerned, the learned Arbitrator has rightly rejected Claim No. 7 since it was barred by the specific clause in the contract. However what has been awarded is the claim for interest under Claim No. 9 and only from 1st January 2003, i.e., after the work was completed, rational for awarding interest has also been explained by the learned Arbitrator by referring to the decision in *Bhagwati Oxygen Limited v. Hindustan Cooper Limited* (*supra*).

Conclusion

62. For all the aforementioned reasons, the Court is of the view that no ground under Section 34 of the Act has been made out for interference with the impugned Award. The petition is accordingly dismissed with costs of Rs. 20,000 which will be paid by THDC to the Respondent within four weeks from today.

S. MURALIDHAR, J.

MARCH 21, 2017
rd/Rm