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

Reserved on: 16th July, 2018
Date of decision : 09th October, 2018

\+   O.M.P. (COMM) 186/2016

DIVINE INFRACON PVT LTD ..... Petitioner
Through: Mr.Sandeep P. Agarwal, Sr. Adv. with Mr.Soumyajit Pani, Mrs.Rehana Ahmed, Mr.Chittaranjan Singh and Mr.Inayat Ahmed, Advs. Ahmed, Advs.

versus

VISTAR CONSTRUCTIONS PVT LTD ..... Respondent
Through: Mr.Ranvir Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the "Act") has been filed by the petitioner challenging the Arbitral Award dated 23.08.2014 (hereinafter referred to as the "Impugned Award") awarding a total amount of Rs 3,01,07,609/- along with future interest @ 9% on the principal amount of Rs 2,25,30,812/- as also cost of Rs.5,00,000/- in favour of the respondent and against the petitioner. The counter claims of the petitioner have also been rejected by the Impugned Award.

2. The petitioner was the successful bidder in a tender/bid conducted by the Delhi Development Authority for allotment of Plot No.4, Sector 13, Dwarka City Centre, Dwarka, New Delhi and a Conveyance Deed dated 10.08.2009 was executed. Under the terms of the tender the petitioner was to setup and operate a hotel on the aforesaid Plot in a timely manner.

3. Subsequently, the petitioner entered into Work Orders/ Letter of Intent with the respondent for Interior decoration works of various parts of the hotel. The disputes between the parties are in relation to these below mentioned Work Orders/Letter of Intent:-

- Work Order dated 11.03.2010 referred to by the parties as "Work Order for ID(Interior Decoration)- Rooms(4-5 Floor) works to Park Plaza Hotels at plot No.4, Sector-13, Dwarka New Delhi-110075";
- Work Order dated 03.06.2010 referred to by the parties as "Work Order for ID(Interior Decoration)- Corridor(4-5 Floor) works to Park Plaza Hotels at plot No.4, Sector-13, Dwarka New Delhi-110075";
- Letter of Intent dated 10.06.2010 referred to by the parties as "LOI for ID- 1st and 2nd floor part works to Park Plaza Hotels at plot No.4, Sector-13, Dwarka New Delhi-110075"

4. Clause 1 of the Work Order dated 11.03.2010 stipulates the Contract Price to be Rs 5,67,90,000/- excluding Service Tax and VAT

and also lays down conditions wherein the said 'Contract Price' can be adjusted. The same is reproduced hereinbelow:-

> *"1.0 **Contract Price***
>
> *1.1 The Contract Price shall be in the sum of Rs.56,790,000 (Indian Rupees Fifty Six Million Seven Hundred Ninety Thousand Only) excluding Service Tax + VAT as applicable, which shall include, but not limited to the Scope of Works as set out in the "Summary of Package (A) Contract Price" which is attached herewith as Bill of Quantities for ID-Rooms Works.*
>
> *1.2 The Contract Price is inclusive of, prevailing taxes and duties except VAT and service tax, as on 11th March 2010 (i.e. the date of issue of Work Order):*
>
> *The contract Price shall be adjusted upwards or downwards to take account of any rise or fall respectively of the prevailing taxes and duties and/or imposition of any new tax, duty, etc., by the Statutory Boards during the Contract Period.*
>
> *1.3 No adjustments will be allowed in respect of the Contract Price for any fluctuations in the cost of labour, materials, equipment, services, insurances, freight charges, exchange rates, etc., that may occur during the Contract Period or any extended time authorised under the Conditions of Contract.*
>
> *1.4 No adjustments and/or claims will be allowed for any items in the Bills of Quantities which are deemed to include for all materials, labour, preliminaries, profits, etc., for the due, proper and complete execution of each item and comply fully with the respective drawings and specifications and trade preambles in the Contract.*

1.5 This shall be an item rate contract and rates are inclusive lead, lift, protection and cleaning of floor, disposal of debries."

5. Similarly, the Work Order dated 03.06.2010 stipulates the 'Contract Price' at Rs 93,18,700/- and the Letter of Intent dated 10.06.2010 sets the 'Contract Price' at 10,60,00,000/- respectively.

6. Clause 3 of the Work Order dated 11.03.2010 provided for a 'Contract Period' of 80 consecutive days and stipulated the completion date to be 31.05.2010. The same is reproduced hereinbelow:-

"3.0 ***<u>Contract Period</u>***

3.1 The Contract Period for the Works shall be 80 Consecutive days from the date of issue of Work Order, i.e. 11th March 2010. The completion date for this contract shall be 31st May 2010. You will do all necessary co-ordination with all other contractors working at the project."

7. The Work Order dated 11.03.2010 in Clause 4 also provides for payment of works as per the monthly progress made, upon certification by the Project Manager. The same is reproduced herein below:

"4.0 ***<u>Certification and Payment of Progress claims and Retention Money.</u>***

4.1 Payment for the Works shall be based on monthly progressive evaluation, and shall subject to the five (5) percent retention for value of the Works done up to a maximum of 5% of the total contract value.
4.2 In the case of monthly progress claim, 70% of the value of work done as certified by the Project Manager shall be paid within 10 days of submission of progress

claim and balance within 28 days of submission of progress claim to the Project office.

4.3 Retention Money shall be released against Bank Guarantee from approved bank of equivalent amount to you after satisfactory completion of work within your scope. The Bank Guarantee shall be valid till completion of Defects Liability Period of 12 months from the date of completion of work."

8. The petitioner in an email dated 06.01.2011 sent the 'Final Agreed Summary' to the respondent summarizing the work done and the amount payable under the Work Orders/ Letter of Intent. The respondent in reply to the above, vide letter dated 16.06.2011, indicated the Items/Works left out in the 'Final Agreed Summary' and also some of the items that were executed after 06.01.2011. The relevant portion of the aforesaid letter is quoted below:-

> *"This is with reference to the Final Summary of Bill sent to us by you through email of January 07, 2011 (Copy enclosed) amounting to Rs.149.44 lacs. Some of the items /works executed by us were left out by you in the above said assessment. We have very clearly indicated the same to you vide our mail dated January 07,2011(Copy enclosed). Also some of the items were executed after 6th January 2011.*
>
> *We are attaching herewith the details of all these items/ works. We are also ready to get the measurement done for all these items/works at site, if required. You are requested to approve the same at the earliest, so that we can raise our invoice for the same."*

9. It is the case of the petitioner that the respondent had left the work incomplete as a consequence of which the petitioner had to get the work

done by third parties. The petitioner allegedly incurred a total cost of Rs 2,571,288/- for such work.

10. The disputes between the parties primarily pertain to the payment of the invoices raised by the respondent under the Work Orders/Letter of Intent and also certain Items/work done by respondent as detailed in the 'Final Agreed Summary'.

11. The Arbitrator in his Impugned Award while rejecting the counter claims of the petitioner, has adjudicated the claims of the respondent in the following manner:-

S.NO	*Amount Claimed (In INR)*	*Amount Allowed (In INR)*	*Date of Accrual of Interest*	*Time Period up to the Date of Award*	*Simple Interest @9% p.a. up to the Date of Award (In INR)*
1A.	*39,99,488/- Outstanding towards five invoices for the work done up to 18.10.2010, certified on 25.10.2010*	*39,99,488/-*	*26.10.2010*	*3 years, 9 months and 26 days.*	*13,75,467/-*

1B.	*3,35,226/- Additional work done between period of 25.10.2010 up to 06.01.2011*	*3,35,226/-*	*07.01.2011*	*3 years, 7 months and 16 days.*	*1,09,433/-*
1C.	*3,14,930/- Charges for labour due to delay in completion of building, services and other civil works.*	*Rejected*			
1D.	*8,15,588/- Charges towards procureme nt of various materials due to delay in completion of building works, service works and*	*Rejected*			

	other civil works and also on account of increase of DVAT rates.				
1E.	*1,88,401/- Supply of 100 sheets of veneer delivered on 07.12.2010 and invoice raised on 13.07.2011*	*1,18,351/- (purchase price of 80 sheets) and Rs. 17,752/- (contractor's OH & Profit @ 15% of Rs. 1,18,351/-)* *Aggregate amount Rs.1,36,103 /-*	*14.07.2011*	*3 years, 1 month and 9 days*	*33,105/-*
1F.	*7,59,172/- Damaged interior works for 4th and 5th floor guest rooms*	*7,29,973/- (service tax component of Rs.29,199 not given)*	*23.07.2010* *Date when invoice was raised*	*4 years and 1 month*	*2,68,265/-*
2A.	*6,66,472/- Outstandin*	*6,66,472/-*	*30.07.2010*		

	g towards work done up to 05.08.2010 on 4th and 5th floor corridors.		*Date when last invoice was raised towards this liability*		
2B.	*5,14,384/-* *More work for second agreement after 05.08.2010, as is covered under the "Final Agreed Summary"*	*5,14,384/-*	*07.01.2011* *Since the claim stems out of "Final Agreed Summary" dated 06.01.2011*	*3 years 7 months 17 days*	*1,67,918/-*
3A.	*1,32,62,319 /-* *Difference of amount to be paid and actual payment made towards BOQ rates of work done under*	*1,32,62,319 /-*	*23.11.2010* *Date of last invoice towards this work being raised*	*3 years and 10 month*	*45,75,500/-*

	LOI dated 10.06.2010				
3B.	*37,81,210/-* *Extra work done after "Final Agreed Summary".*	*Rejected*			
3C.	*39,50,268/-* *VAT and service tax on work done public areas*	*Rejected*			
4A.	*16,60,024/-* *Labour and mason*	*16,60,024/-*	*23.11.2010* *Date of last invoice raised towards this liability*	*3 years and 10 month*	*5,72,708/-*
4B.	*12,26,823/-* *Mock-up room*	*12,26,823/-*	*06.05.2010* *Date of invoice raised*	*4 years 3 months and 17 days*	*4,74,401/-*
Aggregate of principal awarded amount					*2,25,30,812 /-*

Aggregate of interest on principal awarded amount	*75,76,797/-*
Aggregate of Principal Sum and Interest	*3,01,07,609/-*

12. Learned senior counsel for the petitioner submits that the Arbitrator has ignored the specific terms of the Work Order dated 11.03.2010, especially Clause 1.3 to 1.5 whereby it is clearly indicated that this was a contract for a fixed price and could not be varied. Relying upon the following judgments of the Supreme Court, he submits that as the Arbitrator has travelled beyond the terms of the contract, the Award cannot be sustained:

1. ***Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr.***, AIR 1999 SC 3627;
2. ***Bharat Coking Coal Ltd. v. Annapurna Construction,*** (2003) 8 SCC 154;
3. ***State of Rajasthan v. Nav Bharat Construction Co.***, (2006) 1 SCC 86.

13. Learned senior counsel for the petitioner further submits that the Arbitrator has erred in interpreting the contract by not applying the principles of literal Construction of contract but by interpreting the terms of the Work Orders in a manner that he felt was just and proper. In this regard he places reliance on the following judgments of the Supreme Court:

1. ***Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond & Gem Development Corporation Limited and Anr.,*** (2013) 5 SCC 470;

2. ***Food Corporation of India. v. Chandu Construction and Anr.,*** (2007) 4 SCC 679.

14. I am unable to agree with the submission made by the learned senior counsel for the petitioner. Clause 1.5 of the Work Order dated 11.03.2010 reproduced hereinabove clearly suggests that the same was an item rate contract. Clause 10 of the Work Order dated 11.03.2010 which is reproduced hereinbelow further fortifies the said interpretation:

> *"10.0 **Evaluation of Variations and Items included under Provisional Sums***
>
> *10.1 Evaluation of variations will be as under*
>
> *i. Works executed in quantities or at times and locations which can be readily absorbed into the Contractor's program me on the same basis of commercial profitability as the original Contract Work shall be valued at the same price as those in the Bills of Quantities.*
>
> *ii. Works executed as aforesaid but for which there is no exactly equivalent item in the Bills of Quantities shall wherever possible valued at comparable prices extrapolated from prices for similar though not identical works in the Bills of Quantities.*
>
> *iii. If and only if, work cannot be valued on any of the foregoing bases as mentioned above, the work shall be valued based on the actual prime cost to the Contractor of his materials, transport and labour for the work concerned, plus 15 (fifteen) percent, which percentage shall include for the contractor's establishment, water, power and all other cost, supervision, overheads and profit; plus all prevailing taxes, which are applicable."*

15. The Arbitrator has also considered this issue in detail and has held as under:

> *"22. There is yet another aspect which cannot be ignored in evaluating the admissibility of Exhibit CW-1/1. The first agreement dated 11.03.2010, which forms the basic understanding between the parties does not limit the quantum of work and deals primarily with the commercial aspects, completion period, certification process, precautions and payment mechanism. The following parts of the reply to interrogatories, served by the Claimant to RW-1 are illustrative of the above. The same may be reproduced hereunder:*
>
> > *"Q. 24: Is it not correct that the work orders and the LOI were essentially item rate contracts and that the value of the contract was only indicative which could go up or down depending on the quantum of work executed?*
> > *Ans. 24: It was an item rate contract and payments were as per BOQ's.*
> >
> > *Q. 25: Is it not correct that in the item rate contract what is agreed is the rate for doing each item and the final payment that is made is determined on the basis of the work that have actually been executed?*
> > *Ans. 25: Yes."*
>
> *23. Thus, it was clearly understood by the Respondent that the final payment, which it would be required to make to the Claimant would be determined on the basis of the actual work that would be executed by the Claimant, notwithstanding the initial estimate of quantum of work. The agreement dated 11.03.2010 does not restrict the Respondent to expand the quantum of work. The said agreement does not contain any clause which would prohibit the parties from undertaking the exercise of conciliation or re-conciliation of accounts.*

24. "Final Agreed Summary" (Exhibit CW-1/1 and Exhibit CW-2/2) is thus an outcome of such an exercise only. Not only this, clause 10 of the agreement leaves a scope for the parties for 'evaluation of variations and items included under provisional sums'. The said clause acknowledges the possibility of variations in quantities, in consonance with clause 1.5 of the same agreement. It proposes a formula for valuing the work done in the event of variations.

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"iii. In any event, the Claimant could not have claimed any amount over and above the 'Contract Price' stipulated in the respective agreements."

F. The above argument of the Respondent requires the Tribunal to determine as to whether the contract prices mentioned in the three agreements have the effect of providing an upper cap or ceiling, beyond which the Respondent was not liable to pay any amount, notwithstanding the quantum of work executed by the Claimant.

G. Clause 1.5 of the first agreement (adopted in the second agreement as well) stated in no uncertain terms that the contract in question was an item rate contract. No ceiling was provided in the agreement in relation to the quantum of work. Even in the BOQ's annexed with the agreements, it was not stated that the quantities would be unalterable. The parties in any case do not dispute the fact that it was their common understanding that the Claimant would be paid on the basis of actual work executed by it applying the item rates, albeit as per the Respondent the work was to be executed within the stipulated time, which aspect is separately dealt *with. RW-1 in reply to queries no. 24 and 25 of the interrogatories served upon him by the Claimant admits that it was an item rate contract and that in an item rate contract, what is agreed is the rate for doing each item and the final payment that would be made, is to be determined on the basis of the work having actually been executed.*

H. The above contention of the Respondent is also negated by the "Final Agreed Summary", in respect of which there is already a discussion in paragraphs 17 to 26 above. It, therefore, necessarily follows that the contract prices mentioned in the agreements do not constitute a cap on any liability to pay on the part of the Respondent and corresponding entitlement of the Claimant."

16. Therefore, the Arbitrator has not passed the Impugned award in ignorance of the terms of the Work Orders but has interpreted the same in a manner which cannot be said to be unreasonable or perverse.

17. In ***Associate Builders v. Delhi Development Authority,*** (2015) 3 SCC 49 the Supreme Court has reiterated the limited scope of challenge to an Arbitral Award in the following words:

"42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> ***"28. Rules applicable to substance of dispute.*** *(1)-(2)*
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd.,(2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

"112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593:2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless *it is found that there exists any bar on the fact of the award."*

44. *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011)10 SCC 573: 2012 3 SCC (Civ) 818, the Court held : (SCC pp. 581-82, para 17)*

> ***"****17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram, AIR 1954 SC 689, Thawardas Pherumal v. Union of India, AIR 1955 SC 468, Union of India v. Kishorilal Gupta & Bros.,AIR 1959 SC 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 SC 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 SC 214 and Renusagar Power Co. Ltd. v. General Electric Co. (1984) 4 SCC 679: AIR 1985 SC 1156)"*

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306, the Court held: (SCC pp. 320-21, paras 43-45)*

> *"43**.** In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.*

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

> *43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."*

18. Therefore, I find no merit in the objection raised by the learned senior counsel for the petitioner.

19. Learned senior counsel for the petitioner further submits that the Arbitrator has erred in granting various claims of the respondent based on the document titled 'Final Agreed Summary' which was merely a rough and provisional summary prepared by the petitioner and was therefore not binding on it. Infact, the respondent itself had challenged the said summary and therefore no reliance could have been placed thereon for granting the relief in favour of the respondent.

20. I have considered the submission made by the learned senior counsel for the petitioner, however, I find no merit in the same. It is not denied that the document titled 'Final Agreed Summary' had been prepared by the petitioner itself and sent to the respondent. The respondent challenged the same only to the limited extent that it had left out certain other work done by the respondent, however, the same could in no manner absolve the petitioner of its liability admitted by it under the 'Final Agreed Summary'. The Arbitrator has also discussed this issue at great length and has held as under:

> *"17. The above document has been exhibited in the affidavits of both the witnesses of the Claimant first as Exhibit CW-1/1 and then as Exhibit CW-2/2. It is filed with the list of documents attached to the SOC at pages 177 to 217. Curiously, the Respondent in the affidavit of admission/denial has denied the document. In its pleadings and evidence, the Respondent has disputed the admissibility of this document contending that the Claimant in its own pleadings has stated that the same is only a rough and provisional summary, which was yet to be finalized and that is why it has not been signed and hence, is not binding.*

18. The above plea and submission of the Respondent needs to be examined in light of its statement in the examination-in-chief. In paragraph 19 of the affidavit of its Assistant Project Manager (Interior), who appeared as RW-1, it is stated as follows:

> *"19. That the 'final agreed summary' was a provisional summary of work compiled by the Respondent to be verified by both parties. It was for this reason that it was not even signed by any party. The fact that the final agreed Summary was not even final has been incontrovertibly acknowledged by Claimants in paragraphs 22 and 23 of their statement of claim wherein they have submitted that they told the Respondent that they will check the correctness of the "Final Agreed Summary" and revert. The Claimant further in paragraph 23 has in incontrovertible and irrefutable terms stated that the "Final Agreed Summary" did not reflect the correct position in so far as the works which were carried out by the Claimant. The Claimant had to have several discussions with the Respondents to settle the final amount pertaining to the Final Agreed Summary. Therefore, it is submitted that the Final Agreed Summary cannot be relied upon entirely for the correctness of claims raised by the Claimant. In connection with the same, it is imperative to mention the Claimant have themselves in paragraphs 7,11,14,16 and 21 based their claims on the "Final Agreed Summary" which it is reiterated was merely a rough provisional summary and not final."*

19. The contention of the Respondent to the above effect does not appear to be correct. In paragraphs 22 and 23 of the SOC, all that the Claimant has stated is that they would cross-check the summary sent by the Respondent and that it was not exhaustive in the sense that there *were several items/works, claimed to be executed by the Claimant, which were not included in the said summary. This aspect is further fortified by the letter dated 16.06.2011 (page 245 of the documents filed with the SOC). This letter is an admitted document as per the Respondent's affidavit of admission/denial. In the said letter, it is mentioned that some of the items/works stated to be executed by the Claimant were left out in the "Final Agreed Summary" and accordingly the same were sought to be claimed on the basis of the claim sheet attached to the said letter. Therefore, the reservation of the Claimant vis-a-vis CW-1/1 was only to the effect that some additional items were not covered in the said summary. It cannot be lost sight of that the Respondent itself has prepared the entire document and has carried out an exhaustive accounting of all the work, indicating the amounts that would be payable to the Claimant in respect thereof. A bare perusal of the said document reveals that the accounting carried out by the Respondent is not confined to the invoices raised by the Claimant, on the contrary it covers even those works, which were not specifically spelled out in the three agreements. The Respondent further does not dispute that during the entire execution of the project, it had employed a dedicated Project Manager for the works in question and that he was in the loop at all the successive stages of the execution of the work. It therefore, necessarily follows that the summary was prepared by the person/persons who had direct, primary and first-hand knowledge of the quantum of work and the applicable rates; who were produced as witnesses by the Claimant and who only sought to prove the document by putting exhibit mark(s) thereupon. As such the said document i.e. Exhibit CW-1/1 (Exhibit CW-2/2) stands duly proved by the Claimant.*

20. In the opinion of the Tribunal, merely because the Summary was not found to be complete in all respects *by the Claimant, owing to its belief that some items were still not included in the said summary, it cannot be a ground for the Respondent to wriggle out of the admissions contained in the said summary or to deny the document itself. The Respondent as its admitted author, cannot escape from its binding effect, particularly when the document records the work done by the Claimant, as per own records of the Respondent.*

21. Furthermore, in the covering letter of CW-1/1 the Respondent writes as follows, "'dear sir, pls. find final agreed summary". An examination of the summary illustrates that it deals in detail with the particulars of the work done in rooms, corridors, public area, banquets, toilets, high energy toilets, business centre, crew lounge, Indian restaurant and lounge bar, etc. Thus the Respondent itself having taken pains to incorporate above details in the said summary cannot be heard to say that the same is not binding on it.

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26. Therefore, the "Final Agreed Summary" which is Exhibit CW-1/1 (and also Exhibit CW-2/2) is an admissible document and will be relied upon by the Tribunal in determining the claims made by the Claimant. From the discussion contained in paragraphs 17 to' 25 above, it clearly emerges that such a summary does not undermine the written agreements or their scope. Any document in the nature of the "Final Agreed Summary" whereby the party awarding the work, summarizes the work done and crystallizes the amount payable to the contractor, is bound to be construed as a document in the aid of the agreed terms and conditions. It is not alien to the written contract. It does not militate against the written contract. Above all, both the parties having agreed to have certain claims arising out of this document adjudicated through this Tribunal are *estopped from questioning this document in any manner whatsoever."*

21. The above being a matter of appreciation of evidence led before the Arbitrator, which in no manner can be said to be perverse, cannot be interfered with by this Court in exercise of its power under Section 34 of the Act. In ***Associate Builders*** (supra) the Supreme Court has further reiterated as under:

> *"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)*
>
>> *"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second*

respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

22. I, therefore, find no merit in the submission made by the learned senior counsel for the petitioner in this regard.

23. Learned senior counsel for the petitioner has further submitted that the respondent had delayed the completion of the work within the stipulated time forcing the petitioner to get the work done from a third party at considerable expenditure. He submits that the fact of suspension of work had been admitted by the respondent in its email dated 11.04.2011. The petitioner was therefore entitled to its claim of loss suffered on account of said delay.

24. I find no merit in the submission made by the learned senior counsel for the petitioner. The Arbitrator in his Impugned Award has held that the terms of the Agreement do not suggest that time was the essence of the Agreement. In any case, no communication had been addressed by the petitioner to the respondent complaining of delay on the part of the respondent in executing the work. The Arbitrator further holds that the petitioner has been unable to prove any loss suffered by it due to the said alleged delay. The relevant findings of the Arbitrator in this regard are reproduced hereinunder:

"i. Time was the essence of the contract and the Claimant is in breach of this covenant, having not completed the work in time":

A. The first two agreements provide for the date of conclusion of work, however, they do not use and expression conveying the concluding dates being sacrosanct. The second agreement adopts the clauses of the first agreement and the first agreement provides that the Claimant will coordinate with all the contractors to ensure conclusion of work by the stipulated date. Assuming the same applies to the third agreement (LOI dated 10.06.2010 which does not contain any time stipulation as agreed by RW-2 as well in answer to question no. 1 of his cross examination), the fact remains that the Respondent has not set up any case to the effect that the Claimant failed to coordinate with the contractors resulting in the work remaining incomplete by the stipulated date. This being so, the factum of time being the essence of the contract, neither flows from any specific clause of the agreement, nor from the evidence led by the Respondent.

B. In the interrogatories served by the Claimant, in response to queries no. 9 and 10, RW-1 gives an evasive reply; refers to letter dated 16.08.2011 (written after one year of the time stipulated in the agreement) which unfortunately does not contain any reference to time being sacrosanct or essence; and, states that the time-lines were matter of common knowledge despite being specifically asked as to whether the Respondent confronted the Claimant with this aspect in writing at any point in time. It is also noteworthy that the letter dated 16.08.2011 was in response to the Claimant's letter dated 18.06.2011 and there is no writing pointed out by the Respondent's witness, which could establish that the Respondent was insisting on treating the time being the essence of the contract. Furthermore, RW-2 in answer to question no. 2 of his cross examination, states that the date of soft launch of the hotel was October 2010, contradicting the statement of RW-1, who in answer to query no. 10 of his reply to interrogatories states that the soft launch was due for March 2010.

C. Not only this, RW-1, even in his cross examination (answer to question 12 and 13), fails to point out any correspondence wherein the Respondent has complained about delay in completion of work during the execution of work under work orders and LOI. Needless to say, that this aspect is intrinsically linked with the time being or not being the essence of the contract.

D. On the contrary, when a question to this effect was asked from CW-1 in interrogatory no. 10 served upon him by the Respondent, he clarified that the 'progress of work was dependent on other agencies progress which were working on other aspects of the project like Electrical Works, Air Conditioning, Plumbing, Fire Fighting, etc'. Significantly, the Respondent did not cross-examine him on this aspect at all when CW-1 entered the witness-box. The conclusion therefore is that the terms of the contract, as understood and acted upon by the parties, do not support the theory of time being the essence of the contract. It was also contended by the Respondent that it was entitled to certain tax exemptions if the work was completed commensurating with Commonwealth Games, however, this contention is of no avail to infer that the time was of essence, for the reason that it is not the case pleaded besides it is not borne out of the contractual terms.

"ii. The delay in execution of work on the part of the Claimant disentitles it to claim the amounts and rather it vests the Respondent with the right to counter-claim damages."

E. As discussed in the preceding paragraphs, the Respondents did not during the stage of execution of work or at any point immediately thereafter object to the delay or raise any plea that it was suffering losses on account of the alleged delays on the part of the Claimant. In any event, assuming a plea of delay was indeed raised, the delay in itself cannot be a ground to deny a claim or make a counter-claim for damages unless the

Respondent proves by cogent evidence the actual loss, if any, it has suffered on account of the delay. The Respondent has not proved any actual loss as required to be proved under Section 73 of the Contract Act. It has already been concluded in the preceding sub-paragraphs that time was not the essence of the contract in the present case and therefore, it was imperative for the Respondent to prove the alleged breach on the part of the Claimant. Neither the breach is established nor any loss stated to have been suffered, is proved. Therefore, in my view, there is no justification to withhold any amount to which the Claimant may be found entitled, on the ground of the alleged delay. Its impact on the counter-claim no. 3 shall be dealt with separately.

xxxxxxx

v. The Claimant left the work incomplete compelling the Respondent to get the same completed through third parties."

J. RW-1, the Assistant Project Manager (Interiors) in paragraphs 5, 6, 13 and 23 of his affidavit by way of examination-in-chief has deposed to the above effect on the line of the Respondent's SOD, where it has so been pleaded. He has stated that the Respondent paid Rs. 25,00,000/- to Magic decor (P) Ltd. for getting the remaining work completed. RW-2 in paragraph 5 of his affidavit by way of examination-in-chief has reiterated the same position. The Respondent also filed a summary of payments along with certain bills as Document No. 9 (pages 74 to 84) as per the index of documents dated 05.03.2013, claiming that the said documents indicate payments made to the third parties.

K. However, most curiously, the Respondent does not proceed to prove the said document in the examination-in-chief of any of its two witnesses. It is interesting to note that the Respondent is relying on its letter dated 16.08.2011 (document no. 8 at pages 71-73 with its index *dated 05.03.2013) wherein it has disputed its monetary liability to pay an amount claimed by the Claimant in letter dated 18.06.2011. By this time, eight out of ten bills, which are included in the summary at page 74 had been raised as per the Respondent itself by the third parties. In the ordinary course, if the said bills stated to have been raised by the third parties were towards the work done by them on the Claimants account, the Respondent would certainly have mentioned about the same in the said letter dated 16.08.2011. Any such mention is conspicuous by its absence. This raises a huge question mark on the truthfulness of this line of defence/counter-claim. A casual mention of non-completion of the work in their letter dated 13.05.2011 (page 55 of the documents filed with the SOD dated 05.03.2013) does not alter the above position in favour of the Respondent.*

L. Not a single query has been raised by the Respondent in the interrogatories served upon the witnesses of the Claimant suggesting or questioning to the effect that the Claimant left the work incomplete or abandoned the project mid way requiring the Respondent to have the same completed from the third party. Even in the cross-examination of the witnesses of the Claimant, not a single question or suggestion has been put to this effect. Therefore, there is no merit in this defence raised by the Respondent. Its impact on the counter-claim no. 4 will be separately dealt with."

25. The above again being a matter of appreciation of evidence which can by no means be said to be perverse in nature, cannot be interfered with by this Court in exercise of its power under Section 34 of the Act. Infact, the learned senior counsel for the petitioner has been unable to show how any of the findings given by the Arbitrator are incorrect in any manner.

26. Last submission made by the learned senior counsel for the petitioner is that for the additional work carried out by the respondent, as also for the work carried out by the respondent in the Letter of Intent dated 10.06.2010, there was no Arbitration Agreement in existence between the parties. He submits that for the said claims, the Impugned Award is beyond the terms of the reference.

27. As noted above, as far as the additional work is concerned, the Arbitrator has held that the Work Orders and Letter of Intent in question were item rate contracts and the final amount was payable depending upon the actual work done by the respondent. Therefore, it cannot be said that the Arbitrator did not have the jurisdiction to adjudicate on the work actually done by the respondent, though, the same was beyond the Contract Price quoted in the Work Order or the Letter of Intent.

28. As far as the plea that the Letter of Intent did not contain an Arbitration Agreement between the parties, learned senior counsel for the petitioner has been unable to show that the said plea had been taken before the Arbitrator in the Statement of Defence filed by the petitioner or in form of an application under Section 16 of the Act. Infact, the petitioner had based its counter claim on the basis of not only the Work Orders but also the Letter of Intent and therefore, it cannot now be heard to say that there was no Arbitration Agreement between the parties as far as the claims under the Letter of Intent are concerned. The Arbitrator in paragraph 10 of the Impugned Award has further recorded as under:

> *"10. The claims and counter-claims raised by the parties were treated as issues. The parties did not object to the*

arbitrability of any of the claims or counter-claims. Thus there is no dispute on the terms of reference."

29. Section 4 of the Act is reproduced as under:

> *"**4. Waiver of right to object.**—A party who knows that—*
>
> *(a) any provision of this Part from which the parties may derogate, or*
>
> *(b) any requirement under the arbitration agreement,*
>
> *has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."*

30. Sub-Section 2 and 3 of Section 16 of the Act are quoted herein below:

> *"(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*
>
> *(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."*

31. A reading of the above provisions would clearly indicate that a plea of lack of jurisdiction of the Arbitral Tribunal must be taken not later than in the Statement of Defence. In the present case, as noted above, before the Sole Arbitrator there was no challenge made to the

jurisdiction of the Arbitrator to decide the claims and the counter claims that were based on the Letter of Intent. The petitioner, therefore, is estopped from now challenging the jurisdiction of the Sole Arbitrator to decide such claim and counter claims.

32. In ***MSP Infrastructure Limited v. Madhya Pradesh Road Development Corporation Limited***, (2015) 13 SCC 713, the Supreme Court while interpreting sub-Section 2 of Section 16 of the Act has held as under:-

> *"13..... On a plain reading, this provision mandates that a plea that the tribunal does not have jurisdiction shall not be raised later than the submission of the statement of defence. There is no doubt about either the meaning of the words used in the section nor the intention. Simply put, there is a prohibition on the party from raising a plea that the tribunal does not have jurisdiction after the party has submitted its statement of defence. The intention is very clear. So is the mischief that it seeks to prevent. This provision disables a party from petitioning a tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. This is exactly what has been done by the respondent Corporation. They did not raise the question of jurisdiction at any stage. They did not raise it in their statement of defence; they did not raise it at any time before the tribunal; they suffered the award; they preferred a petition under Section 34 and after two years raised the question of jurisdiction of the tribunal. In our view, the mandate of Section 34 clearly prohibits such a cause. A party is bound, by virtue of sub-section (2) of Section 16, to raise any objection it may have to the jurisdiction of the tribunal before or at the time of submission of its statement of defence, and at any time*

thereafter it is expressly prohibited. Suddenly, it cannot raise the question after it has submitted to the jurisdiction of the tribunal and invited an unfavourable award. It would be quite undesirable to allow arbitrations to proceed in the same manner as civil suits with all the well-known drawbacks of delay and endless objections even after the passing of a decree."

33. In any case, the two Work Orders and Letter of Intent in the present case are part of the same transaction and have been considered as such by the parties. Therefore, I find no merit in the objection raised by the learned senior counsel for the petitioner in this regard.

34. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with cost quantified as Rs.50,000/-.

NAVIN CHAWLA, J

OCTOBER 09, 2018/Shikhar/Arya