

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Reserved on: 30.08.2019
Pronounced on: 16th Sep.2019

+

O.M.P. 601/2012

OIL INDUSTRY DEVELOPMENT BOARD

..... Petitioner

Through: Mr. Ajay Kumar Jha & Mr. K.R.
Sasiprabhu, Advocates.

versus

GODREJ & BOYCE MFG CO LTD

..... Respondent

Through: Mr. Sumit Chander, Mr. Gurdeep
Chauhan & Ms. Smeeksha Pandey,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

O.M.P. 601/2012

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act') challenging the Award dated 30.1.2012 passed in the Arbitration proceedings with respect to a Contract dated 25.6.2008.

2. Petitioner is a statutory body established under the Oil and Industry Development Act, 1974 and the respondent is a Company incorporated under the Companies Act, 1956. The petitioner invited

bids for interior works (including internal electrical work) for ground floor, second floor and third floor of the Oil Industry Development Board Office at Noida. The respondent emerged as a successful bidder and the bid was accepted on 4.4.2008 resulting into the execution of a contract between the parties on 25.6.2008.

3. As per the case of the petitioner herein, respondent was required to coordinate with and consult Engineers India Ltd. for the execution of the work. The work was to be completed within 30 weeks from the date of Letter of Acceptance dated 4.6.2008. The time period was inclusive of mobilization and demobilization. The total cost of the project was fixed at Rs.5,11,50,000/-, but the final value of the contract was worked out to Rs.5,87,83,164/-.

4. The respondent submitted a bank guarantee dated 14.6.2008 for an amount equivalent to 10% of the contract value as security deposit. The amount, of course, was enhanced as the contract value at the time of final bill had increased. The ten weeks contract which was to be completed by 13.8.2008 got delayed.

5. It is the case of the petitioner that right from the start the respondent was not well equipped with adequate men and material to execute the work to complete the same within ten weeks. The petitioner had provided the requisite site to complete the work, but the respondent was unable to complete the same. The respondent took a total of 77 weeks to carry out the work and thus there was a delay of 65 weeks. Substantial delay was attributable to the respondent. While

considering the imposition of penalty, it was taken into account that all the drawings were not handed over in one go to the respondent, but progressively from 14.6.2008 to 14.1.2009. However, even thereafter the respondent should have completed the work latest by 28.2.2009, as per the revised schedule submitted by the respondent. Thus, the delay of 36 weeks beyond 28.2.2009 was solely attributable to the respondent. As per Clause 21.1 of the General Conditions of Contract ('GCC') penalty/liquidated damages of 1% of the contract value per week of delay was levied which would come to 10% of the contract value. This amount worked out to Rs.58,78,316/- which was realized by the petitioner by encashing a bank guarantee for a sum of Rs.51,15,000/- and by deducting the balance of Rs.7,63,316/- from the final bill.

6. The respondent thereafter raised a dispute and in terms of Clause 82.1 of the GCC sought settlement through arbitration.

7. A Sole Arbitrator was appointed and the respondent filed a list of claims and the petitioner herein filed counter-claims. The claims and the counter-claims are extracted herein as under:-

S. NO.	DESCRIPTION OF CLAIM	AMOUNT (RS.)	REMARKS
01	Wrongful deduction of LD Charges	51,15,000.00	
02	LD Charges on extra/additional work	7,63,316.00	
03	Payment to Electrical contractor	8,00,000.00	
04	Deduction from settled Bills (RA-7)	16,82,602.50,	
05	Payment to Painter/Sub Contractor on third party	5,82,708.00	

06	Wrongful deduction on account of Rebate/Recoveries	14,25,360.00	
07	Liquidation of check list point and handing over documents	8,83,265.00	
08	Payment towards minor items	17,88,895.00	
09	Damages Liquidated/Un-liquidated	50,000,00.00	
10	Interest @ 24% from 16.07.2009	-	
11	Cost of Arbitration Proceedings	-	
	TOTAL	1,80,41,146.50 + Interest + Cost of Arbitration	

Counter Claims:

S. NO.	DESCRIPTION OF CLAIM	AMOUNT (RS.)	REMARKS
01	Loss on account of Rental	3,15,00,000.00	
02	Maintenance Cost	31,51,549.00	
03	Electricity Charges	38,34,626.00	
	TOTAL	3,84,86,175.00	

8. The learned Arbitrator passed an Award on 30.1.2012, whereby he disallowed all the three counter-claims of the petitioner and allowed claim Nos. 1/a and 2/b. Claim No. 7/g was partly allowed. Thus, a total amount of Rs.62,78,316/- was awarded in favour of the respondent, along with simple interest at the rate of 12% per annum, payable after six weeks from the date of publication of the Award, i.e. w.e.f.15.3.2012.

9. The learned Arbitrator has allowed claim Nos. 1/a and 2/b of the respondent towards wrongful deduction of the liquidated damages and liquidated damages charges on extra/additional work. The claims

have been allowed on the ground that the final approved drawings were provided to the respondent/claimant only on 2.7.2009, which was beyond the last date of completion and that the staff of the respondent was not allowed to enter the site on 16.7.2009. The learned Arbitrator came to a finding that the delay in completion of work of nearly 65 weeks was due to fault of both the parties and not of the respondent alone.

10. Claim No. 7/g was a claim for an amount of Rs.8,83,265/- towards non-liquidation of check-list points and handing over documents and was allowed on the ground that the respondent could not have been held responsible for any material or defects pertaining to the period after July, 2009, when their entry was banned. Learned Arbitrator has observed that the petitioner had never informed the respondent upto July, 2009 of the defects etc. and the recoveries have been arbitrarily affected on lumpsum basis. Besides this, the petitioner had included some items of repairs about which the respondent was never informed formally earlier.

11. The three counter-claims of the petitioner have been rejected on the sole ground that the petitioner never claimed payment of such losses from the respondent prior to the start of arbitration proceedings.

12. The petitioner has challenged the Award on several grounds. There is a challenge to the learned Arbitrator having allowed Claim Nos. 1, 2 and 7 of the respondent, as well as the grant of interest on

the awarded amount. The petitioner has also challenged the rejection of all its counter-claims by the learned Arbitrator.

13. The first contention raised before me by the learned counsel for the petitioner is that there is violation of Section 31(3) of the Act inasmuch as the learned Arbitrator has not given any reasons in support of the findings. Section 31(3) of the Act provides that the Arbitral Award shall state the reasons in support of the finding, upon which it is based, unless the parties have agreed, *inter-se*, that no reasons are to be given.

14. The next contention of the learned counsel is that the Arbitrator has erred in holding that the petitioner was not entitled to impose any penalty on the respondent because the final approved drawing was actually provided to the respondent on 2.7.2009 and the delay was thus not solely on the part of the respondent. Learned counsel for the petitioner contends that this conclusion of the learned Arbitrator has no basis and is contrary to the record. The document on which the Arbitrator has relied is a drawing which had been submitted on 2.7.2009, but actually had nothing to do with the original scope of the work. This was only in relation to some minor changes and modifications in the work, which was regarding some interior layout of the HOD and the conference room. He further submits that in fact it was brought out before the learned Arbitrator that these additional works were not even included in the final bill measurements by the respondent which clearly reflect that they were deleted from their scope of work and no such work was actually carried out. The delay

in completion of the work was thus solely attributable to the respondent and the petitioner was entitled to levy the penalty/liquidated damages as per the contract terms.

15. The next contention of learned counsel for the petitioner is that as per the terms of the contract, the work had to be completed within ten weeks from 4.6.2008. The drawings were progressively handed over to the respondent from 14.6.2008 to 14.1.2009 and thus the work should have been completed latest by 28.2.2009, which was the revised schedule submitted by the respondent. Thus, the delay of 36 weeks beyond 28.2.2009 was solely attributable to the respondent. The delay in work was on account of the fact that the respondent could not mobilize adequate manpower/material to execute the work. The records fortified that from the very beginning of the contract, the respondent was delaying the work inasmuch as, the site itself was mobilized only on 15.7.2008 i.e. after a delay of six weeks. Learned counsel submits that the petitioner had repeatedly brought to the notice of the respondent, the delay in execution of the work and submits that in this regard various letters were placed before the learned Arbitrator. Reliance is particularly placed on a letter dated 12.1.2009 where the slow performance of the respondent was seriously condemned by the petitioner. Learned counsel submits that the matter was in fact also taken up at the highest level of the respondent and on 20.1.2009 a detailed program was submitted by the respondent, with an assurance that the work would be completed latest by 28.2.2009. However, even after this there was no progress in the work and the respondent was

also put to notice as per Clause 33(2) of the GCC that the petitioner would be constrained to get the balance work executed at the risk and cost of the respondent, if there was no improvement at the site by 10.5.2009. Learned counsel further points out that even till July, 2009, the respondent could not complete the work and ultimately the work had to be completed through a risk and cost contract, placed on another agency. Since there was a delay of 77 weeks the petitioner rightly invoked the clause of liquidated damages and deducted the 10% of the contract value as penalty, as per Clause 21 of the GCC. Learned counsel therefore submits that the learned Arbitrator has committed patent illegality in allowing the claims of the respondent towards the deduction of the LD charges.

16. Lastly, it is contended by learned counsel for the petitioner that the learned Arbitrator has committed a patent error by dismissing the counter-claim on the sole ground that it was never raised prior to the arbitration proceedings. He submits that notice of a counter claim to a claimant is never a pre-condition. In fact, a counter-claim is filed only after the statement of claim is filed. This right is recognized by Order VIII Rule 6A of the CPC. He further submits that Section 2(9) of the Act defines a 'claim' and includes a 'counter-claim' as well. Thus, this part of the Award is patently illegal and deserves to be set aside.

17. *Per contra*, learned counsel for the respondent submits that there is no infirmity or illegality in the impugned Award. He submits that this Court cannot interfere in the findings given by the learned

Arbitrator, as it is the learned Arbitrator who is the master of facts and law and even if this Court was to come to a different conclusion, interference cannot be made. He submits that the Award is a well-reasoned Award and the learned Arbitrator has gone into various documents on record and has come to a correct finding that the delay was on part of both the parties. Learned counsel submits that the learned Arbitrator has rightly held that the drawings were provided to the respondent only on 2.7.2009 and it is this which contributed to the delay in completion of the work. He denies that this was not a drawing relating to any additional work, but related to the original scope of the work. Initially, the petitioner had only given a lay-out drawing on which the work was started by the respondent. It was only after the final drawing was given on 2.7.2009, that the respondent was able to carry out the work in the HOD room and the conference room, since these drawings related to the sealing plan as well as the electrical lay-outs. Learned counsel submits that the respondent had completed its part of the work and there was no delay on its part with respect to the areas for which the site and the drawings were handed over. This according to him is clearly evident from an acknowledgement given by the petitioner by its letter dated 12.5.2009. He submits that it was not only the late provision of documents/drawings which had caused the delay, but also the unavailability of work fronts. Learned counsel explains that for any interior renovation work certain drawings are required, which include Partition Lay-Out, ceiling plan, electrical and flooring plan etc. Initially only the partition lay-out drawing was given and the respondent had started the work on 26.6.2009. The last

drawing for the ceiling plan was given only on 2.7.2009 and 25 days were given to complete the work. However, on 16.7.2009 itself the staff was banned from entering the premises. In any case, Clause 53(a) of the GCC clarifies that alterations and modifications were form a part of the original contract and therefore it cannot be contended by the petitioner that the drawings given on 2.7.2009 were beyond the scope of the original work.

18. Learned counsel for the respondent next contends that all the counter-claims have been rightly rejected by the learned Arbitrator as there was not a whisper of these claims by the petitioner in any of its communications prior to the commencement of Arbitration proceedings. He submits that even assuming that the counter-claims were maintainable, even then the petitioner was not entitled to claim compensation, as they were responsible for the delay in completion of the work and in any case no compensation could be claimed above 10% of the contractual value as per Clause 21 of the GCC.

19. I have heard the learned counsels for the parties and have examined their respective contentions.

20. It is a settled law that under Section 34 of the Act this Court cannot sit as a Court of appeal and there are limitations and restrictions to the extent an interference can be made in the Award.

21. A perusal of the Award shows that the learned Arbitrator has traversed through the pleadings of the parties as well as various documents placed before it and came to a finding of fact that the

drawings had been handed over to the respondent only on 2.7.2009 and there was a delay in providing clear site of the work to the respondent. The learned Arbitrator has also taken note of the fact that the delay in providing of the site has been acknowledged by the petitioner and thus came to a finding that both parties were responsible for delay of the work, beyond the revised date of completion of work. The petitioner had taken a stand that the drawings given on 2.7.2009 were actually not relating to the original scope of the work. The drawings for the original work were in fact made available progressively from 14.6.2008 till 17.1.2009. All electrical drawings had been handed over by 22.12.2008. Even going by this date, the work should have been completed by 28.2.2009, but the records revealed that the respondent continued work till 25.3.2009 and thereafter almost abandoned the site. The drawings given on 2.7.2009 were with respect to certain modifications required as per OIDs requirements and were relating to some modifications. In fact, even after receiving the revised drawings no such work was carried out by the respondent.

22. Having considered all these contentions and traversing through the documents and evidence on record, the learned Arbitrator has found that the respondent had been able to prove through various meetings and letters that they had repeatedly requested for providing clear site to enable them to carry out the project which was relating to the interior works, but the petitioner failed to give the clear site on time. In the opinion of the learned Arbitrator the various letters and photographs placed during the proceedings proved that there was a

delay on part of both the parties as the petitioner was responsible for delay in providing the drawings, materials and clear site, while the respondent was responsible for delay in mobilization, getting labour, etc. In my view, the finding that both parties are equally responsible for delay is a finding of fact arrived at by the learned Arbitrator based on pleadings and evidence led before it and cannot be interfered with under Section 34 of the Arbitration Act.

23. Section 34(2)(b) of the Act has clearly laid down the principles on which the Courts can interfere in an Arbitral Award under the Arbitration and Conciliation Act, 1996 which are broadly summed up as under:-

- (a) Fundamental policy of Indian Law; or
- (b) Interest of India; or
- (c) Justice or Morality; or
- (d) Patent Illegality.

The Apex Court in the case of ***Associate Builders Vs. DDA (2015) 3 SCC 49***, has elaborated the said principles.

24. In ***McDermott International Inc. Vs. Burn Standard Co. Ltd and Ors, (2006) 11 SCC 181***, the Court held as under:-

“58. In Renuagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression “public policy” was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] (for short “ONGC”). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L&S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression “public policy” on the touchstone of Section 23 of the

Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC [(2003) 5 SCC 705] this Court, apart from the three grounds stated in Renusagar [1994 Supp (1) SCC 644] , added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.”

25. In the case of **Associate Builders (supra)**, the Apex Court has divided ‘patent illegality’ into three sub-heads as under:-

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. ...

XXX

XXX

XXX

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act...

XXX

XXX

XXX

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.”

26. The Apex Court in ***Associate Builders (supra)*** has clearly held that the Arbitrator is the sole Judge of quantity and quality of evidence before him and the Courts should generally refrain in interfering with a pure finding of fact. The Court may, on the facts of a given case, come to a conclusion that the finding of the Arbitrator is unjust or possibly there was another view, but the Court in a challenge to an Award cannot substitute its own view, however plausible it may be.

27. In fact, in a recent judgment of ***Ssangyong Engineering & Construction Co. Ltd. Vs. National Highways Authority of India (NHAI) (2019) SCC Online SC 677***, the Apex Court has elaborated on the expression ‘public policy of India’ and has held as under:-

“35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the

award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.”

28. In ***Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran*** (2012) 5 SCC 306, the Apex Court held as under:-

“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.”

29. A reading of the above law would show that this Court cannot exercise its powers as a Court of Appeal against an Arbitral Award. The Arbitrator is the final adjudicator of facts and evidence.

30. Whether the delay was on account of the petitioner or the respondent is a finding of fact arrived at by the learned Arbitrator based on documents and evidence on record. The finding of the learned Arbitrator that both parties were responsible for delay is not a finding which can be said to be patently illegal or so perverse, as to reach a conclusion that no reasonable minded Arbitrator could have arrived at such a finding. In fact, the voluminous arbitral record shows that both sides had produced number of letters, correspondences exchanged, meetings held and photographs to prove their respective versions and the learned Arbitrator has taken a view based on the record placed before it. The Arbitrator took note of the

fact that the respondent had informed Engineers India Limited about the constraints suffered by them at the site, through various meetings and have requested them to take appropriate action to enable the respondent to begin the execution of the project work allotted to it. The contract required that the respondent was to get the entire site in the beginning but the site was not made available, till completion. The project drawings were also delayed and the last approved drawings were handed over on 02.07.2009. The Arbitrator also took note of the fact that the petitioner had made number of modifications in the drawings and even the materials brought at the site were different. The work done at the site by the petitioner was faulty inasmuch as instead of PCC of 40 mm in the BOQ, PCC upto 175 mm was brought and used in the execution of the work. The Arbitrator took cognizance of the admission of the respondent that there was delay in providing clear site of the work as well as the drawings inasmuch as the Project drawings were handed over progressively from 14.06.2008 to 14.01.2009 and the respondent was expected to complete the work in a period of little over a month.

31. Therefore, in my view, the grounds taken by the petitioner, as regards the claims of the respondent which have been allowed by the learned Arbitrator have no merit and this part of the Award is upheld. Present petition is thus dismissed to this extent.

32. In so far as the contention of the petitioner that the Award is an unreasoned Award is concerned, there cannot be a quarrel with the proposition of law that the learned Arbitrator must give reasons for the findings it has arrived at. Section 31(3) of the Act clearly stipulates

the requirement of giving reasons, for arriving at a particular finding. The Apex Court in the case of ***Som Dutt Builders Vs. State of Kerela (2009) 10 SCC 259*** has held that the giving of reasons under Section 31(3) of the Act is not an empty finality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Tribunal is not expected to write a judgment like a Court or give very elaborate reasons, but merely noticing the submission of the parties or referring to some documents is no substitute for reasons. Howsoever brief they may be, reasons must be indicated in the Award, as this would reflect the thought process leading to a particular conclusion. In the absence of reasons, the Award would be legally flawed.

33. In the light of the said law and Section 31(3) of the Act, I have examined the impugned Award. I find that with respect to each of the claims of the respondent the learned Arbitrator has given some reasoning for arriving at a conclusion that both the parties were at fault due to which the work got delayed. The relevant part of the Award of the learned Arbitrator is reproduced hereinunder:-

“The claimants informed Engineers India Ltd. about these constraints through various meetings and the Engineers India Ltd. were requested to take appropriate action in order to enable the claimant to begin the execution of the project work allotted to them. As per the Contract Agreement the claimant was to get the entire contract site in the beginning but the claimants never got the complete site of work, till completion. The project drawings were also delayed by the respondent/EIL through out the project and last approved drawings were handed over to clamant on 02.07.2009.

From the month of April 2009 on wards, the claimant performed extra items of work and repair work only.

The claimants have brought out that there were a number of modifications made in the Drawings by the Respondents and even charges were made in the materials brought to site. The work done at site was faulty as against the PCC of 40 mm in the BOQ, the PCC of up to 175 mm was required at site & was executed.

The delay in providing clear site of work and the drawings has been accepted by the respondent, as according to them the clear work site and project drawings were handed over by them to the claimant progressively from 14.06.2008 to 14.01.2009 and according to the respondent the work should have completed latest by 28.02.2009. According to the respondents the work was to be completed in 10 weeks from 04.06.2008 to 13.08.2008, but the completion took 77 weeks and work could not be completed till 16.07.2009. The respondents have stated that the work should have been completed by 28.02.2009 and the delay up-to 28.02.2009 was concurrent delay on the part of both parties and after 28.02.2009, the delay was solely attributable to the claimant.

The respondents stated that there were delays by the claimants in procurement of materials required at site and the claimants were also short of labour at work site and the claimants never got the labour License for this project.

On the other hand the claimants have proved that they received the last drawing on 02.07.2009 and their staff were not allowed to enter the site of work on 16.07.2009. From these details it is quite clear that the complete delay of nearly 65 weeks took place due to the faults of both, the claimants as well as respondents (Actual date of completion being 30.11.2009).

XXX

XXXX

XXXX

The claimant has stated that the respondents had acknowledged the advance stage of completion of the site on 12.05.09 through their letter given as Annexure "B" to the letter of claims. Also claimant stated that they received the last approved drawings on 02.07.2009 and in this way the complete delay was on account of the respondents and there was no justification with the respondents for imposing any penalty. Also the claimants received only verbal approval and the Co-ordination plan for various agencies working on the site was not made available to the claimants and this delayed the provision of work fronts to the claimants. The claimants have requested refund of complete LD charge imposed on them.

The respondents have stated that all the drawings were handed over to the claimants by 14.01.2009 and the work was to be completed by 28.02.2009. The respondents have levied penalty for the delay after 28.02.2009 as per the clause 21 of GCC (Maximum Penalty of 10% of the Contract Value).

It is observed from the documents placed before the tribunal that the final approved drawing was actually provided to the claimants on 02.07.2009 and in this way the complete delays in completion of the work will be considered as concurrent delay and there is no justification with the respondents to impose any penalty on the claimants.”

34. The question as to what would be meant by a reasoned Award was decided by the Apex Court in the case of **McDermott International Inc. (supra)** and the Apex Court held as under:

56. In Bachawat's Law of Arbitration and Conciliation, 4th Edn., pp. 855-56, it is stated:

“... ‘Reason’ is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration. In re, ‘proper, adequate reasons’. Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons.

The meaning of the word ‘reason’ was explained by the Kerala High Court in the contest of a reasoned award....

‘Reasons are the links between the materials on which certain conclusions are based and the actual conclusions....’

A mere statement of reasons does not satisfy the requirements of Section 31(3). Reasons must be based upon the materials submitted before the Arbitral Tribunal. The Tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored....

Statement of reasons is a mandatory requirement unless dispensed with by the parties or by a statutory provision.”

57. In Konkan Rly. Corpn. Ltd. v. Mehul Construction Co. [(2000) 7 SCC 201] this Court emphasised the mandatoriness of giving reasons unless the arbitration agreement provides otherwise.”

35. It cannot thus be contended by the petitioner that it is an unreasoned Award. As held by the Apex Court, the learned Arbitrator is not expected to write a judgment and the reasoning should be sufficient to indicate the thought process of the arbitrator in arriving at a particular finding. The learned Arbitrator has given ‘reasons’ for arriving at the conclusion that the delay was also on part of the petitioner and which I have extracted above. A perusal of the reasoning clearly reflects the mind of the learned Arbitrator in arriving at the said conclusion and in my opinion, it cannot be argued that the impugned Award is an unreasoned Award. This contention of the petitioner, thus, deserves to be rejected.

36. In so far as the rejection of the counter-claims of the petitioner are concerned, the same have been rejected by the learned Arbitrator on the sole ground that the petitioner had never claimed these amounts from the respondent before the arbitration proceedings started. On this account also, I find that the contention of the learned counsel for the petitioner is justified. In the case of ***State of Goa Vs. Praveen Enterprises (2012) 12 SCC 581***, the Apex Court has clearly held that for raising a counter-claim it is not essential that the party must raise such a claim before the other party, prior to the arbitration proceedings or issue a notice invoking arbitration. The counter claim itself envisages filing of a claim by one party to which the other party along with its reply files a counter claim. This has also been held by this

Court in *Escorts Ltd. Vs. Knorr Bremsa (2007) SCC Online Del 1541* and *Gokul Projects Vs. Cyclone Entergy P. Ltd. (2018) SCC Online Del 11814*. As held by the Apex Court in *State of Goa (supra)*, the object of providing counter claims is to avoid multiplicity of proceedings and divergent findings. Keeping this object in view the respondent in an arbitration proceeding has a choice of raising the dispute (counter-claim) by issuing a notice to the claimant and then resort to independent arbitration proceedings or raise a dispute by way of counter claim in pending proceedings. The only effect of such counter claim would be on the issue of limitation. In this regard, I may quote from a judgment of this Court in the case of *BSNL Vs. Ribacom P. Ltd. (2017) SCC Online Del 11860* as under:

“As far as the issue of non-service of notice to the respondent before raising a counter claim is concerned, the same is no longer res integra and it has been authoritatively held by the Supreme Court in State of Goa V. Praveen Enterprises (2012) 12 SCC 581 that the object of providing for counter claims is to avoid multiplicity of proceedings and to avoid divergent findings. The arbitrator will have jurisdiction to entertain any counter claim, even though it was not raised at a stage earlier to the stage of pleadings before the arbitrator.”

37. In view of the above, the Award insofar as it refuses to consider the counter-claim of the petitioner is set aside, leaving it open to the petitioner to agitate its claims in accordance with law.

38. In view of the above, the petition is partially allowed, with no orders as to costs.

I.A. No. 11996/2012 (for stay)

38. In view of the detailed judgment passed in the main petition, the present application is dismissed.

JYOTI SINGH, J

SEPTEMBER 16th, 2019

AK

