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

Judgment Reserved on 06.12.2018

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Judgment Pronounced on 30.07.2019

+ **O.M.P. (COMM.) 157/2017 & I.A. 3873/2017**

NATIONAL BUILDINGS CONSTRUCTIONS
CORPORATION LTD.

..... Petitioner

Through: Mr. Manoj Kumar Das with
Ms. Geeta Das and Mr.
Deepak Kumar, Advs.

versus

J. R. CONSTRUCTIONS

..... Respondent

Through: Mr. Mayank Goel with Mr.
Monamshal Marings, Advs

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J:

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "the 1996 Act") to assail the award dated 06.12.2016.

2. Via the impugned award, the arbitral tribunal has awarded a cumulative sum of Rs.1,13,25,985/- inclusive of interest in favour of the respondent i.e. J.R. Constructions (hereafter referred to as "JRC") at the rate of 12% per annum towards pre-reference and *pendente lite* interest.

2.1 The petition came up for hearing for the first time on 27.03.2017 when this Court, while giving an opportunity to JRC to file a reply, called upon JRC to specifically respond to the following aspects brought to fore

on behalf of the petitioner i.e. National Buildings Construction Corporation Ltd. (hereafter referred to as “NBCC”):

- (i) First, amounts that had been awarded against Claim Nos.17 and 18 which, according to NBCC, had not been claimed by JRC;
- (ii) Second, costs of arbitration had been awarded which, again according to NBCC, had not been claimed by JRC in its Statement of Claim (in short “SOC”); and
- (iii) Lastly, interest had been awarded despite specific prohibition contained in Clause 73.3 of the subject contract in respect of pre-reference and *pendente lite* period.

3. Pursuant to this direction, JRC filed a reply and attempted to answer the issues raised by the NBCC.

4. However, before I proceed further, it may be necessary to advert, broadly, to the facts and circumstances which led to the institution of the instant petition.

4.1 On 24.10.2005, NBCC issued a Letter of Award (in short “LOA”) in favour of JRC for construction of a Link Road in Mizoram between Pukzing and Silsuri abutting the Indo-Bangladesh Border. The road length was 17.81 kms, while the total value of the contract was pegged at Rs. 881.61 lakhs.

4.2 The JRC was, initially, given seven (7) months to complete the work. The time for this purpose was to commence from 03.11.2005 and as per the contract, the work had to conclude on 03.06.2006.

4.3 At a joint meeting held on 01.11.2007, it was agreed to lop off 10 kms of the roads stretch initially awarded to JRC and handover the work to another entity, namely, BT Construction. Notably, this joint meeting was attended by the representatives of NBCC, JRC and BT Construction.

4.4 It may be relevant to note that it was JRC's stand that the work on 10 kms stretch awarded to BT Construction did not pertain to the subject contract.

4.5 Continuing with the narrative, on 13.11.2007, JRC submitted its 10th Running Bill (RA) of even date, whereupon, it was paid a sum of Rs.883.45 lakhs inclusive of advances.

4.6 It appears that between 2007 and 2009, JRC continued executing parts of the subject contract which fell within its domain.

4.7 Concededly, there were difficulties in completion of the work due to the intersection of rivers, drains, work involving rock cutting, deviation and diversion of road alignment, etc. which later on led to the foreclosure of the subject contract.

4.8 It is in this background that on 30.11.2010, a joint measurement of the work carried out by JRC and BT Construction was carried out. According to NBCC, JRC had completed the work worth Rs.749.18 lakhs. Therefore, according to NBCC, JRC had been paid an excess amount equivalent to Rs.154.27 lakhs (Rs.883.45 lakhs – Rs.749.18 lakhs).

4.9 NBCC claims that JRC on the same date i.e. 30.11.2010 submitted its 12th RA Bill and/or final bill via which a sum of Rs.17,41,985/- was claimed. NBCC asserts that the 12th RA Bill and/or final bill was finalized for a gross amount of Rs. 94,489/- and that after deduction towards tax and other recoveries was made, nothing was payable to JRC. NBCC claims that this position was accepted by the JRC.

5. It is also NBCC's claim that the excess sum amounting to Rs.154.27 lakhs was not factored in the final bill pertaining to the instant contract. According to the NBCC, this amount was adjusted from the security deposit, earnest money deposit and dues payable *qua* other works executed by the JRC i.e. LOA No.1536, dated 08.11.2006; LOA No. 49, dated 30.01.2008; and LOA No. 568, dated 04.07.2006.

5.1 Concededly, in the interregnum, the extension of time was granted to JRC to execute the subject contract and therefore, the scheduled date of completion was re-fixed as 30.11.2011.

5.2 It appears that prior to a formal foreclosure of the subject contract, on 04.11.2010, the remaining work was allotted to the entity by the name M/s. Ruby Enterprises. This claim of JRC has been accepted by the arbitral tribunal.

5.3 The record reveals that there is no dispute that the contract awarded to the JRC was foreclosed on 14.01.2011 which was nearly ten (10) months before the extended time frame. A formal agreement of even date was executed in that behalf between the parties.

5.4 It is not in dispute that JRC thereafter raised claims concerning the monies payable to it in respect of the subject contract. Resultantly, on 15.06.2012, the Chairman and Managing Director, NBCC appointed a Committee headed by, one, Mr. M.K. Verma (hereafter referred to as “Verma Committee”) to look into the grievances raised by JRC.

5.5 On 15.04.2013, the Verma Committee rendered a report *via* which it concluded that no amounts were payable to JRC as JRC had executed the foreclosure agreement dated 14.01.2011.

5.6 Since JRC was aggrieved by the conclusion reached by the Verma Committee, it once again addressed a letter dated 13.05.2013 to NBCC’s Chairman and Managing Director. This resulted in the parties executing a supplementary agreement dated 22.08.2013. Via this agreement, parties agreed to have their disputes adjudicated upon by an arbitral tribunal.

5.7 Consequent thereto, an arbitral tribunal was constituted. JRC lodged 24 claims amounting to a cumulative value of Rs. 5.44 crores, inclusive of interest. The SOC was filed by JRC on 30.10.2013 to which NBCC responded by filing a Statement of Defence (in short “SOD”) whereby it, *inter alia*, challenged the jurisdiction of the arbitral tribunal to adjudicate

upon the disputes on merits principally on the ground that parties had executed a foreclosure agreement dated 14.01.2011 (in short “foreclosure agreement”). In a nutshell, NBCC’s stand was that the disputes were not arbitrable. This apart, NBCC also raised its defence on the merits *qua* the claims raised by JRC.

5.8 The arbitral tribunal, though, partially allowed the claims lodged by JRC and, as noted above, awarded a sum of Rs.1,13,25,985/- inclusive of interest at the rate of 12% per annum towards pre-reference and *pendente lite* interest. In absolute terms, interest was quantified at Rs.39,44,403/-. For the sake of convenience, the break-up of claims awarded in favour of JRC is set forth hereafter :

<i>Claim No.2</i>	<i>Deduction workforce</i>	<i>Rs.3,50,000/-</i>
<i>Claim No.3</i>	<i>Deduction facilities</i>	<i>Rs.65,000/-</i>
<i>Claim No.4</i>	<i>Deduction office expenses</i>	<i>Rs.12,000/-</i>
<i>Claim No.5</i>	<i>Other recoveries</i>	<i>Rs.11,500/-</i>
<i>Claim No.7</i>	<i>Cook Facility</i>	<i>Rs.4,000/-</i>
<i>Claim No.8</i>	<i>Deduction on facilities (Computer)</i>	<i>Rs.5,000/-</i>
<i>Claim No.9</i>	<i>Deduction telephone facility</i>	<i>Rs.10,500/-</i>
<i>Claim No.10</i>	<i>Deduction stationery facility</i>	<i>Rs.18,000/-</i>
<i>Claim No.11</i>	<i>Guest House facility</i>	<i>Rs.4,000/-</i>
<i>Claim No.12</i>	<i>Deduction vehicle facility</i>	<i>Rs.1,200/-</i>
<i>Claim No.14</i>	<i>Refund of Testing Charges</i>	<i>Rs.2,43,563/-</i>
<i>Claim No.16</i>	<i>Withheld personal account</i>	<i>Rs.10,64,790/-</i>
<i>Claim No.18</i>	<i>Refund/non-payment against 12th RA Bill</i>	<i>Rs.37,87,029/-</i>
<i>Claim No.20</i>	<i>Refund of EMD</i>	<i>Rs.10,00,000/-</i>
<i>Claim No.23A</i>	<i>Cost of arbitration</i>	<i>Rs.8,00,000/-</i>
<i>Claim No.24</i>	<i>Present, Pendente lite Interest @12% pa on claims from 28.2.2011 till the date of award 6.12.2016</i>	<i>Rs.39,44,403/-</i>
<i>Total</i>		<i>Rs.1,13,25,985/-</i>

5.9 It is in this background that the NBCC has approached this court.

6. The petitioner has assailed the award, broadly, on the following grounds:

(i) Firstly, the arbitral tribunal had no jurisdiction to adjudicate upon the claims raised by JRC given the fact that parties had entered into a foreclosure agreement.

(i)(a) According to Mr. Dass, JRC itself had sought foreclosure of the subject contract and after the 12th RA Bill and/or final bill had been finalized, and therefore, no amounts whatsoever were payable to JRC. It is Mr. Dass's submission that arbitration was triggered as an afterthought nearly one year and six months post the execution of the foreclosure agreement.

(ii) Secondly, according to Mr. Dass, Claim Nos.2, 3, 4, 5, 7, 8, 9, 10, 11 and 12 pertained to recoveries and adjustments from RA Bill Nos.1 to 12 made during the execution of work by JRC. The adjustments, according to learned counsel, were made on account of NBCC having provided the workforce and other facilities such as labour, vehicles, telephone, stationery, computer, cooks, guest house, as also incurred expenditure towards running the site office. Mr. Dass contended that since expenses had been incurred under these heads by NBCC, recoveries, and adjustments were made from RA Bill Nos. 1 to 12 which were accepted by JRC. Furthermore, it was contended that since claims on account of workforce and facilities given by NBCC fell under the category of "excepted matters", the same were not arbitrable under Clause 28.3 of the subject contract.

(iii) Thirdly, claim Nos.17 and 18 were awarded in favour of JRC even though no such claims were made by JRC. This submission of Mr. Dass, in fact, finds mention in order dated 27.03.2017 when a case was sought to be made out on behalf of NBCC for issuance of notice in the petition.

(iv) Fourthly, arbitration costs in the sum of Rs. 8 lakhs have been awarded, though, in the SOC, there was no mention *qua* the same. JRC had submitted the details of costs incurred by it after final arguments had been advanced in the matter.

(v) Lastly, the arbitral tribunal has granted towards pre-reference and *pendente lite* interest, a sum of Rs.39,44,403/-, even though the same was prohibited under Clause 73.3 of the subject contract.

Effect of the foreclosure agreement

7. The argument advanced on behalf of NBCC is that since the parties had executed the foreclosure agreement, there was no dispute between them and thus nothing remained alive, so to speak, to carry out adjudication. Pertinently, the arbitral tribunal, on the other hand, after perusing foreclosure agreement, observed that it contained an expression to the effect that JRC had received “full” payment and not “full and final” payment. Besides the difference in semantics, the arbitral tribunal, to my mind, has touched upon two vital issues and thus correctly concluded that it had jurisdiction to arbitrate in the matter.

7.1 The first facet pertained to the appointment of the Verma Committee while the second facet related to the execution of the supplementary agreement dated 22.08.2013 (in short “supplementary agreement”). The Verma Committee was appointed, concededly, on 15.06.2012, nearly one and a half years after the execution of the foreclosure agreement. The mandate of Verma Committee, even according to NBCC, was to ascertain as to whether or not JRC had any grievance about non-payment of its dues.

7.2 The second and more crucial aspect was the execution of the supplementary agreement whereby parties agreed to refer claims and counter-claims to the arbitral tribunal. Via the supplementary agreement, parties had agreed to refer to a common named-arbitrator not only the disputes pertaining to the LOA in issue but also those concerning four other LOAs, one of which related to Improvement of City Roads in Kolasib Town, Mizoram. The LOA pertaining to Kolasib Town is dated 30.01.2008.

7.3 As to why, I have referred to LOA dated 30.01.2008, specifically, will become clear in the latter part of my judgment.

7.4 That being the situation, in my opinion, the arbitral tribunal, correctly came to the conclusion that merely because the foreclosure agreement had been signed, it did not prevent JRC from seeking adjudication of its claims.

7.5 In addition, thereto, the arbitral tribunal has taken note of the fact that the 12th RA Bill and/or final bill was signed by JRC after NBCC had served upon it a letter dated 23.03.2011. Via this letter, NBCC had called upon JRC to sign the 12th RA Bill and/or final bill. Qua the charge of “duress and coercion”, the arbitral tribunal, while noticing that this allegation was made for the first time only in the SOC, concluded that JRC was brought under duress as work had been allotted by NBCC to another entity known as M/s. Ruby Enterprise vide LOA dated 04.11.2010, even before the foreclosure of the subject contract.

8. Given the aforesaid findings in the award and the material placed before me, I completely agree with the conclusion reached by the arbitral tribunal that the execution of the foreclosure agreement did not take away its jurisdiction to arbitrate upon the disputes obtaining between the parties. In reaching this conclusion, I am not basing my view on whether or not the expression “receipt of full payment” in the foreclosure agreement would tantamount to “full and final payment”. What is clear though that events post the execution of the foreclosure agreement did point in the direction that there were aspects relating to the subject contract which had not attained closure. The fact that Verma Committee was appointed and NBCC on its own chose to execute a supplementary agreement with JRC to refer disputes pertaining not only to the subject LOA but *qua* other LOAs to a common named-arbitrator amply demonstrated that JRC’s claims required adjudication.

Refund of recoveries made by NBCC against RA Bill Nos.1 to 12

9. In so far as the second issue i.e. recoveries or adjustments made by NBCC from RA Bill Nos. 1 to 12 is concerned, to my mind, a perusal of the award would show that except for claim No.7, the conclusions reached *vis-à-vis* all other claims are tenable. The argument that these claims fell in the category of “excepted matters” was never put forth before the arbitral tribunal. It is for the first time before this court that this argument has been advanced. Therefore, in my opinion, such an objection taken for the first time before this court, cannot be entertained. In the written submissions though, on behalf of NBCC, these recoveries are sought to be categorized as excepted matters by conflating the provisions of Clause 28.3 read with Clause 27.3. Based on these clauses, the submission advanced is that the decision of Engineer-in-Charge concerning the recoveries is final and binding on the contractor i.e. JRC.

9.1 The submission advanced is untenable for the reason that these claims do not exclude the jurisdiction of the arbitral tribunal to ascertain as to whether or not the recoveries made were justifiable if put to a challenge.

9.2 A perusal of the supplementary agreement would show that all claims and counterclaims arising between the parties out of or in connection with the LOA in issue and other LOAs had been referred to a common named- arbitrator. In this agreement, no words of limitation are found which would have me conclude that the recoveries made by NBCC against RA Bill Nos.1 to 12 could not be adjudicated upon by the arbitral tribunal.

10. A perusal of the award alongside the details given in the table above would show that the arbitral tribunal has sustained claim Nos. 2, 3, 4, 5, 8, 9, 10, 11 and 12 partially, broadly based on the following rationale:

- (i) Firstly, deductions were made from some RA Bills and not from the others, even though under Clause 28.3 of the subject contract, it was incumbent upon the JRC to provide the facilities indicated therein.
- (ii) Secondly, NBCC had failed to provide the basis for recoveries.
- (iii) Thirdly, the quantification was arrived at after fair assessment of the material placed before him.

11. Having regard to material placed on record and the finding returned by the arbitral tribunal, in my opinion, all these recoveries fall within the domain of appreciation of evidence. Therefore, no interference is called for by me.

12. In so far as claim No.7 is concerned, the reasoning given in paragraph 11.7.2 of the award shows that the said claim has been rejected by the arbitral tribunal. However, inadvertently, while summing up the claims in paragraph 13.7 of the award, it is noted that Claim No.7 has been allowed. Accordingly, this part of the award is set aside, only to lend clarity that reference to claim No. 7 in paragraph 13.7 of the award emanates from a typographical error.

13. Insofar as Claim No.16 is concerned, it dealt with refund sought by JRC along with interest in respect of an amount equal to Rs.10,64,790/- under the heading “JR Personal Account”. The arbitral tribunal has allowed this claim in full, *inter alia*, on the ground that while recoveries had been made of a cumulative sum of Rs.10,64,790/- from various RA Bills, NBCC was unable to provide proper justification or explanation *qua* the same unlike recoveries made under Clause 28.3 of the subject contract. The arbitral tribunal has returned a finding of fact that there was no provision in the subject contract which would sustain deduction under the head “JR Personal Account”.

13.1 Mr. Dass was unable to draw my attention to any provision in the subject contract which entitled NBCC to make recoveries against “JR Personal Account”.

13.2 Therefore, this deduction made by NBCC was rightly overturned by the arbitral tribunal.

14. Likewise, Claim No. 20, which relates to non-refund of Earnest Money Deposit (in short “EMD”) has been allowed by the arbitral tribunal on account of inconsistent stand adopted by NBCC. The arbitral tribunal notes in paragraph 11.20.1 of the award the following:

“11.20.1....On one hand he is saying that he has already released the amount and on the other hand he is saying that the same has been adjusted against his counter claim. No evidence has been brought out by the Respondent in support of his contention that the said EMD had been adjusted by him against his counter claim before the arbitration was invoked. It is apparently clear that the respondent has taken the said plea belatedly after the arbitration has been invoked. ...

.... The above facts clearly show that, the stand taken by the Respondent is an afterthought. In view of above, the claim of the claimant stands substantiated and it appears to be fair and reasonable to award the said Rs. 10,00,000/- (Rupees Ten lacs only) in favor of the Claimant. ...”

15. Given what is noted by the arbitral tribunal *qua* which nothing has been shown by counsel for NBCC for me to conclude otherwise, no interference is called for *vis-à-vis* this claim as well.

Claim Nos.17 and 18 awarded in favour of JRC without claims being made in that behalf

16. It must be stated at the outset, a fact that I have noted hereinabove as well, that this contention was raised on behalf of NBCC on 27.03.2017 when a notice was issued in the captioned petition.

17. A perusal of the award, however, shows that the arbitral tribunal has not awarded any amount in respect of Claim No.17. Therefore, the assertion to the contrary made before the court is incorrect.

18. Claim No.18 is described as follows:

“Refund of Rs.16,33,735/- along with interest withheld against Non Payment of 12th RA Bill and Final Bill plus Rs.1,94,42,624/- (Rs.11,98,75,361 – Rs.10,04,32,737/-) against deviation of work.”

19. In respect of Claim No.18, after perusing the material placed before it, the arbitral tribunal has returned the following findings of fact :

(i) Firstly, the contention of NBCC that JRC had abandoned the work after the 10th RA Bill was submitted was wrong. According to the arbitral tribunal, JRC carried out some work, even though the same may have been carried out at a slow pace.

(ii) Secondly, the contention of JRC that it had been forced to sign RA bills by NBCC which showed that the work carried out by him had been executed by BT Construction was not backed by evidence.

(iii) Thirdly, no notes were provided by NBCC for accounting purposes concerning 11th and 12th RA Bills (which is also the final bill) to demonstrate the extent of work carried out by JRC and BT Construction. The fact that the contents of 11th RA Bill have been carried forward to the 12th RA Bill which has been signed on behalf of JRC would exclude the possibility of JRC having carried out the work shown in the 11th RA Bill.

(iv) Fourthly, since 12th RA Bill and/or final bill accounts for work carried out until 30.11.2010, it would account for any overpayments made to JRC in 2009.

(v) Fifthly, NBCC was correct in its contentions, based on the provisions of Clause 37.2 of the subject contract, that all payments made to JRC were advances against final payment and therefore, JRC was bound by the contents of the 12th RA Bill and/or final bill.

(vi) Lastly, and most importantly, from the point of view of JRC, the work executed by BT Construction had been accounted for on the basis of rates which were 14% above the scheduled rates whereas the work carried out by JRC was accounted for on the basis of minus (-) 3% of the scheduled rates.

20. On the basis of the last finding, the arbitral tribunal has ruled in respect of Claim No.18 that JRC is entitled to refund of Rs.37,87,029/-.

The manner in which this amount has been arrived at is set-forth hereafter :

(i)	<i>Recovery made at B.T.C. rate</i>	=	<i>Rs.2,53,95,370/-</i>
(ii)	<i>The value of above [the] work at [the] scheduled rate = Rs.25395370 x 100/114</i>	=	<i>Rs.2,22,76,640/-</i>
(iii)	<i>The value of [the] above work at the JRC rate = Rs.22276640 x 97/100</i>	=	<i>Rs.2,16,08,341/-</i>
(iv)	<i>Extra recovery made by Respondent on account of work carried out by BTC</i>	=	<i>Rs.37,87,029/-</i>

21. Mr. Dass has assailed award of this amount on the ground that once a finding was returned that the 12th RA Bill was properly generated, then, the arbitral tribunal could not have proceeded to award a sum of Rs.37,87,029/- in favour of JRC. To my mind, this submission is misconceived as a perusal of the findings returned by the arbitral tribunal would show that while it accepted the contention made on behalf of NBCC that there was no coercion employed on JRC to sign the 12th RA Bill and/or the final bill, there was an error in quantifying the value of the work executed by BT Construction. Mr. Dass, both in his arguments across the bar and also in the written submissions, has not assailed the finding returned by the arbitral tribunal that the rates at which BT Construction's work was quantified was 14% above the scheduled rates whereas the rates for quantifying JRC's work was minus (-) 3% of the scheduled rates. If this position is correct, to which no challenge is laid on behalf of NBCC, then, it was, to my mind, entirely within the domain of the arbitral tribunal to excise from the 12th

RA Bill and/or final bill, excess amount adjusted towards work carried out by BT Construction. JRC, under Claim No.18, had sought refund of a larger amount. The arbitral tribunal based on its appreciation of the material placed before it accorded relief of a lesser amount. In my opinion, it is not within the domain of this court to interfere with the award on this score.

Costs of Arbitration (Claim No.23A)

22. In respect of the said claim, the argument advanced by Mr. Dass is that no such provision was made in the SOC. To this extent, Mr. Dass is right. JRC appears to have requested the arbitral tribunal to award costs of arbitration at the hearing held on 21.03.2016. The procedural order of the arbitral tribunal reads as follows :

“1. During the hearing on 19.03.2016, for the work improvement of City Roads in Kolasib Town, Mozoram vide LOA No.NBCC/SBG(A&M)/GHY/UD/MIZ/KOLASIB II/08/049 dated 30.01.2008, the Claimant has filed details of total expenditure in the arbitration proceedings for all the above five works in two sheets for each work.

2. The Respondent is directed to file his details also towards expenses/cost of reference.”

22.1 The aforesaid procedural order, which the arbitral tribunal passed, however, had a background, which is, JRC's letter dated 13.10.2013. In this letter, JRC had indicated to the arbitral tribunal that it had inadvertently not claimed costs of arbitration. It is not NBCC's case that it did not know of the letter dated 13.10.2013. A perusal of procedural order dated 21.03.2016 would show clearly that the arbitral tribunal had even handedly called upon both sides to file their bill of costs. Furthermore, a closer examination of the procedural order dated 21.03.2016 would show that details of expenditure incurred towards arbitration were furnished to the arbitral tribunal during a hearing held on 19.03.2016 pertaining to another

LOA dated 30.01.2008. As noted in paragraph 7.2 above, NBCC had referred to common named-arbitrator disputes arising between the parties pertaining not only to the LOA in issue but also other LOAs including LOA dated 30.01.2008. Therefore, at the hearing held before the arbitral tribunal pertaining to LOA dated 30.01.2008, JRC had handed over a bill of costs in the sum of Rs.11,69,105/- which included the fee of the arbitrator, travelling expenses and money paid to counsel and advocate-on-record. Though opportunity was given, NBCC did not respond to the claim made in this behalf by JRC. The arbitral tribunal while allowing the claim, gave the following reasoning:

“Claim No. 23A: Claim for Cost of Arbitration

11.23A. From the awards given by me on most of the claims of the Claimant and counter claims of the Respondent, it is evident that generally the Respondent has been found as lacking in the proper administration of the contract. Many of the claims made by the Claimant have been allowed by me, though partly, which goes to show that the arbitration could have been avoided on many of the issues/claims raised by the Claimant. In the overall analysis, I assess that it would be fair and reasonable to award a sum of Rupees Eight Lacs only towards the cost of arbitration in favor of Claimant. The above award is after taking into the consideration the share of expenses to be borne by the Claimant out of the expenses made by the Respondent during the conduct of arbitration hearing.”

23. To my mind, the fact that it did not form part of the SOC ought not to have made much difference as long as costs under this head were incurred by JRC. This was not a claim on merits but pertained to expenses incurred by JRC in prosecuting its claims.

24. It is not NBCC's stand that these expenses were not incurred. Therefore, in my opinion, this objection is not sustainable and hence rejected.

Pre-reference and pendente lite interest awarded contrary to Clause 73.3

25. Interest has been dealt with in the award as a separate claim. The arbitral tribunal has awarded interest under claim No.24. The details of the claims under which interest has been awarded are set out in paragraph 11.24.13 of the award. The arbitral tribunal has awarded interest at the rate of 12% per annum as against 18% sought by JRC for the period commencing from 14.01.2011 till the date of the award and granted interest at that very rate from the date of the award until the date of payment. Importantly, the arbitral tribunal has indicated that interest quantified until the date of the award will be excluded in the calculation of future interest. Furthermore, the arbitral tribunal has also provided that no future interest would be payable if NBCC were to pay the awarded amount within 90 days of the award.

26. NBCC's objection to the grant of interest emanates from the provisions of Clause 73.3 of the subject contract. To appreciate the submission made on behalf of NBCC, Clause 73.3 is extracted hereafter:

"73.3 LIEN IN RESPECT OF CLAIMS IN OTHER CONTRACTS

Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Engineer-in-Charge or by NBCC against any claim of the Engineer-in-Charge or NBCC in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Engineer-in-Charge or the NBCC.

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Engineer-in-Charge or the NBCC will be kept withheld or retained as such by the Engineer-in-Charge or the NBCC or till his claim arising out of the same contract or any other contract

is either mutually settled or determined by the arbitration clause or by the competent court, as the case may be, and that the contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor.”

27. A plain reading of the clause would show that the Engineer-In-Charge or NBCC may withhold or retain, by way of lien, any sum of money due and payable to the contractor (in this case JRC) including security deposit returnable to the contractor/JRC against any claim of Engineer-In-Charge or NBCC in respect of monies due out of or under “any other contract” made by the contractor/JRC with the Engineer-In-Charge or NBCC. Furthermore, the money so withheld or retained by Engineer-In-Charge or NBCC can continue to be withheld or retained. The clause goes on to provide that the right to retain or withhold the said amount would terminate when claims arising out of the same contract i.e. the subject contract or any other contract are either mutually settled or determined by arbitration clause (by which one would understand, in the arbitration proceedings), or by the competent court. It is in these situations that the contractor/JRC can have no claim for interest or damages in respect of monies withheld or retained. The only caveat added is that the contractor should be duly notified. It is not the case of NBCC that the factum of withholding or the retention of the amount by way of lien either by Engineer-In-Charge or NBCC was as required under Clause 73.3 notified to JRC. On the other hand, recoveries were made in an *ad hoc* manner without any disclosed basis against RA Bills by NBCC, as found by the arbitral tribunal. Therefore, on a plain reading of Clause 73.3, the prohibition contained therein would not apply in the instant case. I find no reason, therefore, to interdict the conclusion reached by the arbitral tribunal which is that the prohibition to grant interest under Clause 73.3 was not

applicable in the facts and circumstances obtaining in the instant case. The judgments cited by Mr. Dass are distinguishable and therefore, will not help the cause of NBCC.

Rejection of Counterclaims:

28. According to NBCC, the counterclaims have been wrongly rejected. A perusal of the award shows that NBCC had lodged five (5) counterclaims. The fifth counterclaim pertained to costs of arbitration. The arbitral tribunal rejected the said claim whereby Rs. 20 lakhs was sought, *albeit*, belatedly by NBCC *vide* letter dated 15.07.2016 though details were furnished only for a sum of Rs.9,89,000/- payable towards fee of the arbitrator, its counsel, and T.A./D.A. expenses incurred by the representing officer, as also, travelling expenses incurred by the advocate and other miscellaneous expenses incurred in the conduct of arbitration proceedings.

29. The learned arbitrator rejected the claim for the following reasons:

“12.5.2 From the awards given by me on most of the claims of the Claimant and counter claims of the Respondent, it is evident that generally the Respondent has been found as lacking in the proper administration of the contract. Many of the claims made by the Claimant have been allowed by me, though partly, which goes to show that the arbitration could have been avoided on many of the issues/claims raised by the Claimant. In the overall analysis, I find that the Respondent have been mainly responsible for dragging the Claimant to come to the stage of arbitration.”

30. Clearly, the learned arbitrator was of the view that since NBCC had caused a situation to obtain which forced JRC to litigate, it was not entitled to any monies claimed under Counterclaim No.5. I see no reason to come to a different view.

31. As regards, counterclaim Nos. 1 to 4 are concerned, the common thread which runs through the discussion *qua* these claims in the award is that NBCC lodged these counterclaims as a counterblast; that there was no

reference made to these counterclaims before the Verma Committee; that in the 12th RA Bill and/or final bill, no adjustments had been made in respect of monies now sought to be claimed by way of counterclaims; and in the foreclosure agreement, nothing was mentioned with regard to JRC being responsible for breach or prolongation of the subject contract. Insofar as breach of contract and/or prolongation of the subject contract by JRC is concerned, the following recital in the foreclosure agreement sheds some light:

“AND WHEREAS due to difficult approaches, inter-section of rivers, nallahs, huge rock cutting deviations and diversions of road alignment etc., the works got hampered.”

32. Clearly, the parties were *ad idem* that delay in the execution of the subject contract occurred on account of the aforesaid reasons given in the recital to the foreclosure agreement and not necessarily due to faults attributable to JRC.

33. In my opinion, the reasoning given by the arbitral tribunal is in line with the material placed on record and therefore, calls for no interference.

34. For the foregoing reasons, I find no scope for interfering with the impugned award. The petition is, accordingly, dismissed. The pending application shall also stand closed. The parties shall, however, bear their respective costs.

(RAJIV SHAKDHER)
JUDGE

JULY 30 2019/pmc