

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 26, 2020

+ O.M.P. (COMM) 186/2019, I.A. 8723/2019

PONDICHERRY UNIVERSITY Petitioner

Through: Mr. Anil Seth and Mr. Parvesh
Khanna, Advs.

versus

B.E. BILLIMORIA & CO. LTD & ANR. Respondents

Through: Mr. Shyam D. Nandan and
Mr. Goutam Shivshekhar, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The challenge in this petition is to the Arbitral Award dated November 02, 2018, as corrected under Section 33 of the Arbitration & Conciliation Act, 1996 (for short, 'Act of 1996') vide order dated December 15, 2018.

2. Some of the ancillary facts, as pleaded by the petitioner are that the respondent No.2 (RITES LIMITED) for and on behalf of the petitioner, had floated a tender for '*Construction of Convention Centre having Auditorium of 2500 seating capacity and ancillary building for Puducherry University*' ('Project', for short). RITES issued a Letter of Award dated January 24, 2012 as well as entered into a Contract for execution of Project on April 4, 2012 ('Contract' for short) with respondent No.1. That as per the Contract, the Project was to be completed within eighteen months and original date of completion was August 06,

2013. RITES for and on behalf of the petitioner, got the work executed from the respondent No.1 and had taken all actions pursuant to the directions of the petitioner and had even filed pleadings, evidence for and on behalf of the petitioner before the learned Arbitrator.

3. It is the case of the petitioner that till March 28, 2016 i.e fifty months after Award of work, the progress of work by respondent No.1 was only 25.77%. The progress was slow due to inadequate deployment of resources. The respondent No.1 had failed to achieve targets. A show cause notice dated February 24, 2016 was issued by RITES to respondent no.1. Thereafter, vide termination notice dated March 28, 2016, RITES terminated the contract as the respondent No.1 had failed to mobilize resources and accelerate the progress of work. It is the case of the petitioner that the slow progress and failure of respondent No.1 is clear from minutes of meeting dated January 22, 2015, July 22, 2015, October 01, 2015 and the revision letters dated February 16, 2015, March 04, 2015, April 20, 2015, July 07, 2015, August 10, 2015, October 07, 2015, December 30, 2015, January 18, 2016 and February 02, 2016.

4. The Ld. Arbitrator was appointed by this Court. The respondent No.1 filed its claim statement before the learned Arbitrator. The RITES for and on behalf of the petitioner filed its Statement of Defence and counter claims. Both the parties filed admission / denial of each other's documents. Both the parties filed their evidence by way of affidavits and their witnesses were cross examined by the other side. The learned Arbitrator passed arbitral Award on November 02, 2018. Pursuant thereto, the

respondent No.1 moved application under Section 33 of the Act of 1996 and the learned Arbitrator passed the order on the said application on December 15, 2018.

AWARD:-

5. It may be stated here that the prayers made by the respondent No.1 (claimant before the learned Arbitrator) in its claim petition are the following:-

A. to declare that the Respondents have wrongfully and unlawfully terminated the Agreement No. RITES/CP//TC/PQ/PU/Pondi/Auditorium I Civil Package dated 03.04.2012 relating to the “Construction of Convention Centre having Auditorium of 2500 seating capacity and its ancillary buildings for Pondicherry University” at Pondicherry;

B. Declare, direct and award the reliefs claimed by the Claimant under Claim No.1 to Claim NO.16 under these facts and circumstances stated above, in the light of the provisions in the Agreement and the governing law of the land.

C. declare that the show cause notice for levy of liquidated damages issued by the Respondent No.1 vide Letter dated Ref RITES/ROC-II/CP/PU Auditorium /BEB/Gen/2012 dated 01.04.2016 is illegal, null and void.

6. As stated above, the RITES (R1 before Ld. Arbitrator) filed reply and counter claim on behalf of the petitioner, which were summarized by the learned Arbitrator as under:-

(1) Rupees 1,20,84,847.22/- towards payment against Final negative bill.

(2) Rupees 5,43,80,411.55/- towards additional cost for getting balance work completed at Risk & Cost of Claimant.

(3) Interest on Award amount i.e (1) Interest pendent lite; (2) Future / Post Award interest.

(4) Cost of Arbitration.

7. RITES resisted the claim by stating that there was no delay in performance of their obligation under the Contract, inasmuch as the Project site was handed over to respondent No.1 on February 07, 2012 and the drawings were also provided in time. RITES also stated that there was no delay in payment of the running bills to respondent no.1 and the delay was caused due to the slow pace, at which the respondent No.1 performed its work despite repeated reminders by RITES.

8. Based on the pleadings of the parties, the following issues were framed by the learned Arbitrator:-

1. Whether the arbitration proceedings are not maintainable against the Respondent No.1 in its individual capacity? (OPR)

2. Whether the Respondents are in breach of the Agreement dated 3rd April 2012? (OPC)

3. Whether the delay in execution of works under the Agreement was solely attributable to the acts and omission of the Defendants? (OPC)

4. Whether the termination of the Agreement by the

Defendants by their letter dated 28th March 2016 is illegal and contrary to the contractual terms? (OPC)

5. *Whether the Claimant is entitled to receive payment for the full value of the work done by it as detailed in the final measurements submitted by the Claimant to the Defendants vide its Letter dated 4th April 2016?* (OPC)

6. *Whether the Claimant is entitled to receive price escalation against work done under the Agreement?*

7. *Whether the forfeiture of the Claimants Earnest Money Deposit, the Security Deposit and the Bank Guarantees by the Defendants is illegal being contrary to the contractual terms and whether the Claimant is entitled to refund of amounts to the same?* (OPC)

8. *Whether the Claimant is entitled to receive outstanding monies from the Running Account (RA) Bills submitted by the Claimant?* (OPC)

9. *Whether the Defendants have unlawfully recovered interest on Mobilization Advance from the RA Bills submitted by the Claimant?* (OPC)

10. *Whether the Claimant is entitled to receive pre suit interest under the various heads as claimed?* (OPC)

11. *Whether the Claimant is entitled to receive interest pendent lite and/or future/post award interest at 18 percent per annum or at any other rate, and from which date?* (OPC)

12. *Whether the Claimant is entitled to a declaration that the Show Cause Notice for levy of liquidated damages issued by the Defendant No.1 vide letter dated 1st April 2016 is illegal, null and void?* (OPC)

13. Costs

14. Relief.

9. Vide order dated July 28, 2017, the following additional issue was framed by the Tribunal on the asking of RITES:-

15. Whether the Respondent No.2 is entitled to the counter claim and if so to what extent? (OPR)

10. The learned Arbitrator decided the issues in the Award in the following manner.

ISSUE NO.1

11. That RITES was acting as an agent of the petitioner (University) and thus, the proceedings were not maintainable against the RITES in its individual capacity. However, in view of the fact that RITES represented the petitioner in the capacity of an agent, the learned Arbitrator deemed it appropriate to refer RITES and the petitioner compendiously as “*respondents*” in the Award.

ISSUE NOS. 2 & 3

12. The learned Arbitrator was of the view that there was considerable delay caused by the petitioner / RITES in giving Good for Construction Drawings (GFCD); refusal to release interim payments on time as well as non-payment of steel fabrication. The learned Arbitrator held that the petitioner / RITES were in breach of the contract in terms of Section 8 Clause 7 and Section 8 Clause 11 of the GCC and the issues were decided in favour of the respondent No.1 herein.

ISSUE NO. 4

13. The learned Arbitrator, on the basis of findings on issue Nos. 2 and 3 held that the petitioner / RITES were not justified in issuing termination notice dated March 28, 2016. According to him, withholding interim payments, payments for steel fabrication as well as delaying the handing over of Good For Construction Drawings ('GFCDs' for short), delayed the Project and the fault for slow progress of work was attributable to the petitioner / RITES. This issue was decided in favour of the respondent No.1.

ISSUE NO. 12 & COUNTER CLAIM NO.2

14. Issue No.12 was decided in favour of the respondent No.1. It was held that the show cause notice dated April 01, 2016 for levying liquidated damages was not tenable being contrary to the terms of Contract. The learned Arbitrator rejected the counter claim No.2 of the petitioner / RITES.

ISSUE NO. 8

15. This issue is decided in favour of the respondent No.1, whereby the learned Arbitrator decided that the respondent No.1 is entitled to Rs.1,11,62,125/- wrongly withheld / deducted amount by the petitioner / RITES towards non-achievement of milestones like non-deployment of Technical Staff, non-submission of PF challans and delay in submission of CAR & Workmen compensation policy.

ISSUE NO. 6

16. This issue was decided against the respondent No.1, inasmuch as its claim for escalation was rejected.

ISSUE NO. 7

17. This issue was decided in favour of the respondent No.1 whereby the learned Arbitrator directed refund of Rs.27,20,000/- towards Earnest Money Deposit and a sum of Rs.36,41,587.92/- towards Security Deposit.

ISSUE NO. 9

18. The learned Arbitrator decided this issue in favour of the respondent No.1 and directed refund of an amount of Rs.95,59,762.56/- recovered by petitioner / RITES towards interest on mobilization advance.

ISSUE NO.5 & COUNTERCLAIM NO.1

19. The learned Arbitrator decided this issue in favour of respondent No.1 directing payment of Rs.30,22,173.31/- as per the final measurements of the work done. The counter claim No.1 was rejected.

ISSUE NO.15

20. The learned Arbitrator has, in view of findings to issue Nos. 5 and 12 rejected the counter claim of petitioner / RITES.

ISSUE NOS. 10 & 11

21. The learned Arbitrator declined the grant of pre-award interest to the respondent No.1 but awarded post Award / future interest if the awarded amount is not paid within a period of two months at the rate of 6.25% p.a. till the date of payment.

ISSUE NO.13

22. No cost of arbitration was granted to either party.

CLAIM NO.10

23. This claim was rejected.

ISSUE NO. 14

24. The learned Arbitrator granted respondent no.1 herein (claimant before the Arbitrator) a total amount of Rs.5,39,86,768.76 (as per the corrected Award dated December 15, 2018).

25. Having noted the conclusion of the learned Arbitrator in the Award, the submissions of the learned counsel for the parties are as under.

SUBMISSIONS ON BEHALF OF PETITIONER:-

26. It was the submission of Mr. Anil Seth appearing for the petitioner that till August 06, 2013, the respondent No.1 had executed work for Rs.4,22,60,480/- which is only 14.42% of the total value. He stated, the termination of the contract is, on account of failure on the part of the respondent No.1 to adhere to the timelines in completing the work.

27. On issue Nos. 2 and 3, he stated, the conclusion of the learned Arbitrator is contrary to the facts, evidence on record and conditions of the contract. According to him, the finding that the work was delayed due to the omission on the part of the petitioner / RITES to provide the GFCDs and delay in making payments, is without considering the breaches committed by the respondent No.1, inasmuch as there was (i) inadequate deployment of equipment, machinery and man-power by respondent No.1; (ii) inadequate deployment of material by respondent No.1; (iii) slow progress in work by respondent No.1.

28. According to Mr. Seth, documents like Site Order Book, Minutes of Meeting, notices and letters were placed on record

and the same were referred to, during the oral submissions and in the written arguments but were not considered and dealt with in the Award.

29. Mr. Seth has also stated that the finding that the work was delayed on account of the petitioner/ RITES in not providing on time the GFCDs and that there were repeated revisions is contrary to the facts. In fact, there is no finding of the learned Arbitrator as to, which work was delayed due to the delay in providing GFCDs. It was his submission that no delay in the work on account of alleged drawings were proved. Even otherwise this aspect was not relevant for the purpose of termination in March, 2016.

30. According to him, even the drawings referred to in para 102 of the Award were merely foundation drawings of building, which were provided in the year 2012 progressively. The same had no bearing on termination effected in the year 2016. The termination was on account of respondent no.1's failure to meet the targets and inadequate deployment of resources, which fact is clear from the minutes of meetings, letters and notices issued in 2015 and 2016 prior to the termination of the Contract and the failure of the respondent no.1 to take steps to deploy resources and expedite the progress. He laid stress on the fact that the respondent No.1 had not even proved the date of providing drawings, as stated in para 102 of the Award. The Ex.C-XXI, 'Drawing Issue Register', referred in Para 120 of the Award was denied by the petitioner / RITES and was not proved by respondent No.1. So, the learned Arbitrator has not based his findings on proved documents. He further stated that there was

only minor variation in the Central Line Plan issued in 2012, which was limited only to the work of boundary wall, which was not affecting execution of the main building work, which was abnormally delayed because of the respondent No.1. That apart, the drawings provided on January 19, 2015 were the revision incorporating location foundation for the Air Conditioning Chiller, which was outside the main building and had not affected / delayed any work. The said work was only minor in nature and was additional work.

31. It was also his submission that the learned Arbitrator ignored the cross examination of the petitioner's witness (RW-1, the site-in-charge) wherein the petitioner's witness has stated that the revision in drawings was very minor in nature and the same was revised at the request of respondent No.1. The witness was not confronted with any document or question thereafter. Mr. Seth has also submitted that the learned Arbitrator has failed to appreciate that the Hindrance Register jointly maintained by the parties at the site records hindrances of only four days on account of minor revision in the work. In view of this, the finding of the learned Arbitrator that there was a delay at the end of the petitioner / RITES in providing the drawings, is contrary to the facts. In fact, it was his submission that out of the total delay only four dates were at the end of the petitioner / RITES and balance was at respondent No.1's end. Mr. Seth also stated that the finding in para 104 of the Award that various works were inordinately delayed on account of revision and issue of drawings during the currency of the contract, which affected the progress of the work is contrary to the facts, based on assumptions. It was

further stated that there is no finding of the learned Arbitrator in para 106 that the petitioner was in breach of Clause 7 of Section 8 of GCC for not making the payment within the stipulated time. The learned Arbitrator relied upon Ex.C-29, which has been denied by the petitioner / RITES and respondent No.1 has not proved the same. He submitted that the finding of the learned Arbitrator in para 107 that the document R-32 is fabricated, is perverse.

STEEL WORK

32. It was the submission of Mr. Seth that the finding of the learned Arbitrator in para 112 of the Award that Entry 10.2 of the Contract did not shed any light on the manner in which the payment of steel work is to be released, is contrary to the said Entry and other conditions of Contract. Entry 10.2 provides that the payment is to be released after the fabrication steel structure is fixed in position and steel primer is applied. According to Mr. Seth, the learned Arbitrator failed to appreciate that Clause 11 of Schedule F to the Contract provides for CPWD Specifications, 2009 for CPWD-DSR items. He stated, the learned Arbitrator failed to appreciate Clause 10.2.4 of CPWD Specifications, 2009 provides that only the work "*as fixed in place*" shall only be measured. Thus, the measurement / payment has to be done only after the erection is completed and not merely partial fabricated work. He also stated that the learned Arbitrator also ignored the fact that the respondent No.1 was released advance against the material brought at site, in terms of Clause 10B to the extent of 90% of the assessed value material and claimant was not entitled for any other payment till execution.

TERMINATION OF CONTRACT

33. Mr. Seth's submission was also that the learned Arbitrator has failed to appreciate that the progress of the work by the respondent No.1 was poor since the Award of Contract till the date of termination of the Contract. He also stated that the learned Arbitrator has held contrary to the facts and documents on record that termination vide letter dated March 28, 2016 is illegal and contrary to the terms of the Contract.

34. Mr. Seth's submission was that the learned Arbitrator's conclusion on issue No.12 and counter claim No.2 are perverse, wrong, incorrect and contrary to the facts on record. The findings of the learned Arbitrator that petitioner / RITES had failed to establish any breach on the part of the respondent no.1 and respondent No.1 has suffered damages, is contrary to the facts on record. In fact, he stated that the learned Arbitrator has failed to consider that the respondent no.1's deployment of man-power, machinery at site was inadequate. The failure is recorded in minutes of meeting, letters and documents and site order book. It was his submission that none of the documents were considered by the learned Arbitrator. It was his submission that thus, the petitioner is entitled to liquidated damages and additional cost for getting the work executed at the risk and cost of the respondent No.1.

35. Mr. Seth has also stated that even the findings of the learned Arbitrator on issue No.8 is perverse. He stated that the petitioner / RITES had made the deduction towards non-deployment of Technical Representative and Dy. Technical Representative in terms of Clause 36(4) read with Schedule F.

The said deductions were made in RA bill, which was accepted by respondent no.1, as it did not object to the same. The learned Arbitrator has ignored the letter of respondent No.1 dated June 12, 2015 (Ex.R-62) whereby it had requested RITES to defer the deduction. Thus, the refund of Rs.20,00,000/- by the learned Arbitrator is unjustified.

36. Mr. Seth had stated even the Award of the learned Arbitrator for release of Rs.2,58,000/- towards non providing laboratory test by the respondent No.1 is bad. He stated that the learned Arbitrator has wrongly stated that the petitioner / RITES has not referred to any provision of the Contract under which deductions were made. According to Mr. Seth, the petitioner / RITES had referred to Clause 10A of the contract, which cast an obligation on the respondent No.1 to get the lab test of the material brought at site. As the respondent No.1 had failed to get the materials tested, the petitioner / RITES deducted the amount from the RA bills. At no stage, did the respondent No.1 object to the deductions nor did respondent No.1 demonstrate that it got the material tested. Mr. Seth also stated, even with regard to payment of provident fund, respondent no.1 did not submit any challan showing the deposit, when in terms of Clause 19B, the obligation is of the respondent No.1.

37. Even on issue No.6, he stated that the calculation by respondent No.1 of Rs.14,87,281.29/- as recoverable from the petitioner, is not maintainable as respondent No.1 failed to substantiate the computation of the amount and in any case, it is contrary to Ex.RW-3/41, which is the final bill prepared by respondent No.1 and which was proved by the witness of the

petitioner / RITES.

38. On issue No. 7, Mr. Seth had stated that the conclusion of the learned Arbitrator is untenable, inasmuch as the termination being valid, the encashment of Performance Bank Guarantee, earnest money, security deposit is justified.

39. On issue No.9, Mr. Seth has stated that the respondent No.1 is not entitled to interest under Clause 10B(ii) of GCC on mobilization advance as the same is also payable irrespective of whether the claimant / respondent no.1 is in breach of the contract or not. Even otherwise, it is the case of the petitioner, that the respondent no.1 was in breach.

40. On issue No.5 and counter claim No.1, he stated that the conclusion is contrary to the facts as the learned Arbitrator failed to appreciate that the said bill is in negative. Final bill was proved by the petitioner / RITES and is exhibited as Ex.R-46. Finally, he stated that the rejection of counter claim, is contrary to the facts, contractual conditions and the Award is liable to be set aside and counter claim needs to be granted.

41. Mr. Seth also relied upon the judgment of the Supreme Court reported as **2004 (5) SCC 314, Satyanarayana Brothers Pvt. Ltd. vs. T.N. Water Supply & Drainage Board** to contend that if the documents are not considered then the conclusion is perverse and need to be set aside.

42. On the other hand, Mr. Shyam D. Nandan, learned counsel for the respondent no.1 would submit that the dispute arose from Contract dated April 03, 2012 entered into between the petitioner acting through its Power of Attorney holder and agent i.e. RITES and respondent No.1, whereby the respondent

no.1 was to construct an auditorium within the premises of the petitioner. The RITES was overseeing the Project of the petitioner. He contends that the Project overshot its timelines owing to various actions / inactions on the part of the RITES and the petitioner, which led to undue delay. The respondent No.1 invoked the arbitration when the Contract was illegally terminated by the RITES on March 28, 2016. RITES contested the arbitral proceedings on behalf of both itself and the petitioner till the stage of final arguments. The petitioner made its independent entry into the proceedings only at the stage of final arguments. The petitioner has not filed pleadings or adduced any independent evidence on its own before the learned Arbitrator and has relied entirely upon the evidence and pleadings of respondent No.2/RITES. Ironically, the petitioner is the one who has challenged the Award.

43. According to him, the respondent No.1 based its claim on the ground of delay attributable to RITES and the petitioner. The said ground along with the findings of the learned Arbitrator, are narrated in the chart reproduced as Annexure-A to the written submissions, which depicts the following:-

- (i) *Delay in handing over the project site - Not accepted*
- (ii) *Delay in handing over FC Drawings - Accepted*
- (iii) *Delay in payment of RA Bills/ deducted
payment-Accepted*
- (iv) *Delay in making payment for fabrication of
structural steel -Accepted*
- (v) *Delay in approving electrical sub-contractor*

Etc - Not accepted

44. According to Mr. Nandan, it is clear from the above that only three of the five grounds raised, have been allowed by the learned Arbitrator while the rest have been dismissed. He stated that the respondent No.1 had laid a lot of emphasis on the delay in handing over GFCDs by the RITES. The learned Arbitrator has concluded that there was indeed delay in handing over the GFCDs. This finding is made on the basis of the admission of the RITES' own witness i.e. RW-1 who stated as under:-

"Q 8: Was the said Drawings revised by the Respondent after handing over to the Claimant?"

Ans: No. Except for some minor clarification.

Q9: (Shown Para22 at page 23 of SOD). The Respondent No.1 has stated that the Drawings were handed over to the Claimant on 29.02.2012. Is this a wrong statement? '

Ans: No. The dates are based on Drawing Issue Register.

Q10: (Shown Exh. C-100 of Claimant's additional documents). Is this the final GFC Drawing for foundation handed over by the Respondent No.1 to the Claimant?

Ans: Yes.

Q 11: I put it to you that this was handed over to the Claimant on 04.05.2012. What do you have to say?

Ans: I cannot answer. I will have to check and revert.

Q.12. Can you tell me how many times the GPC Drawings for foundation were revised?

Ans: I cannot tell the actual number. The GFC Drawings were revised on the request of the agencies working at the site.

Q13: I put it to you that the Respondent No. 1 revised the GFC Drawings for foundation on its own without any request from the Claimant. What do you have to say?

Ans: In most of the cases, RITES would not have revised any Drawings, including GFC Drawings for foundation, on its own.

Q15: I put it to you that the GFC Drawings for foundation were revised three times by the Respondent-No. 1 on its own volition. What do you have to say?

Ans: I cannot say. However, if any modifications or revisions were carried out on the volition of Respondent No.1, they were of a very minor nature.

Q16: I put it to you that one of the revisions made to, the GFC, Drawings for foundation was the increase of foundation depth from 1.5 M to 2 M. What do you have to say?

Ans: It is incorrect. The depth of 2M for foundation was specified from the beginning, in the GFC Drawings for foundation.

45. Mr. Nandan stated, the petitioner has relied on a witness who has given evidence destructive to its own case. According to Mr. Nandan, the respondent No.1's case was that the delay in the present case caused 'financial choking' inasmuch as the petitioner / RITES; (a) intentionally delayed payment of RA Bills raised by the respondent No.1 in the most arbitrary fashion and; (b) the petitioner / RITES delayed the making of payment / non-payment of charges for fabrication of structural steel.

46. **Delay in payment of running bills.**

It was the submission of Mr. Nandan that the petitioner / RITES paid the RA bills after drastic deductions and that too after long periods of delay. The reasons attributed by them for such deductions and delay are wholly extraneous to the contract. The acts of the petitioner / RITES severely choked the cash flow of the respondent no.1 and thereby hampered the progress of the work drastically.

47. He stated that relevant contractual clauses are clause 7 of Section 8 of the GCC read with schedule F of the Contract. As per these provisions, the respondent no.1 is entitled to interim payment if the gross work done together with net payment / adjustment of advances for material collected since last such payment is more than the amount stipulated in schedule F, i.e., Rs. 30 Lacs. The Engineer-in-Charge may verify the bills so submitted by taking appropriate measurements of the work where necessary. However the clause also expressly stipulates that 75% of the bill amount would be paid in three working days. The remaining amount of the bill is envisaged to be paid within 15 days. As per clause 7 of Section 8 of the GCC, the petitioner /RITES had to pay the interim bills if the measurements prima facie were correct. It could take detailed measurements after making payments and thereafter if any discrepancy was found the amount paid could be deducted from the RA bill. He stated that this procedure was never adhered to.

48. According to Mr. Nandan it was the case of the petitioner / RITES that the RA bills submitted were either defective or inflated and consequently the respondent no. 1 was asked to

resubmit the bills many times before the money was finally released. He stated that the plain reading of clause 7 of Section 8 of GCC makes it clear that at the time of releasing amount claimed in RA bills all that Engineer-in-Charge had to see was whether the measurements in the bills were prima facie correct. That apart it was his submission that the measurement book which was required to be maintained was not even produced before the learned Arbitrator. He also stated that the RA bills were paid only after making several deductions which were not in accordance with the Contract. He justified the conclusion of the learned Arbitrator on the aspect of the delay in payment of running bills.

49. Similarly, on the issue of payment for structural steel fabrication, he stated that it was the respondent No.1's case that the Contract contains a composite bill of quantities in relation to the structural steel component of the work. This entry envisages a composite / block rate to be paid in respect of three distinct components of the work relating to structural steel (1) procurement (2) fabrication and (3) erection. In relation to procurement, the petitioner / RITES had paid money by way of secured advance / mobilization advance as per the terms of the contract. In relation to fabrication, the petitioner / RITES had paid part rate for the work done of 73 metric tones covered by the RA bills raised till RA bill No. 8 even though such structure has not been erected. Thus, initially, the petitioner / RITES were not interpreting the BOQ entry to disallow the payment of part rate for the work done in respect of the distinct components of structural steel. Thereafter, all of a sudden, the petitioner /

RITES stopped paying for the fabrication component of the structural steel work in the subsequent bills taking the stand that the payment will not be made unless the fabricated steel is also erected. He stated the non-payment of the balance bills was an afterthought which action has been rightly found illegal by the learned Arbitrator and resulting in payment in favour of the respondent no.1 in the impugned award. According to him, the rest of the claims which have been awarded by the learned Arbitrator are also justified in the facts of this case. He submitted that the learned Arbitrator has passed a balance Award allowing only some of the respondent No.1's claims. The claims, which have been allowed are essentially by way of restitution.

50. According to Mr. Nandan, counter claims of the petitioner / RITES cannot stand, as it is proved that the breach was on the part of the petitioner / RITES. The learned Arbitrator had also disallowed the counter claims of the petitioner on the ground that the same were not properly instituted. The petitioner cannot undo such a flaw at this stage. Thus, he seeks the dismissal of this petition.

51. Having heard the learned counsel for the parties and perused the record, the only issue which arises for consideration is whether the learned Arbitrator was justified in passing the impugned Award. It may be stated here, in substance the justification of the learned Arbitrator in allowing some of the claims of the respondent no.1 and rejecting the counter-claims of petitioner / RITES is primarily that the termination of the contract by petitioner / RITES is unjustified. Learned Arbitrator has held (i) there was delay in interim payment of running

account bills (ii) the delay in providing the drawings (iii) refusal to make part payment in structural steel fabrication. He also held that the reasons for not adhering to the timelines cannot be attributed to the respondent no.1 herein.

52. Now I shall deal with the submissions made by the learned counsel for the parties on the findings of the learned Arbitrator on the aforesaid three aspects.

53. **Delay in providing the drawings.**

The case of respondent no.1 before the learned Arbitrator was that the additional delay was caused due to subsequent revisions in the approved drawings provided by the petitioner / RITES. It was the case of the respondent no.1 that it had completed 98.2 meters level slab on November 5, 2014 as per revision 1 drawing. Thereafter, respondent no.1 had invited the petitioner / RITES for inspection of the shuttering and reinforcement works, at which stage, petitioner / RITES instructed respondent no.1 to put the concreting on hold stating that further revisions were anticipated in the details of the reinforcement. The petitioner / RITES thereafter issued revised drawings on November 28, 2014 which led to delay in concreting of 98.2 meters level slab and columns above 98.2 meters from November 5, 2012 to November 28, 2014.

54. Whereas the case of the petitioner / RITES was that there is no delay in issuing the drawings and specifications to the respondent no.1 pertaining to various parts of the project. The petitioner / RITES placed reliance on the Drawing Issue Register (R-65) and its letter dated July 24, 2013 (Ex.R7) addressed to respondent no.1 to show that the drawings for the Foundation

work were handed over to respondent no.1 on February 29, 2012; the drawings for Plinth Beam Level on March 24, 2012 and drawings above FFL were issued to respondent no.1 on March 6, 2012 and March 21, 2012. It was submitted that the drawings for Beam Reinforcement Steel were revised by the petitioner / RITES, however, there was inconsequential delay of only 4 days due to the aforesaid revision.

55. On this aspect, learned Arbitrator has held (i) Clause 11, Section 7 of the GCC states that “work to be executed in accordance with the specifications, drawings and order etc.”; (ii) letters dated November 6, 2012, December 3, 2012 and December 6, 2012 of the respondent No.1 showed that the demand raised by respondent No.1 for drawings were not denied by the petitioner / RITES, rather the petitioner / RITES assured the respondent No.1 that drawings would be issued shortly; (iii) the witness of respondent No.1 filed Drawing Issue Register to show drawings were issued with inordinate delay and revisions were carried out; (iv) the petitioner / RITES had filed on record the “Drawing Issue Register” to show issuance of drawings on time; (v) RW-1 witness of petitioner / RITES admitted, revisions were made in the drawings by the petitioner / RITES even after drawings were issued to respondent no.1; (vi) the Drawing Issue Register of petitioner / RITES do not record the revisions and thus the Register cannot be relied upon; (vii) from the Drawing Issue Register of respondent No.1 (C-XXI) it is clear that drawings underwent several revisions; (viii) for a Project of this nature, it is important that the drawings are issued on time

without any modifications. If modifications are required, sufficient extension of time should have been granted.

56. I have seen para 102 of the Award wherein the learned Arbitrator had reproduced the contents of Ex.C-XXI of the respondent no.1 which gives the dates when the drawings were given to respondent no.1 and the revisions carried out.

57. The plea of the petitioner / RITES is that the said Ex.C-XXI was not proved by the respondent No.1 in its affidavit, despite the fact same was specifically rejected by petitioner / RITES in admission / denial statement. In this regard, it may be stated that the said exhibit was produced by respondent no.1's witness (CW-3) as a Drawing Issue Register only to show the date of issuance of drawings and the revisions carried out. If this document, i.e., Ex-C-XXI is read in conjunction with the statement of the petitioner / RITES witness Mr. R. Ramakrishnan (RW-1) who has in his deposition has stated / accepted that the modifications or revisions were carried out, then the learned Arbitrator rightly accepted Ex.C-XXI and rejected Ex.R-65, with which I see no illegality.

58. From the perusal of Ex.C-XXI it is seen that most of the drawings were issued on February 29, 2012, March 21, 2012, March 24, 2012, May 4, 2012 and December 26, 2012. In so far as the drawings for Central Line Plan are concerned, they were initially issued on February 29, 2012, but revised on different occasions and the last one being on January 19, 2015, which is after almost three years from the date of first issuance. So, it follows that the GFCDs were delayed between two months to almost three years. It is irrelevant to say that the drawings of

Central Line Plan, do not relate to the main building but boundary wall. The fact is the boundary wall also constitutes the project and the drawings related to the said plan, were revised only on January 19, 2015, i.e., after almost three years.

59. The plea of Mr. Seth was that the said drawings were not relevant for holding failure at petitioner's end and termination vide notice dated March 28, 2016, which was on account of respondent No.1's failure in expediting the progress of work, failure to meet the target and inadequate deployment of resources is not appealing as the delay in furnishing GFCDs to respondent No.1 by petitioner / RITES may have resulted in failure to expedite the progress of work. In other words, the delay has resulted / contributed in the slow progress of work which cannot be attributed to respondent No.1 but to petitioner / RITES. Therefore, the conclusion of the learned Arbitrator that the petitioner / RITES issued the drawings for various works after inordinate delay and carried out the revisions on many occasions which severely affected the progress of the work is justified.

60. **Delay in interim payments**

On the aspect of delay in interim payments, the findings, of the learned Arbitrator are as under:

1. Clause 7 of Section 8 of the GCC read with Schedule "F" of the contract stipulates that once the bill is submitted the petitioner / RITES is obligated to release an amount equivalent to 75% within three days from the date of presentation of the bill and the balance amount within 15 days.

2. The defence of the petitioner / RITES is that there was a delay in assessing the amount payable to respondent no.1 as most of the bills were lacking supporting documents or that the bills as submitted were inflated and incorrect.
 3. Ex.R-32 which is a “Record of Statement of Bills” is fabricated in the absence of any endorsement from respondent No.1 or appropriate comments of respondent no.1 on the RA bills.
 4. The plea of petitioner / RITES that they are contractually bound to disburse the payment of bills only when they cumulatively reach Rs.30 Lacs was rejected by stating the petitioner / RITES should have waited till that time and release 75% of the amount in three days and rest in 15 days.
 5. In the event of irregularities came to be discovered by petitioner / RITES in the bills already paid out, it would have been possible for it to claim adjustments in the subsequent bills.
 6. There was a positive obligation on the petitioner / RITES to adhere to the timeline of 3 /15 days. In any construction Project of this nature, interim payments to the contractor are very vital.
 7. The RA bills released were after inordinate delay and after making unfair deductions which the petitioner / RITES have not been able to explain.
61. It was the contention of Mr. Seth, as noted above, that the finding is not based on any proved documents placed by respondent no.1 on record and further the finding of the learned Arbitrator that Ex.R-32 is a fabricated document is a perverse

finding. That apart, the case of the petitioner in the pleading as noted by the Id. Arbitrator is that the delay has taken place in assessing the amount payable to the respondent No.1, as most of the bills submitted were lacking in supporting documents or that the bills submitted were inflated and incorrect and the petitioner / RITES was contractually bound to disburse payments of bills only when they reach cumulative value of Rs. 30 Lacs.

62. On the first plea, the petitioner / RITES relied on their communications to respondent No.1 dated August 14, 2012 and October 27, 2012 (against first RA bill) wherein it has been stated that the bills are improper and have infirmities. Similarly, reliance was also placed on communications dated October 16, 2012, October 31, 2012, November 21, 2012 and November 28, 2012 (against second RA bill) to state that the infirmities in the RA bill no.2 were informed to respondent no.1. In fact a statement giving details of the bills / remarks of petitioner / RITES was exhibited by the petitioner / RITES as Ex.R-32.

63. The aforesaid plea of the petitioner / RITES appears to be appealing on a first blush, but on a deeper consideration, I find that Clause 7 of Section 8 of the GCC inter alia stipulates (1) all interim payments shall be regarded as payment by way of advances; (2) any certificate given by the Engineer-in-Chief relating to the work done or materials delivered forming part of such payment may be modified or corrected by any subsequent certificate or by final certificate and shall not by itself be conclusive that any work or materials to which it relates is / are in accordance with the contract /

specifications; (3) The Engineer-in-Chief in his sole discretion on receipt of written request from Contractor and on the basis of a certificate from Engineer may make interim advance payment without detailed measurement of work done, at 75% of the assessed value. The advance payment so allowed shall be adjusted in the subsequent interim bill by taking detailed measurement thereafter; (4) If in the opinion of the Engineer-in-Chief, it is found that the amount for interim advance payment claimed by the Contractor was excessive, the facility for interim advance payment shall be withdrawn.

64. Given the sweep of Clause 7 of Section 8 of GCC, it is clear that any payment made shall be treated as advance subject to final determination of the measurement of work that too as per Contract and specifications. It follows that every payment made against RA bill was provisional. So, given nature of said clause of the Contract, a positive obligation is on the petitioner / RITES to pay 75% of the bill within three days and balance 25% within 15 days. There is dispute that the stipulation / period was not adhered to. It is precisely for the above reasons, the learned Arbitrator has interpreted the provisions of the contract to say the following:

“Under the Contract, there was a positive obligation cast on the Respondents to adhere to the time line of 3 days (for 75%) and 15 days (for the balance). It is emphasized that in a construction project of a nature such as this, interim payments to the Contractor are

very vital. The delay on this account is detrimental to the progress of the work. In the instant case, although the payment of RA Bill was released, however, the same was done after an inordinate delay and after making unfair deductions, which the Respondents have not been able to explain. Accordingly, I find that the Respondent was in breach of Clause 7, Section 8 of the GCC for not making the payment within the time period stipulated therein.”

65. In so far as the stand of the petitioner / RITES that the bills were not timely paid because of various infirmities / shortcomings is concerned, the infirmities / shortcomings so pointed out have been rejected by the learned Arbitrator as the petitioner / RITES have filed a statement giving such details but without filing on record the response by the respondent No.1 to such infirmities / shortcomings. Similar is the position now as well, inasmuch as the petitioner / RITES have filed only the communications (as referred above) sent to respondent No.1 without the response of respondent no.1 on the same. I see no infirmity in the decision of the learned Arbitrator as the response of respondent no.1 would become relevant to assess the justification of the petitioner / RITES to raise such objections / infirmities. Finally, I may state here that the interpretation given by the learned Arbitrator to clause 7 of Section of GCC is a possible interpretation and cannot be interfered with by this court in these proceedings. The conclusion of the learned Arbitrator on this aspect is upheld. Ordered accordingly.

66. **Non-payment of structural steel fabrication charges:**

On this plea of the respondent no.1, learned Arbitrator has stated as under:

1. The Petitioner / RITES witness (RW1) during his cross-examination admitted that 73 MT of fabricated steel was not “erected” at the time of certification of RA bill No.8 and yet the payment for the same was made.
2. The petitioner / RITES had stopped making the payment towards fabrication of steel after RA bill No. 8 on the premise that the contract does not envisage payment of fabrication of steel as a separate item.
3. The conduct of the petitioner / RITES is an afterthought belied by the petitioner / RITES contemporaneous and spontaneous understanding of the Contract.
4. The Provisions of contract are silent on the aspect of mode and the manner in which the payment with respect to the steel work (workmen, fabrication, erection) is to be released.
5. Entry 10.2 of the contract do not shed any light on the manner in which the payment of steel work is to be released. In the absence of any specific provision to be followed for payment with respect steel work, the Tribunal has to take note of the practice followed, i.e., payment was made with respect to 73 MT.

67. The submission of Mr. Seth in this regard was that the conclusion of the learned Arbitrator is contrary to clause 10.2.4 of the CPWD specifications, which were brought to the notice of the learned Arbitrator, who failed to appreciate the same. This Court is of the view that to decide the issue, it is necessary to reproduce clause 10.2 of the CPWD specification, which reads as under:

“10.2 STEEL WORK IN SINGLE SECTION FIXED INDEPENDENTLY WITH CONNECTING PLATE

10.2.0 *The steel work in single section of R.S. joists, flats, Tees Angles fixed independently with or without connecting plate, is described in these clauses.*

10.2.1 Fabrication

The steel sections as specified shall be straightened and cut square to correct lengths and measured with a steel tape. The cut ends exposed to view shall be finished smooth. No two pieces shall be welded or otherwise jointed to make up the required length of member.

All straightening and shaping to form, shall be done by pressure. Bending or cutting shall be carried out in such a manner as not to impair the strength of the metal.

10.2.2 Painting

All surfaces which are to be painted, oiled or otherwise treated shall be dry and thoroughly cleaned to remove all loose scale and loose rust. Surfaces not in contact but inaccessible after shop assembly, shall receive the full specified protective treatment before assembly. This does not apply to the interior of sealed hollow sections. Part to be encased in concrete shall not be painted or oiled. A priming coat of approved steel primer such as Red Oxide/Zinc Chromate primer conforming to IS 2074 shall be applied before any member of steel structure are placed in position or taken out of workshop.

10.2.3 Erection

Steel work shall be hoisted and placed in position carefully without any damage to itself and other building work and injury to workmen. Where necessary mechanical appliances such as lifting tackle winch etc. shall be used. The suitability and capacity of all plant and equipment used for erection shall be upto the satisfaction of the Engineer-in-charge.

10.2.4 Measurements

The work as fixed in place shall be measured in running metres correct to a millimetre and weights calculated on the basis of standard tables correct to the nearest kilogram. The standard weight of steel sections shall conform to IS 808 with tolerance in sizes as per IS 1852. Tolerance in weight is given in Table 10.3. Steel sections shall be acceptable within tolerance limits. Payment for steel sections shall be made as per actual weight within tolerances. Sections having weight on higher side than permissible tolerance, may be acceptable but payment shall be made on the basis of standard weight only. Steel sections having weight variations lower side than permissible variation shall not be acceptable.

Unless otherwise specified, weight of cleats, brackets, packing pieces, bolts, nuts, washers, distance pieces, separators, diaphragm gussets (taking overall square dimension) fish plates, etc. shall be added to the weight of respective items. In riveted work allowance, is to be made for weight of rivet heads. Unless otherwise specified an addition of 2.5% of the weight of structure shall be made for shop and site rivet heads in riveted steel structures.

No deduction shall be made for rivet/ or bolt holes (excluding holes for anchor or holding down bolts).

Deduction in case of rivet or bolt hole shall however be made if its area exceeds 0.02 sqm.

The weight of steel sheets, plates and strips shall be taken from relevant Indian standards based on 7.85 Kg/m² for every millimetre sheet thickness. For rolled sections, steel rods and steel strips, weight given in relevant Indian Standards shall be used.

10.2.5 Rate

Rate includes the cost of labour and materials required for all the operations described above.

68. Having noted clause 10.2, it is clear that the same relates to steel work in single section fixed independently with connecting plate. The said work consists of three variations, i.e., (i) fabrication (ii) painting and (iii) erection. Clause 10.4.2 on which reliance has been placed by Mr. Seth refers to the manner in which measurement of the whole work shall be taken if the work were fixed / erected. That apart, I note clause 10.2.5 stipulates the rate to include the cost of labour and materials required for all the operations mentioned above.

69. It is a conceded case that the cost of the material, i.e., of 262 MT steel was paid by the petitioner / RITES. What was claimed by respondent no.1 was the fabrication charges which entail straightening / cutting / smoothening of the steel and not the charges for painting and erection as that stages have yet not reached. There is nothing in clause 10.2 which bars payment of charges for each operation. In this regard, the following observation of the learned Arbitrator in Para 112 of the impugned award is of some relevance:

“It is imperative to note that the provisions of contract are silent on the aspect of the mode and the manner in which payment with respect to steel work (procurement-fabrication-erection) is to be released. Entry 10.2 at Page 200 and 201 of the Contract do not shed any light on the manner in which the payment for steel work is to be released. In the absence of any specific provision to be followed for payment with respect to steel work, the Tribunal will have to take note of the practice followed by the Parties.”

70. That apart, I find that the learned Arbitrator has only held that respondent no.1 is entitled to receive payment towards

fabrication of steel even though the same has not been erected. It means, the learned Arbitrator has not directed payment for painting / erection as the said stages have not yet come. The said conclusion of the learned Arbitrator is justified and needs no interference.

71. In so far as the finding of the learned Arbitrator on the termination of the Contract vide letter dated March 28, 2016 is concerned, it was the submission of Mr. Seth that the finding on termination letter is illegal, is contrary to the fact and voluminous record.

72. In this regard, I deem it appropriate to reproduce the finding of the learned Arbitrator in para 132 of the impugned Award. The same reads as under:

“132. The Respondents have mainly cited slow progress of work for terminating the Contract. The Claimant has persistently maintained that due to paucity of finance (resulting from non-payment of R.A. Bills), it was unable to mobilize plant, machinery, material, man-power etc. on the site which resulted in slow progress of work' The Tribunal, for the reasons record above '(See Issue 2 & 3 'above), has held that the Respondents were not justified in withholding, interim payments, payments for steel fabrication as well as delaying in handing over GFCDs, which delayed the Project. Resultantly, the Termination Notice, which was issued for the reason of slow progress of work, is untenable and illegal as the fault for the slow, progress of work lies with the Respondents.”

73. It is seen from the above that the learned Arbitrator has primarily held that the termination is bad because of his findings on issue nos. 2 and 3. I have already held that the findings of the learned Arbitrator on the issue nos. 2 and 3 as justified. So, it

necessarily follows that the finding of the learned Arbitrator on the termination that it is illegal has to be upheld.

74. In so far as the challenge to the findings of the learned Arbitrator on issue no.12 and counter-claim no. 2 are concerned, the same primarily pertains to show cause notice dated April 1, 2016 issued by the petitioner / RITES for levying liquidated damages and counter-claim for Rs.5,43,80,411,57/-, i.e., the cost incurred by the petitioner / RITES for getting balance work executed. Learned Arbitrator has in Paras 139 to 141 of the impugned Award held as under:

“139. There is no gainsaying that Clause. 2 of Section 8 of GCC has no application where delay is caused because of failures on the part of the Respondents on the predication of the adage that no person can be allowed to take advantage of its own wrong. Similarly, the Respondents cannot seek refuge of Section 73 of the Indian Contract Act for being compensated of the alleged expenditure that it may have incurred in completion of the Project, when the Respondents have failed to establish the breach of the Contract by the Claimant. The Respondents may have been entitled to compensation / damages had it been successfully proved that the delay in completion was attributable solely or at least primarily to the Claimant.

*140. It must be noted that at the time when parties entered into Contract, it was intended that time should be of the essence of the contract and the work should be completed by 06.08.2013. However, repeated extensions of time were admittedly granted by the Respondents. Thus, as per the settled principle law, which was enunciated by the Hon'ble Supreme Court in **Hind Construction Contractors v. State of Maharashtra (1979) 2 SCC 70**, the Tribunal is of the opinion that time has ceased to be of essence in the performance of this Contract.*

*141. The law relating to liquidated damages has been settled in India by the Hon'ble Supreme Court in **Kailash Nath Associates Versus Delhi Development Authority & Anr.**, (2015) 4 SCC 136. It is trite to state that compensation can only be given for damages or loss actually suffered and proved. In order to recover/impose liquidated damages in terms of Clause 2, Section 8 of the GCC, it was necessary for the Respondents to establish and quantify, that it had suffered losses by reason of delay in completion of the construction of the Convention Centre. Since, the Respondents have failed in its endeavour to establish any breach on behalf of the Claimant as well as that it had suffered damages, I am not inclined to hold that the imposition of liquidated damages by the Respondents was unjustified."*

75. From the above, it is clear that the learned Arbitrator has decided Issue No.12 in favour of respondent No.1 and also rejected the counter claim based on the finding that the delay in executing the Contract was caused because of the failures on the part of the petitioner / RITES and they cannot take advantage of their own wrongs. I see no reason to interfere with such findings.

76. In so far as issue no. 8 with regard to entitlement of respondent no.1 to receive outstanding monies, which have been withheld / deducted from the running bills is concerned, the plea of Mr. Seth was that the same is contrary to the invoices and documents on record. I find that the learned Arbitrator has awarded the amounts under different heads, i.e., (i) non-deployment of Principal Technical Representative / Deputy Technical Representative; (ii) contractors all risk policy / Workmen Compensation Policies; (iii) non-submission of PF challans / mandatory lab tests. In so far (i) above is concerned, it was the submission of Mr. Seth that the deduction has been

made towards non-deployment of Principal Technical Representative and Deputy Technical Representative in terms of clause 36(4) read with Schedule “F”. According to him, in fact respondent No.1 had not at any stage objected to the said deductions. He has relied upon a letter dated June 12, 2015, Ex.R-62 of respondent No.1 in that regard. Learned Arbitrator while allowing the claim in favour of respondent no.1 has stated as under:

“The Respondents averment regarding non-deployment of Principal Technical Representative has remained critically unsubstantiated by evidence and thus, no deductions on this account can be allowed from the amounts due to the Claimant.”

77. Suffice, it would be to state Mr. Seth is right in contending that the respondent No.1 had not objected to the deductions. The respondent no.1 had not contested the deductions by stating that Principal Technical Representative or Deputy Technical Representative were in fact deployed at the site. Having not said anything with regard to deployment of Technical Representative / Deputy Technical Representative, presumption is that they were not deployed. Hence, the award of the claim directing the return of the money by the learned Arbitrator is liable to be set aside as the same has been granted without considering the effect of the letter dated June 12, 2015 and similar letters written by respondent no.1.

78. In so far as (ii) above is concerned, learned Arbitrator in Paras 148 to 150 has stated as under:

“148. Clause 47 of the Contract titled "Insurance to be taken by the Contractor & Employer to be indemnified",

provides that the Contractor shall affect Contractor's all risk insurance policy (CAR Policy) in the joint names of the Employer / Respondent and the Contractor/Claimant. Clause 47.3 titled 'Workmen Insurance' provides that the Employer shall not be liable for any payment in respect of any damage or compensation payable according to law in respect or in consequence of any accident or injury or loss of life of any workman or other person in the employment of the Contractor or any Sub-Contractor, except an accident or injury resulting from any act / or default of the Employer / Respondent.

149. Further, Clause 47.4 is titled "Recovery from the Contractor", which reads as under:

"Without prejudice to the other rights of the Employer against the Contractor in respect of such default, the Employer shall be entitled to deduct from any sums payable to the Contractor the amount of any damages, compensation costs, charges and other expenses paid by the Employer and which are payable by the Contractor under this clause. "

150. It is pertinent to note that the Respondents have not been able to show that he suffered any damages for non-compliance of the CAR and Workmen Compensation Policies or had made any payment towards compensation costs or any other charges which were otherwise payable by the Claimant. In the absence of any relevant document or evidence on this issue, I am of the view that the Respondents wrongfully withheld an amount towards delay in submission of the CAR and Workmen Compensation policy.

79. I agree with the aforesaid conclusion of the learned Arbitrator inasmuch as the petitioner / RITES have not been able to show that they suffered any damages for non-compliance of contractors' all risk policy / Workmen Compensation policies. In fact, on perusal of clause 47.4 as reproduced by the learned

Arbitrator, it is clear that the amount has to be deducted only if petitioner / RITES has suffered cost / damages.

80. In so far as (iii) above is concerned, it is the conclusion of the learned Arbitrator that the petitioner / RITES has not been able to point out any provision pursuant to which they can deduct / withhold any amount on that account.

81. On the laboratory test, it was the submission of Mr. Seth that clause 10(a) of the Contract cast an obligation on the respondent No.1 to get the lab test of the material brought at the site and further respondent No.1 has not objected to the deductions.

82. At the outset, I may state that no communication of the respondent No.1 has been shown that the respondent no.1 had not objected to the deductions. Further clause 10(a) shall not come to the aid of the petitioner / RITES as the same only caste an obligation on the respondent No.1 to get the laboratory test of the material brought at the site, but does not empower the petitioner / RITES to make deductions. Similarly, on the aspect of PF challan, learned Arbitrator held that petitioner / RITES have not pointed out any provision in the Contract to make such deductions. That apart, I find it is not the case of the petitioner / RITES that for non-submission of PF challans liability has come on the petitioner/RITES for such payments. If that be so, no deduction could have been made by the petitioner / RITES.

83. In so far as issue no. 7 is concerned, I agree with the finding of the learned Arbitrator on this issue, whereby the learned Arbitrator has directed the refund of Rs.2,38,81,119.97/- towards encashment of bank guarantee, refund of Rs.27,20,000/-

towards earnest money deposited and refund of Rs.36,41,587.92/- towards security deposit on the ground that clause 3 postulates forfeiture only in the eventuality the Contractor is liable for action under clause 3 (i) and clause 3 (xi). But in the present case, show-cause notice issued by the petitioner / RITES has been held to be illegal. Hence, I agree with the conclusion of the learned Arbitrator.

84. In so far as issue no. 9 is concerned, same is with regard to recovery of interest on mobilization advance from RA bills submitted by respondent no.1. The learned Arbitrator in Para 168 of the award held as under:

“168. In my opinion, the contractual stipulation with regard to interest will apply only in the event that the Claimant is in breach of the terms of the Contract. I have already discussed it above that the Respondents were in breach of the Contract and therefore, the Respondents are not entitled to recover from the Claimant any interest on the mobilization advance. It is apposite that interest would be recoverable only in those cases where despite advances having been given to a Contractor, no work has been done, or expenses incurred. In other words, the Contractor has merely utilized the advances drawn by it and theoretically earned interest. This case does not fall in that category.”

85. Mr. Seth had made two-fold submissions, firstly amount of mobilization advance being recoverable with interest whether respondent no.1 has breached the agreement or not; secondly, respondent No.1 was in breach of the Contract as is clear from the documents placed on record. I am not impressed by both the arguments of Mr. Seth. Clause 10(b)(ii) of Section 8 of the GCC states as under:

"If the Contract period gets extended due to any reasons, the BG Bonds shall be kept renewed from time to time to cover the balance amount to be recovered together with interest @10% and valid for the likely period of complete recovery.

86. The aforesaid clause is of some relevance and has been interpreted by the learned Arbitrator in the manner depicted above. He is of the view that interest can be claimed from the respondent No.1 if respondent no.1 is in breach of the terms of the Contract. In other words, if the other party is in breach, which is in this case, no interest is payable by respondent no.1 on mobilization advance. Such an interpretation is a possible interpretation to clause 10(b)(ii), and the same cannot be interfered in these proceedings under Section 34 of the Act of 1996.

87. In so far as the challenge of the petitioner to the conclusion of the learned Arbitrator on issue no.5 and counter-claim no.1 are concerned, respondent No.1 had raised a claim for Rs.1,64,93,401/- as the amount payable by the petitioner / RITES against 16th final bill. Similarly, petitioner / RITES has made a counter-claim for Rs.1,20,84,847.22 on the basis of the 16th / final bill. Learned Arbitrator has, while accepting the measurement of the work filed by the petitioner / RITES and noting the total work done till the date of termination as per 16th / final bill being for Rs.8,00,42,194.312/- and also noting his conclusion on issue nos. 8, 9 and 12 had held that the recoveries effected were wrongful and untenable and the fact that till 15th RA bill an amount of Rs.7,70,20,021/- stood paid, granted the balance amount of Rs.30,22,173.31/-. The same need no

interference, except that in view of my finding on issue no. 8, the benefit thereof shall enure in favour of the petitioner and that amount would be adjustable.

88. Issue no. 15 is whether RITES is entitled to counter-claim. In view of the finding to Issue nos. 5 and 12, the counter-claim by RITES was rejected. The same is justified.

89. On the aspect of interest, learned Arbitrator has granted post award interest @ 6.25% per annum, if the awarded amount is not paid within two months. The same is justified. No submission has been made, that the correction carried out to the award vide order dated December 18, 2018 is incorrect.

90. During the course of his submissions, Mr. Seth had relied upon the judgment of the Supreme Court in the case of *Sathyanarayana Brothers (P) Ltd. v. T.N. Water Supply & Drainage Board (2004) 5 SCC 314*.

91. I have considered the aforesaid judgment, the same is distinguishable on facts and as such has no applicability.

92. In view of my discussion above, the award passed by the learned Arbitrator is upheld except to the extent of Issue no.8 as the grounds for interference with an Award are very limited. The position of law is also well settled by the Supreme Court in the case of *Associate Builders v. Delhi Development Authority (2015) 3 SCC 4*; as well as in the judgments of this Court in *Devika Builders Pvt. Ltd v. National Cooperative Consumers and Ors. 2015 (3) ArbLR 448 (Delhi)* and *M/s. TRG Industries v. NHPC Ltd., 2015 (2) ArbLR 352 (Delhi)*. The petition is disposed of.

No costs.

I.A. 8723/2019

Dismissed as infructuous.

V. KAMESWAR RAO, J

MAY 26, 2020/ak/jg

