

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

+ FAO(OS) (COMM) 273/2019 and CM APPL. 44443/2019

+ FAO(OS) (COMM) 280/2019 and CM APPL. 44986/2019

Date of decision: 13.02.2020

IN THE MATTER OF:

NATIONAL BUILDING CONSTRUCTION CORPORATION LTD

[PRESENTLY NBCC (INDIA) LIMITED]

..... Appellant

**Through: Mr. Manoj K. Das, Ms. Geeta Das and
Mr. Shailesh Kumar Singh, Advocates**

versus

M/S J R CONSTRUCTION

..... Respondent

**Through: Mr. Mayank Goel and Mr. Monamshel
Masing, Advocates**

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

HIMA KOHLI, J.

1. The appellant/National Building Construction Corporation (in short 'NBCC') has filed FAO(OS)(COMM) 273/2019 against the judgment dated 30.07.2019, passed by the learned Single Judge in OMP(COMM) 157/2017 whereby a petition filed by it under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'A&C Act') directed against the Arbitral Award dated 06.12.2016, has been dismissed.

2. FAO(OS)(COMM) 280/2019 has been filed by the appellant/NBCC, being aggrieved by an order dated 08.08.2019, passed by the learned Single Judge partly allowing OMP(COMM) 171/2017 against the Arbitral Award

dated 06.12.2016, on the aspect of *pendente lite* interest awarded in respect of Claim No.17 and holding that only post-award simple interest @ 12% could have been granted to the respondent. At the same time, the Award was sustained on the remaining aspects on the ground that the judgment dated 30.07.2019, passed by the same Bench in OMP(COMM) 157/2017, subject matter of FAO (OS) (COMM) 273/2019, would cover the present case as well. As the pleas taken to assail the impugned judgment are similar, both the appeals are being taken up together for a decision. For the sake of convenience, we propose to refer to the facts narrated in FAO (OS) (COMM) 273/2019.

3. On 24.10.2005, the appellant/NBCC issued a Letter of Award (LoA) in favour of the respondent/contractor for construction of a Link Road in Mizoram, abutting the Indo-Bangladesh Border. The length of the road was 17.81 kms. The contract value was for a sum of Rs.881.61 lakhs. The contract was to commence on 03.11.2005 and conclude on 03.06.2006. On 01.11.2007, in a joint meeting conducted by the appellant/NBCC, the respondent/contractor and BT Construction, it was agreed that a 10 kms. stretch of the road initially awarded to the respondent/contractor, would be handed over to BT Construction. The respondent/contractor took a stand that the work in respect of this stretch of road having been awarded to BT Construction, it was excluded from the subject contract. Between the years 2007 to 2009, the respondent/contractor continued executing parts of the subject contract. Difficulties in completion of the work finally led to a foreclosure of the subject contract. On 30.11.2010, joint measurement of the work executed was carried out by the respondent/contractor and BT

Construction.

4. As per the appellant/NBCC, the respondent/contractor was paid an excess amount of Rs.154.27 lakhs whereas work worth Rs.749.18 lakhs had been completed by it. On deducting Rs.749.18 lakhs from Rs.883.45 lakhs, the respondent/contractor was paid an excess amount of Rs.154.27 lakhs. On the date the joint measurement took place, the respondent/contractor had submitted its 12th RA Bill and/or final bill wherein it claimed a sum of Rs.17,41,985/- from the NBCC. It is the version of the appellant/NBCC that the 12th RA Bill and/or final bill was finalised for a gross amount of Rs.94,489/- and on deductions made towards tax and other recoveries, nothing was found due and payable to the respondent/contractor, which position was accepted by it.

5. Further, the appellant/NBCC claimed that an excess amount of Rs.154.27 lakhs had been paid to the respondent/contractor, which was not a part of the final bill pertaining to the contract and the said amount was adjusted by it from the security deposit, earnest money deposit and other dues payable to the respondent/contractor *qua* other works executed by it for the NBCC relating to three separate Letters of Award dated 04.07.2006, 08.11.2006 and 30.01.2008. Though the respondent/contractor was granted extension of time to execute the subject contract and the scheduled date of completion was extended to 30.11.2011, the contract was foreclosed 10 months earlier, on 14.01.2011.

6. The respondent/contractor raised claims against the appellant/NBCC in respect of the subject contract. The CMD, NBCC appointed a Committee known as the Verma Committee to look into the grievances raised by the

respondent/contractor. On 15.04.2013, the Verma Committee gave a report wherein it concluded that no amounts were payable to the respondent/contractor as it had executed the Foreclosure Agreement on 14.01.2011. Aggrieved by the said decision, the respondent/contractor again approached the CMD, NBCC. This resulted in the parties executing a Supplementary Agreement on 22.08.2013, agreeing *inter alia* to refer all their *inter se* disputes, subject matter of the contract, for adjudication to an Arbitral Tribunal.

7. Before the Arbitral Tribunal, the respondent/contractor raised 24 Claims for a total value of Rs.5.44 crores, including interest. The said claims were contested by the appellant/NBCC, who not only challenged the jurisdiction of the Arbitral Tribunal to adjudicate upon the disputes on merits on the ground that the parties had executed a Foreclosure Agreement dated 14.01.2011 and therefore, the disputes were not arbitrable, it also contested the claims on merits and filed counter claims.

8. Under the Award dated 06.12.2016, the learned Arbitral Tribunal partly allowed the claims of the respondent/contractor and against a total demand of Rs.5.44 crores, awarded a sum of Rs.1,13,25,985/- including interest @ 12% per annum towards pre-reference and *pendente lite* interest. The interest component of the awarded amount comes to Rs.39,44,403/.

9. Aggrieved by the aforesaid Award, the appellant/NBCC filed a Section 34 petition on five grounds, i.e., that the Arbitral Tribunal lacked the jurisdiction to adjudicate the claims in view of the Foreclosure Agreement dated 14.01.2011 executed by the parties and the invocation of arbitration was an afterthought; that Claims No.2, 3, 4, 5, 7, 8, 9, 10, 11 and

12 related to recoveries and adjustments from RA Bills No.1 to 12 and since the respondent/contractor had accepted RA Bills No.1 to 12, it could not have raised the said claims. It was next canvassed that claims raised on account of workforce facilities given by the NBCC fall under the category of ‘*excepted matters*’ and were not arbitrable under Clause 28.3 of the contract; that Claims No.17 and 18 were wrongly awarded in favour of the respondent/contractor though no such claims were lodged by it; that costs of Rs.8 lakhs were wrongly awarded to the respondent/contractor when it had not even raised a claim in this regard. Lastly, it was urged that the Arbitral Tribunal had erred in granting pre-reference and *pendente lite* interest though the same was impermissible under Clause 73.3 of the contract. It is noteworthy that similar pleas were taken by the appellant/NBCC to lay a challenge to a separate Arbitral Award dated 6.12.2016, subject matter of OMP (COMM) 171/2017 [assailed in FAO (OS) (COMM) 280/2019], that has also been repelled by the learned Single judge for the very same reasons as spelt out in the impugned judgment dated 30.7.2019, except for correcting a typographical error regarding grant of *pendente lite* interest awarded under Claim No.17.

10. The learned Single Judge rejected all the aforesaid grounds taken by the appellant/NBCC to assail the Award and dismissed its Section 34 petition by holding that the reasoning given by the Arbitral Tribunal is based on the material placed before it and does not deserve any interference. Aggrieved by the said decision, the appellant/NBCC has filed the present appeals under Section 37 of the A&C Act.

11. When FAO(OS)(COMM) 273/2019 was listed for admission on

09.10.2019, Mr. Manoj K. Das, learned counsel for the appellant/NBCC had submitted before us that the impugned judgment has been assailed primarily on two counts. Firstly, against the findings returned by the learned Single Judge regarding the observations made by the Arbitral Tribunal relating to Claim No.18 raised by the respondent/contractor (on refund/non-payment against 12th RA Bill), wherein it was held entitled to refund of Rs.37,87,029/-. Secondly, a grievance was raised that Claims No.1 to 12 lodged by the respondent/contractor fell under the category of ‘*excepted matters*’, as contemplated under Clause 28.3 read with Clause 27.3 of the contract governing the parties.

12. Noting that the first ground taken by learned counsel for the appellant/NBCC to assail the impugned judgment was that though it had been argued before the learned Single Judge that the respondent/contractor had not even lodged a claim for refund of Rs.37,87,029/-, the said amount had been awarded in its favour towards excess recovery made at BTC rates and further, that Claim No.18 of the respondent/contractor was in respect of “*refund of Rs.16,33,735/- along with interest withheld against 12th RA Bill and/or final bill plus Rs.1,94,47,624/- against deviation of work*”, we had enquired from learned counsel for the appellant/NBCC as to whether any such plea was taken at all before the learned Single Judge, for us to examine the impugned judgment in the said light. In reply, learned counsel for the appellant/NBCC had requested for deferment of arguments in the appeal to enable NBCC to file a review application before the learned Single Judge. It is not in dispute that the appellant/NBCC did file RP No.505/2019 sometime in the beginning of December, 2019, which has been dismissed by the

learned Single Judge vide order dated 20.01.2020. Thereafter, arguments were addressed by learned counsel for the parties on the merits of the appeals.

13. It was firstly argued by Mr. Manoj K. Das, learned counsel for the appellant/NBCC that the learned Single Judge committed an error by failing to appreciate that the Arbitral Tribunal was not vested with the jurisdiction to entertain any claim, which was not a part of the Statement of Claim and the sum of Rs.37,87,029/- awarded in favour of the respondent/contractor under Claim No.18 deserved to be set aside as no such amount was claimed by the respondent/contractor on account of amount adjusted by the NBCC towards the work carried out by BT Construction. He argued that awarding a sum of Rs.37,87,029/- against Claim No.18, by adjusting amounts towards the work carried out by BT Construction was an entirely new head, which did not fall under the head of “*refund/non-payment against 12th RA Bill*” or “*claim under deviation of work*”. It was canvassed that since the said claims were neither pleaded, nor mentioned by the respondent/contractor in Claim No.18, any amount awarded under the said head, was not sustainable and liable to be set aside.

14. *Per contra*, Mr. Mayank Goel, learned counsel for the respondent/contractor drew the attention of this Court to paras 6(iii), 19(vi) and 20 of the impugned judgment to urge that cogent and valid reasons were given by the learned Single Judge to uphold the Award qua Claim No.18. For ease of reference, the said paras are extracted below:-

“6. (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.

XXX XXX XXX

(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.

XXX XXX XXX

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

15. We are of the opinion that besides paras 6(iii), 19(vi) and 20, the learned Single Judge has also given detailed reasoning in para 21 of the impugned judgment in the following words:-

“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."

(emphasis added)

16. We are inclined to concur with the view expressed by the learned Single Judge as recorded above. Once the appellant/NBCC had not questioned the findings returned by the Arbitral Tribunal regarding the rate at which the work executed by BT Construction had been quantified, which was 14% above the scheduled rate, whereas the rates for the respondent/contractor for the work executed was quantified at minus (-) 3% of the scheduled rates, then the Arbitral Tribunal was entitled to exclude the excess amount that the NBCC had adjusted towards the work that was executed by BT Construction from the 12th RA Bill and/or final bill. As is apparent from the record, under Claim No.18, the respondent/contractor had sought refund of a much higher amount, i.e., Rs.16,33,735/- alongwith interest plus Rs.1,94,42,624/- against deviation of work, whereas the amount finally awarded in its favour was Rs.37,87,029/-.

17. We see no reason to interfere with concurrent findings returned on the above aspect by both, the Arbitral Tribunal and the learned Single Judge. Besides, the issue sought to be raised by learned counsel for the appellant/NBCC invites a re-appreciation of the evidence brought on record, which in our view is beyond the pale of interference under Section 37 of the A&C Act. It has been repeatedly held that finding of facts based on appreciation of evidence returned by the Arbitral Tribunal do not deserve interference by courts either under Section 34 or under Section 37 of the A&C Act.

18. The aforesaid position was reiterated by us in a recent decision in the case of Ministry of Youth Affairs & Sports vs. Swiss Timing Ltd. reported as **2019 SCC Online Del. 10934**, that has been upheld by the Supreme Court. For ease of reference, paras 19 and 20 of the said judgment are extracted hereinbelow:-

“19. We are also mindful of the law on interference by the courts in respect of findings of facts based on appreciation of evidence, returned by the Arbitral Tribunal. In Sutlej Construction Limited Vs. Union Territory of Chandigarh reported as (2018) 1 SCC 718 the Supreme Court has held as follows:-

*“11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be “justice”. **Associate Builders v. DDA, (2015) 3 SCC 49.***

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of reappreciating the evidence as the first

appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (**Sudarsan Trading Co. v. State of Kerala** [**Sudarsan Trading Co. v. State of Kerala**, (1989) 2 SCC 38; **Harish Chandra & Co. v. State of U.P.**, (2016) 9 SCC 478 and **Swan Gold Mining Ltd. v. Hindustan Copper Ltd.**, (2015) 5 SCC 739.

13. The learned Single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final court on facts. In the present case, the learned Single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court.”

20. In Ssangyong Engineering Construction Co. Ltd. vs. National Highways Authority of India reported as **2019 SCCOnline SC 677**, the Supreme Court has reiterated the aforesaid view in the following words:-

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

*principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of **Associate Builders (supra)**.*

*36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of **Associate Builders (supra)**, as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

*37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of **Associate Builders (supra)**, or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of **Associate Builders (supra)**. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that **Western Geco (supra)**, as understood in **Associate Builders (supra)**, and paragraphs 28 and 29 in particular, is now done away with.*

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the

backdoor when it comes to setting aside an award on the ground of patent illegality.”

19. Coming to the second contention of the learned counsel for the appellant/NBCC that Claims No.2, 3, 4, 5, 7 to 12 relating to recoveries and adjustments from RA Bills No.1 to 12, lodged by the respondent/contractor fall under the category of ‘*excepted matters*’ and could not have been adjudicated upon by the Arbitral Tribunal, we had specifically posed a query to learned counsel as to whether any such plea was taken or urged before the Arbitral Tribunal. He conceded that no such plea was raised during the arbitration proceedings but states that it was taken in the Section 34 petition. Learned counsel sought to urge that the plea that the learned Arbitrator was not vested with the jurisdiction to go into the said claims being a legal plea, can be taken at any stage of the proceedings including at the appellate stage.

20. We are afraid the said argument is not persuasive. In a recent decision of this court in UBV Infrastructure Ltd. vs. National Highways Authority of India reported as **2020 SCC OnLine Del. 60**, where counsel for the appellant therein had taken a plea regarding set-off in the Section 37 petition, which had not been urged before the learned Single Judge, we had opined that the appellant could not be permitted to take the said ground for the very first time at the appellate stage and had declined to examine the same. For taking the said view, strength was drawn from the decision in Sutlej Construction Limited Vs. Union Territory of Chandigarh reported as **(2018) 1 SCC 718**, where the Supreme Court had accepted the submission made in opposition to the appeal that when the appellant therein had not

raised or urged a particular point before the Arbitral Tribunal or the Single Judge and the Division Bench of the High Court, it could not be permitted to raise the same for the first time at the appellate stage. A similar view has been taken by the Supreme Court in Union of India Vs. Susaka Private Limited and Ors. reported as (2018) 2 SCC 182, cited by learned counsel for the respondent.

21. In the instant case, the appellant/NBCC had admittedly not taken a ground in respect of '*excepted matters*' before the Arbitral Tribunal. The inevitable inference is that after weighing all the pros and cons of the case, the appellant/NBCC took a conscious decision to drop the plea regarding '*excepted matters*' and decided not to challenge the said aspect before the Arbitral Tribunal. Having resorted to such a course of action, we are in agreement with the view expressed by the learned Single Judge that the appellant/NBCC is precluded from raising the said issue in the Section 34 petition. The assumption is that the appellant/NBCC waived its right in this regard and is thus barred from going that way now. Even otherwise, this is not a purely legal issue as sought to be urged before us. For arriving at any conclusion as to whether recoveries and adjustments could have been made by the appellant/NBCC from R.A. Bills No.1 to 12, on account of NBCC having provided several facilities to the respondent, would entail appreciation of the evidence, which exercise cannot be undertaken either in the proceedings under Section 34 or Section 37 of the Act. We therefore decline to interfere with the findings returned on this aspect in the impugned judgment.

22. As for the contention of the learned counsel for the appellant/NBCC that the learned Single Judge has erred in upholding the Arbitral Award on the aspect of costs of arbitration to the tune of Rs.8 lakhs imposed on the NBCC, it was argued before the learned Single Judge that though the statement of claim filed by the respondent/contractor did not specify a claim towards cost of arbitration yet, the Arbitral Tribunal has proceeded to award substantial costs in its favour.

23. The aforesaid submission did not find favour with the learned Single Judge on noticing the factual context of the case, which reveals that the respondent/contractor had submitted a letter dated 13.10.2013 to the Arbitral Tribunal stating *inter alia* that due to inadvertence, it had not claimed costs of arbitration. This position was brought out in the in the proceedings held before the Arbitral Tribunal on 21.03.2016, on which date, both sides were directed to file the details towards bill of costs. The observation made in the impugned judgment on this aspect is pertinent and is extracted below:-

“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 expanses 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.” (emphasis added)

24. We are in complete agreement with the view taken above. In our view not much would turn on the respondent/contractor not including costs as a

separate claim in the Statement of Claim for the reason that the same was not a claim on the merits of the disputes between the parties, but related to the expenses actually incurred by the respondent/contractor in pursuing its claims before the Arbitral Tribunal, which included the fee of the Arbitrator, travelling expenses incurred by the counsel and the Advocate on Record etc. In any event, Section 31A of the A&C Act inserted in the Statute vide Notification dated 23.10.2015, lays down a regime of costs pertaining to arbitration and vests the discretion in the court or the Arbitral Tribunal, as the case may be, as to whether costs would be payable by one party to the other, the amount of such costs and when are such costs to be paid. Section 31A(2) prescribes that the general rule while making an order on payment of costs is that the unsuccessful party shall be ordered to pay costs to the successful party. In the instant case, the learned Arbitrator has granted costs in favour of the respondent/contractor, who is the successful party. For the aforesaid reason, we see no reason to interfere with the view expressed by the learned Single Judge above.

25. Lastly, a ground has been sought to be urged by learned counsel for the appellant/NBCC on the pre-reference and *pendente lite* interest awarded under Claim No.24 by the Arbitral Tribunal, which he submitted is contrary to the terms of Clause 73.3 of the contract. As against interest claimed @18% by the respondent/contractor for the period commencing from 14.01.2011, till the date of the Award, the Arbitral Tribunal has awarded interest @12% per annum from the date of the Award, till the date of payment. In other words, pre-reference interest has been completely excluded while calculating future interest. The Award also states that if the

appellant/NBCC would pay the amount awarded to the respondent/contractor within 90 days from the date of making the Award, no future interest would be payable.

26. Reliance placed by the appellant/NBCC on Clause 73.3 of the contract to urge that interest awarded under Claim No.24 was liable to be interfered with, is found to be meritless in the light of the fact that the said Clause could have been invoked by NBCC only in certain circumstances, subject to the contractor being notified in that regard. It is not in dispute that the appellant/NBCC did not notify the respondent/contractor while withholding or retaining amounts towards security deposit etc. As a result, Clause 73.3 could not come to its aid. The view taken by the learned Arbitral Tribunal for awarding interest, is therefore found to be plausible. In any case, this Court is of the view that interpretation of the terms and conditions of the contract governing the parties, falls strictly within the domain of the learned Arbitrator and the learned Single Judge in exercise of powers under Section 34 and the Division Bench in exercise of powers under Section 37 of the A&C, ought not to step into the shoes of the learned Arbitrator to give a different interpretation to the terms and conditions of the contract governing the parties, unless and until the interpretation given by the Arbitrator is so perverse, arbitrary or contrary to the terms of the agreement that it cannot withstand judicial scrutiny. That is not the case here. [Refer: National Highways Authority of India vs. ITD Cementation India Ltd. reported as **(2015) 14 SCC 21**]

27. In view of the foregoing discussion, we are of the opinion that both the appeals are meritless and are accordingly dismissed alongwith the

pending applications with costs of Rs.25,000/- awarded in favour of the respondent/contractor in each appeal.

HIMA KOHLI, J,

ASHA MENON, J

FEBRUARY 13, 2020

Rkb/NA

