

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 10th November, 2022
Pronounced on: 22nd February, 2023

+ **O.M.P. (T) (COMM.) 7/2019 & I.A.5087/2019**

ELECON ENGINEERING COMPANY LIMITED Petitioner
Represented by: Mr. Manish Vashisht, Sr.
Advocate with Mr. Sanjeev
Kumar Sharma, Mr. Shivam
Dahiya, Ms. P.Sandhya, Ms.
Ditai Singh & Ms. Kamal
Dalal, Advocates.

versus

THE INDURE PRIVATE LIMITED Respondent
Represented by: Mr. A. Sibal, Sr. Advocate
with Mr. Prashant Mehta &
Ms. Divita Vyas, Advocates.

+ **O.M.P. (COMM.) 236/2019 & I.A. 8496/2019**

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THE INDURE PRIVATE LIMITED Respondent
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with Mr. Prashant Mehta &
Ms. Divita Vyas, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

O.M.P. (T) (COMM.) 7/2019

1. The petitioner has filed the petition under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "A & C Act, 1996"*) seeking termination of mandate of the learned Sole Arbitrator.
2. The petitioner has also filed O.M.P. (COMM.) 236/2019 to challenge the Arbitral Award dated 6th May, 2019 which has already been pronounced, wherein the appointment and jurisdiction of the Arbitrator forms one of the ground of challenge to the Award. The controversy in regard to the appointment of Arbitrator and alleged wrongful assumption of jurisdiction shall be considered in the petition under Section 34 of the A & C Act, 1996.
3. The petition is accordingly disposed of.

I.A.5087/2019 (for stay of proceedings) in O.M.P. (T) (COMM.) 7/2019

4. The application was filed seeking stay of the arbitration proceedings pending before the sole arbitrator. The learned Arbitrator has already concluded the arbitral proceedings and the Award dated 6th May, 2019 has been pronounced, making the present application infructuous.
5. The application is hereby dismissed.

O.M.P. (COMM.) 236/2019

6. The petition under Section 34 of the A & C Act, 1996 has been filed on behalf of the petitioner to quash or set aside the Arbitral Award dated 6th May, 2019.

7. The **facts in brief** are that the petitioner is a Public Limited Company engaged in the business of manufacturing Material Handling Equipment (MHE), including Industrial Gears and Reducers, Mining Equipment, Casting Processes, etc. and supplying of the same to the fertilizer, cement, coal, power generating, mining, chemical, steel, port-mechanization, minerals and metal processing sectors.

8. The respondent is also a Private Limited Company, engaged in the business of supply of Ash Handling Systems and Engineering, Procurement and Commissioning services for Solar Plants and Material Handling Systems, etc.

9. The respondent approached the petitioner to submit its offer for Supply, Transportation & Erection & Commissioning of Reversible Stacker-cum-Reclaimer with Tools and Tackles, Mandatory Spares & Commissioning Spares for 2x525 MW Monnet Thermal Power Project, Angul, Orissa. After being fully satisfied, the offer was accepted by the respondent. A Letter of Intent (LOI) dated 06th February, 2012 was issued and the petitioner was appointed as the Contractor for the Design, Engineering, Manufacturing, Testing/Inspection, Supply, Loading, Packing & Forwarding, Transportation, Storage at Site, Erection and Commissioning and PG Test of 1 No Reversible Stacker-cum-Reclaimer with Tools and Tackles, Mandatory Spares and Commissioning Spares as per agreed specifications. *The total Contract price agreed upon was Rs. 12,95,07,000/- on F.O.R. Site basis, inclusive of transportation but*

exclusive of transit insurance, taxes and duties.

10. The relevant provisions of the Contract providing for payment terms and completion time are reproduced as under:

“3. Payment Terms:

A. For Supply

a) 10% Payment as advance against submission of Advance Bank Guarantee of Equivalent Amount & CPSG of 10% which shall be converted into PBG valid up to Guarantee/Warranty Period.

b) 87% Payment with 100% taxes & duties shall be released through 45 days L/C on usance basis (All interest Charges will be in Elecon's scope).

c) Balance 3% Payment shall be released after Erection and Commissioning of Stacker Cum Reclaimer (If Commissioning is delayed due to reasons not attributable to Elecon, this payment shall be released within 3 months from the date of last supply against submission of equal amount of Bank Guarantee).

B. For Erection and Commissioning

a) 10% Payment as advance against submission of Advance Bank Guarantee of Equivalent Amount & CPSG of 10% which shall be converted into PBG valid up to Guarantee/Warranty Period.

b) 80% Payment with 100% taxes shall be released on pro-rata basis within 15-20 days on completion of work on mutually agreed mile-stones and after approved by our site Incharge and submission of product, PF challans and labour payment details.

c) Balance 10% Payment shall be released after Erection and Commissioning of Stacker Cum Reclaimer.”

4. Completion period:

Erection and Commissioning of complete system shall be

complied within 15 months from the date of LOI (submission of Drawings/Datesheet within 2 weeks from the date of receipt of LOI). Delivery commencing in 8 months.”

11. It was further agreed that the detailed Purchase Order (PO) shall be released after receiving the price breakup from the petitioner. The petitioner provided the price breakup and submitted the bank guarantees issued by the State Bank of India on 25th February, 2012. The petitioner also submitted a pre-receipted Invoice bearing No. ADV-01 dated 25th February, 2012 for the supply portion of Rs. 1,25,100/- being 10% of the advance payment under the terms of LOI dated 06th February, 2012. Despite receiving the bank guarantees, the respondent failed to adhere to its part of the obligations as per the scope of Work defined under LOI dated 06th February, 2012 or to pay the advance amount.

12. Further, for the reasons best known to it, the respondent bifurcated and divided the entire scope of Work under LOI into two independent Contracts which read as under:

*“(a) **Purchase Order NO. I-5018/ Monnet/ SCR/EECL/ Mar-01(S) dated 27-03-2012** for Design, Engineering, Manufacturing, Testing/Inspection, Supply & Transportation of 2000TPH Stacker cum Reclaimer with tools & tackle, mandatory spares & commissioning spares for 2x525 MW Monnet Thermal Project, Angul, Orissa and;*

*(b) **Work Order No. I-5018/Monnet/ SCR/ EECL/Mar-02(E&C), dated 27-03-2012.-MonnetProject** for Erection, Testing & Commissioning and Performance & Guarantee testing/ Acceptance Test and handing over of Stacker Cum Reclaimer including Mandatory Spares for 2x525 2x525 MW Monnet Thermal Power Station at Malibra~ani, Distt, Angul/Orrisa of MPCL.*

10. The Petitioner submitted the Bank Guarantees to the tune of 10% for the entire amount of LOI. Upon issuance of two separate and independent Contracts, the respondent was under the obligation to return the bank guarantees and to submit them again in terms of the bifurcated amounts of each Agreement. However, the petitioner, in good faith, did not raise any issue and started the work.

Purchase Order dated 27th March, 2012:

13. The present dispute pertains to the Purchase Order bearing reference P.O. No. I-5018/Monnet/SCR/EECL/Mar-01(S) dated 27th March, 2012 issued by the respondent for the scope of Work defined in Clause 4 of the Purchase Order. As per Clause 5 of the Purchase Order, the total price consideration was **Rs. 12,09,46,000/- inclusive of transportation, packing and forwarding charges.** The respondent was liable to pay the Insurance charges and all applicable taxes, duties on finished goods such as excise duty, sales tax and any other taxes/levies as the per actual rates prevailing as on dates of dispatch till the scheduled completion period.

14. The petitioner submitted the requisite Bank Guarantees to the respondent, but it committed breach of its contractual obligations in terms of the LOI and did not open the Letter of Credit. The material procured and manufactured by the petitioner remained idle despite inspection of the same by the respondent. The respondent deliberately failed to secure the payments by not opening the Letter of Credit and committed terminal breach of its obligations, putting the petitioner into irreparable financial losses. The respondent also caused an inordinate delay in releasing the

advance money even after the bank guarantees (Advance Bank Guarantees and Performance Bank Guarantee) were furnished to the respondent on 25th February, 2012.

15. It is submitted that despite repeated requests, the respondent inordinately delayed to inspect the ready material and to issue a Material Dispatch Clearance Certificate (*hereinafter referred to as "MDCC"*). Eventually, on inspection, a part of the material worth Rs. 4,80,70,500/- got dispatched on the basis of progressive invoices upon opening the Letter of Credit for the aforesaid material.

16. The respondent on 05th May, 2012 advanced an amount of Rs. 1,25,23,100/- by way of Cheque bearing No. 945975 dated 21st April, 2012 drawn on Punjab National Bank, Greater Kailash, Part-II, New Delhi. Out of the said advance, an amount of Rs. 48,07,050/- was adjusted against the said progressive Invoices. After adjustment, an amount of Rs. 77,16,050/- remained unadjusted due to repudiation and breach of the obligations on the part of the respondent to inspect and give approval of the ready material for its dispatch upon opening of Letter of Credit.

17. Apart from the above, a sum of Rs. 14,12,115/- had also been deducted by the respondent towards retention money to which the petitioner is entitled.

18. The respondent carried out inspection for further part of the material/equipment worth Rs. 86,80,500/- and issued an MDCC, but failed to open the Letter of Credit or arrange for the transit insurance to dispatch the material. The petitioner repeatedly reminded the respondent to open the Letter of Credit and to lift the material but the respondent

maintained complete silence.

19. It is submitted that on 22nd November, 2013, a meeting was held between the petitioner and the respondent, wherein the respondent confirmed and assured that it would open the Letter of Credit and inspect and approve the material.

20. On the assurance of the respondent, the petitioner prepared further raw material; designed and manufactured the specific equipment/material worth Rs. 27,72,000/- and informed the respondent for inspection and approval. However, the respondent utterly failed to adhere to the Minutes of Meeting held on 22nd November, 2013 for which reason the material could not be dispatched. The respondent, despite being in breach of its obligations and deriving illegal enrichment, lodged the claim with the Bank for encashment of the advance Bank Guarantee. All the requests of the petitioner for an updated status of the project and for return of the advance Bank Guarantee and Contract Performance Guarantee did not elicit any response from the respondent.

21. On account of *pro rata* adjustment of advance in the progressive Invoices, the amount of advance was reduced from time to time. The corresponding reduction of the amount in the Bank Guarantee was renewed on 17th March, 2015 for an amount of Rs. 84,98,650/-.

22. The petitioner has explained that various Purchase Orders were issued from time to time since 2008 which became the subject matter of litigation and were referred to Arbitration.

23. The respondent moved a Petition under Section 11 of the A & C Act, 1996 for appointment of the Arbitrator which was disposed of. The respondent then gave a Notice of Invocation and pursuant thereto, the

learned Arbitrator took cognizance of the disputes arising out of the Purchase Order dated 27th March, 2012. The respondent raised an objection to the appointment/assumption of jurisdiction by the Arbitrator and filed an application under Section 12 of the Act which was dismissed. The respondent thereafter did not appear before the learned Arbitrator and was proceeded *ex parte*. The respondent's Claim for Rs. 77,160,050/- towards unadjusted advances/excessive payments along with interest @ per annum compounded annually was allowed *vide ex parte* Award dated 6th May, 2019 .

24. The learned Arbitrator referred to the testimony of CW-1 Vivek Kumar who had proved the relevant Ledger Accounts as Ex.CW-1/9 to conclude that there were unadjusted advances amounting to Rs. 77,16,050/- to which the Claimant/respondent was held to be entitled.

25. Aggrieved by the said Award, it was challenged on the following grounds:

- (i) The appointment of the arbitrator was violative of the General Terms and Conditions of the Contract;
- (ii) The petitioner never consented to the appointment of learned Arbitrator who self assumed the jurisdiction and pronounced the Award;
- (iii) No equal, fair and independent treatment given to the Petitioner in so much as its Application under Section 12 of the A & C Act, 1996 was dismissed and *ex parte* Award was pronounced without giving it an opportunity to file a counter-claim;
- (iv) The Award was pronounced beyond the period prescribed

under Section 29A of the A & C Act, 1996;

- (v) Claim No.1 for sum of Rs. 77,160,050/- towards unadjusted advances/excessive payments made by the respondent to the petitioner, was granted without any evidence and was barred by Limitation;
- (vi) Claim No. 2 for liquidated damages have been granted without any basis; and
- (vii) The interest has been awarded without any basis and at an exorbitant rate.

26. **Submissions heard.**

27. The objections to the Award have been filed under Section 34 of the A & C Act, 1996. To appreciate the grounds of challenge as raised by the Appellant, it is pertinent to first define the scope of interference under Section 34 and Section 37 of the A & C Act, 1996. In Delhi State Industrial & Infrastructure Development Corporation Ltd. vs. M/s. H.R. Builders FAO (OS) (COMM) 77/2022 decided on 03rd June, 2022, relying on the observations of the Apex Court in its decision in Mc Dermott International Inc Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181, held that the scope of interference under Sections 34 of the A & C Act, 1996 is extremely limited to when '*an award is in conflict with the public policy of India*, which includes cases of fraud, breach of fundamental policy of Indian Law and breach of public morality or is "*patently illegal*,". Likewise, the Supreme Court in Anglo-American Metallurgical Coal vs. MMTC Limited (2021) 3 SCC 308 had observed that the Court is not permitted either under Section 34 or 37 of the A & C Act, 1996 to independently evaluate the merits of the Award, but must confine its

authority to the parameters permitted under the Statute. Extreme caution must be observed by the Court and it should be hesitant to disrupt the concurrent conclusions arrived at in the Arbitral Award which is validated by the Court under Section 34 of the A & C Act, 1996.

28. In Dyna Technologies Pvt. Ltd. vs. M/s Crompton Greaves Ltd. (2019) 20 SCC 1, same proposition of law was stated which has recently been again reiterated in the decision of National Highway Authority of India vs. M. Hakeem (2021) 9 SCC 1, wherein the Apex court has observed that Section 34 of the Act, has a different methodology and it cannot be considered as a typical Appellate jurisdiction. Section 34 demands respect to the finality of the arbitral ruling and the party autonomy in having chosen to get their issues resolved through alternate forum of arbitration which would be thwarted if the courts were to accept the challenge to the arbitral rulings on factual issues in a regular manner. The claim being supported by reasons does not call for any interference.

29. The grounds raised by the petitioner shall be dealt by this court in view of the limited parameters available under Section 34 of the A & C Act, 1996, namely, patent illegality; in conflict with the public policy of India, which includes cases of fraud; breach of fundamental policy of Indian Law and breach of public morality as stated above.

Appointment of Sole Arbitrator:

30. The first ground of challenge to the Arbitration Award is in regard to the appointment of sole Arbitrator. It is claimed that he is self-proclaimed Arbitrator who has assumed jurisdiction without the consent of the petitioner.

31. To succinctly state the controversy, in an earlier arbitration proceeding which was ongoing before the learned Arbitrator in respect of Purchase Order dated 02nd November, 2011, the respondent sought to introduce the disputes pertaining to the present Purchase Order dated 27th March, 2012 arising out of the LOI dated 06th February, 2012. An objection was taken by the petitioner before the learned Arbitrator that the disputes pertaining to this Purchase Order dated 27th March, 2012 could not be made a subject matter of an ongoing arbitration in respect of earlier dispute especially when no Notice of Invocation in regard to the present Purchase Order dated 27th March, 2012 had been given by the respondent.

32. This objection was rightly taken by the petitioner in the previous ongoing Arbitration that since each Purchase Order is an independent contract, and if the respondent was seeking any adjustments, it was at liberty to do so either by way of Counter-Claim or set-off but could not have sought for the jumbling up of various Purchase Orders. This objection had been taken and accepted by the learned Arbitrator, leading to the initiation of the present arbitration.

33. Consequently, the respondent thus, initiated a separate arbitration in respect of the Purchase Order dated 27th March, 2012 and filed a Petition under Section 11 of A & C Act, 1996 for appointment of an Arbitrator.

34. The petition was disposed of by this Court *vide* Order dated 05th March, 2018 by observing as under:

“1. The petitioner has filed the present petition under Section II of the Arbitration and Conciliation Act, 1996, inter alia, praying that an Arbitrator be appointed to adjudicate the disputes that have arisen in respect of the Purchase Order

bearing reference no.I-5018/Monnet /SCR/EECL/Mar:-01(8) dated 27.03.2012 (hereafter 'the Agreement'). The Agreement contains an arbitration clause where the parties had agreed to refer the disputes to Shri N. P. Gupta, Chairman of the claimant on the written request being made by either patty.

2. It is stated that the Purchase Order in question was one of the four Purchase Orders that had been issued and disputes in relation to one Purchase Order have already been referred to the arbitration by a former Judge of this Court, Justice R. C. Jain (Retired). In view of the above, the petitioner had also made an application to the said Arbitrator to consider the disputes arising out of the Agreement (i.e. the Purchase Order dated (27.03.2012)).

3. The learned counsel appearing for the respondent does not dispute the existence. of an Arbitration Agreement. He also states that the respondent would. have no objection for reference of the disputes to Justice R. C. Jain (Retired). However, he states that in the present case, the petitioner has not invoked the arbitration clause, inasmuch as, no written request had been made by either party indicating the disputes to be resolved by arbitration.

4. The learned counsel appearing for the petitioner does not dispute the above. He. however. submits that the application made by the petitioner before the Arbitrator ought to be considered as a notice of invocation of arbitration.

5. A bare perusal of the said application indicates that the petitioner had not indicated any disputes,, which it insists are to be resolved by arbitration. In view of the above, the said application cannot be considered as a notice invoking the arbitration clause under the Agreement.

6. Accordingly, the present petition is disposed of by leaving it open for the petitioner to invoke the arbitration clause in accordance with law.

7. The petition and the application are disposed of.

8. The date already fixed as 16.05.2018 stands cancelled.”

35. The petitioner consented to the name of Justice R.C. Jain (Retd.), who was also the sole Arbitrator in the earlier arbitration proceedings between the parties, to be the arbitrator in the disputes which had arisen in respect of present Purchase Order dated 27th March, 2012. Since the only objection was that the Notice of Invocation of arbitration had not been given, the petition was disposed of with the observations that the parties shall be at liberty to invoke the arbitration clause in accordance with law.

36. Accordingly, the respondent gave a Notice of Invocation dated 06th March, 2018 and indicated that though under the Arbitration Clause, Mr. N.P Gupta, Chairman of Indure Private Limited had been nominated as the sole arbitration, but as Section 12 (5) of the A & C Act, 1996 read with seventh Schedule of the A & C Act, 1996 Mr. N.P Gupta was not eligible to act as the sole arbitrator. It was further indicated that since the respondent had consented to the appointment of Justice R.C Jain (Retd.), he may be appointed as the sole Arbitrator for adjudication of the disputes arising under the Purchase Order dated 27th March, 2012.

37. Thus, the respondent rightly issued a Notice dated 06th March, 2018 in compliance of Section 21 of the A & C Act, 1996. The petitioner, in its Reply dated 06th April, 2018, took an objection that the claims of excessive payments raised in the Notice to be cannot be adjudicated without referring to all other contracts arising out of the LOI dated 06th February, 2012. However, as already observed, each Purchase Order constitutes a separate contract entailing independent proceedings. Significantly, there are various arbitration proceedings between the parties in respect of various Purchase Orders and the objection was rightly taken

in the Reply.

38. Further an objection was taken that a detailed mechanism for settlement of disputes was provided under Clause 46 of General Terms and Conditions of Contract which provided that the parties may first try for amicable settlement. All unsettled disputes and differences arising out of the Contract were to be referred to the Engineer whose decision was to be final and binding on the parties. Prior to the initiation of any arbitration proceedings, if any dispute arises between the Purchaser and the Contractor, the Purchaser's Project In-charge and the Contractor's Representatives shall use their best efforts and good faith to arrive at a reasonable and equitable resolution. If they were unable to do so within 30 days, either party by written Notice could refer the matter for resolution in good faith negotiation between their respective senior officers having decision making powers, provided that they have not had any substantive involvement in the matters under dispute. It was claimed that prior to issuance of the Invocation Notice, no such attempt had been made in terms of Clause 46 of the General Terms and Conditions of the Contract.

39. In regard to this objection, it may be observed that though the General Terms and Conditions of the Contract are generally applicable, they get superseded by a special contract which may be entered into between the parties. The Purchase Order dated 27th March, 2012 contained Clause 20, the Arbitration Clause which provided for referral of disputes to arbitration. **Clause 20 reads as under:**

“Clause 20:

“All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and

operation or effect of this order or the breach thereof shall be settled by arbitration in accordance with the provisions of Indian Arbitration/Reconciliation Act 1996 or any statutory modification thereof for the time being in force and the awards made in pursuance thereof as subsisting shall be binding on the parties.

Except where otherwise provided in the Order, any dispute arising out of or in connection with the order or claim there under and as to the respective rights, obligations and liabilities of the parties hereto whether during the continuances of this order or thereafter shall be referred to at the written request of either party to the sole arbitration of Sh. N P Gupta, Chairman Of The Indure Private limited, Indure House, Greater Kailash - II, New Delhi shall be the venue of the arbitration unless otherwise agreed to by both M/s Elecon Engineering Co. Ltd. and The Indure Pvt. ltd .”

40. The procedure was duly followed by the respondent by giving a Notice of Invocation dated 06th March, 2018. The General Terms and Conditions of the Contract, though provided for a general procedure, got superseded by the terms as contained in the impugned Purchase Order. The procedure for referral of disputes to Arbitration was in accordance with Clause 20 of the Purchase Order and the objection in this regard is without any merit.

41. The objection taken is, therefore, not tenable.

Unilateral Self-Assumption of the Jurisdiction by the Sole Arbitrator:

42. The second objection taken by the petitioner is that there was unilateral self-assumption of the jurisdiction by the sole arbitrator to whose appointment the petitioner had never agreed as is evident from its

Reply dated 06th April, 2018.

43. This contention of the petitioner is also without merit as the respondent at the time of disposal of the Arbitration Petition bearing No. ARB.P. 08/2018, had consented to the reference of the disputes under the Purchase Order dated 27th March, 2018 to the learned sole Arbitrator, Mr. R.C. Jain (Retd.) who was already the sole Arbitrator in respect of the disputes between the under Purchase Order of 02nd November, 2011. The only objection taken was non-invocation of Arbitration by serving a Notice, which has been duly addressed by the respondent by sending Notice of Invocation dated 06th March, 2018.

44. There is no requirement under the law that consent to the name of the learned Arbitrator has to be given only in response to Notice of invocation. Once the petitioner had already consented to the appointment of the learned Justice R.C. Jain (Retd.) as the sole Arbitrator in the proceedings under Section 11 of the A & C Act, 1996, the petitioner now cannot perform a *volte-face*.

45. No ground has been established by the petitioner which reflects that the appointment of the learned Arbitrator was against the established procedure or without the consent of the petitioner or was self assumed as claimed by the petitioner. The challenge to the Award dated 06th May, 2019 on the ground of self assumption of jurisdiction by the learned Arbitrator is absolutely fallacious and misplaced.

No equal, fair and independent treatment to the petitioner:

46. The next objection taken by the petitioner is that no equal treatment was being given to both the parties and the petitioner had reason to

believe that it would not receive a fair or independent adjudication of their claims. The reason for such apprehension was that despite an application under Section 12 read with Sections 13 and 14 of A & C Act, 1996 dated 28th May, 2018 was filed by the petitioner, the same was disposed of after five months on 30th October, 2018. Even thereafter, accommodation was being given to the respondent for filing his statement of claim despite the delay.

47. If the petitioner was dissatisfied with the dismissal of its application under Section 12 of the A & C Act, 1996, it was open for it to seek its remedy before the appropriate forum at the appropriate stage. Instead of filing the statement of defence, or following the dismissal of its Application with appropriate remedy, the petitioner did not show up and the learned Arbitrator proceeded *ex parte*.

48. Further, mere dismissal of an application under Section 12 of the A & C Act, 1996, especially in the factual background as stated above, cannot be considered as a reason to give rise to any reasonable apprehension of any kind of bias in favour of the respondent herein. Essentially, the petitioner's apprehension of denial of fair and independent adjudication of its Claims is based on conjectures and misplaced apprehensions, which is not supported by any concrete facts.

49. The petitioner has also taken a plea that it was entitled to set off of its own claims against the claims raised by the respondent. However, the same could have been considered only if the petitioner had participated in the proceedings and submitted its defence/set-off before the learned Arbitrator. The record shows that after the dismissal of the application, the respondent failed to appear before the learned sole arbitrator and was

proceeded *ex parte* and the matter was decided in its absence. The petitioner has not been able to provide any reasonable grounds for creating an apprehension about independence of learned sole arbitrator.

Award beyond the statutory period as defined in Section 29A of the A & C Act, 1996:

50. The Award has been challenged by the petitioner on the ground of the Award having been pronounced beyond the statutory period of one year from the Notice of Invocation dated 06th March, 2018 as the statutory time period for concluding the Arbitration expired on 05th March, 2019. However, the Award has been made on 06th May, 2019 which is beyond the stipulated period under Section 29A of the A & C Act, 1996 and, therefore, the Award is *non-est*. Though Section 29A has been amended on 30th August, 2019 to provide that the period of twelve months shall be reckoned from the date of completion of pleadings, but since this Arbitration has been invoked prior to 30th August, 2019, it is the unamended Section 29- A of A & C Act, 1996 which shall be applicable.

51. Section 29A as first introduced in 2015, reads as under:

“(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.”

Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.”

52. However, Section 29A as amended w.e.f. 09th August, 2019 reads as follows:

*“(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal **within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23***

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of section 23.”

53. The amended Section 29A provides that the time frame for concluding the arbitration *shall be twelve months from the date of completion of pleadings* instead of *twelve months from the date the arbitral tribunal enters upon the reference* i.e., from the date when the arbitrator receives the notice of his appointment.

54. The petitioner in the instant case had not filed a Statement of Defence before the arbitrator, while the respondent herein filed their Statement of Claim and supporting documents on 23rd January, 2019. The date on which the respondent herein filed their Statement of Claim and supporting documents will be construed as the date on which the pleadings were completed.

55. The question is whether the amended Section 29A shall be applicable to the Award rendered at a time when the erstwhile provision was in force i.e., prior to 29th January, 2019 though is still under challenge under Section 34 of the A & C Act, 1996. Section 29A of the Arbitration & Conciliation Amendment Act, 2019 constitutes a rule of procedure which does not accrue into a substantive right or obligation as this

provision does not deal with the right to arbitrate a dispute, but provides the procedure to arbitrate a dispute i.e., the time frame within which the arbitral tribunal is bound to pass an award.

56. The Apex Court in Smt. Dayawati v. Inderjit, AIR 1966 SC 1423 observed that unlike substantive laws, procedural laws are always applied retrospectively. Emphasis was thus laid on the language of the new law. It was held that if the new law, through its language, displays an intention to be applied on even pending matters, then such a law shall be applicable for matters pending before the court of trial as well as the court of Appeal. Thus, even a court of Appeal can give effect to a new procedural law which came into effect after the judgement of the court of first instance.

57. Likewise, the Apex Court in Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 observed that a procedural statute, which is generally applicable in a retrospective manner, would be applied prospectively only when the result of its application creates new disabilities, obligations or imposes new duties in respect of transactions already accomplished. The law relating to forum and limitation was held to be procedural in nature.

58. This court in Shapoorji Pallonji and Co Pvt Ltd vs Jindal India Thermal Power Ltd, 2020 SCC OnLine Del 2611 held that the amended Section 29A, being procedural in nature, is applicable to pending arbitrations as on the date of the amendment.

59. Subsequently, this court in ONGC Petro Additions Limited vs Ferns Constructions, 2020 SCC OnLine Del 2582 by reading Section 26 together with Section 29A, held that the Section 29A of the Arbitration & Conciliation Amendment Act, 2019 is applicable to pending arbitrations

commenced after 23rd October, 2015 i.e., the date on which Section 29A was introduced by the 2015 amendments.

60. In view of the aforesaid judgements, Section 29 A as amended in 2019 is applicable to Awards which though were commenced prior to the 2019 amendment, but are still pending challenge under Section 34 of the A & C Act, 1996.

61. This view is further supported by the fact that Section 29A (4) of the A & C Act, 1996 remains unamended even after the 2019 amendment.

Section 29A (4) reads as follows:

“29A (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.”

62. In M/s.Chandok Machineries Vs. S.N. Sunderson & Co, 2018 SCC Online Del 11000, the court placed reliance on Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao, (1987) 4 SCC 93 and held that:

“31. Even Section 29A(4) of the Act empowers the Court to extend the time for making of the Award even after the expiry of the period. Once the Court extends the time for making of the Award, the proceedings, if any, undertaken by the Arbitral Tribunal after the expiry of the prescribed period, shall stand validated.

32. *In the present case, even assuming that the date of the Award has to be taken as 7th July, 2017, when a copy of the same was dispatched to the parties by the Arbitral Tribunal, this Court can extend the time for making of the Award in exercise of its powers under Section 29A(4) of the Act. It is not shown by the petitioner why the time limit should not be extended by this Court. The only submission made by the learned senior counsel for the petitioner is that such extension of time can be granted only on an application made by any of the parties to the arbitration proceedings. In my opinion, such application need not only be in writing but can also be oral.”*

63. The issue of limitation for completing the arbitral proceedings falls within the scope of interference under Section 34 and thus Section 29A as amended in 2019 which provides for reckoning the time of completion of arbitration proceedings from the date of completion of pleadings, shall be applicable.

64. In the present case, the award though already passed on 06th May, 2019 is still under challenge in a Petition under Section 34 of the A & C Act, 1996. It is thus, held that the objection that the Award dated 06th May, 2019 was beyond the prescribed period as stipulated under Section 29A of the A & C Act, 1996, is without merit.

The Award is perverse and suffers from patent illegality:

65. The petitioner has challenged the findings in respect of the learned Arbitrator having allowed Claim No. 1 for a sum of Rs. 77,160,050/- towards unadjusted advances/excessive payments made by the respondent to the petitioner on the ground that it was not substantiated by any evidence.

66. This contention is totally beyond the record as the learned Arbitrator had referred to the testimony of CW-1 Vivek Kumar who had proved the relevant Ledger Accounts as Ex.CW-1/9 to establish that there were unadjusted advances amounting to Rs. 77,16,050/- to which the Claimant/respondent herein was held to be entitled.

67. The argument that the claim was allowed without there being any evidence, is not tenable.

68. Further, the other objection taken was that **Claim No.1 was barred by Limitation.**

69. Before going into the merits of this submission, it is pertinent to note that though the petitioner had not contested the claim, as it was proceeded *ex parte*, the plea of limitation was not raised before the learned Arbitrator, but the law of limitation is a legal aspect which the learned Arbitrator is bound to consider while considering any claim for recovery of money.

70. In the case of Extramarks Education India Private Limited vs. Shri Ram School & Anr. 2022 SCC OnLine Del 3123, the question of whether the law of limitation can be out manoeuvred by the consent of the parties to an arbitration was considered. It was found that even if the parties have agreed to refer their claim to the learned Arbitrator, it would still not be within their domain to concede to availability of legal remedy the claim itself is found to be time-barred. The Sole Arbitrator could not have ignored that the claim was barred by limitation which is a pre-requisite for allowing any money claim. A reference in this regard may also be made to C. Selvaraj (died) vs. The Corporation of Madras, Rep. By its Commissioner (1995) 2 MLJ 84.

71. Learned counsel on behalf of Respondent, in his Written Submissions has asserted that the amount was crystallized on 31st March, 2015 which was the end of the financial year when the project was stalled. The petitioner had categorically admitted in its Letter dated 04th April, 2018 in regard to the Invocation of Arbitration in respect of Work Order bearing No. I-5018/Monnet/SCR/EECL/Mar-01(E & C) dated 27th March, 2012 as under:

“4. You have released an Advance of Rs.1,25,23,100/- on 05.05.2012 against ABG for the entire value covered under the aforesaid single LOI No. I-5018/ Monnet/ SCR/ EECL/ Feb-01 dated 06.02.2012. It is a matter of record that an amount of Rs.48,07,050/- was adjusted against the supply invoices and due to The Indure's non response, inaction (deemed hold by The Indure) on supply of balance material an amount of Rs.77,16,050/- remains unadjusted.....”

72. It is asserted that in view of the acknowledgement of the claim by the petitioner, it cannot assert that the claim was barred by limitation.

73. In the present case, the Ledger maintained a record of the transactions under the Purchase Order dated 27th March, 2012 wherein the last entry was made on 12th September, 2013 and the closing balance as on 31st March, 2014 was Rs. 77,160,050/- which was the outstanding amount towards the respondent. The limitation period has to be construed from 01st April, 2014. The period of three years from the said date for raising the claim gets concluded on 31st March, 2017 which is much prior to the date of Notice of Invocation which is 06th March, 2018.

74. Pertinently, the admission has been made in Letter dated 04th April, 2018 which is beyond a period of three years from the date i.e., 01st April, 2014 from where the limitation has to be reckoned and does not

qualify as a valid acknowledgement under Section 18 of the Limitation Act, 1963.

75. However, **Section 25(3) of the Indian Contract Act, 1872** reads as under:

“Section 25(3): –

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.”

76. The admissions made by the petitioner and the outstanding liability in terms of Section 25(3) of the Indian Contract Act, 1872 amounts to a fresh Contract entitling the respondent to its recovery. For this, a reference may be had to R. Madesh vs. M. Rathinam 2015 SCC OnLine Mad 3094, wherein it has been held that where the acknowledgement of liability though made after a period of limitation, it creates a new cause of action providing a fresh start to the limitation period i.e., from the point of promise, a new limitation period commences.

77. A reference may also be made to Kapaleeswarar Temple vs. T. Tirunavukarasu AIR 1975 Mad 164, wherein it was observed that a debt may have become time-barred, but when the debtor admits his liability beyond the period of limitation, it creates a fresh obligation in favour of the creditor and would amount to a fresh contract which can certainly be made a basis for an action for recovering the amount promised and acknowledged therein by the debtor.

78. Therefore, though the claim of the respondent may have been

time-barred at the time of Invocation of Arbitration, but in view of the admission contained in Letter dated 04th July, 2018, it amounts to a fresh contract giving a fresh lease of limitation and thereby making this claim recoverable by the claimant/respondent.

79. The argument of the learned counsel for the petitioner that the Claim No.1 was barred by limitation, is not sustainable in view of Section 25(3) of the Indian Contract Act, 1872 and has been rightly allowed by the learned Arbitrator. There can be no challenge to the Award of the claim in the sum of Rs. 77,16,050/-.

Claim for Liquidated Damages:

80. The second claim of the respondent was for *liquidated damages to the tune of Rs. 60,47,300/-*. The learned Arbitrator observed that the petitioner herein (respondent before the Arbitrator) had completed and discharged its contractual obligations to almost 1/3rd of the agreed work and failed to complete the balance supplies worth Rs. 7,28,75,500/-, therefore, the claimant/respondent was entitled to liquidated damages @ 5% of the said amount of Rs. 7,28,75,500/- as per Clause 17 of the Purchase Order/Contract dated 27.03.2012, Ex. CW-1/1. The liquidated damages have thus been calculated at Rs. 36,43,775/- and the claim was partly allowed.

81. It cannot be ignored or overlooked that the objections under Section 34 of A & C Act, 1996 are not by nature of an appeal and an award cannot be disturbed by re-appreciating the evidence. However, an award can be disturbed if it is found to be perverse and against the public policy of India. Any award based on no evidence or which is contrary to the law of

the land has to be necessarily set aside. For this, a reference may also be made to PSA Sical Terminals Pvt. Ltd. vs. The Board of Trustees of V.O. Chidambranar Port Trust Tuticorn And Others 2021 SCC OnLine SC 508.

82. Further in Associate Builders vs. Delhi Development Authority Civil Appeal No. 10531/2014, (2015) 3 SCC 49, the Apex court interpreted Section 28 (1) (a) and (3) of the A & C Act, 1996 to hold that there is a mandate imposed on the arbitral tribunal to decide the dispute in accordance with the substantive law for the time being in force in India which would include the Indian Contract Act, the Transfer of Property Act and other such laws in force, the tribunal must pass the award in compliance with the substantive law in India. Hence, if the award is passed in violation of the provisions of the Indian Contract Act, it could be set aside.

83. Sections 73 and 74 of the Indian Contract Act, 1872 provide for calculation of liquidated damages and for their mitigation. Sections 73 and 74 of the Indian Contract Act, 1872 read as under:

“Section 73:—

73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. —When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the

parties knew, when they made the contract, to be likely to result from the breach of it." Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract. —When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract."

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Section 74:—

74. Compensation for breach of contract where penalty stipulated for:— 34 [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

(Exception) — When any person enters into any bail-bond, recognizance or other instrument of the same nature or,

under the provisions of any law, or under the orders of the 35 [Central Government] or of any 36 [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

84. In Fateh Chand vs. Balkishan Das AIR 1963 SC 1405, the law relating to the damages had been propounded which reads as under:

“Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award in case of breach of contract is unqualified except as to maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles.

The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a Plaintiff or a Defendant in a suit. Use of the expression “to receive from the party who has broken the contract” does not predicate that he jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be

exercised in dealing with the claim of the party complaining of breach of contract....”

XXXXX

XXXXX

XXXXX

43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum, is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.”

85. In the light of these principles for grant of liquidated damages, the facts of present case may be considered. Clause 17 of the Purchase Order dated 27th March, 2012 reads as under:

“17. DELAY IN COMPLETION SCHEDULE

The recovery/ adjustment on account of delay in completion schedule shall be as under:

(a) The time for and date of completion as per completion schedule, specified shall be deemed to be the essence of the contract and work shall have to be completed not later than the date(s) specified. Should the ELECON'S fail to complete the work or any part thereof within the specified period Indure shall be entitled at their option:

(i) To recover from the ELECON'S at the rate of 0.5%

(one percent) of the contract price for each week or part of the week for which the contract completion has been delayed. The recovery of such amount will be limited to 5% of the contract price. For this, purpose a delay of one day also shall be considered as a delay of one week. The above is genuine estimate of loss in case of delay and not by way of penalty.”

86. From Clause 17 itself, it is evident that if the work is not completed within the specified date, then the respondent herein would be entitled to recovery from the petitioner @ 0.5% of the contract price of the turn-key contract for each week or part of the week for which the contract completion has been delayed. The recovery amount shall be limited to 5% of the contract price. It further provided that the above is a genuine estimate of loss in case of delay and is not by way of penalty. The other option given was to cancel the contract or part thereof and to get the same completed at the risk and cost of the petitioner.

87. The respondent has submitted in its Statement of Claim that against the Purchase Order dated 27th March, 2012, Ex. CW-1/1, the total invoiced amount was Rs. 4,80,70,500/- and the last Invoice was dated 29th June, 2013 out of the total contract value of Rs. 12,09,46,000/-. Thus, only, approximately 1/3rd of the total value of the work was completed, which shows that there was a clear delay and abandonment of the project.

88. The respondent was, therefore, entitled to liquidated damages in respect delay caused in the completion of the contract @ 5% of the contract price as has been stipulated in the contract. The unchallenged testimony of CW-1/Vivek Kumar proved that the invoice amount was Rs. 4,80,70,500/- out of the total contract value of Rs.12,09,46,000/- leaving an unaccomplished work worth Rs. 7,28,65,500/- . The liquidated

damages have, thus, been assessed according to the terms of the Purchase Order dated 27th March, 2012.

89. A similar clause in regard to the payment of liquidated damages which stipulates a genuine pre-estimate was considered in the case of Construction And Design Services vs. Delhi Development Authority (2015) 14 SCC 263, wherein it was observed as under:

“xxxxxx

xxxxxx

xxxxxx

16. *In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. **There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.***

18. *Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable*

compensation. Evidence of precise amount of loss may not be possible but in absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the Court has to proceed on guess work as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation.”

90. Thus, the liquidated damages have been awarded by the learned Arbitrator in terms of the Contract between the parties. The claim has not been contested by the petitioner and the findings in this regard have not been shown to be perverse or patently illegal which merit any interference under Section 34 of the A & C Act, 1996.

91. The role of this court under Section 34 of the A & C Act, 1996 is merely supervisory as held in McDermott International Inc. (supra). In M/s L.G. Electronic India Pvt. Ltd. vs. Dinesh Kalra FAO (OS) (COMM) 86/2016 it was held that it is not conceivable to re-examine the facts to arrive at a different decision in the absence of any valid permissible ground under Section 34(2) of the Act, 1996.

92. Further, in Dyna Technologies Pvt. Ltd. (supra), the Apex court had observed that Section 34 A & C Act, 1996 has a different methodology and the claim being supported by reasons, does not call for any interference.

93. In the case of M. Hakeem, (supra), 1 it had been observed by the 3-Judge Bench of the Apex Court that interference with the conclusions of fact and law is not permissible in either Section 34 of the A & C Act, 1996. Only when the determination is *ex facie*, perverse or in conflict

with the provisions of the Contract, can the Court's interference be justified.

94. Likewise, the Supreme Court in Anglo-American Metallurgical Coal (supra), had observed that the Court is not permitted either under Section 34 of the A & C Act, 1996 to independently evaluate the merits of the Award, but must confine its authority to the parameters permitted under the Statute. Extreme caution must be observed by the Court and it should be hesitant to disrupt the concurrent conclusions arrived at in the Arbitral Award which is validated by the Court under Section 34 of the A & C Act, 1996.

95. Thus, there can be no re-appreciation of facts and considering that the findings of the learned Arbitrator is duly supported by evidence and reasons, it is not within the scope of Section 34 of A & C Act, 1996 to get into re-appraisal of facts and merits.

96. This ground raised by the petitioner to challenge the findings, does not call for any interference.

Interest is exorbitant:

97. The other aspect is the challenge to the interest. The Arbitral Tribunal holds the discretion to award interest to the parties unless the Agreement contains a clause that covers the issue of interest as held in Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation (2022) 9 SCC 286.

98. The Arbitration Agreement does not contain any such clause in the present case. In fact, interest has been awarded in accordance with Section 31(7) (a) & (b) of the A & C Act, 1996 i.e., @ 2% higher than the

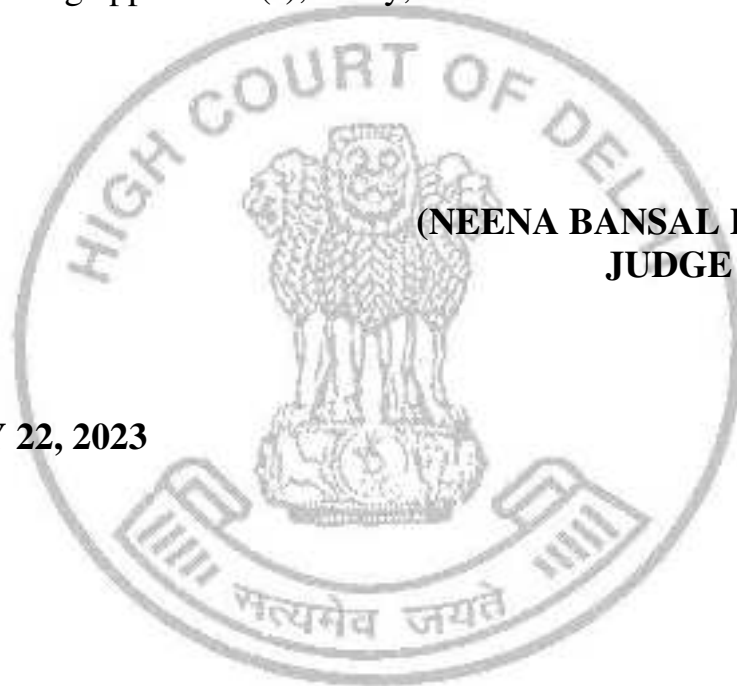
prevalent rate of interest.

99. Thus, the challenge under this ground is without merit.

Conclusion:

100. The appellant has not been able to establish any ground for challenge of the Award. There is no merit in the Objections under Section 34 of the A & C Act, 1996 which is hereby dismissed.

101. The pending application(s), if any, is also dismissed.



(NEENA BANSAL KRISHNA)
JUDGE

FEBRUARY 22, 2023
S.Sharma/PA