

M/S. Gulraj Engineering Construction Co. Vs. Hotel Corporation of India Ltd.

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Court : Mumbai

Decided On : Sep-07-2012

Judge : ANOOP V. MOHTA

Appeal No. : ARBITRATION PETITION NO. 341 OF 2009

Appellant : M/S. Gulraj Engineering Construction Co.

Respondent : Hotel Corporation of India Ltd.

Judgement :

The Petitioners, Original Claimants, have challenged award dated 14 January 2009, passed by the Sole Arbitrator, appointed in view of the contract agreement dated 28 April 2000 and 22 October 2001, for the works of renovation of 60 Guest Rooms together with connected shafts and corridors at Centaur Hotel, Mumbai Airport, Mumbai and also renovation of additional 60 Guest Rooms together with connected Shafts and corridors at Centaur Hotel, Mumbai Airport, Mumbai.

2 The summary of award is as under:-

Claim No.	Details	Amount Claimed by Claimant in Rs.	Amount Awarded to Claimant in Rs.	Remarks
1	Interest for Delayed Payments Ph-I	9,52,403.88	1,70,916.00	Compensation for delayed payment for the period between schedule date of payment (15.09.01) and actual date of payment (10.06.02) @ 10% of final amount payable.
2	Escalation-Ph:	15,08,711.00	Nil	The contract does not contain specific escalation clause and formula.
3	Silicon Sealant-Ph-I	45,232.00	45,322.00	The seepage was due to design of windows in Phase-I. The design was changed in Phase-II and the problem was eliminated. There was no provision for applying of sealant in Phase-I and therefore, it is additional

				work.
4	Freak high rate items Ph-I	1,89,351.00	1,89,351.00	This is an amount of freak high rate items and estimated rates differentiate in additional FH rates items declared after finalization of contract. Respondents added additional 10 Items (over agreed 13 items at the time of negotiations) for payment @ estimated rates in place of quoted rates.
5	Establishment charges Ph-I	8,00,000.00	Nil	No claim could be admissible for delay in completion except the grant of extension of completion period with or without levy of compensation for delay. No compensation for delay was levied in this case.
6	Interest on the above dues Ph-I	As applicable.	Nil	The claimants have received their full and final payment. There is no provision for such claims in the contract.
7	Interest for delayed payment Ph-II	26,67,112.74	1,31,911.80	Compensation for delayed payment for the period between schedule Date of payment (21.09.02) and actual date of payment (31.03.03) @ 10% of final amount payable.
8	Escalation Ph-II	28,29,628.00	43,813.09	The contract contains additional items on requirement basis. The escalation may be payable for used quantities for such items in Phase-II works. The issue of payment of escalation, for works was of phase-II, was not materialized.
9	Establishment charges Ph-II	14,00,000.00	Nil	No claim could be admissible for delay in completion except the grant of extension of completion period with or without levy of compensation for delay. No compensation for delay was levied in this case.
10	Interest on the above	As applicable	Nil	The Claimants have received their full and final payment.

	dues Ph-II			There is no provision for such claims in the contract.
11	Arbitration Cost	To be furnished	Nil	The parties are required to bear their respective cost.
	TOTAL	1,03,92,438.00	5,81,223.89	

3 The Respondents entered into an agreement on 28 April 2000 and 22 October 2001 with the Petitioners-claimants. There was arbitration clause for settlement of the dispute. The work was completed in all respect by the Petitioners. The dispute arose about certain claims and as the same was not settled by the Respondents, the Petitioners invoked Arbitration clause. The Sole Arbitrator was appointed on 3 November 2005/ 22 February 2006. The same was continued for both the works.

4 The Petitioners filed their statement of claims on 30 March 2006. The Respondents filed defence on 16 November 2006. The Claimants-Petitioners filed rejoinder on 12 December 2006. Admittedly no oral evidence led by the parties. The learned Arbitrator, based upon the pleadings, documentary evidence, oral arguments, and the contractual terms, has passed the award. The Petitioners appear to have filed the statement of claims based upon the Phase-I work and also Phase-II work. The disputes/ differences arising out of these two works have been raised and decided in the present award by the Arbitrator.

5 The summary so recorded above, itself shows the claims and its details referring to Phase-I and Phase-II. The Petitioners have also principally restricted the submission referring to claim Nos. 1 and 6 for Phase-I work and Claim Nos. 7, 8 and 10 for Phase-II work. The challenge was also raised that the Arbitrator has relied upon clause 57 of the General Conditions of the contract, whereas the Arbitration Agreement is provided in Clause 41 and its sub-clauses of General Conditions of contract. The ground was also raised with regard to the law of limitation and so also the interest on delayed payment. The averments/grounds are specifically raised. Though the final hearing was concluded on 25 July 2007, the award was passed after 18 months i.e. on 14 January 2009. A copy was served on 23 January 2009. Therefore, preferred this Section 34 Petition under the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act) on 13 April 2009. In all submitted to set aside the award on various grounds, including non-application of mind, contrary to the terms and conditions and against the public policy.

6 The basic dates and events referring to the respective correspondences, as referred and relied are as under:-

a) On 3 April 2001, during the negotiations for the work of Phase-II, parties agreed for suitable price adjustment/price escalation formula for Phase-II work.

b) On 16 April 2001, the final bill for Phase-I, submitted by the Petitioner.

c) On 26 April 2001 and 8 May 2011, LOI issued by the Respondents to the Petitioners for Phase-II work on the same terms and conditions as in the earlier contract.

d) On 9 May 2001, the Petitioners protested to the issuance of the said LOI without inclusion of escalation clause by its letter and recorded the fact of meeting of 3 April 2001, placing on record that parties had agreed to suitable price adjustment/price escalation formula. The Petitioners also made it clear that they were commencing the subject work based on the above mentioned facts and request that the same may be incorporated in the detailed work order to be issued. (Phase-II).

e) On 10 May 2001, the minutes of meeting prepared by the architect of the project recorded that in the presence of respondent pet has called upon the Respondents to issue detailed work order incorporating the various clauses mentioned in LOI and acceptance letter of the Petitioners. At this time also the Respondents kept silent thereby implying their consent to agree to the proposal of the Petitioners to include the escalation clause in the work order to be issued and the Petitioners chose to continue with the work relying on this implied/silent consent of the Respondents. (Phase-II).

f) On 29 May 2001, the architect of the Respondents recommended to the Respondents to adopt price variation clause of the Government of Maharashtra (PWD). This will clearly go to show that the Petitioners were always given to understand that the escalation clause will be part of the work order to be issued in future by the Respondents. (Phase-II)

g) On 25 June 2001, the Petitioners once again called upon the Respondents to give its decision on various issues pending with them including the issue of inclusion of the price escalation clause in the agreement. (Phase-II)

h) On 27 June 2001, the Petitioners submitted its 1-RA bill claiming escalation. (Phase-II)

i) On 5 July 2001, the consultants informed the Respondents while certifying the 1st RA bill of the Petitioners that in absence of detailed work order claim of escalation could not be scrutinized. (Phase-II).

j) On 18 July 2001, the Petitioners placed on record that he had already spent a sum of Rs.1.50 crores by the time and non-issuance of work order had created serious apprehensions in the mind of the Petitioners.

The Petitioners called upon to take an immediate action on all the issues. (Phase-II) k) On 2 August 2001, the Petitioners called upon the architects to modify the COP after incorporating the price escalation clause. (Phase-II)

l) On 16 August 2001, the Petitioners submitted its 2nd RA bill claiming escalation. (Phase-II)

m) On 11 October 2001, the Petitioners submitted its 3rd RA bill claiming escalation. (Phase-II) n) On 22 October 2001, the Petitioners received work order, which was after the scheduled date of completion and after major part of the Phase-II work had been completed. The petitioners were shocked to read the work order since it did not include the price variation clause, (for short, PVC) (Phase-II).

o) On 29 October 2001, the Petitioners immediately registered its protest to this irresponsible act of the Respondents and pointed out that the PVC remained to be mentioned in the work order. The Petitioners further requested the Respondents to amend the work order to include PVC.(Phase-II)

p) On 30 October 2001 letter of the Petitioner calling upon the Respondent to make payment of its final bill including interest on delayed payment. (Phase-I.)

q) On 16 January 2002, the minutes of meetings as prepared by the Manager Engineer of the Respondents recording that the Petitioners had asked for the increase in costs due to escalation and interest payment on delayed payments in R.A. Bill payments (Phase-II).

r) On 2 March 2002, the work completion certificate stating that pet had completed work on 28 February 2002. (Phase-II)

s) On 16 April 2002, in response to contractor's final bill COP issued by the consultant to the Petitioners. Point 8.3 of the letter-Compensation for delayed payments is not considered. Consultant certified the final bill amount payable at Rs.3.45 Crores. (Phase-I.)

t) On 23 April 2002, the Petitioners submitted its final bill. (Phase-II).

u) On 30 April 2002, letter of the Respondents making final payments to the Petitioners. Claim for interest on delayed payment is not considered on the ground that there was no provision in the contract for the same. Final amount paid at Rs.3,39,42,202.73 to the Petitioner. (Phase-I.)

v) On 30 May 2002, the architects of the Respondents issued alleged COP for the final payments. (Phase-II)

w) On 25 June 2002, the Petitioners did not accept the same as final and called upon the Respondents to issue

the final COP after including PVC. (Phase-II).

x) On 10 June 2002, the final payment received by the Petitioners. (Phase-I)

y) On 7 October 2010, the work completion @ 5 months. (Phase-I)

7 So far as the Phase-I, Claim No.1 for payment of compensation of Rs.9,52,403.88, the Petitioners has claimed payment of interest on delayed payments on a running bills and final bills. The same was resisted by written statement. The chart is placed to show admission of delayed payments. The Petitioners, therefore, claimed interest on delayed payments. The Arbitrator has granted 1,70,916.00, being 10% of final amount payable, in respect of the final bill.

8 The Petitioners also claimed No. 6 (Phase-I) and 10 (Phase-II), for interest on the amount at 24% p.a., but, not granted by the Arbitrator.

9 The Petitioners for Phase-II, in claim No. 8, prayed for payment of escalation of Rs. 28,29,628.00 (escalation on BOQ items at Rs. 27,36,826.37 and escalation on item basic rates at Rs.92,801.00). The Arbitrator rejected the first part in toto. However, partly granted for part B, Rs. 43,813.09.

10 For phase-II, Claim No.7, the interest was claimed on delayed payment of Rs.26,67,112.74. The Arbitrator has granted an amount of Rs.1,31,911.80 being 10% of final payable amount of final bills on the basis the reasoning for claim No.1 of Phase-I.

11 The Arbitrator, as recorded, refused to grant escalation claim for Phase-I by holding that the contract does not contain specific escalation clause and formula. No establishment charges for Phase-I and Phase-II were awarded as remarked. The interest on the amount dues as claimed, was also not awarded as the claimants have received full and final payment and as there is no further provisions for such claim for Phase-I and Phase-II. So far as the escalation Phase-II is concerned, the restricted amount is awarded as mentioned above. The interest for delayed payment in Phase-II, as recorded above has also been awarded in part. The Arbitrator has ordered the parties to bear their respective costs. The Petitioners have not pressed any other claims except referred above, and of which separate synopsis also filed on record. The Respondents have not challenged, neither the Petitioners, the grant of award in respect of the other claims i.e. claim Nos. 3 and 4.

12 The learned Arbitrator by providing detailed reasons, rejected the three preliminary objections raised by the Respondents. There is no Petition and/or challenge made to the said findings by the Respondents in any of the proceedings.

13 The Arbitrator, as noted and as pointed out, though observed, not dealt with the aspect of limitation by giving any specific reason while granting and/or rejecting the claims of the Petitioners. Therefore, the Petitioners have submitted that there is non-application of mind by the Arbitrator, by not dealing with the aspect of the limitation while dealing with their claims. Though awarded, the restricted amount as recorded above, I am not inclined to accept the submission of the learned counsel appearing for the Petitioners to interfere and/or accept the submission, as the Arbitrator by giving reasons, awarded the amount though in part. The grant of amount in part, needs to consider specifically when the Respondents have not challenged the said aspect further.

14 The learned Arbitrator, dealt with Claim No.1 of Phase-I and Claim No. 7 of Phase-II i.e. payment of compensation on delayed payments and payment of interest on delayed payments. As per clause 8 of Annexure-A to the condition of contract, it was made permissible for the Petitioners-Contractors to claim for compensation/interest for delayed payment. The relevant clause 8.3 compensation on delayed payment reads as under:-

Compensation on delayed payment:

8.3.1 - The Contractors M/s. GECC in their Final Bill claimed compensation payment on delayed payment (Page no.19 of their Final bill). It can be seen from the statement that HCI Ltd. have released payment of their 1st to 4th R.A. Bills in 13 installments. Moreover, the Contractors have stated that their payment has been delayed from 8 days to 121 days. The total compensation for delayed payment till 16/04/2001 is claimed for 11.38 Lakhs.

8.3.2 - As per the Contract Act, payments to the Contractors should be released in stipulated period. However, it is observed that the HCI Ltd. have not honoured Contractors payment due to procedural delay of joint measurements etc. in stipulated period. Therefore, they may claim for compensation/interest for delayed payment. In absence of details from HCI Ltd., we have not scrutinised Contractors claim.

15 The time period, of honoring the final bill if prescribed and as mentioned 60 days from the date of issue of final payment certified by the Respondents, the Petitioners are entitled to claim such interest/compensation on delayed payments. There is nothing mentioned or pointed out that there was any bar in making payment of interest on interim payments. If amount is due and payable as per the contract terms and conditions, on a submission, even on interim bills, subject to scrutiny, if any, the Contractor is entitled for the interest and/or compensation even on due interim payments. The whole purpose of interim bills in such type of contracts, just cannot be overlooked that the Contractor, from time to time, needs money to continue with the project to see and settle their and internal obligations/liabilities to the third persons like labours or other subcontractors and/or their respective sellers, from whom they purchased the material. The whole purpose of final interim payment aspect get frustrated, if there is no timely payment made, specifically when, the parties have agreed to make/receive such payment, pending the final bills.

16 The learned Arbitrator has recorded that the final bill was submitted on 16 April 2001 and the due date of payment, as per the contract, was 15 September 2001. The final bill was paid on 10 June 2002. The Arbitrator awarded the compensation of Rs.1,70,916.00 for the delay from the due date and upto the date of payment @ 10% on the final payable amount. There is nothing mentioned about the interim payment based upon the interim bills and/or entitlement of the Contractors.

17 The interim payment for the same reasoning, the learned Arbitrator has decided Claim No. 7 (Phase-II) by observing that the final bill was submitted on 23 April 2002 and the due date of payment was 21 September 2002, the final bill was paid on 31 March 2003, therefore, awarded the compensation/interest on delayed payment on the final payable amount of Rs.13,19,118.00 @ 10% i.e. Rs.1,31,911.80, in respect of part of final bill. It is not the case that the Arbitrator has not considered and not granted compensation on delayed payment. Admittedly, the Arbitrator has considered and granted compensation/ interest as recorded above, but not on interim bills amount.

18 The substantial argument was made with regard to the payment of escalation in respect of Claim No.8, Phase-II work, as amount was of Rs. 28,29,628.00. The Arbitrator has granted amount of Rs.43,813.09. The learned Arbitrator rejected the payment of escalation on BOQ items (part A) totally by holding that there is no such price adjustment clause provided and/or accepted. In this case, the relevant evidence and the dates clearly demonstrated that since beginning, even during the negotiations of work of Phase-II on 3 April 2001, as recorded, the parties agreed for suitable price adjustment/price escalation formula. The LOI was issued by the Respondents for Phase-II on the same terms and conditions like Phase-I, on 24 June 2001/ 8 May 2001. The completion time period was 5 months i.e. 7 October 2001. The Petitioners, therefore, protested/ objected about the non-inclusion of escalation clause for the LOI by letter dated 9 May 2001 referring to the negotiations meeting dated 3 April 2001. The work was commenced by the Petitioners, though based upon the LOI, but also taking note of basic negotiations of 3 April 2001. The minutes of the meeting prepared by the architect of the project recorded on 10 May 2001 has also no where dealt with the proposal of the Petitioners to include the escalation clause to continue with the work, basically by relying on implied consent of the Petitioners for the same. On the contrary, by a letter dated 29 May 2001, the Respondents' architect recommended to adopt the price variation clause of Government of Maharashtra, PWD. This itself shows, that

understanding between the parties including the implied concept to proceed with the work, based upon such Government escalation issues. There is force in the contention of the learned counsel appearing for the Petitioners and the documents so referred above also supports the same that the issue of escalation and the claim accordingly was always agitated since beginning by the Petitioners. There is no specific letter of rejection except the LOI in question which was objected immediately by the Petitioners as recorded above. The Petitioners again on 25 June 2001, called upon the Respondents to give its decision including this issue. The Petitioners submitted its RA Bill claiming escalation on 27 June 2001. The Respondents' consultants, while certifying RA Bill No.1, observed on 5 July 2001 that in absence of detailed work order, claim of escalation could not be scrutinized. It is relevant to note that by this time, the Petitioners have claimed Rs.1.50 Crores. Admittedly, the work order was not issued even on this date i.e. 18 July 2001. The Petitioners again called upon the Respondents to take action on all the issues. The request was again made on 2 August 2001 for the incorporation. Second RA Bill was submitted on 16 August 2001 and the third one on 11 October 2001. The Petitioners received work order on 23 October 2001, which was admittedly after the scheduled date of completion and after major part of work of Phase-II was completed. In the work order also, the price variation clause was missing. The Petitioners on 29 October 2001, again protested the action and requested to amend the work order also. A minutes of meeting recorded by the Manager Engineer on 16 January 2002 about the increase costs due to escalation and interest payment on delayed payment. The work was completed on 28 February 2002, certificate was issued accordingly. The Petitioners on 23 April 2002, submitted the final bill. The Respondents architect issued COP for the final payments on 30 May 2002. The Petitioners resisted and called upon to include PVC on 25 June 2002. Ultimately, the Petitioners asked for increase price in the statement of claim. The same was objected. The rejoinder was also filed.

19 The learned counsel appearing for the Petitioners has relied upon the judgment of **RamjiDayawala and Sons (P) Ltd. Vs. Invest Import** (1981) 1 SCC 80), though based upon the old Arbitration Act. The Supreme Court has observed as under:-

15.....

On the contrary, after a specific objection only with regard to arbitration agreement in the subcontract Ex. A by the appellant, the respondent allowed the appellant to proceed further with the implementation and execution of the subcontract, without controverting what the appellant had stated in the letter and the cable. This would unmistakably show that the respondent accepted the alteration as suggested by the appellant in that the arbitration agreement was deemed to have been deleted from the subcontract Ex. A. Add to this the circumstance that a petty labour contractor could not have been expected to or was not likely to agree to arbitration by a foreign arbitral tribunal stationed in Paris because it would be beyond its reach to seek relief by arbitration in a foreign country.

20 In the present case, there is no denial to the above facts of initial negotiations and from time to time demand for escalation clause and the claim of increase price accordingly. Admittedly, the additional work was given for Phase-II. There is no serious dispute with regard to Phase-I which was awarded much prior to this date.

21 The final bill of Phase-I was submitted after negotiation meeting for Phase-II work. The situation and the time was different. The parties proceeded on the basis of the negotiations and completed the work, by persisting through the letters for the price escalation clause and the increased price. Admittedly, the work order was not issued even till the date of completion of the work. The work order though issued again, was without escalation clause. No reference and/or discussion was made or not communicated directly to the Petitioners inspite of the repeated representation read with the earlier negotiations that there would be no escalation clause. On the contrary, as recorded, the Respondents' Officers noted even the request of increase in costs and suggested to consider by following variation of clause of Government of Maharashtra, PWD. These facts are not in dispute.

22 The whole argument is that letter of intent read with the final work order, no way provide this PVA and therefore, itself means that the Respondents have rejected and/or not granted the claim of increase costs due to escalation. There is no such findings given by the Arbitrator. There is no evidence given with regard to the case of the Petitioners referring to the negotiations dated 3 April 2001, till the claim of escalation in all the bills filed from time to time. As dispute arose, the Petitioners raised statement of claim surrounding the escalation clause. The documents and the materials were on record. The learned Arbitrator, in my view, ought to have given findings with regard to the case of the Petitioners while rejecting the payment of escalation Part-A, Phase-II in such fashion.

23 Normally, the letter of intent, as well as, the final work order binds the parties. In these documents, there is no escalation clause provided and/or given. But, there is no specific denial to the case made by the Petitioners with regard to the basic negotiations and the issue discussed and agitated by the Respondents officers, from time to time about the Petitioners escalation clause even referring to the price variation clause of Government of Maharashtra, PWD. The detailed reasonings, are therefore, necessary for the learned Arbitrator to consider and/or adjudicate on this, while rejecting the claim on escalation by assigning the reasons, by overlooking the above facts and circumstances.

24 Now, point still remains, whether the Court under Section 34 is empowered to grant and/or reconsider the clauses and the material and evidence led by the parties with this regard. Here is a case, in my view, the learned Arbitrator failed to take note of the basic averments, including the admitted documents placed on record by the Petitioners. The contents of which are also not in dispute, specifically with regard to the clause PVA since the inception and negotiations before the proceedings with the additional work (Phase-II). The award, if so passed by overlooking the material documents of the Petitioners, definitely cause great injustice and hardship, as that resulted into the denial to the escalation claim, though the work was completed under the directions and supervisions of the Respondents' officers. There was no specific denial communicated to the Petitioners, at any point of time. On the contrary, the understanding and assurances so recorded supports the case of the Petitioners.

25 The Arbitrator is, even otherwise, bound to follow the basic principles of the provisions of CPC and/or the Evidence Act and/or the related Acts, even if not specifically applicable, still the principles just cannot be overlooked when we talk about the reasoned order based upon the evidence, as well as, the material placed on record. This itself means, the Arbitrator needs to consider the basic principles of CPC, Evidence Act and/or related laws, including the principle of natural justice, fair-play and equity. The Arbitrator, therefore, while deciding the matter, if failed to take note of the basic contention related with the material documents placed on record, which goes to the root, though for a particular claim, just cannot be overlooked.

26 Considering the scope and purpose of Section 34 and the power of the Court to interfere with the award so passed, itself is, if the Arbitral Tribunal overlooked the basic documents, as well as, the correspondences, which in my view, also goes to the root of the matter, then that is nothing sort of overlooking the material, as well as, the documents on record. The reasons, if not given, referring to those contentions, as well as, the correspondences which in the present facts and circumstances are quite relevant and as noted the learned Arbitrator just referred those documents but not at all given any reasons. The claim of escalation so agitated even from the day of negotiations read with the correspondences so referred and also the fact that the Respondents' officers, on various occasions, even referred and specifically observed that the provisions of variations provided in the Maharashtra Government, PWD Rules could be given and/or taken care of, just cannot be overlooked by the Arbitral Tribunal.

27 It is well settled that the Arbitral Tribunal is bound by all the terms and conditions between the parties. There is no provision for any escalation and based upon the same both the parties acted upon, then there is no question of any claim revolving around the same but in the present facts and circumstances of the case, as noted, the Petitioners have claimed the increased price of the escalation only for Phase-II work, i.e. renovation of additional 60 Guest Rooms. In my view, in such type of contract, it is necessary for the parties to make the

terms and conditions very clear. Before starting of the work, if negotiations took place and based upon which the Petitioners permitted to proceed with the additional work, the correspondences with regard to the escalation was going on. Even the Petitioners Officers were fully aware of the same, but admittedly there was no negative communication forwarded and/or sent by the Respondents at any point of time. The issuance of Letter of Intent itself is not sufficient to say that the rejection was communicated basically, in the facts, where admittedly, as recorded above, the request was throughout made for escalation. The grant of Phase-I award of contract, in no way compared with the grant of renovation of the additional award. The parties, in a given case, may expect to proceed based upon the agreed terms and conditions. Admittedly, the final order work was not issued immediately after Letter of Intent, it was issued after completion of the work. This circumstance, in my view, makes the present case different than the others to the effect that though there is no specific agreement with referring to the escalation clause, still the Petitioners are entitled at least to raise those pleas of escalation/increased costs. Mere rejection, on the foundation that there is no specific agreed clause, referring to the general terms and conditions and by overlooking the facts and circumstances of this case, in my view, amounts to apparent error on record as the learned Arbitrator failed to take note of the basic correspondences between the parties. Overlooking such correspondences/material that itself in my view, means the award so passed is contrary to the material placed on record. Therefore, it is illegal.

28 Section 34 (4) of the Arbitration Act, 1996 provides as under:-

Section 34 (4):-

On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

29 Therefore, the Court is empower to issue appropriate direction/order, by keeping the matter pending, to re-adjudicate and/or determine particular issue/point so that the grounds so raised for setting aside the award would be eliminated. It means, instead of remanding the matter whole and/or all issues, the Court permits and directs the Arbitral Tribunal to resume the proceedings and take such action to pass additional award and/or modify the award and/or make appropriate correction in the award.

30 The Court, however, in a given facts and circumstances, if comes to the conclusion that all the issues are inter-linked and/or interconnected including the claim, as well as, the counter-claim and it is not possible to remand the matter on a particular issue and/or needs to remand the matter on all issues for re-consideration and/or for retrial, in my view, under the Arbitration Act, there is no such bar. On the contrary, it is permissible mode to settle such disputes with particular directions to dispose of the matter within a reasonable time. The Arbitral Tribunal, therefore, based upon the material available on record, can dispose of the matter within reasonable time. It is always subject to the directions of the Court. The Court, may permit the parties to lead additional evidence and/or complete and/or conclude the proceedings based upon the material available. I am inclined to observe that under the Arbitration Act, 1996, the power of remand under Section 34, just cannot be taken a view merely because there is no such express provision available under the Act, which was admittedly available under the Old Arbitration Act.

31 The Apex Court has observed in **State of Uttar Pradesh and Ors. Vs. Combined Chemicals Company Private Limited** (2001) 2 S.C.C. 151, as under:-

35. If the arbitrator who passed the award dated 17-11-1989 is not available, then the parties may move the trial court, which shall give an opportunity to them to nominate their respective arbitrators within a specified time. If the parties fail to nominate their arbitrators, then the court may appoint an arbitrator who shall pass an award after giving opportunity to the parties in terms of the preceding paragraph.

32 Therefore, taking overall view of the matter, I am also inclined to observe that the remand of the whole

matter is only the solution. The part and/or issue and/or particular claims, are inter-connected and inter-linked and cannot be separated. Therefore, the learned Arbitral Tribunal needs to consider all the issues afresh by giving opportunity to both the parties.

33 It is made clear that if the same sole Arbitrator is available, who has passed the award, he can resume and continue with the matter subject to the parties' discussion and/or negotiations for various other aspects. If the sole Arbitrator is not available, the liberty is granted to the parties to take steps to appoint a fresh Arbitrator and proceed with the matter, based upon the material already available on record. The additional evidence, if any, if the party wants to place on record, it will be subject to the consent and if there is objection, subject to hearing and order of the Arbitral Tribunal.

34 Resultantly, the following order:

ORDER

- a) The impugned award dated 14 January 2009 is quashed and set aside.
- b) The matter is remanded.
- c) The Arbitral Tribunal to dispose of the matter expeditiously by giving opportunity to both the parties.
- d) All the points are kept open.
- e) The Petition is accordingly remanded except the costs so awarded.

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