IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CIVIL PROCEDURE

OMP No. 473/2006

Date of decision: 21.11.2007

M/s MECON LIMITED ...PETITIONER

Through: Mr. S.K. Taneja, Sr. Advocate
with Mr. Rajesh Gupta and
Mr. Harpreet Singh, Advocates.

Versus

M/s PIONEER FABRICATORS (P) LTD ...RESPONDENT

Through: Mr. Raman Kapur and
Mr. Dhiraj Sachdeva,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

SANJAY KISHAN KAUL, J. (Oral)

(1) A Work Order was issued by the petitioner to the respondent dated 31.05.2000 for construction of five retail outlets of the Indian Oil Corporation located at five places viz. Faridpur, Kesarpur & Transport Nagar (T.P.Nagar) in the District Bareilley and Bankatara and Gulamkhera, both in the District of Shahjahanpur in the State of Uttar Pradesh. The letter of award/the agreement was executed on 13.06.2000 and the

Handing over of the sites took place in phases. Four sites were handed over on 06.06.2000 and thus the date of completion was 25.08.2000 while one site was handed over on 12.07.2000, consequently having the completion date of 30.09.2000. Apart from the agreement which provided for the relevant BOQ items, there was a provision for non BOQ items agreed to between the parties as per the terms of the contract. There was delay in the execution of the contract as is apparent from the fact that the work was completed on 31.10.2001 with a delay of more than 10 weeks. Final measurements were taken in March, 2002 and the re-conciliation of measurements was done in September, 2002. Extra items were carried out during the execution of the contract and the rates for the same were settled on 07.08.2002. The final bill dated 04.10.2002 was submitted on 08.10.2002. The final bill was to the tune of Rs 1,92,81,990.62 for BOQ items and Rs 1,05,05,374.10 for non BOQ items. Thus the total bill submitted was to the tune of Rs 2,97,87,364.72.

(2) The bill was passed for Rs 2,88,74,334 and a no claim certificate was issued on 14.02.2003 by the respondent. It may be noticed at this stage that the payments were being made from time to time in respect of the running bills raised, albeit belatedly.

(3) The petitioner, after passing of the final bill, still did not pay

amount of liquidated damages would be deducted out of the amount payable. The total amount to be paid after scrutiny of the running bills was Rs.57,41,541/-, out of which liquidated damages of Rs 28,87,433/- were deducted and thus the remaining amount due was Rs.28,54,018/-. This amount admittedly due was also not paid and, in fact, has not been paid till date.

(4) The respondent not having received the amounts, claimed to be due to them, including the admitted amount, addressed a letter dated 19.03.2003 informing the petitioner that despite the work having been completed in all respects on 31.10.2001, huge payments were remaining outstanding. It is alleged in the letter that no claim certificate was forwarded to the respondent by the petitioner under the cover of the letter dated 14.02.2003 as a condition for release of payment. The said letter states 'under protest'. Despite this, the amount had not been released and thus the respondent was revoking the no claim certificate sent under the cover of the letter dated 14.02.2003 and invoked the arbitration clause existing between the parties setting forth the list of claims and disputes as annexure to the letter. The letter dated 19.03.2003 was addressed to the Deputy General Manager and Project Coordinator of M/s MECON Limited, 14-15th Floor, Scope Minar, Laxmi Nagar, Delhi - 110 092. The letter was acknowledged at the office of the

never reached the concerned officer. The petitioner claims that in terms of clause 15.0 of letter of award, correspondence had to be addressed to the Deputy General Manager (Attention: Mr. A.K. Sharma), MECON Limited at the office of Hauz Khas. (It is not disputed that the office at the relevant stage of time when the letter was served had shifted to 14-15th Floor, Scope Minar, Laxmi Nagar, Delhi – 110092). The petitioner thus claims that the letter was not correctly addressed as it was not made – Attention: Mr. A.K.Sharma. The petitioner on account of the claim of letter not being placed before the relevant officer, did not act in pursuance to the same with the result that the respondent addressed another letter dated 24.04.2003 stating that more than 30 days had passed since the request and as no action had been taken, the respondent was forwarding a panel of three persons as per the agreed procedure for appointment of sole arbitrator. Once again, the letter was identically addressed as the letter dated 19.03.2003 and once again the petitioner claims that the same was never placed before the relevant officer. This letter also evoked no response. A reminder was sent on 29.07.2003 by the respondent, but to no avail and thus vide letter dated 28.08.2003 the respondent appointed one of the three persons Sh. K.D.Bali, former Director General (Works) of CPWD, to act as the sole arbitrator.

(5) It is at that stage that the first response was sent by the

of the earlier letters and stating that it is the petitioner who had to appoint the arbitrator. This was followed up by the letter dated 05.09.2003 of the petitioner proposing a panel of three names from which the respondent could pick up one as an arbitrator. This course of action was not acceptable to the respondent and it was duly communicated by the letter dated 06.09.2003 since according to them the arbitration clause had worked itself out in terms of the procedure prescribed for appointment of the arbitrator.

(6) The petitioner filed a petition before this Court being Arbitration Application no.238/2003 under Section 11 of the Arbitration and Conciliation Act, 1996 ('the said Act' for short) which was disposed of by the Order dated 08.12.2003. It was held that the dispute raised about non receipt of communications by the petitioner cannot be gone into in a petition under Section 11 of the said Act and the petition was not maintainable. Learned counsel for the petitioner thus sought to withdraw the petition and stated that he would invoke other remedies as available in law to challenge the jurisdiction of the arbitrator.

(7) It is thereafter that the petitioner filed an application under Section 16 of the said Act which was not accepted by the sole arbitrator. Vide the Order dated 04.03.2004, it was held that once the letter was written to the concerned authority in the

it was not a case of an appointment by the designated authority. The arbitrator thereafter proceeded to adjudicate the disputes which has resulted in an award dated 27.06.2006 against the petitioner. The petitioner seeks to assail the said award in the present petition under Section 34 of the said Act. Simultaneously, the petitioner seeks to assail the Order dated 04.03.2004, which procedure undisputedly is in accordance with law.

(8) Learned counsels for the parties have been heard at length. In order to appreciate the rival contentions, it is necessary to re-produce the arbitration clause which is as under:

> "5.0 ARBITRATION
>
> 5.1 All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the WORKS or the execution or maintenance thereof of this CONTRACT or the rights touching or concerning the WORKS or the execution effect thereof or to the rights or liabilities or the construction meaning operation or effect thereof or to the rights or liabilities of the parties or arising out or in relation thereto whether during or after completion of the CONTRACT or whether during or after determination, foreclosure or breach of the CONTRACT (other than those in respect of which the decision of any person is by the CONTRACT expressed to be final and binding) shall after written notice by either party to the CONTRACT to the other of them and to the Appointing Authority hereinafter mentioned be referred for

5.2 For the purpose of appointing the sole Arbitrator referred to above, the Appointing Authority will send within thirty days of receipt of the notice, to the CONTRACTOR a panel of three names of persons who shall all be presently unconnected with the organization for which the WORK is executed.

The CONTRACTOR shall on receipt of the names as aforesaid, select any one of the persons named to be appointed as a sole Arbitrator and communicate his name to the Appointing Authority within thirty days of receipt of names. The Appointing Authority shall thereupon without any delay appoint the said person as the Sole Arbitrator. If the CONTRACTOR fails to communicate such selection as provided above within the period specified, the Appointing Authority shall make the selection and appoint the selected person as the Sole Arbitrator.

If the Appointing Authority fails to send to the CONTRACTOR the panel of three names as aforesaid within the period specified, the CONTRACTOR shall send the Appointing Authority a panel of three names of persons who shall all be unconnected with either party. The Appointing Authority shall on receipt of the names as aforesaid select any of the persons named and appoint him as the sole Arbitrator. If the Appointing Authority fails to select the person and appoint him as the sole Arbitrator within 30 days of receipt of the panel and inform the CONTRACTOR accordingly, the CONTRACTOR shall be entitled to appoint one of the persons from the panel as the sole Arbitrator

(9) A perusal of the aforesaid arbitration cause thus shows that the agreed procedure for appointment of an arbitrator required the the respondent to invoke the arbitration clause and thereafter for the petitioner to forward a panel/list of three arbitrators from which the respondent could pick up one arbitrator. In case of failure of the petitioner to do the needful, the respondent had the right to send its own panel of three arbitrators for the petitioner to pick up one of them and even on the failure of the petitioner to do the same, the respondent could appoint one of the three as the sole arbitrator. The time stipulated by the petitioner to respondent was thirty days in each of such stages.

(10) The first submission of learned senior counsel for the petitioner is that the very appointment of the arbitrator is not in accordance with the arbitration clause since the petitioner never got the opportunity to respond to the letter of the respondent dated 19.03.2003 invoking the arbitration clause as the same was not addressed to the concerned person. The position remained the same even for subsequent letters as they were also identically addressed.

(11) It is not in dispute that clause 15.0 of the letter of award provided for the correspondence with regard to the Order to be made in duplicate to the addressees provided therein. The

the letter had been addressed to the correct address. The letter had to be addressed to the Deputy General Manager, M/s MECON Limited (Attention: Mr. A.K.Sharma) or General Manager, M/s MECON Limited. Letters in question have been addressed to the DGM and PD, M/s. MECON Limited. There is thus full description of the officer and the letter had been sent at the correct address. However, the letter does not make the same 'Attention: Mr. A.K.Sharma'. In my considered view, the view taken by the arbitrator in the Order dated 04.03.2004 cannot be said to be erroneous or calling for any interference in this behalf. It is not a case where there is an appointing authority mentioned in the agreement, but the communications had to be addressed to a particular officer. The communications have been so addressed. One could have found some merit in the plea of the petitioner if the letters had been addressed to a different office as a large corporation like the petitioner may have different offices and different officers located therein. Not only that, the service is also at the relevant floor of the building. Merely, because the letter was not made 'Attention: Mr. A.K.Sharma', though the description was correct, cannot imply that the letter was not properly served. If the letter had not been placed before the concerned officer, the petitioner needs to put its own house in order. The position would be the same in respect of the letters addressed

(12) Learned counsel for the petitioner referred to the judgment of the Supreme Court in Union of India v. Tecco Trichy Engineers & Contractors; (2005) 4 SCC 239 where it was held that in case of a communication to be addressed to a State or a department, it must be addressed to the departmental head concerned, who is directly connected with and in control of the arbitral proceedings. There can be no dispute about this proposition of law, but as stated aforesaid, in the present case, communications were addressed by designation to the concerned officer.

(13) I am thus of the view that the procedure prescribed under the arbitration clause 5 has been properly followed and in view of the failure of the petitioner to take necessary steps, the arbitrator was properly appointed.

(14) The second plea of learned senior counsel for the petitioner arises from the alleged non consideration by the arbitrator of what is claimed to be the other plea raised in the application filed under Section 16 of the said Act. This is predicated on the respondent having issued a no due certificate and acceptance of the rates of extra items. It is thus the plea of the petitioner that only the disputes contemplated in claim nos.1 and 16 could have been gone into by the arbitrator while the remaining claim nos. 2 to 15 were outside the purview of the arbitrator as no dispute existed in respect of the same. These claims are

had accepted that nothing more was due than the amount of the final bill of Rs 66,15,716. This bill was subsequently revised before the arbitrator to Rs 57,41,541/- consisting of the balance amount due of Rs 28,54,118 and liquidated damages of Rs 28,87,433/-. It is thus pleaded that it was not open to the arbitrator to have adjudicated and awarded any amount over and above the said amount.

(15) In order to appreciate the aforesaid contention, the consequences of the no claim certificate and the circumstances under which it was issued have to be examined. The original records of the arbitrator have been referred to by learned counsel for the respondent to show that the form of the no claim certificate was forwarded by the petitioner under the cover of their letter dated 14.02.2003. On the same date, the respondent addressed a letter enclosing the no claim certificate in the prescribed format, but the letter states that it is 'under protest'. This letter was received by the petitioner on 15.02.2003. Learned counsel for the respondent thus pleaded that a catena of case laws has analyzed the aspect of such no claim certificates which are issued under the threat of the amount not being released. In the alternative, it is pleaded that even if it be assumed that the no claim certificate had been so issued, at best it can be said that the respondent agreed to accept the amount in full and final payment of its dues but

conditional offer and the petitioner admittedly not having paid the said amount, cannot hide behind the no claim certificate to deny the genuine claims of the respondent. It is in these circumstances that the letter dated 19.03.2003 is stated to have been addressed by the respondent.

(16) The aspect of such a no claim certificate was examined in Pandit Construction Company v. Delhi Development Authority and Anr; 2007(3) Arbitration Law Reporter 205 (Delhi), which is a judgment of this Court where it was found that often endorsements are made on the final bill as 'accepted in full and final'. The judgment of the Apex Court in Bharat Coking Coal Ltd v. M/s Annapurna Construction; 2003 (3) R.A.J.44 (SC) was averted to where the Supreme Court has observed that merely because a party had accepted the final bill, the same would not mean that it was not entitled to any other claim. In order for the claim to be presumed to be fully settled, it should unequivocally be stated so that no further claims would be raised and thus the Supreme Court held that in the absence of such a declaration, the contractor must be held not to be estopped and precluded from raising any claim. This Court held that in view thereof, the settlement must be recorded in clear and unambiguous terms. Learned counsel for the respondent has also referred to the judgment of the Division Bench of the Bombay High Court in Ravindra Anant Deshmukh

Ltd; AIR 1997 Bombay 284 where it was held that a no demand certificate obtained as a condition precedent for scrutiny of bill cannot constitute accord and satisfaction and a cause for refusing to refer dispute to arbitration. A reference has also been made to the observations in two judgments of the Supreme Court. The first is Bharat Coking Coal Ltd v. M/s Annapurna Construction's case (supra) which has already been referred to. The second judgment is : Chairman and M.D., NTPC Ltd v. Reshmi Constructions, Builders and Contractors; (2004) 2 Supreme Court Cases 663. It would be useful to reproduce the observations made in paras 27 and 28 of the said judgment, which are as under:

> "27. Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

(17) Learned counsel for the respondent has referred to Jiwani Engineering Works (P) Ltd v. Union of India AIR 1981 Calcutta 101 wherein the learned single Judge has recognized the well known and notorious fact that unless a no claim certificate is issued by the contractor, the payment of final bill would not be made. Learned senior counsel for the petitioner on the other hand has referred to the judgment of the learned single Judge of this Court in Double Dot Finance Limited v. Goyal MG Gases Limited; 2005 (1) Arbitration Law Reporter 324 (Delhi). The aspect of coercion and duress has been discussed in para 9 of the said judgment.

(18) If the aforesaid legal position is considered in the facts of this case, it is found that no claim certificate in the prescribed form was forwarded by the petitioner to the respondent under the cover of this letter as a pre-requisite for the final bill to be processed and paid. The respondent sent the certificate, but the cover of the letter clearly stipulated that the same was 'under protest'. There was no clear and unequivocal statement by the respondent that on receipt of the amount, claims of the respondent would the stand fully satisfied or that there are no other claims outstanding. The most important aspect is that even after obtaining such a certificate, the

petitioner did not make the payment and proceeded to deduct the amount of liquidated damages. Even the amount admittedly due as per the petitioner to the respondent after deduction of the liquidated damages was never paid. Till date, this amount remains outstanding.

(19) In such a situation, it can hardly be said that the issuance of a no claim certificate would amount to a surrender by the respondent of the right to claim further amounts as may be legally due to the respondent. I am thus unable to accept this plea of the petitioner.

(20) The second linked aspect in this behalf arises form the rates for extra items stated to be agreed upon. In this behalf, learned counsel for the petitioner has drawn the attention of this Court to the provisions of clause 7.0 and 8.0 which read as under:

> "**7.0 EXTRA WORK work**
>
> Contractor shall execute extra items of work, which are not included in BOQ as and when instructed by MECON's site engineer pending finalisation of rates. Basis for fixing of rate for extra items shall be as indicated below:
>
> (1)To be desired from similar/ closest item of work as appearing in BOQ.
> (2)Where items of similar character are not available in BOQ and forgoing method is not applicable, rate shall be based on the norms of the National Building Organization for labour, materials and other

material content are not available in NBO, CPWD norms shall be adopted for labour materials content respectively. However, in both cases local prevailing market rates for labour and material shall be adopted.

(3)Where rates for extra items of work cannot be established by rate analysis as per (i) and (ii) above, the rate of such items shall be estimated and fixed by MECON based on the market rates and assessment for labour, materials and other factors involved thereon.

(4)The overheads, supervision and profits including all taxes shall be considered as 15 % (fifteen percent) in both (ii) and (iii) above.

8.0 FIRM RATES

Rates as quoted and agreed shall be firm upon completion of work. In no circumstances whatsoever the reason be, variation on rates of the items shall be permitted.

(21) A reading of the aforesaid provision shows that the respondent had to carry out the extra items of work which were not included in BOQ and the rates for the same were to be fixed as per clause 7.0. Rates as per clause 8.0 which are quoted and agreed are to remain firm upon completion of work. Thus what is really envisaged is where such extra work is to be done, the rates would be quoted and agreed to between the parties and would not be varied. In the present case, though the extra work has been undisputedly done and the work was completed by 31.10.2001, no rates were agreed upon. The rates were only agreed upon allegedly on 07.08.2002 when the

payment. The mere fact that some ad hoc payment was made during the currency of the contract would make no difference. The methodology adopted by the petitioner was the same in respect of these extra items rates as was in respect of final bill i.e. that the same would not be released till the respondent agreed to the same. The stated agreement is just two months prior to the final bill.

(22) One could have found some force in the contention of the learned counsel for the petitioner if the petitioner had acted bona fide and released the amount in pursuance to the final bill as in that eventuality it may have been possible to plead that the matter stood concluded on the payment of the said amount. This did not happen and even undisputed amount was not paid to the respondent inviting much larger liability on the petitioner. It is a typical case where in a public sector corporation like the petitioner nobody fixes the responsibility for such financial consequences arising from the complete neglect of the relevant officer to pay the amount and settle the matter. Since the amount does not go out of the pocket of the officer and is to the debit of the petitioner-Corporation, no care has been taken at the relevant stage of time which has occasioned the arbitral proceedings and the consequent award.

(23) Now coming to the analysis and the grounds of challenge to the different claims awarded by the arbitrator. However, before

parameters on which such scrutiny must take place. The judgment of the Supreme Court in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629 may be averted to for the said purpose. The settled legal position even under the Indian Arbitration Act, 1940 was that this Court does not sit as a court of appeal or seek to derive different conclusions on the appraisal of the evidence than that arrived at by the arbitrator. If the view taken by the arbitrator was a plausible view, though may not be the only view, no interference was called for. The said Act sought to restrict the scope of challenge, but in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.'s case (supra) the phrase 'Public Police of India', used under Section 34 (2)(b) (ii) was given a wider than narrower meaning. It was thus held that this Court can set aside an award if it is contrary to the fundamental policy of Indian law, interest of India, justice or morality, is patently illegal or is so unfair and unreasonable that it shocks the conscience of the Court. However, illegality of a trivial nature was held liable to be ignored. Thus the phrase 'Public Policy of India' cannot be used only a mantra to be recited but the challenge must be brought within the four corners of the observations made aforesaid by the Supreme Court.

that the amount of Rs 28,54,018/- is the balance contract price which is due and payable by the petitioner to the respondent and has not been paid. The dispute is only in respect of the amount of liquidated damages of Rs.28,87,433/-. Learned senior counsel for the petitioner seeks to contend that the liquidated damages on pro rata basis were sought to be recovered even from the running bills, but after the second bill, the recovery was deferred on account of the respondent's letter dated 09.11.2000. The said letter of the respondent refers to the fact that there is a delay in execution of the project due to heavy rains and some unavoidable reasons and simultaneously a request was made not to deduct any liquidated damages from the running bills till the job is complete. The arbitrator has considered the evidence on record. It is the conclusion of the arbitrator that the delay was occasioned on account of the contributory factors of both the parties. Thus the blame has not been put on one party or the other exclusively. The arbitrator also found that on consideration of the material placed before him, it was really not possible to bifurcate the percentage of delay attributable to one party or the other. Such a conclusion cannot be said to be unreasonable for the reasons that at times the delay occasioned by one party may not

amount by the other party. The fact remains that both the parties partially defaulted in complying with their obligations under the contract and thus the arbitrator found that blame could not be laid at the door of one party exclusively. In my considered view, this conclusion can hardly be said to be perverse or so illegal as to shock the conscience of the Court. This being the conclusion of the arbitrator, deduction of liquidated damages from the amount of running bills of the respondent has been rightly held to be improper and illegal and thus the respondent has been held entitled to recover the said amount. Along with claim no.1 and claim no.16 has also been simultaneously considered by the arbitrator which was for liquidated damages. If the claim is scrutinized more closely it would be seen that so called liquidated damages is really a claim for interest on the amounts which had fallen due but not paid within time. Thus whatever terminology may be used, in sum and substance, this claim is only on account of interest payable on the dues of the respondent. It is trite to say that if a party unreasonably detains the amount due to the other party, interest must follow as a course. I find no infirmity or impropriety in the grant of the said claim.

(25) The second claim relates to the delay in payment of the

contend that the bills had been paid promptly if one sees the chart, the dates when such bills were raised and the dates of payment. It is further contended that the bills were not accompanied by requisite documents and that is the reason there was delay in making payment. Insofar as the aspect of documents not being submitted along with bills is concerned, the same appears to be an afterthought. However, the first argument, on the first blush, appears to have merit as the time difference between the bill being raised and the amount being paid is not large. However, on a closer scrutiny, it is found that the bills had to be paid within three/four days. Learned counsel for the respondent explains that this provision was as per the special conditions of the contract and is so stipulated in clause 2.2, which reads as under:

> "2.2 BILLING PROCEDURE:
>
> Following procedures shall be adopted for billing of works executed by the CONTRACTOR.
>
> 2.2.1 All measurements shall be recorded in sextuplicate on started measurement sheets supplied by OWNER/MECON and submitted to MECON for scrutiny and passing.
>
> 2.2.2. MECON shall scrutinize and check the measurements recorded on the sheets and shall certify correctness of the same on the measurement shets shall be as follows:
>
> 2.2.3. ENGINEER-IN-CHARGE shall pass

conditions of the CONTRACTS 3 (three) days of submission of the bills, complete in all respects and send the same MECON, New Delhi.

2.2.4. MECON shall make all endeavour to make payments of undisputed amount of the bills submitted based on the joint measurements within 4 (four) days from the date of certification by the Engineer-in-Charge.

2.2.5 Measurements shall be recorded as per the methods of measurement spelt out in MECON SPECIFICATIONS / CONTRACT DOCUMENT. MECON shall be fully responsible for checking the measurements quantitatively and qualitatively as recorded in the Measurement Books/Bills.

2.2.6 While preparing the final bills overall measurements will not be taken again. Only volume of work executed since the last measured bill along with summary of final measurements will be considered for the final bill. However, a detailed check shall be made as to missing measurements and in case there are any missing items or measurements the same shall be ignored. "

(emphasis supplied)

(26) There is force in the contention of the learned counsel for the respondent and rationale of the same also appears to be apparent. The total period of the contract was only eighty days. The contract was for a large amount. The respondent claims to have made arrangements through loans availed of from the bank and any contractor would expect release of payments periodically as the work is carried out. This is, in fact, the concept of running bills. Thus the running bills had to be raised frequently at short intervals because of the total

the aforesaid clause 2.2 provides for comprehensive checks being carried out by the Engineer in Charge within three days of the submission of the bills and every endeavour being made to make the payment of the undisputed amount within four days from the date of certification of the Engineer in Charge. Thus, what may appear to be a short period actually has a consequence insofar as the present contract is concerned. The respondent along with this claim had given detailed calculations of the proof of days of delay and the compensation arising from same.

(27) Finally, the respondent was granted interest at the rate of 12.5 per cent per annum on the delayed period as against the claim made of 24 per cent per annum. The arbitrator has further relied on the certificate of the bank submitted by the respondent to the effect that the respondent had taken credit from the bank at the rate of 13.25 per cent to 13.75 per cent per annum as the basis of the award of interest of 12.5 per cent per annum, which can hardly be said to be unreasonable.

(28) Claim no.3 is for payment of compensation on account of non payments/restricted payments made in the running account bills. The claim was laid for Rs 98,300 but has been awarded only to the extent of Rs 27,000 on the basis of interest rates mentioned aforesaid and to that extent is on a similar footing as claim no.2.

which claim no.5 has been disallowed. Rest of the three claims have been allowed in toto. It is the submission of learned counsel for the petitioner that in view of the agreement arrived at in respect of the extra items, no other amount could have been awarded. This aspect has already been dealt with while considering the objection raised by the petitioner in the application under Section 16 of the said Act and thus it cannot be said that the arbitrator fell into an error in awarding the claims of the respondent in this behalf for the reasons set out hereinbefore while dealing with this aspect.

(30) Claim no.10 is on account of payment for extra expenditure incurred in respect of costs of material, labour, wages and fuel for work executed during the prolongation period. In this behalf, learned counsel for the respondent submits that as per the condition 3.5 and 3.6 of the letter of award, the unit rates are to remain firm for the period of contract and for a period of three months thereafter. Thus the claim laid is for the period after that date. The claim was watered down to Rs 5,45,300 on account of calculation of escalation to be done as per the CPWD formula to be adopted on an all-India basis.

(31) It is trite to say that if a party is responsible for the delay, it cannot avail of the benefit of delay. In the present case, there are contributory factors for both the parties even though the extent of contributions is not bifurcated by the arbitrator. Thus

that the amount would have accumulated to Rs 5,45,300 as per the said calculations, in my considered view, the whole amount ought not to have been awarded. Since there is no percentage bifurcation of the same, at best the arbitrator could have directed sharing of the amount between the two parties in this behalf. The award of the whole amount runs contrary to the settled principles of law that a defaulting party cannot take the benefit of its own default and since at least part of the default is attributable to the respondent, the respondent should be entitled to only half of the said amount of Rs 5,45,300/- amounting to Rs 2,72,650/-. In respect of this claim, it may be noticed that the calculation of damages is on the principles as contained in Mcdermott International Inc. v. Burn Standard Co. Ltd & Ors;2006 (2) R.A.J.661 (SC). Learned counsel for the respondent has referred to the said judgment of the Supreme Court wherein the Hudson's Formula, Eichleay's Formula and Emden's Formula have been recognized. It is thus one out of these three formulas which has been adopted by the arbitrator.

(32) On the principle set down in respect of the award of claim no.10, the amount awarded in respect of claim no.8 (for payment of extra expenditure incurred by the claimant on additional monthly 'overhead charges') of Rs 21,67,412/- and the amount awarded in respect of claim no.11 (for payment of extra expenditure incurred on watch & ward and maintenance

to the extent of half i.e. Rs.10,83,706/- and 5,19,750/- in respect of claim nos.8 and 11 respectively. In fact, in respect of all the aforesaid, learned counsel for the respondent stated that this could be a fair resolution to the matter in issue.

(33) Claim no.14 is directed on the failure of the petitioner to give a certificate in respect of the recovery of works tax so that the respondent could have availed of the benefit. Since this certificate was not given, the amount deducted has been held to be not amenable to such deductions and, in my considered view, no fault can be found with the same.

(34) The other claims made by the respondent have been rejected except for claim on account of interest where interest has been granted at the rate of 12.5 per cent per annum which can hardly be said to be unreasonable.

(35) In view of the aforesaid, the challenge to the award is allowed to the aforesaid extent and the petition is allowed to that extent leaving the parties to bearing their own costs.

Sd/-

SANJAY KISHAN KAUL, J.