

(2012) 03 DEL CK 0133
In the Delhi High Court
Case No : O.M.P. 411 of 2003

National Building Construction Corporation Limited	APPELLANT
Vs	
A.M. Rasool Construction and Engineering Services Pvt. Ltd.	RESPONDENT

Date of Decision : 07-03-2012

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Companies Act, 1956 — Section 20, 20(4), 33, 34
Limitation Act, 1963 — Article 158, 18

Citation : (2012) 4 AD 569 : (2012) 188 DLT 86

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Ginny Jetley Rautray, for the Appellant; Arun Francis, for the Respondent

Judgement

Justice S. Muralidhar

1. This judgment disposes of the objections filed by the National Building Construction Corporation Ltd. ("NBCC") to the Award dated 21st July 2003 of the Sole Arbitrator in the disputes between NBCC and AM Rasool Construction & Engineering Services Private Limited under Sections 30 and 33 of the Arbitration Act, 1940 ("Act").

Background Facts

2. NBCC was assigned by the Government of Libya the work of construction of 1305 houses at Benawalid and Ghat, Libya and a 120 bedded hospital project at Ghat, Libya. A contract was entered into between NBCC and the Housing Corporation of Libya ("HCL"). In view of the magnitude of the work, NBCC decided to appoint sub-contractors. The work of construction of 100 houses at Kalala, Ghat, Libya on labour rate basis was awarded to M/s. A.M. Rasool and Company, a partnership firm, referred to as Piece Rate Worker ("PRW"). A Letter of Intent ("LOI") dated 29th December 1978 issued by the NBCC to the PRW read as under:

We are pleased to inform you that your offer for construction of 100 houses as above at Ghat, Libya, on labour rates, is acceptable to us subject to the following conditions:

1. Tentative estimated value of the labour contract is Libyan Dinars three lakhs ninety two thousand three hundred seventy point sixty four (LD 3,92,370.64) including 35% premium.

You shall have to furnish performance guarantee of 7½ (seven and half only) of the above sum in Indian currency in the form of the contract from any nationalized/scheduled Bank.

2. That you will mobilize on the site of work within six weeks of the issue of this letter.

3. Advance of 10% of the estimated value of the contract will be paid to you in Libyan Dinars against Bank Guarantee from nationalized scheduled bank for equivalent Indian Currency within 15 days of furnishing the guarantee for performance of the contract or mobile at site whichever is later. However, this advance shall be limited to actual expenses to be incurred by the PRW.

4. That the time of completion for construction of 100 houses shall be 18 months from the date of issue of this letter of intent.

5. We are agreeable to give you a premium of 35% over the rate given in the enclosed schedule of items.

6. Award of some more houses may be considered by the Corporation at Ghat for execution in due course after the Corporation is satisfied with the performance of the PRW for construction of these 100 houses. Additional houses that may be awarded to the PRW shall be at the rates on which the work of 100 houses at Ghat has been allotted.

7. PRW will extend all reasonable facilities to the other contractor such as electrical works etc.

8. The variations shall be limited 25% of the contract value.

3. The work of construction of 100 houses was to be completed in a period of 18 months from the date of the LOI. The total value of the contract was Libyan Dinar ("LD") 3,92,370.64 including 35% premium on the scheduled rates as per Bill of Quantities ("BOQs") forming part of the contract. The PRW was to furnish 7.5% performance guarantee and 10% mobilization advance guarantee towards mobilization advance payable in LDs which was limited to actual expenses. The permissible variation was limited to 25% of the contract value.

4. The requirement was that PRW had to register the contract in Libya with the Libyan Tax Department with all expenses on that account being borne by the PRW. It was deemed that "the PRW has visited the site of work before agreeing to these rates, terms and conditions after considering all the factors required for

working out such rates." NBCC was to be responsible for any variation at any stage. No claims at any stage were to be entertained as a consequence of variations "except otherwise provided in the terms and conditions.

5. Clause 22 of the Financial Terms and Conditions ("FTC") and Clause 51 of the General Terms and Conditions ("GTC") between NBCC and HCL were to form a part of the contract. Clause 4 of the GTC provided that the following documents would form part of the tender documents:

- (a) GTC of the contract between NBCC and HCL.
- (b) FTC of the contract between NBCC and HCL.
- (c) Technical Specifications (TS) and Conditions (Part II)
- (d) BOQ for each type of house.

6. Clause 10 of the GTC provided that PRW shall abide by the bye-laws of the Indian Government and shall be responsible for any acts or violations in that regard.

7. Clause 22 of the FTC between the parties read as under:

Clause 22. The General Conditions of the Contract entered into by the Corporation Libya shall be application to PRW also.

8. Clause 51 of the GTC read as under:

Clause 51. Enforcement of Libyan Laws and Jurisdiction of Libyan Courts. The contract would be explained and executed in accordance with Libyan Laws and Regulations and only Libyan Courts would exercise jurisdiction over any dispute arising from the Contract.

9. On 30th April 1979 a Memorandum of Agreement was entered into between the parties. A change in the type of houses as per the requirement of Libyan clients was intimated by NBCC to the PRW and accepted by it. It is stated by NBCC that the changes were covered in the 25% plus or minus (variation) which was accepted by the PRW without reservations.

10. On 15th December 1981, a Supplementary Agreement was entered into between the parties regarding enhancement of rates for construction of the 100 houses of type M/4/G. In terms of the Supplementary Agreement, NBCC agreed to pass on to the PRW a 50% enhancement in the labour rates granted by the Libyan clients with effect from 1st April 1980. It was mentioned in the Supplementary Agreement as under:

a) the Technical Specification Part I which was deemed by the PRW to have been deleted vide Para 4(c) of the General Terms and Conditions appended with the Letter of Intent Nos. 343/M/F dated December 29, 1978 and 343/M/F dated 2.4.1980 shall be deemed as a part of the contract with the PRW for the construction of 100 houses type M/4/G at Ghat, Libya from the date of starting of

works.

b) The PRW will withdraw all claims which may have arisen due to non-inclusion of Technical Specification Part I in the earlier contract including claims due to extra items and shall execute the items covered under the BOC issued to him at agreed rate.

c) The PRW shall not put up any claim on account of idle labour/wages for any reason whatsoever during the pendency of the contract of the construction of 100 Houses M/4/G at Ghat, Libya.

d) The above said 50% increase in the labour rate of the PRW shall be paid subject to the Corporation's receiving a similar 50% enhancement in its rates from the clients. The rates for items which do not exist in BOQ (extra items) shall be decided according to the relevant clause of the agreement and shall be payable only on receipt of the amount from the clients.

e) The above agreement is entered into with the PRW as a package deal with the proviso that whatever escalation/benefits might be authorized by the Corporation with reference to this agreement above.

11. The PRW by its letter dated 10th September 1981 stated that any extra items claimed earlier on account of TS Part-I "shall be treated as withdrawn, nor we shall submit any claim on this account in future. However, items not covered under the scope of our Agreement and do not exist in the BOQ shall be treated as extra items and we are prepared to execute such extra items on an amicable basis subject to approval by clients.

12. The construction of 100 houses was completed and handed over initially to the NBCC by the PRW on 31st March 1983 and finally handed over to the client by the NBCC on 31st March 1984.

13. In the meanwhile, NBCC assigned the PRW the additional work of construction of 12 M/4/G type houses on the same terms and conditions based on the final Agreement dated 30th April 1979. The letter dated 25th January 1983 awarding this additional work reads as under:

M/s. A.M. Rasool & Co.

Ghat

Subject: Deviation Order to Labour contract for construction of 100 nos. M/4/G Houses.

Dear Sirs,

With reference to your letter dated 10.8.1992 and as per agreement clause No. 6 we hereby award the construction of 12 nos. M/4/G/Houses at Kalala, Ghat with the same terms and conditions of original Agreement dated 30.4.1979 (Deviated as M/4/G Houses on 11.2.1980) which was concluded for 100 Houses.

Completion time for this work will be six months from the date of this letter.

14. By another letter dated 12th May 1983, the PRW was awarded the work of construction of boundary wall for 20 class rooms at Ghat on the same terms and conditions of the original Agreement dated 30th April 1979. The said letter reads as under:

M/s. A.M. Rasool & Co.

Ghat

Subject: Deviation Order No. 2 to Labour contract for construction of 100 nos. M/4/G Houses Construction of Boundary Wall for Schools and Hostels.

Dear Sir,

With reference to your letters dated 1.4.1983, 26.4.1983 and 28.4.1983, we hereby award you the construction of Boundary Wall work at 20 Class Room School and Hostel at Ghat with the same rates, terms and conditions of the Original Agreement dated 30.4.1979 which was concluded for 100 M/4/G Houses with a rebate of 11%.

The work will be executed as per Technical Specifications of the Clients which are also applicable for 100 M/4/G Houses as per your contract.

However, in case the clients allow T.S.R. 1981 rate for this work, the rate shall be changed to the same as 100 Housing Rate i.e., by waving 11% rebate which is offered by you now.

Completion time for this work will be four months from the date of this letter i.e. dated 12.5.1983. Bill of quantity for this work is enclosed as Annexure (A).

15. The additional work of construction of boundary wall was completed and handed over by the PRW to NBCC on 31st March 1984. However, the construction of 12 houses was not completed within the stipulated time. According to NBCC, the work of plumbing, sanitation, etc. was abandoned by the PRW by its letter dated 22nd March 1987 and the remaining work on the 12 houses was completed by NBCC and handed over to the Libyan clients. According to the NBCC, the entire work of construction was inordinately delayed on account of the laches, neglect and poor performance in the execution of the work by the PRW.

16. According to the PRW, the work of construction of 100 houses at Ghat, Libya and handing it over to NBCC by the PRW on 31st March, 1983 with a delay of 33 months, was caused due to the delays and hindrances caused by NBCC. After the satisfactory completion of the defect liability period specified for the said work, the said 100 houses were finally handed over to NBCC on 31st March 1984. As regards the boundary wall, the work was awarded by the letter dated 12th May 1983 and the stipulated period of completion was four months ending on 12th September 1983. As regards the 12 houses, the completion period specified was six months from 25th January 1983 i.e. it was to be completed by 24th July

1983. It is stated that the work of 12 houses was completed by the PRW and finally handed over to NBCC on 12th January 1992. It was denied that the work of plumbing, sanitation, etc. in relation to 12 houses was abandoned by the PRW by the letter dated 22nd March 1987, as alleged by the NBCC. According to the PRW, this position was acknowledged by the NBCC in its Certificate dated 18th January, 1995. The case of the PRW is that after the handing over of 12 houses on 12th January 1992, the PRW submitted the final claims by a letter dated 16th March 1994.

Change in the constitution of the PRW

17. At this stage it is necessary to advert to the change in the constitution of the PRW. As earlier noticed, the PRW was a partnership firm. It had eight partners at the time of award of the contract in question by NBCC. M/s. A.M. Rasool Construction and Engineering Services (P) Ltd., a company incorporated under the Companies Act 1956 became a partner of the PRW with effect from 24th March 1984. The first eight partners then retired from the firm and only the company M/s. A.M. Rasool Construction and Engineering Services (P) Ltd. continued. It took over all the assets and liabilities of the firm. By a letter dated 17th April 1984 M/s. A.M. Rasool Construction and Engineering Services (P) Ltd. informed NBCC of the above change in the constitution of the PRW and that "M/s. A.M. Rasool Construction and Engineering Services (P) Ltd. is henceforth the sole proprietor of M/s. A.M. Rasool & Co. w.e.f. 01.04.1984." A copy of the Memorandum and Articles of Association of M/s. A.M. Rasool Construction and Engineering Services (P) Ltd. was enclosed with the letter. A preliminary objection raised by NBCC to the locus of M/s. A.M. Rasool Construction and Engineering Services (P) Ltd. to represent the PRW was rejected by the learned Arbitrator by an interim Award dated 23rd April 2000 which will be referred to hereafter. Accordingly, the reference hereafter in this judgment to PRW is to M/s. A.M. Rasool Construction and Engineering Services (P) Ltd.

18. Since the NBCC failed to settle the claims so submitted, the PRW invoked the arbitration clause by a letter dated 13th June 1994 addressed to NBCC. With NBCC failing to send any panel of arbitrators, the PRW filed Suit No. 99-A of 1995 u/s 20 of the Act in this Court on 10th January 1995. Against an order dated 20th December 1996 passed by the Single Judge directing the CMD of NBCC to appoint an Arbitrator, the PRW filed an appeal and thereafter a Special Appeal. By an order dated 25th September 1997 the Division Bench allowed the appeal and remanded the case to the learned Single Judge to appoint an arbitrator in terms of Section 20(4) of the Act. By an order dated 19th December 1997 the learned Single Judge appointed Mr. Justice G.C. Jain (Retired) as Sole Arbitrator.

Preliminary objections of NBCC rejected by the Arbitrator

19. The PRW filed its statement of claim on 21st January 1998 and NBCC filed its written statement and reply. Thereafter, Justice Jain expired and the case came

up again before this Court for the appointment of another arbitrator. After hearing the PRW and NBCC, the Court by an order dated 18th November 1998 appointed Mr. Justice M.P. Singh as arbitrator.

20. NBCC raised five preliminary objections before the learned Arbitrator in its letter dated 5th May 1999 which were rejected by the learned Arbitrator by an interim Award dated 23rd April 2000. The first was that there was no privity of contract with A.M. Rasool Construction and Engineering Services (P) Ltd. as the original contract was only with M/s. A.M. Rasool and Co., the firm. The second was that there was no proper legal representation and authorization on behalf of the claimant. The third was that the appointment of the Arbitrator could be made only by a Libyan Court and the arbitration had to proceed according to Libyan law. It was contended by NBCC that "the Arbitrator appointed by Delhi High Court has no jurisdiction to proceed with the matter." The fourth objection was that the claim was barred by the Indian law of limitation. The fifth objection was that the reference made to the Arbitrator was beyond the scope of the dispute.

21. As regards the first objection, it was held by the learned Arbitrator in the order dated 23rd April 2000 that there was a change in the constitution of AM Rasool & Co. even while the contract was being executed. The PRW was taken over by M/s. A.M. Rasool Construction and Engineering Services (P) Ltd. and the change was brought to the notice of NBCC by letter dated 17th April 1984 annexing copy of the Memorandum and Articles of Association. NBCC in its reply dated 19th April 1984 stated: "In view of the change of proprietorship of your company we request you to kindly call on this office to clarify certain points." Thereafter no objection was raised by NBCC till the hearing of the claims before the learned Arbitrator. The completion certificate dated 18th January 1995 clearly stated that the company was the contractor. It was noted by the learned Arbitrator that "from 1.4.1984 till 4.5.1999 the date of hearing before me, no objection was ever raised by the Respondent regarding the constitution of the claimant company." The learned Arbitrator referred to the correspondence exchanged between the parties after 17th April 1984 and even the pleadings before this Court up to the appointment of the arbitrator, throughout which it was the company which was representing the PRW, when no such objection was raised by NBCC. The learned Arbitrator concluded that: "The claim petition is maintainable at the instance of M/s. A.M. Rasool Construction and Engineering Services (P) Ltd. which has become the sole Proprietor of M/s. A.M. Rasool & Company." The objection was accordingly rejected.

22. The second preliminary objection was also rejected as the petition u/s 20 of the Act had been filed by the Director of the PRW, who had duly signed the verification clause on 10th January 1995. As regards the third objection as to the jurisdiction of Indian courts, the learned Arbitrator noted that when the Division Bench by order dated 25th September 1997 set aside the order dated 20th December 1996 of the Single Judge directing the CMD of NBCC to appoint an Arbitrator, and remanded the matter to the Single Judge to proceed in

accordance with law and to appoint an Arbitrator as postulated by Section 20(4) of the Act, no objection was raised by the NBCC as to the jurisdiction of the Delhi High Court. The learned Single Judge appointed Justice Jain as the Arbitrator. When an application was filed for appointment of another Arbitrator in place of Justice Jain, after he expired, the Court passed the order dated 18th November 1988 in which it was recorded that the counsel for the NBCC had no objection to the prayer made in the application. The order of the Division Bench holding that the appointment of the Arbitrator is in accordance with Section 20(4) of the Act had become final. It was further noticed that for more than six years, NBCC had participated in the initiation and progress of the arbitration proceedings in Delhi. It should, therefore, be deemed to have submitted to the jurisdiction of the Delhi High Court. It was further observed by the learned Arbitrator that while the main contract for execution of the work "may be governed by the Libyan law but the procedural matter has to proceed in accordance with Indian law, otherwise it will entail grave injustice to the Indian subcontractor who executed the work in Libya." There was no specific mention in the contract that the arbitration would be held in accordance with the Act. It was further held by the learned Arbitrator that the dispute arising from the contract had to be decided by the learned Arbitrator according to the Indian law of arbitration.

23. As regards the fourth preliminary objection as to limitation, it was held by the learned Arbitrator that: "From the record it is evident that the NBCC has admitted the completion of 100 houses in 1984, 12 houses on 12.1.1992. The letter dated 22.1.1986 cannot close the chapter of payment because the completion of 12 houses was done on 12.1.1992 much after 22.1.1986." Further by letter dated 24th May 1993, NBCC had admitted that LD 402896.55 was payable to the PRW. On 16th March 1994 the PRW had submitted its claims and had invoked the arbitration clause on 13th June 1994 which was within three years from 12th January 1992. Therefore, the invocation of arbitration was within time.

24. Analyzing the letter dated 21st January 1986 relied upon by the NBCC, the learned Arbitrator held that the letter was an acknowledgement of the pendency of the claim and its being considered and not repudiated. Once NBCC had stated that the question of payment was still under consideration, it meant that it had not been finally rejected. It was held that the order for construction of 100 houses, for the construction of 12 houses and then the boundary wall and hostel work were not three different works. It was held: "All the works, for the purpose of limitation, will be deemed to be one transaction as the payments have been made cumulatively. The NBCC at all times treated three works namely 100 houses, 12 houses, compound wall as one project." Reference was made to the decisions of the Supreme Court in *Union of India (UOI) and Another Vs. L.K. Ahuja and Co.*, and *State of U.P. Vs. Lakhmi*, . The preliminary objection in regard to limitation was accordingly rejected.

25. As regards the last preliminary objection, the learned Arbitrator recorded the

statement of counsel for the PRW that it would not claim anything over and above what was covered by the two deviation orders and the main order for 100 houses. Therefore, no further finding was required to be given on the said preliminary objection.

Earlier Proceedings u/s 33

26. Thereafter, the NBCC filed OMP No. 118 of 2000 in this Court u/s 33 of the Act to have the effect of the arbitration agreement determined. The contention of NBCC was that Clause 51 of the GTC of the contract between NBCC and the HCL which was part and parcel of the contract between NBCC and the PRW had ousted the jurisdiction of Indian courts. By a judgment dated 21st February 2002 NBCC Vs. AM Rasool Constn. and Engineering Services (P) Ltd., a learned Single Judge of this Court disposed of the said petition holding, inter alia, that the arbitration clause in the contract between the parties was an independent clause and Clause 51 of the GTC of the contract between NBCC and HCL "had neither overriding nor superseding effect." The intention of the parties was manifest that the disputes had to be referred to the sole arbitration of the Project Director of NBCC in India. Clause 14 of the contract between NBCC and the PRW was "independent of all other clauses" including clauses of the GTC. Since the contract was signed in India and the registered offices of the parties were also situated in India, the conclusion was that "the parties had expressly agreed for submission to Indian Courts in case any dispute arises from the contract in question." In any dispute it was immaterial that the contract was to be executed abroad or whether the contract was in the nature of an international commercial transaction. While disputes between NBCC and HCL were to be adjudicated upon by the Libyan court, intention of the parties was clear that disputes between NBCC and PRW would be "decided on Indian soil through the arbitration of the Project Director." The petition was accordingly dismissed.

The impugned Award

27. The Arbitrator then proceeded with the matter and delivered the impugned Award on 21st July, 2003. The conclusions of learned Arbitrator in the impugned Award could be summarized as under:

(1) The PRW had submitted a detailed programme to the NBCC on 16th April 1979 requesting NBCC to proceed with the necessary pre-arrangements of procurement of raw material at site. Reminders were sent on 21st May 1979 and 8th July 1979. Even by 27th August 1979 when the further letter was written the materials had not been supplied. Another letter was sent on 11th October 1979 by the PRW. Due to non-supply of stones etc. the cement and concrete work had to be stopped completely. The reinforcement work could also not start because of non-supply of 10 mm dia, 1 mm dia and 14 mm dia steel. There was short supply of steel and shuttering wood for at least two weeks. On 2nd April 1980 another letter was sent complaining about non-availability of binding wire and cement and pointing out that the PRW's laborers were sitting idle for the last 5

days. The complaint made on 24th April 1980 stated that there was no stock of cement for the last one month and the PRW was given only 35 bags of cement daily which was not sufficient for any concrete work. Even the mixture machines were not in working order. After referring to a number of such letters and complaints, the learned Arbitrator concluded that PRW had complied with Clause 12 GTC furnishing phase-wise requirement of material well within time and rejected NBCC's objection in this regard.

(2) The objection of the NBCC that there was no authorized representative on behalf of the PRW to deal with the work was rejected.

(3) The objection of the NBCC that the bank account had not been opened by the PRW to enable payment to be made was also rejected since even according to the statement submitted by the NBCC, the bank account had become operational by 31st May 1979.

(4) The objection by the NBCC to the non-registration of the contract within a particular time limit was held to be unfounded. Moreover, the registration or otherwise of the contract would have no effect on the work progress of the project.

(5) In terms of the documents produced, it appeared that the site was handed over to PRW only on 17th June 1979, i.e., after more than six months of the LOI.

(6) The layout plan and drawings were handed over to PRW by NBCC only by the end of July 1979 and work started on 2nd August, 1979. Therefore, the delay of seven months in this regard was caused by the NBCC.

(7) NBCC filed a brief compilation of the labour strength showing month-wise details from 30th April 1979 to 1986. The chart produced showed that till October 1979 there were 45 workers and the strength was increased up to 129 as against the maximum required number of 178. Any delay on the part of the PRW in completion of construction of 100 houses was impliedly condoned by the NBCC. Although the construction started on 2nd August, 1979, NBCC on 11th February 1980 directed the PRW to construct different types of M/4/G houses. This contributed to delay in completion of the 100 houses. If it was unhappy with the delay in completion of the work or with the required number of labour for completing the project, NBCC could have cancelled the project or imposed penalty of 1% per day of the value of the whole work delayed subject to the maximum of the 10% of the contractual value of the whole work as contemplated by Clause 7 of the FTC. However, no such step was taken by NBCC and no notice was sent to the PRW. The Libyan Government also extended the time for completion of the project till 1989. Further, the allotment of two additional works through deviation orders showed that NBCC was satisfied with the work progress by the PRW. Therefore, the labour strength did not contribute in the delay in completion of the project.

(8) The diversion of labour was of no relevance to the construction of 100 houses

since that had already been handed over on 31st March 1983 whereas the diversion of workers to some other works with ISCON at Wari was with effect from 8th December 1984.

(9) The mobilization advance commenced to be released with effect from 14th May, 1979 and continued up to 8th September 1979 but in small amounts. After referring to the entire correspondence in this regard, it was concluded that "short payment and delayed payment of mobilization advance by the NBCC has also caused delay in the progress of 100 houses."

(10) Ex.C-789 showed that a total sum of LD 89500 had been deducted by NBCC as income tax at source to the extent of 10% from each bill of the PRW for the construction of 100 houses, 12 houses and compound wall. The tax department of the Libyan Government wrote a letter dated 12th March 1987 to NBCC requiring it to pay back the tax deducted to the PRW so that the tax department could claim directly from the PRW for the years 1979 to 1983. The objection of NBCC regarding payment of tax was rejected.

(11) NBCC had unnecessarily blocked LD 89500 over which amount the PRW lost interest. There was an additional burden to the PRW on account of labour strike with the NBCC's labour going on strike, but for which no claim was made by the PRW.

(12) The handing over of the 100 houses after completion on 31st March 1983 was two months after the extended period. But no objection as to delay was raised at that stage by NBCC.

(13) NBCC issued a certificate on 11th February 1990 Exb.C-765 admitting that delay in completion of 12 houses was caused because of non-supply of material to the PRW in time by NBCC. The resultant overstay had caused extra burden to the PRW as most of the workers were sitting idle and their labour cost was not paid by the NBCC. The award of additional works through deviation orders showed that NBCC was satisfied with the work of the PRW in continuing with the completion of the 100 houses project.

(14) The letter dated 22nd March 1987 (Ex. C-725) sent by the PRW was not an intimation about abandonment of the work but showed that the PRW was placing before NBCC its difficulties in order to avoid further delay in handing over the work and further pointing out that without payment of bills it was not possible to carry on with the work. On receipt of the said letter, NBCC never wrote to the PRW stating that it has abandoned the work. Therefore, such a plea was not permissible to be raised before the Arbitrator for the first time.

(15) The contract dated 30th April 1979 had been modified by an agreement dated 15th December 1981 by means of which Technical Specification ("TS") Part-I was made applicable and through which NBCC agreed to pass on the 50% enhancement in the rates granted to it by the Libyan Clients in the form of 50% increase in the labour rates in the works done by the PRW from 1st April 1980.

NBCC by its letter dated 26th June 1983 (C-425) informed the PRW that it had released 50% as per the Agreement dated 15th December 1981. The extra items were to be mutually settled after considering the complete enhancement receipt by the NBCC from the Libyan clients. NBCC wrote a letter stating that the payment would be made to the PRW within seven days of receipt of payment from the Libyan client. No objection was raised by the NBCC that the enhancement was not payable. It was also not denied that LD 70350 had been released by the Libyan client to the NBCC. However, the second enhancement of 50% claimed by PRW was beyond the scope of the contract and was not payable.

(16) The PRW was fully justified in not mobilizing labour at site before the site plan and drawing was made available by NBCC. NBCC was required to prepare running account bills each month for the works executed during the month at the BOQ rates in cooperation with the PRW. However, in a period of 51 months only 18 bills were prepared for the work of construction of 100 houses. Therefore, there was a breach of Clause 3(2) FTC by NBCC.

(17) Time ceased to be the essence of the contract with NBCC itself extending the time periodically without raising any objection even at the time of handing over of the project of 100 houses. The certificates issued by NBCC on 15.3.1982 (C-356), 12.8.1984 (Ca498), 12.8.194 (C-499), 29.10.1984 (C-511), 29.10.1984 (C-512), 11.2.1990 (C-765), 2.2.1991 (C-767) and 18.1.1995 (C-842) all showed that the work had been completed to the satisfaction of the Libyan clients and that there was no objection even by NBCC regarding any dissatisfaction on its part. Ex.C-778 was a Certificate dated 29.2.1999 issued by the Libyan authorities stating that the PRW was a sub-contractor of NBCC for the construction of 100 houses and 12 houses and that the project was finally handed over to the clients.

(18) Even after the initial handing over of the 100 houses on 31st March 1983 and the final handing over in July 1984, and also after handing over the compound wall on 31st July 1984 payments had been received by NBCC from the Libyan clients. Since NBCC failed to bring on record all the details of receipt of such monies by it from the Libyan clients, an inference had to be drawn that "NBCC has deliberately withheld the details in respect of the payment made to it by the Libyan clients and the payments made to all the sub-contractors, particularly to the PRW." The money should have been paid to the PRW when it was received by NBCC after the final handing over of the 100 houses. If the Libyan client had paid for all the 432 houses, it was the duty of NBCC to pay the PRW proportionately for the 100 houses.

(19) The learned Arbitrator then noted the admitted claims in regard to the 100 houses, 12 houses and compound wall and then proceeded to deal with the individual items of claim in respect of each of those works. The tabulation of the claim and amounts allowed by the learned Arbitrator in relation to the construction of 100 houses is as under:

S.No.

Description of the claim

Amount Claimed

Amount Allowed

1.

Claim towards work accepted by the Libyan employers of NBCC but not incorporated in the bills prepared and paid to PRW by NBCC.

LD 65,087.154

LD 43,391.436

2.

Escalation of rates granted to NBCC by the Libyan Employer but not passed on to PRW.

LD 2,62,471.216

NIL

3.

Balance amount due for extra items (15 Nos.) paid at much lower rate than to which PRW was entitled.

LD 2,50,940.719

Allowed in full

4.

Amount due under various extra items got executed by the claimants not paid for from the NBCC.

LD 1,55,625.514

Allowed in full

5.

Extra expenditure incurred and/or losses suffered due to overhead expenditure including additional and other establishment cost during the un-contemplated prolonged period of contract.

LD 1,16,216.255

Allowed in full

6.

Damages for extra expenditure and/or losses suffered for importation/

deportation of Technicians for unanticipated prolonged period beyond the original contract period.

LD 2,79,880.019

Allowed in full

7.

Damages for the extra expenditure incurred by PRW by way of commission paid to the

bank and ECGC and losses suffered and the margin money kept with the banker for keeping the mobilization advance guarantee and performance guarantee in force for the un-anticipated prolonged period of contract.

Rs. 2,25,536.65

Allowed in full.

8.

Refund of amount wrongly deducted from 14th RA Bills allegedly being incurred by NBCC for repatriating 12 technicians sent to Libya by NBCC without consent by PRW and interest thereon.

LD 2556.900 + 8041.450

Allowed in full.

9.

Work of additions and alterations carried out in the houses Nos. 136 and 195 but not incorporated in the bills or paid to PRW.

LD 9,542.000

Allowed in full.

10.

Refund of balance security deposit of PRW.

LD 17,431.000

Allowed in full.

11(a)

Claim for interest of outstanding amount of LD 17,431.000 lying with NBCC as balance security deposit (including interest thereon).

LD 33,205.055

Allowed in full.

(b)

Interest on outstanding security deposit amount of LD 17,431.000.

Interest at 18% per annum.

Allowed in full.

12.

Outstanding to be paid out of 18th RA bill.

LD 1,581.628

Allowed in full.

13(a)

Interest on LD 1,581.628 from 31.7.84 till 28.2.94

LD 3,013.000

Allowed in full.

(20) As regards claims relating to construction work of 12 houses, the learned Arbitrator allowed Claim Nos. 1, 3, 4 and 5 relating to measurement; Claim Nos. 6, 7, 8 and 15(a) relating to damages; Claim Nos. 9(a), 9(b), 13(a) and 13(b) relating to interest; and Claim Nos. 10, 11 and 12 relating to claim for release of security deposit etc. As regards the work in relation to compound wall, he allowed claims related to measurements in Claim Nos. 1 (partly allowed), 2 and 3; claim relating to damages in Claim No. 6; claim for release of security deposit in Claim Nos. 8 and 9; and interest claims in Claim Nos. 7(a), 7(b), 10(a) and 10(b).

Proper law of the contract

28. One of the objections raised by NBCC concerns the proper law of the contract between the parties which according to the NBCC was the Libyan law. On the basis of the decision of the Supreme Court in Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others, it was submitted by Ms. Ginny Jetley Rautray, learned counsel appearing for NBCC, that the earlier decision of this Court in February 2002 in NBCC v. A.M. Rasool Construction and Engineering Services Pvt. Ltd. (supra) had only decided the issue of the curial law, i.e., the proper law of the arbitration agreement as well as the procedural law of arbitration and not the proper law of the contract, i.e., the law applicable to the substantive contract. In other words, it was contended that even if one were to accept that the arbitration proceedings could be held in India and that the arbitral proceedings should be governed by the law of India, the proper law of the contract was still the Libyan law. Referring to Clause 22 of the FTC between the parties, it was stated that the general conditions of the contract entered into by NBCC with the HCL would be applicable to the PRW. Clause 51 of the GTC of the contract

between NBCC and the HCL made it clear that the contract would be executed in accordance with the Libyan laws and regulations "and only Libyan Courts would exercise jurisdiction over any dispute arising from the contract." It is therefore submitted that the proper law governing the contract between NBCC and PRW was the Libyan law.

29. According to Ms. Jetley, even the February 2002 judgment of this Court acknowledged that all the terms of the GTC of the contract between NBCC and the HCL became part and parcel of the contract between NBCC and the PRW. She referred to the observation in para 40 of the said judgment which acknowledged that "substantive laws of the contract may be the Libyan laws". Consequently it was submitted that the question as regards the proper law of the contract remained to be decided. It is submitted that even the learned Arbitrator did not decide the issue and merely observed that the law governing the contract would be the Indian law.

30. Ms. Jetley submitted that the proper law of the contract could be determined by examining the system of law to which the contract had the closest and most real connection. In this context, it is pointed out that the work was to be executed in Libya; the contract was required to be and in fact registered under the Libyan law; the workers were to be paid wages under rules those fixed by the Libyan Government from time to time (Clause 8 GTC); PRW was to abide by the bye-laws of the Libyan Government and was to be responsible for any acts of violation (Clause 10 of GTC); PRW was to bear all taxes and duties imposed as per the Libyan laws (Clause 6(b) of FTC); PRW was to be paid in Libyan Currency and any amount transferred would be as per Libyan Exchange Control Regulation (Clause 9 of the FTC); PRW had to pay contributions towards INAS or bear any other terms under the Libyan laws (Clause 10 of the FTC); PRW was to conform to all prevailing Libyan labour laws (Clause 15 of the FTC). It is further submitted that even assuming that the parties had not expressly stated that the proper law of contract would be the Libyan law, by the application of the "doctrine of infection", the same system of law had to govern both the main contract between NBCC and HCL and the sub-contract between NBCC and the PRW. Reliance is placed on the judgment in *Wahda Bank v. Arab Bank Plc*, [1996] CLC 408. Lastly, it is submitted that the February 2002 judgment did not constitute *res judicator* since it decided the "proper law of arbitration" and not the "proper law of the contract". Moreover, the proceedings arose u/s 33 of the Act which deals with the challenge to the existence and validity of the arbitration agreement.

31. On behalf of the PRW, it is submitted by Mr. Arun Francis, learned counsel for the Respondent that there is no specific objection taken by the NBCC in the present petition that the Award is liable to be set aside since the learned Arbitrator did not apply Libyan laws while deciding the claims of the PRW. Reliance is placed on the decisions in *Build India Construction System Vs. Union of India (UOI)*, , *M/s. Atlas Export Industries Vs. M/s. Kotak and Company*, ,

Delhi Jal Board Vs. Vijay Kumar Goel and Another, and National Thermal Power Corporation Ltd. Vs. Wig Brothers Builders and Engineers Ltd., . Secondly, it is submitted that inasmuch as the judgment of February 2002 of the learned Single Judge while deciding OMP No. 118 of 2000 had categorically held that Clause 51 GTC would not apply as far as the PRW was concerned, the issue of substantive law was also decided and therefore the said judgment constituted *res judicator*. Thirdly, it is submitted that if according to the Petitioner, the applicable law was the Libyan law then the foreign law had to be proved before the Arbitrator. This burden of showing what the Libyan law was, which barred the PRW from claiming the amounts under the various claims, was not discharged by the NBCC.

32. The above submissions have been considered. The decision in Sumitomo Heavy Industries Ltd. draws a clear distinction between (a) the proper law of reference, (b) the proper law of the arbitration agreement, (c) law governing the arbitration proceedings (*curial law*) and (d) the proper law of the contract. The parties could well choose to apply a different law as far as the substantive contract itself was concerned. This could be different from the law governing the arbitration proceedings, i.e., the manner in which the reference has to be conducted.

33. The proceedings filed by NBCC (OMP No. 118 of 2000) u/s 33 of the Act were triggered by the interim Award of the learned Arbitrator dated 23rd April 2000. One of the preliminary objections raised before the learned Arbitrator by NBCC concerned the jurisdiction of the Arbitrator. It was contended that the appointment of the Arbitrator could be made only by the Libyan Court "and the arbitration could proceed according to Libyan law." The objection was really in relation to the *curial law*. The learned Arbitrator held that the NBCC having not objected to his appointment by the Delhi High Court, in substitution of the earlier Arbitrator who expired, had conceded to the jurisdiction of the Delhi High Court. The learned Arbitrator noted that the contract made no specific mention that the arbitration would proceed in accordance with Libyan law. It was held that it would be against public policy if in view of Clause 14 of the agreement and Clause 51 GTC the Project Director NBCC is appointed as an arbitrator to adjudicate the dispute "and he is asked to decide the matter in accordance with Libyan law here at Delhi." Further, while "the main contract for execution of work may be governed by the Libyan law, but the procedural matter has to proceed in accordance with the Indian law otherwise it will entail grave injustice to the Indian subcontractor who executed the work in Libya." The preliminary issue raised by NBCC before the learned Arbitrator was that the Libyan law would govern the arbitral proceedings. It did not specifically urge that the "proper law of the contract" was the Libyan law. Consequently, the interim Award dated 23rd April 2000 of the learned Arbitrator did not decide the issue concerning the proper law of the contract.

34. The above interim Award of the Arbitrator was examined in the 2002 judgment in OMP No. 118 of 2000. A perusal of the said judgment indicates that

Clause 51 of the GTC of the contract between NBCC and the HCL was considered. The discussion was essentially in the context of Section 33 of the Act about the existence and validity of the arbitration agreement. It was observed that "Section 33 concerns only with the term relating to the arbitration in the contract and not with the other terms of the contract which did not arise for consideration on an application under that Section." The Court categorically held that Clause 51 of the GTC would govern the curial law, i.e., the law that would govern the arbitration proceedings. In para 43 it was held that the incorporation of the terms and conditions of the contract between the NBCC and HCL by way of Clause 4 in the contract between the NBCC and the PRW "does not affect the arbitration clause contained in the independent contract between the parties. Intention of the parties was clear that they would decide their disputes on the Indian soil through the arbitration of the Project Director." It is in this context that the Court observed that even while "substantive law of the contract may be the Libyan laws" it did not mean that the Libyan law would also govern the arbitration proceedings.

35. A careful reading of the February 2002 judgment bears out the submission of learned counsel for NBCC that it did not in fact decide whether the proper law of the contract was the Libyan law. It only observed in passing that it may be the Libyan law. Therefore, the said decision does not constitute *res judicata* as regards the point concerning the proper law of the contract. Therefore, the said issue arises for consideration in the present proceedings.

36. It requires to be recalled that even at the stage of final hearing before the learned Arbitrator it was not specifically urged by NBCC that the "proper law of the contract" was the Libyan law. Also, in the present petition challenging the Award, no specific ground has been raised on the above point. It has been raised only in the rejoinder and later in the written submissions. There is merit in the contention of learned counsel for the PRW that such a point had to be specifically raised in the substantive objection petition at the first instance. NBCC was required to raise this substantive objection when it filed the Section 34 petition and not later at the stage of rejoinder by which time the limitation for raising such objection had already expired.

37. In the arbitral proceedings, following the interim Award, the parties proceeded on the basis that it was the Indian law that would govern the contract. The contract in the instant case does not expressly state that the proper law of the contract is the Libyan law. It is this that has prompted NBCC in its written submission to invoke the "doctrine of infection" by relying in the judgment in *Wahda Bank* to contend that the parties should have been deemed to have subjected both the main contract as well as the sub-contract to the same law, i.e., the Libyan law. The proposition, though attractive, appears not to help the NBCC in the present case. The question to be asked is what the intention of the parties to the contract was. As observed in *National Thermal Power Corporation Vs. The Singer Company and others*, where the parties have neither expressly

nor impliedly chosen a proper law for the contract, the issue should be decided on the touchstone of "how a just and reasonable person would have regarded the problem like this and for this purpose where the contract was made, the form and object of the contract, the place of performance, place of residence or business of the parties, reference to the courts having jurisdiction and such other links". The Court has to determine the system of law with which the transaction "has the closest and most real connection".

38. If one were to apply the above test in the instant case, it would not be possible to arrive at a categorical answer. While the place of performance of the contract was Libya, the registered office of both the parties was in India. The contract was entered into in India. The earlier decisions of this Court at the stage of appointment of the Arbitrator and later u/s 33 of the Act have decided that it is the Delhi Court that has the jurisdiction in regard to the disputes between the parties. Those orders have attained finality. No doubt, the subject matter of the contract and the place of its performance was Libya but that by itself would not answer the question concerning the "closest and most real connection". The attempt at reference by way of incorporation of Clause 51 of the GTC and Clause 22 of the FTC governing the contract between NBCC and HCL into the present contract seems incongruous in light of the parties agreeing under Clause 14 to refer the disputes to an Indian Arbitrator. It seems unlikely that the parties intended the Indian arbitrator to apply the Libyan law of contract while deciding the disputes. Further, the burden was on NBCC to prove what the Libyan law was. This makes it imperative for the party to urge the ground concerning the proper law of the contract at the first available opportunity and definitely at the beginning of the arbitral proceedings.

39. In the instant case, far from urging the point before the Arbitrator, no attempt was made by NBCC to prove before the Arbitrator what the Libyan law governing the contract was. The question of applicability of a foreign law is a question of fact which requires to be proved by leading expert evidence. In the present case, NBCC made no such effort to prove the Libyan law. The parties stated before the learned Arbitrator that no oral evidence would be led and the matter may be decided on the basis of the documentary evidence only. There was no document produced by NBCC to show what the Libyan law relevant to the contract was and how it should be applied. Only in relation to the claim concerning interest a point was raised by NBCC that under the Libyan law, i.e. Islamic law, no interest could be charged. The learned Arbitrator noted the objection and observed "it was only at the argument stage that it was contended by the counsel for the NBCC that in Muslim countries interest is unknown and cannot be awarded. Except raising this oral objection, no law has been shown barring payment of interest."

40. Apart from the above reasons, in a dispute that has gone for over 17 years, it becomes imperative for the Court to examine the consequences of accepting this kind of a plea touching on the question of the applicable law. If accepted, it

would mean that the entire arbitration proceedings have to be re-started since all the claims would have to be decided in accordance with the Libyan law which even today NBCC has not been able to prove. Without even knowing what the applicable law is it would be a totally futile exercise to remand the case for deciding the claims and counter claims in accordance with the Libyan law. Moreover, no injustice can be said to have been done to NBCC on this score. Being an Indian company, it cannot complain that the failure to decide the claims by the Arbitrator in accordance with the Libyan law has caused it prejudice or has resulted in miscarriage of justice.

41. Consequently, the submission made on behalf of NBCC that in terms of the "doctrine of infection" the parties should be deemed to have agreed that the contract should be governed by the Libyan law is rejected. The plea of NBCC that the Award is liable to be set aside since the claims of the PRW and the counterclaims of NBCC were not decided in accordance with the Libyan law should fail.

Objection as to limitation

42. The next objection by NBCC to the impugned Award is based on limitation. Ms. Jetley referred to the various RA bills and payment certificates to submit that as far as the payment in relation to the work of construction of 100 houses, the measurements were taken and payments made in April 1984 itself as recorded in the final bill (R-259). Even as regards the construction of 12 houses, the final bill was prepared in February 1990 and was accepted by PRW under protest. However, the dispute regarding measurement was raised for the first time on 16th March 1994. As regards the compound wall, the work was completed in 1984, final bill was prepared in 1987 and the claim on the basis of disputed measurement was only made in 1994. Each of these contracts was distinct and separate. It is submitted that the claims of the PRW were therefore time barred and the interim Award dated 23rd April 2000 of the learned Arbitrator rejecting this plea was erroneous.

43. The case of the PRW is that there is no specific objection raised by the NBCC in the present petition as regards limitation. Under Article 119(b) if a party wants an award set aside, it should raise such plea within 30 days of the notice of filing of the Award. NBCC received a letter dated 15th September 2003 from the Arbitrator intimating it that the impugned Award had been filed in this Court. NBCC filed objections to the Award on 15th October, 2003. There was no objection taken by the NBCC that the PRW's claims were barred by limitation. Such plea was taken only in the rejoinder filed on 10th March 2005 for the first time and that too without even amending the objection petition. This would clearly amount to taking an additional ground after the period of limitation had expired.

44. The above objection of the PRW is valid. In *Madan Lal Vs. Sunderlal and Another*, in the context of the Act, it was held in para 8 as under:

It is clear therefore from the scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in s. 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Art. 158 of the Limitation Act. If no such application is made award cannot be set aside on any of the grounds specified in s. 30 of the Act. it may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period of limitation. But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation.

45. The interim Award dated 23rd April 2000 of the learned Arbitrator extensively dealt with this point and held against the NBCC. The said interim Award as regards the said point was not challenged by NBCC in the present petition when it was first filed. The failure by NBCC to raise the point of limitation, in the first place, in the objection petition and to raise it two years later in the rejoinder would tantamount to permitting an additional ground to challenge the Award after the period of limitation for filing the objection has expired. On this ground, this Court rejects the objection raised by the NBCC that claims of the PRW were barred by limitation.

46. Independent of the above conclusion, it is seen that the view taken by the learned Arbitrator on the issue of limitation is a plausible one to take. This proceeds on the basis that the three contracts were not separate contracts but part of the main contract for the work of construction of 100 houses. In fact the LOIs concerning the construction of 12 houses and the boundary wall were by way of "deviation orders" with reference to the main contract. All the bills for the three constituent works make reference to a single contract number. Ex. C-496 is a letter written by the NBCC to the Libyan Tax Department wherein the contract for work was initially registered for LD 378525 but was increased to LD 915000 due to additional works, extra items etc. NBCC recommended enhancing the registration of the single contract to the higher value. C-570 is another letter from NBCC indicating that the contract for 100 houses "has been extended to 12 houses work at Kalala, in addition to work which is in progress". After the conclusion of the contract for 12 houses on 12th January 1992, the reconciliation of arrears with dues was done by NBCC and accordingly a Certificate (C-793) dated 24th May 1993 was issued acknowledging that payment was due on account of running bills/final bills/security deposit/performance guarantee and other miscellaneous items. It was contended by learned counsel for NBCC that this document and the letter dated 14th September 1993 (C-798) were not acknowledgements for the purposes of Section 18 of the Limitation Act, 1963 since they had been made after expiry of the limitation period. Once it is stated that the 18 RA bills were not final bills, the period of limitation cannot be said to have begun running from that date. As explained in *Union of India v. L.K. Ahuja and Maj. Inder Singh Lekhi v. DDA*, for the purposes of limitation a dispute arises from the assertion of a claim and its denial. There was no repudiation as such by

NBCC of any of the PRW's claims till they were raised in 1994 within two years of the final payment in 1992. C842 is a letter by NBCC dated 18th January 1995 certifying that the PRW was the sub-contractor for the work of "100 + 12 houses and compound wall at Kalala, Ghat" and that they completed the project to the satisfaction of the Libyan clients and "the works have been handed over as per the details given.

47. The conclusion of the learned Arbitrator that the contract was a single one comprising the three components viz., construction of 100 houses, construction of 12 houses and the compound wall, was a plausible view to take in the circumstances. It cannot be held to be contrary to the clauses of the contract or the evidence on record. Consequently, there is no legal infirmity in the interim award dated 23rd April 2000 of the learned Arbitrator, as reaffirmed in the impugned final Award, negating the objection of NBCC that the PRW's claims were barred by limitation.

Objections as to individual claims

48. Before examining the objections in relation to individual claims it is necessary to recapitulate the law as regards the scope of interference by the Court. In AIR 2001 2933 (SC) it was observed AIR, p. 2936:

9. The position in law has been noticed by this Court in *Union of India (UOI) Vs. A.L. Rallia Ram, and Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore*, to the effect that the arbitrator's award both on facts and law is final; that there is no appeal from this verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award, the following observations in *Champsey Bhara & Company v. Jivraj Balloo Spinning and Weaving Company Ltd.* L.R. 50 IndAp 324, a decision of the Privy Council, are relevant:

An error in law on the face of the award means, in their Lordships view, that you can find in the award or a document actually incorporated thereto, as for instance note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous.

10. In *M/s. Arosan Enterprises Ltd. Vs. Union of India and Another*, this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible view points, the interference in the award based on erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principles, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator.

49. As regards the objection on the individual claims, it is submitted that the Award was disproportionately high inasmuch as the value of the labour contract was LD 378525.582 whereas the Arbitrator had allowed claims to the extent of LD 2191189 and Rs. 2,25,530. The learned Arbitrator has given cogent reasons for allowing the claims of the PRW and has discussed the evidence in great detail. This Court does not propose to sit in appeal over such findings of the learned Arbitrator by re-examining the evidence.

50. According to NBCC there are several perverse findings in the impugned Award that can be termed as perverse. The first is that the learned Arbitrator held that there was no legal relationship between the parties till 30th April 1979 when the contract was signed. It is submitted that this finding is contrary to the LOI dated 29th December 1978 which clearly stated that the time was to run from the date of issue of the LOI. It is submitted that the submission of bank guarantee ("BG") by the PRW for 7.5% of the value of the contract, the mobilisation at the work site as well as the time for completion were all computed with reference to the LOI.

51. The signing of a contract was envisaged in the LOI dated 29th December 1978. The LOI was itself modified on 2nd April 1979, i.e., three months after the original LOI was issued. The PRW submitted the performance BG dated 6th April 1979 as well as the BG to secure the mobilisation advance on 11th April 1979 based on the revised value specified in the modified LOI. It was only after signing of the agreement on 30th April 1979 that the enforceable rights and obligations of the parties got crystallised. This finding of the learned Arbitrator, therefore, cannot be said to be perverse.

52. The second perverse finding according to NBCC was the conclusion by the learned Arbitrator that since the site was handed over only on 17th June 1979 and the working drawings were delivered by the end of July 1979 there was no need for mobilisation of labour by the PRW prior thereto. It is submitted that the obligation to mobilise labour arose from the LOI itself since that had to be done within six weeks of the issue of the LOI. It is further contended by the NBCC that no time was specified for handing over of the site or delivery of the drawings. Further, the PRW itself applied for extension of time for mobilisation as also for submission of the BG.

53. The above contentions have been discussed by the learned Arbitrator. It was noticed by the Arbitrator on 14th May 1979 that the first batch of technicians had reached whereas the drawings had not been finalised and even the site had not been handed over. From that date itself the authorised person of PRW was available at the site. The site was handed over only on 17th June 1979. Therefore, it is obvious that the PRW could not afford to mobilise labour till such time the site is handed over since as per clause 12 GTC idle labour was not to be paid for. The learned Arbitrator has dealt with this issue concerning the availability of labour at considerable length. These objections were not raised by NBCC at the relevant time. Neither was the contract sought to be terminated nor

did NBCC impose any liquidated damages. Consequently, the finding of the learned Arbitrator about the delay having been caused by NBCC in handing over of the site as well as the drawings cannot be said to be perverse.

54. It is then submitted that the finding of the learned Arbitrator that the registration or non-registration of the contract could have no effect on the progress of the work was perverse. It was submitted that this is contrary to the Libyan laws in terms of which no foreign contractor could commence work without getting the contract registered within sixty days of its execution. As pointed out by the PRW, the contract was to be registered with the Libyan revenue department and the PRW was to be registered with the Libyan tax department. The work only started in 1979. The PRW could not have commenced work without registration. Again NBCC does not appear to have raised this issue with the PRW. There was nothing produced by NBCC before the Arbitrator to show that there was any delay in the registration of the contract by the PRW with the Libyan authorities.

55. NBCC contended that the finding of the learned Arbitrator that the labour strength did not contribute to the delay in the continuation of the project was perverse. It is submitted that the contract envisaged deployment of 178 workers whereas the chart set out in the impugned Award of the learned Arbitrator showed that at no stage during the execution the PRW actually deployed those number of workmen.

56. As pointed out by the PRW the contract itself does not contemplate deployment of any specified strength of workers. NBCC had estimated that the peak strength labour requirement could be around 178 workers but according to the PRW due to various changes by the NBCC in the work, as instructed during the course of the execution, and due to the delay in supply of materials by the NBCC, there were no sufficient work fronts available for 178 workers. With Clause 12 of the FTC prohibiting PRW from making a claim for idle labour, it had to plan the labour strength from time to time considering available work fronts and availability of materials. NBCC did not levy liquidated damages and therefore it does appear that this was not the reason for the delay in completion of the work. The learned Arbitrator's finding in this regard cannot be held to be perverse.

57. The next issue raised by the NBCC was that the finding of the learned Arbitrator that the delivery was accepted by it of 100 houses on 31st March 1983 without objecting to the delay was perverse. This Court is unable to accept the above contention since NBCC had extended time up to 31st January 1983. At the time of the initial handing over of 100 houses by PRW to it on 31st March 1983 NBCC did not raise the issue of delay. It also did not invoke its right to levy liquidated damages in accordance with Clause 7 of FTC. In the circumstances, the above finding of the learned Arbitrator cannot be said to be perverse.

58. It was contended by the learned counsel for the NBCC that there was

inconsistency in the findings of the learned Arbitrator regarding diversion of labour. The contention is that while on the one hand the learned Arbitrator held that alleged diversion had not caused any delay in the completion of 100 houses since the diversion took place after the initial handing over of 100 houses on 31st March 1983, he also rejected the NBCC's contention that the diversion of labour had contributed to the delay in the completion of 12 houses and compound wall on the same basis. Yet again the learned Arbitrator had allowed claims relating to measurement over and above those recorded and accepted by the PRW. Reliance is placed on the decisions in Nangia Construction Pvt. Ltd. Vs. Rail India Technical and Economic Services and Bharat Builders Vs. Delhi Development Authority .

59. The learned Arbitrator has categorically held that the diversion of labour had not affected the work in relation to the completion of 100 houses. Since under Clause 12 GTC payment of compensation for idle labour was barred, the PRW had to necessarily divert the idle labour to other works since the site was not made available and materials required were not supplied by NBCC in good time so as to keep the labour engaged. As regards the 12 houses it was completed on 12th January 1992 although the allotted time was six months from 26th January 1983. Here again the finding of the learned Arbitrator was that the delay is attributable to the NBCC. The contention of PRW which has been accepted by the learned Arbitrator is that labour was available and if the materials had been supplied in good time, there would have not been any need to divert labour to any other work and the construction of 12 houses could have been completed in time. It has further been pointed out by the learned Arbitrator that the NBCC did not levy liquidated damages on this score as well. The learned Arbitrator's findings in this regard are plausible and cannot be termed as perverse.

60. Learned counsel for the NBCC then argued at length on particular items of claim in relation to the three works. As regards claim pertaining to measurement, these were Claim No. 1 for 100 houses, Claim No. 1 for 12 houses and Claim No. 1 for the compound wall. The basis for these claims were that under Clause 3 FTC payments were to be made by NBCC to the PRW within seven days of receipt of payment by NBCC from the Libyan clients. It is pointed out by learned counsel for the PRW that the 18th RA Bill admittedly was not the final bill. He drew a distinction between the final bills for the 12 houses and the compound wall which were accepted by the PRW under protest. Consequently, it is submitted that the claims were in accordance with the contractual provisions. The objection of the NBCC is that there was no joint measurement taken for the works not incorporated in the bills, for which however, it had received payments from the Libyan clients.

61. The learned Arbitrator held the 18th RA bill for 100 houses (Ex.R-259) did not indicate that it was the final bill. Further, it only mentioned that the measurements had been accepted as full and final by the PRW and not the amounts indicated therein. Moreover, there is no answer to the finding of the learned Arbitrator that NBCC had prepared only 18 RA Bills in 51 months

although it was required to prepare monthly bills. If this was on account of the delays in the completion of the works, then the delay as held by the learned Arbitrator was largely on account of NBCC itself.

62. The learned Arbitrator also rejected the contention of NBCC that the PRW had abandoned the work. Moreover, the complete details of the payments received by NBCC from Libyan clients were not made available by it before the learned Arbitrator. The learned Arbitrator's reasoning in relation to claims pertaining to measurements cannot be said to be patently illegal or perverse.

63. It is next contended by NBCC that claims pertaining to extra items which were paid at lower rates, i.e., Claim No. 3 for 100 houses, Claim No. 4 for 12 houses and Claim No. 3 for compound wall, ought not to have been allowed. The NBCC contended that as per Clause 6 (A) FTC, rates for extra items had to be mutually settled and extras could have been executed only on written instructions. Reliance is placed on the decisions in *Food Corporation of India v. Chandhu Construction* 2007 (2) ALR 74 (SC), *Bhagat Ram Sahani and Sons Vs. Delhi State Industrial Development Corpn.*, and *Republic Construction Co. Vs. DDA*. A similar contention is raised by the NBCC in regard to claims pertaining to extra items which were not incorporated in the bills at all. These included Claim No. 4 for 100 houses, Claim No. 3 and 5 for 12 houses and Claim No. 2 for compound wall.

64. The learned Arbitrator, after analysing the documents, held that the extra items included in the bills were indeed paid at much lower rate than to which the PRW was entitled. Therefore, the claim for the balance payment was justified. There was no regular practice of NBCC issuing written orders to the PRW. As regards claims pertaining to extra items not incorporated in the bills, they were not covered by TS-1 or TS-2. The PRW contested the plea of NBCC that it raised the extra item claim for the first time in March 1994. It is submitted that the claims were raised much earlier in 1980 and 1985. Further, it is pointed out that TS-1 did not bar payment to the PRW for the extra works involved. The learned Arbitrator observed that NBCC did not produce anything on record to show that the rates claimed by the PRW were excessive. TS-1 was analysed by the learned Arbitrator and it was held that there was no provision therein barring extra payments. This being a plausible view to take, it does not call for interference.

65. Learned counsel on both sides have placed detailed tabulations on each item of claim in respect of the extra items. Without going into these details it is sufficient for this Court to observe that these are all matters of evidence which have been appreciated by the learned Arbitrator. This Court is not persuaded to hold that the learned Arbitrator erred in either analysing that evidence or in the reasons given for the conclusions.

66. As regards the claims pertaining to damages, i.e., Claims 5, 6 and 7 for 100 houses, Claims 6, 7 and 8 15A and 15B for 12 houses and Claim No. 6 for the compound wall, NBCC contends that under the contract rates were firm and

included all expenses. These included the expenses of keeping the BG alive and in any event the PRW was expected to keep the BG alive till the end of the maintenance period.

67. The learned Arbitrator, after finding that the NBCC was in breach of contract and responsible for delay in completion of work, held as a result that NBCC could not deny the PRW the expenses incurred as a result of the prolonged period of construction. The learned Arbitrator referred to the judgment of the Supreme Court in *Bengal Traders v. West Bengal Electricity Board* 2001 (2) RAJ 315 which held that although the rates were firm it would not debar the contractor from claiming compensation for the prolonged period of construction. It was further held that details submitted by the PRW had not been denied by NBCC and that in any event time had ceased to be the essence of the contract. The learned Arbitrator's findings are based on a proper analysis of the evidence placed on record and the applicable law. They cannot be held to be perverse or patently illegal. The Award in respect of the claims pertaining to damages therefore does not call for interference.

68. NBCC's objections to the Award in respect of the PRW's claims for wrongful deductions i.e., Claims 8 and 9 for 100 houses, and Claim No. 5 for the compound wall, requires this Court to re-appreciate the evidence which has already been examined in detail by the learned Arbitrator. In sum the learned Arbitrator found that NBCC was unable to substantiate its defence with reference to the documents on record. Even as regards to the admitted claims, i.e., Claims 10 and 12 for 100 houses, Claims 10, 11 and 12 for 12 houses and Claims 8 and 9 for compound wall, the learned Arbitrator found that despite specific directions, NBCC failed to produce details of the payments received by it from the Libyan clients. In the circumstances, no fault can be found with the learned Arbitrator for drawing an adverse inference and holding that payments were received by NBCC from the Libyan clients and it should proportionately make payment to the PRW.

69. Allowing of the interest claims by the learned Arbitrator in relation to 100 houses, 12 houses and compound wall has been assailed by NBCC on the ground that there was no provision in the contract in that regard; that final payments had not been released from the Libyan clients, therefore, payment for interest on the admitted amount did not arise and finally that no interest was payable in Islamic countries. The learned Arbitrator held that NBCC failed to prove the law which barred payment of interest. Indeed, it is a matter of evidence and not mere contention. NBCC itself had claimed interest on the counter claim. It also claimed interest from the Libyan clients. As pointed by the learned Arbitrator the contract does not prohibit the payment of interest. In the circumstance the objection on this ground is also without substance.

70. Finally, it was contended that all amounts as claimed by the PRW had been allowed by the learned Arbitrator without calling for any proof. Reliance was placed on the decisions in *Ishwar Singh and Sons Vs. Delhi Development*

Authority and Another and Prominent Electric Works Vs. Delhi Development Authority and Others . It was also claimed that the value of the contract value is only LD 37852582 whereas claims have been allowed by the learned Arbitrator to the tune of LD 2191189 and Rs. 2,25,530 and that the Award is liable to be set aside on this ground alone.

71. With the contract having been executed over several years, there was bound to be escalation in the rates. Consequently, the mere fact that the awarded amount exceeds the value of the contract originally entered into cannot per se be a ground for setting aside the Award. As regards the proof for the claims made by PRW, the documents produced by the PRW as well as NBCC were analysed in great detail by the learned Arbitrator. This contention is therefore rejected. There have been no submissions made with regard to the rejection of NBCC's counterclaims.

72. For the aforementioned reasons, the objections of NBCC to the impugned Award dated 21st July 2003 are hereby rejected and the said Award is made rule of the Court. The petition is disposed of with costs of Rs. 30,000 which will be paid by NBCC to the PRW within four weeks. Decree sheet be drawn up accordingly.