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

\+ O.M.P. 262/2003

M/S. POWER GRID CORPORATION
OF INDIA LIMITED ..... Petitioner

Through: Mr. S.B. Upadhyay, Senior Advocate with Mr. P.K. Mishra, Advocate.

versus

M/S. KLEN AND MARSHALLS
MANUFACTURERS &
EXPORTERS LTD. ..... Respondent

Through: Mr. Manpreet Singh Doabia, Advocate with Mr. Krishnan Nandkumar, Advocate.

AND

\+ O.M.P. 88/2006

M/S. KLEN AND MARSHALLS
MANUFACTURERS &
EXPORTERS LTD. ..... Petitioner

Through: Mr. Manpreet Singh Doabia, Advocate with Mr. Krishnan Nandkumar, Advocate.

versus

M/S. POWER GRID CORPORATION
OF INDIA LIMITED ..... Respondent

Through: Mr. S.B. Upadhyay, Senior Advocate with Mr. P.K. Mishra, Advocate.

% Date of Decision : APRIL 08, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? No.

2. To be referred to the Reporter or not? No.

3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Both parties have filed objections under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging not only the arbitral Award dated 9th May, 2003 passed by Mr. Justice P.K. Bahri (Retd.), the sole Arbitrator but also the order dated 14th December, 2005 passed by him rejecting the two applications filed under Section 33 of Act, 1996.

2. Briefly stated the facts of the present case are that Kishenpur-Moga Transmission system of which the project in question formed a part, was planned for evacuation of power from various projects particularly in the State of Jammu & Kashmir to other beneficiary Northern States. This project was financed by the World Bank and it involved procurement of transmission line materials and installation of the same on towers to be fabricated and erected enroute the transmission line.

3. On 10th January, 1995, M/s. Power Grid Corporation of India Limited (in short "PGC") issued a Letter of Award to M/s. Klen and Marshalls Manufacturers & Exporters Ltd. (in short "K & M") for supply of line material, that is, Bersimis Conductors and Earth wires. The material to be supplied by K & M was to be used by another contractor of PGC, namely, M/s. Cobra for erecting towers and stringing in that sector covering 275 kms.

4. In accordance with the terms of the Letter of Award, the conductors and earth wire were to be supplied by K & M within a period of 24 months, that means, till 10th January, 1997. However, the contract of supply of line materials at the request of K & M was first extended upto December, 1997 and then upto September, 1998. The said extensions were without prejudice to the rights and contentions of PGC to recover liquidated damages and to forfeit the bank guarantee furnished under the contract.

5. It is the case of PGC that despite the aforesaid two extensions, the contractor, namely, K & M failed to supply 2081.221 km of conductors. Consequently, on 3rd September, 1998, the PGC terminated the Letter of Award dated 10th January, 1995.

6. As disputes arose between the parties, this Court vide order dated 1st September, 1999 passed in A.A. 427/1998 under Sections 8 and 11 of Act, 1996 appointed Mr. Justice P.K. Bahri (Retd.) as the Sole Arbitrator to adjudicate upon the disputes between the parties.

7. By the impugned Award dated 9th May, 2003, learned Arbitrator directed PGC to pay to K & M US$ 1435006 and Rs. 45,10,798 within two months. The Arbitrator further directed that in case aforesaid amounts were not paid within two months, PGC would pay interest at the rate of 12% per annum on the said amounts with effect from 9th July, 2003 till the date of payment.

8. Both K & M and PGC have challenged the impugned Award by way of OMP Nos. 88/2006 and 262/2003 respectively.

9. Mr. Manpreet Singh, learned counsel for K & M submitted that the termination of Letter of Award by PGC was arbitrary, discriminatory and against public policy. He submitted that despite the Arbitrator coming to the conclusion that PGC had delayed in opening of Letter of Credit as well as in issuance of Project Authority Certificates, the Arbitrator had erroneously reached the conclusion that PGC was legally justified in terminating the aforesaid Letter of Award/contract.

10. Mr. Singh contended that the Arbitrator had not considered the fact that K & M had procured/imported raw materials under Special Imprest Licence and as such K & M could not have disposed of either the raw material or the finished products in the open market. In this connection, Mr. Singh drew my attention to the finding of the Arbitrator at para 59 of the impugned Award, which reads as under :-

> *"59. .....The claimant has pleaded that the whole of 10% of the advance was used in procuring raw material. A Local commissioner on site visit found the unused raw material available with the claimant and ready to deliver 172.734 kms of conductors out of which 159.774 Kms stood already inspected and cleared by the respondent at the factory of JMEL. I have already held that the claimant is not entitled to recover any amount as price of the said raw material and conductors from the respondent."*

11. Mr. Singh further stated that the Arbitrator had erroneously disallowed K & M's Claim No. 4 pertaining to reimbursement of cost

incurred in carrying out R IV/Corona tests at EDF, France. He pointed out that at the time of submission of quotation, K & M had offered type testing at M/s. Tag Corporation, Chennai which was approved by PGC and only thereafter the Letter of Award had been issued. He stated that later on when it was found that the testing of Bersimis Conductors could not be carried out at M/s. Tag Corporation, it was suggested by PGC that testing be done at EDF, France. He stated that in compliance with PGC's suggestion, the test was conducted at EDF, France and consequently, K & M was entitled to reimbursement of the said cost of testing as the said costlier test was carried out at PGC's suggestion.

12. Mr. Singh submitted that the Arbitrator had erroneously awarded a sum of Rs. 6,33,39,912/- as liquidated damages even though the Arbitrator had come to the conclusion that despite termination of the contract, PGC had suffered no loss as it had procured the balance goods at a much lower price than the contracted price. In this connection, Mr. Singh drew my attention to the observations of the Arbitrator in paras 49 to 52 of the impugned Award, which read as under :-

> *"49. I have already given a finding that the contract was validly terminated. The respondent in law would have been entitled to damages for the loss suffered by it in natural course of things arising from the contract broken by the claimant. As a matter of fact the respondent admittedly managed to procure the balance goods at much lower prices than the contract price. So in procurement of the balance goods the respondent has not suffered any loss.*
>
> *50. The respondent has in evidence filed document to show as to what the respondent would have earned as profit in case the projection in question had been completed in time. The*

facts show that even if the claimant had supplied all the goods well in time, the same could not have facilitated the completion of the project in any reasonable period. The goods in question were admittedly needed for stringing purposes after the towers had been constructed.

51. The trouble arose between M/S Cobra and the respondents. The contents of the affidavit of Shri D.C. Joshi of the respondent make it quite clear that at the time of the termination of the contract by M/S Cobra no work of stringing had commenced. Thus the goods already supplied by the claimant remained stored and it is only after the contract of the claimant stood terminated that the disputes with Cobra were resolved and its contract was restored.

52. Thus it cannot be urged with any rationality that due to non-supply of the goods by the claimant in terms of the contract, the respondent had suffered any loss or damage. The learned counsel for the respondent contended that M/S Cobra and the claimant were responsible for the delay in completion of the project and thus the respondent has claimed losses proportionally from the claimant. This contention has no merit. The respondent in law is entitled to be compensated for the losses suffered by it if any in natural course of things. M/S Cobra and the claimant are not jointly responsible for performing their obligation under the contracts. There is no tripartite agreement. Non-supply of the goods by the claimant in terms of the contract has not at all contributed towards any delay in completion of the project or even the work of M/S Cobra in terms of its contract with the respondent. ……..”

13. Mr. Singh lastly stated that though PGC’s counter claim for Rs. 2,15,78,888/- on account of additional security was rejected by the Arbitrator, yet no refund of the said amount had been directed in the impugned Award. In this connection, Mr. Singh referred to PGC’s exhibit R-8 in which PGC had admitted that it had retained an amount of Rs.2,15,78,888/- as additional security.

14. On the other hand, Mr. S.B. Upadhyay, learned senior counsel for PGC submitted that this Court should not interfere with the arbitral award on merits, as prayed for by K & M, as this Court exercises limited jurisdiction under Section 34 of Act, 1996. He further submitted that as long as the view taken by the Arbitrator was a plausible view, this Court should not interfere with the same.

15. However, PGC in its OMP 262/2003 challenged the impugned arbitral Award on two grounds. Mr. Upadhyay pointed out that the Arbitrator had disallowed PGC's claim towards encashment of contract performance guarantee on the ground that the same was included in PGC's claim for liquidated damages. According to Mr. Upadhyay, this view of the Arbitrator was contrary to Clause 22.2 of General Conditions of Contract (hereinafter referred to as "GCC") read with Clause 9 of the Letter of Award which specifically provided that PGC would be entitled to encashment of bank guarantee in addition to liquidated damages—which claim was without prejudice to PGC's other rights under the contract. Clause 22.2 of GCC and Clause 9 of Letter of Award are reproduced hereinbelow:-

> Clause 22.2 of GCC
>
> *"22.2 An unexcused delay by the Supplier in the performance of its delivery obligations shall render the Supplier liable to any or all of the following sanctions forfeiture of its performance security, imposition of liquidated damages and or termination of the Contract for default.*
>
> Clause 9 of Letter of Award
>
> *9.0 Liquidated Damages For Delay*

If you fail to deliver any or all of the Goods or perfom the Services within the time period(s) specified in the Contract, or any extension thereof granted by POWERGRID, then POWERGRID shall without prejudice to its other remedies under the contract, deduct from the Contract Price as Liquidated damages, a sum equivalent to half percent (0.5%) of the delivered price of the delayed Goods or unperformed Services for each week of delay or part thereof until actually delivery or performance, upto a maximum deduction of Ten percent (10%) of the delayed Goods or Services Contract Price. Once the maximum is reached, POWERGRID may consider termination of the Contract inline with Clause No. 23 Section GCC, Bidding document, Vol-1.

POWERGRID may, without prejudice to any other method of recovery, deduct the amount of such damages with any monies due to or to become due to you. The payment or deduction of such damages shall not relieve you from your obligation to complete the works or from any of your other obligations and liabilities under the contract."

16. Mr. Upadhyay further submitted that Arbitrator had contrary to Clauses 6.3.5 and 6.3.1 of the Letter of Award negated the counter claim of PGC towards price variation. According to Mr. Upadhyay the Arbitrator had erroneously awarded partial relief to K & M under the said Clauses as it had applied the price variation formula on the basis of date of despatch instead of date of receipt. He submitted that as the Arbitrator had disregarded Clause 6.3.5, the impugned Award to that extent was violative of Section 28(3) of Act, 1996.

17. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in ***Delhi Development Authority*** *Vs.* ***R.S. Sharma and Company, New Delhi*** reported in ***(2008) 13 SCC 80***, after referring to a catena of judgments including ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*** reported in ***(2003) 5***

SCC 705 has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

18. In fact, the Supreme Court in ***McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.*** reported in ***(2006) 11 SCC 181*** has succinctly summed up the scope of interference by this Court by stating *"the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc....."*

19. I am of the opinion that this Court in Section 34 jurisdiction under Act 1996, cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the material on record. This Court cannot substitute its own evaluation on findings of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the parties had selected their own forum, the deciding forum must be conceded the power of appraisement of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for this Court to take upon itself the task of being a judge on the evidence before the arbitrator.

20. In the present case, the Arbitrator has given a number of cogent reasons for reaching the conclusion that PGC's termination of the contract

was reasonable and legally justified. A detailed discussion on this aspect can be found in paragraphs 15 to 36 of the impugned Award. However, the same are not being repeated herein for the purpose of brevity.

21. Undoubtedly, the Arbitrator came to the conclusion that there was some delay in opening of Letter of Credits as well as in issuance of Project Authority Certificates. But according to him, the said delay did not have any bearing in K & M's failure to supply adequate quantity of goods both in the stipulated period as well as in the extended period of contract. The relevant observations of the Arbitrator in this connection are reproduced hereinbelow:-

> *"19. The respondent has admitted that there took place some delay as the respondent was not clear as to how such certificates be issued in favour of the claimant. The goods were to be manufactured by the joint venture partners. It is true that the Export/Import policy of the year 1995-97 is applicable and the respondent has not shown as to what were the provisions of such policy which created any confusion. The respondent thus initially was prevented from supplying goods as per the contract. However, the period of supplies was extended twice and no issue was raised by the claimant for initial delays occurring due to reasons imputable to the respondent.*
>
> *xxx xxx xxx*
>
> 22. *The claimant is right in pleading that some delay had occurred on part of the respondent in opening the letters of credit. The claimant had sent letters dated 2.12.1995, 4.11.1997, 5.11.1997, 23.1.1998, 28.1.1998 and 4.2.1998. R-4 gives the details of the dates on which letters of credits were opened. Relevant dates would be the dates on which the same were communicated to the claimant. However, it is evident that the supplies made by the claimant throughout were never adequate to fully utilize the amounts of various letters of credit. Thus the delay in opening of the letters of credit materially did not have much bearing in failure of the claimant to make adequate supply of the goods."*
>
> (emphasis supplied)

23. Consequently, in my opinion, the Arbitrator's finding that PGC's had validly terminated the contract is not liable to be interfered with by this Court in Section 34(2) of the Act, 1996.

24. I am also not impressed by Mr. Singh's other objection that the Arbitrator failed to appreciate that the raw material imported by K & M under the Special Impressed Licence could not have been disposed of in the open market. Firstly, the said submission was not advanced before the Arbitrator. Moreover, Mr. Singh was not able to show from the arbitral record any condition which prohibited K & M from disposing of in open market either the raw material or the furnished product manufactured from the said raw material. In fact, the Arbitrator in the impugned Award concluded that K & M failed to supply the contracted goods within the period of the contract as well as the extended period. Consequently, this objection is also baseless.

25. In my view, the Arbitrator has also given cogent reasons for holding that K & M was not entitled to reimbursement of costs incurred in carrying out R IV Corona Test at France. The relevant reasoning in the impugned Award is reproduced hereinbelow:

> *"15. The first question which needs decision in this case as to whether the respondent has validly terminated the contract in question. The claimant pleads that delay in supply of goods occurred on account of various failures of the respondent. The claimant pleads that M/S.Tag Corporation was under the contract, a named entity for carrying out R IV Corona test. The respondent had declined to have the tests done from it as it offered to carry out test using reduced scale*

technique. The tests had to be carried out strictly in terms of specifications mentioned in the contract. The respondent was right in refusing to accept the carrying out of tests on reduced scale technique. It was an obligation of the claimant to have named such entity in the bid documents which had the capability and capacity to carry out such tests as per specifications given in the tender documents.

16. The respondent in terms of the contract was not to name such entity. The claimant thus found such an entity in France where the tests were carried out as per specifications. The respondent is not to be blamed for the delay which occurred on account of the claimant selecting an entity which did not have the capability and capacity to carry out the tests as per specifications.

17. Reference to clause 8.1 of General Conditions of Contract is misplaced because it does not put any obligation on the respondent to select the entity which may carry out the tests. The respondent only insisted on carrying out the tests as per specifications and it was the obligation of the claimant to find out the entity which could carry out such tests. Mere fact that U.P.State Electricity Board in another contract agreed for carrying out of tests by M/S.Tag Corporation on reduced scale technique does not legally bind the respondent to follow the same practice in its independent contract with the claimant. As per the specifications the R-IV/Corona tests were to be conducted at a height of above 15 meters whereas the M/S Tag Corporation suggested the reduced scale technique so that tests could be carried out upto 5 metres height only."

26. As far as Mr. Singh's objection with regard to grant of liquidated damages is concerned, I am of the view that three learned Single Judges of this Court in ***Indian Oil Corporation Vs. M/s. Lloyds Steel Industries Ltd.*** reported in ***144 (2007) DLT 659, M/s. Haryana Telecom Ltd. Vs. Union of India & Anr.*** reported in ***AIR 2006 Delhi 339*** and ***Union of India & Anr. Vs. M/s. Samrat Press*** in ***O.M.P. 361/2002*** decided on ***3rd October, 2008*** have held that the judgment of ***Oil & Natural Gas Corporation Ltd.*** (supra) is based upon the peculiar language of the contract therein as it

specifically stipulated that liquidated damage was a *"genuine pre-estimate of damages duly agreed by the parties".* In fact, this Court in ***Indian Oil Corporation Vs. M/s. Lloyds Steel Industries Ltd.*** (supra) held as under:-

> *"39. No doubt, the parties to a contract may agree at the time of contracting that, in the event of breach, the party in default shall pay a stipulated sum of money to the other. However, the stipulated sum has to be a genuine pre-estimate of damages likely to flow from the breach and is termed as 'liquidated damages. If it is not a genuine pre-estimate of the loss, but a amount intended to secure performance of the contract, it may be a penalty……*
>
> *xxx xxx xxx*
>
> *41. It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow therefrom that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage, provided the*

basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian Legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation [see State of Kerala v. United Shippers and Dredgers Ltd., AIR 1982 Ker. 281]. Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed.

42. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered."

(emphasis supplied)

27. In ***Union of India & Anr. vs. M/s. Samrat Press*** (supra) another Single Judge of this Court held as under:

> *"13. Objection is raised to the aforesaid findings of arbitrator relying upon the Judgment of **ONGC v SAW Pipes Ltd** (2003) 5 SCC 705. I, however find that, that case turned on the peculiar language of the agreement in question in that case. This court also has in **Indian Oil Corporation v M/s Lloyds Steel Industries Ltd** 2008(1) R.A.J. 170 (Del) after noticing **ONGC** (supra) held that without damage/loss being proved, liquidated damages could not be allowed and no fault could be found with the arbitral award for the said reason.*
>
> *14. Merely because the agreement provides for liquidated damages and the award does not allow liquidated damages for the reason of the interpretation of law by the arbitrator would not make the award contrary to the agreement so as to have the same set aside. The arbitrator is entitled to adjudicate legality or interpretation of a term of the agreement and not bound to follow the same literally. If the arbitrator by examining the legal effect of the agreement holds the same to be not entitling the petitioner to liquidated damages without proving loss or damage, the same does not call for interference with the arbitral award. The purpose of the 1996 Act was to reduce / limit the challenge to the arbitral awards. Of course, the Apex Court in **ONGC** (supra) has interpreted the new Act also to mean that the court is empowered to set aside the award if not in accordance with law. In my view, an arbitral award would be in accordance with law, if the correct law is applied, even though a wrong view or interpretation of the same has been taken.*
>
> *15. In the facts and circumstances of the present case, the principle of law required application of facts and even if in such application of facts the arbitrator reaches a conclusion different from the one which the court may reach, the same still does not call for setting aside of the award. Only if, irrespective of the factual application, the conclusion reached by the arbitrator under no circumstance can be reached under the law, is in my respectful view a ground under Section 34 of the Act for setting aside of the award made out. In this regard, I may notice that **ONGC** (supra) had struck a different note than the then prevalent law. It had been held by a Constitution Bench of the Apex Court in **Fateh Chand v Balkishan Das** AIR 1963 SC 1405 that a provision in an agreement for liquidated damages did not ipso facto call for such damages to be awarded and to be entitled to damages, loss and damages had to be proved. The Apex Court in*

> ***ONGC*** *(supra), relying upon the peculiar language in the agreement of the parties having arrived at a genuine pre-estimate of the loss which shall be suffered for the reason of the delay and further agreeing that assessment of such loss was difficult, had held the parties to be bound by the same and upheld the award of liquidated damages. Notwithstanding the said judgment, as in* ***Indian Oil Corporation*** *(supra), the courts have, depending upon the facts of the case continued to follow the Constitution Bench judgment unless finding the language to be as in* ***ONGC*** *case. The arbitrator in the present case also has noticed that the agreement did not provide of the liquidated damages being a genuine pre-estimate and held the petitioner to be not entitled to the same. Thus, it cannot be said that the award on the said claim is contrary to the law prevailing or for that reason contrary to public policy. As long as a correct law is applied even if a wrong view of the same is taken, the arbitrator being a judge chosen by the parties themselves is empowered by the parties to finally decide the matter not only of fact but also of law and this court does not sit in appeal over the award. See* ***Tribal Co-operative Marketing Development Federation of India Ltd v Auro Industries Limited and Anr.*** *98 (2002) DLT 654 and* ***Flex Engineering Ltd v Antartica Construction Co. and Anr*** *2007 (2) ARB LR 387 (Delhi). The award cannot be set aside even if the decision appears erroneous. Even under the 1940 Act where the scope of interference with award was much more, the Apex Court in* ***Tarapore and Company v. Cochin Shipyard Ltd., Cochin and Anr*** *AIR 1984 SC 1072 and* ***U.P. Hotels and Ors. v. U.P. State Electricity Board*** *AIR 1989 SC 268 held that arbitrator decision on a question of law is also binding even if erroneous and in* ***P. V. Subba Naidu and Ors. v. Government of A.P. & Ors*** *(1998) 9 SCC 407 the Apex Court further held that courts are not right in examining and interpreting the contract to see whether the claim was sustainable under the contract****.*** *I, therefore, do not find any merit in this objection also of the petitioner.*

28. Consequently, in my view as the Arbitrator concluded that PGC had suffered no loss on account of termination of the contract, PGC was not entitled to recover any amount as liquidated damages. Accordingly, the said sum of Rs.6,33,39,912/- is liable to be refunded to K & M.

29. However, in my opinion, as the Arbitrator concluded that K & M had committed breach of contract in not supplying conductors in

accordance with the Letter of Award, PGC was legally justified in encashing the performance guarantees. The Arbitrator's conclusion that K & M miserably failed to adhere to its commitment under the Letter of Award is recorded in paragraphs 33 to 36 of the impugned Award and the same are reproduced hereinbelow:

> *"33. The period of supply was extended till 30.9.1998 vide amendment V to the contract in terms of the letter dated 7.2.1998 on the request of the claimant vide letter dated 5.2.1998. It was made clear to the claimant that no further extension shall be granted. The claimant miserably failed to adhere to its commitment as only meager quantity of conductors were supplied which forced the respondent to terminate the contract. Before terminating the contract the respondent had sent a number of letters requiring the claimant to augment the supplies and complete the same within the extended period of the contract. The claimant was also warned that the contract would be terminated in case the claimant failed to supply the goods as contracted. The claimant failed to perform its obligation despite all these communications from the respondent. Even if we consider that the time was not essence of the contract as there were provisions in the contract for extension of time and for imposing liquidated damages even then after the last extension was granted the respondent categorically made the time of delivery an essence of the contract.*
>
> *34. The respondent thus was justified legally to terminate the contract as the claimant committed breach of the terms of the contract in not supplying the conductors in terms of the amendment to the contract.*
>
> *35. It was not legally incumbent upon the respondent to wait till expiry of last date of delivery before resorting to terminate of the contract. The claimant was obligated to supply particular quantity every month. Despite reminders by respondent making its intention clear that if supplies were not augmented in terms of the contract, it would terminate the contract the claimant failed to respond in positive manner. Thus I hold that the respondent was legally justified in terminating the contract.*
>
> *36. Mere fact that the respondent restored the contract of M/S.Kobra is no ground that the respondent ought to have given more time to the claimant for completing the supplies. The respondent was to get completed a huge project and has to keep in view that no factor should remain which may*

impede the expeditious completion of the project. The claimant's poor record of supplying the goods over an extended period was justification enough for the respondent to terminate the contract and look for alternate supplier. In hind sight the respondent succeeded well in procuring the balance quantity from other contractors and also at much lower prices……"

30. As far as Mr. Upadhyay's plea with regard to claim of price variation is concerned, I am of the view that the Arbitrator in the impugned Award had interpreted Clauses 6.3.1, 6.3.2 and 6.3.5 of the Letter of Award. In fact, the Supreme Court in a catena of cases has held that in the realm of interpretation of a contract, the arbitrators are supreme. One such judgment under Act, 1996 is ***Mcdermott International Inc.*** (supra) wherein it has held as under:

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law."

(emphasis supplied)

31. As far as Mr. Singh's objections with regard to additional security of Rs.2,15,78,888/- is concerned, I find that though PGC's counter claim for retention of additional security had been rejected by the Arbitrator but as K & M had filed no claim with regard to the said refund, Arbitrator passed no

direction of refund. However, Mr. Upadhyay stated that in view of amendment No.5, K & M could not even raise a claim with regard to refund of Rs.2,15,78,888/-.

32. I am of the opinion that this issue cannot be decided in a Section 34 petition. However, ends of justice would be met if K & M is given liberty to raise this issue by way of an independent arbitration. In view of Section 14 of the Limitation Act, the said claim would not be barred by limitation. Ordered accordingly.

33. Consequently, the impugned Award is amended only to the extent that PGC encashment of performance guarantees for a sum of Rs.6,36,09,161/- is allowed while PGC's liquidated damages claim for Rs.6,33,39,912/- is disallowed. With the aforesaid observations, both petitions are disposed of but with no orders as to costs.

MANMOHAN,J

APRIL 08, 2010
rn/js