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

Judgment reserved on: 11.05.2026
Judgment pronounced on: 08.09.2026

\+ **O.M.P. (COMM) 113/2021**

M/S PRIME MEIDEN LTD .....Petitioner

Through: Ms. Malvika Trivedi, Sr. Adv with Mr. Mohit Siwaeh, Ms. Sujal Gupta, Mr. Vaibhav Chauhan, Advs.

versus

M/S KIRBY BUILDING SYSTEM INDIA PVT. LTD .....Respondent

Through: Mr. Nikhil Nayyar Sr. Adv. with Mr. Dhananjay Baijal, Mr. Akshar Bhatt, Mr Tilak Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, ***("the Act")*** seeking to set aside the Arbitral Award dated 18.09.2020 ***("impugned Award")*** passed by the learned Arbitral Tribunal ***("AT")*** in the matter of *"M/S Kirby Building System India Pvt. Ltd. v. M/S Prime Meiden Ltd. (Formerly Prime Electric Ltd.)".*

FACTUAL MATRIX AS PER THE PETITIONER

2. The petitioner (respondent before the AT), namely M/S Prime Meiden Ltd. (Formerly Prime Electric Ltd.) is an Indian company having its registered office at Prime Group Building, 11/5B, Pusa Road, New Delhi – 110005, and undertaking business of electricity supply from Special Economic Zone (SEZ) at Naidupet Mandal (Nellore Dist.), Andhra Pradesh – 524421.

3. The respondent (Claimant before the AT), namely M/S Kirby Building System India Pvt. Ltd. (now known as Kirby Building Systems & Structures India Pvt. Ltd.) is also an Indian company engaged in the business of manufacture, supply and installation of pre-engineered building ***("PEB")***.

4. In furtherance of the tender document dated 12.02.2009, a Letter of Intent dated 25.05.2009 was issued by the petitioner for supply and erection of PEBs for their transformer manufacturing unit situated at SEZ, Naidupet.

5. Pursuant thereto, a work order dated 29.05.2009 was issued by the petitioner to the respondent for a fixed priced contract of Rs. 12,50,00,000/- inclusive of all the taxes and charges as applicable thereon.

6. On 27.10.2009, the petitioner, after negotiations with the respondent, agreed to amend the said work order. Resultantly Clause Nos. 5, 4(a) and 17 of the work order stood amended with mutual consent of the parties and an amendment dated 27.10.2009 was incorporated.

7. A supplementary work order dated 28.06.2010 was also issued by the petitioner for certain extra work under the headings A and B for a fixed price of Rs. 98,57,500/-, making the aggregate work order value as Rs. 13,48,57,500/- (Rs. 12,50,00,000 + Rs. 98,57,500).

8. Thereafter, the respondent in the time frame between February to April 2012, claimed that it had completed the work assigned *vide* the work orders. However, as per the petitioner the same was not completed since no completion certificates were issued.

9. Despite this claim of completion, the petitioner noticed heavy leakage in the PEL plant at its site. Accordingly, a meeting was convened between the parties to discuss possible solutions for the defects, and in the said meeting the respondent tendered its apology for the defect, attributing it to human error occasioned while transferring the design data to construction drawings.

10. In the aforesaid meeting, the respondent also agreed to carry out the scheduled work within 6-8 weeks, but it failed to do so.

11. The petitioner, on 14.08.2014, addressed a detailed communication to the respondent setting out the losses suffered by it due to the respondent's unprofessional execution of the work, which resulted in numerous problems primarily being water leakages.

12. Since the respondent failed to remedy these deficiencies by plugging the leakages, the petitioner was compelled to have them rectified by engaging an outside agency for the purpose of waterproofing. The letter dated 14.08.2014 also stated that the petitioner would assess its losses and would duly communicate the same in order to claim liquidated damages.

13. The respondent, *vide* its letter dated 08.09.2014, disputed the claims made in the petitioner's letter as baseless and claimed that an amount of Rs. 1,23,75,000/- was due to it.

14. Pursuant thereto, the respondent issued a legal demand notice dated 29.10.2016 for payment of its dues and upon failure of compliance with the said notice, the respondent invoked arbitral mechanism contained in Clause No. 25 of the work order dated 29.05.2009 *vide* letter dated 04.03.2017.

15. Accordingly, a petition under Section 11 of the Act bearing Arbitration Petition No. 454/2017 was filed before this Court seeking appointment of AT, which culminated with the appointment of nominee arbitrator for the petitioner and resultantly the composition of the AT, which entered upon reference on 27.04.2018.

Impugned Award

16. The AT ruled in favour of the respondent and awarded a sum of Rs. 1,23,75,000/- along with interest at the rate of 9% to be calculated from 12.03.2014 till the date of payment with costs of Rs. 6,60,500/- and Rs. 3,00,000/-.

SUBMISSIONS ON BEHALF OF THE PETITIONER

Finding of AT on the Issue of Limitation

17. Ms. Trivedi, learned senior advocate appearing on behalf of the petitioner, submits that the impugned Award not only suffers from patent illegality but is also self-contradictory, and therefore fails to justify the relief granted therein.

18. The AT has erroneously given a finding that the demand of arbitration (invoked on 04.03.2017) of the respondent was within the limitation period on the ground that the letter dated 14.08.2014 created a jural relationship between the petitioner and the respondent. However, the said letter made no reference whatsoever to any bill/invoice raised by the respondent, let alone creation of any jural relationship, and it merely pointed out the defects in the executed work. Reliance is placed on *Reliance Asset Reconstruction Co. Ltd. v. Hotel Poonja International (P) Ltd.*[1], *J.C. Budhraja v. Orissa Mining Corpn. Ltd.*[2], and *Chotanagpur Carrier Pvt. Limited v. Central Coalfield Limited*[3].

19. The AT has erroneously computed the period of limitation as the work stood completed in the year 2012 but the AT has proceeded to calculate limitation period of 3 years in invoking arbitration from the date of letter dated 14.08.2014 by holding that the said letter created a jural relationship.

20. The AT has further ignored the fact that the claim of respondent stood barred by virtue of Article 18 of the Limitation Act, 1963 *("limitation Act")*. Reliance is placed on *Satya Narayan Sharma v. Union of India*[4], *Satender Kumar v. Municipal Corporation of Delhi & Anr.*[5]

21. Moreover, the AT failed to appreciate material facts available on record i.e., the minutes of meeting dated 07.08.2012 and 13.01.2013, wherein the respondent had categorically accepted that there were some errors in execution of the work and that the respondent promised to rectify the same.

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[1] (2021) 7 SCC 352.
[2] (2008) 2 SCC 444.
[3] 2020 SCC OnLine Jhar 971.
[4] RFA (COMM) 245/2023, Delhi High Court.
[5] (2010) SCC OnLine Del 424.

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Incapacity/Inability of the Petitioner

22. It is also submitted that the AT was fully apprised of the ongoing internal management disputes within the petitioner company and of the resultant inability of the petitioner to effectively present its case before the AT. Such inability of a party to pursue its case constitutes a valid ground for setting aside the impugned Award. Reliance is placed on Section 18 read with Section 34(2)(a)(i) and (iii) of the Act. Reliance is also placed on *Al-Amin Seatrans Ltd. v. Owners and Party*[6], and *Narinder Singh & Sons v. Union of India*[7].

Mandate of the AT

23. It is further submitted that the mandate of the AT expired on 16.04.2019, as the same was never validly extended. The AT in its Order dated 10.04.2019 recorded the consent of the counsel appearing on behalf of the petitioner to extend the mandate by 6 months. However, the same does not constitute valid consent because the counsel did not have any authority/Vakalatnama. Reliance is placed on *Department of Transport v. Star Bus Services Pvt. Ltd.*[8]

24. Ms. Trivedi, learned senior counsel, further submits that the impugned Award is a non-speaking award because it merely records the facts and the proceedings without setting out any reasons for arriving at its findings. Consequently, the impugned Award is devoid of any

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[6] 1994 SCC OnLine Cal 221.
[7] (2022) 18 SCC 690.
[8] 2023 SCC OnLine Del 2890.

application of mind and is liable to be set aside. Reliance is placed on *Som Datt Builders Ltd. v. State of Kerala*[9].

25. Lastly, it is submitted that the AT has wrongly dismissed the application of the petitioner filed under Section 23 of the Act seeking leave to file a statement of defence.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

26. At the outset, Mr. Nayyar, learned senior counsel for the respondent, submits that the present petition deserves to be dismissed as the impugned Award is a reasoned award and the petitioner, by way of the present petition, is seeking reappreciation of evidence/review of the matter by this Court, which is impermissible under Section 34 of the Act.

Finding of AT on the Issue of Limitation

27. The AT has rightly concluded the demand for arbitration to be within the limitation period as the bargain between the parties should be considered as a whole to constitute a composite work/building contract and should not be understood as severable. Thus, the additional finishing works undertaken between 2012 and 2013 are also inseverable and in continuation of the original scope, culminating the process in letter dated 14.08.2014. Reliance is placed on *State of Madras v. Gannon Dunkerley & Co.*[10].

28. The nature of contract is that of an *"indivisible works contract"*, wherein the contract is treated as subsisting by reason of the issuance of snag lists, holding meetings, requiring further work, etc. Thus, the

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[9] (2009) 10 SCC 259.
[10] 1958 SCC OnLine SC 100.

petitioner cannot contend that the work was completed on a date which was, in fact, never accepted by the petitioner itself.

29. He further submits that the work order itself envisages a mechanism for completion/payment, wherein the onus of acceptance of completion lies on the petitioner. When the petitioner itself had not finally accepted the site despite the respondent's request dated 05.01.2012, and has subsequently directed additional finishing works to be carried out in accordance with the minutes of the meetings dated 07.08.2012 and 28.01.2013, the petitioner cannot claim that the jural relationship had ended when the prerequisite itself had not been fulfilled. Reliance is placed on Clause Nos. 6 and 8 of the work order.

30. It is on this aforesaid premise that the petitioner disputed the work itself and refused to fulfil the pre-requisite for the payment. Consequently, the final bill dated 12.03.2014 was raised and the same was disputed on 14.08.2014. Thus, the AT has computed the period of limitation by treating 14.08.2014 as the date of repudiation which gave rise to the cause of action for the respondent.

31. The judgments relied upon by the petitioner are inapplicable to the present factual matrix and the contractual terms existing between the parties. Moreover, the findings of the AT are based on the crystallisation of the dispute by the letter dated 14.08.2014 and the same is supported by the decision of Hon'ble Supreme Court in *Major (Retd.) Inder Singh Rekhi v. DDA*[11].

<u>Incapacity/Inability of the Petitioner</u>

[11] (1988) 2 SCC 338.

32. It is further submitted that the plea of "incapacity" of the petitioner under Section 34(2)(a)(i) of the Act is misconceived as the defence of the petitioner was closed due to repeated non-appearances and defaults, as is evident from a perusal of the procedural orders of the AT.

33. The term "incapacity" is used under Section 34(2)(a)(i) of the Act in the context of incapacity of a party at the time of entering into the arbitration agreement, and encompasses incapacities such as minority, mental incompetence, and the like. It does not extend to practical difficulties faced by a party in pursuing its case.

34. Thus, the term "incapacity" cannot be construed to mean the difficulty of a party in appointing its legal representatives or other issues of like nature. Reliance is placed on paragraph Nos. 129 and 130 of *Honeywell International Middle East Ltd. v. Meydan Group LLC*[12] and the decision in the case of *Delhi Jal Board v. Reliable Diesel Engg. (P) Ltd & Ors.*[13]

35. The plea of "incapacity" raised by the petitioner is unsubstantiated, as neither the NCLAT orders nor the ROC documents state the company to be incapable of pursuing litigation or arbitration. In fact, the NCLAT proceedings show that that the company was running its daily operations including the functioning of the authorised officials to sign documents.

36. Additionally, the counsel for the petitioner participated in the proceedings and even cross-examined the respondent's witness,

[12] [2014] EWHC 1344 (TCC).
[13] 2005 SCC OnLine Del 1360.

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without filing a valid Vakalatnama or a statement of defence until the award was reserved.

<u>Mandate of the AT</u>

37. It is further submitted that since the counsel appearing for the petitioner failed to file a Vakalatnama and was proceeded *ex parte*, the first extension of the mandate of the AT was granted only with the consent of the respondent.

38. The second extension was granted by this Court on 04.12.2019, when the counsel for the petitioner was also present in Court and did not object to the same.

39. The final extension was granted by the Hon'ble Supreme Court by virtue of its Orders dated 10.07.2020 and 23.09.2021 passed in *Cognizance for Extension of Limitation, In re*[14].

<u>REJOINDER SUBMISSIONS ON BEHALF OF THE PETITIONER</u>

40. It is stated in the rejoinder arguments that contention of the respondent that the work was never completed in January 2012 is untenable and self-contradictory as the entire case of the respondent before the AT and, in fact, the entire impugned Award is based on the premise that the work was completed in January 2012. Reliance is placed on paragraphs Nos. 10 (E), (H) and (G) of the impugned Award in this regard.

41. Additionally, as recorded in the impugned Award, the respondent's witness CW-1 himself stated that the small snags were rectified and the work stood completed in January 2012.

[14] (2021) 18 SCC 250.

42. Another contention of the respondent that the letter dated 14.08.2014 was in the nature of a rebuttal to the respondent's invoice is misconceived, as the said letter did not refer to any bill/invoice. It was an independent letter seeking unquantified liquidated damages for the delays and leakages.

43. In fact, the respondent addressed a reply communication dated 08.09.2014 to the petitioner claiming the pending amount of Rs. 1.23 crores on the basis of the raised invoice dated 12.03.2014. Thus, there was no acknowledgement of debt in the letter dated 14.08.2014 so as to conclude the existence of a jural relationship between the parties.

44. Additionally, Article 18 of the limitation Act squarely applied to the present case. Since the work was completed in January 2012, the claim of respondent was barred by limitation.

ANALYSIS AND FINDINGS

45. I have heard the learned counsels for the parties and perused the documents and material placed on record.

SCOPE OF INTERFERENCE UNDER SECTION 34 OF THE ACT

46. The scope of interference under Section 34 of the Act is now clearly established. The Court is not required to sit in appeal as an Appellate Court over the Award, and it can neither reappreciate the evidence nor reinterpret the terms of the contract, when the view already taken by the arbitrator is a probable and possible one. Judicial intervention with the Award is permissible only on limited and specific grounds, as encapsulated under Section 34 of the Act. The Court is not required/empowered to reappreciate evidence or substitute its own view with that of the Arbitral Tribunal. It is a settled position of law that

Section 34 of the Act embodies the principle of minimal judicial interference, thereby preserving the foundational precept of the Act, the finality and efficacy of Arbitral Awards. The Hon'ble Supreme Court has recently observed this scope of interference in the judgment of ***Consolidated Construction Consortium Ltd. v. Software Technology Parks of India***[15], the relevant paragraphs of which read as under:

> *"46. Scope of Section 34 of the 1996 Act is now well crystallised by a plethora of judgments of this Court. Section 34 is not in the nature of an appellate provision. It provides for setting aside an arbitral award that too only on very limited grounds i.e. as those contained in sub-sections (2) and (2-A) of Section 34. It is the only remedy for setting aside an arbitral award. An arbitral award is not liable to be interfered with only on the ground that the award is illegal or is erroneous in law which would require re-appraisal of the evidence adduced before the Arbitral Tribunal. If two views are possible, there is no scope for the court to re-appraise the evidence and to take the view other than the one taken by the arbitrator. The view taken by the Arbitral Tribunal is ordinarily to be accepted and allowed to prevail. Thus, the scope of interference in arbitral matters is only confined to the extent envisaged under Section 34 of the Act. The court exercising powers under Section 34 has per force to limit its jurisdiction within the*

[15] (2025) 7 SCC 757.

four corners of Section 34. It cannot travel beyond Section 34. Thus, proceedings under Section 34 are summary in nature and not like a full-fledged civil suit or a civil appeal. The award as such cannot be touched unless it is contrary to the substantive provisions of law or Section 34 of the 1996 Act or the terms of the agreement."

47. With the above scope of Section 34 of the 1996 Act in mind, I shall now deal with the rival contentions.

FINDING OF AT ON THE ISSUE OF LIMITATION

48. The primary challenge of the petitioner against the impugned Award can be distilled into one core controversy i.e., the findings of the AT on the issue of invocation of demand of Arbitration within the period of limitation period.

49. The challenge against the findings of the AT *qua* this issue is principally founded on the ground that the letter dated 14.08.2014 had no reference to any bill/invoice of the respondent and the said letter was merely a communication addressed to the respondent raising a demand for unquantified liquidated damages towards the expenses incurred by the petitioner due to defects in performance of contractual obligations by the respondent. Hence, the letter did not create any jural relationship between the parties in terms of Section 18 of the limitation Act so as to reckon the period of limitation from that date.

50. Accordingly, as per Article 18 of the limitation Act, the limitation had already expired in January 2015 i.e., 3 years from January 2012 (purported date of completion of work), thus, the claim of the respondent was barred by limitation but the AT has erroneously held it to be maintainable. Article 18 of the limitation Act reads as under:

	Description of suit	Period of limitation	Time from which period begins to run
18.	For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years.	When the work is done.

51. *Per Contra*, the respondent has contended that the findings of the AT *qua* limitation are correct as the nature of contract is that of an *"indivisible works contract"* and it was treated as subsisting by the petitioner itself by not accepting the site and directing additional finishing works to be carried out, thus, the petitioner cannot claim the end of the jural relationship in such a factual scenario.

52. It is pertinent to note that in the present case no statement of defence was filed and the petitioner did not raise the issue of limitation before the AT, the AT examined the issue of limitation on its own volition.

53. In absence of the petitioner raising this issue before the AT in its pleadings, this issue cannot be agitated for the first time in the section 34 petition and this objection of the petitioner can be rejected outrightly. The judgment of Hon'ble Division Bench titled ***International Breweries (P) Ltd. v. Kalpana International Breweries Ltd.***[16] also substantiates this view. However, despite the same, not only on law but also on facts the objections of the petitioner do not merit consideration. The relevant paragraphs of ***International Breweries (Supra)*** read as under:

[16] 2024 SCC OnLine Del 9466.

31. The Appellant has vociferously argued that the claims are beyond limitation. However, the Appellant has not referred to the series of communications between the period from October 2006 and March 2009, exchanged between the parties and which form part of the Arbitral record.

32. Admittedly, since this issue was not raised before the Sole Arbitrator by the Appellant in its Statement of Defence, no evidence was led by either party in this regard. ***<u>The issue of limitation, therefore, cannot be examined without evidence given the disputed contentions of the parties in the present case. The fact that this was not raised by the Appellant in its Statement of Defence, whether or not there was any other evidence to show that the claim was within limitation, could only have been examined by the Sole Arbitrator</u>****. There is no such finding in the Arbitral Award, since this aspect was concededly not adjudicated upon by the Sole Arbitrator.*

<u>33. There is another aspect as well. Limitation being a mixed question of fact and law, cannot be decided by this Court in these proceedings. Since the issue of limitation was not raised by the Appellant, the same would be deemed to have been waived and could not be permitted to have been raised for the first time either in the Petition under Section 34 of the Arbitration Act or Section 37 of the Arbitration Act.</u>

34. It is the consistent view of this Court that the plea of limitation has to be raised at the first opportunity by the party resisting the claim. If there is no objection in the first instance, then the same would lead to a deemed waiver by such party. [See : Municipal Corporation of Delhi v. Harcharan Dass Gupta[13]].

35. In Uttam Singh Duggal & Sons v. Union of India[14], a Coordinate Bench of this Court held that an objection not raised before the arbitrator ought not to be entertained by way of an objection to the Award. It was held that:

"In the present case the objections appears not to have been raised before the Arbitrator and therefore ought not to have been entertained by way of objection to the Award. Speculative though it may be, there is good reason to assume that the Arbitrator had looked into every clause of the Agreement and had thereafter returned his findings."

[Emphasis is ours]

36. This Court in a Petition under Section 37 the Arbitration Act cannot undertake an examination as to whether the plea that the Appellant lost its right to challenge the claim of the Respondent as being barred by limitation, or whether the Respondent could show that its claim was within time. Thus, it not necessary for us to advert any further on the same.

54. At this stage, I find it pertinent to see the findings of the AT on the issue of limitation and the same read as under:

"E. The Respondent has not filed defence to the claim of the Claimant. The Respondent even failed to file counter-claim of liquidated damages. As per claim, the work was awarded to the Claimant of the value of Rs. 13,48,57,540/- (Rupees Thirteen Crore Forty-eight Lacs Fifty-seven Thousand Five Hundred Forty only) dated 27.10.2009. The work was completed and handed over to the Respondent in January, 2012 vide e-mail dated 11.01.2012 and 12.01.2012 at page 157 of the documents.

F. On delivery of the project the Claimant was entitled to the amount agreed between the parties i.e. the balance sum of Rs. 1,23,75,000/- (Rupees One Crore Twenty-three Lacs Seventy-five Thousand only). The Claimant was entitled to the completion certificate which the Respondent failed to provide. The Respondent having failed to provide the completion certificate, the Claimant raised the invoice Ex. CW 1/32 on 12.03.2014 within 3 years of the completion of the work in January, 2012. The amount of the invoice dated 12.03.2014 has not been paid. The Claimant is entitled to the Award of the said amount of Rs. 1,23,75,000/- (Rupees One Crore Twenty-three Lacs Seventy-five Thousand only).

G. The question is, Can Award be made by the Arbitral tribunal when the demand for arbitration was made on 04.03.2017 i.e. more than 3 years after the completion of work in January, 2012? as the law of limitation is matter of public policy.

H. The Respondent after the building was handed over to the Respondent by the Claimant in January 2012 pointed out the snags which as per deposition of PW 1 were removed and the demand of the balance payment was made. The Respondent as per deposition of PW 1 wrote the letter CW 1/34 dated 14.08.2014 making the demand of the liquidated damages from the Claimant. This letter creates the jural relationship between the Claimant and the Respondent. This letter has been issued by the Respondent within three years of the completion of work in January, 2012. Therefore, from the date of Ex. CW 1/34, the demand of arbitration vide CW 1/37 is within limitation. The claim of the Claimant therefore of Rs. 1,23,75,000/- (Rupees One Crore Twenty-three Lacs Seventy-five Thousand only) is enforceable at law. The Claimant is entitled to the said amount."

55. The AT before dealing with the issue of limitation categorically in paragraph No. 10 (E) of the impugned Award, has explained the premise on which the entire issue is based. It has noted specifically that the matter was decided in absence of any defence/counterclaim.

56. It was further held that the work was handed over to the petitioner in January 2012 by the respondent and the petitioner failed to issue a competition certificate. Instead, the petitioner asked the respondent to do some additional work (rectifications) that the respondent continued to perform (rectified) thereafter, and in absence of a completion certificate the respondent was constrained to raise the invoice dated 12.03.2014.

57. Even though there was no objection before the AT that the demand for Arbitration is barred by limitation, the AT proceeded to decide the said issue and observed that it was in response to this demand for payment by way of invoice that the letter dated 14.08.2014 demanding unquantified liquidated damages was addressed by the petitioner to the respondent. Thus, the AT concluded that the said letter created a jural relationship between the parties so as to reckon limitation from that date for the purpose of raising demand of Arbitration. The letter dated 14.08.2014 is important and reads as under:

PRIME MEIDEN

PRIME GROUP

14 August 2014

M/s Kirby Building Systems India Ltd

Pashamylayaram

Medak District

ANDHRA PRADESH

Ref: Work Order dated 29 May 2009 and additional work order dated 28 June 2010 for Supply & Erection of Pre-Engineered Building for our Transformer Manufacturing Unit at Naydupeta, Nellore, Andhra Pradesh

Dear Sirs,

Work Order for supply and erection of pre-engineered building for our transformer manufacturing unit at our SEZ

Naydupeta, Nellore, was awarded to you on 29 May 2009 for a firm and fixed price contract for Rs. 12,50,00,000/- with a completion period of eight months. An additional order for a value of Rs. 98,57,500/- was released on 28 June 2010; total overall value of the entire job being Rs. 13,48,57,540/-. Though the time schedule for completion of the entire project was eight months from the date of issue of the initial work order, the work was delayed considerably, and most surprisingly was abandoned without any notice/reason. At the time you left the project there were many serious issues at site, most importantly it was leaking all around the partially done job.

We are writing with a lot of anguish that all through we have experienced horrible time in getting the work completed. Leakage issue at site could not be addressed by you despite a lot of follow ups, and finally we had to get it done through other agency. We sent numerous emails, had telephone discussions, arranged meetings etc. for emphasizing to speed up the work but to no avail as you took your own sweet time to complete the work. No interest was shown in completing the job in time and for reasons best known to your team, they adopted delaying tactics.

Even our emails categorically informing that the entire responsibility for delay and consequential financial losses will be to your account and a suitable liquidated damages will be imposed had no effect whatsoever in speeding up the *project.*

Lack of coordination in mobilization of manpower, crane, painters, erection team had all contributed in delaying the project which consequently delayed work such as faraday cage work in test bay, VRD installation, excavation etc. resulting in huge losses to us. In spite of repeated requests and your assurances time and again the project was struck up and at times manpower was reduced drastically that work could not move on at all. Your supervisor was rarely seen at the site and it was the most shocking to know that in April 2011 your entire manpower was suddenly withdrawn and diverted to another project leaving our project totally neglected.

Assurances given by your chairman to our chairman did not have any positive results in speeding up the project. Meeting was organized at the highest level at Hyderabad but to no effect. Every time we discussed about speeding up the project, a new target was given which was never achieved.

In June 2011, discrepancies in the structure erection in the factory building were observed and Kirby was requested to complete the work on priority as commissioning of factory was getting delayed resulting in huge losses to us. Since Kirby failed to do the needful after a number of follow ups and our work was getting hampered due to the incomplete and defective structure erection, we had to get the rectification job done on our own, at your risk and cost, to *avoid idling of gangs and to commission the test plant.*

In July 2011, it was painful to note that Kirby diverted their construction gangs to a nearby site at a very crucial stage when many important works at our plant were yet to be completed without which we could not commission the plant for production resulting in huge losses of revenue. Even the work which had been completed had serious discrepancies and rectification was not carried out in spite of our repeated reminders. Your team did not plug 26 leakage points shown to your team in June 2011 at site and they simply ignored our requests and preferred not to do anything resulting in heavy leakage in July damaging our very costly imported machines placed in Bay 5 and 6.

Kirby was awarded a turn key job of design, manufacture, supply and installation of tailor-made pre-engineered building structure of given size and specification and it was most shocking to receive a communication from you that you shall not provide the doors, which is an integral part of the complete building, in the winding bay 2 as it was not in the scope. It was highly illogical, unreasonable and incorrect.

In October 2011 attention was drawn to the shoddy quality of workmanship as in a moderate rain there was inundation of rain water in almost all the bays and the water accumulation was to the extent of about 15 mm again resulting in huge losses to us in terms of damage to our *plant and machinery. Your erection vendor has done the work in most unprofessional manner which had been brought to the notice of your supervisor from time to time but no serious efforts were made by them to ensure the quality work.*

All the above facts have been brought to your knowledge telephonically, through emails addressed personally to you. Finally, you admitted through your email of 2 February 2012 that leakage is from louvers. You also admitted that louvers usage in such a sensitive area associated with heavy rains and winds is not generally done unlike other factory buildings and that your engineering team was working for an alternate solution and will arrest the leakages immediately.

Since there was a long snag list, including leakage from many spots, and no serious effort was being made by Kirby, a meeting was called at our Prime Tower on 9 February 2012. An assurance was given that complete snag list will be attended to, in consultation with PEL site engineers, before the end of February, and a joint inspection shall be carried out for satisfactory results.

Since leakage issue was not attended to and in July heavy leakage was observed at the plant, a meeting was called on 31 July 2012/7 August 2012, which was attended, among *others by Mr. G.P. Raju who apologised for the leakage and admitted that this was on account of a human error while transferring the design data to the construction drawings and assured that all necessary steps will be taken to arrest the leakage and will be fixed within 6-8 weeks. It was agreed that a thorough technical check will be done as per Kirby QA system for the entire plant, including valley gutters in terms of design adequacy with additional factor of safety, even if these are to be replaced with new gutters. It was also agreed that for additional factor of safety, the valley gutters will be provided with proofing to seal against leakage.*

Regrettably, nothing concrete came out of the July 2012 meeting as the entire operation of the plant was stalled on 31 October 2012 as the plant floor was completely wet due to water leakage and our entire team was involved in clearing the water to protect coils kept inside bay 2 and other areas, The VPD pit was water logged to a height of 2 ft and five motors were in water. Apart from damages to our plant and machinery, there was no production activity for over a month resulting in huge losses to us.

Again due to rains on 4/5 December 2012, our entire shop floor in the factory was wet with water all around damaging a lot of our equipment and we provided photographs of the affected area through our email of 12 December 2012.

Regrettably, you ignored completely our apprehension that if the rectification was not completed urgently, there may be problems during November/December rains which may result in big losses in factory as shop floor shall be occupied with jobs under production and continued rectification job at a very slow disappointing pace.

A meeting was called at PEL site on 28 January 2013 to review matters discussed in the meeting held on 7 August 2012, particularly with regard to water leakage issue. It was noticed that Kirby was able to plug many points (over 70 locations) on the roof sheet but it was noticed that whenever there was rain new leaking points occur. Further, Kirby still had to complete a number of jobs discussed in the August meeting.

We suffered huge losses on account of leakage all over the plant every time there were rains and Kirby was simply helpless in plugging the leakage points. Since we were not getting any full-proof leakage solution from Kirby and in order to stop further losses on account of damages to our plant and machinery from leakages as and when there were rains: consequential financial losses on account of stoppage in production for longer durations during leakage; production and manpower losses, it was finally decided that we get the waterproofing of the entire pre-engineered building through outside agency costing us heavily.

The above facts are based on written complaints in the form of exchange of emails, minutes of the meeting, site reports etc., leaving no doubt whatsoever that Kirby has been responsible for delaying the entire project resulting in heavy losses to us in terms of delay in our production schedules, escalated project cost, production losses, failure in honouring our commitments to a number of our valued clients etc.

We are in the process of ascertaining the cost incurred in plugging the leakages by providing waterproofing for factory shed and loss to the equipment/machinery including production loss due to avoidable delay in completion of factory which will be sent to you in due course as claim for further necessary action. However, we are sending all the documents/copies of various communications in this regard in support of our claim to be lodged shortly.

For Prime Meiden Ltd

U.C. MISRA

DIRECTOR & CEO

58. The finding of the AT that the letter dated 14.08.2014 established a jural relationship between the petitioner and the respondent, is based on cogent reasons and substantiated legal reasoning. From a perusal of the letter reproduced herein above, it is clear that the petitioner itself treated the contract as subsisting by asking/directing the respondent to rectify the snags in the project allegedly caused due to the deficiency in performance of contractual obligations by the respondent. The same is also substantiated by the minutes of the meeting dated 07.08.2012 and 23.01.2013, which are also referred in the letter reproduced hereinabove.

59. The letter dated 14.08.2014 was addressed within three years from January 2012 and in turn the demand for Arbitration (dated 04.03.2017) was also made within three years from 14.08.2014. Thus, the AT has correctly returned a finding that the letter created a jural relationship between the petitioner and the respondent, and correctly computed the limitation period for invoking arbitration from the date of that letter.

60. I am of the view that the question *qua* bar of limitation is a mixed question of law and fact. The case of the petitioner, as presented, would require this Court to undertake a fresh determination on this issue by undertaking appreciation of evidence. In effect, the petitioner is warranting re-appreciation of evidence and substitution of findings of the AT on an issue which has already been considered by the AT.

61. I cannot review/re-appreciate the findings of the AT particularly when the view of the AT is plausible and substantiated by material and evidence placed before the AT. Hence, I am not inclined to interfere with the same.

62. The reliance placed by the petitioner on paragraph Nos. 20 and 21 of ***J.C. Budhraja (Supra)*** to contend that the words used in any acknowledgement in terms of Section 18 of the limitation Act must indicate the existence of jural relationship and the statement must be made with the intention to admit such relationship, is misconceived as the findings with respect to the existence of jural relationship is arrived by the AT after due appreciation of the letter dated 14.08.2014 and the same is a plausible view. Hence, the same cannot be interfered with by this Court under its narrow scope of Section 34 of the Act.

63. The reliance placed on ***Satendra Kumar (Supra)*** also does not support the case of the petitioner as the said judgment was passed in a petition filed under Section 11 of the Act, whereas the present petition is filed under Section 34 of the Act and the scope of interference allowed under Section 34 is different. Additionally, the said judgment is based on a different set of facts wherein the completion date remained undisputed between the parties, which is not the case in the present petition. The relevant paragraph of the judgment read as under:

> *"14. The conclusion with respect to the issue of limitation therefore is that there is a separate limitation for filing of a petition seeking reference of disputes to Arbitration and which is separate from a decision on merits whether the claims are within limitation or not. The latter aspect is not seen, ordinarily, at the time of passing of an order referring the disputes to arbitration, however, if the claims which are sought to be referred are clearly barred by time on the date of filing of the petition for referring of the disputes to arbitration, then, a petition seeking reference of the disputes to arbitration is dismissed. When I say that the disputes are barred by limitation on the date of filing of the petition, what I mean, and what was meant by the learned Single Judge in the case of Progressive Construction (supra) and the Hon'ble Supreme Court in L.K. Ahuja's case, is that ex*

facie the claims are barred by limitation i.e., from the admitted facts, it can be made out that the claims are barred by limitation. If, however, there is a disputed question of fact to decide the issue whether the claims are time-barred or not, then, this issue is left open for decision in the arbitration proceedings.

15. That time-barred claims need not be referred for decision in the arbitration proceedings, has now been once again reiterated by the Supreme Court in the judgment National Insurance Company v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267. Paras 22 to 22.2 of the said judgment read as under: ...

19. Let us now turn to the facts of the present case. ***<u>That the work was completed by the contractually stipulated date of 14.2.2005 is not in dispute</u>****. In terms of Clause 9 reproduced above, of the General Conditions between the parties, the final bill was to be submitted by the petitioner within three months of physical completion of the work i.e. by 14.5.2005. Since there is no completion certificate or provisional certificate issued in this case, the second portion of the first line of Clause 9 with respect to submitting of the bill within one month of the date of the completion certificate is not relevant. The payment as per Clause 9 had to be made within six months from the receipt of the bill by the Engineer-in-charge. Taking the best case of the petitioner, that the bill was submitted by him of on the last date of the* *three month period of physical completion of the work, the payment had to be made at the very last by 14.11.2005."*

64. The reliance placed by the petitioner on multiple judgments including the above is misconceived as the findings of the AT *qua* the issue of limitation are based on appreciation of the letter dated 14.08.2014 and the same is a rational and a plausible finding. Thus, it cannot be reappreciated by this Court.

65. Additionally, the petitioner's rejoinder submission is also misconceived. The petitioner contends that the entire impugned Award is premised on the ground of completion of work in January 2012, while the respondent's defence (in this petition) is that the work remained incomplete during that period, and hence, these positions are inconsistent.

66. I am of the view that the AT has returned its findings in the impugned Award in absence of a Statement of Defence and a counterclaim. Consequently the findings are based on the Statement of Claim and the evidence placed on record by the respondent. The AT has awarded the entire amount as per the claim of the respondent and it has also categorically recorded in paragraph No. 10 (E) of the impugned Award (as reproduced in paragraph No. 54 of the judgment) that the petitioner failed to file its counterclaim seeking liquidated damages. Thus, the AT correctly relied on the invoice to hold that the respondent is entitled to the entire amount as claimed as per the terms of Contract.

67. To my mind, in any case, the petitioner could have filed a counterclaim or raised its defence against the said claim before the AT, in absence of any such counterclaim or defence, the petitioner now cannot be allowed to state that the findings of the AT are inconsistent only because it treated the contract as subsisting for the calculation of limitation and the work as completed for the purpose of awarding the amount as per claim (in accordance with the bill/invoice raised). The findings of the AT *qua* the issue of limitation are plausible and substantiated by evidence and material placed on record, hence, no interference is warranted.

INCAPACITY/INABILITY OF THE PETITIONER

68. The petitioner has also assailed the impugned Award on the ground that the petitioner was unable to present its case before the AT owing to ongoing management disputes within the company, and accordingly prays that the impugned Award deserves to be set aside by this Court not only because of the "incapacity" of the petitioner in terms of Section 34 (2)(a)(i) of the Act but also of its "inability" to present its case in terms of Section 34(2)(a)(iii) of the Act.

69. Apropos this issue, it is stated by the respondent that by raising this issue the petitioner is only trying to hide its defaults under the garb of "incapacity" and "incapability". It is only because of the defaults on part of the petitioner, that its right to defence was closed and even now there is no document placed on record to prove the incapability of the petitioner in litigation or inability in participating in the Arbitral proceedings at that relevant point of time. Moreover, the company was running its usual functions and in usual functioning there were people authorised to take steps for pursuing legal proceedings on its behalf, thus, leaving no scope for any purported inability of the petitioner to defend its case before the AT.

70. At the outset, the two grounds relied upon by the petitioner are essentially different and operate distinctively. Section 34(2)(a)(i) provides for a ground to set aside an Award when the party was under some incapacity. The term "incapacity" here means the legal capacity of the party at the time of entering into an Arbitration Agreement i.e., any kind of disability essentially arising out of the Indian Contract Act, 1872, which strikes at the core of the Arbitration Agreement and thereby annulling the entire dispute resolution.

71. The respondent has correctly placed reliance on a judgment of this Court in ***Delhi Jal Board (Supra)*** dealing with a similar distinction of grounds of challenge raised by the petitioner under Section 34 proceedings, and the relevant paragraphs of the same read as under:

> *"2. Section 34 (2) (a) (i) permits the setting aside of an arbitral award by the court if the party making the application furnishes proof that the party was under some "incapacity". Section 34 (2) (a) (iii) permits the court to set aside an arbitral award if the party making the application furnishes proof that such party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.*
>
> *…*
>
> *10. As regards the ground of incapacity under Section 34 (2) (a) (i), the learned counsel for the petitioner was unable to explain what he meant by it. The ground 'K' taken in the petition reads as under:*

"K. Because the "incapacity" of the petitioner is writ large and that admits justification to invoke the provisions of Section 34 of the Act in question praying for setting aside the ex-parte award."

Apart from taking the aforesaid ground, there is no factual basis to assert "incapacity" of the petitioner other than trying to bring in the very same grounds urged under Section 34 (2) (a) (iii) which, in any event, are without any basis. Moreover, the 'incapacity' referred to in Section 34 (2) (a) (i), it appears to me, relates to issues such as mental incapacity, minority and such like circumstances. Entanglement in bureaucratic red-tape cannot, by any stretch of imagination, constitute 'incapacity', at least in the context of Section 34 (2) (a) (i). Both the grounds taken by the learned counsel for the petitioner fail. This petition stands dismissed. No order as to costs."

72. In view of the aforesaid judgment it is clear that "incapacity" under Section 34(2)(a)(i) would mean something relatable to an issue which strikes at the root/fountainhead of the ability of a party to enter into the contract and/or the Arbitration Agreement. It cannot mean the functional inability of a party to present its case on account of mismanagement/internal issues relatable to that party. Hence, this argument of the petitioner is without merit.

73. Another contention is that owing to internal mismanagement in the company, the petitioner was unable to present its case before the AT and the same has resulted in violation of the mandate of Section 18 of the Act i.e., equal treatment of parties and full opportunity to present its case. Thus, the impugned Award deserves to be set aside for falling under Section 34(2)(a)(iii) of the Act. Section 18 and 34 of the Act, read as under:

> *"18. Equal treatment of parties.—The parties shall be treated with equality and each party shall be given a full opportunity to present this case.*
>
> *…*
>
> *34. Application for setting aside arbitral award.—*
>
> *…*
>
> *(2) An arbitral award may be set aside by the Court only if—*
>
> *…*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;*
>
> *…"*

74. The law *qua* Section 18 read with Section 34(2)(a)(iii) has been discussed by a Coordinate Bench of this Court in the judgment of ***Sujit Kumar Jaiswal v. Managing Director***[17] and the relevant paragraphs of the same read as under:

> *"59. It is a settled and fundamental principle of Arbitration law that notwithstanding the procedural flexibility accorded to an Arbitral Tribunal, such flexibility cannot be exercised in a manner that compromises the core tenets of fairness*

[17] 2026 SCC OnLine Del 1961.

and justice. The conduct of arbitral proceedings must, at all times, remain aligned with the basic principles of natural justice, which constitute the bedrock of any adjudicatory process. These principles, inter alia, require that no party be condemned unheard and that the decision-making process be fair, transparent, and free from arbitrariness.

60. In this context, it is apposite to refer to Section 18 of the Act, which statutorily embodies these foundational requirements. The provision mandates that the parties shall be treated with equality and that each party shall be afforded a full and fair opportunity to present its case. This obligation is not merely procedural in nature but goes to the very root of the legitimacy of the arbitral process. Any deviation from these principles, whether by denial of adequate opportunity or unequal treatment, would vitiate the proceedings and render the resultant award vulnerable to challenge. …

…

62. Further, at this juncture, this Court deems it apposite to advert to Section 34(2)(a)(iii) of the Act. The relevant portion of Section 34 of the Act is reproduced herein under:…

63. A perusal of the same makes it apparent that even after having a circumscribed scope, an arbitral award may be set aside if the party making the application under Section 34 establishes that it "was otherwise unable to present his *case". The said expression has been judicially interpreted to include situations where the conduct of the arbitral proceedings effectively deprives a party of a meaningful opportunity to present material evidence in support of its case.*

64. Where a party seeks production of witnesses, whose testimony bears directly upon the core issue in dispute, a summary and unintelligible rejection of such request, without any sound reasoning, would result in the party being effectively disabled from substantiating its case. Such a situation would fall squarely within the ambit of Section 34(2)(a)(iii) of the Act and would, therefore, call for the setting aside of the Arbitral Award rendered as a result of such proceedings."

75. From a conspectus of the aforesaid, it is clear that the scheme of Section 18 and Section 34(2)(a)(iii) is such that it requires compliance with the principles of natural justice and necessitates an opportunity to present its case for a party. Any non-compliance with the principles of natural justice would entail interference with the award.

76. In this view of the matter, in the present case, the AT entered upon reference on 27.04.2018 and issued notice to the parties directing appearance on 15.05.2018. Thereafter, on 04.07.2018, it was again directed that the notice of claim shall be served upon the petitioner for filing its reply to the claim on 13.08.2018, however, nobody appeared on behalf of the petitioner on the said date. Pursuant to the non-appearance, fresh notices were issued for appearance on next date fixed on 31.08.2018. On 31.08.2018, a counsel appeared on behalf of the petitioner who submitted his memo of appearance but did not file any reply to the claim nor filed his Vakalatnama. On request of the Counsel, some time was given to the petitioner to file a reply to the claim along with a direction to the petitioner to deposit its portion of the fees of the AT and the matter was then fixed for further hearing on 09.10.2018. *Vide* its order dated 31.08.2018, the AT categorically directed the petitioner to appear before the AT and in case of non-compliance, the AT made explicit its intention to proceed in accordance with Section 25 of the Act. The order of the AT dated 31.08.2018 is important and read as under:

*"**Case No.Arb/B.P.G./02/2018***

Sub: In the matter of Arbitration between M/s. Kirby Building Systems India Pvt. Ltd. Versus M/s. Prime Meiden Ltd.

Ref: Work Order dated 29.05.2009 for the supply and erection of Pre-Engineered Building for the Respondent's Transformer Manufacturing Unit at SEZ Nayudupeta Nellore, Andhra Pradesh.

5th Arbitration Proceedings of dated 31.08.2018

Coram:

Arbitral Tribunal

1. *Shri Bharat Bhushan, DHJS (Retd.)*
   Chairman, Arbitral Tribunal
2. *Shri G.P. Thareja, DHJS (Retd.)*
   Nominee Arbitrator.
3. *Shri Padam Kant Saxena, DHJS (Retd.)*

Nominee Arbitrator.

ORDER

31.08.2018

Present: Shri Dhananjay Baijal, Advocate for the claimant

Shri Gagandeep Panwar, Advocate for the Respondent

Notices were sent to the Respondent at its addresses through Speed Posts pursuance to orders dated 13.08.2018 and as per the Tracking report on record, the Respondents were served on 15.08.2018.

Previously also the Respondents were served on 06.07.2018 by the claimant along with the Statement of claim for 13.08.2018. On 13.08.2018 at the time of hearing, none appeared on behalf of the Respondents before the Tribunal. After the proceedings were recorded, One Shri Gagandeep Panwar, Advocate appeared before the Chairman of the Tribunal. His presence was noted.

In spite of the presence being noted, the notices as per directions of the Tribunal had been issued for today's date. Notice on the respondent at his Delhi address is served as per Tracking report as noted above.

In spite of previous service as well as present service & attendance of Shri Panwar noted, no reply to the claim has been filed before us today. Shri Panwar appeared without the authority of the Vakalatnama. At our request, he has given a memo of appearance. Simultaneously, he after making a request *to us got e-mail from the computer of the Tribunal which email by the respondent seeks two months time. The reason stated is that there is a dispute in the Management of the company. In the manner, the respondent, before the judicial tribunal in the form of Arbitral Tribunal, is acting, we do not approve.*

Considering the request and the conduct of the respondent, we consider it appropriate that a fortnight time is granted to the respondent to present the reply to the claim and deliver the copy of the reply to the claimant. In the event, the copy of the reply is delivered to the claimant, the claimant shall file, if the claimant feels necessary, a rejoinder to the reply within further period of 2 weeks, be filed.

Parties shall appear before the Tribunal for further proceeding as may be required. They can file by way of statement on oath Affidavit also. It is further noted that the Arbitral Tribunal in the event of failure of the respondent and the claimant, as directed the Arbitral Tribunal will proceed further in accordance with Sec. 25 (b),(c) of the Arbitration & Conciliation Act, 1996. Counsel for the respondents shall ensure the filing of the Vakalatnama along with the reply and in any case otherwise also as per requirement of the Advocates Act and the Bar Council Rules.

So far as the payment of Arbitration fee by the parties to the Arbitral Tribunal is concerned, the claimant after calculating the Arbitration fee on the amount as claimed in the claim petition on the basis of the IV-Schedule attached to the Arbitration &

Conciliation Act, 1996 has already deposited their share of 50% of the fee by depositing 3 cheques for the 3 Arbitrators of the amount of Rs.2,44,629/- each. Hence it is directed that the respondent shall also on or before the next date of hearing, deposit the same amount of fee i.e. 3 cheques for Rs.2,44,629/- each in favour of each of the Arbitrator.

However, in case any Counter-claim is filed, then, in addition the Arbitration fee for that shall also be payable in accordance with Schedule-IV of the Arbitration & Conciliation Act, 1996.

Adjourned to ***09.10.2018 at 4.00 PM***

(Padam Kant Saxena) DHJS(Retd.) Nominee Arbitrator	*(Bharat Bhushan) DHJS(Retd.) Chairman, ArbitralTribunal*	*(G.P. Thareja) DHJS(Retd.) Nominee Arbitrator"*

77. Despite the aforesaid order of AT categorically reserving the right to proceed under Section 25 of the Act, nobody appeared on behalf of the petitioner on 09.10.2018. Pursuant thereto, a date was fixed for recording evidence of witnesses of claimant and consequently the statement on oath were filed on 07.12.2018. Again fresh notice was issued to the petitioner. Thereafter, on 26.03.2019, another Counsel appeared on behalf of the petitioner without filing any Vakalatnama but requested for some accommodation in order to file Vakalatnama and to seek instructions from the petitioner. However, as the Counsel was unable to obtain any instructions despite multiple opportunities being afforded by the AT (26.03.2019, 29.03.2019 and 10.04.2019), the AT *vide* its order dated 10.04.2019 decided to proceeded *ex-parte*. The order dated 10.04.2019 read as under:

*"**Case No.Arb/B.P.G./2/2018***

Sub: In the matter of Arbitration between M/s. Kirby Building Systems India Pvt. Ltd. Versus M/s. Prime Meiden Ltd.

Ref: Work Order dated 29.05.2009 for the supply and erection of Pre-Engineered Building for the Respondent's Transformer Manufacturing Unit at SEZ Nayudupeta Nellore, Andhra Pradesh.

11th Arbitration Proceedings of dated 10.04.2019

Coram:

Arbitral Tribunal

1. *Shri Bharat Bhushan, DHJS (Retd.)*
   Chairman, Arbitral Tribunal
2. *Shri G.P. Thareja, DHJS (Retd.)*
   Nominee Arbitrator.
3. *Shri Padam Kant Saxena, DHJS (Retd.)*
   Nominee Arbitrator.

ORDER

10.04.2019

Present: Shri Dhananjay Baijal, Advocate for the claimant.

Shri Dhananjay Baijal, Advocate today, at this stage, informs that Shri Nikhil Nayyar, Advocate the Sr. Counsel in the case has since been designated as Sr. Advocate. This being so, the claimant has now filed a fresh Vakalatnama in favour of S/Shri TVS Raghavendra Sreyas & Dhananjay Baijal, Advocates. The same is placed on record.

Shri Mayank Bughani, Advocate proxy Counsel for Shri Naveen Chawla, Advocate has today appeared. But, he states that they do not have any instructions from the respondent. Hence, they have neither been able to file the Vakalatnama and nor the statement of defense/counter-claim, supporting documents, the necessary payment as also the consent within the meaning of Section 29A(3) of the Arbitration & Conciliation Act, 1996 (hereinafter called 'Act') as ordered vide order-sheet dated 29.03.2019. Consequently, there being no representation on behalf of the respondent, so, they are again ordered to be proceeded ex-parte. Here, it would be pertinent to mention that, earlier too, vide order dated 09.10.2018, the respondent had already been proceeded ex-parte. But, since Shri Naveen Chawla, Advocate had in the meanwhile appeared before the Tribunal on 26.03.2019 and while filing his memo of appearance had stated that he would seek further instructions regarding filing of Vakalatnama, statement of defence/counter-claim and supporting documents, so, the matter was adjourned for today for the purpose. But, in the light of aforesaid circumstances, now this Tribunal is compelled to proceed in the absence of the *respondent again.*

Now, since, the period of 12 months within the meaning of Section 29A(3) of the 'Act' is going to expire on the 15th April, 2019. Hence, Shri Dhananjay Baijal, Advocate Ld. Counsel for the claimant states that since the respondent is being proceeded ex-parte, hence, under the provisions of Section 29A(3) of the Act only his consent would serve the purpose. Hence, he gives his consent to extend the period specified in sub-section 29A(1) of the Act for making award for a further period of six months w.e.f. 15.04.2019. The same is hereby acceded to.

At this stage, the Ld. Counsel of the claimant states that since the nomenclature of the claimant company has been changed and the necessary amendment to that effect has also already since been allowed by the Tribunal, hence, he seeks time to file the amended evidence in affidavit in this regard. Permitted to do so within a period of 3 weeks.

The matter will now come up for the aforesaid purpose for ***08.05.2019 at 12.00 noon****.*

(G.P. Thareja)	*(Bharat Bhushan)*	*(Padam Kant Saxena)*
DHJS(Retd.)	*DHJS(Retd.)*	*DHJS(Retd.)*
Nominee Arbitrator	*Chairman, Arbitral Tribunal*	*Nominee Arbitrator*
10.04.2019	*10.04.2019*	*10.04.2014"*

Signed By:ANSH SRIVASTAVA
Signing Date:08.09.2026
18:50

78. On 27.07.2019, a Counsel again appeared before the AT on behalf of the petitioner along with the chartered accountant of the petitioner company, however, again no Vakalatnama was filed by the said Counsel.

79. Again, when the matter was listed on 10.08.2019, two different counsels appeared on behalf of the petitioner and presented a Vakalatnama purportedly signed by the managing director of the petitioner company, and sought some accommodation which was declined by the AT for reasons recorded in detail. The AT in its order dated 10.08.2019 categorically recorded the dilatory conduct of the petitioner and refused to reverse the judicial clock on the basis of oral assurance of the new counsel appearing on behalf of the petitioner. The detailed order dated 10.08.2019 recording the conduct of the petitioner is important and the same reads as under:

*"**Case No Arb/B.P.G./2/2018***

Sub: In the matter of Arbitration between M/s. Kirby Building Systems & Structures India Pvt. Ltd. Versus M/s. Prime Meiden Limited (Formerly Prime Electric Ltd.)

Ref: Work order dated 29.05.2009 for the supply and erection of Pre-Engineered Building for the Respondent's Transformer Manufacturing Unit at SEZ Nayudupeta Nellore, Andhra Pradesh

12th Arbitration proceedings of dated 10.08.2019

Coram:

Arbitral Tribunal

1. *Shri Bharat Bhushan, DHJS (Retd.)*
   Chairman, Arbitral Tribunal
2. *Shri G.P. Thareja, DHJS (Retd.)*
   Nominee Arbitrator
3. *Shri Padam Kant Saxena*
   Nominee Arbitrator

ORDER

10.08.2019

Present:

For the Claimant:

Mr. T.V.S. Raghavendra Sreyas, Advocate
Mr. Dhananjay Baijal, Advocate
Mr. V. Ravi Prasad, Witness
Mr. Pamidi Aadithya, Witness
For the Respondent:

Mr. Rajnish Kumar, Company Secretary

In the present matter today S/Shri Abhimanyu Dhawan, Ishaan Mukherjee, Advocates are present. A Vakalatnama in the name of ASD Legal Advocates and Solicitors signed by Shri Abhimanyu Dhawan, Advocate and Shri Ishaan Mukherjee, Advocate for ASD Legal and Solicitors has been filed before us. Such Vakalatnama is stated to be signed by Shri Kazumi Ikarashi said *to be the Managing Director is filed although the column who has authorised is not filled in the column of the Vakalatnama. The presence of the Vakalatnama has been accepted today.*

At this stage, a document which is now said to be a photocopy of the original document signed by said Managing Director is submitted to us while dictating the order. We questioned where is the original? It is stated that the Counsel do not have the original at this time.

On the last date of hearing i.e. 27.07.2019, we had recorded what was told to us by Shri Naveen Chawla, Advocate who had appeared on the said date. In the said order, we had made our detailed observations how this arbitral proceedings are being proceeded. On 31.08.2018 i.e. about one year one Shri Gagan Deep appeared for the Respondent. We made our observations on 31.08.2018. Prior to 31.08.2018, the Respondents were duly served for 13.08.2018. In a dramatic way, after the hearing of 31.08.2018 was being completed, Shri Gagan Deep Pawar, Advocate appeared. In that behalf we had to write a detailed order. Inspite of the fact that Vakalatnama was not filed by the said Advocate, we allowed the participation of the Respondents with liberty to present the counter claim, if any, also. We made a request to the Respondent even to deposit the arbitral fee of their share before the next date of hearing detailing the amount to be deposited. Under the circumstances, 09.10.2018 was fixed for hearing….

….

The Arbitral Tribunal finding no other alternative again directed that the Respondent be proceeded ex-parte. Thus matter was fixed for 08.05.2019.

On 08.05.2019,. Shri Naveen Chawla, Advocate along with Shri Rajnish Kumar who is present today also, appeared before us. He handed over to us a resolution of the Respondent dated 12.11.2017 seeking more time. The prayer as was made on the said date was considered. The Claimant had filed the affidavits of two witnesses and we fixed the matter on 27.07.2019 for the evidence of the witnesses.

What happened on 27.07.2019, we had recorded in the said order.

Today we have recorded in detail what we have been doing for the last about an year. Today as noted above, a Vakalatnama as noted above along with a photocopy which it is stated to be an internal communication from the Managing Director to Executive Vice Chairman/Chairman for the appointment of ASD Legal as Legal Counsel for the ongoing arbitration including other legal services as a retainer. We have looked into the document. It is neither signed by Executive Vice Chairman nor Chairman. It seems as submitted that some internal note meant for Executive Vice Chairman and the Chairman and not for us. Along with the said document which is a photocopy we have been given a photocopy of an order passed by National Company Appellate Tribunal New Delhi in Contempt Case No. 11 of 2017 and Contempt Case No. 01 of 2018 in Company Appeal No. 397-

399 of 2017. The Learned Counsel present on behalf of the Respondent drew our attention to paragraph 11 onwards of the said order.

We questioned the Counsel is this order which is shown to us has an effect or prohibits the rights of the Claimant to proceed with the arbitral proceedings, the answer of both the Counsels present was 'No'. If this is the situation, we have not been able to comprehend why this document was submitted to us.

We heard the Learned Counsels further in the matter. At the outset we questioned, have they brought the fee of the Arbitral Tribunal which was their liability and for which their liability was put on the Claimant. The answer is in the negative. Instead it is submitted today like in the past we will make good of the fees within 15 days. Question is should we postpone the matter or revert the judicial clock on the bare assurance while earlier assurances by the previous Counsel have not been found to be truthful. Judicial clock is to be reverted where there is good and/or sufficient cause that what prevented them not to comply with the previous orders. In absence of the good/ sufficient cause, we are not inclined to postpone the matter any further as sought by the Counsels present. What to say of reverting the clock for which there is no prayer before us. Witnesses had visited at the venue of the Arbitral Tribunal from Hyderabad. Should the Claimant be taxed to visit again for evidence on the face and the manner in which the presence is got recorded by the Counsel. The answer is in the negative. The view which have been taken by *us above is supported by the judgment of the Hon'ble Supreme Court as reported in AIR 1964 Supreme Court 983 Arjun Singh Vs. Mahender Nath and also recorded by the Hon'ble Supreme Court in 1955 SCR referred in the said judgment.*

In view of the aforesaid reasons, we proceed ahead so that the matter is heard and decided as per the intent of the legislature in framing the Arbitration & Conciliation Act, 1996.

Let evidence be further recorded. We give opportunity to, the Counsel remain sitting and they may assist us in the matter wherever they feel necessary to assist us.

We had directed to the Claimant on the last date of hearing to deposit the additional fee for which we earlier granted concession to the Claimant for the fees deposited on behalf of Respondent. The Claimant has brought the fees by cheques Nos. 007918, 007919 and 007920 drawn on ICICI Bank for Rs. 1,10,083.50 each in the names of S/Shri Bharat Bhusan, Shri G.P.Thareja and Shri Padam Kant Saxena. This amount has been paid after deducting necessary TDS.

(G.P. Thareja) DHJS(Retd.) Nominee Arbitrator	*(Bharat Bhushan) DHJS(Retd.) Chairman, Arbitral Tribunal*	*(Padam Kant Saxena) DHJS(Retd.) Nominee Arbitrator*

Evidence of CW-1 and CW-2 concluded. Arguments heard.

Award is reserved. On announcement copy of Award will be sent

Signed By:ANSH SRIVASTAVA
Signing Date:08.09.2026
18:50

to both parties.

(G.P. Thareja)	*(Bharat Bhushan)*	*(Padam Kant Saxena)*
DHJS(Retd.)	*DHJS(Retd.)*	*DHJS(Retd.)*
Nominee Arbitrator	*Chairman, Arbitral Tribunal*	*Nominee Arbitrator*

10.08.2019*"*

80. From a conspectus of the aforesaid, I am of the view that the AT has at every step ensured a judicious approach in affording reasonable opportunity to the petitioner. The petitioner, however, has at every step defaulted to comply with its own undertakings and assurances. Hence, the petitioner by raising this contention that it has been denied an opportunity to present its case, cannot be allowed to benefit from its own defaults. The AT has rightly granted multiple opportunities and only thereafter proceeded *ex-parte* with the Arbitral proceedings.

81. The case of the petitioner that the defaults were due to its internal mismanagement is also unsubstantiated as there is no evidence placed on record to show that the petitioner was barred from pursuing/litigating its defence in the arbitral proceedings. On the contrary, from a perusal of the Order dated 29.11.2018 of the NCLAT, it is clear that no restrictions were imposed preventing the petitioner from participating in the Arbitral proceedings. In any case, the petitioner had enough opportunities post 29.11.2018 to pursue its defence before the AT.

82. Be that as it may, from a conspectus of the procedural orders and the impugned Award, I am satisfied that the AT in compliance with Section 18 has afforded multiple opportunities to the petitioner in order to allow it to present its case. Thus, the same cannot be said to be falling under Section 34(2)(a)(iii) warranting interference by this Court. Needless to state, the petitioner was not able to present its case on account of its own defaults and not for any fault attributable to the AT.

MANDATE OF THE AT

83. The petitioner has fleetingly raised a contention that the impugned Award (reserved on 10.08.2019) was passed by the AT (on 18.09.2020) after the expiry of the mandate of the AT, thus, the impugned Award is against public policy. It is also contended by the petitioner that the first initial extension of mandate of AT is invalid in the eyes of law as the AT extended the mandate by recording the consent of the counsel appearing on behalf of the petitioner without any official authority.

84. Chronologically, the mandate of the AT was firstly extended for a period of six months *vide* order of the AT dated 10.04.2019 and thereafter, the mandate was again extended by a further period of 6 months *vide* Order of this Court dated 04.12.2019. It is the case of the petitioner that the mandate expired on 08.06.2020 i.e., prior to the pronouncement of the impugned Award.

85. The petitioner has contended that the initial extension of the mandate of the AT by 6 months was without any valid authorisation. However, from a perusal of the order of the AT dated 10.04.2019 (as reproduced in paragraph No. 72 of this judgment), it is clear that the mandate of the AT was not extended with the consent of the counsel appearing for the petitioner. The AT categorically recorded that the petitioner has been proceeded *ex parte* and hence only the consent of the respondent was required, and it proceeded accordingly.

86. The second extension of mandate of the AT was by the Order of this Court dated 04.12.2019 was for a period of 6 months. The final extension was eventually granted by virtue of the exclusions allowed by the Hon'ble Supreme Court *vide* its Order dated 10.07.2020 and 23.09.2021 in the matter of ***Cognizance for Extension of Limitation, In re (Supra)***.

87. In this view of the matter, the contention of the petitioner that the mandate of the AT had expired is without any basis. Thus, no interference is warranted with the impugned award.

CONCLUSION

88. For all the aforesaid reasons, and having found no ground within the confines of Section 34 of the Act to set aside the reasoned findings of the learned Arbitral Tribunal, I am of the view that the impugned Award does not suffer from perversity, patent illegality or any other recognised vice warranting interference.

89. Accordingly, the petition is dismissed in the aforesaid terms, along with pending applications, if any.

90. The bank guarantee furnished by the petitioner with respect to the awarded amount shall be released in favour of the respondent within 4 weeks from the date of pronouncement of this judgment.

JASMEET SINGH, J

SEPTEMBER 08th , 2026/SS

Signed By:ANSH SRIVASTAVA
Signing Date:08.09.2026 18:50