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

Reserved on: 15th February, 2024

% ***Pronounced on: 28th June, 2024***

\+ **O.M.P. (COMM) 45/2019**

UNION OF INDIA THROUGH EXECUTIVE ENGINEER
Lucknow Central Division No. 2,
CPWD, 1st Floor, Kendriya Bhawan,
Section-H Aliganj, Lucknow, U.P. ..... Petitioner

Through: Mr. Ruchir Mishra, Mr. Mukesh Kr. Tiwari & Ms. Reba Jena Mishra, Advocates.

versus

ANS CONSTRUCTION LTD
E-2/Block, B-1 Extension,
Mohan Cooperative Industrial Estate,
Mathura Road, New Delhi-110044 ..... Respondent

Through: Mr. Sushil Aggarwal, Advocate.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The present Petition under Section 34 of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as the* "Act, 1996"*)* has been filed on behalf of the petitioner for setting aside the impugned Award dated 20.08.2018 as corrected/clarified on 18.09.2018.

2. The petitioner/CPWD has sought to challenge the impugned Award dated 20.08.2018 as corrected/clarified on 18.09.2018 on the ground that it has been passed by ignoring the contractual provisions and applying the extraneous provisions/conditions that were not part of the Agreement between the parties.

3. The **facts in brief** are that the respondent/Claimant, a Private Limited Company, was awarded Tender work for construction of various buildings at 20th Bn. Hqs. Balrampur.

4. An Agreement bearing No. 48/EE/LCD-II/2010-11 *(hereinafter referred to as the* "Agreement"*)* was entered into between the parties for the work construction of Mahila Barrack, including internal electrical installation to be constructed for Mahila Jawans of SSB Bn. Hqrs., Balrampur deployed for the national security along Indo-Nepal Border. As per the terms of the Agreement, the date of start and date of completion of work was stipulated as 06.03.2011 and 05.11.2011 respectively, but it got completed on 07.10.2013, i.e. after about two years of stipulated date.

5. The disputes arose *inter se* the parties after completion of work and a list of 11 Claims was submitted by the /Claimant respondent to EE/LCD-II *vide* Letter dated 05.12.2015. All the Claims were, after examination, held to be not admissible and were rejected by the Executive Engineer *vide* Letter dated 10.02.2016. The respondent filed an Appeal *vide* Letter dated 11.01.2016 under Clause 25(i) of the Agreement before SE/LCC. The SE also after examining the same, came to the same conclusion that the Claims were not permissible and rejected them all by his Letter dated 11.02.2016.

6. Aggrieved by such rejection, the respondent filed an Appeal under Section 25(i) of the Agreement before CE (NZ-II) along with the list of 11

Claims on 17.02.2016. However, this Appeal also met the same fate of rejection of all the Claims by CE (NZ-II) on 23.02.2016.

7. The respondent then gave a *Notice of Invocation of Arbitration on 19.02.2016*. The Arbitrator was appointed who eventually passed the impugned Award dated 20.08.2018 as corrected/clarified on 18.09.2018.

8. All the Claims were decided, but the petitioner is aggrieved by the ***Claims No. 3, 5, 8 & 11*** which are as under:

S. No.	**Claim Number**	**Claim**	**Amount Awarded**
1.	Claim 3.	*10CC (Price Escalation) Claim for Civil materials component, Labour Component & Oil and Lubes component*	Rs. 6,57,848
2.	Claim 5.	*Claim on account of Idling of Resources*	Rs. 11,31,239
3.	Claim 8.	Claim for extra cement consumed in the project as recommended in the Design Mix and above the minimum requirements	Rs. 1,86,140
4.	Claim 11.	Claim for grant of pendente lite and future interest	9% per annum Simple interest on the award awarded against Claim

			No. 3, 4, 5, 6, 8 and 10 and 11% per annum simple interest on the amount of the Award.

9. The petitioner aggrieved by the allowing of the Claims as mentioned above, in favour of the respondent/ Claimant, has filed the present Petition under Section 34 of the Act, 1996.

10. The **petitioner has submitted** that there was a total delay of 702 days in completion of the work. The Ld. Arbitrator attributed the delay of 109 days to the respondent and has accordingly imposed penalty, which has not been challenged by the respondent. However, it has wrongly been observed that the remaining 593 days of delay were attributable to the petitioner. It is asserted that this understanding of the Arbitrator is incorrect because in these 593 days of delay, the Arbitrator has included 337 days during which the work could not progress due to the rain and the work site was inundated with water.

11. It is claimed that while awarding the *Claim Nos. 3 and 5*, the Arbitrator has applied different yardstick to calculate the period of delay attributable to the petitioner and the respondent respectively. While observing that the Contractor cannot be held responsible for the delay in completion of Work during the period of the rains, but this rain inundated period of 337 days has been added to the account of the petitioner/Department.

12. Further, the petitioner has submitted that the Contractor/respondent in one of its Letter dated 27.06.2013 seeking extension of time, had stated in its

own handwriting that he had not suffered any loss due to the delay in work and that an extension be granted to complete the work for which it would not raise any claim. Though this Letter was referred and relied upon by the petitioner before the Ld. Arbitrator, but still compensation has been granted on account of delay. The respondent/Claimant has taken a stand contrary to its Letter in its Claim before the Arbitrator that it had suffered losses due to delay in completion of work. This makes it evident that the Claims of the respondent/Contractor are an afterthought and the same were liable to be rejected in view of its own Undertaking in the Letter.

13. The petitioner has stated that the *Claim No. 3 for escalation for civil material component, labour component and oil lubes component,* has been allowed by the Ld. Arbitrator who has granted a *sum of Rs. 6,57,848/-* to the respondent on the basis of Clause 10CC Formula, without appreciating that this Clause which deals with *price escalation* and is not applicable to the Agreement in question between the parties. The Arbitrator has ignored the internal page 18 of the Contract wherein it was agreed by the parties that Clause 10CC shall not apply to the present Contract as the stipulated period of completion of work was less than 18 months under the Contract. Therefore, the Award under *Claim Nos. 3 for escalation and increase in overhead expenses*, by attributing a delay of 593 days to the petitioner, is perverse and contrary to the material on record.

14. It is further asserted that the judgments of *M/s Nandsons Construction Company vs. MP State Tourism Development and Another,* 2013 SCC OnLine MP 5294 and *State of Orissa vs. Sudhakar Das (Dead) by LRs* (2000) 3 SCC have not been considered by the Arbitrator.

15. In regard to *Claim No. 5* which pertained to *overhead expenses/ idling of resources due to alleged prolongation of Contract,* it is submitted that the Ld. Arbitrator has ignored the contractual provisions and Undertaking of the Contractor that he had not suffered any losses on account of delay in completion of work and that he would not be making any Claim against the petitioner-Department if the extension is granted. The respondent took advantage of their Undertaking to get the extension but subsequently, it reneged and raised a Claim against the petitioner on the ground of delay.

16. It is further submitted that *over calculation of overhead losses has been done on the basis of Tender cost* of Rs. 1,23,75,942/- instead of taking actual completion cost of the work, which was Rs. 1,05,99,337/-.

17. The Arbitrator has calculated overhead expenses on *account of idling of resources* by reducing them to the extent of 50% on the ground that the workforce must have been deployed by the Contractor to do other work that he had in the same premises/work site. Once the Ld. Arbitrator found it reasonable to hold that the workforce of the Contractor was not sitting idle, it was unreasonable and not justiciable for the Arbitrator to award even 50% increase in overhead expenses, when there is a categorical finding of there being no idling of resources of the respondent.

18. Moreover, while attributing the delay of 593 days to the petitioner, the Ld. Arbitrator has even included the period during which the workers were not available during Diwali and Durga Puja and also the period during which they were on strike because of their disputes with the respondent/Contractor. The days during which the workforce was not available, have been erroneously included in 593 days which is a patent illegality in the Award as the petitioner could not have been held liable to

compensate the Contractor for delay on account of non-availability of workforce, for the various reasons as mentioned above.

19. The petitioner has further submitted that under *Claim No. 8* a sum of Rs. 1,86,140/- *on account of extra cement consumed in the Project* as recommended in Design Mix over and above the minimum requirements, has been erroneously awarded to the respondent. It is claimed that the Arbitrator had gone beyond his jurisdiction as there was an express provision in the Agreement under Paragraph 8.8(iii) that the minimum/maximum cement content for *Design Mix concrete* shall be maintained as per the quantity detailed therein even in case where the quantity of cement required was higher than the minimum specified above, to achieve the desired strength based on *approved Mix Design* and nothing extra was to be paid. The Arbitrator has misinterpreted this express provision and has allowed the Claim considering the order of preference given in Paragraph 8.1 of General Condition of the Contract (GCC). It is asserted that the Ld. Arbitrator has failed to appreciate that there was no contradiction in the description of the item and condition mentioned under Paragraph 8.8 (iii) of the Agreement.

20. It is further contended that the party claiming compensation for any loss of money has to prove such loss or damage suffered by him. In the present case, the respondent miserably failed to provide any documentary evidence as has also been observed by the ld. Arbitrator in Paragraph 45.0(i) of the impugned Award. The Arbitrator has failed to appreciate that if a party has not suffered any losses even if the breaches have been committed, such party cannot be awarded any compensation under *Section 73 & 74 of the Indian Contract Act, 1872*. By awarding the losses and damages, *Section*

73 of the Indian Contract Act, 1872 has been rendered negatory and the petitioner has been penalised despite there being no loss suffered by the respondent.

21. In the end, it is contended in respect of *Claim No. 11* that an *exorbitant rate of interest @9%* has been awarded which is untenable as the Contractor/respondent got extension of time on the ground that he had suffered no loss due to delay of work. No interest therefore, should have been awarded to the respondent.

22. It is, therefore, submitted that the impugned Award dated 20.08.2018 as corrected/clarified on 18.09.2018, suffers from patent illegality and is contrary to the express terms of the Contract. It is thus, liable to be set aside.

23. **The respondent in its Reply** to the Petition under Section 34 of the Act, 1996 has denied all the grounds of challenge as agitated by the petitioner in its present petition.

24. While the facts are not in dispute, but it has been asserted that the delay of 593 days has been rightly attributed to the petitioner. It is explained that the respondent in its Letter dated 23.07.2013 seeking grant of extension of time had nowhere stated that it has not suffered any losses on account of delay or that it shall not claim any additional payment for the extension of time. The respondent has further explained that it had filed its *Claim No. 3 on account of price escalation on account of Delay* which was based on Clause 10CC as a tool for calculation or price escalation. The Arbitrator has clearly observed that even though Clause 10CC was not applicable, it cannot be denied that the Project was delayed primarily due to the petitioner's fault

and failure to fulfil its reciprocal obligations. The respondent, therefore, cannot be denied the legitimate compensation arising out of escalation in price.

25. Furthermore, the Arbitrator has observed that since the petitioner had knowledge of serious probability and real danger of heavy rainfall and flood at the Project site, still it did not warn the respondent which made it liable on the *doctrine of reasonable foreseeability*. Reliance has been placed on the decisions in *Food Corporation of India vs. Am Ahmed & Co. and Ans.*, 13 SCC 779 and *K.N. Sathyapalam vs. State of Kerala & Ans.*, (2007) 13 SCC 43.

26. The respondent has further submitted that it has accepted the delay of 109 days as attributed to it and the consequent penalty imposed upon it by the Competent Authority. However, the balance delay of 593 days is not attributable to the respondent. The work remained completely suspended as the approved structural drawings were not provided by the petitioner and further there were discrepancies in the drawings even on 05.03.2012 i.e., after one year of the day on which the Contract was awarded to the respondent. The structural drawings for the first floor columns and slab, including staircase and detailed drawings of toilets, doors and window joinery were awaited on 05.03.2012. The Arbitrator while examining *Claim No. 3,* has rightly imposed *the penalty of Rs. 6,57,848/-,* on the petitioner and the challenge to it by the petitioner, is arbitrary.

27. The Arbitrator has rightly held that the petitioner has no moral basis for insisting on documentary evidence of damages from the respondent. Considering the principle of equity, fair play and justice, when the petitioner had levied the penalty of Rs. 6,74,489/- as compensation for the alleged

delay of 109 days on the part of the respondent, then the petitioner should also correspondingly pay the damages suffered by the respondent for a justified period of 593 days.

28. It is explained by the respondent that in case the formula of the Petitioner is made applicable for the levy of compensation for 593 days' delay on the part of the petitioner, the respondent is entitled for **Rs. 36,69,468/-** (*6,74,489 ÷ 109 days x 593 days) while the respondent has merely been awarded Rs.* 6,74,489/- as compensation. Hence, the Award is fully justified and completely well-reasoned. The petition is liable to be dismissed.

29. In regard to *Claim No. 5* which pertains to the *Idling of resources,* the Ld. Arbitrator has calculated the element of overhead expenses for delayed period which had been reduced by 50% for the reasons that the respondent was having other works on the same site. The delay was purely attributable to the petitioner because of which there was idling of machinery, etc. and the amount of Rs. 11,31,239/- has been rightly awarded to the respondent.

30. It is submitted that the Arbitrator has given a well-reasoned Award which does not merit any interference.

31. *Learned Counsels for both the parties addressed their arguments in detail and also submitted the Written Submissions.*

32. **Submissions heard and the record perused.**

33. ***At the outset it is pertinent to examine the scope of interference by the Court in a Petition filed under Section 34 of the Act, 1996.***

34. The scope of a challenge under Section 34 of the Arbitration and Conciliation Act, 1996 is limited to the grounds stipulated in Section 34 as held in *MMTC Limited v. Vedanta Ltd*, (2019) 4 SCC 163. Comprehensive

judicial literature on the scope of interference on the ground of Public Policy under Section 34 was postulated in *Associate Builders v. DDA*, (2015) 3 SCC 49. The Apex Court placed reliance on the judgment of *ONGC v. Saw Pipes*, (2003) 5 SCC 705 to determine the contours of Public Policy wherein an Award can be set aside if it is violative of '*The fundamental policy of Indian law'*, '*The interest of India'*, '*Justice or morality*' or leads to a '*Patent Illegality'*.

35. For an Award to be in line with the '*The fundamental policy of Indian law'*, the Tribunal should adopt a judicial approach which implies that the Award must be fair reasonable and objective and in accordance with the law of the land. The ground of *'patent illegality'* is applied when there is a contravention of the substantive law of India, the Act, 1996 or the Rules applicable to the substance of the dispute.

36. In *Hindustan Zinc Limited v. Friends Coal Carbonisation*, (2006) 4 SCC 445, the Apex Court referred to the principles laid down in *Saw Pipes* (supra) and clarified that it is open to the court to consider whether an Award is against the specific terms of the contract, and if so, it amounts to patent illegality and is opposed to the Public Policy of India.

37. The Apex Court in the case of *Ssangyong Engineering & Construction Co. Ltd. v. NHAI,* (2019) 15 SCC 131, has exhaustively dealt with the expression *"patent illegality"* and which acts of the Arbitral Tribunal would come within the purview of patent illegality. The only correct interpretation of a Contract would be if no reasonable person could have arrived at a different conclusion while interpreting the relevant Clauses of the Contract and that any other interpretation would be irrational and in defiance of all logic. The findings would suffer from the vice of irrationality

and perversity if the Arbitrator arrived at his findings by taking irrelevant factors into account and by ignoring vital Clauses of the Contract. Hence, the Apex Court held that the Court could intervene and review the merits of an award if it is found to be on wrong interpretation of the Contract and thus, *'patently illegal'*.

Analysis and Findings:

38. Against this background, the question which arises for the consideration of this Court is: *Whether the Award of the learned Arbitrator warrants judicial interference on the grounds as narrated above?*

Delay in Completion of the Project:

39. The foundational basis for the **Claims No. 3 & 5** of the respondent, was the *delay in completion of the contract*. Admittedly, the date of commencement and completion of the work, as per the Agreement dated 25.02.2011 was 06.03.2011 and 05.11.2011 respectively. It is further not in dispute that the Contract got completed on 07.10.2013 i.e. after a delay of 702 days. The respondent had submitted its Claims essentially claiming the increased amounts on account of delay in completion of the Project. The petitioner had attributed the delay of 109 days to the respondent, which was not challenged by the respondent. The Ld. Arbitrator also held delay of 337 days attributable to the petitioner while the remaining balance days of 256 was attributed to the rain and the work site being inundated with water. The Ld. Arbitrator however, included the period of 256 days of rains in the delay attributable to the Petitioner by observing as under:

> *"44. In this case I also find from the Extension of Time (EOT) case Annexure R-30 of CSF prepared the Respondent (Executive Engineer vide letter dated 28.02.2014) itself states that the*

stipulated date of start of the work and completion were 06.03.2011 & 05.11.2011 respectively. In the beginning of the work itself there was a delay of 148 days i.e. from 06.03.2011 to 01.08.2011 due to non-issue of good for construction structural drawings. Therefore it would be seen that there was a clear delay of 5 months out of total period of 8 months on account of non-issue of Good for Construction structural drawings. ***After 01.08.2011 the work could not be started due to inundation of entire work area on account of rain water (cascading effect) and this delay continued upto 24.10.2011. Therefore there was an initial delay of more than 7 months out of total stipulated period of 8 months for which Claimant was not responsible.*** *This is a clear case that the Respondent committed fundamental breach of contract by not providing the site to the Claimant for execution of work due to non-issue of structural drawings & inundation of the site during rainy season initially for 7 months out of total 8 months period. No breach of contract on the part of Claimant could be established by the Respondent because according to Respondent itself the Claimant was responsible for a delay of 109 days out of total delay of 702 days which took place in completion of work. Therefore the Respondent is responsible to compensate for loss of damage to the Claimant caused by breach of contract under section 73 of the Indian Contract Act 1872."*

40. The learned Arbitrator in detail thus, considered the rival contentions of the parties and referred to the Extension of Time (EOT) Letter dated 28.02.2014 prepared by the Executive Engineer/petitioner which stated that in the beginning of the work itself, there was a delay of 148 days i.e. from 06.03.2011 to 01.08.2011 due to non-issue of good for construction structural drawings. The learned Arbitrator while referring to this Letter dated 28.02.2014 of the Executive Engineer, concluded that there was a clear delay of 5 months out of the total period of 8 months of the Contract

since 06.03.2011, on account of non-issue of the construction structural drawings. Thereafter from 01.08.2011, the work could not be started due to inundation of entire work area because of rain water. *This delay in providing the structural drawings had a cascading effect as the delay continued upto 24.10.2011, only when the work could be started.*

41. It was, therefore, held that the respondent could not be held responsible for this delay of 7 months out of the stipulated period of 8 months. It was the petitioner who was held to have committed fundamental breach of contract by non-issue of structural drawings, which led to further delay on account of inundation of the site during the rainy season.

42. This finding of the learned Arbitrator is challenged by the petitioner, on the ground that the structural drawings were made available after 256 days, but the work could not be started in the following period apparently on account of rains, for which the petitioner cannot be held responsible.

43. It may be observed that the contract was for a period of 8 months and it was well within the knowledge of both the parties that the latter part of the Contract falls within the rainy season and the structural drawings ought to be supplied in time for structural work to be completed before the onset of rains and the structural work ought to be completed before the rains while the other completion work would not have been hampered by rains. Since the drawings were not supplied in time, the structural work could not be commenced during the rainy season leading to further delay. It has been rightly observed by the learned Arbitrator that the delay in providing the structural drawings *had a cascading effect* as the work could not be started on account of rains. Had the structural drawings had been provided in time, the work would not have been stalled from being commenced because of

the rainy season, which led to a further delay in commencement of work on account of rains leading to a delay of total period of 593 days, attributable solely to the petitioner.

44. The learned Arbitrator has given reasons why the delay on account of the rainy season though not the fault of the petitioner, but had to be attributed to him because his initial delay further prevented the commencement of work in time on account of the rains. *The learned Arbitrator has rightly attributed the delay of 593 days to the petitioner. There is no illegality in this finding and it does not merit any interference.*

Findings on Claim No 3: Price escalation on account of the prolongation of the Contract:

45. Having concluded that the Ld. Arbitrator has rightly attributed the delay of 593 days to the petitioner, the *Claim No. 3* has to be considered whereby the respondent has been allowed *price escalation on account of the prolongation of the contract.*

46. The moot question before the Ld. Arbitrator was to ascertain the principle for grant of the amount on account of prolongation of the Contract due to delay. The learned Arbitrator accepted the plea of the petitioner that Clause 10CC to determine the price escalation on account of prolongation of the Contract, was not applicable to the present Case as the tenure of the Project was less than 18 months. While acknowledging the non-applicability of *Clause 10CC,* reference was made to the Case of *Food Corporation of India,* (supra), wherein the Supreme Court had observed that *"Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the*

arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable allow escalation under the claim. Once it was found that the arbitration had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the corporation was liable for the consequences of the delay, namely increase in statutory wages. Therefore, the arbitrator, in our opinion had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the high court, rightly so in our opinion."

47. Reliance has also been placed on *K.N. Sathyapalam* (supra) wherein the Supreme Court considered the question of *grant of Claim on account of escalation of cost in the absence of a price escalation clause*. It was observed that *"Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and* ***Alopi Parshad case*** *and also* ***Patel Engg.*** *case."*

48. This principle was reiterated by the Apex Court in the Case of *T.P. George v. State of Kerala* (2001) 2 SCC 758.

49. The principles laid down in *K.N. Sathyapalan* (supra) were upheld by the three Judge Bench of the Supreme Court of India in the Case of *Assam State Electricity Board & Ors. vs. Buildworth Private Ltd.,* (2017) 8 SCC

146, wherein it was observed that *"even though price escalation Clause in the Agreement applied only to the specified period in the contract but it was held to be applicable to the extended period because the parties through their conduct permitted the belated performance of their reciprocal obligations - Price escalation in performing any contract is a normal incident in this age of inflation."*

50. After referring to the aforesaid judgments, the learned Arbitrator has concluded that though Clause 10CC was not applicable in the facts of the present case, but considering that the respondent/claimant was entitled to price escalation on account of delayed performance of the Agreement, the formula as provided in 10CC, can be adopted for ascertaining the price escalation to which the respondent/claimant could be held entitled.

51. It is quite evident that the learned Arbitrator has not held that Clause 10CC was applicable to the facts of the present case; rather it has been held that the Clause 10CC was not applicable. Only the formula given in Clause 10CC, was adopted by observing that "*since it is an established and widely accepted engineering method of working out the increase in the cost of work due to delay in completion of work, as has also been held in the case of K.N. Sathyapalan (supra) and also in the case of Food Corporation of India (supra) and A.M. Ahmed Company (supra)."*

52. It had been observed that though Clause 10CC may not be applicable but the *"assistance of this Clause, can be taken by the Tribunal, in working out the increase in the cost of work due to various unavoidable delay."* The learned Arbitrator, therefore, has rightly invoked the principle/method as contained in Clause 10CC for working out the price escalation due to delayed completion of the Project.

53. The learned Arbitrator had also referred to the Judgment of *M/s Nandsons Construction Company* (supra), wherein the Supreme Court relying upon the case of *State of Orissa* (supra), had held that *"in the absence of any escalation clause, an Arbitrator cannot assume any jurisdiction to award any amount toward escalation."* In this case, the part of the Award granting escalation charges, was held to be not sustainable as it suffered from the patent illegality.

54. This Judgment also observed that the fundamental principle of law is that in the absence of Escalation Clause, no escalation charges can be provided. The same principle has also been reiterated by the learned Arbitrator who also has not held that Clause 10CC was applicable or invoked Clause 10CC to grant the escalation cost, but has merely taken the guidance of this Clause 10CC, to objectively ascertain the quantum of compensation.. Therefore, this judgement also does not help the Petitioner in any manner.

55. Fundamentally, the finding of the learned Arbitrator is that because there was a delay of 593 days attributable to the respondent, they are liable to pay the escalation charges, which has been calculated on the basis of the Formula contained in Clause 10CC only as an objective method of calculation of the escalation charges.

56. **This finding on Claim 3 is in accordance with law and does not warrant any challenge.**

Findings on Claim No.5: on account of idling of resources.

57. The petitioner has also challenged the grant of *the sum of*

Rs.11,31,239/- in Claim No.5 on account of idling of resources, to the respondent.

58. The learned Arbitrator while referring to the delay of 593 days attributable to the respondent, also made a reference to the Letter of Extension dated 23.07.2013, wherein while seeking *Extension of Time,* the respondent had itself stated that it has not suffered any losses due to delay in work. However, the learned Arbitrator granted the amount of Rs. 11,31,239/-, while observing that when the penalty of Rs. 6,74,489/- has been levied by the petitioner, on the respondent on account of delay of 109 days, the petitioner is also liable to pay the compensation in the same ratio for being responsible for delay of 593 days. Consequently, the levy of compensation on the petitioner, has been calculated on the prevalent Engineering practices and in terms of the Agreement for calculating the *Contractors Profit (CP) and Overhead (OH).*

59. It has observed by the Ld. Arbitrator in paragraph 44 (ii) of the Award the date of calculation of the compensation as under: -

> *"44(ii). It is widely* ***accepted that also as per agreement that the element of overheads & contractor's profit (CP & OH) is 15% of the cost of the project. Out of 15%, 7.5% is the element of contractor's profit and 7.5%, the element of overhead expenses.*** *The work was awarded to the Claimant by the Respondent vide letter dated 25.02.2011 (Exh. R-1 of CSF) for an amount of Rs.23,75,942/- and 8 months period was given for completion of work. According to established* ***principles of engineering practice*** *7.5% of the tendered cost i.e. Rs.9,28,196/- was the element of OH (over heads) expenses which was included in the work. In other words, the Claimant would have spent Rs.9,28,196/- on overhead expenses if the work would have been completed by the Claimant in 8 months. According to Respondent itself there was a delay of 593 days (19.5 months) for which the Claimant was not*

responsible. ***Therefore, based on the above analogy the element of overhead (OH) expenses in 19.5 months period work out to Rs.22,62,478/- as (Rs.9,28,196/- X 19.5 divided by 8).*** *As the claimant was having few other works in the Campus therefor the overhead expenses will reduce. Considering this reduction in overhead cost I reduce the overhead expenses by 50%. Therefore, the net amount of damages suffered by the Claimant due to overhead expenses works out to Rs.11,31,239/-. I find that this amount of Rs.11,31,239/- is reasonable & justified and the Claimant deserves to be compensated for alleged damages at least up to this amount. I accordingly consider, decide & award Rs.11,31,239/- (Rs. Eleven lakhs thirty one thousand two hundred thirty nine only) in favour of Claimant against this claim."*

60. The law for grant of compensation is well settled that where a party is unable to fulfil its reciprocal obligations as per the Contract, the claimant is entitled to compensation due to damages/losses suffered as a consequence of breach in terms of Sections 73 and 74 of the Indian Contract Act, 1872.

61. In *McDermott International Inc. vs. Burn Standard Company Ltd. & Ors.,* (2006) 11 SCC 181, the Apex Court had observed that Sections 55 and 73 of the Indian Contract Act,1872 does not lay down the mode and manner as to how and in what manner, the computation of damages or compensation has to be made. As computation depends on circumstances and the methods to compute damage how the quantum, therefore, should be determined, is a matter which falls within the decision of the learned Arbitrator.

62. The Apex Court in the Case of *M/S Kailash Nath Associates v. DDA and Anr.* 2015 AIR SCW 759**,** held that *if the party has not suffered any losses even if the breaches have been committed by a party, such party cannot be awarded any compensation under Section 73 of the Indian Contract Act, 1872. The party claiming compensation, has to prove such loss or damages as suffered by him.* Until and unless, the damages or losses

have actually been suffered, the same cannot be awarded under Section 73 of the Act. A party cannot be penalised even though the other party has suffered no losses.

63. Coming to the facts of the present case, the respondent had claimed damages suffered by it because of idling of resources in the extended period. However, not only in his Letter of Extension dated 27.06.2013, has the respondent stated that no losses shall be incurred due to delay in work and would not seek any extra payments if the extension is granted, but it has also been noted by the learned Arbitrator that there were five other Works of the respondent which were on going on the same site at the given time. The respondent admittedly has not led any evidence whatsoever to show the losses that were suffered by it on account of idling of resources. In fact, the observation of the learned Arbitrator that there were other Projects of the respondent that were on going on the site further enures to the benefit of the petitioner in so much as the circumstances do not justify any inference that the losses on account of idling of machines, may have been suffered by the respondent.

64. It was the respondent who was claiming the compensation on account of idling of resources. The onus was also on the respondent to prove by some evidence about there being losses or extra charges suffered by the respondent, on this account because of prolongation of the Contract. In the case of *Govt. of NCT of Delhi v. DSC Limited* (2024 SCC OnLine Del 4147) it was observed in Para 47 of the said judgment that in order to seek compensation, it is required under Section 74 of the Contract Act to prove that there is loss suffered. It reads as under:

"47. In the end, it may be observed that the learned Arbitrator has

rightly observed that the question of quantification of liquidated damages would have arisen if it was established by the petitioner that they had suffered some losses as is the requirement under Section 55 and Section 74 of the Contract Act. There is not a whisper about any losses having been suffered by the petitioner during the intervening period of September 2010 till November 2011, which is a condition precedent for imposition of any liquidated damages."

65. In the present case, no evidence whatsoever has been produced by the respondent; rather its own Letter speaks to the contrary. When there is no evidence whatsoever led by the respondent of there being any loss, then it cannot be held entitled to any compensation in terms of Sections 73 and 74 of the Contract Act. Such has also been observed in the case of *M/S Kailash Nath Associates* (supra), which is relied in the case of *Edifice Developers Project Engineers Ltd. v. Essar Projects (India) Ltd. (2013) 2 AIR Bom R 244* and also referred to in the case of *Ajay Singh (Sunny Deol) v. Suneel Darshan,* 2015 SCC OnLine Bom 1412.

66. It is, therefore, held that the grant of compensation on account of idling of resources, is not only arbitrary but is also contrary to law and not based on any evidence and is perverse. It suffers from patent illegality and is, therefore, liable to be set-aside. The Apex Court in the case of *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI),* AIR OnLine 2019 SC 329 in its Para 41 held that *"a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality ...and therefore, would also have to be characterised as perverse."*

67. Hence, if any finding is given without any evidence, it is perverse and suffers from patent illegality. Therefore, the ***finding on Claim No.5 granting Compensation in the sum of Rs. 11,31,239 is held to be patently illegal and is hereby set aside.***

Claim No. 8 for usage of extra cement:

The petitioner has challenged the *Claim No. 8,* wherein the respondent/claimant had made a Claim for *extra cement* consumed in the Project as recommended in Design Mix over and above the minimum requirement in the sum of Rs. 3,61,121/-. It is asserted that Clause 8.1 of the conditions of Contract, clearly stated that *in the case of discrepancy between the schedule of Quantities, the Specifications and/or the Drawings, the following order of preference shall be observed: -*

"i). Description of Schedule of Quantities.

ii). Particular Specifications and Special Conditions, if any.

iii). Drawings.

iv). CPWD Specifications.

v). Indian Standard Specifications of B.I.S."

68. As per the terms of Contract, the cement content was to be used in RCC Grade M-25 was 380 kgs, as per the Schedule of Quantities Item No. 3.4, however, Design Mix provided for consuming 450 kgs of cement per cum of RCC. The petitioner had asserted that in view of Clause 8.1 of conditions of Contract, even though 450 kgs of cement per cum of RCC, was used by the respondent but by virtue of Clause 8.1, it was entitled to payment only @380 kgs of cement as minimum content.

69. The Ld. Arbitrator observed as under: -

"55.0 (ii) According to the agreement when there is a

contradiction in the two clauses of the agreement then in that case the issue is required to be decided according to order of preference given in para 8.1 of conditions of contract contained in General Condition of Contract for Central PWD Works on page 10 (Printed book) where it is specified that in the case of discrepancy between the schedule of quantities, the specifications &/or drawings the following order of preference shall be observed:-

i). Description of Schedule of Quantities.

ii). Particular Specifications and Special Conditions, if any.

iii). Drawings.

iv). CPWD Specifications.

v). Indian Standard Specifications of B.I.S.

From the above para it is evident that nomenclature of item no. 3.4 of Bill of quantities will prevail over the clause 8.3 (iii) of the 'Additional Condition for RCC Work'. Therefore as per this clarification the Claimant is entitled to get the payment of extra cement consumed in M-25 mix of RCC. According to item no. 3.4 of Bill of quantities 380 kg of cement per cum of RCC was to be considered while quoting the rate of RCC but as per Job Mix Formula 450 kg of cement per cum of RCC has actually been consumed. This is the admitted position of the Respondent also that in M-25 grade of concrete the cement content @450 kg/per cum of concrete has been actually used in the work. Therefore the Claimant is entitled to get the payment of the cost of extra cement i.e. 70 kg (450 kg – 380 kg) consumed in excess in M-25 grade RCC as compared to the quantity specified in agreement item no. 3.4 of Bill of quantities. The Claimant has provided the details in Annexure 8 (pages 97, 98 & 99) attached with the Statement of Facts (SoF). According to Annexure 8 (pages 97, 98 & 99) attached with Statement of Facts (SoF) total quantity of RCC (M-25 grade) used in the work is 537.2 cum (281.81 cum in foundations and 255.39 in super structure) Rs.4,950/- per M.T. Is the recovery rate of cement (PPC) specified in schedule 'F' in the table made for recovery Rates for the quantities beyond permissible variation."

70. The learned Arbitrator further observed that according to the Agreement between the parties, when there was a contradiction in the two Clauses of the Agreement, then the issue was required to be decided according to the order of preference given in Paragraph 8.1 of Conditions of Contract contained in General Conditions of Contract for Central PWD Works. It was concluded that the nomenclature of Item No. 3.4 of Bill of quantities, shall prevail over Clause 8.3(3) of the additional condition for RCC Work. *Therefore, the respondent was held entitled to payment of extra cement consumed in M-25 mix of RCC. It was the cost of excess cement and was assessed at Rs.1,86,140/- in favour of the claimant.*

71. From the aforesaid discussion, it is held that the findings given by the learned Arbitrator for grant of the Claim for excess cement consumed in the Project, is based on logic and reason. The findings do not suffer from any patent illegality and do not call for any interference.

Claim No. 11: for grant of pendente lite and future interest.

72. The petitioner has also challenged the *Claim No. 11* whereby pendente lite interest @ 9% p.a. and simple interest @11% p.a. from the date of award till the date of payment, has been awarded. The petitioner has contended that the interest imposed is exorbitant.

73. The pendente lite and future interest as granted to the respondent on the Award amount is in fact, much less than the interest rate on the Commercial transaction. There is no basis for asserting that the interest rate is exorbitant. *This contention of the petitioner to challenge Claim No. 11 is hereby rejected as not tenable*.

Partial Setting aside of the Award/ Claim:

74. The conundrum which now arises is whether there can be partial

setting aside of the Award or would it amount to modification of Award and has to be necessarily set aside in toto leaving the parties for a fresh round of arbitration, if so advised.

75. The said question had been engaging attention of the Courts and divergent views have been taken by the Courts. The question came up for consideration before Full Bench of Bombay High Court in the case of *R.S. Jiwani (M/S.) v. Ircon International Ltd.*, 2009 SCC OnLine Bom 2021 wherein some claims were allowed while some were rejected. The Bench observed as under:

> *"36 ...Could there be a greater perversity of justice to a party which has succeeded before the Arbitral Tribunal as well as in the court of law but still does not get a relief. Is that what is contemplated and was the purpose of introduction of the Act of 1996. An Act which was to provide expeditious effective resolution of disputes free of court interference would merely become ineffective statute. Would not the canon of civil jurisprudence with the very object of the Arbitration Act, 1996 stand undermined by such an approach. The effective and expeditious disposal by recourse to the provisions of the 1996 Act would stand completely frustrated if submissions of the respondent are accepted. Partial challenge to an award is permissible then why not partial setting aside of an award.* ***In a given case, a party may be satisfied with major part of the award but is still entitled to challenge a limited part of the award. It is obligatory on the court to deal with such a petition under section 34(1)(2) of the Act.*** *We may further take an example where the Arbitral Tribunal has allowed more than one claim in favour of the claimant and one of such claim is barred by time while all others are within time and can be lawfully allowed in favour of the claimant.* ***The court while examining the challenge to the award could easily severe the time barred claim which is hit by law of limitation. To say that it is mandatory for the court without***

exception to set aside an award as a whole and to restart the arbitral proceeding all over again would be unjust, unfair, inequitable and would not in any way meet the ends of justice."

76. It was further observed that such an interpretation that the Award has to be set aside in its entirety is bound to cause greater hardship, inconvenience and even injustice to some extent to the parties. To compel the parties, particularly a party who had succeeded to undergo the arbitral process all over again does not appear to be in conformity with the scheme of the Act. The provisions of Section 34 are quite *pari materia* to the provisions of Article 34 of the Model Law except that the proviso and explanation have been added to Section 34(2)(iv). The attempt under the Model Law and the Indian Law appears to circumscribe the jurisdiction of the court to set aside an award. There is nothing in the provisions of the Act and for that matter absolutely nothing in the Model Law which can debar the court from applying the principle of severability provided it is otherwise called for in the facts and circumstances of the case and in accordance with law. The courts will not get into the merits of the dispute. Thus, the interpretation which should be accepted by the court should be the one which will tilt in favour of the Model Laws, scheme of the Act and the objects sought to be achieved by the Act of 1996.

77. In the case of *R.S. Jiwani* (supra), it was held that it is difficult to prescribe legal panacea which, with regard to the applicability of the principle of severability, can be applied uniformly to all cases. The judicial discretion vested in the court in terms of the provisions of Section 34 of the A&C Act, 1996 was held to take within its ambit, power to set aside an award partly or wholly depending on the facts and circumstances of the

given case and it was held that the same is not intended to be whittled down or to divest the court of competent jurisdiction to apply the principle of severability to the award of the Arbitral Tribunal, legality of which is questioned before the court. Moreso, the proviso to Section 34(2)(a)(iv) has to be read *ejusdem generis* to the main Section, as in cases falling in that category, there would be an absolute duty on the court to invoke the principle of severability where the matter submitted to arbitration can clearly be separated from the matters not referred to arbitration and decision thereupon by the Arbitral Tribunal.

78. In the case of *R.S. Jiwani (M/S.)* (supra) a reference was made to the decision of the Apex Court of India in the case of *NHAI v. M. Hakeem*, (2021) 9 SCC 1 wherein it was observed that *"Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."*

79. However, in *R.S. Jiwani (M/S.)* (supra) it was observed that the observations were in regard to modification and not to the partial setting aside of the Award. It was thus, concluded that the Court while exercising power under Section 34 of the A&C Act, 1996, can set aside an Award partly, depending upon the facts and circumstances of the case.

80. In this context, reference was made to the judgment of the Supreme Court in the case of *J.G. Engineers Pvt. Ltd. v. Union of India*, (2011) 5 SCC 758, wherein the doctrine of severability was invoked and it was held that when the Award deals with several claims that can be said to be separate and distinct, the Court can segregate the Award on items that do not suffer from any infirmity and uphold the Award to that extent.

81. The Bombay High Court in the recent judgment of *National Highway Authority of India v. The Additional Commissioner, Nagpur,* 2022 SCC OnLine Bom 1688 noted the aspect of grave inconvenience highlighted in the aforesaid Full Bench judgment of Bombay High Court in the case of *R.S. Jiwani (M/S.)* (supra) and observed that if parties are required to go for arbitration afresh in its entirety on every occasion, even when the arbitral award is only partly set aside, that the arbitral award is found liable to be set aside on some issues, it would lead to multiple rounds of litigation, going against the very purpose of alternative dispute redressal mechanisms like arbitration. The claimants would be forced to pursue numerous rounds of proceedings before the arbitrator and Courts, which cannot be countenanced, thereby indicating that the contention raised in this regard on behalf of the appellants is unsustainable. *Thus, following the principle of severability of claims it was held that the Award may be set aside partially.*

82. It is evident from the *Claims 3, 5, 8 and 11 under challenge*, that they were all independent of each other and such part of the Award in respect of Claim No. 5 which is independent, is liable to be set aside.

Conclusion:

83. The Petition under Section 34 Arbitration & Conciliation Act, 1996 is therefore, partly allowed and the Award to the extent of *Claim No. 5 in*

regard to the grant of compensation in the sum of Rs.11,31,239/-, on account of idling of resources, is hereby set aside.

84. *The Petition under Section 34 is partly allowed.*

(NEENA BANSAL KRISHNA)
JUDGE

JUNE 28, 2024
***S.Sharma*/RS**