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

Reserved on: 18th May, 2026
Pronounced on: 28th September, 2026

\+ O.M.P. (COMM) 182/2019

M/S. DWARIKA PROJECTS LTD. .....Petitioner

Through: Mr. Abhishek Mohanty and Mr. Ansh Kajauria, Advocates
Mob: 8171785552

versus

NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY .....Respondent

Through: Mr. Sourav Roy, Mr. Anshu Deshpande, Mr. Hemant Gupta, Advocates
Mob: 6201512750

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

MINI PUSHKARNA, J.

INTRODUCTION

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 **("Arbitration Act")**, seeking partial setting aside of the Arbitral Award dated 10th December, 2018 **("Award")**, passed by the Sole Arbitrator in the arbitral proceedings, bearing *Arbitration Case No. 14/2017*, titled as *M/s. Dwarika Projects Ltd. Versus New Okhla Industrial Development Authority and Anr*.

2. By way of the impugned Award dated 10th December, 2018, the Sole

Arbitrator, held the petitioner entitled to Claim no. 1 for Rs. 75,11,727/- as well as Claim no. 3 for Rs. 18,93,296/-. Claim no. 2 was also partly allowed in favour of the petitioner for Rs. 8,90,033/-, thereby, bringing the total amount awarded in favour of the petitioner to Rs. 1,02,95,056/-. The respondent was held entitled to deduct the taxes paid or payable by it on Claim no. 1, after giving proof of the same to the petitioner.

3. The petitioner has been further held to be entitled to pre-arbitration interest from 16th May, 2012, to 21st August, 2017, and interest during the arbitral proceedings up to 10th December, 2018, both at the interest rate of 12% compounded annually. Further, the petitioner has also been held entitled to interest under Section 31(7)(b) of the Arbitration Act at 2% higher than the current rate of interest prevalent on the date of the Award up to the date of payment. The petitioner has also been awarded Rs. 12,36,025/- as costs of arbitral proceedings.

4. Claim nos. 4 to 10, as raised by the petitioner, were rejected.

FACTUAL BACKGROUND

5. The facts relevant for adjudication of the present petition, as culled out from the impugned Award and the pleadings on record, are as under:

5.1 The petitioner, i.e., M/s. Dwarika Projects Ltd., is a company incorporated under the Companies Act, 2013, and is engaged, *inter alia*, in the business of construction of roads and bridges. The respondent, i.e., New Okhla Industrial Development Authority, is a statutory authority responsible for the development and planning of Noida, Uttar Pradesh.

5.2 The respondent floated a tender for *"Construction of Bridge No. 2 on Irrigation Drain between Sector-78 & 49, Noida"*, in respect of which the petitioner made a bid, thereby, offering rates 18.80% below the quoted rate.

5.3 The respondent awarded the tender to the petitioner and issued a Letter of Acceptance dated 27th November, 2009, for works amounting to Rs. 18,09,47,233.04/-.

5.4 Thereafter, a Contract Agreement dated 07th December, 2009, was executed between the parties for *"Construction of Bridge No. 2 on Irrigation Drain between Sector-78 & 49, Noida"* **("Contract")**.

5.5 The construction work was to be completed within a period of twelve (12) months, i.e., by 06th December, 2010, but was completed considerably beyond the said date, with each party attributing the delay to the other.

5.6 Disputes having arisen between the parties in relation to the delayed completion of the work and non-payment of the final bill bearing no. 18 dated 18th August, 2017 **("Final Bill")**, the petitioner sought arbitration under Clause 34 of the General Conditions of Contract **("GCC")**.

5.7 As the respondent failed to act upon the petitioner's request for appointment of an Arbitrator, the petitioner approached the High Court of Judicature at Allahabad by way of *Arbitration and Conciliation Application No. 108/2015*.

5.8 The said High Court, *vide* order dated 21st August, 2017, sought consent of the proposed Sole Arbitrator, and having received the same, allowed the petitioner's application on 18th September, 2017.

5.9 Before the Sole Arbitrator, the petitioner filed a Statement of Claim dated 25th October, 2017, seeking twelve (12) claims, whereas, the respondent filed a Reply dated 23rd December, 2017, seeking three (3) counter-claims.

5.10 *Vide* order dated 25th September, 2017, the learned Arbitrator recorded that the place of arbitration shall be at New Delhi as agreed between the parties, and informed by learned counsels for the parties.

5.11 The learned Arbitrator framed sixteen (16) issues *vide* order dated 10th February, 2018, which read as under:

> *"xxx xxx xxx*
>
> *1. Whether the Statement of Claim has been signed, verified and filed by the duly authorized representative of the claimant Company?*
>
> *2. Whether the claims of the claimant are barred by limitation as stated in para 5 of the reply of the respondent?*
>
> *3. Whether the claimant is entitled to the claim no. 1, as claimed in the Statement of Claim towards the works executed under the Bill of quantities under the Final Bill/Bill No. 18?*
>
> *4. Whether the claimant is entitled to claim no. 2, as claimed in the Statement of Claim towards the alleged withheld amounts in RA Bills?*
>
> *5. Whether the claimant is entitled to claim no. 3, as claimed in the Statement of Claim towards alleged withheld payment in RA Bill No.17?*
>
> *6. Whether the claimant is entitled to claim no. 4 as claimed in the Statement of Claim towards price variation?*
>
> *7. Whether the claimant is entitled to claim no. 5 as claimed in the Statement of Claim towards overlaps and wastages?*
>
> *8. Whether the claimant is entitled to claim no. 6 as claimed in the Statement of Claim towards claims for crash barrier?*
>
> *9. Whether the claimant is entitled to claim no. 7 as claimed in the Statement of Claim towards steel of SAIL make?*
>
> *10. Whether the claimant is entitled to claim no. 8 as claimed in the Statement of Claim towards filling 40000 soil bags for strengthening banks of the irrigation drain?*
>
> *11. Whether the claimant is entitled to claim no. 9 as claimed in the Statement of Claim towards loss of profit on account of delay?*

12. Whether the claimant is entitled to claim no. 10 as claimed in the Statement of Claim towards head office and site overheads during period of delay?

13. Whether the respondent is entitled to the counter claim of loss due to prolongation of the contract as claimed in their counter claim no. 1?

14. Whether the claimant and respondent are entitled to interest on their claims and counter claims, if they are awarded, and at what rates and for what period?

15. Whether the claimant or the respondents, or both are entitled to the costs of the arbitration proceedings?

16. Any other relief to which the parties are entitled?

xxx xxx xxx "

5.12 *Vide* Award dated 10th December, 2018, the learned Arbitrator held the petitioner entitled to Claim nos. 1 and 3, and partly allowed Claim no. 2, while Claims nos. 4 to 10 were rejected. The counter-claims raised by respondent, were rejected.

5.13 Aggrieved by the impugned Award, the petitioner has filed the present petition under Section 34 of the Arbitration Act, seeking setting aside of the findings of the learned Arbitrator *qua* the rejection of Claim nos. 4, 7, 9, and 10, as well as the partial rejection of Claim no. 2.

PROCEEDINGS BEFORE THIS COURT

6. During the course of arguments, and as recorded in the order dated 28th April, 2026, passed by this Court, the petitioner has confined its challenge only to findings of the learned Arbitrator in respect of price variation, i.e., Claim no. 4.

7. The petitioner has further stated before this Court that its submissions regarding the delay caused by the use of SAIL steel, and the delays in the

removal of electric poles and passing of bills, have been made only in relation to the issue of price variation. The petitioner contended that since there were delays, on account of which the Contract was extended, it was entitled to price variation for the extended Contract period, as well.

8. By way of order dated 08th May, 2026, this Court noted the submission of the petitioner that since the petitioner was claiming price variation for the extended Contract period, the issue before this Court would be with regards to the applicable price index.

9. Accordingly, the scope of the present petition is only limited to rejection of the petitioner's Claim no. 4 towards price variation, under which the petitioner claimed Rs. 2,29,43,350/- along with interest at 14% per annum amounting to Rs. 4,31,80,382/-, in respect of two periods, namely, the period from 07th December, 2009, to 06th December, 2010 **("original Contract period")**, and thereafter, the period from 07th December, 2010, to 30th April, 2012 **("extended Contract period")**.

<u>SUBMISSIONS OF THE PETITIONER</u>

10. Before this Court, the petitioner has raised the following contentions for setting aside the findings of the learned Arbitrator in respect of Claim no. 4:

10.1 The findings of the learned Arbitrator suffer from patent illegality, being contrary to the express terms of the Contract and ignoring material evidence under Section 34(2)(b)(ii) read with Section 28(3) of the Arbitration Act.

10.2 The challenge to the impugned Award falls within the ambit of Section 34(2-A) of the Arbitration Act, on the ground that the Award is illegal, defies all logic and is perverse.

10.3 The Contract was not a fixed-rate contract, but one that expressly contemplated price variation under Clause 50 of the Special Conditions of Contract **("SCC")**. The learned Arbitrator erred in ignoring the expression *"barring adjustment (which may be plus or minus) to be made as provided for herein"*, forming part of Clause 50.1 of the SCC.

10.4 The rates quoted in the Bill of Quantities **("BOQ")** were arrived at as on the date of the tender, and did not take into account the margin of fluctuation in prices that could occur during the currency of work. In support of this contention, the petitioner relies upon the following provisions of the Contract:

a. Clause 50.2(i) of the SCC, which provides that payment as per the Contract shall be subject to adjustment in accordance with the price variation formula to provide for variation in the market rates of inputs like labour, materials and fuel/energy during the currency of the Contract.

b. Clause 3.1.1(c) of the Notice Inviting Tender **("NIT")**, which provides that the Contract price quoted by the tenderer, i.e., the petitioner, is subject to adjustment during the performance of the Contract in accordance with the respective Clauses of the SCC;

c. Clause 3.1.2 of the NIT, which provides that the prices and measurements referred to, will be based on actual measurements, and as per items specifically mentioned in the Priced BOQ, as well as price variation in terms of the respective Clauses of the SCC;

d. Clause 10.2 of the Instructions to Tenderers, which provides that prices quoted by the tenderer shall be subject to adjustment during the performance of the Contract, to reflect variation in the cost of labour, material components, plant, and other general variations, in accordance with the procedure specified in the SCC. It further provided that the price adjustment provision will not be taken into consideration in tender evaluation.

10.5 On the basis of the aforesaid provisions, the petitioner contends that the prices quoted in the BOQ were subject to adjustment made in accordance with the price variation formula in terms of Clause 50 of the SCC, and thus, the petitioner was entitled to price variation for the original Contract period.

10.6 Without prejudice to its contention that the delay had been occasioned by the respondent, the petitioner has claimed that price variation would be available for the extended Contract period as well, even where the delay is attributable to the petitioner. In this regard, the petitioner has placed reliance on Clause 51, read with Clause 7 of the SCC, which makes price variation payable in each of the four situations in which extension may be granted, as provided under Clauses 7.2, 7.3, 7.4 and 7.5 of the SCC, the only distinction being in the applicable price index.

10.7 Where extension is granted under Clause 7.5 of the SCC, on account of delay attributable to the contractor, price variation is still payable. However, under Clause 51.2 of the SCC, where the indices rise, the price adjustment is limited to the amount payable as per the indices applicable to a bill made on the last date of the original completion period, or the extended period under Clauses 7.2, 7.3 or 7.4, and under Clause 51.3 of the SCC, where the indices fall below those applicable on such date, the lower indices are to be adopted.

10.8 Thus, the petitioner has submitted that Clause 51 of the SCC does not exclude price variation merely because the extension is granted under Clause 7.5 of the SCC. In holding otherwise, the learned Arbitrator has created a new contract between the parties.

10.9 On the finding that the amount of price variation was claimed on a presumptive basis, the petitioner has contended that price variation under Clause 50 of the SCC is required to be computed by applying the stipulated formula to the indices published by the Reserve Bank of India, and not on the basis of actual bills and invoices. The petitioner's entitlement is, therefore, confined to the amount as per the price variation formula, irrespective of the actual escalation in costs suffered by it. Accordingly, the finding that the claim was merely presumptive is stated to be misconceived.

10.10 Further, the petitioner has submitted that the parties herein had entered into another agreement dated 07th December, 2009, for *"Project No. 6 on Irrigation Drain between Sector 136 and 142, Noida"*. The said agreement was contemporaneous with the present Contract, having been executed between the same parties on the same date, and also contained identical price escalation provisions.

10.11 In the arbitration proceedings arising out of disputes under the aforesaid agreement, the respondent herein had taken an identical plea that since the delay in completion of the project was attributable to the petitioner herein, the petitioner was not entitled to the benefit of the price escalation clauses. The said argument was, however, rejected by the Sole Arbitrator *vide* Arbitral Award dated 28th December, 2017, wherein, it was held that the petitioner was entitled to the benefit of the price variation formula, which provided for variation in market rate of inputs such as labour, material, fuel etc.

10.12 The petitioner has contended that Courts exercising jurisdiction under Section 34 of the Arbitration Act, in similar cases as aforesaid where different interpretations have been accorded to the same contractual clause in distinct arbitral awards, have held that the clause in question ought to be interpreted in a uniform manner. Consequently, the price variation clause in the present Contract ought to be interpreted by this Court in a manner that is consistent with the view adopted in the previous Award.

SUBMISSIONS OF THE RESPONDENT

11. Rebutting the contentions of the petitioner, the respondent has raised the following arguments before this Court:

11.1 At the outset, the respondent has argued that under Section 34 of the Arbitration Act, this Court cannot reassess and reappreciate the evidence considered by the learned Arbitrator, nor sit in appeal over the findings of the Arbitrator.

11.2 As regards the original Contract period, the respondent has placed reliance on Clause 50.1 of the SCC to state that the rates as per the BOQ were to hold good till completion of the work, and no additional claim was admissible on account of fluctuation in market rates. Further, the prospective bidders were cautioned in advance that the rates quoted would hold good for the entire period of the Contract at the stage of invitation of bids itself.

11.3 In any event, the respondent has claimed that price variation could be granted only through the procedure prescribed by Clause 50.3 of the SCC, which required the Engineer to certify the adjustment amount, upon verification of the bill. Absent such certification, no amount was payable to the petitioner.

11.4 The respondent has further submitted that the indices adopted by the petitioner are not those contemplated by Clause 50 of the SCC, being neither the indices published by the Reserve Bank of India, nor those applicable to the Delhi area for the period of the work under consideration. The petitioner has also erroneously calculated the index as an average for the period of works.

11.5 As regards the extended Contract period, the respondent has contended that a conjoint reading of Clauses 7.4, 7.5, 7.6 and 51 of the SCC reflects that the only remedy with the petitioner on account of delay was to seek an extension, and that no price variation could be claimed by the petitioner on account of delay attributable to the petitioner.

11.6 Clause 7.1(ii) of the SCC requires that an application for extension of the Contract period shall reach the Engineer at least 30 days before the stipulated or extended date of completion, and provides that where the contractor fails to apply, or fails to apply in time, the Engineer shall be justified in holding that any subsequent delay is due only to the contractor's failure or fault. It is the case of the respondent that no extension was sought by the petitioner in terms of the said Clause, and that the delay in completion of the Contract is, therefore, solely attributable to the petitioner.

11.7 Moreover, since the extension was granted to the petitioner under Clause 7.5 of the SCC, the petitioner, under Clause 51.2 of the SCC, was required to only consider the indices prevalent on the last date of the original completion period, and not the last date of the actual completion of work. The petitioner has, however, considered the indices beyond the said date while calculating the price variation for the extended Contract period.

11.8 It is, thus, submitted that the learned Arbitrator's view with respect to price variation is a plausible view, particularly in light of various judgments wherein the Supreme Court has declined to award compensation arising out of delay.

ANALYSIS AND FINDINGS

12. This Court has heard the learned counsels for the parties, and has perused the documents on record.

Scope of Interference under Section 34 of the Arbitration Act

13. Before delving into the contentions of the parties with regard to the impugned Award, it is apposite to set out the scope of interference provided under Section 34 of the Arbitration Act. It is well settled that a Court exercising jurisdiction under Section 34 of the Arbitration Act does not sit in appeal over the findings in the Arbitral Award.

14. Further, Section 34 of the Arbitration Act is circumscribed and does not extend to reappreciation of the evidence placed before the Arbitrator, or to substitution of the Court's own view for that of the Arbitrator merely because another interpretation of the contract in question is possible, or even preferable.

15. However, this Court can interfere with an Arbitral Award under Section 34 of the Arbitration Act, when the Arbitral Award is vitiated by patent illegality, including, where the Arbitrator has failed to act in accordance with the terms of the contract, has ignored its specific provisions, or has taken a view that is not a plausible one.

16. In this regard, reliance is placed upon the decision in ***OPG Power Generation Private Limited Versus Enexio Power Cooling Solutions India Private Limited and Another, (2025) 2 SCC 417***, wherein, the Supreme Court held that if the conclusion of the Arbitrator is based on a possible view of the matter, the Court should not interfere, however, where, on a full

reading of the contract, the view of the Arbitrator on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference. The relevant paragraph of the judgment reads as under:

> *"xxx xxx xxx*
>
> ***84.*** *An Arbitral Tribunal must decide in accordance with the terms of the contract. In a case where an Arbitral Tribunal passes an award against the terms of the contract, the award would be patently illegal.* ***However, an Arbitral Tribunal has jurisdiction to interpret a contract having regard to terms and conditions of the contract, conduct of the parties including correspondences exchanged, circumstances of the case and pleadings of the parties. If the conclusion of the arbitrator is based on a possible view of the matter, the Court should not interfere*** *[See : SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16; Pure Helium India (P) Ltd. v. ONGC, (2003) 8 SCC 593; McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181; MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163 : (2019) 2 SCC (Civ) 293].* ***But where, on a full reading of the contract, the view of the Arbitral Tribunal on the terms of a contract is not a possible view, the award would be considered perverse and as such amenable to interference*** *[South East Asia Marine Engg. & Constructions Ltd. v. Oil India Ltd., (2020) 5 SCC 164 : (2020) 3 SCC (Civ) 1].*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

17. Further, in ***Dheeraj Rastogi Versus Dnata International Private Limited, 2024 SCC OnLine Del 545***, this Court held that an award is liable to be interdicted only if the deficiencies pointed out in the challenge go to the root of matter, and not merely because an alternative view on facts and interpretation of contract exists. The relevant excerpts of the judgment are as follows:

"xxx xxx xxx

13. *These factual determinations are based entirely upon assessment of the evidence placed by the parties before the learned arbitrator and his interpretation of the contractual clauses, particularly Clause O(3).* ***Interference with such interpretation and findings under Section 34 of the Act is permissible, only if found to be perverse in the sense that no reasonable Arbitral Tribunal could have come to the same conclusion*** *[Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 and McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181.] . On both counts, I do not find any such deficiency in the approach of the learned arbitrator so as to cross this high threshold.*

14. *Mr Chaudhary raises alleged factual discrepancies in the analysis of the learned arbitrator relating to quantum of the alleged fraud [Para 49 of the award.] , dates of the inquiry by the Registrar of Companies and the observation, that the FIR had not been pursued further [Para 32 of the award.] . However, I am of the view that the award is not liable to be overturned on this basis.* ***The approach of the court, while scrutinising an arbitral award, is one of caution and circumspection. An award is liable to be interdicted only if the deficiencies pointed out in the challenge go to the root of the matter. The aforesaid approach has been summed up in the judgment of the Supreme Court in Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1] in the following terms: (SCC p. 12, paras 24 and 25)***

> *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner,* ***unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award.*** *Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction.* ***The mandate under Section 34 is to respect the finality of the***

*<u>**arbitral award and the party autonomy**</u> to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.*

*25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. <u>**The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.**</u>"*

xxx xxx xxx"

(Emphasis Supplied)

18. In ***Ssangyong Engineering and Construction Company Limited Versus National Highways Authority of India (NHAI), (2019) 15 SCC 131***, the Supreme Court held that the ground of patent illegality also comprehends perversity, that is, a finding based on no evidence at all, or an award which ignores vital evidence in arriving at its decision, in the following manner:

"xxx xxx xxx

40. *The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , namely, that the <u>**construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).**</u>*

41. ***<u>What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, 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. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.</u>***

xxx xxx xxx

69. *We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal.*

xxx xxx xxx"

(Emphasis Supplied)

19. Accordingly, the issue for determination in the present petition is

whether the impugned Award goes beyond the terms of the contract, as agreed between the parties, in respect of Claim no. 4.

Findings of the Arbitrator

20. This Courts notes that the learned Arbitrator rejected the petitioner's claim for price variation for both the original Contract period and the extended Contract period.

21. As regards the original Contract period, the learned Arbitrator held that the rates in terms of the accepted BOQ were to hold good till completion of the works, and that consequently, price variation under Clause 50.1 of the SCC was inapplicable during the original Contract period, and therefore, no additional claim could be raised.

22. As regards the extended Contract period, the learned Arbitrator held that since extensions had been granted under Clause 7.5 of the SCC on account of the defaults by the petitioner, in public interest and upon imposition of penalty, the petitioner could not be permitted to take advantage of its own fault.

23. The learned Arbitrator further held that the petitioner had incurred no extra expenses, and had made no attempt to prove the same by bills, invoices or muster rolls of labour, with the result that price variation stood claimed on a presumptive basis.

24. The aforesaid findings of the learned Arbitrator in respect of the original Contract period and the extended Contract period are considered separately hereinafter.

Entitlement to Price Variation for the Original Contract Period

25. The learned Arbitrator held that the petitioner was not entitled to price variation for the original Contract period in the following terms:

"xxx xxx xxx

<u>The Arbitral Tribunal finds that under the Clause 50.0 (sic) of the Contract, rates of bill of quantities were to hold good till the completion of the work. The price variation of the BOQ, during the period up to which the work had to be completed under the Contract would not entitle the Contractor to claim any variation in prices of BOQ.</u> *The extensions on the delay which are not on account of the Employer will also not entitle the Claimant any claim towards variation in prices. It is only where the Contractor is not at fault for delay in execution of the project, such as the delay in handing over the site, or the delay in providing the drawings within time, or stoppage of work or direction of any additional work by the employer or the like, may attract a claim towards price variation. In the present case the Claimant had itself applied for extension of time and has not given any reasons except the removal of electricity poles from Sector 49 side of the site and the timely instructions for use of steel of SAIL only for delay. These reasons cannot be accepted as justiciable reasons to consider and allow the variation in prices of material.*

<u>In the present case there is a provision in Clause 50.0 of the Contract for variation of prices. Price variation is however subject to a condition in Clause 50.1 which provides that the rates as per the accepted BOQ shall hold good till the completion of the Works, and no additional claim or amount shall be admissible on account of fluctuation in market rates, increase in any taxes, levies, fees, royalties etc. barring adjustment (which may be plus or minus) to be made provided in the price variation formula. Clause 50.2, provides for adjustment on account of price variation in Clause 50.3.1.</u> *The adjustments on account of price variations may be positive (in which extra amount shall be paid to the Contractor) or negative (in which it shall be recovered from the Contractor). The adjustment on account of price variation shall be calculated separately, for each period between two successive dates of measurements of bills and paid along with each bill which is to be certified by the Engineer. Clauses 50.4 to 50.6 provides for procedure in case of revision of the Base Year for indices, procedure in case of delay in availability of final RBI indices and price variation on items not in the Bill of Quantities…*

xxx xxx xxx

<u>The price variation is claimed for the bond period from 07.12.2009 to 06.12.2010, and thereafter 08.12.2010 to 30.04.2012 when the work was completed. The Claimant is not entitled to any variation in the bond period from 07.12.2009 to 06.12.2010 in as much as under the contract no price variation under Clause 50.1 is applicable on the rates as per the accepted bill of quantities which has to hold good till the completion of the works and for which no additional claim can be raised…</u>

xxx xxx xxx"

(Emphasis Supplied)

26. The relevant Clause referred to by the learned Arbitrator, namely, Clause 50 of the SCC, is reproduced as under:

"xxx xxx xxx

50.0 PRICE VARIATION

50.1 Accepted rate applicable till the completion of work

The rates as per the accepted Bill of Quantities, shall hold good till the completion of the Works, and no additional claim or amount shall be admissible on account of fluctuation in market rates, increase in any taxes, levies, fees royalties, etc., barring adjustment (which may be plus or minus) to be made as provided for herein.

50.2 Price variation formula

i. The payment as per the Contract shall be subject to adjustment in accordance with the following Price Variation Formula, and other terms given herein, to provide for variation in the market rates of inputs like labour, materials and fuel / snergy during the currency of the Contract:

ii. To the extent that full compensation for any rise or fall in costs to the Contractor is not covered by the Price variation formula, the rates in the accepted Bill of Quantities shall be deemed to include amounts to cover the contingency of such rise or fall of costs.

$$V = Vl + Vs + Vc + V_b + Vf + Vm$$

Where,

V	=	Total adjustment on account of all factors
Vl	=	Adjustment on account of labour component p x R x (I - Io) / Io
Vs	=	Adjustment on account of Steel component q x R x (Ws - Wso) / Wso
Vc	=	Adjustment on account of Cement component
	=	r x R x (We - Wco) A/Vco
Vb	=	Adjustment on account of Bitumen component sxRx(Wb-Wbo)/Wbo
.Vf	=	Adjustment on account of Fuel/Lubricant component txRx(Wf-Wfo)/Wfo
Vm	=	Adjustment on account of Machinery and Machine Tools
	=	u x R x (Wm - Wmo) A/Vmo
p	=	Cost Coefficient of Labour to the Total Cost.0.22
q	=	Cost Coefficient of Steel to the Total Cost 0.25
r	=	Ost Coefficient of Cement to tha Total Cost 0.15
s	=	Cost Coefficient of Bitumen to the Total Cost 0.05
t	=	Cost Coefficient of Fuel and Lubricant to the Total Cost 0.05
u	=	Cost Coefficient of other Machinery and Machine Tools to the Total Cost 0.13
Note:		p+q + r + s + t+u = 0.85, balance 0.15 shall be fixed component

R	=	Gross value of the work done by the Contractor for the period of work under consideration, after excluding therefrom the cost of any materials supplied free or at fixed rate to the Contractor as also any specific payments to be made to the Consultants engaged by the Contractor, which shall be indicated in the Contractor's offer letter.
Io	=	Consumer Price Index for Industrial workers, published in the Reserve Bank of India (RBI) Bulletin, as applicable to Delhi area for the month in which the tender was opened.
I	=	Average of monthly Consumer Price Index for Industrial workers published in the Reserve Bank of India Bulletins as applicable to Delhi area for the period of work under consideration.

Wso	=	Whole Sale Price index for Iron & Steel items as published in the RBI "Bulletin", for the month in which the tender was opened.
Ws	=	Average of the monthly Whole Sale Price Index for iron & Steel items as published in the RBI Bulletins, for the period of work under consideration.
Wco	=	Whole Sale Price index for Cement as published in the RBI Bulletin, for the month in which the tender was opened.
Wc	=	Average of the monthly Whole Sale Price Index for Cement as published in the RBI Bulletins, for the period of work under consideration.
Wbo	=	All India Average wholesale price of Bitumen at the IOC depot at Mathura, for the period of work under consideration,
Wb	=	Whole Sale Price index for Fuel, Power, Light and Lubricants, as published in the RBI Bulletin, for the month in which the tender was opened.
Wfo	=	Average of the monthly Whole Sale Price Index for Fuel, Power, Light and Lubricants as published in the RBI Bulletins for the period of work under consideration.
Wf	=	Whole Sale Price Index for Machinery and Machine Tools as published in the RBI Bulletin, for the month in which the tender was opened,
Wmo	=	Average of the monthly whole sale Price Index Index for Machinery and Machine Tools as published in the RBI Bulletins for the period of work under consideration.

Period of Work under consideration will mean as under:

i. In the case of first "On-account Bill" the period from the date of issue of "Letter of Acceptance" to the date of measurement of the first bill.

ii. In the case of second and subsequent "On-account" and Final bills, the Period from the date of measurement for previous bill to the date of measurement of that bill.

Note: Responsibility of making available the RBI Bulletins desired by the Employer or the Engineer shall rest with the Contractor.

50.3	**Adjustment on account of price variation**
50.3.1	Adjustments on account of Price Variations may be positive (in which case extra amount shall be paid to the Contractor), or negative (in which case the amount of Price Variation shall be recovered from the Contractor). Adjustment on account of Price Variation shall be calculated separately, for each period, between two successive dates of measurements for bills and paid along with each bill.
50.3.2	After verifying the bill, the Engineer shall certify the adjustment amount and advise the same to the Employer along with the 'On Account' bill. Any amount due from Contractor on account of negative adjustment shall be recovered from his pending or other bills at the earliest.
50.4	**Procedure in case of revision of the Base Year for Indices**
	In case of revision of the base year for various indices by RBI, conversion factor / method for linking the old series with new series as used by the office of Economic Advisor, Govt. of India shall be used.
50.5	**Procedure in case of delay in availability of final RBI Indices**
	Where the final Price Indices are not available in the Reserve Bank of India Bulletins, while making payment towards on-account bills, payment towards Price Variation will be made on provisional basis based on the indices available, to be adjusted in subsequent bills as and when the final Indices figures become available.
50.6	**Price variation on items not in the Bill of Quantities**
	Price variation clause shall not be applicable to any extra item of work not included in the accepted Bill of Quantities and for which the rates are fixed separately under Clause 13.0 of the "General Conditions of Contract" unless decided otherwise in exceptional cases at the time of acceptance of such rates by the Employer / Engineer.

xxx xxx xxx"

27. The finding of the Sole Arbitrator, read with the Clause 50 of the SCC as reproduced hereinabove, is based solely upon the initial part of Clause 50.1 of the SCC, without taking into account the qualifying words being *"barring adjustment (which may be plus or minus) to be made as provided for herein"*. The said Clause expressly contemplates the adjustments as provided under Clause 50.2 of the SCC, including, adjustments for variations in the market rates of inputs like labour, materials and fuel/energy during the course of the Contract.

28. The finding of the learned Arbitrator, therefore, proceeds on an incomplete reading of Clause 50 of the SCC, and in doing so, disregards the contractual framework that has been prescribed for such adjustments.

29. In this regard, reference is made to the judgment in the case of ***PSA Sical Terminals Private Limited Versus Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Others, (2023) 15 SCC 781***, wherein, the Supreme Court has held as under:

"xxx xxx xxx

82. *It could thus be seen, that Sical wanted the agreement to be amended so as to change the "royalty payment method" to "revenue-sharing method". TPT was always opposed to it. The intention of TPT is apparent from its various communications and its stand before the Arbitral Tribunal, that it was not agreeable for amendment of the agreement from "royalty payment method" to "revenue-sharing method".*

83. However, ignoring the stand of TPT, by the impugned award, the Arbitral Tribunal has thrust upon a new term in the agreement between the parties against the wishes of TPT. The "royalty payment method" has been totally substituted by the Arbitral Tribunal, with the "revenue-sharing method". It is thus clear, that the award has created a new contract for the parties by unilateral intention of Sical as against the intention of TPT.

xxx xxx xxx

85. As such, as held by this Court in Ssangyong Engg. & Construction Co. Ltd. [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , the fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract has been foisted upon an unwilling party. This Court has further held that a party to the agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, rewriting a contract for the parties would be breach of fundamental principles of justice entitling a court to interfere since such case would be one which shocks the conscience of the court and as such, would fall in the exceptional category.

86. *We may gainfully refer to the following observations of this Court in Bharat Coking Coal Ltd. v. Annapurna Construction [Bharat Coking Coal Ltd. v. Annapurna Construction, (2003) 8 SCC 154] : (SCC pp. 161-62, para 22)*

"22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. ***Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction,*** *whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."*

87. It has been held that the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction.

88. *It will also be apposite to refer to the following observations of this Court in Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. [Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619] : (SCC p. 646, para 43)*

"43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference."

89. It has been held that an Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its powers ex debito justitiae. It has been held that the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

90. In that view of the matter, we are of the considered view, that the impugned award would come under the realm of "patent illegality" and therefore, has been rightly set aside by the High Court.

xxx xxx xxx"

(Emphasis Supplied)

30. Further, reference may be made to ***Delhi Metro Rail Corporation Limited Versus Delhi Airport Metro Express Private Limited, (2024) 6 SCC 357***, wherein, it was held that the interpretation of a contract cannot be unreasonable, such that no person of ordinary prudence would take it. The Court distinguished between a matter of mere "alternate interpretation" of a contractual clause and an unreasonable and uncalled for interpretation of the clause. The relevant paragraphs of the judgment are as follows:

> *"xxx xxx xxx*
>
> ***46.*** ***Interference with an arbitral award cannot frustrate the "commercial wisdom behind opting for alternate dispute resolution", merely because an alternate view exists. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1, paras 24-25.] However, the interpretation of a contract cannot be unreasonable, such that no person of ordinary prudence would take it. The contract, which is a culmination of the parties' agency, should be given full effect. If the interpretation of the terms of the contract as adopted by the Tribunal was not even a possible view, the award is perverse.*** *[Konkan Railway Corpn. Ltd. v. Chenab Bridge Project Undertaking, (2023) 9 SCC 85 : (2023) 4 SCC (Civ) 458 : 2023 INSC 742.]*
>
> ***47.*** *Clause 29.5.1(i) entitles the concessionaire to terminate the agreement if DMRC "failed to cure such breach or take effective steps for curing such breach" within the cure period. Pertinently, the clause uses two separate phrases, "cure" and "effective steps to cure". The clause reads as follows:*
>
> > *"29.5.1. The concessionaire may after giving 90 (ninety) days' notice in writing to DMRC terminate this agreement upon the occurrence and continuation of any of the following events (each a "DMRC event of default"), unless any such DMRC event of default has occurred as a result of concessionaire event of default or due to a force majeure event.*
> >
> > > *(i) DMRC is in breach of this agreement and such breach has a material adverse effect on the concessionaire and DMRC has failed to cure such*

breach or take effective steps for curing such breach within 90 (ninety) days of receipt of notice in this behalf from the concessionaire;"

(emphasis supplied)

48. *The Tribunal found that since certain defects remained after the cure period, this was indicative of the fact that the defects were not cured and that no effective steps were taken. However, logically, the fact that defects existed at the end of the cure period relates to one aspect of the termination clause — that the defects were not completely cured. It does not explain whether effective steps were taken within the cure period. Effectively, the Tribunal considered that in-progress steps that had not yet culminated into completely cured defects were not "effective steps" to offset termination. This places the two components i.e. "curing of defects" and "taking effective steps to cure defects" at par, to mean that only the completed curing of defects is relevant. The Tribunal fails to explain what amounts to an "effective step" and how the steps taken by DMRC were not effective, within the meaning of the phrase.*

49. Evidently, this could not have been the intention of the parties, because they have clearly agreed to include the phrase "effective steps". *They clearly intended that once a cure notice was served on a party, it would be open to them to either cure defects or to initiate effective steps, even if they could not culminate into the complete curing of defects within the cure period. Incremental progress, even if it does not lead to complete cure, is an acceptable course of action to prevent termination according to the 2008 Agreement.*

50. The Tribunal did not appreciate the individual import of the two phrases separately from each other. This was not a matter of mere "alternate interpretation" of the clause, but an unreasonable and uncalled for interpretation of the clause, which frustrated the very provision, and which no reasonable person would have accepted considering the terms of the clause. We must clarify that the Tribunal could have still arrived at the conclusion that the steps taken during the cure period were not effective within the meaning of the clause for certain reasons. However, such discussion and reasoning is conspicuously absent.

xxx xxx xxx"

(Emphasis Supplied)

31. Considering the position of law, it is evident that the learned Arbitrator has not merely offered another interpretation of Clause 50 of the SCC, but has construed the provision in a manner which frustrates its very purpose and renders the procedure for price variation, as agreed by the parties, wholly inoperative.

32. The finding of the learned Arbitrator that no price variation is applicable during the course of the Contract, is against the plain terms of the Contract. Thus, it is noted as follows:

I. Clause 50.1 of the SCC specifically states that rates as per accepted BOQ hold good till completion of work and no additional claim is admissible on account of fluctuation in market rates, increase in taxes, levies, fees, royalties etc. barring adjustments to be made in accordance with the price variation formula provided.

II. Clause 50.2 of the SCC provides for the price variation formula and states that payment as per the Contract shall be subject to adjustments in accordance with the price variation formula to provide for variation of market rates of inputs like labour, material and fuel, energy during the pendency of the Contract.

III. Clause 50.2(ii) of the SCC provides that to the extent that full compensation for any rise or fall in costs to the contractor is not covered by the price variation formula, the rates in the accepted BOQ shall be deemed to include amounts to cover the contingency of such rise or fall of costs.

IV. Clause 50.3 of the SCC provides that adjustment on account of price variation is to be calculated separately for each period between two successive dates of measurements for bills and paid along with each payment.

V. Further, Clause 3.1.1(c) of the NIT specifically states that the Contract price quoted by the tenderer is subject to adjustments in accordance with the SCC. Clause 3.1.2 of the NIT clarifies that prices and measurements will be based on, *inter alia*, price variation in terms of the respective Clauses in the SCC. Clauses 3.1.1 and 3.1.2 of the NIT, are reproduced as under:

"xxx xxx xxx

3.1.1 a. Unless explicitly stated otherwise in the Tender Documents, the contract shall be for the whole works, based on the Bill of Quantities and payment shall be as per accepted rates of Contract for the items completed as certified by the Engineer.

b. All duties, taxes, royalties, fees, sales tax on works contract / Trade Tax with surcharge according to the provisions of UP Trade Tax Act, cess, worker's welfare cess, octroi, toll taxes, other levies etc. payable by the Contractor under the Contract shall be included in the quoted rate(s) / total Contract Price submitted by the Tenderer and the evaluation and comparison of Tenders by the Employer shall be made accordingly.

c. The Contract Price quoted by the Tenderer is subject to adjustment during the performance of the Contract in accordance with the provisions of respective Clauses of the Special Conditions of Contract.

3.1.2 The prices and measurements referred to will be based on actual measurements, and as per

(i) Items specifically mentioned in Priced Bill of Quantities.

(ii) Price variation in terms of respective Clauses of Special Conditions of Contract.

xxx xxx xxx"

VI. Clauses 10.1 and 10.2 of the Instruction to Tenderers, states that prices quoted by the tenderer in the BOQ shall be subject to adjustments to reflect variations in the cost of labour, material, etc. in accordance with the

SCC. It further clarifies that the price adjustment provision is not taken into consideration at the time of tender evaluation. The aforesaid Clauses 10.1 and 10.2 of the Instructions to Tenderers, read as under:

"xxx xxx xxx

10.1 The tenderer is required to quote for all the items as per Bill of Quantities enclosed along with the tender documents.

10.2 Prices quoted by the tenderer, will include all tax liabilities and the cost of insurance to this contract and shall be subject to adjustment during the performance of the Contract, to reflect variation in the cost of labour, material components, plant, and other general variations, in accordance with the procedure specified in Special Conditions of Contract. The price adjustment provision will not be taken into consideration in tender evaluation.

xxx xxx xxx"

33. This Court, thus, finds that the finding on price variation for the original Contract period does not represent a possible view based on the terms of the Contract, and is liable to be set aside.

Entitlement to Price Variation for the Extended Contract Period

34. The relevant findings of the learned Arbitrator with regards to the petitioner's entitlement to price variation for the extended Contract period are provided as under:

"xxx xxx xxx

The price variation is claimed for the bond period from 07.12.2009 to 06.12.2010, and thereafter 08.12.2010 to 30.04.2012 when the work was completed. The Claimant is not entitled to any variation in the bond period from 07.12.2009 to 06.12.2010 in as much as under the contract no price variation under Clause 50.1 is applicable on the rates as per the accepted bill of quantities which has to hold good till the completion of the works and for which no additional claim can be raised. ***For the period of extension, the price variation may be claimed under Clause 51.2, in case of sub-clause 7.5 where the extension is on account of delays due to the contractor. The price adjustment in such case following under sub-clause 7.5 will be limited to the amount payable as per the indices applicable to a bill made on the last date of the original completion period or the extended period under sub clauses 7.2, 7.3 or 7.4, provided***

<u>however there is a satisfaction of the Engineer under Clause 7.5 with the remaining works or the portion of work can be completed by the Contractor in a reasonable and acceptable short time.</u> *The Engineer may in such case allow the extension or future extension of time subject to and without prejudice to any other rights available on their behalf by way of ascertained and Liquidated damages, to be recovered as per provisions of Clause 2 of the GCC for the period the Contractor is in default.*

In the present case the work was to be completed by 06.12.2010. It was however actually completed according to the Final Bill on 16.05.2012 with a delay of 1 year 6 months and 10 days, on the extensions granted by the Employer. The Contractor was given notices on 26.11.2010 to achieve the key dates failing which penalty would be imposed on him and thereafter similar notices were given on 18.01.2011, 20.01.2011, 24.01.2011. On 27.01.2011 a penalty of Rs. 1,00,000/- was proposed for delays as against the bar chart presented by the Contractor. Notices were also given on 08.02.2011 and 28.02.2011 by which the Contractor was communicated with the Award of penalty of Rs. 1 Lakh by the Chief Project Engineer. On 11.03.2011 another notice was given by the Assistant Project Engineer detailing the deficiencies, with direction to complete them within a week and thereafter again on 21.03.2011, 01.04.2011, 27.04.2011, 28.04.2011, 29.04.2011, 02.05.2011, 25.05.2011, 31.05.2011, 10.06.2011, 17.06.2011, 19.09.2011, 19.01.2012, 23.02.2012 and 02.04.2012. In all these letters/ notices the Contractor was directed to speed up and complete the work giving details of the deficiencies on the site.

In the letters/ notices dated 19.09.2011, Shri R.S. Raghav the Project Director, CCD-II, Noida has referred to a letter of the Contractor dated 07.07.2011 in which he has requested for extension of time upto 31.12.2011 to complete the work which was to be completed by 06.12.2010. Taking into consideration all the reasons and the public interest to be served in completing the bridge expeditiously, the approval of the Competent Authority to complete the works up to 31.12.2011 with penalty of Rs. 2,00,000/- was communicated with the condition that the work should in any case be completed by 31.12.2011. ***<u>The correspondence between the parties in which the reasons for the delays in the work is attributed to the Contractor and the</u>***

approval was given, in public interest, clearly shows that the extensions to complete the works was granted in public interest, on imposition of penalty and thus the extension under Clause 7.5 of the Contract, after imposition of penalty does not entitled the Contractor to any benefit. The Contractor cannot take advantage of his own faults in failing to complete the work within time and thereafter seeking extensions which were allowed in public interest to complete the project. The anxiety of the Employer and its willingness to grant extensions to complete the unfinished work cannot give any advantage to the Contractor. The provisions under the contract clearly indicate that on such events where the extensions were allowed for deficiencies and default on the part of the contractor, the price variation cannot be claimed. *The Contractor was not awarded any extra work, nor the drawings of the bridge were modified. In fact, the delay amounted a breach of contract on the part of the Contractor which was condoned by the Employer in compelling circumstances and in public interest. Further, the Contractor did not incur any extra expenses and has also not made any attempt to prove the extra expenses by bills and invoices, by bringing on record the muster rolls of the labor, and the bills and invoices of steel, cement, bitumen, fuel/lubricants, machines and tools. All these price variations have been claimed on presumptive basis. The claim for price variation is as such not acceptable. The issue is accordingly decided against the Claimant.*

xxx xxx xxx"

(Emphasis Supplied)

35. The learned Arbitrator, in arriving at the aforesaid finding, relied upon Clause 7 read with Clause 51 of the SCC and are reproduced hereinbelow:

"xxx xxx xxx

7.0 DELAY AND EXTENSION OF CONTRACT PERIOD (Supplemental clause 2 and 5 of GCC)

7.1 Time to be essence and Extension of Time

i. Time allowed for execution and completion of the Works or part of the Works as specified in the Contract, in accordance with these conditions, is the essence of Contract on the part of the Contractor. Subject to any requirement in the Contract as to completion of any portion or portions of the works before completion of the whole, the Contractor shall fully and finally complete the whole of the Works comprised in the Contract (with such modifications as may be decided by the Employer / Engineer in terms of Clause 14.0 of **GCC)** by the date stipulated in the Contract or extended date in accordance with the Contract. In case of delay on the part of the Contractor, the Contractor shall pay as compensation an amount as provided herein. This is without prejudice to the right of the Employer to rescind the Contract in terms of **Clause 3.0 of GCC.**

ii. As soon as it becomes apparent to the Contractor, that the Works and / or portions thereof (required to be completed earlier) cannot be completed within the period(s) stipulated in the Contract, or the extended period(s) granted, he shall forthwith inform the Engineer and advise him of the reason (s) for the delay, as also the extra time required to complete the works and / or portions of work, together with justification thereof. In all such cases, whether the delay is attributable to the Contractor or not, the Contractor shall be bound to apply for extension in the period of completion of the whole works and / or portions thereof. This application shall reach the Engineer, at least 30 days before the stipulated or extended date of completion of the whole works or the stage completion date of any portion of the work. In case the Contractor fails to apply for the extension of Contract or fails to apply in time, the Engineer, shall, in the case of any subsequent delay the completion of the whole and / or portion of works, be justified to hold that such delay is due only to Contractor's failure or fault and shall take further action accordingly in terms of the Contract. Any reasons or circumstances leading to delay in the completion of the work (s) even if they are not the result of the Contractor's failure or fault shall not invalidate or vitiate the Contract.

7.2. Extension due to Modifications

If any modifications ordered by the Employer / Engineer or site condition actually encountered are such, that in the opinion of the Employer / Engineer the magnitude of the work has increased materially, then such extension of the stipulated date of completion may be granted, as shall appear to the Employer / Engineer to be reasonable.

7.3 Delays not due to Employer / Contractor

If the completion of the whole work (or part thereof which as per the Contract is required to be completed earlier), is likely to be delayed on account of:

a. Any Force Major event referred to in Special Conditions of Contract.

b. Delay on the part of other Contractors or other parties engaged directly by the Employer on whose progress the performance of the Contractor necessarily depends.

c. Any order of Court.

d. Any other event or occurrence which, according to the Employer / Engineer is not due to the Contractor's failure or fault, and is beyond his control.

The Employer / Engineer may grant such extension in period of completion of the work(s), as in his opinion is reasonable.

7.4 Delay due to Employer / Engineer

In the event of any delay by the Employer or the Engineer, to hand over to the Contractor the possession of site necessary for execution of Works, or any part of the Works if different dates for handing over the site for different Works have been indicated in the Contract, or to give necessary notice to commence the Works, or to provide necessary Drawings or instructions or clarifications or to supply any material, plant or machinery, which under the Contract is the responsibility of the Employer, then such delay, shall in no way affect or vitiate the Contract or alter the character thereof; or entitle the Contractor to damages or compensation thereof, but in any such case, the Employer / Engineer shall grant such extension or extensions of time to complete the work, as in his opinion is / are reasonable.

7.5 Delays due to Contractor

If the delay in the completion of the whole Works or a portion of the Works, for which an earlier completion period is stipulated, is due to the Contractor's failure or fault, and the Engineer feels that the remaining Works or the portions of Works can be completed by the Contractor in a reasonably and acceptable short time, then, the Engineer may allow the Contractor extension or further extension of time, for completion, as he may decide, subject to the following:

a. Without prejudice to any other right or remedy available to the Employer on that behalf, by way of ascertained and liquidated damages, recover a sum as per the provisions of Clause 2 of GCC for the period the Contractor is in default.

7.6 **Time to continue to be the essence of Contract in spite of extension of time**

It is an agreed term of the contract that notwithstanding grant of extension of time under any of the **Sub-clauses** mentioned above; time shall continue to be the essence of contract on the part of the Contractor.

xxx xxx xxx

51.0 **PRICE VARIATION DURING EXTENDED PERIOD OF CONTRACT**

51.1 The price adjustment as worked out above i.e, either increase or decrease will be applicable upto the stipulated date of completion of the work including the extended period of completion where such extension **has** been granted under Sub-Clauses 7.2, 7.3 or 7.4 above However, where extension has been granted under Sub-Clause 7.5 above, price adjustment will be due as follows:

51.2 In case the indices increase above the indices applicable to a bill made on the last date of original completion period or the extended period under Sub-Clauses 7.2,7.3 or 7.4 above, the price adjustment for the period of extension under Sub-Clause 7.5 above will be limited to the amount payable as per the indices applicable to a bill made on the last date of the original completion period or the extended period under Sub-Clauses 7.2,7.3 or 7.4 above as the case may be.

51.3 In case the indices fall below the indices applicable to a bill made on the last date of the original or extended period of completion under Sub-Clauses 7.2, 7.3 or 7.4 above, as the case may be, then the lower indices will be adopted for Price Adjustment for the period of extension under Sub-Clause 7.5 above.

xxx xxx xxx"

36. The aforesaid indicates that the learned Arbitrator initially notes that where the extension is on account of delays attributable to the contractor under Clause 7.5 of the SCC, price variation may be claimed as per Clause 51.2 of the SCC. The learned Arbitrator further noted that the price adjustment, in case it falls under Clause 7.5 of the SCC, will be limited to the amount payable as per the indices applicable to a bill made on the last date of the original completion period or the extended period under Clauses 7.2, 7.3 or 7.4 of the SCC.

37. Therefore, it is apparent that the learned Arbitrator, in the earlier paragraphs as extracted hereinabove, himself acknowledged that the Contract provides for price variation even if the extension is on account of

delays attributable to the contractor.

38. The learned Arbitrator, thereafter, relied on the letters and correspondences exchanged between the parties to conclude that the delay was attributable to the contractor, i.e., the petitioner. He further concluded that the provisions under the Contract clearly indicated that in case extensions were allowed for deficiencies and default on the part of the contractor, price variation cannot be claimed.

39. A perusal of the learned Arbitrator's findings, thus, reveals an apparent discrepancy in the views expressed therein.

40. A conjoint reading of Clauses 51.2 and 7.5 of the SCC, shows that the Contract itself envisages the grant of price adjustment, even where the extension of time is caused by delays attributable to the contractor.

41. The distinction drawn by the Contract is not between cases where price variation is payable and where it is not, but between the manner in which such price variation is to calculated.

42. Clause 51.1 of the SCC prescribes the indices applicable where delay is not on account of the contractor. In such a situation, the indices as on the last date of the extended period are applicable.

43. Clause 51.2 of the SCC prescribes that where delay, and thus, extension is on account of the contractor, price variation is worked out as per indices applicable on the last date of the original completion period.

44. Accordingly, the issue of responsibility for delay assumes significance only for the purpose of quantification of the claim, and not for determining the existence of entitlement to price variation itself.

45. However, the learned Arbitrator has treated delay caused by the contractor as a complete bar to price variation. Such a conclusion does not

flow from the contractual provisions, and effectively introduces a restriction upon the parties, which they themselves did not agree upon. To that extent, the Award travels beyond the interpretation of the contract, and amounts to rewriting of its terms.

46. Thus, holding an Award to be patently illegal where the Arbitrator failed to decide in accordance with the terms of the contract, the Supreme Court in the case of ***State of Chhattisgarh and Another Versus Sal Udyog Private Limited, (2022) 2 SCC 275***, has held as under:

> *"xxx xxx xxx*
>
> ***26.*** *To sum up, existence of Clause 6(b) in the agreement governing the parties, has not been disputed, nor has the application of the Circular dated 27-7-1987 issued by the Government of Madhya Pradesh regarding imposition of 10% supervision charges and adding the same to cost of the Sal seeds, after deducting the actual expenditure been questioned by the respondent Company.* ***We are, therefore, of the view that failure on the part of the learned sole arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the "patent illegality ground", as the said oversight amounts to gross contravention of Section 28(3) of the 1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making an award. The said "patent illegality" is not only apparent on the face of the award, it goes to the very root of the matter and deserves interference.*** *Accordingly, the present appeal is partly allowed and the impugned award, insofar as it has permitted deduction of "supervision charges" recovered from the respondent Company by the appellant State as a part of the expenditure incurred by it while calculating the price of the Sal seeds, is quashed and set aside, being in direct conflict with the terms of the contract governing the parties and the relevant circular. The impugned judgment dated 21-10-2009 is modified to the aforesaid extent.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

47. It is evident that the learned Arbitrator has not made the decision on

the aspect of price variation in consonance with the terms of the Contract. This goes to the very root of the matter.

48. This Court notes that the respondent has placed reliance on various Supreme Court decisions including, *inter alia*, ***Ramnath International Construction (P) Ltd Versus Union of India, (2007) 2 SCC 453***, to submit that the Supreme Court has declined to award compensation arising out of delay. However, the decision in the said judgment was based upon a specific clause in the contract between the parties that expressly prohibited all claims in respect of compensation, or otherwise, as a result of extension of time. In view thereof, it was held that where extension of time is granted on account of delay, whether attributable to the contractor or the employer, the contractor is precluded from claiming any compensation arising out of such delay.

49. However, ***Ramnath International (supra)*** does not apply to the facts and circumstances of the present case as the contractual provisions in the present case are materially different. The Contract in the present case does not contain any provision which bars the entitlement of the contractor to price variation upon the grant of extension of time on account of its own delay.

50. On the contrary, as noted above, Clauses 50 and 51 of the SCC expressly provide for price variation and the method for calculating the same.

51. Accordingly, the findings of the Sole Arbitrator in respect of Claim no. 4 stand vitiated on account of patent illegality.

FINDINGS OF THE ARBITRATOR QUA DELAY BY THE PETITIONER IS A PLAUSIBLE VIEW

52. Though the petitioner has confined the challenge in the present proceedings only *qua* claim no. 4 with regards to price variation, however, learned counsel appearing for the petitioner has also made submissions in respect of the issue of delay in completion of the Contract, insofar as the same is related to the issue of price variation.

53. Learned counsel appearing for the petitioner submits that the learned Arbitrator has wrongly held that delay was attributable to the petitioner by ignoring material evidence. It is submitted that delay was not attributable to the petitioner, as the delay occurred on account of the failure of respondent to remove electric poles on time, instructions for the use of steel of SAIL make only, delayed/non-payment of bills, and non-payment of costs for price escalation.

54. As regards the issue of shifting of electrical poles from the site is concerned, the learned Arbitrator has held as follows:

> *"xxx xxx xxx*
>
> As far as non-removal of the electricity poles are considered, it is stated in paragraph 23 of the Statement of Claim that electric poles were removed way back on 7.5.2010. The Claimant was aware of the situation of the site. Adequate site was always available but the Claimant did not adjust the works. The poles were on one side of the drain. The other side was free. The work was not adversely affected on account of few poles on one side of drain nor there was any idling of any man, plant and machinery. The correspondence on record supports the contention of the Respondent that there were few poles on one side of the drain which were removed on 07.05.2010 and which did not hamper or restrict the work or idling of man, plant and machinery.
>
> In the letter dated 10.04.2010 and thereafter the letter dated 24th April 2010, the claimant informed that it has casted 109 and 121 piles respectively out of 180 and the work had to be stopped due to non- shifting of electric poles. This letter is in response to a letter dated 26.03.2010 in which the claimant is informed by the Asst. Project Engineer that only 80 out of 182 piles have been casted, and that only 32 piles are affected by the electric poles and that efforts are being made at Divisional level to shift the poles. The Electric Poles were removed by 07.05.2010. The

claimant has thus failed to establish that non-shifting of Electric poles in time, had the effect of delaying the project.

xxx xxx xxx"

55. Perusal of the aforesaid shows that the learned Arbitrator has taken into account that an adequate site was always available, as the poles were on one side of the drain, while the other side was free. Thus, it has been held that the work was not adversely affected on account of few poles on one side of the drain, nor there was any idling of any man, plant and machinery. Further, the learned Arbitrator has noted that the few poles on one side of the drain were removed on 07th May, 2010, and did not hamper or restrict the work in any manner.

56. The petitioner has not shown any evidence to establish that there was complete stoppage of work due to non-removal of the electrical poles. Further, it has come on record that a site was available for work, and electric poles existed only on one side of the drain, which were also removed by the respondent.

57. The view taken by the learned Arbitrator is a plausible view and this Court finds no reason to interfere with the same.

58. The petitioner has also alleged that the delay in the present case was caused due to the non-availability of the SAIL steel in the market. It is the petitioner's case that it was forced by the respondent to use the SAIL steel, therefore, delay was attributable to use of the same. The learned Arbitrator has rejected the said claim by holding as follows:

"xxx xxx xxx

In reply it is stated in paragraph 16 of the Statement of Defense that under the terms of the Contract the Claimant/Contractor was not free to use any brand conforms to ISI mark. The Claimant was aware that for the project steel of SAIL was to be used and not that manufactured by Pashupati. The cost was calculated on the basis of SAIL steel. In March, 2011, the Respondent had clarified that in case the Claimant was desirous of using any alternate brand then it could use TISCO and Rathi. The Respondent has communicated in the letter dated 21.03.2011, in which it was stated in paragraph 4 that according to the instructions of the Higher Officers SAIL steel has to be used on priority. In case the SAIL Steel is not available, TISCO and Rathi steel may be used after carrying out the tests in any reliable laboratory.

Shri Satyavrat Panda appearing for the Claimant submits that the payment had to be made using steel of MoRTH specification, reference no. 1600. In the letter dated 01.02.2011 annexed with the documents of the claim at Sl. No. 88 page 1098, the Claimant had informed Chief Project Engineer that there was acute shortage of SAIL steel in the market. The requirements of using SAIL steel in the project will pose a serious impact to get the steel in time.

The shortage can be easily verified from the market. Further a request was made to approve more steel brand as per the contract bond and which was in the interest of the project. Alternatively, the Noida Authority may provide SAIL steel on the cost taken in the analysis. The use of SAIL steel was required in terms of the contract and alternatives were also mentioned. In the letter dated 28.01.2010 the claimant had informed the Project Engineer that there is shortage of SAIL Steel TMT Bar in the market. The orders were placed for SAIL Steel on 9th January and payment was also made but the dealer is unable to supply and thus permission was sought for some other brand recognized by ISI Mark. The request was again made to the same effect on 16.03.2010. In the letter dated 10.04.2010 the claimant informed that as against order of 54 MT of SAIL steel on 12.03.2010, only 30 MT has been supplied. The balance 24 MT of 10 mm dia is still to be supplied. The non - availability could be checked from Sail Depot Manager.

The Tribunal finds that the project was to be completed by 06.12.2010. The demand for specifying any alternative brand of cement, on the scarcity of the SAIL steel in the market was made on 20.1.2010 and thereafter on 16.03.2010. In the letter dated 10.04.2010 the Project Engineer was informed by the Claimant that out of 54 MT 30 MT was supplied. The claimant was thus getting the supplies with some delay which cannot be said to have resulted in stoppage of work. The demand was finally met by letter dated 21.03.2011 in which the Claimant was allowed to use TISCO and Rathi brands if the SAIL steel is not available after getting the material tested in any reliable laboratory.

During the arguments, an enquiry was made to show any written directions by which only SAIL steel was required to be used. Learned Counsel for the Claimant could not point out to any specific direction issued by the Respondent to the Claimant to use the steel of SAIL brand only, and that no other steel could be used. The Contract did not limit the use of steel only of SAIL brand. In any case on the request of the Claimant the other brand conforming to the specification, were permitted to be used in the Project. There is no material or evidence to show the difference of prices of the SAIL steel and the price of steel used by the Claimant. The delays in the project on this ground has not been established. In the circumstances there is no merit in the claim towards the steel of SAIL make and the delay caused due to non-availability of the SAIL steel in the market.

xxx xxx xxx"

59. The learned Arbitrator while rejecting the averment in this regard, has categorically held that the petitioner herein was unable to show any specific demand from the respondent with regards to use of SAIL steel. The learned Arbitrator has noted that the respondent allowed the petitioner to use the steel from alternate brands *vide* letter dated 21st March, 2011.

60. It is to be noted that the Contract itself in Clause 12.3 of the SCC mentions that the petitioner should conform to Indian Standard

Specifications. No term of the contract made SAIL steel mandatory. Thus, the petitioner was free to use any steel brand as long as it conformed to the aforesaid specifications.

61. No document was produced by the petitioner to show that the respondent asked it use SAIL steel. In fact, the respondent *vide* letter dated 21st March, 2011, clarified that in case SAIL steel was not available, the petitioner may use TISCO and Rathi brands. However, despite the aforesaid letter, the petitioner *vide* letter dated 08th July, 2011, undertook to use SAIL steel only.

62. On an overall conspectus of the facts and circumstances of the case, the view taken by the learned Arbitrator is a plausible view, and accordingly no interference is called for.

63. As regards the delay in payment of bills, the learned Arbitrator held as follows:

> *"xxx xxx xxx*
>
> As far as the non-payment of bills for works executed as per BOQ, the Tribunal does not find any details to substantiate the claim. The running bill numbers 1 to 17 were paid from time to time. There was no such delay much less inordinate delay which can be said to have contributed in stoppage of work. The project was completed with a delay of more than one year and six months.
>
> The Claimant has claimed the loss of profit on account of delay calculated @ 10% of the value of the contract during the period of delay. It has claimed 1,18,00,258/- as loss and profit @ 10% on the value of the work executed during extended period i.e. after 07.12.2010 calculated @ Rs. 11,80,02,585/-. It is stated by learned counsel for the Claimant that the staff, plant and machinery had to be made available on site due to the delays caused by the Respondent to complete the works in the project. It lost an opportunity to work on other projects and earn profits which the Claimant would naturally made in the construction industry and which have been reasonably claimed @ 10% of the work.

In reply the Respondent have stated that the delay was caused by the Claimant himself and not by the Respondent. It is stated in para 26 of the Statement of Defense that in view of the admission that during the original contract period the claimant could perform work only for the value of Rs. 7.38 Crores, and that in next 18 months it had performed worked totaling Rs. 11.80 Crores it is clear that the delay was attributable to the claimant alone. Further the Claimant has submitted and negotiated the tender with time as essence of the contract which it could not perform. The profit therefore cannot be derived on the contract value which the contractor could not complete in time.

This Arbitral Tribunal has already held that none of the factors alleged for the delay were attributable to the Respondent. The entire delay was caused by the Claimant himself and thus there is no question of considering the claim towards loss of profit on account of delay. The Claim is not acceptable. The Issue is thus decided against the Claimant.

xxx xxx xxx"

64. Thus, the learned Arbitrator has held in categorical terms that there was no such delay in payment of bills, which can be said to have contributed to stoppage of work.

65. Further, this Court also notes that as per the evidence on record various letters dated 15th January, 2010, 21st January, 2010, 25th January, 2010, 12th August, 2010, 26th November, 2010, 18th January, 2011, 20th January, 2011, and 27th January, 2011, were written by the respondent to the petitioner bringing forth a series of shortfalls by the petitioner leading to the slow pace of the project. These letters have not been challenged by the petitioner as fabricated or inaccurate. The said letters bring forth various incidents related to the petitioner's persistent failure to keep up with the pace of work. The alleged delay in payment of bills or non-payment of price

variation, have not been substantiated as the underlying cause for the delay in executing the contract.

66. Taking into consideration the documents and evidence on record, it cannot be said that the finding of the learned Arbitrator on delay being attributable to the petitioner, is based on no evidence or that the learned Arbitrator has ignored such vital evidence that no reasonable person could have reached such a conclusion. The present is not a case where there is no evidence to support the finding regarding delay being attributable to the petitioner. It is a well settled principle that if the Arbitrator takes a view which is plausible, reasonable and possible on the basis of material on record, the Court, under Section 34 of the Arbitration Act, would not interfere even if another view is possible. In the present case, the finding of the learned Arbitrator is a possible view based on an appreciation of documents. Therefore, the Award, on this aspect, does not call for interference.

CONCLUSION

67. In view of the detailed discussion hereinabove, it is held that the impugned Award suffers from patent illegality on the determination of Claim no. 4, and is set aside to that extent.

68. Insofar as the quantum of price variation is concerned, the parties are at liberty to invoke fresh arbitration proceedings seeking determination of the same.

69. Accordingly, the present petition is partly allowed and disposed of, in the aforesaid terms.

MINI PUSHKARNA, J

SEPTEMBER 28, 2026/KR