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

Judgment reserved on: 30.07.2024

Judgment pronounced on: 10.01.2025

+ O.M.P. (COMM) 267/2019

M/S. SATISH BUILDERS .....Petitioner

Through: Mr Anshul Mittal, Mr Kshitij Mittal, Ms Vaishali Mittal, Mr Ashok Aggarwal, Mr Sarthak, Advs.

versus

UNION OF INDIA .....Respondent

Through: Mr Manish Mohan, CGSC, Mr Prakhar Vashisth, Mr Deepen Yadav, Mr Shekhar Saharan, Mr Nitish Bhardwaj, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G E M E N T

: JASMEET SINGH, (J)

O.M.P (COMM.) NO. 267/2019

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act") challenging the Award dated 25.01.2019 (hereinafter called the "Impugned Award") and the Corrected Award dated 18.02.2019 (hereinafter called the *"Corrected Impugned Award*") specifically the findings of the learned Arbitrator regarding Claim Nos. 1,2 ,31,32,33,36& 3 in the case titled "*Satish Builders Vs. Union of India*".

Brief Facts

2. The brief facts in the present matter are as under:-

a. The petitioner is a registered partnership firm and was awarded the work of *"C/O Regional Office Building for Bureau of Indian Standard at Plot No. 4A, Sector 27B, Chandigarh, including Electrical Installation"* by Respondent through the Executive Engineer, Chandigarh Central Division – I, *vide*the Letter No. CCD – I/54(889)/AB/48 dated 07.07.2012 for a total tendered amount of Rs. 6,53,79,880/-.

b. The stipulated date of start of work was 29.07.2012 while the stipulated date of completion was 28.07.2013. However, the work was completed on 31.03.2015 (being a total delay of 611 days).

c. The Petitioner invoked the Arbitration Clause on 19.05.2017 in terms of Clause 25 of the contract on the ground that the respondent – Union of India did not release justified payments against the work done to the petitioner as well as made unjustified recoveries.

d. Consequently, the learned Sole Arbitrator was appointed by the respondent *vide* the Letter No. 24/11/2016/A&C/2425 dated 03.08.2017.

e. The petitioner filed its Statement of Claims raising 42 claims for various defaults and breaches on the part of the respondent and the respondent filed a Statement of Defence. No Counter Claims were raised by the respondent.

*f.*The learned Arbitrator passed the Impugned Award dated 25.01.2019 partly allowing claims of the petitioner.

g. The learned Arbitrator passed the corrected Award u/s 33 (2) of the Arbitration & Conciliation Act *vide* his order dated 18.02.2019.

3. The petitioner is challenging findings of the learned Arbitrator in Claim Nos. 1, 2, 3, 31, 32, 33 and 36. The claims are reproduced are as below:

S.No.	Claims	Claimed Amount	Awarded Amount

Claim No. 1	*Work executed but not paid, withhold amount, withhold mile stone, illegal recovery, part rates, less rates paid etc*	*Rs.1,53,00,198/-*	*Total: Rs. 17,09,495/-*
Claim No. 2 (Clubbed with Claims No. 31, 32, 33, & part 36)	*Escalation from day 1 under 10CC*	*Rs. 21,00,000*	*Rs. 4,38,070/- (as corrected on 19.04.2019)*
Claim No. 31	*Claim as per Clause 6A Schedule F para 2(X) 15% profit on 10C*	*Rs. 6,75,000*	*Clubbed with claim no. 2*
Claim No. 32	*Claim as per Clause 10c on P.O.L.*	*Rs. 3,75,000*	*Clubbed with claim no. 2*
Claim No. 33	*Escalation damages for Escalation as per Clause 10 C after stipulated date of completion*	*Rs. 5,25,000*	*Clubbed with claim no. 2*
Claim No. 36	*Claim 10C on all Substituted items,*	*Rs. 3,00,000*	*Clubbed with claim no. 2*

	Extra Items and Deviation on market rates along with 18% interest from due date of payment till Actual date of payment		
Claim No. 3	*Incentive 5% on Tender Value*	*Rs. 29,95,439*	*Nil*

Submissions of Petitioner:

General:

4. One of the objections taken by the petitioner in the present petition against the impugned Award is that the general findings of the learned Arbitrator in para 6 and claims no. 1, 3, 5 of the Award are vitiated by bias. However, the said objection of bias has been dropped by the learned counsel for the petitioner.

5. In view of the above, the claim wise objections raised by the petitioner are as under:-

Claim No. 1

6. The petitioner submits that Claim No.1 was divided into various sub-claims and the petitioner is aggrieved *qua* the findings of the following sub-claims:-

a. **Part-B(i):**

i. The petitioner submits that the findings of the learned Arbitrator under this head are contrary to record, since as per clause 12.2, the petitioner had duly submitted analysis of rates based on prevailing market rates and the same were neither questioned nor any counter rates were calculated by the respondent. In view of the same, the

learned Arbitrator erred in unilaterally ignoring the rates of the petitioner on the ground that the same are unreasonable and contrary to the terms of the contract.

ii. The petitioner submits that finding with respect to the purchase vouchers not being submitted is factually incorrect, since the same forms part of the Arbitral Record.

Part H:

iii. The petitioner submits that the learned Arbitrator ignored that the Final Rates of the substituted items are to be derived by adding and subtracting the rates of the BOQ items to be substituted with the difference of the Market rates**.**

iv. Additionally, Labour Escalation is also payable on the same. The same is also evident by the circular issued by the DG (Works) CPWD wherein it states that escalation is payable on substituted items.

b. **Part J:**

i. As per Clause 12.2 of the Contract, the petitioner was entitled to receive market rates for all items whose quantities deviated and exceeded the permissible BOQ Deviation Limits. The petitioner submitted detailed analysis of rates of all such quantities beyond the deviated limits, which was never disputed by the respondent. However, the learned Arbitrator arbitrarily reduced the rates of the items claimed.

Claim No. 2, 31, 32, 33 and part of Claim No. 36

7. The learned Arbitrator has arbitrarily decreased the cost of escalation on other materials which was calculated in terms of Clause 10CC and even in the absence of an escalation clause, the contractor is entitled to the same if the delay is not attributable to the contractor/petitioner.

8. The learned Arbitrator has without any reason reduced the escalation cost, which was derived on the accepted formula of Clause 10CC. The learned Arbitrator by the virtue of the same reduced part of the claim.

Claim No. 3

9. The petitioner submits that claim no. 3 was made in respect of Clause 2A of the GCC, which grants incentive for early completion.

10. The petitioner submits that once the works gets delayed due to hindrance beyond its control, then such hindrance period is not to be taken into account while computing the period for completion of works for calculating bonus under clause 2A.

11. The petitioner submits that regular correspondences were sent by the petitioner informing the reason for delay by the respondent, therefore the petitioner was entitled to claim bonus/ incentive for 255 days. It is submitted that even as per the register of the respondent, the justified delay also came to 645 days, which the respondent admitted was due to its own default, nonetheless the learned Arbitrator rejected the said claim. The same is unjustified and contrary to record.

Additional Claims

12. Even though the prayer of the present petition is restricted to challenging findings of part of Claims No. 1 (Part B(i), Part H, Part J); Claims No. 2, 31, 32, 33, part of Claim No. 36; and Claim No. 3 but since the petitioner has sought to additionally challenge the finding of the learned Arbitrator on the aspect of delay of 611 days, the claims, being Claims Nos. 4, 6, 8, 11, 12, 14, 34, 16, 17, 19, 20,22- 29, 38 and 40; Claim No. 5; Claims No. 7 and 15; Claims No. 9 and 30; and Claim No. 41, also form part of the challenge.

13. It is pertinent to mention that neither any arguments have been made against the said claims nor does the prayer clause seek setting aside of the same. However, the pleadings made against the said Claims are as under:-

Claim Nos. 4, 6, 8, 11, 12, 14, 34, 16, 17, 19, 20,22- 29, 38 and 40

14. The counsel for the petitioner states that the learned Arbitrator has failed to appreciate that the value of the various Staff, Plant & Machinery, T&P, Lab. Establishment, Watch & Ward Staff, Engineering Staff, Office Expenses etc. was not merely based on the total tender cost but was also based upon the stipulated period, for which the same were to be employed. Therefore, the expenditure was to be calculated on the basis of the number of additional days for which the same had to be incurred (i.e. for additional 611 days of execution of work at the site) instead on value of the balance work.

Claim No. 5

15. The petitioner submits that the petitioner was claiming an interest @12% on the amounts due but wrongly impounded by the Respondent department and since the delay way solely attributable to the respondent, the learned Arbitrator was bound to grant interest.

Claim No. 7 and Claim No. 15

16. The petitioner submits that the learned Arbitrator, while rejecting the said claims recorded that the full payment is to be released immediately after the particular item is completed, however since the same was not done, the Respondent Department was liable to pay interest thereupon.

Claim No. 9 and Claim No. 30

17. The petitioner submits that the learned Arbitrator gravely erred in rejecting the said claims for Loss of Profit since the contract was prolonged by a period of 611 days over and above the stipulated period of 365 days due to the breaches by the respondent. Hence, the losses suffered by the petitioner ought to be compensated.

Claim No. 41

18. The petitioner submits that mere award of 8% *pendent-lite* interest is against the terms of the contract as the Clause 10-B (IV) of the Agreement, which mandates interest at the rate of 10%. Even for the future interest, the petitioner was awarded for 10%, therefore *pendent-lite* interest should also be @10% or more.

Claim No. 1 (Part D):

19. The petitioner has further attempted to challenge Claim No. 1 (Part D) at the time of final arguments by way of filing of an additional short note, even though the same does not find any mention in the pleading, prayer or written submissions filed by the petitioner at the earlier stage.

20. The petitioner submits that the learned Arbitrator has sought to rewrite the terms of the contract, more specifically clause 8.1 of the Agreement and clause 1 of the SCC (Special Conditions of Contract), while adjudicating the claim towards Extra Work/Finishing work on exposed concrete surface.

21. The petitioner submits that the learned Arbitrator has tried to apply an interpretation of CPWD specifications when the above said clauses give preference to “Nomenclature of Item as per schedule of quantities” over CPWD specifications in case of any dispute.

22. The petitioner submits that Nomenclature of Item No. 3.4 specifically and unambiguously excludes the price of 'Finishing', therefore there was no scope of ambiguity that the finishing work carried out by the petitioner was to be charged extra.

Submissions of the Respondent:

Claim 1

(Part B)

23. The respondent submits thatthe learned Arbitrator has awarded the amount after duly taking into account the prevailing market rates and the contract provisions. The respondent argues that the analysis of rates of the materials at site are supposed to be inclusive of the VAT and additional 5% miscellaneous charges. However, the contractor in case of certain items has analysed the rates while adding 12.5% towards VAT and additional 5% misc. charges, which is incorrect.

(Part H)

24. The respondent submits that the petitioner cannot place its reliance on Clause 10C since the same is applicable only on agreement items and not on substituted items. The respondent submits that the rates of substituted items are derived by adding or subtracting the difference of market rates of the substituted item and Agreement item to or from the rate of the Agreement item. So, the

substituted items rates get decided on market rates and clause 10C is not applicable on these items.

(Part J)

25. The respondent submits that the petitioner revised this statement of claim through rejoinder and claimed for Rs. 24,67,363/-on the ground that09 BOQ items of work deviated beyond the limit laid down under Schedule F of the Agreement are to be paid at market rates under Clause 12.2 of the contract. It is submitted that claims out of the said 9 items: (a) 03 BOQ Items namely items No. 4.1, 9.1 and 9.5have not been deviated beyond the limit laid down in Schedule F of the Agreement; (b) The rates paid for 03 BOQ Items No. 5.3, 7.1 & 12.2.1 are justified; (c) The rates for balance 03 BOQ Items No. 7.2.1, 11.6.1.1 & 11.3.1, have been modified by the learned Arbitrator correctly. Therefore, the respondent submits that the justified amount works out to 13,718/- and the same has already been paid to the petitioner.

Claim 2, Claim 31, Claim 32, Claim 33, Claim 36

26. The respondent submits that the objections raised in the present petition do not fall under any ground in section 34(2) of the Arbitration and Conciliation Act, 1996. This court cannot re-appreciate evidence nor sit in appeal over an Arbitral Award. It is submitted that the learned Arbitrator has passed a reasoned award and it does not warrant any interference.

27. The respondent further submits that under the said claims, escalation is categorised in two parts being: Escalation on other materials on the principle of Clause 10 CC and Escalation on labour under Clause 10C.

a. Escalation on other materials: - The respondent submits though there is no provision for escalation on other materials in the contract even then the learned Arbitrator has awarded an amount of Rs. 2,36,934/- .

Hence, there is need no further modification, especially since the claim of the petitioner was not tenable.

b. Escalation on labour: - The respondent submits that the rates of deviated items and extra items are calculated on prevailing market rates, therefore escalation on these items is not payable. It is submitted that the correct amount of escalation on agreement items up to SDOC and beyond comes to Rs. 12,46,596, (though claimed as 16,27,120 by the petitioner) againstwhich the Respondent have already paid Rs. 10,45,400. Balance amount payable by the respondent under this category is Rs. 2,01,196/-, which has been correctly awarded by Ld. Arbitrator and already paid to the petitioner. The petitioner under this claim has added 1% labour cess, 12.5% VAT and 15% CP &OH which has per methodology laid down in the contact are not payable.

Claim 3

28. The respondent submits that Clause 2A of the agreement stipulates payment of bonus if the work was completed before the stipulated date. In the present case, admittedly the work was completed on 31.03.2015 and is way beyond the stipulated date of completion, i.e.28.07.2013. Hence, the bonus/incentive was not payable.

Analysis

29. I have heard the arguments raised on behalf of both the parties and perused the material on record.

30. At the outset, the scope of interference in proceedings under section 34 of the Arbitration and Conciliation Act, 1996 has been laid down by the courts time and time again, more recently summarised in the judgment of this court in

Indian Railways Catering and Tourism Corp Ltd. v Brandavan Foods Products, 2024:DHC:6114. The operative portion of which reads as under:-

> *"42. The scope of examination of an arbitral award under Section 34 of the Act can be traced, more significantly so, in* ***Associate Builders v. DDA****, 2024:DHC:6114 O.M.P. (COMM) 495/2022 & Conn. matters (2015) 3 SCC 49****, SsangyongEngg. & Construction Co. Ltd. v. NHAI****, (2019) 15 SCC 131 and* ***Delhi Airport Metro Express (P) Ltd. v. DMRC****, (2022) 1 SCC 131. Reliance is also placed upon, inter alia,* ***Dyna Technologies (P) Ltd v. Crompton Greaves Ltd*** *(2019) 20 SCC 1;* ***UHL Power Co. Ltd v. State of H.P.*** *(2022) 4 SCC 116;* ***South East Asia Marine Engineering & Constructions Ltd v. Oil India Ltd*** *(2020) 5 SCC 164;* ***Patel Engineering Ltd v. North Eastern Electric Power Corporation Ltd*** *(2020) 7 SCC 167; P****SA SICAL Terminals (P) Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin****, 2021 SCC OnLine SC 508; and* ***Army Welfare Housing Organisation v. Sumangal Services*** *(P) Ltd (2004) 9 SCC 619.*
>
> *43. For the sake of brevity, the principles delineated in the aforesaid cases are summarised hereinafter.*
>
> *44. The award can be set aside on the ground of patent illegality if: a) the view taken by the arbitral tribunal is impossible or such that no reasonable person could arrive at it; b) if the arbitral tribunal exceeds its jurisdiction by going beyond the contract, and adjudicating upon issues not referred to it; c) the finding of the arbitral tribunal is based on no evidence or it ignores material evidence. Rewriting of contractual terms by the Arbitrator is completely prohibited, and an Award which suffers from such perversity is liable to be set aside. The illegality must go to the root of the matter and does not include mere erroneous application of law or a contravention of law which is unrelated to public policy or public interest. If two views are possible, the Court will not interfere with the view of the arbitral tribunal if it has taken one of the two views. Reappreciation of evidence is also impermissible.*
>
> *45. The award can also be set aside on the ground of it being in contravention with public policy of India, the scope of which includes: a) fraud or corruption; b) violation of Sections 75 and 81 of the Act; c) any*

contravention with the fundamental policy of Indian law; d) violation of the most basic notions of justice or morality, so as to shock the conscience of the Court. The Court does not function as a Court of appeal, and errors of fact cannot be corrected. The arbitrator's findings on facts must be accepted, as the arbitrator is the ultimate master of the quantity and quality of evidence in making the award.

46. It is also relevant to note that the Court cannot modify or rewrite the Award, and can only set it aside, post which the parties can re-initiate arbitration proceedings, if they so choose. However, partial setting aside is valid and justified, if the part proposed to be annulled is independent and can be removed without affecting the rest of the award. For this, reliance is placed upon ***McDermott International Inc. v. Burn Standard Co. Ltd****., (2006) 11 SCC 181;* ***S.V. Samudram v. State of Karnataka*** *(2024) 3 SCC 623 and* ***National Highways Authority of India v. Trichy Thanjavur Expressway Ltd. 2023*** *SCC OnLine Del 5183."*

31. With this position in law, I shall now deal with the contentions raised by the parties.

32. Even though the petitioner has prayed for setting aside ofmultitude of claims (including Claim Nos. 1, 2, 3, 31, 32, 33 and 36) but during the course of arguments the petitioner has primarily raised objections against the findings of the learned Arbitrator with respect to:(i) the delay being attributable to both the parties (which has resulted in dismissal/part dismissal of claims including but not limited to payment of bonus, escalation and loss of profit) and (ii) Finishing of work on exposed concrete surface, which has resulted in dismissal of claim no. 1(D).

Finding on Delaybeing attributable to both the parties

33. I shall first be dealing with the objections raised against the finding of the learned Arbitrator that the delay is attributable to both the parties. The operative portion of the Award in this regard reads as under: -

"6.2.2 On perusal of these documents and the correspondence exchanged between the parties, it is seen that both parties have caused delay in execution of the work. Whereas the Claimant had started writing letters from day one of the start of Work and putting allegations on the Respondent for not issuing drawings and/not giving decisions, the Respondent had been writing their observations for the Claimant for not deploying required resources on the Work.The Claimant, as mentioned under para 6.1, has not been specific in pointing out at which point which item got delayed for want of which drawing or decision. The Architectural and structural drawings had been issued by the Respondent before stipulated date of start of the Work for an overall view of the work and planning and taking up the work. Some drawings were to be issued as and when stage of the Work warranted. Had the Claimant deployed required resources on Work, the stages of the Work would have arrived early and accordingly the stage needed drawings would have been issued early accordingly. The Respondent had pointed out what was getting delayed for non-availability of manpower. Detailing of observations is given in para 6.1.

6.2.3 Going by the stipulated date of completion and actual date of completion, it is seen that the work got delayed by 611 days. In this delay, as pointed out above, both parties are responsible. That means by going further in the details, it could be laid down which party is responsible for how much period out out of 611 days. This however is not required to be worked out as the Respondent have decided to justify the entire period of 611 days as justified period. This presumably has been done on the basis of the undertaking given by the Claimant on the application for seeking Extension of Time (EOT) that they would not Claim for the damages if EOT could be granted by the Respondent without levy of Compensation under Clause 2 of the Contract. The Claimant however has submitted that this undertaking had been given by them under duress. The fact that the Respondent have justified the entire delay of 611 days and have not levied compensation on the Claimant for delay in execution, support the view that the said undertaking was not given under duress.

6.2.4 Going by above, it is clear that justified delay on the Work is 611 days and the same has been taken by the Respondent on their part

irrespective of the fact that the delay was contributed by both the parties.”

(Emphasis Supplied)

34. The petitioner submits thatthe respondent has already admitted that the delay was due to its own defaults. The same is also recorded in paras 6.2.2. to 6.2.4 of the Impugned Award, however contrary to the same the learned Arbitrator has held that the parties were equally responsible for the delay. The Petitioner relies on the letter dated 17.02.2016 by the Executive Engineer, Chandigarh Central Division, CPWD to show that the respondent accepted that the delay was justified since it was due to its own faults and hence the respondent did not levy any compensation for 611 days. The operative portion of the letter (EOT) is reproduced as under:-

GOVERNMENT OF INDIA
CENTRAL PUBLIC WORKS DEPARTMENT
Office of Executive Engineer,Chandigarh Central Division-I
C.P.W.D., Sector 7B, Chandigarh
Email:- cpwd_chdcd1@yahoo.co.in
Telephone:- 0172-2792636 Fax 0172- 2790345

File. No. CCD-I/20(E.O.T)/2015-16/ 446 Dated 17-2-16

सेवा में,

अधीक्षण अभियन्ता,
चण्डीगढ़ केन्द्रीय परिमण्डल,
के.लो.नि.वि., चण्डीगढ़।

विषयः- **C/o Regional Office Building for Bureau of Indian Standard at Plot No. 4A, Sector -27B, Chandigarh including electrical installations. (E.O.T. Case).**

Agreement No.	:-	**02/CCD-I/2012-13/CE(NZ-I)**
Agency	:-	**M/s Satish Builders**
Estimated cost	:-	**Rs.6,56,09,950/-**
Tendered Amount	:-	**Rs. 5,99,08,790/-**
Date of start	:-	**29.07.2012**
Time allowed	:-	**365 Days**
Stipulated date of completion	:-	**28.07.2013**
Actual date of completion	:-	**31.03.2015**

The E.O.T. case for the above work has been submitted by M/s Satish Builders vide their letter No. SB/BIS/15/11/2012 dated 20.11.2015 along with Part-1. This work was scheduled to be completed by 28.07.2013 has actually been completed on 31.03.2015, thus getting delayed by 611 days. The below hindrances were considered and recommended vide this office letter No. 3271 dated 04.12.2012 and the milestones were shifted vide your office letter No. 4463 dated 12.12.2012 by considering hindrances upto 26.11.2012 as below :-

Sr. No	Financial progress	Milestones as per Agreement	Milestone as per Re-scheduled
1	1/8th (of the tendered amount)	26.10.2012	29.12.2012
2	3/8th (of the tendered amount)	24.01.2013	11.04.2013
3	3/4th (of the tendered amount)	24.04.2013	10.07.2013
4	Work completed	28.07.2013	13.10.2013

(i.e. total acceptable days 80 days)

Hindrance No.1 :- Due to Non Receipt/Issuance of Complete Architectural and Structural Drawings work could not be Started.

Contractor applied the said period of hindrance which is recorded in the hindrance register at Sr. No.1 for the same period. Regarding the same it is submitted that complete revised architectural and detailed structural drawings could not be issued in one instance and as per the dated shown in the hindrance register against hindrance No.-1, required drawings issued in piecemeal due to which work foundation works for basement could not be started. There were some changes made in structural drawings and also some changes made in roof & elevation etc. The weightage on the grounds found justified is recommended as under for rescheduling of milestone as per Annexure-A.

(iii) 29.07.2012 to 04.09.2012 i.e. for 38 days @ 100% = 38 Days
(iv) 05.09.2012 to 26.09.2012 i.e. for 22 days @ 50% = 11 Days

Hindrance No.2 :- Main Electric Cable of Adjacent Plot was Passing through the Land of BIS Plot.

(29.07.2012 to 29.10.2012) = 93 Days

Contractor applied said hindrance on the said grounds and same has also been recorded in the hindrance register at Sr. No. 2 for the same period. Regarding the same it is stated that main cable connecting connection to the adjacent building..belongs to company affairs was passing through the BIS plot. Same was required to be shifted. Letters to concerned office i.e. SDO, UT electricity department were written on dated 24.07.2012 & 01.09.2012. Respective U.G. cable was shifted from the plot of BIS on 29.10.2012. As work in unaffected portion was taken up and after deduction of overlapped period of 60 days only 50% of remaining period found justified and recommended for rescheduling of milestone as per Annexure-A.

93 Days (-) 60 Days = 33 Days @ 50% Days = 17 Days

Hindrance No.3 :- Due to Non Decision of Lift Pit size & Depth.

(22.08.2012 to 20.10.2012) = 60 Days

This hindrance is also recorded in the hindrance register at Sr. No. 3 and regarding the same it is stated that decision regarding lift pit size & depth was conveyed by the E.E. (E) CPWD, Chandigarh vide letter No. 24(89)/CCED-I/12-13/5455 -56 dated 18.10.2012. This hindrance is also justified but due to overlapping of whole the period by above hindrances, nil period is recommended for rescheduling of milestones.

= Nil

Hindrance No.4 :- Due to Limited Size of Plot Excavation of Full basement cannot be Taken.

29.07.2012 to date

Agency has applied hindrances on the said grounds and regarding the same it is stated that location of BIS plot is such that in front side there is one petrol pump and there is no approach to plot from remaining three sides. Entry can only be made from front and the size of plot is small and the location of building is such that in case the excavation for basement for the front portion is started approach to the building portion on the rear side is very difficult and practically

impossible. The hindrance found justified on the said grounds is @50% after deducting overlapping period of 93 days and recommended for rescheduling of milestones.

29.07.2012 to date ....i.e. upto 26.11.2012 = 121-93 = 28@50% = 14 Days

Hindrance No.5 :- Due to Heavy Rains.

22.08.2012 to 15.09.2012 = 25 Days

Hindrance shown under Sr. No. 5 is fully overlapped by the above hindrance as such nil period is recommended for re-scheduling of milestone.

= Nil

Considering all the hindrances stated above which were beyond the control of contractor the total justified hindrance works out to be 38+11+17+14 = 80 Days.

During rescheduling of 1st case of milestone, period of hindrance upto 26.11.2012 was already considered. The 2nd case of rescheduling covered period after 26.11.2012.

The recommendation of rescheduling the 2nd case of mile stone vide this office letter No 2175 dated 11.09.2013 were as below.

(i) Hindrance due to non-issue of complete architectural & structural drawings for hindrance No. 1(V) to (X)
(29.07.2012 to 16.04.2013) = 261 Days

Net days of hindrance after over lapping (29.07.2012 to 20.11.2012 = 114) come to 147 Days. In absence of structural drawings work of structure and subsequent works delayed badly 50% weightage has been considered on this account.

147@50% = 74 Days

For Hindrance 1(XI) & XII architectural drawing for building details were delayed due to which this hindrance.

Net hindrance after overlapping come to 2+53 = 55 days 30% weightage has been considered justified .

53 days @ 30% = 17 days = 91 Days

The above hindrances were considered upto 11.06.2013 and 3rd & 4th milestones were shifted vide your office letter No. 2260 dated 06.09.2013 (i.e. total 91 days) as below :-

Sr. No.	Milestones as per Agreement	Rescheduled Milestones vide letter No. 23(3446)/W-1/4463 dated 12.12.2012	Milestone proposed for Rescheduling
3rd Mile stone	24.04.2013	10.07.2013	09.10.2013
4th Mile stone	28.07.2013	13.10.2013	30.11.2013

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13. **False ceiling drawing issued on dated 14.08.2014 than verbally changed on 25.09.2014, after that out false ceiling work was hampered due to A.C. agency.**
29.07.2012 to 25.09.2014 = 788 days.

The modular furniture of the building was also the part of A/A & E/S of the work. There was a change in decision of the client to adjust whole of the staff on ground floor only accordingly there was deliberations within the client department regarding layout of the furniture at ground floor. The issue of design of false ceiling was linked with the layout of furniture from aesthetic point of view. The layout of the furniture was never finalized by the client due to which the false ceiling work was hampered. The layout plan of the furniture is still not finalized.

The Architectural drawings of the building were to be given by the client who got this from U.T. Architectural wing. The drawing of the false ceiling was received on 31.01.2014. after great pursuance. But as stated in above paras regarding matching false ceiling design with modular furniture, the client gave a decision to not to carry out false work which was conveyed to the agency by this office No. 171 dated 12.03.2014 (copy enclosed). Again in the month of August the client delinked the matter of false ceiling from the modular furniture design and accordingly vide No. 1816 dated 14.08.2014 (copy enclosed) the contractor was again asked to carry out false ceiling work. It is pertinent to mention that the work was got carried from the agency because his rate of this item was very low. Had the work being carried out from other agency the rates would definitely have been higher.

Considering time of 15 days for gearing their sources for false ceiling work and 04 months to complete the work a period of 135 days from 15.08.2014 is found justified and period from 31.01.2014 to 14.08.2014 is consequentially allowed. It is also on record in hindrance register that AC ducting in ceiling work was also going on which created hindrance for false ceiling work. However, the agency was still carrying out the work as for as possible. The work of AC was completed on 11.03.2015 after which the ceiling tiles were finally placed after making the false ceiling members finally leveled and taking up the finishing work and the building was completed on 31.03.2015. Thus in view of the above whole of the period from 01.12.2013 (from the next day of rescheduled 4th mile stone i.e. 30.11.2013) is found justified for grant of E.O.T.

As per above the period of justified hindrance works out to be 486 days.

.....

The contractor has carried out some additional items also, even though the work has completed within the tendered amount. These items were carried out during the period of hindrance mentioned in Sl. No. 13 hence no extra time is considered justifiable for this extra work. It is also mentioned that there was no ideal T&P and ideal man power during the period mentioned in Sl. No. 13.

Thus total justified period of hindrance comes to:-

(i)	Approved period during 1st case of milestone extending 4th milestone upto 13.10.2013 from 28.07.2013	77 days
(ii)	Period from 14.10.2013 to 30.11.2013 of the shifted date of 4th milestone during 2nd case of milestones.	48 days
(iii)	As per hindrance of Sr. No. 13	486 days
	Total	611 days

(9)

In view of above, it is recommended that EOT for this work may be granted upto 31.03.2015, the actual date of completion, without any levy of compensation.

Encls:- Copies of Letters as above & Copy of Hindrance register.
Register (A) Hindrance (B) S.O.B (2 nos) (C) Cement Register
(D) Dog-Register in original by Hand through EE on 22/4/16

कार्यपालक अभियंता,
चण्डीगढ केन्द्रीय मण्डल-एक
केलोनिवि, चण्डीगढ।

N.O.O.

Copy to:-

Assistant Engineer, Chandigarh Central Sub-division-III, Chandigarh his letter No. 54(16)/CCSD-III/08 dated 27.01.2016.

कार्यपालक अभियंता,

35. The petitioner has attempted to suggest that the respondent had admitted that the delay was attributable solely to the respondent. However, a perusal of the award shows that both the parties alleged the factum of responsibility of delay on the other party. It is for this reason that the learned Arbitrator adjudicated the controversy. The operative portion of the Award in this regard reads as under:-

> *"6.1.14 In this case one of the major issue is that of justification of delay in execution. In submissions made, the Claimant justify delay of 975 days.*

In Synopsis, they justify delay of 826 days and 866 days in two alternatives. The Claimant justify delay of 611 days.

The Supreme Court has already settled that this issue cannot be settled by any of the party to the case. The same has to be decided by third party; the Court or the Arbitrator. The Supreme Court decision in the matter of M/s J.G. Engineers Pvt. Ltd Vs. UoI (CJ-3/CD-3 page 124 -138) under para 14 and 15 is reproduced below;

> *14. The decision as to who is responsible for the delay in execution and who committed breach is not made. subject to any decision of the Respondent or its officers, nor excepted from arbitration under any provision of the Contract.*
>
> *15. In fact. the question whether the other party committed breach cannot be decided by the party alleging breach. A Contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.*

In this case both the parties have not agreed on as to who committed breach and what should be the quantum of delay. Therefore according to the Supreme Court Judgment it has first to be decided by this Tribunal as to who committed breach of the Contract and what should be the delay in execution of the Work."

("Emphasis Supplied")

36. It is in these circumstances, the learned Arbitrator has gone through the entire arbitral record and observed that though the petitioner has written numerous letters to the respondent regarding delay, but no specific issues were raised, i.e. pointing out specific delays caused to particular works.

37. In furtherance of the same, the learned Arbitrator enumerated instances when the issue of non-availability of adequate workforce was brought to the attention of the petitioner by the respondent and nothing was done on the

petitioner's part. The operative portion of the Award in this regard reads as under:-

> "*6.1 .8 There are numerous occasions when the Respondent pointed out to the Claimant to increase the man power to expedite the Work as the pace of Work was very slow. Following are some of the instances when the Respondent through Site Order Book wrote to the Claimant/ made observations in this regard and the Claimant had nothing to say in their defense and simply wrote "noted" :*
>
> *i. The Respondent wrote on· 05.12.2012 to increase man power.*
> *ii. On 19.08.13 more man power deployed.*
> *iii. The Respondent issued instructions on 18.10.2013 to expedite the work.*
> *iv. On 24.10.2013 the Respondent wrote to Claimant that Electrical equipment are lying in open at site but El Sub Station Building and Pump House were not ready and as such asked to deploy resources on those areas.*
> *v. On 02.11.2013 the Respondent wrote that progress of Work was very slow.*
> *vi. On 11.11.2013 the Respondent wrote that there were many work areas like external work, work in toilets which could be taken up. This could not be done obviously for shortage of man power.*
> *vii. On 26.11.2013 the Respondent wrote that various targets given by the Claimant v could not be achieved for shortage of man power.*
> *viii. On 09.12.2013 the Respondent Wrote to expedite the slow pace of work.*
> *ix. On 19.12.2014 the Respondent wrote to start the outside work.*
> *x. On 14.03.2014 the Respondent wrote that the work was. stand still and only two three :-J workers were working.*
> *xi. On 25.03.2014 the Respondent wrote that the man power had not been augmented at site.*
> *xii. On 02.04.2014 the Respondent listed large no. of activities which had not been taken up by the Claimant.*
> *xiii. On 14.04.2014 the Respondent wrote that except Trench work no other activity was going on.*
> *xiv. On 21.07.2014 the Respondent wrote that progress of work was very slow and asked to increase the man power.*

xv. On 05.08.2014 the Respondent wrote that except Painters no other worker was available at site and asked to take up the pending works on SOS basis.

xvi. On 25.08.2014 the Respondent wrote that there was no worker at site and the work had stopped.

xvii. On 14.10.2014 the Respondent wrote that observations made earlier had not been attended.

xviii. On 23.12.2014 the Respondent wrote that labour had not been deployed to attend the observations made."

38. A perusal of the letters discussed above shows that the respondent has repeatedly informed the petitioner that the work was being carried out in a slow pace and the petitioner was repeatedly asked to increase its manpower by the respondent. Even in the EOT relied upon by the petitioner, the respondent notes that though the period of delay of 486 days (under serial number 13) has been justified, however no ideal T&P and ideal manpower was provided during this time. The said EOT dated 17.02.2016 of the respondent has also been considered by the learned Arbitrator in para 6.2.3 of the Award (reproduced above).

39. In the said circumstances, I am of the view that the question of delay falls within the subjective assessment of the learned Arbitrator. The learned Arbitrator has considered all the letters exchanged between the parties (including the EOT) and thereafter come to the finding that the delay was attributable to both the parties.

40. Once the learned Arbitrator has gone through entire record and has come to a finding that the delay is attributable to both parties, this court under the limited jurisdiction of section 34 of the Arbitration and Conciliation Act, 1996 cannot substitute the view taken by the learned Arbitrator if the same is a

plausible view and is based upon material available before the learned Arbitrator.

41. Hence, I am not inclined to interfere with the finding of the learned Arbitrator regarding delay and the objection raised against the same is dismissed.

42. In view of the above, the other claims sought to be challenged on the ground that the delay was solely attributable to the respondent (being Claim Nos. 4, 6, 8, 11, 12, 14, 34, 16, 17, 19, 20,22- 29, 38 and 40: Loss and Damages, Overheads, etc.; Claim No. 5: Interest 12% on due amount impounded wrongly; Claim No. 7 and Claim No. 15: Interest on part rates of Agreement Items and Extra Items respectively; Claim No. 9 and Claim No. 30: Loss of profit due to various breaches) do not warrant any inter-reference.

Claim No. 3: Bonus/incentive as per clause 2A

43. The petitioner has contented that since the delay was not attributable to the petitioner, hence it is liable to claim bonus/incentive for early competition as per clause 2A. Clause 2A reads as under:-

> "**CLAUSE 2A: Incentive for early completion**
> *In case, the contractor completes the work ahead of scheduled completion time, a bonus @ 1% (one per cent) of the tendered value per month computed on per day basis, shall be payable to the contractor, subject to a maximum limit of 5% (five per cent) of the tendered value. The amount of bonus, if payable, shall be paid along with final bill after completion of work. Provided always that provision of the Clause 2A shall be applicable only when so provided in 'Schedule F'"*

44. The learned Arbitrator in this regard held as under:-

"*As per findings of the AT under para6.2.delay of611 days is justified for the Work. The Claimant have taken 365+ 611 days to complete the work. They have therefore not completed the Work before time even by a single day. As such the Claimant are not entitled to Bonus/Incentive.*

The Claim is not justified."

45. In the present case, since I have already dealt with and upheld the finding on delay by the learned Arbitrator (delay being attributable to both the parties), hence the finding on claim no. 3 for non-grant of bonus/incentive under clause 2A of the Agreement does not warrant any interference.

Claim No. 2, 31, 32, 33 and part of Claim No. 36

46. All these claims were clubbed together for adjudication on Escalation.

47. The petitioner submits that the learned Arbitrator has arbitrarily decreased cost of Escalation on Other Materials calculated on clause 10CC without any reason.

48. The operative portion of the Award reads as under:-

"In this Claim, the Claimant have Claimed Escalation in the cost of labour and materials other than cement and steel during entire construction period on all items of work; Agreement Items, Substituted Items, Extra Items and Deviated Items. Escalation in the cost of of cement and steel is already covered under Clause CA of the Contract.
There is no application of Clause 10 CC in the Contract. Clause 10C and 10CA are applicable. As Clause 10CC is not applicable, the Claimant have calculated the Escalation on other materials on the principle of Clause 10 CC.

……

While working out Escalation on other materials, the Claimant worked out the cost of other materials as 40% of the Gross Value of the Work done for every quarter of the year. As the Stipulated period of construction is 365days, increase in cost of other materials is not

permitted in first 4 quarters of the period. The Claimant have worked out the increase in balance 7 quarters in an indirect way Rs. 4,53,869. The Claimant have not produced records that he paid extra on account increase in the cost of other materials, It is felt that it will be reasonable to pay under this to 50% of the theoretically worked out amount, say Rs. 2,36,934."

("Emphasis supplied)

49. Under the heading of escalation on other materials, the learned Arbitrator observed that the petitioner has failed to show any evidence with respect to amounts paid extra by it on account of increase in cost of the material payable under clause 10CC. The learned Arbitrator was of the view that the petitioner has calculated the same in an indirect manner and was inclined to award 50% of the amount arrived at.

50. I am of the view that the learned Arbitrator analysed the material available on record and found that the petitioner has not produced any document to show that it had incurred extra amounts for increase in cost of material. No document has been shown to me that the petitioner incurred extra amounts for increase in cost of material. This court in the limited jurisdiction under section 34 of the Arbitration and Conciliation Act, 1996 cannot reappreciate evidence. The Hon'ble Supreme Court in *NTPC Ltd. v. Deconar Services (P) Ltd*., (2021) 19 SCC 694 has held as under:-

"*12. Further, it is also a settled proposition that where the arbitrator has taken a possible view, although a different view may be possible on the same evidence, the court would not interfere with the award. This Court in Arosan Enterprises Ltd. v. Union of India [Arosan Enterprises Ltd. v. Union of India, (1999) 9 SCC 449] , held as follows : (SCC p. 475, paras 36-37)*

"36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the

court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology ―error apparent on the face of the record does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined."

51. In view of the above, I am not inclined to interfere with the said finding. The objections raised against the said claim are rejected.

Claim No. 1

Part B(i)

52. With respect to part B(i) of claim no. 1, the petitioner states that the petitioner had duly submitted analysis of rates of Substituted Items and Extra Items on market rates, in terms of clause 12.2.

53. The learned Arbitrator while deciding the present claim has held as under:-

"This part of the Claim pertain to 'Dorma' make fittings. As is clear from the records, the Respondent asked the Claimant verbally to submit the details of Dorma Fittings. The Claimant submitted Performa invoice of

the items and on the basis of the rates indicated by the Company in their Invoice, the Claimant worked out the rates of the items and submitted the same. The Respondent asked the Claimant to submit purchase vouchers which the Claimant did not submit: As per procedure, the Claimant should have submitted the rates of the items within fifteen days of occurrence of the items and the Respondent within one month of submission of the analysis of the rates by the Claimant should have sanctioned the rates. But this was not the stage of occurrence of the items. The items were purchased and fixed later. The Engineer In Charge; Respondent, asked the Claimant to submit purchase vouchers which they did not. The Respondent verified themselves the rates in the market in which they found that the Company had offered 15% rebate on the rates indicated in the Performa Invoice. The Respondent finalized the rates of the items on the basis of the rates verified from the market and finalized the rates of the items. The rates appears to be correct and reasonable. As the Claimant did not submit purchase vouchers and from the submissions made by the parties it is not clear as to when the items were purchased and fixed, it is difficult to assess whether the Respondent committed breach by not sanctioning the items within stipulated time under the Contract or not. This is however clear that the Respondent did not clarify this issue in their defense. Therefore, giving advantage of this to the Claimant, the amount of Claim can be worked out from the statement submitted by the Claimant for this Claim. It is noticed that the Claimant have worked out their rates on the basis of the rates in Performa Invoice. After adding installation cost. Freight charges, labour cess and O.H & C.P. the amount of Claimant and the Respondent comes Rs. 1063249 and Rs. 9,54,865 respectively. The difference in amount is Rs.1,08,384 only as deductions towards WCT and labour Cess will be made from both sides amount.

The Claim is justified for Rs. 1,08,384."

54. A perusal of the above shows that the learned Arbitrator was of the view that the petitioner failed to submit the purchase vouchers to the respondent. In the absence of the purchase vouchers, the respondents themselves verified the

rates and found that the company had offered 15% rebate on the rates indicated in the Performa invoice.

55. In addition, the learned Arbitrator was of the view that as per the documents available on record it is difficult to ascertain when the items were purchased and fixed, hence it was unclear whether the respondent committed any breach by sanctioning the items within stipulated time. In this view of the matter, the learned arbitrator awarded Rs. 1,08,384/-.

56. To my mind, the learned Arbitrator analysed the rates provided by the petitioner under clause 12.2 and reasoned that the same is without credible evidence, the petitioner only submitted Performa Invoices and not purchase vouchers showing the actual purchase price of the items. Nothing has been shown to me to prove the contrary by the petitioner. The respondent verified that the manufacturer/company was showing 15% rebate on the rates given in the Performa invoice. The learned Arbitrator analysed the material available before him and thereafter arrived at his finding giving benefit to the petitioner. Therefore, I am of the view that the said findings are plausible and in terms of *NTPC Ltd. (supra)* cannotbe interfered with/substituted under the limited jurisdiction of section 34 of the Arbitration and Conciliation Act, 1996.

57. In this view, the objections raised against Part B(i) of Claim no. 1 does not merit any consideration and is rejected.

Part D:

58. The petitioner on 30.07.2024 handed over an additional short note dated 29.07.2024 to challenge the findings of the learned Arbitrator for part D of Claim no. 1. The petitioner claims rewriting of terms of clause 8.1 of the

Agreement and Clause 1 of SCC by non-grant of amount for Extra item/Work towards finishing work on Exposed Concrete Surface.

59. The petitioner has not challenged the same in the present petition under section 34 of the Arbitration and Conciliation Act, 1996and has raised it subsequently. Since, the grounds in the note of arguments do not form part of the objection petition, the respondent did not have the opportunity to meet the same in brief written synopsis filed in March of 2020. Hence, this claim needs to be rejected at the threshold.

60. Without prejudice to the above, the operative portion of the Award reads as under:-

> "*The Claimant have Claimed for 6mm thick finishing plaster on exposed Concrete surface. In this regard, the provision in the specifications is very clear. As per para 5.4. 7 of the specifications, the exposed concrete surface finishing is part of the concrete item and it's cost is included in the cost of the item. This plaster finish is on the concrete surface which is obtained through formwork. Para 4.2.13 clearly lays down that that plastering and finishes other than those obtained through for workshall be specified and paid for separately unless otherwise specified. The Claimant made the plea that Directorate General of Works later issued modification in the case making it clear that finishing plaster on exposed concrete surface is part of the concrete item which justifies their Claim. In this regard it is to be understood that the purpose to issue the amendment by the Directorate General of the Works must have been to remove the ambiguity and make it abundantly clear that finishing on exposed concrete surface is part of the concrete item.*
>
> *The Claimant have Claimed extra for under layer of tile work ocn the plea that on rough face of the wall, 15 mm thick under layer has been done. This is allegedly on the analogy of the regular plaster that on rough side of the wall 15mm plaster is done. In this case the item clearly lays down that the tiles are to be fixed on an under layer of 12mm thick. Therefore paying extra for 15mm thick under layer does not arise. Technically, it is*

possible to have smooth surface with 12 mm under layer on rough side of wall. One thing has to be understood that in case of regular plaster on wall, minimum cushion of 12 mm is required on wall for weather protection. On fare face it can be achieved with 12 mm thick plaster but on rough surface it can be achieved with 15 mm thick plaster only. the case of under layer of tiles, criteria of weather protection is not there and that is why 12mm thickness is ok."

61. The petitioner submits that the learned Arbitrator has attempted to apply an interpretation of CPWD specification in contravention to the clause 8.1 of the Agreement and clause 1.1 of SCC whereby clear preference has been given to Nomenclature of item as per Schedule of Quantities. The clauses 8.1 of the Agreement and Clause 1.1 of the SCC read as under:-

Clause 8.1 of the Agreement

"8.1 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 Specification and Special Condition, if any.*
iii. *Drawings.*
iv. *C.P.W.D. Specifications.*
v. *Indian Standard Specifications of B.I.S."*

Clause 1.1 of the SCC

"1.1 Except for the items, for which Particular Specifications are given or where it is specifically mentioned otherwise in the description of the items in the schedule of quantities, the work shall generally be carried out in accordance with the "CPWD Specifications 2009 Vol. I & 11" and as per instructions of Engineer-in- Charge. Wherever CPWD Specifications are silent, the latest IS Codes / Specifications shall be followed and the rates should be all inclusive.

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. Nomenclature of item as per Schedule of Quantities
ii. Special Conditions.
iii. Particular Specifications.
iv. CPWD Specifications.
v. Architectural Drawings.
vi. Indian Standard Specifications of B.I.S.
vii. All non-schedule items shall be governed by manufacturer's specifications.

……"

62. The petitioner submits that the nomenclature of schedule of item 3.4 unambiguously excludes the price of 'finishing,' and hence the petitioner was entitled to charge extra for cost of finishing. Item 3.4 is reproduced as under:-

"Providing and laying in position machine batched and machine mixed design mix M-25 grade cement concrete for reinforced cement concrete work, using cement content as per approved design mix, including pumping of concrete to site of laying but excluding the cost of centering, shuttering, finishing and reinforcement, including admixtures in recommended proportions as perIS: 9103 to accelerate, retard setting of concrete, Improve workability without impairing strength and durability as per direction of Engineer-ln-Charge."

("Emphasis Supplied")

63. A perusal of the above item shows that the cost of finishing was to be excluded for the item of 3.4, however it does not signify that the same be charged extra especially since Clause 9 of the Particular Specifications categorically states that finishing shall be done in accordance with CPWD specifications. Clause 9 of the Particular Specifications reads as under:-

*"**9.0. FINISHING:-***

9.1 The work shall be done in accordance with CPWD Specifications.

9.2 All painting material of approved brand and manufacturer shall be brought to the site of work in the original sealed containers. The material brought to the site of work shall be sufficient for at least 30 days of work. The material shall be kept under the joint custody of contractor and representative of the Engineer-in-charge. The empty containers shall notfrom the site till the completion of the work without permission of the Engineer-in-charge."

64. Additionally, Clause 1.32 of the Special Conditions, which is in relation to Batch Mix Concrete, specifically states that no additional cost shall be paid on account of 'finishing' of pointed wall surface. Clause 1.32 of the Special Conditions read as under:-

"1.32 In the item of finishing walls with water proofing cement paint, only the plain/flat area shall be " measured for payment and nothing extra shall be paid on account of pointed wall surface."

65. Hence, in view of the above reproduced clauses, I do not find favour with the argument raised by the learned counsel for the petitioner that the learned Arbitrator could not have applied CPWD specifications to decide the aspect of Extra Item/Finishing work on Exposed Concrete Surface.

66. Even otherwise, the argument raised by the petitioner that "*Nomenclature of Item as per Schedule of Quantities"* should have been given preference over the CPWD Specifications above is a question of interpretation of the contract and not rewriting terms of contract. The same is clearly under the domain of the learned Arbitrator and does not fall under the limited grounds of challenge available under section 34 of Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court in *M.P. Power Generation Co. Ltd. v. ANSALDO*

Energia SpA, (2018) 16 SCC 661 summarised the position in law. The operative portion reads as under:-

> *"**25.** The limit of exercise of power by courts under Section 34 of the Act has been comprehensively dealt with by R.F. Nariman, J. in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the arbitrator. The restrictions placed on the exercise of power of a court under Section 34 of the Act have been analysed and enumerated in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] which are as follows:*
> *(a) The court under Section 34(2) of the Act, does not act as a court of appeal while applying the ground of "public policy" to an arbitral award and consequently errors of fact cannot be corrected.*
> *(b) A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the sole judge of the quantity and quality of the evidence.*
> *(c) Insufficiency of evidence cannot be a ground for interference by the court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34(2) of the Act.*
> *(d) An award can be set aside only if it shocks the conscience of the court.*
> *(e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the court. Error of construction is within the jurisdiction of the arbitrator. Hence, no interference is warranted.*
> *(f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the court under Section 34 cannot substitute its opinion over the arbitrator's view."*
>
> *("Emphasis Supplied")*

67. In view of the above, I am not inclined to entertain this objection and the same is rejected.

Claim H

68. With respect to thesubmission of the petitioner thatthe petitioner is entitled to receive labour escalation under clause 10C of the Agreement with respect to all BOQ items, including the substituted items, the learned Arbitrator has held as under:-

> *"The Claimant have raised this Claim payment of labour escalation on Substituted Items under Clause 10C. Rates of the Substituted Items are derived by adding or subtracting the difference of the market rates of the Substituted Item and Agreement Item to or from the rate of the Agreement Item. So the Substituted Items rates get decided on market rates. These items are also prepared at the time of execution. Therefore Clause 10 C is not applicable on these items.*
> *This part of the Claim is not justified."*

69. Clause 10C of the Agreement reads as under:-

> "*CLAUSE 10C : Payment on Account of Increase in Prices/Wages due to Statutory Order(s)*
> *If after submission of the tender, the price of any material incorporated in the works (excluding the materials covered under Clause 10CA and not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 thereof) and/or wages of labour increases as a direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any changes of rate in sales tax/VAT, Central/State Excise/Custom Duty) beyond the prices/wages prevailing at the time of the last stipulated date of receipt of tenders including extensions, if any, for the work during contract period including the justified period extended under the provisions of clause 5 of the contract without any action under clause 2, then the amount of the contract shall*

accordingly be varied and provided further that any such increase shall be limited to the price/wages prevailing at the time of stipulated date of completion or as prevailing for the period under consideration, whichever is less.

If after submission of the tender, the price of any material incorporated in the works (excluding the materials covered under Clause 10CA and not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 thereof) and/or wages of labour as prevailing at the time of last stipulated date of receipt of tender including extensions, if any, is decreased - as a direct result of the coming into force of any fresh law or statutory rules or order (but not due to any changes of rate in sales tax/VAT, Central/State Excise/Custom Duty), Government shall in respect of materials incorporated in the works (excluding the materials covered under Clause 10CA and not being material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 hereof) and/or labour engaged on the execution of tie work after the date of coming into force of such law statutory rule or order be entitled to deduct from the dues of the contractor such amount as shall be equivalent to the difference between the prices of the materials and/or wages as prevailed at the time of the last stipulated date for receipt of tenders including extensions if any for the work and the prices of materials and/or wages of labour on the coming into force of such law statutory rule or order. This will be applicable for the contract period including the justified period extended under the provisions of clause 5 of the contract without any action under clause 2.

Engineer in Charge may call books of account and other relevant documents from the contractor to satisfy himself about reasonability of increase in prices of materials and wages.

The contractor shall, within a reasonable time of this becoming aware of any alteration in the price at any such materials and or wages of labour, give notice thereto to the engineer-in-Charge stating that the same is given pursuant to this condition together with all information relating thereto which he may being position to supply.

For this purpose, the labour component of the work executed during period under consideration shall be the percentage as specified in

Schedule F of the value of work done during that period and the increase/decrease in labour shall be considered on the minimum daily wages in rupees of any unskilled adult male mazdoor, fixed under any law, statutory rule or order."

70. A perusal of clause 10C shows that that the same pertains to increase in prices/wages on account of statutory orders during the period of contract (including extensions) however it does not deal/provide for payment of escalation on substituted items. Substituted items are dealt with in clause 12 of the Agreement, which reads as under:-

"12. The Engineer-in-Charge shall have power (i)to make alteration in, omissions from, additions to, or substitutions for the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and (ii) to omit a part of the works in case of non-availability of a portion of the site or for any other reasons and the contractor shall be bound to carry out the works in accordance with any instructions given to him in writing signed-by the Engineer-in-Charge and such alterations, omissions, additions. or, substitutions, shall form part of the contract as if originally provided therein and any altered, additional or substituted work which the contractor may be directed to do in the manner specified above as part of the works, shall be carried out by the contractor on the same conditions in all respects including price on which he agreed to do the main work except as hereafter provided.
12.1 The time for completion of the works shall, in the event of any deviations resulting in additional cost over the tendered value sum being ordered, be extended, if requested by the contractor, as follows;
(i) In the proportion which the additional cost-of the altered, additional or substituted work, bears to the original tendered value plus.
(ii) 25% of the time calculated in (i) above or such further additional time as may be considered reasonable by the Engineer-in-Charge.
12.2……. In the case of substituted items (items that are taken up with partial substitution or in lieu of items of work in the contract), the rate for

the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the following para.

(a) If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).

(b) If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rates of substituted item and the agreement item (to .be substituted)…"

("Emphasis Supplied")

71. A combined reading of the clause 12 and the finding of the learned Arbitrator shows that the learned Arbitrator considered clause 12.2 to come to the finding that labour escalation is not applicable on substituted items under clause 10C since the same is to be decided on the basis of market rates, as given in clause 12.2.The said analysis by the learned Arbitrator appears to be a fair and reasonable interpretation, especially since Clause 12 of the Agreement categorically states that any substitutions and substituted workshall form part of the contract as if originally provided for and the same shall be carried out by the contractor on the same conditions in all respects including price.

72. In view thereof, the objections raised against the same does not warrant any interference and are rejected.

Claim J

73. The petitioner submits that the petitioner is entitled to receive payment at market rates on all deviated items which exceeded the permissible BOQ

Deviation Limits in terms of clause 12.2 of the Agreement. In this regard, the learned Arbitrator observed that:-

> *"This part of the Claim is regarding Deviated quantity not paid on prevailing market rates. The Claimant have sent revised statement for this part of the Claim through rejoinder and changed caption of the Claim. The Claim is submitted is for Rs. 24,25,607. This part of the Claim is covered under Clause 12.2 of the Contract. Submission of the Claimant is that quantities of 9 items of Work have deviated beyond the limit laid down under Schedule F for which they are entitled to be paid market rates under Clause 12.2 of the Contract but he has not been paid the correct rates*
>
> *It has been observed that quantities of items no. 4.1, 9.1 and 9.5 have not deviated beyond limit and rates of items no. 5.3, 7.1 and 12.2.1 paid are justified. Rates of the 9 following three items need change as under:*
>
> *Item no. 7.2.1 (qty. 0.96 Kg) rate to be Rs. 2300 instead of Rs. 1930.05*
>
> *Item no. 11.6.1.1 (qty. 66,27 mtr) rate to be Rs. 1100 instead of Rs. 953.00*
>
> *Item no. 11.13.1 (qty. 128 no.) rate to be Rs. 300 instead of Rs. 271.90*
>
> *With above details, Claim amount comes Rs. 13717*.64
>
> *This part of the Claim is justified for Rs. 13718*."

74. Clause 12.2 of the Agreement reads as under:-

> *"12.2 Deviation, Extra Items and Pricing*
>
> *In the case of extra items (items that are completely new, and are in addition to the items contained in the contract) the contractor may within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis, for the work and the engineer-in-charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.*
>
> *In the case of substituted items …*
>
> *……*

In the case of contract items, substituted items, contract cum substituted items,which exceed the limits laid down in schedule F, the contractor may within fifteen days of receipt of order or occurrence of the excess, claim revision of the rates, supported by proper analysis for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the schedule of quantities, the Engineer-in-Charge shall within one month of receipt ofthe claims supported by analysis, after giving consideration to the analysis of the ratessubmitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined."

75. The learned Arbitrator observed that out of the 9 items of work for which quantities have been said to have deviated beyond the BOQ limits, 3 have not been deviated, 3 have been justified and only rates of three items need to be changed. The said finding is based on analysis of material and documents available on record.

76. The petitioner has submitted that all the items discussed above were deviated beyond the permissible BOQ limits and the learned Arbitrator has not rightly appreciated the same. I am of the view that the same is a matter of evidence. The learned Arbitrator on assessment of the rates submitted by the petitioner found no deviation in items 4.1, 9.1 and 9.5 and was of the opinion that payment of rates of items no. 5.3, 7.1 and 12.2.1 was justified. The learned Arbitrator only found infirmity in rates of items 7.2.1, 11.6.1.1 and 11.13.1 and the said infirmities were duly rectified. In view of the finding being based on subjective assessment on facts of the learned Arbitrator, I am not inclined to differ/interfere with the same.

77. Additionally, the learned Arbitrator also awarded an amount of Rs. 1,70,639 for deviated items beyond the BOQ limits in Part A of Claim No. 1. The operative portion of the Award in this regard reads as under:-

"***Claim No. 1***

Part A

In this case quantities of certain items had increased beyond the limit specified in Schedule F of the Contract and market rates of these items are less than the Agreement rates. This situation is covered under Clause 12.3 of the Contract. Under the provisions of the Contract, the onus lies on the Engineer in Charge; the Employer, to issue notice to the Contractor within one month of occurrence of the increase in the quantity intimating the increase in quantity and ask his comments relating to revision of rates of the item within fifteen days of issuance of the notice. The Engineer in Charge within one month of the expiry of fifteen days period, shall revise the rates of the items based on market rates taking in to consideration the reply of the Contractor. In this case, the Engineer in Charge did not comply with the provisions of the contract. He issued notice much later even after. completion of the work. Silence on the· part of-the Engineer In Charge on rates of the items when these were being executed, gave assurance to the Contractor that he would get the quoted rates of the items in the agreement. Therefore the Claimant is entitled to Agreement rates for all such items.

The Claim is justified for Rs. 1, 70,639."

78. In this view, the findings on the said claim does not warrant any interference and the same is rejected.

Conclusion

79. In view of the above, the present petition and pending applications, if any, are dismissed.

JASMEET SINGH, J

JANUARY 10th, 2025/dj