



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

+ **O.M.P. (COMM) 130/2023 and I.A. 6584/2023**

Reserved on : 25.07.2023

Pronounced on : 16.08.2023

IN THE MATTER OF:

GOVERNMENT OF NCT OF DELHI

..... Petitioner

Through: Mr. Anupam Srivastava, ASC,
GNCTD with Mr. Dhairya Gupta
and Mr. Vasuh Misra, Advocates.

versus

R.S SHARMA CONTRACTORS PVT LTD

..... Respondent

Through: Mr. M.K. Ghosh, Advocate with
Mr. H.S. Sharma, AR.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The present petition under section 34 of the A&C Act¹ has been preferred by the petitioner, Govt. of NCT of Delhi, assailing the Arbitral Award dated 16.11.2022 rendered by the AT² comprising of a Sole Arbitrator.

2. The impugned Award was rendered in the context of disputes arising w.r.t Agreement No. EE/CD-III/ACS/Agmnt/10/14-15 (*“the Contract”*) dated 13.09.2014, executed in favour of the

¹ Arbitration and Conciliation Act, 1996

² Arbitral Tribunal



Respondent/Contractor³ for widening of bridge at RD-900m of Shahdara out fall drain near Kalindi Kunj, Noida (“*the Project*”).

3. The stipulated dates for commencement and completion of the Project were 13.09.2014 and 12.03.2016 respectively. Indisputably, the Project could not be completed within the stipulated period, resulting in a request for extension of time by the Contractor. The extension was granted, and the Project was finally completed on 17.01.2019. Disputes having arisen w.r.t payment of final bills and attributability of delays, arbitration was invoked. In its statement of claim, the Contractor raised claims for a total of Rs.5,44,24,036/-, inter alia, alleging that the delay in execution of work was attributable to the petitioner. A total of 8 claims were filed, pursuant to which the petitioner filed its statement of defence, but no counter claim.

4. The details of the claims raised are as follows:

i) Claim 1: Claim on account of work done not paid. Petitioner denied the claim on the ground that the cost of the initial test pile was not payable as per MORTH specification and that the pile was rejected as per the terms and conditions of the agreement, as the quantity of RMC poured in pile was less than the required quantity. Thus, nothing extra is payable

ii) Claim 2: Claim on account of less payment of substituted item. Petitioner denied the claim on the ground that the rate was derived on the basis of CPWD/DAR components and the same was approved on 15.10.2015, and not after completion of the work. Thus, nothing extra is payable

³ R.S. Sharma Contractors Pvt. Ltd.



iii) Claim 3: Claim on account of less rate paid for extra item 4. Petitioner denied the claim on the ground that the rate paid by the department was accepted by the Contractor. Thus, nothing extra is payable

iv) Claim 4: Claim on account of increase in wages as per clause 10C. Petitioner denied the claim on the ground that the Contractor had already given an undertaking to not claim anything extra due to delay on the EOT proforma part 1. Thus, nothing extra is payable

v) Claim 5: Claim on account of prolongation of contract

Claim 5(a): Claim on account of increase in wages for labour on prevailing rates as per clause 10C as a compensation

Claim 5(b): Claim on account of increase in prices of material as damages in prolongation of contract

Claim 5(c): Compensation for losses on account of overstay at site in extended period for site establishment

Claim 5(d): Compensation for losses on account of overstay of machinery, tools and plant in extended period

Claim 5(e): Claim on account of head office expenses

Petitioner denied the claims on the ground that the Contractor had already given an undertaking to not claim anything extra due to delay on the EOT proforma part 1. Thus, nothing extra is payable

vi) Claim 6: Claim on account of interest @12%. Petitioner denied the claim on the ground of whatever was stated in the above-mentioned claims

vii) Claim 7: Due on account of GST on claim amount @ 12%. Petitioner denied the claim on the ground of whatever was stated in the above-mentioned claims



viii) Claim 8: Cost of arbitration. Petitioner denied the claim on the ground of the general submissions made

5. The summary of claim amounts, as claimed and as awarded by the AT, is set out below:-

| Claim No. | Claimed Amount (in Rs.) | Awarded Amount (in Rs.) | Interest awarded @ 10% p.a. from date |
|------------------|------------------------------------|------------------------------------|--|
| 1. | 10,31,144/- | 10,00,000/- | 17.03.2021 |
| 2. | 38,67,054/- | 32,93,054/- | 17.03.2021 |
| 3. | 30,10,524/- | 2,25,000/- | 17.03.2021 |
| 4. | 17,58,801/- | 17,58,801/- | 17.03.2021 |
| 5. | (a) 1,09,15,572/- | 1,64,00,000/- | 17.03.2021 |
| | (b) 1,02,95,700/- | | |
| | (c) 1,09,58,800/- | 1,36,10,349/- | |
| | (e) 62,96,384/- | | |
| | (d) 50,36,057/- | 17,00,000/- | |
| 6. | Interest @12% p.a. | Interest @ 10% p.a. | As per claim no. 6 |
| 7. | GST @12% | Declaratory Award | As per claim no. 7 |
| 8. | 12,54,000/- | 10,00,000/- | Nil |
| Total | 5,44,24,036/- plus interest | 3,89,87,204/- plus interest | As per claim no. 6 |

6. During the course of submissions, Mr. Anupam Srivastava, learned counsel appearing for the petitioner has restricted the challenge to the *OMP (COMM.)130/2023*



impugned Award, to the extent that claims for escalation cost and for prolongation of Contract were allowed. He further submitted that the ground of challenge is also restricted to sub-section 2A of Section 34 of the A&C Act i.e., patent illegality.

7. Mr. Srivastava, while assailing the impugned Award, contended that the delay in completion of the Project was entirely attributable to Contractor, as while seeking extension of time, the following endorsement was made by it:

‘we have not suffered any loss due to delay and extra work hence we will not claim anything extra.’

8. It was further contended that subsequent to such extension, the Contractor never claimed that the said endorsement was made under any duress. In fact, no such allegation was made in its statement of claim filed before the AT. Learned counsel has referred to the decision of the Supreme Court in Associate Builders v. Delhi Development Authority reported as **(2015) 3 SCC 49**, Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI) reported as **MANU/SC/0705/2019**, and State of Orissa v. Sudhakar Das (Dead) by LRs reported as **(2000) 3 SCC 27**.

9. Per contra, learned counsel for Contractor has defended the impugned Award, by contending that the delay of 1041 days was attributable to the petitioner, as correctly held by the AT. The Contract had provided for such extension of time per Clause 5.2 and 5.4. It was further contended that the Contractor was forced to give the endorsement in its letter seeking extension of time, as by that time, its security as well as payments towards final bill amounting to Rs. 66 lacs and Rs. 31 lacs respectively, were pending with the petitioner. Since the contract is silent



upon the issuance of any ‘no claims’ certificate, the endorsement was clearly under duress. In support, he has referred to the judgments in P.M. Paul v. Union of India reported as **1989 Supp (1) SCC 368**, K.N. Sathyapalan (Dead) By LRs. v. State of Kerala & Anr. reported as **(2007) 13 SCC 43** and Assam State Electricity Board & Ors. v. Buildworth Private Limited reported as **(2017) 8 SCC 146**.

10. The scope of Section 34 of the A&C Act has come to be defined in a plethora of decisions. Supreme Court in UHL Power Co. Ltd. v. State of H.P. reported as (2022) 4 SCC 116, has expounded its scope as under:-

“16. As it is, the jurisdiction conferred on Courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an Appellate Court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. In MMTC Limited v. Vedanta Limited, the reasons for vesting such a limited jurisdiction on the High Court in exercise of powers under Section 34 of the Arbitration Act has been explained in the following words:

“11. As far as Section 34 is concerned, the position is well- settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental



policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.”

17. A similar view, as stated above, has been taken by this Court in *K. Sugumar v. Hindustan Petroleum Corpn. Ltd.*, where it has been observed as follows:

“2. The contours of the power of the Court under Section 34 of the Act are too well established to require any reiteration. Even a bare reading of Section 34 of the Act indicates the highly constricted power of the civil court to interfere with an arbitral award. The reason for this is obvious. When parties have chosen to avail an alternate mechanism for dispute resolution, they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.”

11. The meaning and scope of patent illegality has been explained by the Supreme Court in Associate Builders (Supra), in the following manner:-

“42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads –



(a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:

*“28. Rules applicable to substance of dispute.-(1)
Where the place of arbitration is situated in India-*

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

(b) A contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

(c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

*“28. Rules applicable to substance of dispute.- (3)
In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”*

This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be



something that no fair minded or reasonable person could do.”

12. Recently, in Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation, reported as (2022) 1 SCC 131, Supreme Court explained the expression ‘patent illegality’ in the following manner:-

“29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".”

13. The Arbitral Tribunal observed that delay in execution of Project was attributable to the petitioner. The relevant extract of the impugned



award reads as under:-

“7.5.5.6. Finding & Decision of the Tribunal

7.5.5.6.1. This is quite unusual as the site of the work is invariably mentioned in the tender document. In any case, the undisputed fact is that in the agreement, it is mentioned that the site for the work is available. This statement is absolute and firm and without any rider. Admittedly, the hindrance free site was to be handed over to claimant on date of commencement.

7.5.5.6.2. There is no gainsaying that the site was first pre-requisites for commencement of the work and thus it was fundamental reciprocal obligation/promise of the respondent to provide site.

7.5.5.6.3. Section 46 of the Indian Contract Act, 1872 provides as under:

"Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time."

7.5.5.6.4. Explanation: The question "What is a reasonable time" is, in each particular case, a question of fact.

7.5.5.6.5. Given the fact that the stipulated time for completion of work with a estimated cost of tender of Rs. 16,33,06,6311- was 18 months, I am of the view that the respondent was under obligation to provide hindrance free site & drawing immediately after the stipulated date of start on 13.09.2014 particularly as stipulated time of contract was 18 months.

7.5.5.6.6. Admittedly, the claimant completed the work. The overall position, based on the facts and figures as brought out by the claimant and admitted by respondent as per EOT proforma filed by the Respondent vide letter dated 23.08.2022 which is on record, is mainly given as under:

i. Hindrance due to pile design .



- ii Due to change of methodology of boring of piles .*
- iii Hindrance due to change of level of deck slap*
- iv Hindrance due to NGT order for closure of Hot mix plant in winter season*
- v. Hindrance due to funds*
- vi. Monsoon*

7.5.5.6.7. Due to these admitted hindrances the work was delayed for 1041 days whereas the Claimant has claimed the delay for 1042 days and the Respondent admitted the delay for 1047 days as justified delay against the required EOT for only 1041 days.

7.5.5.6.8. The Respondent has submitted that they have granted EOT without levy.

7.5.5.6.9. It has been observed by me that all the hindrances are not attributable to the contractor. Delay is mostly due to inter departmental correspondence and factual site condition and availability of materials etc. in the market. Though, no individual can be held responsible for hindrances/delays but the systems as a whole is responsible for which the Respondent is only responsible.

7.5.5.6.10. Having regard to relevant facts as discussed above, I am of view that respondent has committed a serious breach which is of the most fundamental in nature and which goes to very root of contract. Thus, the Respondent is entirely responsible for the prolongation of contract.”

14. Pertinently, the aforesaid findings of the AT have not been assailed by the petitioner. Further, during the course of arguments, apart from challenging the impugned Award on the ground of perversity, no other submission has been addressed. In fact, the AT observed in the para 7.5.5.6.7, extracted hereinabove, that the petitioner admitted delay of



1047 days as justified delay, whereas the Contractor's request for extension of time was only for 1041 days.

15. The petitioner contended that Contractor's undertaking, in the form of endorsement, was without any duress. Examining the said contention in light of terms of the Contract, it is seen that Clause 5 of the Contract provided that contractor is entitled for seeking extension of time. The relevant clause reads as under:-

“The time allowed for execution of the Works as specified in the Schedule 'F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from such time period as mentioned in schedule 'F' or from the date of handing over of the site whichever is later. If the Contractor commits default in commencing the execution of the work as aforesaid, Government shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the earnest money & performance guarantee absolutely”.

5.1 As soon as possible after the Contract is concluded, the Contractor shall submit a Time and Progress Chart for each mile stone and get it approved by the Department. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the works. It shall indicate the forecast of the dates of commencement and completion of various trades of sections of the work and may be amended as necessary by agreement between the Engineer-in-Charge and the Contractor within the limitations of time imposed in the Contract documents, and further to ensure good progress during the execution of the work, the contractor shall in all cases in which the time allowed for any work, exceeds one month (save for special jobs for which a separate programme has been agreed upon) Complete the work as per mile stones given in Schedule 'F'.



5.2 If the work(s) be delayed by:

- (i) force majeure, or*
- (ii) abnormally bad weather, or*
- (iii) serious loss or damage by fire, or*
- (iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or*
- (v) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or*
- (vi) non-availability of stores, which are the responsibility of Government to supply or*
- (vii) non-availability or break down of tools and Plant to be supplied or supplied by Government or*
- (viii) any other cause which, in the absolute discretion of the Engineer-in-Charge is beyond the Contractor's control. then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the authority as indicated in Schedule 'F' but shall nevertheless use constantly his best endeavours to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.*

5.3 Request for rescheduling of Mile stones and extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form to the authority as indicated in Schedule 'F'. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.

5.4 In any such case the authority as indicated in Schedule 'F' may give a fair and reasonable extension of time and reschedule the mile stones for completion of work. Such extension shall be communicated to the Contractor by the authority as indicated in Schedule 'F' in writing, within 3 months of the date of receipt of such request. Non application by the contractor for extension



of time shall not be a bar for giving a fair and reasonable extension by the authority as indicated in Schedule 'F' and this shall be binding on the contractor.”

16. The petitioner’s contention that Contractor never claimed that the endorsement was given under duress, is fallacious as the Contractor in its rejoinder before the AT, clearly outlined the circumstances under which the said endorsement was given. This Court also finds strength in the submission of the learned counsel for Contractor that, only when the petitioner tried to take the benefit of the endorsement in its statement of defence, did the Contractor give explanation in its rejoinder. Whether such an endorsement can be enforced against the claimant to deny its legitimate claims, especially when the impugned Award holds the petitioner guilty of delay, would not require much deliberation, in light of what has been held by Supreme Court in the case of R.L. Kalathia & Co. vs. State of Gujarat reported as **(2011) 2 SCC 400**. The Supreme Court observed as under:-

“(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine, at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred



from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing 'no-dues certificate'."

17. Issuance of NOC⁴ or other similar 'no claim' certificate by a party, in favour of another contracting party, by itself does not disentitle the party having a claim from explaining the circumstances in which NOC is issued. Reverse of the same is equally true. There is no absolute rule which outrightly negates the evidentiary value of NOC's or 'no claim' certificate. It can't be said that in every case NOC or 'no claim' certificate should be treated as unreliable evidence and the giver of the certificate enjoys some sort of immunity in law that will save his rights despite issuance of a 'no claim' certificate. Rather, issuance of 'no claim' certificate must be treated as prima facie evidence against the issuer of such certificate, and a heavy burden must be cast upon him to prove that the same was not given voluntarily or that the same was issued under compelling circumstances that were coercive in nature.

The compelling circumstances would vary from case to case. Factors like nature of relationship between the contracting parties, the inequality in the bargaining power/position of the parties, the dominant position that a party may enjoy, nature of the transaction, remedies available under the contract, would need to be considered to determine if the issuance of 'no claim' certificate was voluntary in nature or not. While the mere presence of one or more of these factors may not be sufficient to conclude that the issuance of 'no claim' certificate was involuntary, however, how these factors played out in a given case/factual matrix and affected the decision-making ability of the issuer,

⁴ No Objection Certificate



would have to be ascertained by the court.

18. In the present case, the AT has opined that the NOC issued by the Contractor was involuntary and hence, cannot be enforced against the Contractor to deny a claim, to which it was otherwise entitled. AT has given a finding of fact in this regard, after examining the circumstances under which NOC was issued by the Contractor. There is nothing patently illegal about such finding. Thus, there is no reason for this court to interfere with this finding.

19. Petitioner's second contention that the AT erred in awarding claim on account of prolongation of Contract, as there was no clause in the Contract providing for the same, is also meritless. It is pertinent to note that the Contractor had claimed damages towards the escalation cost, on account of breach of Contract by the petitioner. Admittedly, the Project was completed to the satisfaction of the petitioner, and the delay in execution was attributable to the petitioner. Clause 10C of the Contract provided for increase in cost of materials and labour during the period of extension. The claim was sub-divided into two sub heads i.e., claim on account of increase in wages for labour on prevailing wages as per Clause 10C and claim on account of increase in prices of material. The AT observed that the petitioner had granted extension of time considering the hindrances, and without levy of any compensation, which showed that the delay was attributed to the petitioner. A party cannot draw any benefit out of its own folly, to the detriment of the other. In the case of P.M. Paul (Supra), Supreme Court while dealing with the same issue has held as under:-

“12. In the instant case, it is asserted that the extension of time was granted and the arbitrator has granted 20%



of the escalation cost. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. The arbitrator has noted that claim No. I related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract from 9/5/1980 for the work under phase I, and from 9/11/1980 for the work under phase II. The total amount shown was Rs.5,47,618.50. After discussing the evidence and the sub-missions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20 per cent of the compensation under claim No. I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not mis-conducted himself in awarding the amount as he has done.

13. It was submitted that if the contract work was not completed within the stipulated time which it appears, was not done then the contractor has got a right to ask for extension of time, and he could claim difference in price. This is precisely what he has done and has obtained a portion of the claim in the award. It was submitted on behalf of the Union of India that failure to complete the contract was not the case. Hence, there was no substance in the objections raised. Furthermore, in the objections raised, it must be within the time provided for the application under Section 30 i.e., 30 days during which the objection was not specifically taken, we are of the opinion that there is no substance in this objection sought to be raised in opposition to the award. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. Therefore, the arbitrator had jurisdiction to go into this question. He has gone into that question and has awarded as he did.



14. Claim No. 1 is not outside the purview of the contract. It arises as an incident of the contract and the arbitrator had jurisdiction. In that view of the matter the objections raised against the award, cannot be sustained. No other objection was urged before us. The award, therefore, must be made the rule of the Court and there will be a decree in terms of the award, and the respondent is directed to pay Rs. 17,500 as the arbitrator's remuneration and Rs. 10,000 as advocates' fees and costs."

20. In K.N. Sathyapalan (Supra), Supreme Court observed as under:-

"31. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the Original Agreement and a specific prohibition to the contrary in the Supplemental Agreement, the appellant could have made any claim on account of escalation of costs and whether the Arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad's case and also Patel Engg.'s case. As was pointed out by Mr. Dave, the said principle was recognized by this Court in P.M. Paul's where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the



contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George's case”.

21. In Assam State Electricity Board & Ors. (Supra), the Supreme Court has held as under:-

“13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.”

22. Recently in Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. reported as **(2019) 7 SCC 236**, the Supreme Court, while considering a contract which provided for price escalation, refused to interfere with the award.

23. The AT, after considering the above, found the same violative of Section 73 of the Contract Act, which entitles a party to claim compensation for breach of the contract committed by the other contracting party. Even if contract does not provide for price escalation, it would not preclude a party to claim escalation in price, as a measure of



damages suffered by it, if the other contracting party is guilty of causing delays in completion of contractual works.

24. The AT, while considering the contentions raised by the petitioner, came to the conclusion that the endorsement given by Contractor, while seeking extension of time, would not come in its way in seeking escalation cost, especially when the delay was attributable to the petitioner. In the considered opinion of this Court, the view taken by the AT was both possible and plausible, and needs no interference in light of the narrow scope of Section 34 of the A&C Act.

25. Consequently, the objections fail and the petition alongwith pending application is dismissed with no order to costs.

(MANOJ KUMAR OHRI)
JUDGE

AUGUST 16, 2023
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