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

% ***Reserved on: April 25th ,2024***
Pronounced on: September 30th, 2024

\+ **OMP (COMM)151/2017**

UNION OF INDIA
Represented by the Executive Engineer (C)
PWD Division M-333,
Delhi Technological University Complex,
Bawana Road,
Delhi-110042.

..... Petitioner

Through: Ms. Mehak Nakra, ASC (Civil) with Ms. Achal Gupta, Mr. Devansh Solanki and Mr. Shrikant Mishra, Advocates

versus

M/S SATISH BUILDERS
Govt. Contractor,
11/390, Sunder Vihar,
Outer Ring Road,
New Delhi-110087.

.....Respondent

Through: Mr. Anshul Mittal, Ms. Vaishali Mittal Dawar, Ms. Payal Mittal and Mr. Sarthak Tagra, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. A Petition under Section 34 of the Arbitration & Conciliation Act, 1996 has been filed on behalf of the petitioner to challenge the Arbitral

Award dated 15.07.2010 made by the learned Sole Arbitrator in the Claim Petition filed by the Respondent/ Claimant.

2. ***Briefly stated,*** the Respondent (*who is the petitioner herein*) had issued a Notice inviting Tender for construction of 100 bed Hospital at Pooth Khurd, Delhi on 21.08.1999. The Claimant (*who is the respondent herein*) being the lowest bidder, was granted tender by Executive Engineer, PWD Division, No.16 *vide* Letter dated 24.12.1999. The tendered amount was Rs.3,93,12,522/- which was 29.57% of the estimated amount of Rs.3,03,41,149/-. The Agreement dated 24.12.1999 was consequently entered between the parties. The Date of Commencement of work was 03.01.2000 which was to be completed within six months and the Date of Completion was 02.07.2000. However, the work was completed beyond 276 days from the stipulated date i.e. on 04.04.2001.

3. The respondent (*who is the petitioner herein*) had asserted during the arbitral proceedings that the Claimant was unable to execute the work with the stipulated time schedule because of the slow progress of the execution of work for which repeated requests were made by the petitioner. The Claimant, however, failed to maintain the necessary pace of work as required under the Contract.

4. The petitioner herein has further submitted that in terms of Clause 6 of the Agreement for maintaining complete records, measurements of all items having financial value which were required to be taken jointly by the authorized representatives of both the parties and duly signed in acceptance of its correctness, had to be entered into the Measurement Book. Unless the items were entered into the Measurements Book as per the Agreement between the parties, no payment could be made to the respondent/ Claimant.

No objection ever was taken by the respondent to the measurement recorded in the Measurement Book at any stage. In fact, Claimant made categorical endorsement on 10.10.2001 in the Measurement Book accepting the Bills and measurement by writing that *"Bill & Measurements Accepted".*

5. On completion of the work, the Final Bill was prepared on 12.10.2001 which was accepted by the respondent without any protest or demur. No objection was raised by the respondent/claimant at the stage was taken about the running Bills either in regard to quantity or the rate at which the payment for each item were disbursed. A payment of Rs.3,28,560/- in the Final Bill after deduction of the amounts already paid pursuant to the running bills and statutory deductions, was received by the respondent on 29.11.2001. The total amount paid to the respondent under the Contract was Rs.4,35,94,153.00 against the tendered amount of Rs.3,93,12,522.00. The respondent/Claimant addressed a communication dated 18.12.2001 to the petitioner undertaking not to go for Arbitration. The petitioner gave a Reply *vide* letter dated 27.12.2001 stating that it was not aware of the reasons for which the respondent had addressed the letter to the petitioner. However, no further reply was received from the respondent.

6. The petitioner has asserted that the execution of work was delayed by the respondent who applied for extension of time from 03.07.2000 to 04.04.2001 i.e. 276 days. The extension of time was granted by the Competent Authority on 27.12.2001 condoning the delay in execution of work. The Claimant had given an undertaking that "*I undertake that I have not suffered any Loss & Damages on account of this delay. So, I will not claim anything extra on this account even in Arbitration also*". This clearly reflects that the respondent had not suffered any loss or damages. The

subsequent initiation of the arbitration proceedings by the respondent was manifestly malafide and without any basis. Despite the *Undertaking* that the respondent has not suffered any loss or damage, the respondent invoked Arbitration proceedings which ended in the Arbitration Award dated 15.07.2010.

7. The *Award has been challenged* on the grounds that *Claim 3* has been awarded to the respondent by ignoring the express terms and conditions of the Agreement whereby in terms of Clause 10CC of the Agreement, the grant of compensation was expressly prohibited. The respondent in its communication darted 03.12.1999 had categorically agreed to exclude the operation of Clause 10CC from the Agreement. Even otherwise, the amount claimed by the respondent in Claim No. 3 varies from the amounts claimed in the Statement of Claim, Rejoinder and additional submissions filed by the respondent.

8. The learned Arbitrator erred in awarding Rs.30,60,918.00 in relation to *Claim No.2* for alleged loss of profit due to prolongation of the Contract for 276 days. Also, it committed an error in granting Rs.16,31,940.00 for *Claim No.4* for alleged damages allegedly suffered on account of overheads during the extended period of 276 days. It is asserted that the learned Arbitrator failed to appreciate that the respondent had not produced a shred of evidence to support that it had suffered loss of profit or overheads for the extended period. Without the relevant supporting material, no compensation could have granted to the respondent. The charts/tables submitted by the respondent at the time of conclusion of the arbitration proceedings were not mentioned during the commencement of the proceedings. Even otherwise, the table/charts submitted by the respondent do not contain any analysis

and/or breakup which would show the actual ground for calculating the amounts.

9. No Notice under *Section 55 of the Indian Contract Act* was ever served upon the petitioner. The respondent while seeking extension of time in its Application dated 25.01.2001 had given an *undertaking* that he has not suffered any loss or damage, despite which the same has been awarded to the respondent.

10. Further, no grievance was raised by the respondent while accepting the payment of the Final Bill. No Notice was ever received by the petitioner in regard to alleged loss or damages. The learned Arbitrator, therefore, committed a grave error of law in awarding the same.

11. The *Claim No.5* has been partially allowed in the sum of Rs.4,84,707/- on account of alleged work executed but not paid for by the petitioner. It is asserted that the learned Arbitrator has failed to appreciate that in terms of Clause 6 of the Agreement, all the measurements having financial value were entered into Measurement Book which was duly signed jointly by both the parties. The respondent had never raised any objection while signing the Measurement Book and had made a categorical endorsement on 10.10.2001 in the Measurement Book accepting the Bill and the measurement by writing that *"Bill & Measurements Accepted".*

12. In regard to the *Claim No. 5* (iii), a payment of Rs.1,35,677.00/- was granted by the learned Arbitrator for the scheduled items, as per the market rate. The said Claim has been challenged on the ground that as per the contract between the parties, while accepting the tender rates, some of the items were abnormally on the higher side and, therefore, the rate paid to the respondent for the deviated agreement quantities were done at market rate

with the consent of both the parties and were accepted by the respondent without any protest or demur. Therefore, no claim was raised by the respondent during the execution of the work. The payment had been made as per Clause 12.1.2(v) which stipulates that the contractor shall within 15 days of the receipt of the Order, carry out the work and inform the Engineer-in-Charge of the rate which the Contractor proposes to claim for such item of work, supported by analysis of the rate claimed. The Engineer-in-Charge shall within a stipulated time process the claim and fix the rate based on the market rate. The leaned Arbitrator has failed to appreciate that the respondent had wrongly claimed Rs.1,35,677.53/- when the amount as per the Claim of the respondent works out to Rs. 1,27,964.01. It clearly reflects that this Claim was fabricated.

13. For the *Claim No. 5* (iv), the amount of Rs. 1,32,842/- has been granted to the respondent by the learned Arbitrator for the extra items allegedly not paid at correct rates. However, there was no evidence on record for such a Claim. The respondent had relied on the Letter dated 22.06.2000, which was *ex facie* fabricated and the receipt of which was denied by the petitioner. In the letter, the analysis of the rates consisted of 64 sheets whereas in the purported receiving, it is shown that 68 pages as having been received. The leaned Arbitrator failed to appreciate that a mistake in counting cannot exceed the number of pages.

14. The learned Arbitrator in the *Claim No. 5* (ix) has erroneously granted payment of Rs. 2,05,347.00/- to the respondent for the extra items carried out by the respondent for which the petitioner had not made the payment, as per the contract between the parties. The parties had agreed that the respondent would carry out some items free of charge as per the Negotiation

Letter dated 03.12.1999. Moreover, some of the items had been paid at the time of execution of the work. The learned Arbitrator ought to have appreciated that the calculation submitted by the respondent was without any authentic detail and merit, was baseless and hypothetical and was therefore, liable to be rejected. The learned Arbitrator ought to have granted to the respondent only such payments to which he was entitled as is reflected in Measurement Book and Final Bill.

15. It is further argued that the learned Arbitrator was under an obligation to pass a reasoned award in terms of Clause No. 25 of the Agreement which he has failed to do. He has erred in awarding interest under Claim No. 6 since the Claims themselves were without material basis.

16. The learned Arbitrator is guilty of bias and legal misconduct. The Award suffers from patent inconsistencies and is based on misinterpretation and misconstruction of the provisions of the Agreement and is contrary to law and Public Policy. Hence, the petitioner has sought the Award dated 15.07.2010 to be set aside.

17. **The respondent in its Reply** has denied that the Award was patently inconsistent with the agreed terms or was contrary to law and public policy.

18. It is asserted that the reappraisal of evidence is not permitted under Section 34 of the Arbitration and Conciliation Act, 1996. The completion of work got delayed due to many hindrances, hurdles and breaches etc., attributable to the petitioner alone. The petitioner consequently granted extension for delay of 276 days without levy of compensation.

19. It is asserted that the Award is a reasoned Award giving due explanation after appreciation of evidence of each claim; it has been made in

accordance with law and the objections raised by the petitioner are untenable in law.

20. It is explained that in the *Claim No. 3*, a sum of Rs. 2,53,326/- for escalation on the value of the work executed during the extended period has been rightly awarded on the basis of Cost Index issued by CPWD, for which detailed reasons have been given. The reference to Clause 10CC is incorrect as the amount has not been awarded under Clause 10CC.

21. Likewise, the *Claim No. 2* was for loss of profit suffered due to extension of the contract by 276 days. The delay was solely attributable to the petitioner and under this Claim. The respondent had claimed 10% profit of the work which it could not execute due to many hindrances all attributable to the petitioner. However, the learned Arbitrator has reduced the rate of profit to 6%, amounting to amount of Rs.30,60,918/- even though 10% was allowed as admitted by the petitioner.

22. Similarly, the *Claim No. 5* has been awarded by the learned Arbitrator, for which he has given detailed reasons. The learned Arbitrator has not travelled beyond the jurisdiction.

23. Finally, it is submitted that the challenges to the Award are irrelevant, baseless and misconceived and are denied *in toto.*

24. **The oral submissions have been made and the Written Submissions** have been filed on behalf of the parties which are essentially on the same line as their respective pleadings.

25. **Submissions heard and the record along with the Written Submissions perused.**

Claim No. 1. on account of amount withheld wrongly and illegally while paying the last Bill on 29.11.2001.

26. *Claim No. 1* for Rs. 5,36,668/- was made from the Final Bill paid on 29.11.2001 on account of the amount that was illegally withheld by the petitioner. The learned Arbitrator has given the detailed reasons to explain that the amounts denied on account of penal rate recovery for cement and steel, testing charges, recovery on account of TEs and non-submission of labour licence, were completely unjustified for the detailed reasons stated therein and the sum of Rs. 86,350/- along with interest @ 9% per annum, (amounting to Rs. 27,334/-) has been rightly granted.

27. The learned counsel on behalf of the petitioner argued that the Final Bill had been accepted without any protest or demur and the respondent could not have asserted subsequently that the certain amounts remained due in the Final Bill.

28. In the similar situation in the case of *GAE Projects (P) Ltd. v. GE T&D India Ltd*., 2024 SCC OnLine Del 4816, the contractor while accepting the final amount had even given an undertaking that this is the full and final payment. But even then, it had been observed that such acceptance essentially is driven by economic duress on account of dominant position of the Government Agency.

29. Likewise, in the case of *M/s Ambica Construction vs. Union of India,* (2006) 13 SCC 475 and *R.L. Kalathia & Co vs. State of Gujarat*, (2011) 2 SCC 400, the contractor claimed that he had been compelled to issue a *No Due Certificate* without which no amount would be released. It was held that merely because *No Due Certificate* had been given by the contractor, it cannot be said that there was no arbitral claim which may be referred to arbitration.

30. Similarly, in *The Oriental Insurance Co. Ltd. vs. Dicitex Furnishing Ltd.*, (2020) 4 SCC 621, it was observed that there can be no bar to refer the disputes to arbitration where the Final Bill have been accepted. It is for the Arbitrator to consider whether the Final Bill has been correctly settled or there are certain amounts which are due. Merely because the Final Bill had been accepted by the respondent, does not debar the Arbitrator from considering whether there are any dues which had been wrongly deducted while making the payment under the Final Bill.

31. The Co-ordinate Bench of this Court in *M/s Thermal Engineers and Insulators Pvt. Ltd. vs. Delhi Tourism and Transportation Development Corporation Ltd.*, ARB.P. 1033/2021 decided on 25.02.2022, in similar situation observed that whether the entire contractual obligations have been discharged by the petitioner, is a subject matter of arbitration.

32. It is therefore, well settled that merely because the Final Bill had been accepted, the Respondent could not agitate for his legitimate Claims. Additionally, the learned Arbitrator has given cogent explanation and reasons for holding that the awarded amount was unjustly denied. The petitioner has not been able to show that the findings of the learned Arbitrator in respect of the *Claim No. 1* were without any evidence or reason or suffered from any patent illegality.

Claim No. 2. on account of loss of profit due to prolongation of the contract period for 276 days.

33. The *Claim No. 2* was made for Rs. 48,92,185/- on account of loss of profits due to prolongation of the contract period for 276 days. There is no denial that the project got extended by 276 days. The learned Arbitrator observed that the essential conditions for claiming loss of profit require

proof of definite breach of contract by the respondent (the petitioner herein), actually loss suffered with evidence, institution of claim at appropriate time, proof of efforts to avoid such losses and Notice under Section 55 of the Indian Contract Act. The learned Arbitrator concluded that the salient features which emerge are that (i) time did not remain an essence of the Agreement as on account of unilateral extension granted by the petitioner herein, (ii) undertaking given by the respondent herein that it has not suffered any loss and would not go for arbitration, was under duress which is indicated from the fact that the same was given on 18.12.2001 and the Superintendent Engineer sanction extension of time without levy of compensation on 27.12.2001, and (iii) as per the registration, the total delay of 312 days was justified against actual delay of 276 days that was given to the respondent herein.

34. The learned Arbitrator thus, concluded that the claimant had been deprived of profit which it would have earned had the contract performance not been delayed by 276 days for the reasons solely attributable to the petitioner. Accordingly, taking the profit margins to be 6%, the loss of profit has been calculated at Rs. 30,60,918/- in favour of the respondent. Again, there are cogent explanations and reasons given for which the petitioner has not been able to raise any tenable objection.

Claim No. 3. on account of amount under Clause 10CC as the contract period was extended to 15.2 months.

35. The Claim No. 3 for Rs. 53,58,850/- was on account of dues for the extended contract period to 15.2 months.

36. The learned Arbitrator reasoned that Clause 10CC was not applicable to the facts in the present case since the contract period was of six months

but observed that it cannot be overlooked that the contract got concluded in 15.2 months whereby the escalation cost beyond the stipulated date of completion, had occurred and was payable to the respondent herein. The method of calculating escalation cost during the extended period adopted was by calculating averages on the basis of the sanction Cost Index by CPWD on the stipulated date of completion and on the actual date of completion. The amount of escalation has thus, been calculated as Rs. 2,53,326/- in favour of the respondent.

37. The basic argument of the petitioner was that Clause 10CC was not applicable despite which the escalation cost has been given.

38. As has already been mentioned above, the learned Arbitrator has not invoked Clause 10CC but has given the escalation cost on the ground of realities of there being an increase in the escalation in the cost during the extended period of the contract.

39. While acknowledging the non-applicability of Clause 10CC, reference was made to the case of *Food Corporation of India*,13 SCC 779, wherein the Supreme Court had observed,

> *"Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable allow escalation under the claim. Once it was found that the arbitration had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the corporation was liable for the consequences of the delay, namely increase in statutory wages. Therefore, the arbitrator, in our opinion had jurisdiction to go into this question. He has gone into that question and has awarded as he did.*

> *The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the high court, rightly so in our opinion."*

40. Reliance has also been placed on *K.N. Sathyapalam*, (2007) 13 SCC 43, wherein the Supreme Court considered the question of *grant of Claim on account of escalation of cost in the absence of a price escalation clause.* It was observed that *"Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and* ***Alopi Parshad case*** *and also* ***Patel Engg.*** *case."*

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

42. The principles laid down in *K.N. Sathyapalan* (supra) were upheld by the three Judge Bench of the Supreme Court of India in the Case of *Assam State Electricity Board & Ors. vs. Buildworth Private Ltd.*, (2017) 8 SCC 146, wherein it was observed that *"even though price escalation Clause in the Agreement applied only to the specified period in the contract but it was held to be applicable to the extended period because the parties through their conduct permitted the belated performance of their reciprocal obligations - Price escalation in performing any contract is a normal incident in this age of inflation."*

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

44. The learned Arbitrator had also referred to the Judgment of *M/s Nandsons Construction Company vs. MP State Tourism Development and Another,* 2013 SCC OnLine MP 5294 and wherein the Supreme Court relying upon the case of *State of Orissa vs. Sudhakar Das (Dead) by LRs* (2000) 3 SCC, had held that *"in the absence of any escalation clause, an Arbitrator cannot assume any jurisdiction to award any amount toward escalation."* In this case, the part of the Award granting escalation charges, was held to be not sustainable as it suffered from the patent illegality. This Judgment also observed that the fundamental principle of law is that in the absence of Escalation Clause, no escalation charges can be provided.

45. The same principle has also been reiterated by the learned Arbitrator who also has not held that Clause 10CC was applicable or invoked Clause 10CC to grant the escalation cost, but has merely taken the guidance of this Clause 10CC, to objectively ascertain the quantum of compensation. Therefore, this judgement also does not help the Petitioner in any manner.

46. It is quite evident that the learned Arbitrator has not held that Clause 10CC was applicable to the facts of the present case; rather it has been held that the Clause 10CC was not applicable. Only the formula given in Clause 10CC, was adopted to calculate the escalation cost. He observed that though Clause 10CC may not be applicable but the *"assistance of this Clause, can*

be taken by the Tribunal, in working out the increase in the cost of work due to various unavoidable delay." The learned Arbitrator, therefore, has rightly invoked the principle/method as contained in Clause 10CC for working out the price escalation due to delayed completion of the Project.

47. Fundamentally, the finding of the learned Arbitrator is that because there was a delay of 276 days attributable to the petitioner, they are liable to pay the escalation charges, which has been calculated on the basis of the Formula of the sanctioned cost index (based on the increase in sanctioned building cost index during the extended period) contained in Clause 10CC only as an objective method of calculation of the escalation charges.

Claim No. 4 for Damages suffered on account of overheads during the extended period of 276 days.

48. The Claim No. 4 was claimed for Rs.78,85,714/- for damages on account of overheads during the extended period of 276 days .

49. The learned Arbitrator observed that from the factual situation, though the respondent was not entitled to the claimed amount but having regard to the supervisory staff, machinery etc., that had to be put to use for completion of the work during the extended period of 276 days, and having regard to the detailed salaries of the staff, charges of hiring and supervisory expenditure, the overhead cost has been calculated to be in the sum of Rs.16,31,940/-.

50. The detailed calculations have been mentioned in the Arbitral Award to justify the manner in which the amount has been calculated for overhead expenses.

Claim No. 5. on account of work executed but not paid.

51. The Claim No. 5 was filed for Rs. 99,39,465/- on account of executed work done by the respondent herein. Again, the claim amounts were divided into subhead with detailed reasons, the claims have been decided as under : -

S. No.	Claim 5	Reasoning by the arbitrator	Whether claim allowed or denied?
i.	Items measured and paid in R/ A bills but payment withdrawn in final bill and even full quantity not measured.	The pre-final bill specifies the part and full rates for extra items paid. As the Engineer-in-charge is authorized to set rates for extra items under the contract, the full rates in the pre-final bill are considered approved. Therefore, any reduction made in the final bill is unjustified.	ALLOWED Rs. 10,841
ii.	Measurement recorded less due to not following proper mode of measurement.	Claimants/Respondents have not been able to substantiate their sub-claim in question on facts and documentary evidence.	DENIED
iii.	Schedule items not paid as per agreement rates (Deviated quantities paid at market rate only AHR items without any notice and any analysis).	The Petitioners were not justified in paying for the deviated quantities at rates lower than the agreement rates. In an inflationary economy, rates tend to escalate, and there is no basis for reducing the contract rates for deviated quantities.	ALLOWED Rs.1,35,677
iv.	Extra items executed but not measured & paid at all. (a)Items recorded with measurements in MB but not carried over for payment & not paid at all.	Claimants/Respondents have not been able to substantiate this claim on the basis of documents on record.	DENIED
v.	Schedule items executed but under measured i.e.	Claimants/Respondents have not been able to substantiate this	DENIED

	measurements not recorded for full work.	claim on the basis of documents on record.	
vi.	Dispute regarding extra items not paid at correct rates (No dispute in quantity except dismantling of Kota Stone Slab Flooring).	Claimants/ Respondents had withdrawn their claim against few items.	ALLOWED Rs.1,32,842
vii.	Statement for Rates reduced without any notice and consent	Reduction in rates done by the Petitioner to be in order and in terms of the agreement.	DENIED
viii.	Schedule items executed but paid at wrong rate	No reason to differ with the assessment of the Petitioner that the work has been done with adanga/dongri in place of makrana marble 2nd quality.	DENIED
ix.	Statement for the extra items agreed by Department but not paid.	Some items under this claim have been withdrawn, paid, or deemed not payable based on the agreement dated 03.12.1999. For other items, the rates and measurements claimed were accepted.	ALLOWED Rs.2,05,347
TOTAL			Rs. 4,84,707

52. The detailed reasons have been given by the learned Arbitrator recording the reasons why the amounts have been allowed and disallowed. The petitioner has not been able to show any illegality in the findings of the learned Arbitrator.

Claim No. 6. for interest on all due amounts from due date pf payment.

53. Claim No. 6 for interest @ 24% per annum, wherein also the learned Arbitrator has considered each claim individual and has awarded interest @ 9% per annum for the period specified therein.

Conclusion:

54. The learned Arbitrator has given cogent explanation and reasons for allowing and disallowing the claims of the respondent. The petitioner has not been able to show any patent illegality of breach of fundamental policy. Essentially, the challenge is on merits, which is not tenable under law.

55. There is no merit in the present petition under Section 34 of the Act, which is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 30, 2024
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