

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

Judgment reserved on: 05.12.2013

% Judgment delivered on: 31.03.2014

+ O.M.P. 420/2012

PUBLIC WORKS DEPARTMENT

..... Petitioner
Through: Ms. Nandita Rao and Ms.Neha Mam,
Advocates.

versus

M/S NAVAYUGA ENGINEERING CO LTD & ANR

..... Respondents
Through: Mr. Arijit Mazumdar, Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

J U D G M E N T

VIPIN SANGHI, J.

1. These are objections preferred by the petitioner under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) to the arbitral award dated 26.12.2011 made by Shri S.C. Vasudeva, the Sole Arbitrator, whereby certain claims of the respondent contractor have been allowed and the counter-claim of the petitioner has been rejected.

2. The petitioner invited tender for construction of bridge across river Yamuna near Geeta Colony vide the press notification dated 19.07.2004. The estimated cost of work was Rs.90,04,25,485/-. The time allowed for

completion of work was thirty six months. The respondents' tender was accepted vide letter dated 05.11.2004 for an amount of Rs.99,76,57,431/-. The stipulated date of commencement of work was 30.01.2005 and the scheduled date of completion was 29.01.2008. The contract was to be governed by, inter alia, the General Conditions of Contract (GCC) for Central Public Works Department works. The work was completed on 22.12.2008. Consequently, there was a delay of 328 days. The petitioner granted extension of time to the respondents up to the date of completion of the work without levy of liquidated damages, as stipulated in the contract.

3. The respondents invoked arbitration raising several claims. As aforesaid, the learned Arbitrator has awarded some of the claims while rejecting a few others. The petitioner has advanced submissions only to assail the award made on Claims No.1 & 4.

4. Claim No.1 was made by the respondent contractor initially for a sum of Rs.23,86,75,025/- on account of balance payment for work. However, subsequently, since the final bill had been passed and paid, the respondents reduced the claim to Rs.14,23,77,790/-. The respondent claimant, thereafter, twice modified the claimed amount. On 24.05.2010 the amount claimed was computed as Rs.14,76,87,032/-. The amount finally claimed under Claim No.1 was modified at Rs.10,46,36,748/-. This amount had been worked out by the respondent on the basis of the quantities recorded in the final bill. While accepting the final payment from the petitioner, the respondents accepted the final measurements, but disputed the rates. This dispute – essentially, relates to the rates to be applied in respect of works

carried out by the respondents for the work done after the stipulated date of completion.

5. To justify the said claim, the case of the claimant was that the work was delayed on account of various hindrances on the part of the petitioner for which the respondent contractor was not responsible. The stipulated date of completion was 29.01.2008. On 28.01.2008, vide Exhibit C-40/1, the respondent had communicated to the petitioner that the respondents could not continue with the balance work after 29.01.2008 on the prevailing contract agreement prices. The respondent, therefore, requested the petitioner to process the contract for substantial closure as on 29.01.2008. Since time was of the essence of the contract, the respondents further offered to complete the balance works, if they are paid the new rates as per the present market along with new terms & conditions and agreements. The further case of the respondents was that a meeting was held between the respondent and the Chief Engineer, Building Project Zone B-1 on 01.02.2008, wherein the Chief Engineer had assured the respondents that they would be paid the current rates and on the basis of the said assurances, the respondents had completed the project.

6. Before the learned Arbitrator, the petitioner's case was that the request for payment of market rates for the work done beyond the stipulated date of completion was rejected by the petitioner. The respondent pleaded that in the pre-bid meeting held on 26.07.2004, it had been made clear to the contractors that no compensation will be payable beyond the provisions contained in the contract document for any time and cost overrun due to delay, if any, in removal of hindrances on the part of the petitioner. The

petitioner claimed that the hindrances mentioned by the respondent contractor were well-known to it at the time of tendering. The demand for revision of rates was denied by the petitioner during the currency of the work itself vide Exhibit R-14 dated 30.04.2008. Provisional Extension of Time (EOT) was granted by the petitioner on account of delays in removal of the hindrances, and to keep the agreement alive. The petitioner relied upon Clauses 12.2 and 12.4 of the GCC to defend the said claim.

7. The learned Arbitrator rejected the defence of the petitioner on the premise that, firstly, the quoted rates are valid and binding during the stipulated date of completion, and not thereafter. Secondly, there was fundamental breach of the contract on the part of the petitioner. Consequently, the respondent was not bound to perform the contract beyond the stipulated date of completion on their quoted rates. The respondent had informed the petitioner of their intention to repudiate the contract before the stipulated date of completion, i.e. 28.01.2008, as they were not in a position to continue the work at the quoted rates. However, they had stated that they would continue the work if their demand for market rates was acceded to. Though the petitioner rejected the claim for market rates vide Exhibit R-12 dated 29.01.2008, but the said refusal to deny the market rates did not address the basic demand for new rates beyond the stipulated date of completion. Thirdly, in the meeting held with the Chief Engineer on 25.04.2008, the Chief Engineer had given an assurance that the respondent would be paid the market rates, and the communication Exhibit R-14 dated 30.04.2008 denying the market rates, has been issued only thereafter. The respondents' plea that the Chief Engineer had assured payment of market

rates beyond the stipulated date of completion was accepted because the petitioner had, as a matter of fact, examined the respondents' request and worked out reasonable market rates for various items beyond the stipulated date of completion. The analysis of rates based on market rates had been produced by the petitioner at the behest of the Sole Arbitrator. Consequently, the learned Arbitrator awarded an amount of Rs.8,92,00,294/- in favour of the respondent claimant and against the petitioner.

8. The submission of learned counsel for the petitioner in respect of the award made on claim no.1 is that the said award has been made contrary to the contractual terms and the evidence brought on record is also to the contrary. The submission is that the learned arbitrator has acted beyond his jurisdiction and has not decided the reference as per the terms of the agreement resulting in an unfair and unjust award. The submission of Ms. Rao is that clause 13 of the NIT advised the tenderers to inspect and examine the site and its surroundings and satisfy themselves before submitting their tenders as to, inter alia, *“the form and nature of the site, space available, means of access to the site, working conditions”* [emphasis supplied]. It further provides that *“a tenderer shall be deemed to have full knowledge of the site whether he inspects or not and no extra charges consequent on any misunderstanding or otherwise shall be allowed”*.

9. Clause 16 is also relied upon, which states that the contractor should see all the drawings and no claim whatsoever will be entertained for any alleged ignorance thereof. Clause 3.9 is relied upon, which, inter alia, states that:

“The information and site data shown in the drawings and mentioned herein and elsewhere in these tender documents are furnished for general information and guidance only. The Engineer in Charge in no case shall be held responsible for the accuracy thereof or/and interpretations or conclusions drawn there from by the contractor and no claim shall be entertained whatsoever if the site conditions/information is different or otherwise incorrect as it is presumed that the contractor has satisfied himself for all possible contingencies, situations, bottlenecks and acts of co-ordination which may be required between the different agencies.”

10. Ms. Rao submits that Clause 7.16 of Chapter VII – Special Conditions, inter alia, stipulates that ***“the contractor will not have any claim in case of any delay by the Engineer-in-Charge in removal of trees or shifting, raising, removing of telegraph, telephone or electric lines (over head or underground), water and sewer lines and other structures etc., if any, which may come in the way of the work. However, suitable extension of time may be granted to cover such delays. The department shall get the services shifted and the contractor shall provided all assistance to the department during shifting of services at ground. The payment for shifting of services shall be made by the department to the concerned utility department.”*** [emphasis supplied]

11. She submits that the delay caused on account of the work site not being available is also covered by the aforesaid clauses. Ms. Rao submits that the respondent issued the communication dated 28.01.2008 (Exh. C-40/1) i.e. one day prior to the expiry of the stipulated date of completion of the work, wherein the respondent enumerated the various hindrances due to which the work could not be completed. The respondent claimed that the

hindrances were not on its account. The respondent stated in this communication, inter alia, as follows:

“With the cost and resource input required for original time period, the time required for completion of work with above hindrances is not less than 48 months, but considering urgency and pressure from department, notwithstanding hindrances the work can now be completed with meager delay of three months or so. This has become possible due to our deployment of additional resources causing financial loss and burden to us.

Now, as the work is delayed due to above changes and hindrances which deprives us to get the clear bonus and price escalation for the work to be done in the extended period beyond 29.01.08, both of which we could have earned otherwise, we are placed under the double edged sword for no fault on our side.

As the cost of construction has increased tremendously, due to increase in prices of bitumen, reinforcement steel, cement and other construction material and consumables, our prevailing BOQ rates are very much on lower side even if price escalation is added to them. You are well aware of this from the rates of recently accepted tenders in PWD.

Under these circumstances, we regret to inform you that we cannot continue with the balance work of the subject work after 29.01.08 with the prevailing contract agreement and prices. Therefore, we request you to process the substantial closure of the subject work as on 29.01.08, as continuing beyond stipulated date of completion of contract (as has been mentioned in the agreement “the time is essence of contract”) is not possible on same terms and conditions.

Notwithstanding above, we may complete the balance works if you provide us the new rates as per the present market along with new terms and conditions and agreement.

We request you to kindly accept the above and intimate us at the earliest, else, we consider this contract as closed as the unilateral extension of time on same terms and conditions is not acceptable to us.” (Emphasis supplied)

12. She submits that vide Exh. R-12/1 issued by the petitioner without any delay, i.e. on 29.01.2008, the petitioner expressly rejected the demand of the respondent for new rates along with new terms and conditions and called upon the respondent to complete the work immediately as per the agreement of the respondent within three months. The respondent was also informed that if it failed to carry out the work, action under the relevant clauses of the agreement would be initiated as deemed fit. The petitioner, inter alia, stated in the said communication as follows:

“Since agreement is alive and as such your request for allowing new rates alongwith the new term and condition is not as per spirit of agreement and can not be accepted.

You are requested to complete the work immediately as agreed by you within 3 month failing which action under relevant clauses of the agreement will be initiated as deemed fit.”

[emphasis supplied]

13. Ms. Rao submits that vide Exhibit C-41/1 dated 08.02.2008 the respondent rejected the extension of time granted by the petitioner as it was without revision of rates. The respondent further recorded ***“in honour to decision taken in meeting held with Chief Engineer, Building Project zone B-1 on 01.02.08, we have restarted the work on the assurance that our rates and terms shall be revised for the work done after the stipulated date of completion and we shall submit a completion program for completing the***

work at earliest. You are therefore requested to make our future payment for the items to be executed after stipulated date of completion as per the rates enclosed herewith. We have worked out the rates strictly on market rates and we are also enclosing A/R for justifying the reasonability for ready reference.” [emphasis supplied]

14. Ms. Rao submits that even this request of the respondent was expressly rejected promptly on 11.02.2008 vide Exhibit R-13(1). The relevant extract from this communication reads as follows:

“Para 7 No comments. Nothing beyond provision of agreement can be expected.

Para 8 All the Payment are governed as per terms and conditions of the agreement.”

15. Thus, it was clearly stated by the petitioner that nothing beyond provision of agreement can be accepted, and that all payments are governed as per the terms & conditions of the agreement. Ms. Rao submits that the respondent had, in fact, in its application to seek extension of time, made an endorsement that such extension was being sought with the undertaking that no damages will be claimed for extension of time. Ms. Rao submits that this document was also produced before the arbitral tribunal – though belatedly. Ms. Rao submits that the arbitral tribunal chose to disregard and ignore the said undertaking of the respondent on the ground that during oral arguments, a new point had been raised by the petitioner founded upon the said undertaking. The learned Arbitrator placed reliance on several decisions to hold that a new point could not be raised during arguments for it was not covered by the pleadings. Ms. Rao submits that the learned Arbitrator,

however, adopted a different yardstick when it came to entertainment of successive revised claims of the respondent. As noted above, Claim No.1 was revised several times during the course of arbitration. Initially an amount of Rs.23,86,75,025/- was claimed. It was thereafter reduced to Rs.14,23,77,790/-. On 24.05.2010 in the midst of arbitration proceedings, it was again raised to Rs.14,76,87,032/-. Finally, the amount was modified to Rs.10,46,36,748/-. She further submits that arbitration proceedings are not governed by the strict rules of evidence and procedure. Even if the petitioner had relied upon the undertaking of the respondent belatedly, the learned Arbitrator should have examined whether the same was of relevance to decide the disputes on merits, rather than proceeding on a hyper-technicality that the same was belatedly produced. She submits that the respondent could have been given an opportunity to meet the said document by the Arbitrator. Ms. Rao submits that it amounts to legal misconduct on the part of the Arbitrator to ignore relevant evidence/documents.

16. She further submits that the respondent could not claim rates beyond what is permissible under Clause 10 CC of the agreement, which contains the formula to be applied for computation of the escalation payable to the contractor. She submits that the land-possession whereof was belatedly given, belonged to the State of Uttar Pradesh. It was only a small fraction measuring about 100-150 metres, in the overall project site which was about 2040 metres.

17. Ms. Rao further submits that a perusal of the impugned award shows that the learned Arbitrator has merely accepted the figures presented by the

respondent without undertaking any scrutiny thereof. The rates quoted by the respondent have been accepted *per se*.

18. With regard to the Claim No.4, the submission of Ms. Rao is that the said claim pertained to early completion bonus. The contract provided that if the contractor completes the work before the stipulated date of completion, the contractor would be entitled to earn bonus in terms of the contract. Clause 2A of the contract provided “*in case the contractor completes the work ahead of scheduled completion time, an incentive for early completion of work subjected to a maximum limit of 5% (five percent) of the tendered value shall be payable.*”

19. Ms. Rao submits that, admittedly, the work was not completed – for whatever reason, prior to the scheduled completion time which was defined in the contract itself as 29.01.2008. According to her, the contractor was not entitled to the said incentive, since that said date i.e. scheduled completion date was never changed. However, the learned Arbitrator awarded this claim on the premise that the respondent had completed the work before the expiry of the extended date of completion. She submits that this award is also completely contrary to the contractual terms.

20. In support of her submissions, she places reliance on the decisions of the Supreme Court in ***Oil and Natural Gas Corporation Vs. WIG Brothers Builders & Engineers (P) Ltd***, (2010) 13 SCC 377; ***K.P. Poulose Vs. State of Kerala & Another***, AIR 1975 SC 1259; ***Steel Authority of India Ltd. Vs. J.C. Budharaja Government and Mining Contractor***, (1999) 8 SCC 122; ***Kailash Nath & Associates Vs. New Delhi Municipal Committee***, 99

(2002) DLT 361(DB); and *Continental Construction Co. Ltd. Vs. State of Madhya Pradesh*, AIR 1988 SC 1166.

21. On the other hand, the submission of learned counsel for the respondent is that the tender for the work in question was circulated in July 2004. The representation held out by the petitioner in the NIT, as contained in Chapter –I Clause 4 which stated that “*the site for the work is available*”. Similarly, it was stated in Clause 3.11 that “*the entire site of work is available*”. Learned counsel submits that the tender was awarded to the respondent on 05.11.2004, and a part of the site was made available only in September 2007. In terms of Clause 3 of Chapter-I of the NIT, it was stipulated that the time allowed for carrying out the work shall be 36 months after 22 days of the date of issue of acceptance of tender, or from the first date of handing over of the site, whichever is later.

22. He submits that the respondent had clearly stated that it would not work the contract after 29.01.2008 at the contractual rates. Reference is made to the respondents’ letter dated 28.01.2008 Exhibit C-40/1. In this letter the respondent had also asked for closure of the contract, or in the alternative, for market rates in respect of the balance remaining work. He submits that even though the petitioner rejected the demand for new rates on 29.01.2008 vide Exhibit R-12(1), subsequently, in the meeting held with the Chief Engineer (Building Project Zone B-1) on 01.02.2008, he agreed to the respondents’ claim for new rates. This fact was recorded in the respondents’ letter Exhibit C-41/1 dated 08.02.2008, as noted above. He submits that in their response dated 11.02.2008 Exhibit R-13(1) the petitioner did not deny the meeting with the Chief Engineer, as aforesaid. However, the petitioner

only stated that nothing beyond provision of the agreement can be accepted and that all payments are governed as per the terms & conditions of the agreement. Learned counsel submits that the undertaking given by the respondent while seeking extension of time was to the effect that “*I will not claim any damages on account of delay if the EOT is granted without levy of compensation*”. However, the petitioner granted extension of time on 02.03.2009 with the condition “*extension of time for completion of the above mentioned work is granted up to 22.12.2008 without levy of compensation, without prejudice to the right of the Government to recover liquidated damages in accordance with the provision of clause 2 of the said agreement dated 21.11.2004.*”

23. Thus, the extension of time as granted was not in terms of the undertaking given by the respondent and, consequently, the said undertaking is, in any event, not binding on the respondent. Learned counsel submits that the arbitral tribunal is the master of the proceedings. The learned Arbitrator consciously decided not to permit production of documents at a belated stage of arguments. He submits that by producing the undertaking at the last minute, the respondent was denied the opportunity to deal with the same. Consequently, the learned Arbitrator was justified in not permitting the petitioner to place reliance on the said undertaking. This decision of the Arbitrator cannot be assailed as being opposed to public policy under Section 34 of the Act. In this regard, reliance is placed on Section 19 of the Act and the decision of the Division Bench reported as ***DDA Vs. Krishna Construction Co.***, 183 (2011) DLT 331 (DB).

24. So far as the filing of the revised Claim No.1 is concerned, learned counsel for the respondent submits that the revision had initially been made as, during pendency of arbitration, the final bill had been settled. He submits that the claim having been downwardly revised eventually, the petitioner cannot possibly have any grievance.

25. Learned counsel for the respondent submits that if the petitioner had no intention of considering the request of the respondent/ claimant for payment of market rates for the work done beyond the stipulated date of completion, there was no reason for them to have undertaken a detailed exercise of analyzing the rates of various items based on market rates prevailing beyond the stipulated date of completion. He submits that this aspect has been taken note of by the learned Arbitrator in the impugned award. He further submits that the learned Arbitrator has applied his mind to the computation of the amount claimed and awarded. The Arbitrator has noted that for some of the items, the rates demanded by the respondent were, in fact, lower than those worked out by the petitioner itself. However, the Arbitrator has awarded the lower of the two rates. The impugned award under Claim No.1 included an amount of Rs. 22 Lakhs withheld by the petitioner in the 34th, 46th and 47th R/A Bill for which no justification was offered by the petitioner. Learned counsel, therefore, submits that the Arbitrator has applied his mind to the aspect of computation of the amount payable under Claim No.1.

26. Learned counsel for the respondent also submits that Clauses 3.9 and 7.16, as aforesaid, are hit by Section 23 of the Contract Act. Learned counsel for the respondent has placed reliance on the judgment of this Court

in *M/s Simplex Concrete Piles (India) Ltd. Vs. Union of India*, CS (OS) No.614A/2002 decided on 23.02.2010 in this regard. Learned counsel submits that the extension of time had been applied for after the completion of the work. Therefore, it cannot be said that the respondent had the option to either work the contract on the contractual rates, or put the contract to an end. He further submits that the arbitration had been invoked even before completion of the work, i.e. soon after the petitioner had denied the market rates for the work done after the initial contractual period. Learned counsel for the respondent has also placed reliance on the judgment of the Supreme Court in *General Manager, Northern Railway & Another Vs. Sarvesh Chopra*, (2002) 4 SCC 45 and *Asian Techs Limited Vs. UOI & Others*, (2009) 10 SCC 354. The respondent has also placed reliance on the decision of this Court in *DDA Vs. S.S. Jaitley*, 2011 2 Arb.L.R. 213(Delhi).

27. In her rejoinder, Ms. Rao has placed reliance on the judgment of the Supreme Court in *Ramnath International Construction (P) Ltd. Vs. Union of India*, (2007) 2 SCC 453, to submit that the Arbitrator cannot derogate from the terms of the contract which provide that-in case there is any delay which is not attributable to the contractor, the contractor who seeks extension of time would not be entitled to claim any compensation on the ground of such delay.

28. Having considered the rival submissions, perused the award and the relevant exhibits relied upon by the parties as well as the decisions relied upon by them, I am of the view that the impugned award cannot be sustained in respect of both claim nos.1 and 4, and the same is liable to be set aside.

29. The arbitral tribunal has proceeded on the basis that the Chief Engineer of the petitioner had given an assurance to the respondent that the rates and terms shall be revised for the work done after the stipulated date of completion. This finding returned by the arbitral tribunal is in the teeth of the evidence available on record. It is completely contrary to the evidence brought on record and to the express communications issued by the petitioner, repeatedly rejecting the respondents claim for revision of rates in respect of work to be done after the stipulated date of completion.

30. As noticed hereinabove, the respondent had sought new rates vide letter dated 28.01.2008 Exhibit C-40/1. This was promptly denied by the petitioner vide letter sent on the very next day, i.e. 29.01.2008 Exhibit R-12(1). Once again, the respondent sought revision of rates vide letter dated 08.02.2008 Exhibit C-41/1. In this communication the respondent sought to make reference to the assurance given by the Chief Engineer, Building Project Zone B-1 in the meeting held on 01.02.2008. The petitioner, however, once again rejected the demand for new/ revised rates vide letter dated 11.02.2008 Exhibit R-13(1). This communication was issued by the Executive Engineer. If, according to the respondent, the communication dated 11.02.2008 was contrary to the assurance given by the Chief Engineer, Building Project Zone B-1 on 01.02.2008, it was for the respondent to further take up the matter before embarking on further work after the stipulated date of completion of the work. However, the respondent was satisfied with the denial of the enhancement of rates after the stipulated date of completion and continued to affirm the contract, obviously, at its own risk & peril. Merely because the petitioner did not deny the factum of the

meeting having taken place on 01.02.2008 between the respondent and the Chief Engineer, Building Project Zone B-1, it does not imply that the petitioner admitted the version of the respondent that the Chief Engineer had given any assurance that new rates/ revised rates would be made applicable for the work done after the stipulated date of completion. There is absolutely no basis for the arbitral tribunal to conclude that in the meeting which took place on 01.02.2008 between the parties, the Chief Engineer had given any assurance that the new rates/revised rates would be applicable for the work done after the stipulated date of completion.

31. The production of the in-house calculations made by the petitioner in its records by applying different rates from those agreed under the contract cannot lead to any reasonable inference that the petitioner had agreed to pay new/ revised rates for the work done by the contractor after the stipulated date of completion, particularly in the face of the repeated and emphatic denial of claim for new/ revised rates made by the respondent. Any such decision-as claimed by the respondent, would have entailed significantly enhanced expenditure. Such a decision could not have been left to be taken, or communicated, verbally by the Chief Engineer without any recording. The alleged assurance is wholly unsubstantiated and contrary to the petitioner's communications dated 29.01.2008 [Ex. R-12(1)] and dated 11.02.2008 [Ex.R-13(1)]. Thus, there was no material or basis for the learned Arbitrator to assume – on the basis of the respondents communication Ex.C-41/1 dated 28.01.2008, that the Chief Engineer gave any verbal assurance to the respondent to pay higher rates during the extended period.

32. In *Ramnath International Construction (P) Ltd.* (supra), the Supreme Court considered clause 11 of the GCC. Clause 11, considered by the Supreme Court read as follows:

“11. Time, delay and extension.—(A) Time is of the essence of the contract and is specified in the contract documents or in each individual works order.

*As soon as possible, after contract is let or any substantial work order is placed and before work under it is begun, the GE and the contractor shall agree upon the time and progress chart. The chart shall be prepared in direct relation to the time stated in the contract documents or the works order for completion of the individual items thereof and/or the contract or works order as a whole. It shall include the forecast of the dates for commencement and completion of the various trades, processes or sections of the work, and shall be amended as may be required by agreement between the GE and the contractor within the limitation of time imposed in the contract documents or works order. **If the work be delayed:***

(i) by force majeure, or

(ii) by reason of abnormally bad weather, or

(iii) by reason of serious loss or damage by fire, or

(iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the tradesmen employed on the work, or

(v) by reason of delay on part of nominated sub-contractors, or nominated suppliers which the contractor has, in the opinion of GE, taken all practicable steps to avoid, or reduce, or

(vi) by reason of delay on the part of contractors or tradesmen engaged by the Government in executing work not forming part of the contract, or

(viii) by reason of any other cause, which in the absolute discretion of the accepting officer is beyond the contractor's control;

then in any such case the officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of works for which separate periods of completion are mentioned in the contract documents or works order, as applicable.

(B) If the works be delayed:

(a) by reason of non-availability of government stores in Schedule B or

(b) by reason of non-availability or breakdown of government tools and plant listed in Schedule C;

then, in any such event, notwithstanding the provisions hereinbefore contained, the accepting officer may in his discretion, grant such extension of time as may appear reasonable to him and the same shall be communicated to the contractor by the GE in writing. The decision so communicated shall be final and binding and the contractor shall be bound to complete the works within such extended time.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted.” (emphasis supplied)

33. The Supreme Court interpreted the said clause as follows:

“Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not to claim any compensation. In view of the

clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C)."

34. The Supreme Court interpreted the relevant sub clause in clause 11, which reads "*by reason of any other cause, which in the absolute discretion of the accepting officer is beyond the contractor's control*", to mean that the same "*will necessarily include any delays attributable to the employer or any delay for which both the employer and the contractor are responsible. The contract thus provides that if there is any delay, attributable either to the contractor or the employer or to both, and the contractor seeks and obtains extension of time for execution on that account, he will not be entitled to claim compensation of any nature, on the ground of such delay, in addition to the extension of time obtained by him. Therefore, the claims for compensation as a consequence of delays, that is Claim 24 of the Hangar Contract and Claims 13 to 16 of the Road Contract are barred by clause 11(C)*".

35. In the present case, though the contract does not contain a clause similar to clause 11 considered in ***Ramnath International Construction (P) Ltd.***(supra), the effect of the correspondence above referred to is the same. The contract did not grant any right to the respondent to claim enhanced rates for work done after the stipulated date of completion. The respondent could have put the contract to an end if it so desired, at the end of the contractual period. The demand for revised rates made by the respondent was, at best, an offer made by the respondent which was specifically and repeatedly rejected by the petitioner. The respondent had the option to discontinue the work as communicated by it in its communication dated

28.01.2008 (Ex.C-40/1). However, it chose to carry on the work on its own. The respondent was, therefore, precluded from subsequently demanding or raising a claim for enhanced or revised rates.

36. In **J.C. Budharaja** (supra), the Supreme Court interpreted the contractual clauses which prohibited the contractor from raising the claim for damages on account of, inter alia, the delay in handing over the site to the contractor. The Supreme Court observed:

“These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs. 11 lakhs and more for the alleged lapses or delay in handing over work site is, on the face of it, against the terms of the contract.

The Supreme Court further observed that:

“It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction.”

37. The decision in **Ramnath International Construction (P) Ltd.** (supra) was followed in **Wig Brothers Builders & Engineers Pvt. Ltd.** (supra). In

that case, the Supreme Court considered clause 5A of the contract and observed that the said clause specifically provided that in the event of the work being delayed for whatever reasons, i.e. if the delay is attributable to the employer-ONGC, the contractor would only be entitled to extension of time for the completion of work, but would not be entitled to claim any compensation or damages. Since the arbitrator awarded damages in breach of the said clause, the Supreme Court held that the arbitrator had exceeded his jurisdiction in ignoring the said bar contained in the contract and in awarding the said compensation.

38. Reliance placed on *Simplex Concrete Piles (India) Ltd.* (supra) by the respondent is misplaced. I had occasion to deal with this case in *Prem Prakash Vs. Union of India & Anr.* , OMP No. 2 Obj/2004 decided on 04.02.2014 and the observations made therein may be reproduced:

“11. Reliance placed by the petitioner on the judgment of this Court in Simplex Concrete Piles (India) Ltd. v. Union of India, 2010 (5) RAJ 455 (Del), in my view, is of no avail for the reason that the court in that case, proceeded to consider a situation (though hypothetical), where the contractor has no option to sue for damages, and the contract absolutely takes away the right of the contractor to claim damages on account of breach of the employer. In the present case, the said decision cannot be applied, as the petitioner had an option. Once the contractual period was over, the petitioner could have opted not to agree to the extension of the contract, in which case the petitioner could have sued for compensation and damages. The petitioner, however, took the other option i.e. to agree to the extension of the contract on the clear premise that the petitioner shall not be entitled to claim compensation on account of such extension. Having done so, the petitioner could not have claimed any compensation or damages resulting on account of extension of the contract.”

39. Reliance placed on *Asian Techs Limited* (supra) by learned counsel for the respondents is misplaced. The respondent relied upon Clause 11(C) above extracted, to submit that no claim, in respect of compensation or otherwise, howsoever arising shall be admitted where extension is granted on account of non-availability of Government stores, or by reason of non-availability, or breakdown of Government tools and plants mentioned in Schedule 'C' to the agreement. However, the Court did not enforce the said clause against the appellant contractor, because there was a specific assurance given by the respondent department to the appellant contractor to continue the work, and that the rates would be decided across the table. It was on this specific assurance that the contractor continued to execute the work even after the stipulated date of completion. In this regard reference may be made to paragraph 17 of the judgment which reads as follows:

“17. The letter dated 24-11-1988 makes it clear that the appellant was not ready to carry out the work beyond the contracted period otherwise than on separate work orders, and the subsequent correspondence like the letter dated 11-10-1989 makes it clear that it was on the specific assurance given by the respondent to the appellant to continue the work and that the rates would be decided across the table that the appellant went ahead with the work. Hence, in our opinion it is now not open to the respondent to contend that no claim for further amount can be made due to Clause 11(C) and that the arbitrator would have no jurisdiction to award the same.”

40. The decision in *Sarvesh Chopra* (supra) relied upon by the respondent, in fact, supports the case of the petitioner rather than that of the respondent. Para 15 of this decision read as follows:

“15. In our country question of delay in performance of contract is governed by Sections 55 and [56](#) of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, Chitty on Contracts (Twenty-Eighth Edition, 1999, at p.1106, para 22-015) states

"a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract- breaker on the basis that he has committed a fundamental breach of the contract ("a breach going to the root of the contract") depriving the innocent party of the benefit of the contract ("damages for loss of the whole transaction")."

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party, i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into

supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms”. (emphasis supplied)

41. From the above extract, it is clear that on account of delay in performance of the contract by the employer, the contractor becomes entitled to avoid the contract at its option. If such an eventuality arises, it is open to the contractor to- (a) terminate performance of the contract and thereby put an end to all the primary obligation of both parties remaining unperformed; and (b) claim damages from the contract breaker/employer on the basis that he has committed a fundamental breach of the contract i.e. a breach going to the root of the contract, thereby depriving the contractor/innocent party of the benefit of the contract. However, if the contractor does not avoid the contract and accepts the belated performance of reciprocal obligation on the part of the employer, the contractor cannot claim compensation for any loss occasioned by the non performance of the reciprocal promise by the employer at the agreed time, unless at the time of such acceptance, he gives notice to the employer of his intention to do so.

42. In the present case, though the respondent gave such a notice on two occasions, on both the occasions, the said demand of the respondent was rejected by the petitioner expressly and clearly. In spite of the said unequivocal and clear stand taken by the petitioner, the respondent chose to continue to execute the work, obviously, at its own consequence and without

retaining the right to claim revision of rates for the work done after the stipulated date of completion.

43. Reliance placed by the respondent in the decision in *S.S. Jaitley* (supra) is of no avail. In *S.S. Jaitley* (supra), this Court had observed;

63. In my view, those are different situations, than the situation where the contract is illegally rescinded and the balance work is got executed through another contractor. A Contractor is not obliged to carry out the work beyond the stipulated date of contract. If the execution of the contractual work is delayed for reasons attributable to the employer or for reasons not attributable to the contractor, he has two options. He may either choose to put the contract to an end and claim damages for breach of contract by the employer, or he may agree to continue to carry on the work by accepting the extension of time and giving up his right to claim damages for such delay, because he may find it more profitable to execute the balance work, even after delay, than to claim damages by putting the contract to an end. Therefore, a contractor who has opted to continue to execute the work, even though its execution is delayed for reasons attributable to the employer or for reasons not attributable to him may, contractually, be prohibited from claiming any damages due to the delays, as aforesaid. He cannot claim damages because he has been put to prior notice that he would not be entitled to claim damages for such delays and would be entitled only to claim extension of time for completion of the contractual work. He, therefore, exercises his option consciously, if he still chooses to carry out the work, despite the delays, as aforesaid. He is, therefore, bound down by the option he makes. However, when the contract is illegally determined, there is no option given to the contractor. He has no option but to claim damages.

[Emphasis supplied]

44. Reliance placed on *Kalyan Chandra Goyal (supra)* is of no avail. In *S.S.Jaitley (supra)*, I had pointed out the several relevant aspects which were missed out while deciding *Kalyan Chandra Goyal (supra)* by me. Therefore, no reliance can be placed on the said decision.

45. Even though, the following two aspects have become academic in view of the aforesaid discussion, I find force in the submissions of learned counsel for the respondent, firstly, that the refusal of the learned Arbitrator to take the undertaking of the respondent on record on account of its belated filing does not vitiate the arbitral award. No doubt, the rules of evidence and procedure do not inhibit the learned Arbitrator. The Arbitrator is free to devise his own procedure, which is otherwise fair & reasonable and complies with the principles of natural justice. Merely because another Arbitrator may have permitted a party to produce a document even at the stage of arguments, and may have thereafter permitted the opposite party to deal with the same, is no ground to conclude that the refusal of the Arbitrator in the present case to adopt that course of action vitiates the award. The learned Arbitrator has relied upon several decisions in his award for his not permitting the said undertaking to be taken on record at a belated stage. The view taken by the learned Arbitrator on this aspect being a plausible and reasonable view, cannot be interfered with under Section 34 of the Act. Admittedly, there is no pleading made by the petitioner with regard to the said undertaking.

46. In *Krishna Construction Co. (supra)*, the Division Bench of this Court has observed as follows:

“19. The principle that there cannot be any variance between pleading and proof is not to be expressly found in any provision of the Code of Civil Procedure but has been evolved by Courts with reference to Order 6 Rule 2 and Rule 4 thereof as a general principle of law: You cannot win battles by springing surprises. Pleadings of parties are intended to focus the issues on which the parties seek a decision. It would be unjust if parties are permitted to plead and proof at variance. This principle would apply to pleadings and decisions before any Fora where civil disputes are adjudicated.

20. Indeed, the principle would govern an arbitration proceedings and where an arbitrator adjudicates upon a claim on proof entirely different than the pleading, it would amount to springing a surprise upon the opposite party and in violation of justice and would amount to a material irregularity requiring such an award to be set aside under Section 34 of the Arbitration & Conciliation Act 1996.”

47. Reliance placed by the petitioner on ***K.P. Poulose*** (supra) and ***Kailashnath & Associates*** (supra) in support of the submission that the learned arbitrator should have examined the undertaking given by the respondent and could not have ignored the same on account of belated production is of no avail in view of the fact that the petitioner did not grant extension of time on the terms set out by the respondent as discussed herein after.

48. Secondly, even though the respondent had sought extension of time without levy of compensation, the extension of time granted by the petitioner was conditional. The petitioner sought to grant extension of time for completion of the work up to 22.12.2008 without levy of compensation, *“without prejudice to the right of the Government to recover liquidated damages in accordance with the provision of Clause 2 of the said agreement*

dated 21.11.2004". Thus, the extension of time as granted by the petitioner was not unconditional. In any event, it appears that the said undertaking may not have been binding on the respondent even if the same were to be taken into consideration.

49. Consequently, the award made by the arbitral tribunal on claim no.1 is set aside. So far as the award made on claim no.4 is concerned, the same is clearly in breach of the contractual clauses of the agreement. Clause 2A of the contract provided that if the contractor completes the work ahead of the "scheduled completion time", an incentive for early completion of the work stipulated to a maximum limit of 5% of the tendered value shall be payable. The "scheduled completion time" is a defined term and the same was defined in the contract as 29.01.2008. The "scheduled completion time" was not altered by the parties. Merely because the contract may have been performed after the stipulated time of completion on account of extension of time for completion of the work being granted by the petitioner, it does not result in a change of the "scheduled completion time". The arbitral tribunal could not have, by resort to a process of calculation, refixed the "scheduled completion time" under the agreement.

50. In the light of the aforesaid discussion, the impugned award is set aside, leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

MARCH 31, 2014