



2026:DHC:2804



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment reserved on: 27.03.2026**
Judgment pronounced on: 04.04.2026
+ O.M.P. (COMM) 289/2023, I.A. 14392/2023 & I.A. 14396/2023
UNION OF INDIA Petitioner
Through: Mr. Rakesh Kumar, SPC with
Mr. Sunil, Adv.
versus
M/S ANAND AND COMPANY Respondent
Through: Mr. Kunwar Chandresh, Ms.
Poonam Prasad, Mr. Divyansh
Singh & Mr. George Lincoln,
Advs.

CORAM:
HON'BLE MR. JUSTICE AVNEESH JHINGAN

J U D G M E N T

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') challenging the arbitral award dated 17.02.2023.
2. The facts in brief are that the petitioner invited an e-tender for construction of hundred Family Quarters (Type-II, III & IV) including internal W/S, S/I and electrical works for ITBP 22nd Bn. Campus at Chhawla, New Delhi. The bid of the respondent was accepted and a Letter of Acceptance (for short 'LOA') dated 20.06.2017 was issued. An agreement (02/EE/AIMSPD/2017-18) was executed between the parties to the *lis*. The stipulated date of commencement was 11.07.2017 and the time period for completion was twelve months i.e.



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10.07.2018.

2.1 During execution of the contract, disputes arose between the parties. The respondent approached the Engineer-in-Charge of CPWD (hereinafter 'EE') but the disputes were not resolved. Clause 25 of the General Conditions of Contract (hereinafter 'contract') was invoked for forming a Dispute Resolution Committee (for short 'DRC'). On failure to do the needful the respondent by notice dated 08.04.2021 initiated arbitration proceedings which culminated in the impugned award.

3. Learned counsel for the petitioner contends that the arbitrator erred in directing the release of Rs.35,12,328/- withheld for failure of the respondent to achieve the milestones. The submission is that extension of time and rescheduling of milestones are two distinct aspects. Moreover, extension of time is to be granted by the EE whereas rescheduling of milestones is to be done by the Superintending Engineer, CPWD (for short 'SE'). The respondent failed to apply for rescheduling of the milestones under clause 5.3 of the contract and in case of non-achievement of the milestones the petitioner was entitled to withhold the amount to the extent of ten percent of the tender value. Clause 2 of the contract is relied upon to challenge the award of interest on the withheld amount.

3.1 It is submitted that there is a clerical error in awarding the amount of Rs.71,45,578/- on account of release of pending final bills and while doing so the amount already paid was not deducted.

3.2 The awarding of three percent difference on account of



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difference between the Goods and Services Tax (for short ‘GST’) and Value Added Tax (for short ‘VAT’) is canvassed to be based upon assumed calculation and contrary to clause 38 of the contract where under the GST paid is to be reimbursed. The arbitrator erred in awarding the difference of three percent without proof that it was deposited.

3.3 The refund of Rs.3,00,000/- penalty imposed for delay in completing the sample flat is stated to have been allowed without recording reasons and ignoring the terms and conditions of the contract. Neither there was a provision for extending the time for completion of the sample flat nor the time was extended.

3.4 The grant of loss of on-site and off-site expenses for the prolongation period is stated to be against Section 73 of the Indian Contract Act, 1872 (for short ‘Contract Act’) and the law laid by the Supreme Court in **Kailash Nath Associates v. DDA**, (2015) 4 SCC 136 and **Unibros vs. All India Radio**, 2023 SCC OnLine SC 1366. The argument is that there was no proof of actual loss or damage suffered and the arbitrator without any basis apportioned the expenses depicted in the certificate issued by the Chartered Accountant (for short ‘CA’) and awarded the damages.

3.5 The interest awarded at the rate of nine percent is contended to be on the higher side. The costs awarded of Rs.8,00,000/- to the respondent are assailed being on the higher side and contrary to the terms of the contract providing that the arbitration costs shall be equally borne by both the parties.



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4. *Per contra* the delay in achieving the milestones was attributable to the petitioner and for this reason the time was repeatedly extended, yet the amount was withheld for non-achievement of the milestones. The contention is that under clause 5.4 of the contract the milestones should have been rescheduled without filing of an application by the respondent. The award of interest on the refund of the withheld amount is defended by stating that clause 2 of the contract is not applicable to the facts of the case.

4.1 It is argued that from 01.07.2017, GST was levied and service tax thereafter is included in GST. Submission is that clauses 37 and 38 of the contract provided that service tax shall be reimbursed and the arbitrator rightly awarded the service tax portion of the contract covered by GST.

4.2 The contention is that the sample flat was to be completed after two months of casting of first floor slab and the delay in completion was due to repeated revisions suggested by the petitioner. Moreover, the petitioner failed to prove the actual loss or injury suffered due to delay in completion of the sample flat and the arbitrator rightly relied upon the decisions of the Supreme Court in **Kailash Nath Associates** (supra) and **Fateh Chand v. Balkishan Dass**, 1963 SCC OnLine SC 49 to allow the claim.

4.3 The grant of damages for prolongation of the contract is defended as having been granted relying upon a certificate issued by the CA. Contention is that it is admitted position that the work which was to be completed by 10.07.2018 was actually completed on



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05.10.2019 i.e. after delay of 452 days. The submission is that a reasonable amount in accordance with the settled principles of law was awarded by the arbitrator.

4.4 The rate of interest and litigation costs awarded is supported by stating that the discretion exercised by the arbitrator is on a sound basis and no interference can be made within the restricted scope under Section 34 of the Act.

5. Heard learned counsel for the parties at length and perused the relevant record with their able assistance. No other issue than those noted above was pressed.

6. The terms of the contract between the parties provide the time stipulated for completion of the work and the milestones to be achieved periodically. Clause 5 of the contract deals with the extension of time and rescheduling of milestones. Clauses 5.3 and 5.4 of the contract are reproduced below:

“CLAUSE 5

5.3 Request for rescheduling of Mile stones and extension of time, to be eligible for consideration, shall be made by the Contractor (As per Appendix XVI) in writing with supporting documents within fourteen days of the happening of the event causing delay on the prescribed form to the authority as indicated in Schedule 'F'.

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 or rescheduling of the milestones shall be communicated to the Contractor by the authority as Indicated in Schedule 'F' in writing,



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within 3 months or 4 weeks of the date of receipt of such request with all supporting documents respectively failing which it will be deemed that rescheduling of milestones have been approved.

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

7. It is an admitted fact that the time for completion of the project was extended from time to time and delay in completion of the work was not attributed to the respondent. The last extension was granted up to 15.10.2019 vide letter dated 24.09.2019 and almost after one year of the last extension of time, the penalty for non-achievement of the milestones was apportioned from the withheld amount. The contention of learned counsel for the petitioner that the respondent had not applied for rescheduling of milestones is factually wrong. The respondent vide letter dated 23.03.2018 applied for rescheduling of the milestones to the EE and this letter was forwarded to the SE but was not decided. Be that as it may, clause 5.4 of the contract provides that non-filing of an application by the contractor for rescheduling of milestones shall not be a bar for rescheduling the milestones. The view taken by the arbitrator that once time was extended from time to time, the milestones should have been rescheduled is a plausible and calls for no interference.

8. So far as the grant of interest on the amount withheld for non-achievement of the milestones is concerned there is no discussion in



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the award and is bereft of reasons. Clause 2 of the contract provides for withholding of amount on failure of the contractor to achieve milestones mentioned in schedule 'F' or the rescheduled milestones in terms of clause 5.4 of the contract. This amount is to be adjusted against compensation levied at the time of final grant of extension of time. The withholding is automatic without notice and in case the contractor catches up with the progress the amount withheld has to be released. On failure of the contractor to make up the delay the amounts mentioned against the subsequent missed milestones shall also be withheld. Clause 2 of the contract provides that no interest whatsoever shall be paid on the withheld amount and the condition of non-payment of interest on the withheld amount has no exceptions. The granting of interest on the withheld amount is contrary to clause 2 of the contract and cannot be sustained.

9. The clerical error while directing the release of the amount pending from the final bill is conceded by the respondent and it is admitted that the due amount was Rs.54,44,112/-. As there is no modification of the award involved and it is only a clerical error to be rectified, claim 2 awarded is corrected to Rs.54,44,112/-

10. Clauses 37 and 38 of the contract dealing with the levy of taxes and the conditions for reimbursement are reproduced below:

“CLAUSE 37

Levy/Taxes payable by Contractor

(i) Sales Tax/VAT (except Service Tax), Building and other Construction Workers Welfare Cess or any other tax or Cess in respect of this contract shall be payable



by the contractor and Government shall not entertain any claim whatsoever in this respect. However, in respect of service tax, same shall be paid by the contractor to the concerned department on demand and it will be reimbursed to him by the Engineer-in-Charge after satisfying that it has been actually and genuinely paid by the contractor.

(ii) The contractor shall deposit royalty and obtain necessary permit for supply of the red bajri, stone, kankar, etc. from local authorities.

If pursuant to or under any law, notification or order any royalty, cess or the like becomes payable by the Government of India and does not any time become payable by the contractor to the State Government, Local authorities in respect of any material used by the contractor in the works, then in such a case, it shall be lawful to the Government of India and it will have the right and be entitled to recover the amount paid in the circumstances as aforesaid from dues of the contractor.”

“CLAUSE 38

Conditions for reimbursement of levy/taxes if levied after receipt of tenders

(i) All tendered rates shall be inclusive of all taxes and levies (except Service Tax) payable under respective statutes. However, if any further tax or levy or cess is imposed by Statute, after the last stipulated date for the receipt of tender including extensions if any and the contractor thereupon necessarily and properly pays such taxes/levies/cess, the contractor shall be reimbursed the amount so paid, provided such payments, if any, is not, in the opinion of the Superintending engineer (whose decision shall be final and binding on the contractor) attributable to delay in execution of work within the control of the contractor.

(ii) The contractor shall keep necessary books of



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accounts and other documents for the purpose of this condition as may be necessary and shall allow inspection of the same by a duly authorized representative of the Government and/or the Engineer-in-Charge and shall also furnish such other information/document as the Engineer-in-Charge may require from time to time.

(iii) The contractor shall within a period of 30 days of the imposition of any such further tax or levy or cess, give a written notice thereof to the Engineer-in-Charge that the same is given pursuant to this condition, together with all necessary information relating thereto.”

11. Clause 37 of the contract provided that sales tax/VAT shall be payable by the contractor but service tax paid by the contractor shall be reimbursed on satisfaction of actual and genuine payment. As per clause 38 of the contract, the tender rates are inclusive of all taxes except service tax and in case of any future tax or levy or cess imposed after the last stipulated date of receipt of tender i.e. 08.05.2017, the tax or levy or cess shall be reimbursed to the extent of the amount paid. GST would fall within future tax levied after the last date stipulated for receipt of tender and is to be reimbursed. No evidence was produced to show that the amount of three percent difference claimed was actually paid by the respondent. Service tax was not leviable after the implementation of GST on 01.07.2017. The arbitrator without any basis made a split of taxes levied under GST and held that fifteen percent of the forty percent of the work constituted a component of service tax. The finding is against public policy as the service tax under Chapter V of the Finance Act, 1994



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was repealed upon the introduction of GST with effect from 01.07.2017 and there was no question of service tax being levied thereafter. The award of claim of Rs.35,12,329/- claimed as a difference of three percent between the post-GST and pre-GST period is unsustainable.

12. The chart forming part of the contract provided for a penalty of Rs.50,000/- per fortnight for delay in completion of the sample flat. It is an admitted position that the sample flat was to be completed within two months of casting of first floor slab and there was delay in completing the sample flat. The arbitrator considered that the hindrances causing delay between casting of first floor slab and construction of the sample flat were not considered by the petitioner and the respondent was not even given an opportunity to explain the delay. The reliance was placed upon the decisions of the Supreme Court in **Kailash Nath Associates** (supra) and **Fateh Chand** (supra) to hold that in the absence of loss due to breach of contract the imposition of penalty for delay in completion of sample flat cannot be sustained. It is not a case set up even now that the petitioner had substantiated the loss due to breach of contract. The view taken by the arbitrator is plausible and calls for no interference.

13. The respondent under Section 73 of the Contract Act claimed loss of on-site and off-site expenses incurred due to prolongation of the contract period. The law is well settled that for claiming damages under Section 73 of the Contract Act the claimant has to prove the actual loss suffered and in case it is not possible to prove loss, a



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reasonable amount of damages is to be assessed. Reference is made to the following judgments:

13.1 The Supreme Court in **Unibros** (supra) while dealing with a claim for redressal of loss of profit made under Section 73 of the CA arising from prolongation of the contract held:

“19. The law, as it should stand thus, is that for claims related to loss of profit, profitability or opportunities to succeed, one would be required to establish the following conditions : first, there was a delay in the completion of the contract; second, such delay is not attributable to the claimant; third, the claimant's status as an established contractor, handling substantial projects; and fourth, credible evidence to substantiate the claim of loss of profitability. On perusal of the records, we are satisfied that the fourth condition, namely, the evidence to substantiate the claim of loss of profitability remains unfulfilled in the present case.”

13.2 The Supreme Court in **Kailash Nath Associates** (supra) held:

“43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.”

13.3 The Supreme Court in **State of Rajasthan v. Ferro Concrete Construction (P) Ltd., (2009) 12 SCC 1** held:

“55. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of



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the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.”

13.4 The Division Bench of this court in **Tower Vision India (P) Ltd. v. Procall (P) Ltd.**, 2012 SCC OnLine Del 4396 held:

“16. Consequence for breach of the contract are provided in Chapter VI of the Indian Contract Act, 1872, which contains three sections, namely, section 73 to section 75. As per section 73 of the Indian Contract Act, the party who suffers by the breach of contract is entitled to receive from the defaulting party, compensation for any loss or damage caused to him by such breach, which naturally arose in usual course of things from such breach, or which the two parties knew when they make the contract to be likely the result of the breach of contract. This provision makes it clear that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle enshrined in this section is that a mere breach of contract by a defaulting party would not entitle the other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered. When there is a breach of contract, the party who commits the breach does not eo instanti, i.e., at the instant incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. No pecuniary liability thus arises till the



court has determined that the party complaining of the breach is entitled to damages. The court in the first place must decide that the defendant is liable and then it should proceed to assess what the liability is. But, till that determination, there is no liability at all upon the defendant. The courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment. The rule applicable for determining the amount of damages for the breach of contract to perform a specified work is that the damages are to be assessed at the pecuniary amount of difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same. The measure of compensation depends upon the circumstances of the case. The complained loss or claimed damage must be fairly attributed to the breach as a natural result or consequence of the same. The loss must be a real loss or actual damage and not merely a probable or a possible one. When it is not possible to calculate accurately or in a reasonable manner, the actual amount of loss incurred or when the plaintiff has not been able to prove the actual loss suffered, he will be, all the same, entitled to recover nominal damages for breach of contract. Where nominal damages only are to be awarded, the extent of the same should be estimated with reference to the facts and circumstances involved. The general principle to be borne in mind is that the injured party may be put in the same position as that he would have been if he had not sustained the wrong.”

(emphasis supplied)

14. The only evidence produced by the respondent to support the claim for damages was a certificate of expenses issued by the CA.



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There was no evidence of actual loss suffered due to prolongation of the contract. The certificate issued by the CA provides year-wise expenses and head office expenses incurred but there is no certification as to the quantification of loss suffered if any, due to the extension of time period of the contract. In other words, there was no proof of actual loss suffered by incurring additional expenses due to extension of period of the contract. The expenses incurred after the stipulated date of completion of the contract in itself are not evidence of actual loss or damage suffered. It is not the case set up that the actual loss or damage suffered cannot be quantified. The quantification of damages by the arbitrator is based on assumptions and is without any foundation. The compensation awarded is in violation of Section 73 of the Contract Act and the law laid down by the Supreme Court and cannot be sustained being against public policy.

15. The simple interest awarded at the rate of nine percent by the arbitrator calls for no interference within the limited scope of jurisdiction under Section 34 of the Act. No case is made out that the interest awarded is excessive.

16. Section 31A(3) of the Act bestows discretion upon the arbitrator to determine costs considering the facts and circumstances of the case. A reasonable figure has been quantified by the arbitrator taking into consideration the various factors calling for no interference.

17. The Supreme Court in **Gayatri Balasamy v. ISG Novasoft Technologies Ltd.**, (2025) 7 SCC 1 held that while an arbitral award



cannot be modified under Section 34 of the Act, a severable part of the award may be set aside. The relevant paragraphs are quoted below:

“32. In the present controversy, the proviso to Section 34(2)(a)(iv) is particularly relevant. It states that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters non-submitted may be set aside. The proviso, therefore, permits courts to sever the non-arbitrable portions of an award from arbitrable ones. This serves a twofold purpose. First, it aligns with Section 16 of the 1996 Act, which affirms the principle of kompetenz-kompetenz, that is, the arbitrators' competence to determine their own jurisdiction. Secondly, it enables the Court to sever and preserve the “valid” part(s) of the award while setting aside the “invalid” ones. [The “validity” and “invalidity”, as used here, does not refer to legal validity or merits examination, but validity in terms of the proviso to Section 34(2)(a)(iv) of the 1996 Act.] Indeed, before us, none of the parties have argued that the Court is not empowered to undertake such a segregation.

33. We hold that the power conferred under the proviso to Section 34(2)(a)(iv) is clarificatory in nature. The authority to sever the “invalid” portion of an arbitral award from the “valid” portion, while remaining within the narrow confines of Section 34, is inherent in the Court's jurisdiction when setting aside an award.

34. To this extent, the doctrine of omne majus continet in se minus—the greater power includes the lesser—applies squarely. The authority to set aside an arbitral award necessarily encompasses the power to set it aside in part, rather than in its entirety. This interpretation is practical and pragmatic. It would be incongruous to hold that power to set aside would only mean power to set aside the award in its entirety and not in part. A contrary interpretation would not only be



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inconsistent with the statutory framework but may also result in valid determinations being unnecessarily nullified.

(emphasis supplied)

18. The non-awarding of interest on refund of the withheld amount for non-achievement of the milestones; the rectification of the amount due for settlement of the final bill; the denial of three percent difference in post-GST and pre-GST period; and the quashing of awarding of damages under Section 73 of the Contract Act are separable, not dependant on other claims awarded and are not intricately connected with each other.

19. In view of the above discussion, it is concluded as under:

- A. The award directing release of the amount withheld for non-achievement of milestones is upheld.
- B. The award of interest on the amount withheld for non-achievement of milestones is set aside.
- C. The amount awarded towards the final bill is corrected to Rs.54,44,112/-.
- D. The award of three percent difference between the post-GST and pre-GST period is set aside.
- E. The grant of refund of penalty for delay in completion of the sample flat is upheld.
- F. The award of damages under Section 73 of the Contract Act on account of prolongation of the contract is set aside.
- G. The interest granted except on the amount withheld for non-achievement of milestones and the costs awarded are upheld.



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20. The petition is partly allowed. Pending applications stand disposed of.

AVNEESH JHINGAN, J

APRIL 04, 2026

'ha'

Reportable:- Yes

Signature Not Verified

Signed By: CHANCHAL M.P. (COMM) 289/2023
Signing Date: 04.04.2026
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